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## An Analysis Of Teacher Tenure Legislation In The United States

Barbra Finegold Bruckmeyer  
*University of Central Florida*

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AN ANALYSIS OF TEACHER TENURE LEGISLATION IN THE UNITED STATES

by

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B.A. University of Florida, 2001  
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A dissertation in partial fulfillment of the requirements  
for the degree of Doctor of Education  
in the Department of Educational Leadership  
in the College of Education  
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Major Professor: Kenneth T. Murray

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## ABSTRACT

This study examined the legal issues of teacher tenure in public K-12 schools in the United States. Included in this study is a review of the pertinent case law as it pertains to teacher tenure as well as a conclusive review, analysis, and summary of all relevant state statutes concerning teacher tenure in the United States. The federal statutes that influence state teacher tenure laws are also included in this study.

Teacher tenure in public K-12 schools was originally derived from the *Pendleton Civil Service Act of 1883*, which provided job protections to federal civil service employees. The National Education Association (NEA) lobbied for teachers to be included in this law, and in 1909, New Jersey became the first state to offer tenure protections to public school teachers. Over the next century, every state in the union adopted similar laws and provided job protections to public school teachers. These laws have included the number of probationary years a teacher must work in order to earn tenure, the reasons a tenured teacher can be terminated, and the due process required in the event that a tenured teacher should require termination.

In recent years, however, states have begun to alter or remove the tenure laws. Florida, Idaho, and Mississippi have already removed tenure protections for new teachers. Several states have bills moving through the state house and senate asking legislators to continue the elimination of tenure across the country.

This study makes conclusions about the current state of tenure laws in the United States and the federal laws that are causing rapid changes in tenure legislation across the country. This study also makes conclusions from relevant research and case law about the legitimacy of further changes to teacher tenure legislation. This study makes recommendations to school officials and

legislators about teacher tenure and its value within the school system, as well as how they might eliminate the flaws in the process that are driving the legislative changes.

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## CHAPTER I

### INTRODUCTION

Research has suggested that teacher tenure, while important to the educational system for recruitment and retention purposes, is enabling, and in many cases requiring, school administrators to retain unsatisfactory teachers (Kersten, 2006). Tenure is awarded nearly automatically in most states and once tenured, a teacher is so well protected from termination that only teachers who commit moral or criminal infractions can be terminated with any degree of ease. Otherwise it takes at least two years to fire a teacher for poor quality of teaching, and even then it is difficult, prone to procedural errors, and so much work that many administrators refuse to take on the task (Jupp, 2009). With *No Child Left Behind* and *Race to the Top* placing stiff penalties and significant rewards on student achievement and teacher effectiveness, state legislators are beginning to look at teacher tenure as a barrier in the quest for the elusive 100 percent proficiency required by 2014. In the 2011 legislative session, 18 states changed their teacher tenure laws and Florida, Idaho, and Mississippi eliminated tenure for new teachers entirely (Duffrin, 2011). More bills are going through state legislatures in the 2012 session aiming for the same result. Teacher tenure is in flux at this point in history and its future is uncertain.

Tenure, according to the Merriam-Webster Dictionary, is “the act, right, manner, or term of holding something (as a landed property, a position, or an office) especially.” Ballentine’s Law Dictionary expands this to include “the right of certain public officers and public employees to be retained in employment, subject only to removal for certain enumerated causes and in a

prescribed manner.” According to the Columbia Encyclopedia (2008), tenure, in the form of law of land, originated in the English feudal system that developed after the Norman Conquest in 1066. Under the feudal system, the monarch owned all of the land, however tenants held the land for a lord to whom obligations were owed. This type of “tenancy by custom” became a permanent property right that was recorded in the manorial court. Additionally, there were types of free tenure that ensured that all services required by the state were performed. This included knight tenure, which guaranteed the military needs of the state would be met.

The transition of tenure rights from the “law of land” to its application in education has been described by James J. Van Patten (2011). One of the earliest instances of educational tenure being enacted was in 1245, when Pope Innocent IV excused the scholars at the University of Paris from having to attend ecclesiastical court. A year later, the Court of Conservation was created to provide the same protections to university faculty in the face of similar situations. As time went on, practices such as academic abstention protected scholars and universities and granted them autonomy from local, civil, and ecclesiastical officials. Within certain limits, these practices prevented “excessive encroachment” from officials not involved in the academic institution.

In the 1890’s, *Lernfreiheit* was established in Germany, providing protections for both university students and faculty (Patton, 2011). *Lernfreiheit*, the “heart of academic freedom,” allowed students to choose courses, change schools, and be “free of dogmatic restrictions.” It also provided for faculty the rights to freedom of inquiry and freedom of teaching. This allowed faculty to conduct research and report findings without restriction. John Dewey furthered the freedoms of academicians in the U.S. by founding the American Association of University

Professors (AAUP) in 1915 to protect university faculty employment from external interference. This protection was vital because members of university faculty were often dismissed in the 19<sup>th</sup> and early 20<sup>th</sup> centuries for offending individuals or groups or criticizing business ethics. When periods of conflict occurred, such as the expansion of communism, faculty found their books criticized or banned for their rhetoric and were often required to take loyalty oaths (Patton, 2011).

The AAUP issued a Statement of the Principals on Academic Freedom and Tenure in 1940, enumerating the benefits of freedom in teaching, research, and extracurricular activities. The statement emphasized the importance of tenure for the recruitment and retention of qualified teachers and that the security that tenure provided was integral to the success of universities (Patton, 2011).

The U.S. Supreme Court became involved in teacher tenure in 1957 in *Sweezy v. New Hampshire*. Here the court emphasized how important tenure is to academic freedom:

The essentiality of freedom in the community of American universities is almost self-evident. To impose a strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study, to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die (250).

In *Board of Regents v. Roth* (1972), the Supreme Court held that contracts or state laws create liberty and property rights that are constitutionally protected. To gain that protection, the university faculty members are generally required to serve for a predetermined period of time and meet various other requirements before becoming tenured. Prior to gaining tenure, faculty members are only protected in employment property rights for the term of their contract. *Perry v. Sindermann* (1972) further clarified these rights by requiring procedural due process

safeguards for faculty members with property or liberty interests in employment. Safe from unjust dismissal, faculty members are able to freely express their beliefs and opinions and debate or inquire on controversial topics. The court did hold, however, that faculty members are required to behave ethically and responsibly and that tenure would not protect them if they failed to meet those requirements (Patton, 2011).

### **Statement of the Problem / Purpose of the Study**

Until recently, tenure for public K-12 school teachers was codified into law in all fifty states. Reforming teacher tenure laws requires an enormous effort because, as the federal government has no power to pass laws concerning education because of the constitution's exclusion clause, the effort must be made at the state level in all fifty states (Kersten, 2006). Recently, teacher tenure has begun disappearing. Several states (Florida, Idaho, and Mississippi) have enacted statutes ending tenure for new teachers. At this time, there is limited and insufficient information concerning teacher tenure in the fifty states and the recent attempts by state legislatures to abolish it.

The purpose of this study is to fill this informational void. This study will survey and research the pertinent statutes in each of the 50 states regarding teacher tenure as well as the bills that were submitted during the most recent legislative session. This information will enable this researcher to make predictions about what educators can expect over the next two legislative sessions concerning teacher tenure and which states are on the verge of abolishing it.

## Theoretical Framework

In his 1853 essay titled *Over-Legislation*, Herbert Spencer chastised the British government for creating legislation as a knee-jerk reaction to specific problems that did not particularly require legislation. He noted that on any given day, the newspaper would have articles both condemning government agencies for their ineffectiveness and their failure to stop tragedies, while at the same time asking for more government over-site to prevent accidents and mishaps. This push by the public to blame the government for acts of fate and demand new legislation to prevent further uncontrollable outcomes encourages legislators to enact unnecessary laws that bring about unnecessary consequences.

In every case you perceive, on careful inquiry, that besides acting upon that which you sought to act upon, you have acted upon many other things, and each of these again on many others; and so have propagated a multitude of changes in all directions. We need feel no surprise, then, that in their efforts to cure specific evils, legislators have continually caused collateral evils they never looked for.

Spencer spoke specifically about laws such as those concerning the licensing of ship captains. When a spate of shipwrecks occurred, the government began to legislate the licensing. As a result of the legislation, unscrupulous captains were able to gain licensure without qualifications, while the captains with the most experience and skills had their licenses removed. The result of the legislation was more shipwrecks. Spencer ascertained that any time the government legislated as a result of perceived lacks in current law, they ended up not only failing to rectify the problem, but enabling the problem to continue in new and unexpected ways (Spencer, 1992).

## **The Legal Foundation**

The authority to enact teacher tenure lies with each state and is usually codified in state law. The actual definition of tenure varies by state, but essentially it ensures the holder a property right in his or her job. This means that the right to continue to hold that job is mandated by the U. S. Constitution as soon as tenure is granted until such time as the employee retires, resigns, dies, agrees to change their contract, or is dismissed. A teacher holding such a property right is constitutionally entitled to due process and cannot be terminated arbitrarily (Kersten, 2006).

According to Kersten (2006), the foundations of teacher tenure began with the *Pendleton Civil Service Act of 1883*, which created the U. S. civil service system, the purpose of which was to employ and retain employees through merit and not political connections. In 1885, the National Education Association (NEA) suggested that teachers should also be protected by civil service legislation. Within a year, the NEA created a committee to advocate for teacher tenure legislation and in 1909, New Jersey became the first state to enact a teacher tenure law. The arguments at the time were similar to those today (Kersten, 2006). Those who favored tenure believed it would attract better teachers, make teaching a more attractive profession by adding job security, and would stop favoritism and arbitrary dismissal. Opponents feared that it would protect ineffective teachers and prevent their dismissal. The spread of teacher tenure legislation was slow, with only 70 percent of the nation's teachers protected by the 1940s and 80 percent by the 1950s. Today, all but three states have some form of teacher tenure (Kersten, 2006).

## **Research Questions**

1. What are the current teacher tenure laws in each of the 50 states?
2. What significant litigation, at both the state and federal level, has influenced teacher tenure laws?
3. What conclusions and recommendations can be made from the supporting legal research and jurisprudence on the subject of teacher tenure?
4. What are the legal and social ramifications and limitations, with the state and federal laws as currently written and current case law, for teacher tenure?

## **Design of the Study and Overview of the Methodology**

The legal database, LexisNexis, was used to gather the most recent legislation in each of the fifty states concerning teacher tenure. A letter was sent to both the State Chief School Officer and the State Attorney General in each state to obtain this information as well, guaranteeing three sources of information for each state. LexisNexis was again used to gather significant court cases from each of the fifty states as well as at the federal level regarding teacher tenure. Ballentine's Law Dictionary was used to define legal terms.

## Definitions

*Action at law* – an action prosecuted in a law court, as distinguished from a suit in equity. An action, the purpose of which is the recovery of a sum of money or damages, or an action wherein the only relief obtainable or appropriate is a money judgment for damages.

*Administrative regulations* – an act of legislature as an organized body. Any act, regulation, or enactment to which the state gives the force of law.

*Appeal* – a continuation of the original suit rather than as the inception of a new action, confined normally to consideration of the record which come from the court below, with no new testimony taken or issue raised in the appellate court.

*Appellant* – a person who appeals from the judgment of a court

*Affidavit* – a voluntary statement reduced to writing, and sworn to or affirmed before some person legally authorized to administer an oath or affirmation

*Bureaucracy* – a government by bureaus or departments

*Case law* – the law as laid down in the decisions of the courts; that is, in the cases which have been decided

*Circuit court* – a court presided over by a judge or by judges at different places in the same district; a name given to certain courts of general jurisdiction by constitution or statute



*Civil Service* – all civilian officers and personnel in the employment of the state or federal government. The civil service system under which appointments to and tenure of public office are determined by the merit system instead of the former spoils system, under which appointment to public office was usually gained as a reward for political work, with the resulting evils of inefficiency, extravagance, interruption of public business by job hunters, corruption of the electoral franchise, and political assessments.

*Collective bargaining agreement* – an agreement reached by bargaining as to wages and conditions of work, entered into by groups of employees, usually organized into a union or brotherhood, on one side, and an employer or groups of employers on the other side.

*Contempt* – an exhibition of scorn or disrespect toward a court or legislative body

*Damages* – the sum of money which the law awards or imposes as pecuniary compensation, recompense, or satisfaction for an injury done or a wrong sustained as a consequence either of a breach of contractual obligation or a tortuous act

*Declaratory relief* – a judgment which declares conclusively the rights and duties, or the status, of the parties but involves no executor or coercive relief following as of course

*De facto* – in fact, as distinguished from “de jure,” by right

*Deprivation* – a taking of property, rights, or privileges from a person

*Disclose* – to make known that which before was unknown

*District court* – usually, courts of record having general jurisdiction. In some jurisdictions, constitutional courts.

*Due process* – implies and comprehends the administration of laws equally applicable to all under established rules which do not violate fundamental principles of private rights, and in a competent tribunal possessing jurisdiction of the cause and proceeding by hearing upon notice.

*Enjoin* – to forbid; to restrain by injunction; to command; to order.

*Equal protection* – a guaranty under the Fourteenth Amendment to the United States Constitution that no person or class of persons shall be denied the same protection of the law which is enjoyed by the other persons or other classes under like circumstances, in their lives, liberty, property, and in pursuit of happiness.

*Equal rights* – the designation sometimes given to those statutes enacted since the civil war and the abolition of slavery which exemplify the changed feeling of the people towards the African race and are intended to place the colored man upon a perfect equality with all others before the law.

*Establishment clause* – the provision of the First Amendment to the Constitution of the United States concerning establishment of religion, the meaning of which is that neither a state nor the federal government can set up a church; neither can pass laws which aid one religion, aid all religions, or prefer one religion over another; neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion.

*Evidence* – the means by which any matter of fact, the truth of which is submitted to investigation, may be established or disproved. That which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or the other.

*Ex post facto* – after the thing is done; after the act is committed. Signifying something done after, or arising from or to affect, another thing committed before.

*Federal codes* – the codification of the federal statutes.

*Federal statutes* – the written will of Congress as expressed formally by an Act of Congress.

*Findings of fact* – a written statement of an ultimate fact as found by the court, signed by the court, and filed in court, often required by statute as support for the decision and judgment in a trial to the court. A conclusion drawn by the trial court from the facts without the exercise of legal judgment.

*Grievance* – a cause for complaint or protest. The crux of an industrial or labor dispute.

*Injunction* – a form of action in equity which is designed to protect a plaintiff from irreparable injury to his property or other rights of which a court of equity will take cognizance, by prohibiting or commanding the doing of certain acts.

*Insubordination* – refusal to obey directions.

*Judgment notwithstanding the verdict* – a judgment rendered upon a motion made after verdict but before rendition of judgment on the verdict, in which the applicant prevails in showing that he is entitled to judgment under the law notwithstanding the verdict returned against him by the jury.

*Judicial review* – the review of administrative action by an action or proceeding in court.

*Jurisdiction* – the power of the court over the subject matter, over the res and property in contest, and for the rendition of the judgment or decree the court assumes to make.

*Jurisprudence* – the science of law.

*Just cause* – a legal cause; a fair cause relied upon in good faith; a cause based upon acts or omissions detrimental to the public service.

*Liability* – legal responsibility, either civil or criminal. The condition of being bound in law and justice to pay an indebtedness or discharge some obligation.

*Litigation* – an action or suit; a series or group of related suits or actions.

*Mandamus* – a command by order or writ issuing from a court of law of competent jurisdiction, in the name of the state or sovereign, directed to some inferior court, tribunal, or board, or to some corporation or person, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law.

*Misconduct* – a transgression of some established and definite rule of action, where no discretion is left, except what necessity may demand; a violation of definite law; a forbidden act; intentional wrongdoing.

*Misdemeanor* – an indictable offense not amounting to a felony, but sometimes including offenses not punishable by indictment; punishable by imprisonment in the county jail, as opposed to punishable by death or imprisonment in the state prison as is the case with felonies.

*Moral turpitude* – baseness, vileness, or depravity in the private and social duties which a man owes to his fellowmen or to society in general.

*Negligence* – the lack of due diligence or care. A wrong characterized by the absence of a positive intent to inflict injury but from which injury nevertheless results.

*On certiorari* – a writ issued by a superior to an inferior court of record, or to some other tribunal or officer exercising a judicial function, requiring the certification and return of the record and proceedings in order that the record may be revised and corrected in matters of law.

*Petitioner* – one seeking relief by a petition.

*Plaintiff* – the party complaining in an action or proceeding. A person who brings a suit, action, bill, or complaint.

*Preponderance of evidence* – the weight, credit, and value of the aggregate evidence on either side; the greater weight of the evidence; the probability of the truth; evidence more convincing as worthy of belief than that which is offered in opposition thereto.

*Prior restraint* – censorship before publication.

*Prima facie evidence* – evidence which if unexplained or uncontradicted, is sufficient to carry the case to the jury and to sustain a verdict or finding in favor of the side of the issue which it supports, but which may be contradicted by other evidence.

*Procedural due process* – a regular course of justice, which is not unreasonable or arbitrary, upon notice and hearing, in pursuance of an efficacious remedy secured by the law of the state. An orderly proceeding appropriate to the case or adapted to its nature, just to the parties affected and adapted to the ends to be attained; one in which a person has an opportunity to be heard, and to defend, enforce, and protect his rights with the assistance of counsel before a competent and impartial tribunal legally constituted to determine the right involved.

*Property right* – economic interests supported by the law.

*Redress* – remedy; compensation; reparation.

*Respondent* – the party against whom an appeal is taken to a higher court, being the successful party in the lower court.

*Reversed and Remanded* - a familiar expression meaning that the appellate court has set aside the judgment rendered in the trial court and that the case goes back to the trial court for a new trial.

*State police power* – the whole power of government to which all other powers are only incidental and ancillary; nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. An attribute of sovereignty, comprehending the power to make and enforce all wholesome and reasonable laws and regulations necessary to the maintenance, upbuilding, and advancement of public weal and protection of public interests.

*Substantive due process* – freedom from arbitrary action coupled with the equal operation of the laws.

*Suit* – an action; a legal proceeding of a civil kind. Any proceeding in a court of justice by which a person pursues therein that remedy which the law affords him.

*Suit in equity* – an action in equity. A suit prosecuted and tried in accordance with the modes of procedure known to courts of equity.

*Summary judgement* – not a trial; on the contrary it assumes that scrutiny of the facts will disclose that the issues presented by the pleadings need not be tried because they are so patently insubstantial as not to be genuine issues at all.

*Trustee* – that person in a trust relationship who holds the legal title to the property subject to the trust, for the benefit of the beneficiary or cestui que trust, with certain powers and subject to certain duties imposed by the terms of the trust, principles of equity, or statutory provision.

*Writ of mandate* – the process or writ which issues in a proceeding in mandamus where the plaintiff or petitioner is granted relief by way of mandamus.

### **Significance and Limitations of the Study**

This study is significant because the federal Race to the Top grant (74 FR 59688) is causing states to consider reform of their teacher tenure laws. The grant offers significant rewards to states with plans to improve teacher effectiveness, and legislators are looking at

teacher tenure as a barrier to that effort. At the same time, research suggests that the methods undertaken to reform tenure by the state legislators are not sound ways to improve the quality of teaching (Duffrin, 2011). This study will enable educators and legislators to see where each state currently stands on the subject of teacher tenure and will make predictions and conclusions based on those laws and supporting litigation and jurisprudence about forthcoming changes in tenure laws over the coming years.

This study is limited by the fact that the most recent legislation and litigation will be gathered at the onset of the study, however before the study is complete another legislative session will have occurred making it possible that some of the state legislation will have changed since the onset of the study.

### **Organization of the Dissertation**

Chapter 1 includes the introduction and general background of the study, the statement of the problem, the purpose of the study, the theoretical framework, the research questions, the methodology, the significance, and the limitations of the study. Chapter 2 is the Review of Related Literature. Chapter 3 reports the findings of the study. Chapter 4 includes the summary and the conclusions and recommendations that can be made from the research.



## **CHAPTER II**

### **REVIEW OF THE LITERATURE**

#### **Origins of Teacher Tenure**

Few occupations provide job protections. Among those that do are the civil service and university professors. Tenure protection for public school teachers is a derivation of both of these job protections. The purpose for tenure is the same for both of these occupations. The original purpose of tenure was “to insulate employees from undue political forces and to increase the attractiveness of the job” (Hassel, et al, 2011). The historical path toward job protections in the university and the civil service was divergent and resulted in variations of implementation. For both, however, the purpose remains the same, job security and insulation. Job security attracts and retains talented employees in spite of insufficient salaries. Insulation protects employees from political forces, both internal and external, which may interfere with organizational performance. Teacher tenure for public school teachers became a combination of job protections from both the university and the civil service (Hassel, et al, 2011).

## The Civil Service

The origin of tenure for civil service employees was the *Pendleton Civil Service Reform Act of 1883* (Hassel, et al, 2011).

### Pendleton Civil Service Reform Act

The *Pendleton Civil Service Reform Act of 1883, ch. 27, 22 stat. 403*, was passed by Congress following President Garfield's assassination by Charles Guiteau, a disgruntled prospective employee who unsuccessfully sought a federal office. The civil service movement that had begun in New York in 1877 had been unpopular with politicians until the assassination brought enlightenment on the unjust system of federal appointments, which were most often given to family members or political supporters (Hoogenboom, 1961).

The *Pendleton Civil Service Reform Act*, passed on January 16, 1883, created the Civil Service Commission that managed appointments to federal positions and introduced fairness into the growing bureaucracy. Under this legislation, certain federal jobs were classified and prospective employees were required to demonstrate competence on practical examinations. The candidate with the highest score was to be given the job. The law specifically exempted employees in these classified positions from any requirement to support any political party or politician and divorced politics from the federal bureaucracy. The law also limited the number of members of the same family who could be employed within the bureaucracy. The law,

however, applied only to certain federal positions and did not extend to state and local governments, though later legislation did extend the U. S. Civil Service to include more federal jobs and those at the state and local level (Hoogenboom, 1961).

According to Hassel, et al (2011), the main goal of this political insulation is to “protect the public from poor services that could result if most government employees were appointed based on friendship and political allegiance, regardless of the appointees’ qualifications.” The *Pendleton Act* made that possible. Additionally, Hassel, et al (2011) assert that the job protections allow civil service organizations to attract and retain good employees at a lower salary. A few states have recently decreased civil service protections, and in those states, managers report difficulty with filling those positions. Among the top reasons for people to enter into federal employment and to remain in federal jobs is the job security (Hassel, et al, 2011).

According to Hassel, et al (2011) tenure is not simply a policy, it is a system with various design elements, and tenure in the civil service is no exception. In the civil service, the amount of time an employee must work before earning tenure is relatively short, one year for federal employees and six months to a year for city and state employees. That time is a probationary period during which the employee has “career-conditional status.” At the end of the probationary period, federal employees and most city and state employees gain job protection automatically. In policy, there is a rigorous evaluation process during the probationary period, but in practice a manager does not have to take any action unless the employee is going to be denied tenure. This rarely happens; only 1.6 percent of federal employees are terminated during the probationary period. Federal policy and most state level policies require the supervisor to use the probationary period to determine the fitness of the employee and to terminate unqualified

employees. Civil service supervisors and employees, however, consider the required evaluations to be mere formalities at the federal level, and meaningless at the state level. Ultimately, any person who is hired into a civil service position will be granted tenure (Hassel, et al, 2011).

Once granted tenure, civil service employees can only be dismissed for “just cause.” This is an extremely high bar that requires supervisors to provide evidence and specific justification for the dismissal. At the state level, some tenure policies include specific language, allowing dismissal for such reasons as “negligence, inefficiency or inability to perform assigned duties, insubordination, willful violation of the provisions of law or agency rules, conduct unbecoming a public employee, misconduct, habitual drug abuse, or conviction of any crime involving moral turpitude.” Yet, even reasons such as these are considered vague and can be interpreted in various ways by arbitrators, hearing officers, and courts. At the federal level, civil service laws require a specific process that must be followed prior to terminating a permanent employee. The steps of this process include the following: “notice of the dismissal action, an opportunity to respond and present evidence, representation by counsel, a written decision from the agency that initiated the dismissal, a right to appeal to the Merit Systems Protection Board, and a right to judicial review” (Hassel, et al, 2011).

### **Higher Education**

Tenure in the university system evolved on the premise of academic freedom. According to Patton (2011), one of the earliest instances of educational tenure being enacted was in 1245,

when Pope Innocent IV excused the scholars at the University of Paris from having to attend ecclesiastical court. A year later, the Court of Conservation was created to provide the same protections to university faculty in the face of similar situations. As time went on, practices such as academic abstention protected scholars and universities and granted them autonomy from local, civil, and ecclesiastical officials. Within certain limits, these practices prevented “excessive encroachment” from officials not involved in the academic institution (Patton, 2011).

In the 1890’s, *Lernfreiheit* was established in Germany, providing protections for both university students and faculty (Patton, 2011). *Lernfreiheit*, the “heart of academic freedom,” allowed students to choose courses, change schools, and be “free of dogmatic restrictions.” It also provided for faculty the rights to freedom of inquiry and freedom of teaching. This allowed faculty to conduct research and report findings without restriction. John Dewey furthered the freedoms of academicians in the U.S. by founding the American Association of University Professors (AAUP) in 1915 to protect university faculty employment from external interference. This protection was vital because members of university faculty were often dismissed in the 19<sup>th</sup> and early 20<sup>th</sup> centuries for offending individuals or groups or criticizing business ethics. When periods of conflict occurred, such as the expansion of communism, faculty found their books criticized or banned for their rhetoric and were often required to take loyalty oaths (Patton, 2011).

The AAUP issued a Statement of the Principals on Academic Freedom and Tenure in 1940, enumerating the benefits of freedom in teaching, research, and extracurricular activities. The statement emphasized the importance of tenure for the recruitment and retention of qualified

teachers and that the security that tenure provided was integral to the success of universities (Patton, 2011).

The purpose of tenure in higher education historically has been academic freedom. That is “to enable faculty to pursue new ideas, viewpoints, and research innovations without fear of retribution by academic officials who might disagree or whose prior work is diminished by new thinking and research” (Hassel, 2011). Since universities pride themselves to be on the cutting edge of research and thinking, it is critical that professors be able to challenge the administration and conventional wisdom without fearing for their jobs. To that end, tenure in the university system is a reward for achievement, and because universities are highly selective about who is to be granted tenure, it confers significant status. The quality of university professors’ scholarly work reflects on the institution and can attract other high performers to the university, and so tenure is only given to those who have already proven their ability to succeed. The majority of universities will not consider tenure until the professor has been teaching at the institution for at least seven years (Hassel, 2011). Virtually no college or university will make tenure decisions for an employee who has taught for fewer than five years. To earn tenure in the university system, there are rigorous and well defined criteria that a professor must meet. Nearly every university requires a tenure candidate to demonstrate excellence in research and scholarship, teaching, and service. Candidates must demonstrate both quantity and quality of scholarly work, including publications, inventions, and patents. Grants and fundraising, professional activities, and presentations are also taken into account. The tenure board ensures that candidates granted tenure have the recognition and respect of their peers. Candidates are also screened on their teaching ability, including the quality of course syllabi, student evaluations, enrollment levels,

advising of students and supervising of student research, and teaching awards. Finally, candidates are judged on their service to the school, students, faculty, and community. Candidates are expected to be highly involved with all of these groups and to contribute their time to advising, serving on committees, and participating in recruitment and alumni events (Hassel, 2011).

In higher education, it is the default decision to deny tenure. It is the responsibility of the candidates to prove their qualifications, and if they fail to earn tenure, they are most often non-renewed. The tenure review process at most institutions includes review by peers and supervisors, first at the department level and then by leaders at the college level, and finally by the top leadership of the university. The candidate's tenure file is the basis for review at each level. This file includes the professor's scholarly work, evidence of performance, and a statement from the candidate explaining the nature of his or her scholarship. In some universities, candidates are also reviewed by peers at other institutions or are required to provide input from students and alumni (Hassel, 2011).

At the university, the amount of protection afforded by tenure depends on the scope of the award. Tenure contracts can be worded to protect the professor's position at the department, school, or institution level. The professor's position is most secure if awarded at the institution level, however the majority of universities offer tenure only at the department level. The process to dismiss a tenured professor is almost never invoked by universities, but generally includes "notice, a hearing, and one or more opportunities to appeal" (Hassel, 2011). Additionally, even if the university begins dismissal proceedings, it rarely results in dismissal. In recent decades,

fewer than 0.01 percent of tenured professors have been dismissed from universities (Hassel, 2011).

### **Tenure in Public K-12 Schools**

Tenure policies for public K-12 schools vary from state to state and are currently under reform in many states, making it difficult to generalize. Historically, however, every state has included a probationary period before a teacher can gain tenure. The majority of states have required three years of teaching before a tenure decision could be made, however across the country the time it has taken for a K-12 teacher to gain tenure was between one and five years. In nearly every state, the only criteria used to make tenure decisions has been the completion of the probationary period. While most state laws have required probationary teachers to be evaluated every year, those evaluations have not been a part of most states' tenure granting process. In K-12 public education, tenure granting has historically been the default, with administrators only taking action if tenure was to be denied. Once tenured, a teacher historically has been protected from unfair or arbitrary dismissal, though most states have included "incompetence or inadequate performance as grounds for dismissal" (Hassel, et al, 2011). In most states, the due process required to dismiss a tenured teacher has included notice of the reasons for termination, a hearing, and a right to appeal (Hassel, et al, 2011).



## **Legal Foundation and Federal Statutes Governing Tenure**

### Amendment I of the United States Constitution

Many of the cases concerning violations of teacher tenure rights involve rights granted by the First Amendment of the United States Constitution. As an extension of the state, school districts cannot violate a person's constitutional rights, and the rights most often violated by school districts come from the First Amendment, which states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Through litigation, the United States Supreme Court has extended these rights to include freedom of expression, freedom of association, and academic freedom. There are many reasons why a school district may fire a teacher, even a tenured teacher, but the school district may not terminate a teacher for constitutionally protected behavior unless they can prove a legitimate state interest (*Mt. Healthy v. Doyle*, 1977).

### Amendment XIV of the United States Constitution

The Fourteenth Amendment of the United States Constitution serves as another legal basis for actions in court when tenured teachers are dismissed. The amendment states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This amendment serves to apply the Bill of Rights to state actions. The school district, as an extension of the state, is bound to uphold the constitutional rights of its employees. As the conference of tenure entitles the bearer a property right in the job, once a teacher is granted tenure it cannot be removed without due process.

#### 28 USCS § 1343

The federal statute 28 USCS § 1343 is one of the civil rights codes that authorizes the district courts to have jurisdiction over civil actions relating to federal codes or statutes.

Specifically, the statute allows the district courts:

To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for the equal rights of citizens or of all persons within the jurisdiction of the United States.

Cases concerning teacher tenure are often filed in district courts under this statute because removing a teacher's tenure constitutes a deprivation of a constitutionally protected right by an agency of the state, and therefore must be done with due process of law.

## 42 U.S.C.S. § 1983

The other federal statute that is most often used as the basis for teacher tenure cases is 42 U.S.C.S. § 1983. According to this statute:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen...to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress.

This statute allows teachers to bring action in court against a school district, as an extension of the state, for violating constitutional rights and provides a remedy for that deprivation. Most often cases are brought to the courts for violations of First Amendment rights to free speech or association, or the Fourteenth Amendment right to due process. This statute allows the court to grant the petitioner declaratory or injunctive relief, though it does not grant any additional substantive rights.

## The No Child Left Behind Act (20 USCS § 6301)

The *No Child Left Behind Act* was created “to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.” The statute lists twelve goals that will accomplish this purpose:

1. Ensure that all academic assessments, systems for accountability, preparation and training for teachers, curriculum, and instructional materials are high-quality and aligned with the State's challenging academic standards.
2. Meet the educational needs of all children, including those who are limited English proficient, migratory, disabled, Indian, neglected, delinquent, in need of reading assistance, and low achieving.
3. Close the achievement gap between children who are low performing and those who are high performing, especially those gaps between nonminority and minority students, and children who are advantaged or disadvantaged.
4. Hold states, districts, and schools accountable for the improvement of all student's academic achievement and improving low-performing schools while allowing students in those schools alternatives so that they will achieve a high-quality education.
5. Target and distribute resources to the districts and schools with the greatest needs.
6. Increase accountability, teaching, and learning by assessing students on challenging State academic achievement and content standards, and increasing the achievement of every student, especially the disadvantaged.
7. Provide flexibility and increased power for decision making to teachers and schools while making teachers and schools more accountable for student performance.
8. Provide an accelerated and enriched educational program that increases the amount and quality of the instructional time.

9. Reform schools and ensure that all children have access to challenging, effective, and scientifically based lessons and content.
10. Increase the quality of instruction by providing substantial professional development opportunities to staff.
11. Coordinate services under all parts of the *No Child Left Behind Act*, with all other educational services and other agencies serving children to the extent possible.
12. Ensure parents have opportunities to participate in their child's education that are both substantial and meaningful.

The *No Child Left Behind Act* is a federal law concerning education. The federal government, however, has no jurisdiction over educational policy, rendering the *No Child Left Behind Act* as more of a suggestion than a law. In an effort to force states to follow the policy anyway, the federal government tied compliance with the *No Child Left Behind Act* to Title I money (money schools get from the federal government when more than half of the students in the school qualify for free or reduced lunch). Since for many schools Title I money is more than half of their annual budget, school districts cannot afford to refuse to comply with the *No Child Left Behind Act*. The *No Child Left Behind Act* mandates 100 percent proficiency at grade level for all students by 2014, a goal that some may say is unreachable. Since the passing of the law, school districts have focused exhaustively on student achievement and yet the goal of 100 percent proficiency remains elusive. With two years remaining to reach this goal, districts are turning their attention to teacher effectiveness as a possible way to reach compliance. Districts are finding that it does not help to identify ineffective teachers if the teachers cannot be fired and thus the focus has turned to teacher tenure (Wong, 2011).

## Race to the Top Fund (74 FR 59688)

Effective January 19, 2010, the *Race to the Top Fund* is a competitive grant program that is designed “to encourage and reward States that are creating the conditions for education innovation and reform; achieving significant improvement in student outcomes, including making substantial gains in student achievement, closing achievement gaps, improving high school graduation rates, and ensuring student preparation for success in college and careers; and implementing ambitious plans in four core education reform areas.” The first reform area is that school districts should adopt “internationally benchmarked standards and assessment that prepare students for success in college and the workplace.” The second reform area requires that school districts build “data systems that measure student success and inform teachers and principals about how they can improve their practices.” The third reform area requires that school districts increase “teacher and principal effectiveness” and distribute them equitably. The final reform area requires that school districts turn around the lowest achieving schools.

## United States Supreme Court Decisions

### United States v. Wickersham (1906)

In the case of *United States v. Wickersham*, a clerk in the surveyor-general’s office was dismissed due to an alleged lack of work. Shortly after the clerk’s termination, the surveyor-

general submitted a request to the Commissioner of the Land Office asking for additional employees. The commissioner refused the surveyor-general's request because of the recent terminations, which were apparently conducted on improper grounds. The clerk sought relief in the Court of Claims for loss of wages, alleging that he was wrongfully dismissed. The clerk, as a civil servant, could be terminated only for just cause and the charges had to be filed in writing with the head of the department. Neither of these criteria had been met in this case and the Court of Claims found in favor of the clerk.

The government office sought review of the decision in the United States Supreme Court. The court affirmed the claims court's decision and held that the clerk was entitled to back wages. The court disagreed with the government's assertion that the clerk was not a civil servant and noted that the clerk's name had been included on a list of employees that had been filed with the Civil Service Commission by the Secretary of the Interior. As such, the court held that the clerk was a civil servant and entitled to civil service protection

#### Meyer v. State of Nebraska (1923)

In the case of *Meyer v. State of Nebraska*, the plaintiff was a teacher who sought United States Supreme Court review of a judgment by the Nebraska Supreme Court regarding the teacher's convictions under 1919 Neb. Laws ch. 249. This statute prohibited the teaching of a modern language other than English to any student who had not successfully entered and passed the eighth grade. This law applied to any public, private, denominational, or parochial school

and the penalty for any person found guilty of violating the law was a misdemeanor conviction that carried a fine between twenty-five and one hundred dollars and up to thirty days in county jail. In this case, a teacher at a parochial school maintained by Zion Evangelical Lutheran Congregation was convicted for teaching German to a ten-year-old child who had not yet entered and passed the eighth grade. The Supreme Court of Nebraska held that the law was appropriate and a “valid exercise of the state’s police power.”

The United State’s Supreme Court reversed this ruling as arbitrary because it had no rational relationship to any legitimate state goal. The justices believed that the 14<sup>th</sup> Amendment protects a teacher’s right to teach and a parent’s right to hire teachers to teach their children. They also believed that learning and education are supremely important and should be “diligently promoted” and that the state could not use the exercise of police power as a guise to interfere with the liberty interests of its citizens.

The statute had been intended to ensure that English would be the “mother tongue” of every American. Lawmakers believed there was a genuine state interest in indoctrinating children into the American language and culture prior to exposing them to foreign concepts. The legislation had been replicated in twenty-one other states. While challenged in three states, Ohio, Iowa, and Nebraska, the statute had not yet been successfully overturned in any state.

The United State’s Supreme Court justices specifically questioned whether the questionable state interest justified not only curtailing the constitutional rights of educators and parents, but also causing legitimate harm to children while prohibiting a practice that could not be proven to be detrimental to a child. The justices acknowledged that language proficiency is only possible if a child begins instruction at a young age and that the law would harm children’s



brain development. Additionally, they acknowledged a state's right to legislate minimum educational standards for schools, but questioned whether there was any legitimate rationale for legislating a maximum education level.

#### Indiana Ex Rel. Anderson v. Brand, Trustee (1938)

In the case of *Indiana Ex Rel. Anderson v. Brand, Trustee*, a public school teacher who had been granted an annual contract under the Teachers' Tenure Act in Indiana sought a writ of mandate to ensure that the school trustee could not terminate her contract. The Teachers' Tenure Act came into effect on March 8, 1927, and granted permanent contracts to any teacher who had completed five years of teaching. The contract allowed a teacher to be terminated for just cause and certain enumerated reasons. The Teachers' Tenure Act, however, had been repealed with respect to teachers in township schools prior to the petitioner's termination. The district court held in favor of the school trustee due to the fact that the law had been repealed. The state supreme court affirmed the decision. On certiorari, the United States Supreme Court held that the trustee had erred when terminating the teacher's contract. The court held that the teacher had a valid contract that was not made ineffective by the repeal of the law, and so the teacher could only be terminated for the reasons enumerated in the contract and not for political or personal reasons.

### Wieman v. Updegraff (1952)

In the case of *Wieman v. Updegraff*, the appellants were state employees who had refused to sign an oath, required by Oklahoma statute, that stated they were not members of organizations proscribed by the government. The appellee was a citizen and taxpayer who filed suit in the state district court to force the state to discontinue pay to the employees who would not sign the oath. The appellants attacked the suit on the grounds that the law was ex post facto and that it violated the Due Process Clause. The state district court held in favor of the law and enjoined the state from paying salary to the appellants. The state supreme court also upheld the decision.

The United States Supreme Court, however, reversed the decision. The court held that alone, association could not determine the disloyalty and disqualification of an employee. The court held that due process was appropriate for state employees who were excluded by arbitrary and discriminatory laws. The justices felt that it was a misuse of power to create an “indiscriminate classification of innocent with knowing activity.”

### Adler v. Board of Education (1952)

In *Adler v. Board of Education*, Adler, a public school employee, challenged the constitutionality of New York’s Feinberg Law and 1949 N.Y. Educ. Laws 360. The statute disqualifies individuals for employment in public schools if they teach, advocate, or are a

member of a group that teaches or advocates violent overthrow of the government. Additionally, the law states that membership in such a group constitutes prima facie evidence for disqualification. Adler alleged that the laws violated the freedoms of speech and assembly for employees of the public school system and that they denied employees due process.

The trial court ruled that the laws were unconstitutional. The Court of Appeals of New York, however, overturned that decision and held that the New York laws did not violate the employee's constitutional rights. On appeal, the United States Supreme Court upheld the appellate court's decision and held that the laws were constitutional. The court held that the board of education had a right to question the fitness and suitability of an employee engaged in public service. Additionally, the court held that the law had provisions for review of decisions and a process for the employee to present evidence, therefore the law did not violate the employee's due process rights.

#### Cole v. Young (1956)

In the case of *Cole v. Young*, an employee challenged his dismissal as a food and drug inspector under a federal statute that allowed the dismissal of federal employees in the interest of national security. The employee was terminated for "sympathetic association with Communists". The employee filed action in the United States District Court for the District of Columbia, seeking a declaratory judgment that the termination of his employment was unconstitutional and that his due process rights had been violated when the Civil Service

Commission refused to hear his appeal. The court upheld the employee's termination, as did the United States Court of Appeals for the District of Columbia Circuit.

The United States Supreme Court reversed the decision. The court held that the employee's position was not one in which he would have an effect on national security. Therefore his dismissal was unconstitutional.

### Sweezy v. New Hampshire (1957)

In *Sweezy v. New Hampshire*, Sweezy, a university professor, was considered by the state attorney general and the Supreme Court of New Hampshire to be in violation of the *New Hampshire Subversive Activities Act of 1951*. The professor had been questioned by the state attorney general extensively and had answered every question except for those relating to a lecture he had given in class and those relating to the Progressive Party and its participants. The attorney general filed a petition to compel the professor to answer the questions, and when he again refused, the court held him in contempt. The Supreme Court of New Hampshire upheld the decision, but the U. S. Supreme Court reversed on appeal.

The court held that Sweezy's First and Fourteenth Amendment rights had been violated. Sweezy possessed freedoms of speech, expression, and association (which the court here extended to mean a right to lecture) as granted by the constitution and that the attorney general had shown no compelling state interest for violating those rights. Additionally, Sweezy's right to due process had been violated as the attorney general did not have authorization to force a

witness to answer questions. Specifically, Justices Frankfurter and Harlan, in their opinions, stated that the questions asked had violated Sweezy's constitutionally protected rights to academic and political freedom.

### Beilan v. Board of Public Education (1958)

In the case of *Beilan v. Board of Public Education*, a teacher in a Philadelphia public school refused to answer questions posed by the school board about connections he may have had with the communist party, even after he was warned that he would be dismissed if he did not answer the questions. The Supreme Court of Pennsylvania, Eastern District, upheld the dismissal.

The Supreme Court of the United States also upheld the teacher's dismissal. According to the court, "school authorities have the right and duty to screen teachers as to their fitness." The court, bound by the appellate court's interpretation of the state statute used for dismissal, held that the employee's behavior met the definition of incompetency as defined by the appellate court: "deliberate and insubordinate refusal to answer the questions of his administrative superior in a vitally important matter pertaining to his fitness." As the teacher had been warned of the consequences of his actions and the interpretation of the law was consistent with the constitution, the court upheld the teacher's termination.

### Nelson v. County of Los Angeles (1960)

In the case of *Nelson v. County of Los Angeles*, a county employee was terminated after he refused to answer questions provided by the subcommittee of the U.S. House Un-American Activities Committee when he was ordered to answer the questions by the county board of supervisors. A California statute required that public employees testify regarding “subversive activity” or be dismissed. The employee was fired for violating this statute and for insubordination. The employee filed action in the District Court of Appeals of California, Second Appellate District, arguing that he was fired in violation of his Fourteenth Amendment rights because the statute was “arbitrary and unreasonable” and that his termination was illegally based on his use of his First and Fifth Amendment rights. The court affirmed the summary dismissal of the employee.

The United States Supreme Court also upheld the dismissal. The court held that the statute was not arbitrary or unreasonable, nor was the employee dismissed because he invoked his Fifth Amendment rights and was presumed guilty. The court held that the employee was discharged for insubordination when he failed “to give information regarding a field of security which the state had a legitimate interest in securing.”

### Shelton v. Tucker (1960)

In the case of *Shelton v. Tucker*, the petitioner teachers challenged the validity of an Arkansas statute that required teachers to sign an affidavit every year, listing without exception every organization that they had been a member of or gave money to in the previous five years. The petitioners challenged the statute on the grounds that it violated their First Amendment right to freedom of association. The United States District Court for the Eastern District of Arkansas and the Supreme Court of Arkansas held that the law was valid and constitutional.

Hearing the case on certiorari, the United States Supreme Court reversed the decisions of the lower courts and held that the statute was unconstitutional. Justice Stewart specifically expressed in his opinion that the statute was invalid due to “its unlimited and indiscriminate sweep.” The court held that the statute went far beyond a state’s reasonable right to inquire into the competency of teachers.

### Keyishian v. Board of Regents (1967)

In *Keyishian v. Board of Regents*, the appellants, faculty members at a state university, sued for declaratory and injunctive relief after being told that they must sign certificates stating that they were not members of the Communist Party. Signing this certificate was required by state law and failure to do so would result in termination. The faculty members alleged that the law violated the constitution. The United States District Court for the Western District of New

York held that the program, which partly consisted of statutes and partly administrative regulations, was constitutional. The purpose of the program was to prevent subversive employees from being appointed or retained by the state.

The United States Supreme court reversed the decision on direct appeal. They found that the statutes concerning “seditious utterances” were vague. A faculty member could not reasonably know to what extent their speech must go beyond “mere statement about abstract doctrine” in order to be considered seditious. They held that the statutes concerning the distribution of material advocating the forceful overthrow of the government were also vague, in that they did not clearly delineate the extent to which the employee must transcend merely teaching the abstract concept before being terminated. They also found that the statutes that made Communist Party membership prima facie evidence of disqualification violated the employee’s constitutional right to freedom of association because they were not permitted rebuttal to prove that they were not active members or that they had no intent to promote unlawful goals. They also overturned the case of *Adler v. Board of Education*.

Pickering v. Board of Education of Township High School District 205, Will County (1968)

In *Pickering v. Board of Education*, Pickering was a public school teacher when he wrote a letter to the editor of a local newspaper criticizing the superintendent and school board for their poor performance in the past at raising revenue for the schools. The letter appeared in the newspaper days after voter defeated a proposal to increase school taxes. The school board chose



to dismiss the teacher following the letter's publication in the paper, claiming that it interfered with the efficient operation and administration of the school district. The decision was upheld by both the Circuit Court of Will County, Illinois, and the Supreme Court of Illinois. Both courts held that the teacher's termination did not violate his right to free speech and that the contents of the letter were not protected by the First Amendment.

The United States Supreme Court reversed the ruling on certiorari. The court held that as the teacher's employment position was not substantially involved in the subject of the letter, the teacher should be considered a member of the general public speaking on an issue of public concern. The justices argued that there was no proof that the teacher had knowingly or recklessly made any false statements, therefore the teacher's right to speak on any matter of public interest was protected by the constitution and could not be used as the reason for his dismissal.

#### Epperson v. Arkansas (1968)

In the case of *Epperson v. Arkansas*, a biology teacher in a public school brought an action to the state Chancery Court in anticipation of a career limiting dilemma. The new district adopted textbook for her course included a chapter on the Darwinian theory of evolution and it was presumed that she would teach that chapter. However, an Arkansas statute made it a misdemeanor criminal offense to teach the theory of evolution. The teacher asked the court to declare the statute void and to enjoin the district from terminating her contract when she

inevitably violated the statute. The Chancery Court agreed that the Arkansas statute violated the Fourteenth Amendment, however, on appeal, the Supreme Court of Arkansas reversed this holding. The state supreme court held that the statute was a permissible use of the state's power to legislate the curriculum in public schools.

The United States Supreme Court again reversed the decision. The court held that the statute contradicted the First Amendment and violated the Fourteenth Amendment. The court held that the statute violated the establishment clause of the constitution which prevents states from establishing a state religion and that it interfered with the citizens' rights to free exercise of religion.

*Uniformed Sanitation Men Assn v. Commissioner of Sanitation of the City of New York* (1968)

In the case of *Uniformed Sanitation Men Assn v. Commissioner of Sanitation of the City of New York*, fifteen sanitation workers were discharged after refusing to testify about corruption in a disciplinary hearing. The workers refused to testify invoking their Fifth Amendment protection from self-incrimination. The workers filed suit in the United States District Court for the Southern District of New York seeking declaratory judgment and injunctive relief, arguing that they were dismissed for invoking their Fifth Amendment rights and then refusing to waive those rights. The district court dismissed the action, and an appeal to the Court of Appeals for the Second Circuit resulted in the court affirming the dismissal.

The United States Supreme Court reversed the decision. The court held that the employees were “discharged for refusal to expose themselves to criminal prosecution based on testimony which they would give under compulsion, despite their constitutional privilege” to protection against self-incrimination. The court held that public employees are entitled to the protections granted by the constitution like all other citizens. This decision reversed *Gardner v. Broderick (1967)* which held dismissals for this reason to be constitutional.

#### Perry v. Sindermann (1972)

In *Perry v. Sindermann*, the respondent, a teacher at a state college, was not renewed at the end of his fourth annual contract with the college. The teacher was not given a reason for his non-renewal and was not granted a hearing with the college board regarding his dismissal even though he requested one. The teacher brought an action to the district court, alleging that the college had dismissed him because he had been part of a group that was critical of the college’s governing board during the 1968-69 academic year. He believed that the board’s non-renewal of his contract was a violation of his right to free speech and that their refusal to grant him a hearing violated his right to due process. The district court agreed with the college and determined that the college did not have to give him a reason for non-renewal and that a hearing was not required in this case because the teacher did not have a property right in the job.

The United States Court of Appeals for the Fifth Circuit heard the appeal and reversed. They held that if the teacher had not been rehired because of his protected speech, the college did

violate his due process rights. They also stated that even though the college did not have a tenure system, if the teacher had an “expectancy” of employment the following year then the college did owe him due process prior to non-renewal.

The U.S. Supreme court affirmed the appellate court’s decision. They held that the fact that the teacher did not hold tenure did not automatically preclude him from the right to due process because a state is not permitted to deny a person any benefit for reasons protected by the constitution. Therefore, if the college had not renewed him for his constitutionally protected speech, then he did have a right to a hearing at which the college must explain their reasons for non-renewal and the teacher would have an opportunity to refute them. They also held that a tenure system was not necessary to create a property right in the college and that if the teacher could prove that there was a de facto tenure system within the college, then he would again have the right to a hearing regarding his non-renewal. Following the hearing, the teacher would be able to appeal the decision again to the higher courts on the basis of his free speech being violated.

#### Board of Regents v. Roth (1972)

In the case of Board of Regents v. Roth, the respondent was a professor who had been hired by a state-run university as an associate professor on a one-year contract. At the end of the year, the professor was informed by the board of regents that he would not be re-hired for the following year. Pursuant to university rules, the professor was not given the reasons for his non-

renewal nor a hearing to rebut the charges. The respondent challenged the decision in the United States District Court for the Western District of Wisconsin. He filed for declaratory and injunctive relief because he believed that his termination was punishment for comments he had made that were critical of university administration. As such, he believed that the university had violated his First Amendment right to free speech and his Fourteenth Amendment right to due process. The district court granted him summary judgment and the United States Court of Appeals for the Seventh District affirmed and held that the university had violated the professor's due process rights and ordered the board of regents to provide him with reasons for dismissal and a hearing.

The U.S. Supreme Court reversed the decision and remanded the case back to the lower courts. The Supreme Court held that because the professor's contract was for a single academic year and the language of the contract made that abundantly clear, the professor had no property interest in employment at the university because there was no expectation of continued employment either in writing or in understanding. The board of regents had also not done anything to restrict the professor from finding employment at another university. As such, the board of regents had not violated the professor's due process rights because he possessed no due process rights in this case; the university had not infringed on his rights to life, liberty, or property.

All three courts made decisions based solely on the professor's charge that his due process rights had been violated. Four of the nine Supreme Court justices dissented, arguing that because there was a possibility that the board of regents had violated the professor's free speech rights, he should have due process rights in this case. Annual contracts can be non-renewed for

no stated reason, but they cannot be non-renewed for an illegal reason. If the professor was indeed being punished for his critical comments, then he should be granted a hearing to rebut the charges.

### Arnett v. Kennedy (1973)

In the case of *Arnett v. Kennedy*, a nonprobationary employee at the federal Office of Economic Opportunity (EOC), was terminated following false statements he made publicly regarding his supervisor and supervisor's assistant offering bribes to a third party. His supervisor provided him with written notice of the charges, including the fact that he had made the statements recklessly and without "actual facts known to or reasonably discoverable by him." The employee chose not to respond to the charges as was his right under administrative regulations, but instead requested a pre-termination trial hearing before an impartial hearing officer. The employee contended that his statements were protected by the First Amendment. The employee's termination was conducted under the regulations provided in the Lloyd-La Follette Act (5 USCS 7501) which allowed a federal nonprobationary employee to be terminated "only for such cause as will promote the efficiency of the service," and provided the employee the safeguards of written notice, a chance to file a written answer, and a post-removal evidentiary hearing.

The employee filed action in the United States District Court for the Northern District of Illinois for declaratory and injunctive relief, arguing that the act violated First Amendment free

speech rights and Fifth Amendment procedural due process rights. The court held that the act did violate procedural due process requirements and was unconstitutionally vague regarding what statements could be considered for an employee's termination. The court ordered the employee be reinstated with back pay and that any further dismissal proceedings afford the employee a pre-termination hearing.

The United States Supreme Court disagreed on appeal and reversed and remanded the case. The court held that a pre-termination hearing was not required to fulfill procedural due process requirements and that the post-termination hearing was sufficient due process. The court also held that the wording of the act was not unconstitutionally vague or overbroad as it would not include expressions of constitutionally protected free speech.

Interestingly, three judges dissented in this case. One judge argued that this particular case required an impartial hearing officer as the hearing officer in this case was "the object of alleged slander that was the basis for the employee's proposed discharge." The other two dissenting judges believe that the wording of the act was vague and prohibited the employees from expressing free speech.

#### Cleveland Board of Education v. LaFleur (1974)

In the case of *Cleveland Board of Education v. LaFleur*, a group of pregnant teachers from Cleveland public schools challenged whether the maternity leave rules in the district were unconstitutional under 42 U.S.C.S. § 1983 in the United States Court of Appeals for the Fourth

Circuit. The court upheld the constitutionality of the maternity leave policy, which required pregnant teachers to be dismissed from employment five months before the expected birth of their child and allowed re-employment only with a doctor's note attesting to the teacher's health on the first day of the next semester following the date on which the newborn reached three months of age. The United States Court of Appeals for the Sixth Circuit heard a similar case and declared the school board policy unconstitutional.

The United States Supreme Court heard the case on certiorari and upheld the decision from the Sixth Circuit Court and declared such rules to be unconstitutional. The court held that the creation of an arbitrary date during pregnancy after which the teacher was considered unfit to continue teaching violated the due process clause of the Fourteenth Amendment as "the freedom of personal choice in matters of marriage and family life was one of the liberties protected" by this clause. The state interest of maintaining a continuity of instruction did not validate an arbitrary cut-off date and that allowing the teachers to choose firm dates later in the pregnancy would equally serve that objective without violating the teachers' constitutionally guaranteed rights. The judges noted that "while it might be easier for the school boards to conclusively presume that all pregnant women were unfit to teach past a certain date, administrative convenience alone was insufficient to make valid what otherwise was unconstitutional." The court also held that the re-employment regulations were equally unconstitutional and that it should be left to the teacher's discretion when to return to work.



## Elrod v. Burns (1976)

In the case of *Elrod v. Burns*, several Republican employees in the Cook County, Illinois, Sheriff's Office were dismissed when the Republican Sheriff was replaced with a Democratic Sheriff. The employees filed an action in the United States District Court for the Northern District of Illinois, claiming that their First and Fourteenth Amendment rights were violated when they were fired because they were not members of the Democratic Party. The court denied the preliminary injunction because the employees failed to show a claim upon which relief could be granted or irreparable injury. The United States Court of Appeals for the Seventh Circuit reversed the decision and remanded the case to the district court to provide injunctive relief. The court held that employees had a legally valid claim.

The United States Supreme Court affirmed the circuit court's decision. The court held that patronage dismissals infringe upon First Amendment rights to political belief and association, and therefore are only appropriate if they further a vital state interest and the patronage dismissal was the least restrictive means of achieving that interest. As the employees of the Sheriff's Office were not in policymaking positions, their dismissal did not further any vital state interest and therefore unconstitutionally infringed on their right to freedom of political beliefs.

Mt. Healthy City School District Board of Education v. Doyle (1977)

In the case of *Mt. Healthy v. Doyle*, Doyle, an untenured teacher, sent a memorandum concerning teachers' dress code and appearance to a local radio station. The station then used that memorandum in a newscast. When the school board voted the next month not to renew the teacher's contract, they cited the memo to the radio station along with the teacher's unprofessional behavior, which included arguments with fellow teachers and school employees and an obscene gesture directed to female students.

The teacher filed suit with the United States District Court for the Southern District of Ohio for reinstatement and damages, claiming that the board had violated his First and Fourteenth Amendment rights when they refused to rehire him. The court held that the board had in fact violated Doyle's constitutional rights and awarded him reinstatement with back pay. The United States Court of Appeals for the Sixth Circuit affirmed the decision.

The United States Supreme Court vacated the appellate court's judgment on certiorari and remanded the case. The court held that Doyle's communication with the radio station was constitutionally protected, but that the lower courts had failed to prove that the communication was the reason for the teacher's termination or even a substantial part of the justification. The justices felt that the teacher should not end up in a better position because he had sent the memorandum to the radio station that he would have had the communication never occurred. They held that if the board could prove with a preponderance of evidence that Doyle would not have been renewed, without consideration of the protected communication with the radio station, then the board could still choose not to renew the teacher's contract.

### Ambach v. Norwick (1979)

In the case of *Ambach v. Norwick*, two resident aliens challenged a New York State Statute that denied teaching certification to persons who were not U.S. citizens and were not seeking citizenship. The United States District Court for the Southern District of New York had heard the case and ruled that the New York statute violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. The U.S. Supreme Court, however, reversed this ruling and held that the statute was constitutional. The Fourteenth Amendment allows states to deny certification to teachers if they are not seeking citizenship provided that the denial bears a relationship with legitimate state interest. In this case, the court held that because the teachers had continuously refused to seek citizenship despite their eligibility and that education was so fundamentally aligned with state's interest, the statute did not violate the Equal Protection Clause. The opinion of Justice Powell showed that he found education to be fundamental to informed democracy and that only teachers who had made a commitment to process of self-government could adequately fulfill the task.

### Davis v. Passman (1979)

In the case of *Davis v. Passman*, a United States Congressman hired a woman as deputy administrative assistant, but later dismissed her because the congressman concluded that "it was essential" that the deputy administrative assistant "be a man." The woman filed suit in the

United States District Court for the Western District of Louisiana, alleging that her termination violated her equal protection rights guaranteed by the Fifth Amendment and requesting damages in the form of back pay. The district court dismissed the claim, holding that the employee did not have a private right of action and that there was no claim upon which relief could be granted. A panel of the United States Court of Appeals for the Fifth Circuit reversed the decision, holding that the congressman had violated the woman's Fifth Amendment right of equal protection and that the cause of action for damages could be drawn directly from that. Additionally, the court held that the congressman's comments were not protected under the First Amendment. When the Court of Appeals sat en banc to hear the case, however, they reversed the decision of the panel, holding that there was not right of action implied in the Fifth Amendment.

The United States Supreme Court reversed the decision and remanded. The court held that the woman did have a right to action under the equal protection component of the Due Process Clause in the Fifth Amendment, which ensures a constitutional right to freedom from gender discrimination that does not serve important governmental objectives. The court also held that granting damages was an appropriate remedy when no other form of relief was available.

#### Givhan v. Western Line Consolidated School District Et Al. (1979)

In *Givhan v. Western Line Consolidated School District et al*, yet another teacher challenged a district's decision not to renew her contract as a violation of her First Amendment

right to free speech. The school district justified the decision claiming that the teacher had several meetings with the principal privately in his office where she made unreasonable demands and was “insulting, hostile, loud, and arrogant.” In these meetings, the teacher had in fact been criticizing district policies that she found to be racially discriminatory.

The teacher filed suit in the United States District Court for the Northern District of Mississippi seeking reinstatement. The court found that the decision not to renew her contract did violate her First Amendment rights and ordered that she be reinstated. On appeal, the United States Court of Appeals for the Fifth Circuit reversed the decision of the lower court. The court held that her speech was not protected by the First Amendment because it was rendered in a private meeting and was not made public. Furthermore, the court held that she had no constitutional right to “press even ‘good’ ideas on an unwilling recipient.”

The United States Supreme Court, on certiorari, vacated the circuit court’s ruling and remanded the case to the district court. The court held that private conversations are still bound by constitutional protections and that the principal had not been a “captive audience” because he had allowed the teacher admittance into his office. The court remanded the case to the district court to determine if the teacher would have been rehired had it not been for the constitutionally protected conversations.

### Branti v. Finkel (1980)

In the case of *Branti v. Finkel*, two assistant public defenders were terminated after a new public defender was appointed by the recently turned democratic county. The assistants filed action in the district court, arguing that they were terminated because of their political affiliations. The court agreed and issued a temporary restraining order and a permanent injunction to enjoin the public defender from dismissing the employees because of their political beliefs. The United States Court of Appeals for the Second Circuit upheld the district court's decision.

On certiorari, the United States Supreme Court also upheld the temporary restraining order and permanent injunction. The court held that the public defender was incorrect in his argument that "so long as an employee was not asked to change his political affiliation or to contribute to or work for the party's candidates the employee could be dismissed with impunity." The court held that the employees did not need to prove they were coerced into changing their political party, but that it was sufficient to prove they were fired solely for not being Democrats. The court held that as the employees had continuously provided acceptable service to the public defender's office, their political affiliation was the only grounds upon which the public defender could have terminated them. The court held that "the only instance in which it would be acceptable to terminate an employee for his political beliefs would be if those beliefs interfered with the discharge of his public duties." As the assistants' primary duty was to their clients, their political affiliations could not be considered a condition of their employment.

## Rendell-Baker v. Kohn (1982)

The case of *Rendell-Baker v. Kohn* demonstrates the difference in requirements between state institutions and those in the private sector. State institutions are bound by constitutional law as per the Fourteenth Amendment because their decisions are considered to be state actions; however, private institutions have no such requirement. In this case, six employees were fired from a private school that received 90 percent of its budget from public funding. The employees claimed that they had been fired for exercising their First Amendment right to free speech and filed suit in the United States District Court for the District of Massachusetts under 42 USCS 1983. The judge who heard the first case granted the motion for summary judgment in favor of the school, holding that the private school's action to dismiss the teacher was not considered a state action. The judge who heard the other five cases, however, denied the school's motion to dismiss and held that the school had acted "under color of state law."

The United States Court of Appeals for the First Circuit heard all six cases and consolidated the two decisions. The court disagreed with the decision that the five employees had been improperly terminated through a state action and held that the school did not act as an arm of the state despite receiving state money. The court dismissed the employees actions.

The United States Supreme Court, on certiorari, affirmed the circuit court's decision. The court held that the private school did not "act under color of state law" when deciding personnel issues and so the employees were not able to seek relief under 42 USCS 1983. The justices decided that the private school's personnel decisions were not affiliated in any way by

state regulation and that the school's financial relationship with the state was no different than that of any other government contractor.

### Connick v. Myers (1983)

In *Connick, District Attorney In and For the Parish of Orleans, Louisiana v. Myers*, Myers had been an assistant district attorney in the same office for five years when she was involuntarily transferred to another division within the district attorney's office. She vehemently opposed the transfer and brought her opposition to the attention of several of her superiors, including the district attorney. When she was transferred despite her objections, she distributed a questionnaire to her coworkers concerning their feelings on the office transfer policy, morale within the office and confidence in supervisors, the need for a grievance committee, and whether employees felt pressured to work on political campaigns. After it came to light that she had distributed the questionnaire to the fifteen other assistant district attorneys, Myers was fired.

Myers filed suit in the United States District Court for the Eastern District of Louisiana, claiming that her termination was illegal because the district attorney's office had violated her right to free speech by firing her for distributing the questionnaire. The court agreed and ordered that she be reinstated and granted her back pay, damages, and attorney's fees. Upon appeal, the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision.

The United State's Supreme Court, however, disagreed and reversed the lower courts' decisions. They held that the questionnaire Myers distributed was of only personal interest and



not of public concern. Only one question on the survey held any public interest at all, which was whether employees felt pressured to participate in political campaigns. That one question was not enough for the court to consider the questionnaire a public interest rather than an internal personnel issue which should be dealt with as such. The court held that it was unjust to require an employer to justify the termination of an employee with clear evidence that the speech caused a severe disruption to work environment. The employer, according to the court, need only reasonably believe a disruption would occur or that the speech would undermine the employer's authority. Interestingly, four of the nine justices dissented, arguing that the way government offices are run or should be run is of public interest.

#### Davis v. Scherer (1984)

In the case of *Davis v. Scherer*, a Florida highway patrol officer was dismissed without a formal pre-termination hearing or a prompt post-termination hearing. The officer filed action in the United States District Court for the Northern District of Florida under 42 U.S.C.S § 1983 for violation of his due process rights. The court held that because the employer had failed to follow the state's administrative regulations for dismissing an employee, they were not entitled to immunity and could be held liable. The United States Court of Appeals for the Eleventh Circuit affirmed the decision.

The United States Supreme Court reversed the decision on appeal. The court held that the only way for the employee to overcome the state official's qualified immunity was to show

that his constitutional or statutory rights were clearly established when the conduct occurred. The court held that the employee was not able to make such a showing and therefore could not be granted damages.

#### Cleveland Board of Education v. Loudermill et al. (1985)

*Cleveland Board of Education v. Loudermill* consists of two consolidated cases heard before the U.S. Supreme Court in 1984-85. In the first of the two cases, a security guard had been terminated for failing to disclose a prior felony conviction. In the second case, a school bus mechanic was terminated for failing a vision test. In both cases, the employees were classified civil servants, and therefore were entitled to limited tenure rights. Neither employee was granted a pre-termination hearing to question witnesses and present evidence, though both were granted post-termination hearings. The employees argued that their due process rights had been violated.

The United States District Court for the Northern District of Ohio dismissed the case claiming that the district had complied with due process rights for dismissal. The United States Court of Appeals for the Sixth Circuit reversed, stating that because the employees had not been granted a pre-termination hearing, their due process rights had been violated. The U. S. Supreme Court affirmed the appellate court's decision. They held that a tenured employee is due a pre-termination hearing to respond to charges, though not a full evidentiary hearing, and that the district had violated the employees' due process rights.

### Rankin v. McPherson (1987)

In the case of *Rankin v. McPherson*, a deputy county constable in a clerical position who had no contact with the public in the course of her duties engaged in a private conversation with a coworker in a part of the office that was not accessible to the public. During the conversation, they heard a radio report about the attempted assassination of the President of the United States. The deputy then criticized the President's policies and stated that "if they go for him again, I hope they get him." Another employee overheard the remark and reported it to the constable, who then questioned the deputy and fired her. The deputy filed suit in the United States District Court for the Southern District of Texas under 42 U.S.C.S. § 1983 arguing that her termination violated her free speech rights. The court granted summary judgment in the constable's favor holding that the comment made by the deputy was not protected by the First Amendment. The United States Court of Appeals for the Fifth Circuit vacated the District Court's decision and remanded the case for resolution. The court held that the deputy was speaking on matters of public concern and that because her position in the constable's office was so trivial, her free speech interests were "not outweighed by any serious potential for disrupting the mission of the constable's office."

The United States Supreme Court affirmed the decision of the circuit court. The court held that as the deputy made the comment during a conversation concerning the President's politics and following a news report that served as the basis for the comment and was of extensive public interest, the deputy's comment was considered protected speech. Additionally, as the deputy did not serve in a confidential, policy-making, or public contact role, her comment

was not a danger to the efficient running of the constable's office. Justice Powell noted that if "a statement on a matter of public concern is made in an entirely private conversation between coworkers, the employer's legitimate interests will rarely be so great as to justify punishing an employee for such speech." Four justices, however, dissented, arguing that any comment that expresses approval of a Presidential assassination attempt cannot be seen as addressing a matter of public concern, and therefore should not be protected by the First Amendment.

#### City of St. Louis v. Praprotnik (1988)

In the case of *City of St. Louis v. Praprotnik*, an city employed architect was suspended and received two poor performance evaluations because of his violation of a rule prohibiting private employment. In all three cases, the Civil Service Commission found in favor of the employee. At a later date, the architect was transferred and then terminated. He filed action in the United States Court of Appeals for the Eighth Circuit under 42 U.S.C.S. § 1983, claiming that the city violated his First and Fourteenth Amendment rights. The court held in the employee's favor and held the city liable for violating his rights.

The United States Supreme Court, however, reversed the decision. The court held that the city could only be held liable under 42 U.S.C.S. § 1983 if "an injury was inflicted by a government's lawmakers or by those whose edicts or acts may fairly be said to represent official policy." As the employee could not prove that an unconstitutional municipal policy existed and his termination was carried out by an independent commission empowered to "review and

correct improper personnel actions,” the employee’s termination did not violate his constitutional rights.

### Rutan v. Republican Party of Illinois (1990)

In the case of *Rutan v. Republican Party of Illinois*, five people filed suit regarding a 1980 executive order of the Republican Governor of Illinois “that prohibited state officials from hiring any employee, filling any vacancy, creating any new position, or taking any similar action without the governor’s express permission.” The petitioners argued that this order created a political patronage system that allowed the governor to restrict employment and “beneficial employment-related decisions” to employees who had the support of the Republican Party. The petitioners filed suit in the United States District Court for the Central District of Illinois claiming that the order violated employee’s First and Fourteenth Amendment rights. The court dismissed the claim, holding that political patronage violated the First Amendment when it was used to dismiss an employee, however its use in beneficial employment related decisions, such as hiring, promotions, and salary, was not a violation of First Amendment rights. The United States Court of Appeals for the Seventh Circuit upheld the District Court’s decision.

The United States Supreme Court reversed the decision and remanded the case. The court held that as low-level public employees, the patronage system impermissibly infringed on their First Amendment right when beneficial employment decisions and hiring are based on

political affiliations. The court held that patronage systems are justifiable infringements of constitutional rights only when they are “narrowly tailored to further vital government interests.”

#### Waters v. Churchill (1994)

In the case of *Waters v. Churchill*, a nurse in the obstetrics department in a public hospital was dismissed because of the content of a conversation she had with another nurse from a different department. The employee’s supervisor alleged that the nurse has criticized her supervisor and department and discouraged the other nurse from transferring to the department, a conclusion she came to without asking the nurse in question for her side of the story. The dismissed employee filed an internal grievance, claiming that in the conversation in question she had been discussing the hospital’s cross-training program and how she felt it adversely affected patient care. She alleged that she had been fired because she had previously criticized the program. The president of the hospital met with the fired nurse, reviewed the written reports, and had the second nurse interviewed before deciding to reject the grievance. The nurse filed suit in the United States District Court for the Central District of Illinois under 42 U.S.C.S. § 1983, alleging that she had been terminated for speech that was protected by the First Amendment. The nurse was able to produce evidence that prior to the conversation in question she had criticized the cross-training program. The District Court issued summary judgment in favor of the hospital. The court held that the conversation was not protected speech and that even if it had been protected, the nurse’s free speech interests did not outweigh the interests of

the hospital management in maintaining an efficient workplace. On appeal, the United States Court of Appeals for the Seventh Circuit reversed the decision and remanded the case for further proceedings. The court held that the material facts of the conversation were in dispute and that if the nurse's conversation had indeed been addressing a staffing issue that affected patient care, then the speech would be protected under the constitution.

The United States Supreme Court heard the case on certiorari and vacated the Circuit Court's judgment and remanded the case for determination of the actual motive for the termination. If it was found that the nurse had been fired for criticizing the cross-training program as it affected patient care, the speech should be considered protected as a matter of public concern. The justices in this case could not reach a consensus for an opinion. Two justices felt that the speech was clearly protected, while the rest of the justices questioned the material facts that were in dispute and whether the disruption created by the comments gave the hospital a legitimate interest in dismissing the nurse.

#### Garcetti v. Ceballos (2006)

In the case of *Garcetti v. Ceballos*, a deputy district attorney wrote a memorandum addressing alleged inaccuracies in an affidavit that was used in a pending criminal case to obtain a search warrant. The attorney also testified for the defense about the affidavit. Following the incident, the employee was disciplined, allegedly in retaliation for the memo he prepared in his duties as a prosecutor. The attorney filed action in the United States District Court for the

Central District of California arguing that his free speech rights had been violated when he was disciplined for writing the memo. The court disagreed and granted summary judgment for the supervisors, holding that the memo was not protected by the First Amendment because it was prepared by the attorney as part of his duties as a district attorney. The United States Court of Appeals for the Ninth Circuit reversed and remanded the decision holding that alleged government misconduct was of public interest and the attorney's right to free speech outweighed any compelling state interest as there had been no disruption in the district attorney's office following the incident.

The United States Supreme Court reversed the Circuit Court's decision and remanded the case. The court held that "when public employees make statements pursuant to their official duties, such employees are not speaking as private citizens for First Amendment purposes" and therefore can be subjected to discipline for the communications. The decision, however, was not unanimous and four justices dissented arguing that there was no difference between "speaking as a citizen and speaking in the course of one's employment" and the importance of "addressing official wrongdoing" outweighs the right of supervisors to discipline subordinates.



## State Cases

### Keefe v. Geanakos (1969)

In the case of *Keefe v. Geanakos*, the appellant teacher was threatened with disciplinary action for use of an inappropriate word in a high school classroom. On the first day of the school year, the teacher assigned his twelfth grade students to read an article in the *Atlantic Monthly* magazine. The article contained the word “bastard” several times. The teacher discussed the literary merits of the article and the appropriateness of the word with the students prior to their reading the article. The teacher also informed the students that if they found the article to be offensive, they would be given an alternative assignment.

The teacher sought an injunction from the United States District Court for the District of Massachusetts to enjoin his scheduled disciplinary hearing on the grounds that it violated his civil rights under 42 U.S.C.S. § 1983. The district court denied the injunction and the teacher then appealed to the United States Court of Appeals for the First Circuit. The circuit court reversed the decision of the district court. The court read the article and found that it had literary merit and that the use of the inappropriate word was appropriate within the context of the article and that the article sought to discredit the word rather than promote it. The court also argued that the word would already be known to twelfth grade students, and while they could not be held to the same standards as adults, they were so close to adulthood that they could likely handle its use in thought-provoking literature. The judge specifically stated that if “the students must be protected from such exposure, we would fear for their future.” In regard to the fact that parents

were offended by the use of the word, the judges stated that parental sensibilities “are not the full measure of what is proper education.” They also found that five books in the school library also contained the word, and as such, the teacher was well within his right to discuss it in literary terms in his class. The court also held that there was not regulation in the district proscribing use of inappropriate language in literary texts and that such a rule could not be reasonably inferred by teachers. Therefore, the court held in favor of the teacher.

#### Parducci v. Rutland (1970)

In the case of *Parducci v. Rutland*, a public school teacher sought a preliminary injunction in the United States District Court for the Middle District of Alabama to be immediately reinstated to her teaching position. The teacher, Marilyn Parducci, claimed she was terminated from her teaching position for assigning a short story to her 11<sup>th</sup> grade English class that the principal and associate superintendent felt was “literary garbage.” The plaintiff teacher believed her First Amendment right to academic freedom and Fourteenth Amendment right to due process had been violated by her dismissal. The court found nothing in the assigned story that would be inappropriate for high school juniors, and as the principal admitted that Parducci was a good teacher, the court granted her injunction. The court held that by assigning the story, Parducci had done nothing that would disrupt the learning environment of the school and therefore the school board did violate her First Amendment right to academic freedom. The

court reinstated the teacher for the duration of her contract and held that the dismissal be stricken from her personnel file.

### Mailloux v. Kiley (1971)

In *Mailloux v. Kiley*, the school district appealed the decision by the district court in favor of a teacher who had been terminated for conduct that the board did not approve of. The school board argued that the teacher had received notice that the behavior was not appropriate as per the district's Code of Ethics of the Education Profession, which said that the "teacher recognized the supreme importance of the pursuit of the truth and devotion to excellence and the nurture of democratic citizenship." The teacher had appealed the decision in the district court as a violation of his First Amendment right to free speech. The district court and the United States Court of Appeals for the First Circuit both found in favor of the teacher. The court held that although the teacher's conduct was not universally recognized as appropriate teaching, it was generally considered responsible behavior, and that the teacher had acted in good faith. Also, the court held that the notice of improper conduct that the board attributed to the ethics policy was inadmissibly vague and could not be used to make ex post facto decisions concerning a teacher's employment for lessons that other educators simply did not agree with.

### Russo v. Central School District No. 1 (1972)

In the case of *Russo v. Central School District No. 1*, the school board chose not to renew the probationary contract for Susan Russo after she refused to say the Pledge of Allegiance in her homeroom class. The board gave her no reason for her dismissal, as is their right when terminating a non-tenured teacher, however there was no evidence that she had been terminated for any reason other than her failure to salute the flag. Russo sued the school district under 42 U.S.C.S. § 1983 and 28 U.S.C.S. § 1343, alleging that her First and Fourteenth Amendment rights had been violated. The United States District Court heard her case and made findings of fact that Russo had not performed her duties. The court dismissed her complaint.

Russo appealed to the United States Court of Appeals for the Second Circuit. The appellate court made their own findings of fact after judging the findings of fact completed by the district court to be erroneous. The court noted that although Russo did not say the Pledge of Allegiance, she stood in respectful silence during the proceedings, the senior teacher in the room lead the students in the Pledge, and there was no disruption of the educational environment. In fact the school administration did not even know about her conduct until April, and there was no evidence that the students were disrupted or disturbed by the action. Additionally, Russo had made no attempt to draw attention to her behavior or to proselytize her beliefs to her students. The court held that her refusal to say the Pledge of Allegiance was “a form of silent expression” and therefore protected by the First Amendment. The court quoted *Tinker v. Des Moines*, saying that Russo had “not shed her constitutional rights of free speech at the schoolhouse gate.” The court noted the age of the students as being a determining factor in the case. As a teacher, Russo

had agreed to limit her constitutional rights inasmuch as was necessary to effectively do her job. As younger children are impressionable, the decision of the court may have been different if the students had not been high school sophomores. The opinion of the court was that since her students were “not fresh out of their cradles” and were approaching a point when they themselves would be making decisions based on their own beliefs, there was no reason that the teacher, demonstrating another point of view on an issue that was at that time very controversial, would harm the students’ development. As for the impressionable minds of her students, the court noted that by terminating Russo the school had proven that her silent protest was valid because Russo’s only objection to the Pledge was that she did not believe there was “liberty and justice for all.” Citing *Mount Healthy v. Doyle*, the court held that if the school district could not prove that the decision to terminate Russo would have been the same without considering her protected refusal to salute the flag, the district was in error in dismissing Russo. The court reversed the judgment and remanded the case.

James v. Board of Education of Central District No. 1 of the Towns of Addison (1972)

In *James v. Board of Education*, the appellant teacher was dismissed from his teaching position for wearing a black armband in protest of the Vietnam War. A Quaker, James was a strong opponent of war as per his religion, and wore the armband to school on the day that his fellowship celebrated a memorial day for the soldiers in Vietnam. The principal noticed the armband shortly after school began and called James to his office during second period, where he

requested that James remove the armband. James refused and was suspended from his teaching position. The superintendent met with James and instructed him that he was free to express his political views in his own time but not inside the school. He was reinstated with this understanding and returned to his classroom. When the Quakers again celebrated a memorial day the next month, James wore his black armband again to school. He was again called to the principal's office, and when he refused again to remove the armband, he was suspended from his position. The board then voted to terminate James' probationary contract, which pursuant to New York law, they may do at any time during a teacher's probationary year without a hearing.

James appeared before the United States District Court for the Western District of New York seeking review of the decision. The court denied his motion for summary judgment and dismissed his action. James then appealed to the United States Court of Appeals for the Second Circuit under 42 U.S.C.S. §1983, and arguing that his right to freedom of expression had been violated when his employment was terminated. The court reversed the district court's judgment and remanded the case. The court cited *Tinker v. Des Moines* when holding that the school could only limit a teacher's or student's constitutional rights if the person's exercise of those rights created a disruption to the effective operation of the school. As the board could not produce any evidence that James' expression caused any disruption or produced any complaints from students, parents, or teachers, the board violated James' constitutional rights when terminating his contract.

### Webb v. Lake Mills Community School District (1972)

In the case of *Webb v. Lake Mills Community School District*, the plaintiff teacher was granted a permanent injunction by the United States District Court for the Northern District of Iowa, Central Division, requiring that the school district reinstate her as the drama coach. The teacher alleged that she had been terminated from her role as drama coach in violation of her First and Fourteenth Amendment rights to free speech and academic freedom. The superintendent had recommended her termination from her position for staging plays that contained profanity and drinking. The superintendent could not, however, prove that there had been any prior rule prohibiting profanity and drinking in school productions. The teacher, though she had discussed the issue with the superintendent, was under the impression that it was not an absolute rule, but that she could use her judgment about whether it was necessary for the production. The court held that the district's rule against profanity and drinking in school plays was ambiguous and that the previous teacher had not been terminated for committing the same offense. The court held that her removal from the position was arbitrary and capricious and that she had "properly exercised her academic freedom to employ relevant teaching methods."

### Johnson v. Board of Regents of the University of Wisconsin (1974)

In the case of *Johnson v. Board of Regents of the University of Wisconsin*, the plaintiffs, tenured professors at various campuses in the state university system, argued that their

Fourteenth Amendment due process rights were violated when a reduction in funding caused lay-offs within the university system. While Wisconsin law had procedures in place for the involuntary termination of tenured teachers, there had previously been no such procedures that covered termination due to lay-offs. The state officials created interim “reconsideration” procedures, and the faculty members exhausted these procedures. They then argued that the procedures did not constitute adequate due process.

The United States District Court for the Western District of Wisconsin disagreed with the teachers and found that the procedures adopted by state officials constituted adequate due process when terminating a tenured teacher due to loss of funding. The court held the constitutional rights of a laid-off tenured faculty member include a fair opportunity to show that the reasons for the lay-off were unconstitutional or arbitrary. The interim procedure that the state put in place fulfilled these requirements. The teachers were given a written statement informing them of the initiation of lay-off, a description of why the lay-off is necessary, the information and data used to make the decision on why that teacher was being laid-off, and an opportunity to respond. The court held that this procedure constituted adequate due process and that as the board of regents had followed these procedures, the termination of the teachers was constitutional.



### Kaprelian v. Texas Woman's University (1975)

In the case of *Kaprelian v. Texas Woman's University*, Kaprelian was a non-tenured teacher when she was dismissed for unprofessional conduct and disloyalty. Kaprelian appealed the dismissal to the United States District Court for the Eastern District of Texas, claiming that the university had violated her civil rights under 42 U.S.C.S. §§ 1981, 1983, and 1988, as well as her First Amendment right to free speech. The court found in Kaprelian's favor and remanded the case to the university for a tribunal hearing, holding that Kaprelian, while untenured and possessing no property interest, had shown a liberty interest that entitled her to due process.

The university appealed the decision to the United States Court of Appeals for the Fifth Circuit. The court reversed the decision and remanded the case, holding that the district court had erred when deciding that Kaprelian had established a liberty interest and that the district court had not addressed Kaprelian's First Amendment claim. The court requested that proper findings be made prior to establishing a liberty interest to determine if due process was required, but asserted that "refusing to let a teacher apply teaching views in carrying out assignments violated the First Amendment."

### Fern v. Thorp Public School (1976)

In the case of *Fern v. Thorp Public School*, a public school teacher was terminated for distributing inappropriate materials to students. The teacher distributed a survey about sexual

awareness to students. The survey was given out as informational materials and the students were not expected to complete the survey themselves. Parents of the students, however, found the content of the survey to be objectionable and made threats against the teacher that included the teacher being physically forced from the building. The police force in the town did not have enough officers to ensure the teacher's safety at the school and so the teacher was suspended without pay until further hearings. The district sent a letter to the teacher and his attorney offering the teacher a hearing to present evidence in his own favor, however the teacher failed to request that the meeting be held. The school board voted to discharge the teacher.

The teacher filed suit in the district court claiming that the district had violated his rights to free speech and due process by terminating his employment and was granted an injunction to enjoin the district from firing him. The district filed a motion to vacate the injunction, but the district court denied the motion.

On appeal, the United States Court of Appeals for the Seventh Circuit reversed the district court's decision. The court held that the district court had erred in issuing the injunction and in vacating the motion to dismiss the injunction. According to the court, the teacher should have known that the material he distributed was inappropriate, as any reasonable person would. The fact that the teacher did not request the hearing offered by the district waived his claim that his due process rights were violated. The court also held that the district had proven that the teacher's return to the school would create a significant disruption to the learning environment.

### Carey v. Board of Education (1979)

In the case of *Carey v. Board of Education*, the plaintiffs were five tenured teachers employed by the Adams-Arapahoe School District in Colorado. The teachers all taught language arts classes in the district when the school board decided in a public board meeting to ban ten of the books that the teachers had regularly used in their elective Contemporary Literature, Contemporary Poetry, and American Masters classes. These classes were elective courses for eleventh and twelfth grade students and the course description explained that the course readings were drawn from classroom libraries and personal sources and were considered elective optional reading materials. The teachers filed suit in the United States District Court for the District of Colorado, claiming that their First and Fourteenth Amendment rights were being violated and that they had a constitutional right to choose the books for their own classes. The district court agreed that the teachers had a First Amendment right to choose the books used for their classes, but denied the claim because, as the court held, the teachers had waived that right with the collective bargaining agreement in force in their district.

The teachers then sought review in the United States Court of Appeals for the Tenth Circuit. The circuit court also denied the teachers' claims, however they did so for different reasons. The court held that the collective bargaining agreement did not waive the teachers' constitutional rights, however the school board had the right to choose the curriculum and textbooks used in district schools. No matter what the reasons the board used for proscribing the books from the curriculum, the court held that it was acting within its rights to omit any books.

## Dean v. Timpson Independent School District (1979)

The case of *Dean v. Timpson Independent School District* was heard before the United States District Court for the Eastern District of Texas, Tyler Division. The plaintiff was a former employee, Ouida Dean, who had been dismissed from her teaching position with the Timpson Independent School District for using inappropriate materials in her classes. The teacher had used a masculinity survey copied from the magazine *Psychology Today* in her Speech and Psychology classes that contained several sexually explicit questions. The teacher was not present when the survey was administered by a senior student. She had instructed the student to omit questions that were sexually explicit and to inform the students that taking the survey was optional and that if any question made them uncomfortable that they may write “not applicable” in the space provided. Evidence suggested that the student followed these instructions and that the survey was conducted without any classroom disruptions.

When a parent complaint was brought to the attention of the principal, he instructed the teacher to call the parent. She did so and believed the situation to be resolved. Days later, the principal asked her to tender her resignation, which she refused to do on the grounds that she had done nothing wrong. Several days later, the superintendent informed the teacher that she was “being relieved of duty, effective immediately.” She was permitted to return to her classroom for her purse, but was not allowed to finish teaching the remainder of the school day. The board held a meeting to review the situation the next week, during which the teacher was too ill to attend and her husband appeared in her place. At the end of the month, the board voted to terminate Mrs. Dean.

The teacher filed an action in the district court under 42 U.S.C.S. § 1983, and the First and Fourteenth Amendments. She was seeking equitable relief because she felt she was unjustly dismissed in violation of her First and Fourteenth Amendment rights. The court ruled in her favor, ordering the district to reinstate her and pay her back pay and attorney's fees. The court held that the teacher was within her First Amendment rights to use the survey as it did not cause a disruption to the effective operation of the school. The court also held that her Fourteenth Amendment due process rights were violated because she had never been warned not to use supplementary materials in her classroom. She had met with the superintendent previously to discuss her use of an ethics survey which also contained controversial material, but there was no record in her personnel file that such a meeting had taken place or that the superintendent had warned her not to use such materials. The court also held that if such a warning had been given, it still would have been too vague to be valid in this case.

#### Goss v. San Jacinto Junior College (1979)

In the case of *Goss v. San Jacinto Junior College*, Goss, an untenured instructor in the history department, was not renewed by the board of regents for another annual contract for the 1972-73 school year. Goss filed action in the United States District Court for the Southern District of Texas alleging that the board of regents violated her First Amendment rights by terminating her because of her political behaviors. The instructor had a part in forming several faculty associations in conjunction with the teachers' unions and had campaigned for her

husband when he sought a seat on the board of regents. The jury agreed that her First Amendment rights had been violated and awarded her back pay as the college had already reinstated her to her teaching position. The junior college's board of regents appealed the decision to the United States Court of Appeals for the Fifth Circuit, arguing that Goss had been fired for cause due to poor teaching evaluations and a necessary reduction in teaching staff. The appellate court upheld the district court's decision. The court held that the school could produce no evidence that Goss had ever been evaluated poorly. The court also held that if the nonrenewal had been a result of a reduction in force, the school's policy for such a reduction did not place Goss in a position of non-retention. Goss, in fact, had been teaching at the school longer than other teachers in her department, was further along in her doctoral program, and had more students earning credits. Under the college's policy, the reduction in force should not have eliminated her position, but instead the positions of other teachers in her department. The court upheld the jury's decision to award back pay.

#### Kingsville Independent School District v. Cooper (1980)

In the case of *Kingsville Independent School District v. Cooper*, Janet Cooper, a teacher in the district under annual contract, was not renewed for the 1972-73 school year. She filed suit in the district court for equitable relief alleging that she had not been renewed because of a lesson that was within her constitutional rights to teach. Cooper had been teaching American history in the district since 1967. As the district did not have a tenure system, every teacher in

the district taught under a series of annual contracts. In 1971, Cooper taught a lesson she calls the “Sunshine Simulation” that had the students role-play and recreate the Civil War. The lesson raised intense emotions in the students and numerous parent complaints ensued. Cooper had two meetings with the principal, the second in the presence of the district’s personnel director, to discuss the lesson. She was instructed not to discuss anything controversial in the classroom and specifically “not to discuss Blacks in American history.” At the end of the year, the principal and superintendent recommended her for another contract, however the Board of Trustees voted not to renew her contract.

Cooper sought relief from the United States District Court for the Southern District of Texas. The court found in her favor and held that Cooper’s First and Fourteenth Amendment rights had been violated. The court awarded Cooper damages and attorney’s fees. Both Cooper and the Board of Trustees appealed the judgment to the United States Court of Appeals for the Fifth Circuit. Cooper appealed because the court had failed to order her reinstatement. The circuit court affirmed the judgment of the district court, agreeing that 42 U.S.C.S. § 1983 applied to public school districts and, as the teacher was dismissed for discussion protected by the First Amendment, she was entitled to equitable relief. The court vacated and remanded as to the damages awarded, asking the court to award back pay from the date of dismissal through rehire and attorney’s fees for both the appeal and the trial on remand.

### Trotman v. Board of Trustees (1980)

In the case of *Trotman v. Board of Trustees*, the appellant professors were terminated from their teaching positions at Lincoln University during a reduction in force. The professors alleged that the board of trustees had fired them illegally for criticism they had made against the university president's policies and conduct in office.

The United States District Court for the Eastern District of Pennsylvania dismissed the case. On appeal, the United States Court of Appeals for the Third Circuit reversed the decision and remanded the case for further proceedings. The court stated that the board of trustees' action had a "chilling effect" on the professors' exercise of free speech within the university. As the board has "the status of a government official acting in a disciplinary role," before the board imposes prior restraint on free speech they must show proof that it is "essential to a vital government interest."

### Stachura v. Truszkowski (1985)

The case *Stachura v. Truszkowski* is actually a consolidated case including both *Stachura v. Truszkowski* and *Stachura v. Memphis Community School District*. The case began when Delores Truszkowski, the parent of a student in Stachura's class, filed complaints with the school board about the lessons Stachura was teaching in his life science class, claiming he was using improper teaching methods. Following Truszkowski's complaint, other parents joined her in



“vehement and continuing protests, based on unfounded rumors.” As a result of these protests, Stachura was suspended from teaching and shortly thereafter terminated.

After an extensive trial, the jury found in favor of Stachura in both cases and awarded him damages both from the school district and from Truskowski. Both defendants filed for a judgment notwithstanding the verdict (j.n.o.v.) with the United States District Court for the Eastern District of Michigan. The court granted j.n.o.v. to Truskowski, stating that while her role in the case had not been “pretty,” she had filed a grievance with the appropriate government body and that was within her First Amendment rights as a citizen. As she was exercising her constitutional rights appropriately, she could not be held liable for damages. In the case against the school district, however, the court refused to grant j.n.o.v. and held that the school district was liable for damages to Stachura as there had been considerable damage to his livelihood and reputation following the district’s actions.

Both Stachura and the school district appealed these decisions to the United States Court of Appeals for the Sixth Circuit. The court upheld both decisions made by the district court. In the case against Truskowski, the court held that she was within her First Amendment rights to petition “the government of redress of grievances” when she challenged the curriculum in Stachura’s class. In the case against the school district, the court held that the district had erred in terminating Stachura, and in doing so had violated his First and Fourteenth Amendment rights to academic freedom and due process. The court noted that the lessons Stachura was terminated for came directly from the textbook for his course that had been approved by the school board. The videos that were also under contention came from the Health Department, had been shown for several years before Stachura used them in class, and were shown at the directive of the

school principal. The court stated that in terminating Stachura, the principal, superintendent, and school board had refused to accept responsibility for their own decisions and had failed to support one of their teachers. The court held that Stachura was entitled to damages from the school district.

#### Martin v. Parrish (1986)

In the case of *Martin v. Parrish*, a college instructor was dismissed by the college administration for using profanity in class. There had been numerous complaints from students because of the profanity the instructor directed toward them due to poor quality work. The economics professor had been warned previously by the college administration that directing profanity at the students would not be tolerated and any further complaints would result in disciplinary action and possibly termination. The professor was terminated following more student complaints, several administrative steps, and a vote by the board of trustees.

Martin filed a lawsuit under 42 U.S.C.S §1983, alleging that his rights of free speech, academic freedom, due process, and equal protection had been violated. The jury found in his favor on the free speech and equal protection claims but denied that he had not been given due process. On appeal to the United States District Court for the Western District of Texas, the court granted judgment notwithstanding the verdict (j.n.o.v.) in favor of the college administration. The court held that using profanity in the classroom is not constitutionally protected speech.

Martin then appealed to the United States Court of Appeals for the Fifth Circuit. The circuit court affirmed the district court's decision. The court held that Martin's use of profanity was not of public interest and therefore not constitutionally protected speech. Furthermore, the college administration believed that the professor's use of profanity decreased his effectiveness in the classroom, and the court agreed stating that it was "a superfluous attack on a captive audience with no academic purpose of justification." The court also refused his equal protection claim, holding that he was not treated any differently than any other person would be in a similar situation.

#### Fowler v. Board of Education of Lincoln County (1987)

In the case of *Fowler v. Board of Education of Lincoln County*, the plaintiff was a tenured teacher who had been employed by the Lincoln County School Board for fourteen years. On the last day of school of the 1983-84 school year, the teacher, Jacqueline Fowler, showed the movie *Pink Floyd – The Wall*, which was rated "R." The students in Fowler's class were between fourteen and seventeen, in grades nine through eleven. Fowler had rented the video the night before it was shown and had not previewed it prior to showing it to students. She asked the students if any of them had seen the movie and those who had said it had a "bad spot." Fowler asked a student to censor the movie with a file folder and showed the movie while she completed report cards. Fowler did not remain in the room with the students, but came and went throughout the day, trusting that the student was appropriately censoring the movie.

After the video was viewed by the school principal, the district superintendent, and the school board, termination procedures were begun to fire Fowler. She received her termination notice in June and was given, as per her due process rights, a hearing at which she contested the charges with legal counsel. The board chose to terminate her contract for insubordination and conduct unbecoming a teacher.

The teacher filed suit in the state district court, claiming that showing the movie was her constitutionally protected right in accordance with the First Amendment and that the district had violated her free speech rights when they terminated her employment. The court agreed and ordered her reinstatement with damages. The district appealed to the United States Court of Appeals for the Sixth Circuit, and the teacher cross-appealed, claiming that the state statute that allowed the termination of a teacher for conduct unbecoming was unconstitutionally vague. The circuit court disagreed. The court held that the teacher had committed serious misconduct by showing a movie she had never seen, that was controversial and sexually explicit, and shown to the students without any preparation or discussion. The court viewed the movie and decided that it contained material that was not appropriate for the students she taught and that showing the movie constituted conduct unbecoming of a teacher under Kentucky law.

#### Webster v. New Lenox School District (1990)

In the case of *Webster v. New Lenox School District*, Ray Webster, a junior high school social studies teacher, appealed the decision of the United States District Court for the Northern

District of Illinois to dismiss his action for lack of cause. The teacher alleged that the school district and superintendent violated his First and Fourteenth Amendment rights when they prohibited him from teaching creation theory. The United States District Court of Appeals for the Seventh Circuit held that the district court had erred in dismissing the case because the appellant could prove some of the facts that supported his claim. The court, however, did not uphold his claim. The court held that it is necessary for teachers, as subordinate employees, to obey the state authorities charged with curriculum development. The court held that the state had a compelling interest in choosing and forcing adherence to a suitable curriculum. The decision for what should be taught should not be left for the classroom teacher.

#### Spanierman v. Hughes (2008)

In the case of *Spanierman v. Hughes*, the plaintiff teacher filed an action in the United States District Court for the District of Connecticut, alleging that his First Amendment right to free speech and his Fourteenth Amendment rights procedural due process, substantive due process, and equal protection were violated when the school board failed to renew his teaching contract. The teacher was not yet tenured, having not yet taught for the four years required by Connecticut law to gain tenure. The teacher, however, argued that the school board had failed to renew his contract because of the contents of his MySpace page, which he believed violated his right to free speech.

The court found that, as the teacher had not yet earned tenure, he had no property interest in the job and therefore was not due any process in the board's decision not to renew his contract. Additionally, the court held that the plaintiff teacher failed to prove that the contents of his MySpace page were of public interest or concern, therefore it did not constitute protected speech. Furthermore, the court held that as the plaintiff teacher had used the MySpace page to carry on inappropriate conversations with his students and to display pictures that contained nudity where his students could see, the board was within their rights to terminate his contract because his behavior disrupted the learning environment. The court also denied his equal protection claim because he could not show that other teachers in the school had MySpace pages on which they gave their own students access. The court granted the defendant school district summary judgement.

Schimenti v. School Board of Hernando County, Florida (2011)

In the case of *Schimenti v. School Board of Hernando County, Florida*, Linda Schimenti appealed to the Court of Appeal of Florida, Fifth District the order for her termination from the School Board of Hernando County following an informal hearing. Schimenti alleged that she was terminated without due process and had not been given fair notice or an opportunity to respond to the charges. Schimenti was an elementary school teacher with a professional services contract at the time of her dismissal, therefore she could only be dismissed with just cause and was entitled to due process. In this case, Schimenti was given notice that a pre-determination

conference would take place to discuss her absence from work. She did not attend the conference, nor did she return phone calls from the administration regarding her absences from work and the conference. When there was no response at her front door, the administrative complaint was delivered by hand to her mailbox and copies were sent to both e-mail addresses on file. The complaint clearly explained the charges and supporting evidence and informed her of her right to request a hearing. The complaint explained that the District was requesting her dismissal and that if she did not respond to the charges it would be considered admission. Schimenti did not respond and the School Board voted for her dismissal. The court held that the district had afforded Schimenti appropriate due process prior to her dismissal and that her termination was appropriate.

#### Abrams v. Seminole County School Board (2011)

In the case of *Abrams v. Seminole County School Board*, Cydney Abrams, a special education teacher at Winter Springs High School, appealed her termination by the Seminole County School Board for conduct unbecoming a school board employee and misconduct in office. The teacher's dismissal followed what she agreed to be a "prolonged, unprofessional, and inappropriate verbal exchange with one of her students," twenty-six minutes of which another student recorded on her MP3 player. During the shouting match, Abrams directed profane language and derogatory comments at the student. Following the exchange, Abrams was suspended with pay and then without pay. An investigation ensued and the superintendent

recommended her termination to the school board. At Abrams request, the board conducted a due process hearing. At the due process hearing, the Administrative Hearing Officer heard testimony and the presented evidence and agreed that the teacher’s behavior was “inappropriate and a violation of the standard of conduct.” The Hearing Officer, however, did not recommend her termination, but instead recommended reinstatement with two years probation in respect of the isolation of the incident and the teacher’s obvious remorse and willingness to seek help to prevent further occurrences. The school board rejected the recommendation of the hearing officer and proceeded to terminate Abrams’ employment.

Abrams appealed the decision to the Court of Appeal of Florida, Fifth District. The court held that the school board had erred in dismissing Abrams following the due process hearing. The board had “improperly rejected two paragraphs of the findings” by the Hearing Officer and improperly added new findings of fact. The court held that because the Hearing Officer’s “findings were supported by competent substantial evidence, the school board was not allowed to reject them even to make alternate findings that were also supported by evidence.” The board’s decision to terminate the teacher was reversed and the case was remanded so that the school board could make a decision consistent with the Hearing Officer’s recommendation.

### **The Widget Effect**

The Widget Effect is a theory developed by the 2009 New Teachers Project. This study consisted of comprehensive data from 12 districts in four states. After conducting the study, the



researchers concluded that because the teacher evaluation systems in these districts failed to differentiate between effective and ineffective teachers, the teachers were in fact treated like “widgets,” interchangeable parts in an educational machine. Without any evidence of teachers’ strengths and weaknesses, school administrators cannot make informed decisions about the placement or professional development of their teachers, and thus they treat all teachers as if they are essentially equal. The researchers found that in districts that used a binary evaluation rating (satisfactory or unsatisfactory), greater than 99 percent of the teachers received a satisfactory rating. In districts that used more than two rating options, 94 percent of the teachers received the top two ratings and less than 1 percent were rated unsatisfactory. Forty percent of administrators surveyed admitted that they had never denied a teacher tenure because of poor performance, even in schools that were chronically underperforming. Eighty-six percent of administrators surveyed admitted that they had not pursued dismissal of a poorly performing teacher because of the time consuming nature of the process (Weisberg, et al, 2009). This study and others that have drawn similar conclusions have lead to a recent reform in teacher evaluation systems.

## **The Future**

Several cases currently waiting for judicial review seek to change teacher tenure laws once again. *Haridopolos v. Citizens for Strong Schools* (2011) was recently certified to the Supreme Court of Florida as an issue of great public importance. Citizens for Strong Schools accuses the state legislature of violating the Florida Constitution, Article IX, section 1a, which

states that “adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education.” The complaint alleges that the state violates this section by failing to adequately fund schools, failing to pay teachers appropriately, and “adopting a so-called accountability policy that is an obstacle to high quality.”

Finally, a lawsuit was filed on September 14, 2011 in the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida, asking the court to declare Senate Bill 736, which removed tenure for new teachers, unconstitutional. The grounds for this action is Article I, Section 6 of the Florida Constitution that grants public employees the right to collectively bargain. The plaintiffs allege that Senate Bill 736 unconstitutionally restricts public employees’ rights to collectively bargain “with respect to wages, employment contracts, performance evaluations, promotions, and workforce reductions.”

### **Summary**

Teacher tenure has existed in public K-12 education for 103 years and the same arguments used at its inception remain today. Proponents of tenure fear that without tenure to entice college graduates those graduates will take their degrees to fields that pay more. Many believe that it is the promise of lifelong employment that draws people into a field where they are likely to be severely overworked and severely underpaid in spite of their college degrees. Proponents of tenure also fear that teachers might face unjust terminations if it were easier to fire

the teacher than to calm the complaining parent. Opponents, as always, fear that tenure protects ineffective teachers from dismissal.

Nearly 90 years of case law supports the opponents' positions. In nearly every case, the courts have sided with the teacher and academic freedom except in cases of grievous misconduct. The courts have supported the school districts' rights to choose the curriculum, but have also consistently supported the teachers' rights to choose how to present the information. In several cases, the courts have supported the rights of the teachers over the will of the parents and have been willing to give the teacher an opportunity to correct the situation without dismissal. One could say that the courts have consistently treated teachers more professionally than the school districts have.

Interestingly, in 90 years of case law, none of the cases have concerned teacher effectiveness, which is really what the turmoil over tenure boils down to. The courts have heard cases of teachers behaving inappropriately or presenting inappropriate material, but none have addressed the teacher's ability to teach. In fact, in many of the cases, the courts noted that the teacher in question had consistently earned effective evaluations, implying that the court's decision might be different if the teacher was not good at his or her job. One could question why such a case has never come before the courts when surely at least some teachers have been fired for not being able to do their jobs. Possibly, the answer would be that as consistently as the courts have supported teachers and academic freedom, they have also supported school districts' rights to govern their teachers fairly within the laws codified by the state.

## **CHAPTER III**

### **ANALYSIS OF STATE STATUTES**

#### **Introduction**

Throughout the country, teacher tenure laws vary from state to state. Three states have eliminated tenure for teachers. Some states require only the most minimal due process possible for dismissing tenured teachers. Other states require extensive due process prior to terminating a tenured teacher. There are some states that require the teacher to meet certain criteria beyond years of service prior to earning tenure. The following section will detail which states fall into each category.

Table 1: Summary of State Tenure Laws

State	Tenure (Yes/No)	Number of Years to Earn Tenure	Length of Contract	Statutory Criteria for Earning Tenure	State	Tenure (Yes/No)	Number of Years to Earn Tenure	Length of Contract	Statutory Criteria for Earning Tenure
Alabama	Yes	3	Indefinite	None	Montana	Yes	3	1 Year	None
Alaska	Yes	3	Indefinite	Yes	Nebraska	Yes	3	Indefinite	None
Arizona	Yes	3	Indefinite	None	Nevada	Yes	2	Indefinite	None
Arkansas	Yes	3	Indefinite	None	New Hampshire	Yes	5	Indefinite	None
California	Yes	3	Indefinite	None	New Jersey	Yes	3	Indefinite	None
Colorado	Yes	3	Indefinite	Yes	New Mexico	Yes	3	Indefinite	None
Connecticut	Yes	4	Indefinite	None	New York	Yes	3	Indefinite	Yes
Delaware	Yes	3	Indefinite	Yes	North Carolina	Yes	4	Indefinite	None
Florida	No	NA	1 Year	NA	North Dakota	Yes	3	1 Year	None
Georgia	Yes	4	Indefinite	None	Ohio	Yes	7	Indefinite	Yes
Hawaii	Yes	2	Indefinite	Yes	Oklahoma	Yes	3	Indefinite	Yes
Idaho	No	4	2 Years	None	Oregon	Yes	3	Indefinite	None
Illinois	Yes	4	Indefinite	Yes	Pennsylvania	Yes	3	Indefinite	None
Indiana	Yes	5	Indefinite	Yes	Rhode Island	Yes	3	1 Year	None
Iowa	Yes	3	1 Year	None	South Carolina	Yes	4	Indefinite	Yes
Kansas	Yes	3	1 Year	None	South Dakota	Yes	4	Indefinite	None
Kentucky	Yes	4	Indefinite	None	Tennessee	Yes	5	Indefinite	Yes
Louisiana	Yes	3	Indefinite	None	Texas	Yes	3	Indefinite	None
Maine	Yes	3	2 Years	None	Utah	Yes	3	Indefinite	None
Maryland	Yes	3	Indefinite	None	Vermont	Yes	2	1 Year	None
Massachusetts	Yes	3	Indefinite	None	Virginia	Yes	3	Indefinite	Yes
Michigan	Yes	5	Indefinite	None	Washington	Yes	3	1 Year	None
Minnesota	Yes	3	Indefinite	None	West Virginia	Yes	3	Indefinite	None
Mississippi	No	NA	1 Year	NA	Wisconsin	Yes	3	Indefinite	None
Missouri	Yes	5	Indefinite	None	Wyoming	Yes	3	Indefinite	None

Table 2: Statutory Reasons for Termination by State

State	Just Cause	Immorality	Misconduct in Office	Incompetency	Insubordination	Neglect of Duty	Crime of Moral Turpitude	Unsatisfactory Evaluations	Revocation of License	Cruelty	Drug or Alcohol Abuse	Reduction in Force	Violation of Laws or Policies	Disability	Unfit to Teach
Alabama	x	x		x	x	x							x		
Alaska		x		x									x		
Arizona			x					x					x		
Arkansas	x		x	x		x						x			
California		x	x				x	x			x		x	x	x
Colorado	x	x		x	x	x	x	x						x	
Connecticut	x		x	x	x							x		x	
Delaware		x	x	x	x	x						x			
Florida	x	x	x	x	x	x	x	x							
Georgia	x	x		x	x	x			x			x			
Hawaii	x	x											x		
Idaho									x				x		
Illinois	x	x		x		x				x					
Indiana	x	x		x	x	x	x								
Iowa	x														
Kansas	x														
Kentucky		x	x	x	x	x								x	
Louisiana			x	x		x									
Maine															x
Maryland		x	x	x	x	x									
Massachusetts	x		x	x	x			x						x	
Michigan	x														
Minnesota			x			x							x		x
Mississippi	x	x		x		x				x					
Missouri		x		x	x		x						x		x
Montana	x														
Nebraska	x	x	x	x	x	x		x						x	x
Nevada		x	x		x	x	x	x	x				x		x
New Hampshire		x											x		x
New Jersey	x		x											x	
New Mexico	x														
New York		x	x	x	x	x		x						x	
North Carolina		x		x	x	x	x		x		x	x	x		

State	Just Cause	Immorality	Misconduct in Office	Incompetency	Insubordination	Neglect of Duty	Crime of Moral Turpitude	Unsatisfactory Evaluations	Revocation of License	Cruelty	Drug or Alcohol Abuse	Reduction in Force	Violation of Laws or Policies	Disability	Unfit to Teach
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New York		x	x	x	x	x		x						x	
North Carolina		x		x	x	x	x		x		x	x	x		
North Dakota	x	x	x		x	x	x							x	
Ohio	x														
Oklahoma				x		x	x	x		x					
Oregon		x			x	x	x	x	x				x		x
Pennsylvania		x		x		x	x	x		x			x	x	
Rhode Island	x														
South Carolina		x		x		x	x				x		x		
South Dakota	x	x	x	x	x	x		x					x		
Tennessee			x	x	x	x									
Texas	x														
Utah	x							x							
Vermont	x		x	x									x		
Virginia	x	x		x			x						x	x	
Washington	x														
West Virginia		x		x	x	x	x	x		x					
Wisconsin	x	x											x		
Wyoming	x							x							

Table 3: Due Process for Termination by State

State	Due Process (Notice and Hearing)	Evidentiary Hearing	Appeal	State	Due Process (Notice and Hearing)	Evidentiary Hearing	Appeal
Alabama	Yes	Yes	Yes	Montana	Yes	No	Yes
Alaska	Yes	Yes	No	Nebraska	Yes	Yes	No
Arizona	Yes	Yes	Yes	Nevada	Yes	Yes	Yes
Arkansas	Yes	Yes	Yes	New Hampshire	Yes	No	Yes
California	Yes	Yes	Yes	New Jersey	Yes	Yes	No
Colorado	Yes	Yes	Yes	New Mexico	Yes	Yes	No
Connecticut	Yes	No	Yes	New York	Yes	Yes	No
Delaware	Yes	Yes	Yes	North Carolina	Yes	Yes	No
Florida	No	No	No	North Dakota	Yes	Yes	No
Georgia	Yes	Yes	Yes	Ohio	Yes	Yes	Yes
Hawaii	Yes	No	No	Oklahoma	Yes	Yes	No
Idaho	Yes	No	No	Oregon	Yes	No	Yes
Illinois	Yes	Yes	No	Pennsylvania	Yes	Yes	No
Indiana	Yes	No	No	Rhode Island	Yes	Yes	Yes
Iowa	Yes	Yes	Yes	South Carolina	Yes	Yes	No
Kansas	Yes	Yes	No	South Dakota	Yes	No	No
Kentucky	Yes	No	Yes	Tennessee	Yes	Yes	Yes
Louisiana	Yes	No	Yes	Texas	Yes	No	No
Maine	Yes	No	No	Utah	Yes	No	No
Maryland	Yes	Yes	Yes	Vermont	Yes	No	No
Massachusetts	Yes	Yes	Yes	Virginia	Yes	Yes	Yes
Michigan	Yes	Yes	Yes	Washington	Yes	Yes	Yes
Minnesota	Yes	Yes	Yes	West Virginia	Yes	No	No
Mississippi	Yes	Yes	Yes	Wisconsin	Yes	No	No
Missouri	Yes	No	Yes	Wyoming	Yes	No	No



## **States with No Tenure Policy**

The following states have eliminated tenure in the 2011 legislative session. Of these states, only Florida completely eliminated any vestige of prior tenure laws. Idaho and Mississippi both require minimal due process (notice and a hearing) before failing to renew the contract of a teacher. Florida now only requires minimal due process if the teacher is to be dismissed during the term of the annual contract.

### **Florida**

Florida is one of the states that eliminated tenure for teachers during the 2011 legislative session. Florida Statute § 1012.33 does, however, define the terms of teacher's contracts and provide due process procedures for dismissing a teacher during a contract period. During the term of the contract, a teacher may only be dismissed for just cause, which includes immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, or conviction of a crime involving moral turpitude. Just cause may also include two consecutive unsatisfactory evaluation ratings, two unsatisfactory evaluation ratings within a three-year period, or a combination of three consecutive needs improvement and unsatisfactory ratings. The statute requires that a teacher's professional service contract be renewed each year unless the district superintendent notifies the teacher in writing that charges have been filed due to unsatisfactory performance or if the teacher has two consecutive unsatisfactory evaluation ratings, two

unsatisfactory evaluation ratings within a three-year period, or a combination of three consecutive needs improvement and unsatisfactory ratings.

If a district superintendent wished to dismiss a teacher during the term of the teacher's contract, the charges must be sent to the employee in writing. The teacher then has fifteen days to request a hearing. The school board must conduct the hearing within sixty days of the request. A majority vote of the board members is required for dismissal.

## Idaho

The Idaho legislature also chose to eliminate tenure in the 2011 legislative session. Idaho Code § 33-515 specifically states, "it is the intent of the legislature that after January 31, 2011, no new employment contract between a school district and a certificated employee shall result in the vesting of tenure, continued expectations of employment or property rights in an employment relationship." Instead of offering employees a renewable contract in their fourth year of service, Idaho Code § 33-514 allows board of trustees to enter into limited two year contracts with certificated teachers in their fourth year, with the option of adding a third year upon the conclusion of the first contract year. If the board of trustees decides not to employ a teacher for the following year, the board must provide the teacher with written notice that includes the reasons for the non-reemployment. The employee may request an informal review by the board of trustees. The statute allows local school boards to define the parameters of the informal

review. The statute specifies that because these contracts bear no property rights, the employee is not entitled to a formal review prior to non-reemployment.

Idaho Code § 33-513 describes the procedures for dismissing certificated professional personnel during the term of the employee's contract. Such a dismissal can only occur if the teacher violates any educational laws or regulations or if the teacher behaves in a manner that would result in the revocation of his or her teaching certificate. If the superintendent wished to dismiss a teacher during the teacher's contract term, the teacher must be given written notice listing the charges made against the teacher and the particulars of the hearing. At the hearing, the employee may be represented by counsel, present evidence, and cross-examine witnesses. The board must notify the teacher of its decision within fifteen days. The employee may appeal the decision to the district court.

## Mississippi

Mississippi is one of the states that removed teacher tenure protections. Mississippi Code § 37-9-101 specifically states that the legislature wishes to "establish procedures to provide accountability in the teaching profession," and "to provide a mechanism for the nonrenewal of licensed education employees in a timely, cost-efficient and fair manner." The statute also states, "it is the intent of the Legislature not to establish a system of tenure." Mississippi Code § 37-9-59 allows a teacher to be dismissed for "incompetence, neglect of duty, immoral conduct, intemperance, brutal treatment of a pupil or other good cause." The employee must be given

notice of the charges against him or her. The employee has a right to a hearing. The employee may appeal the decision made at the hearing to the chancery court, and if still aggrieved with that decision, may further appeal to the Mississippi Supreme Court. Mississippi Code § 37-9-109 requires that the notice of proposed discharge contain the reasons for the dismissal, a summary of the evidence, and a list of the witnesses to be used at the hearing. The employee is entitled to a fair hearing before a hearing officer or the school board and may be represented by counsel.

### **States with Minimal Tenure Provisions**

There are a number of states with tenure laws that provide only the most minimal due process protections to tenured teachers. These states require that a tenured teacher is entitled to notice and an informal hearing prior to dismissal or nonrenewal.

#### **Connecticut**

Connecticut General Statute § 10-151 describes the teacher tenure law for the state. A Connecticut teacher gains tenure at the completion of forty school months of continuous service provided that the teacher has been offered a contract to return for the next school year. A tenured teacher's contract is continued from year to year and may only be terminated for inefficiency, incompetence, insubordination, moral misconduct, disability, elimination of the

teacher's position, or other due and sufficient cause. Before terminating a teacher's contract, the superintendent must provide the teacher with written notice of the proposed termination. Within seven days of receiving the notice, the teacher may request in writing that the superintendent provide the grounds for the proposed termination. If such a request is made, the superintendent must provide the grounds for the proposed termination to the teacher in writing within seven days. The teacher has twenty days from receipt of the termination notice to request a hearing. The hearing must occur within fifteen days of the request and may be heard either by the school board or a subcommittee of the school board, an impartial hearing panel, or an impartial hearing officer. Within seventy-five days of the original request for a hearing, the school board subcommittee, hearing panel, or hearing officer must submit the findings and recommendation to the school board. The school board then has fifteen days to render a decision and send it in writing to the teacher. The teacher may appeal the school board's decision to the Superior Court.

Senate Bill 24, which is scheduled for a vote during the 2012 legislative session, proposes to change the requirements for a teacher to earn tenure. If the new legislation passes, a teacher would be eligible for tenure after thirty months of continuous service, provided he or she had earned two "exemplary" evaluations or after fifty months of continuous service provided he or she had earned a combination of three "proficient" or "exemplary" evaluations. The bill also proposes to change the process for terminating ineffective teachers. A tenured teacher would be eligible for termination after two years of "below standard" or "developing" evaluations. The teacher would still be entitled to written notice and a hearing before an impartial hearing officer, however at the hearing, the hearing officer would only be ruling on whether the evaluations were conducted according to law and not on the effectiveness of the teacher. If the hearing officer

finds that the evaluations were conducted appropriately, he or she would be able to dismiss the teacher immediately.

## Hawaii

Hawaii Revised Statute § 302A-608 allows a teacher who has completed “the probationary period without discharge” to be continuously employed by the public schools “during good behavior and competent service” until such time that the employee is eligible for retirement. Hawaii Revised Statute § 302A-609 requires that a tenured teacher may only be terminated for inefficiency, immorality, willful violation of policies, or other good and just cause. According to Hawaii Senate Bill 2993, tenure is not entirely regulated by state law. The state of Hawaii has a contract with the Hawaii State Teachers Association (HSTA) which allows teachers to acquire tenure after two years of satisfactory service. The collective bargaining agreement also sets the due process procedure for dismissal. Prior to dismissal, a teacher may institute the grievance process. The teacher is entitled to notice of dismissal, with the reasons for the proposed dismissal provided upon the teacher’s request. The teacher may request a meeting with the superintendent and a hearing before the school board prior to the decision to dismiss. The bill before the senate would require that any collective bargaining contract made after July 1, 2013 “shall not result in the vesting of tenure or continued expectations of employment in an employment relationship.” If this bill passes, it will also remove any tenure rights that teachers

in this state have previously acquired. This bill will be voted on in the 2012 legislative session and may change Hawaii's tenure laws.

## Kentucky

Kentucky Revised Statute § 161.740 allows a teacher to become eligible for continuing service status after being reemployed for a fifth year of teaching after teaching four consecutive years in the same district. Kentucky Revised Statute § 161.790 requires that a teacher's continuing contract "remain in force during good behavior and efficient and competent service" and can only be terminated in the case of insubordination, immoral character, conduct unbecoming a teacher, physical or mental disability, inefficiency, incompetency, or neglect of duty. In order to terminate a teacher for any of these reasons, the superintendent must first send the teacher written notice of the charges. Upon receipt of the notice, the teacher has ten days to request a hearing from the commissioner of education. After receiving the request, the commissioner of education must assemble a tribunal to hear the case. After hearing the case, the tribunal must render a decision by majority vote. If the teacher disagrees with the decision of the tribunal, he or she may appeal the decision to the circuit court with jurisdiction over the county.

## Louisiana

Louisiana Revised Statute § 17:442 allows a teacher to enter into permanent status after successfully completing a three year probationary period. Louisiana Revised Statute § 17:443 states that a permanent teacher cannot be terminated for any reasons other than willful neglect of duty, incompetency, dishonesty, immorality, or belonging to an illegal organization. The teacher must be served detailed written charges that include all of the charges and the evidence and witnesses that support the charges. The teacher is entitled to a hearing before the board and may be represented by counsel. Following the hearing, the board must render a written decision to the teacher. The teacher may appeal the board's decision to a court of competent jurisdiction.

## Maine

According to 20 Maine Revised Statute § 13201, after a teacher serves a probationary period of three years, any subsequent contracts must be for at least two years. Unless the teacher is notified of the board's intent not to renew the contract at least six months before the contract terminates, the teacher's contract will be automatically extended by one year every subsequent year. A teacher who has completed the probationary period and later receives notice that his or her contract will not be renewed is entitled to a hearing where the teacher may be represented by counsel. According to 20 Maine Revised Statute § 13202, the school board may dismiss any non-probationary teacher "who proves unfit to teach or whose services the board deems



unprofitable to the school” provided that the board has allowed the teacher the due process of an investigation, notice of the hearing, and a hearing before the board. The dismissal must be in writing and contain the reasons for the dismissal.

## Missouri

Missouri Statute § 168.104 defines a permanent teacher as a teacher who has been employed by the district continuously for five years and continues to be employed under an indefinite contract. Missouri Statute § 168.114 allows a teacher on indefinite contract to be terminated by the school board only for a physical or mental condition rendering him or her unfit to associate with children, immoral conduct, incompetency, inefficiency, insubordination, willful or persistent violation of school laws, excessive or unreasonable absences, or conviction of a crime involving moral turpitude. Missouri Statute § 168.116 requires that the school board serve a teacher with written notice containing the reasons for the proposed termination. If the reason for the proposed termination is incompetency, inefficiency, or insubordination, the teacher must first have been given thirty days to correct the situation. The teacher may request a hearing before the board of education and may seek judicial review of that decision as well.

## Montana

Montana Code § 20-4-203 allows a teacher to attain tenure status upon the acceptance of a contract for a fourth consecutive year of service in the same district. Once tenured, a teacher's contract is automatically renewed from year to year unless the governing board votes to dismiss the teacher for good cause. Montana Code § 20-4-204 requires that in order to terminate a tenured teacher's contract, the superintendent must make a written recommendation to the trustees of the district. The trustees must then inform the teacher in writing of the charges, the reasons for the recommendation, and his or her rights under the law. The teacher may request a hearing and at the conclusion of the hearing the trustees must vote on the proposed termination. The teacher may appeal the decision to the county superintendent who will appoint an arbitrator to hear the appeal. The teacher may further appeal the termination to the district court of the county.

## New Hampshire

New Hampshire does not have a formal term for tenure, however New Hampshire Revised Statute § 189:14-a provides due process rights to any teacher who has taught at least five consecutive years in the same school district. Such a teacher, prior to dismissal, is entitled to notice of the proposed dismissal, the reasons for the recommendation, and a hearing before the school board. The superintendent bears the burden of proof in the hearing. The school board

must render a decision within fifteen days of the hearing. New Hampshire Revised Statute § 189:13 allows a teacher to be dismissed only for immorality, failure to maintain competency standards, or failure to conform to regulations. New Hampshire Revised Statute § 189:14-b allows a teacher to appeal the school board's decision to the state board of education. If the teacher chooses to appeal the decision, either party may request that the state board conduct a second hearing rather than only review the record.

## Oregon

Oregon Revised Statute § 342.815 defines a contract teacher as a teacher who has completed a three year probationary period in the district and has been reemployed for the next school year. Oregon Revised Statute § 342.865 lists the grounds of dismissal for a contract teacher as inefficiency, immorality, insubordination, neglect of duty, physical or mental incapacity, conviction of a felony, inadequate performance, failure to comply with reasonable requirements, or any action that would cause the revocation of a teaching license. Oregon Revised Statute § 342.895 states that a contract teacher is a teacher employed by two-year contracts which are automatically renewed. If the school board desires to terminate or nonrenew a contract teacher's contract, it may only do so with appropriate due process. The teacher must be given written notice of the intent to dismiss that must include the statutory grounds for the recommendation and the facts to support the recommendation. Twenty days after the teacher receives notice of the intent to dismiss, the school board may take action on the dismissal. If the

board votes to dismiss the teacher, the termination takes effect on that date. A contract teacher so dismissed may appeal the decision to the Fair Dismissal Appeals Board.

## South Dakota

South Dakota Codified Law § 13-43-6.3 requires that due process protections be applied to the termination of any teacher who has taught four consecutive years in the same district.

South Dakota Codified Law § 13-43-6.1 requires that a teacher who has completed four years of consecutive employment only be discharged for just cause, which includes “breach of contract, poor performance, incompetency, gross immorality, unprofessional conduct, insubordination, neglect of duty, or violation of any policy or regulation of the school district.” South Dakota Codified Law § 13-43-6.2 requires that prior to termination, a teacher must be given notice of the intent to dismiss, including the reasons for the proposed dismissal and the teacher’s right to request a hearing. At the hearing, the teacher may be represented by counsel and may present to the school board the reasons he or she should not be discharged.

House Bill 1234, which will come to a vote during the 2012 legislative session, proposes to eliminate tenure in South Dakota for new teachers. If this bill is voted into law, any teacher who has not yet entered into their fourth year of teaching by July 1, 2012, would not be eligible for a continuing contract.

## Texas

Texas Educational Code § 21.153 allows a teacher who has completed three years under a probationary contract to become eligible for a continuing contract. Texas Educational Code § 21.154 requires that a continuing contract teacher continue to teach without need for contract renewal unless dismissed for just cause. Texas Educational Code § 21.158 requires that any teacher under continuing contract who may be dismissed must receive written notice that includes the grounds for the action. The teacher is entitled to a copy of any documentation that supports the charge. Texas Educational Code § 21.159 allows a teacher to request a hearing before the board of trustees.

## Utah

Utah Code § 53A-8-106 allows a provisional employee to gain career employee status after serving for three consecutive years in the same district. Utah Code § 53A-8-102 defines a career employee as a teacher “who has obtained a reasonable expectation of continued employment.” Utah Code § 53A-8-104 requires that prior to dismissing a career employee, the district must provide the teacher with a written notice of the charges against the teacher and the rights the teacher has under the law. If the charge against the teacher is unsatisfactory performance, there must be two evaluations from the past three years supporting such a charge. The board may allow the employee time and assistance to correct the problems. The teacher is

entitled to a fair hearing and may request one. If the board chooses to terminate the teacher's contract following the hearing, the teacher is entitled to written notice that includes the findings of fact that led to the decision.

### Vermont

According to 16 Vermont Statute § 1752, a nonprobationary teacher is a teacher who has taught for at least two consecutive years in the same district. A nonprobationary teacher may only be nonrenewed for the following year for "just and sufficient cause." The superintendent may suspend a nonprobationary teacher pending dismissal for "incompetence, conduct unbecoming a teacher, failure to attend to duties or failure to carry out reasonable orders and directions." The superintendent must notify the teacher in writing and must include the grounds for the suspension. The teacher has a right to appeal to the school board. Both parties may be represented by counsel. After the hearing, the board may vote to dismiss the teacher.

### West Virginia

West Virginia Code § 18A-2-2 allows a teacher to earn continuing contract status after three consecutive years of service in the same district. A teacher's continuing contract must "remain in full force and effect" unless terminated by either the teacher or the school board. In

order for the school board to terminate the continuing contract of a teacher, it must serve the teacher with written notice stating the cause of the action and give the teacher an opportunity for a hearing before the school board. West Virginia Code § 18A-2-8 allows the school board to dismiss a teacher for “immorality, incompetency, cruelty, insubordination, intemperance, willful neglect of duty, unsatisfactory performance, or the conviction of a felony.”

### Wisconsin

Wisconsin Statute § 118.23 allows a teacher to earn permanent employment after the completion of a three year probationary period. A teacher who is permanently employed may only be dismissed for inefficiency, immorality, willful violation of reasonable regulations, or other good cause. In order to dismiss a permanent teacher, the governing board must first provide the teacher with written notice of the proposed dismissal. The teacher may request a hearing before the governing board, at which he or she may be represented by counsel. The board must render a decision by majority vote.

### Wyoming

Wyoming Statute § 21-7-102 defines a continuing contract teacher as a teacher who has served three consecutive years in the same school district and has been offered a contract for a

fourth year. Wyoming Statute § 21-7-104 allows a teacher's continuing contract to continue indefinitely from year to year provided the teacher continues to earn satisfactory evaluations. Wyoming Statute § 21-7-106 requires that the superintendent provide notice to a continuing contract teacher of the proposed dismissal. The teacher is entitled to request a hearing before an independent hearing officer.

### **States with Extensive Tenure Laws**

A number of states have extensive tenure laws. These laws qualify a tenured teacher not only for notice and a hearing, but the hearing must be a full evidentiary hearing. At such a hearing, the teacher may be represented by counsel, present evidence and witnesses, and cross-examine witnesses. Many of these states also include the appeal process in the legislation for teachers who disagree with the school board's decision.

#### **Alabama**

According to the Code of Alabama § 16-24C-4, a teacher of a public, K-12 school may be granted tenure or nonprobationary status after three consecutive school years of full time employment. If the school board chooses to deny tenure to a teacher, it must notify the teacher



of the termination in writing before the end of the teacher's third year of service. There is no mention in the statute of requirements to obtain tenure beyond the years of service.

According to the Code of Alabama § 16-24C-6, a tenured teacher may be fired at any time for "incompetency, insubordination, neglect of duty, immorality, failure to perform duties in a satisfactory manner, or other good and just cause." Termination proceedings must begin with a notice, in writing, of the proposed termination at the recommendation of the chief executive officer. The notice must include the reasons for the recommendation, a short statement describing which of the acceptable reasons for termination the teacher is being charged with, and a reminder that if the employee wishes to request a hearing, he or she must do so in writing within fifteen days. If requested, the hearing must take place between thirty and sixty days of the arrangement of the hearing. At the hearing, the chief executive officer bears the burden of proof. The employee or the employee's representative may present testimony and evidence and cross-examine witnesses. Within ten days of the vote of the school board, the employee must be notified of the decision in writing. If the decision was made following a hearing, the employee may request an appeal to the State Superintendent of Education within fifteen days. The Superintendent of Education must then refer the appeal to the Executive Director of the Alabama State Bar Association to assemble a neutral panel (five retired judges) to choose a hearing officer. The employer must provide a complete record of the administrative proceedings, including transcripts of the hearing, to the hearing officer within twenty days. After the hearing, the hearing officer has five days to make a final ruling.

## Arizona

According to Arizona Revised Statute § 15-538.01, a teacher who has been employed by an Arizona school district for at least three consecutive school years must be offered a contract for the following year unless the teacher has been given notice of the board's intention to seek dismissal. According to Arizona Revised Statute § 15-539, a teacher who has completed more than three consecutive years of service may be dismissed for "unprofessional conduct, conduct in violation of the rules or policies of the governing board or inadequacy of classroom performance." If the governing board intends to dismiss a teacher for unprofessional conduct or a violation of rules, the teacher must be served notice of the intended dismissal ten days before the dismissal occurs. If the governing board intends to dismiss a teacher for inadequacy of classroom performance, the teacher must first be given the opportunity to correct the inadequacy. A written notice of inadequate classroom performance must be given to the teacher with a copy of the evaluation that the charge is based upon. The notice must inform the teacher of the time period he or she has to overcome the inadequacy, which may not begin fewer than ten days of receipt of the notice and must last for at least sixty days. If the teacher corrects the inadequacy in that time period, the dismissal may not continue. If the inadequacy still exists at the end of the remedial period, the governing board must serve the teacher with written notice of the board's intention to dismiss the teacher either ten days after receipt of the notice or at the end of the contract year. A teacher who has received notice of the board's intent to dismiss for any of the above reasons has ten days to request a hearing.

Arizona Revised Statute § 15-541 provides the requirements of a dismissal hearing. If the teacher requests a hearing, it must take place within fifteen to thirty days of the request. The school board may decide to hear the case or to have the case heard by a hearing officer, who would hold the hearing, listen to the evidence, prepare a record, and recommend an action to the governing board. The teacher may have counsel at the hearing and can present testimony and evidence. If the board hears the case, it has ten days to render a decision. If a hearing officer hears the case, he or she has ten days to provide a recommendation to the board which includes the findings of fact and conclusions. If either party disagrees with the hearing officer's findings, he or she may present arguments to the governing board. Arizona Revised Statute § 15-543 allows a teacher to appeal the decision of the governing board to the superior court in the county.

Arizona House Bill 2497, if passed, will change the contracts of nonprobationary teachers. Rather than the current contract that is automatically renewed each year, the teacher would instead be offered a multiyear contract of up to three years.

## Arkansas

The Arkansas Teacher Fair Dismissal Act provides the regulations for teacher tenure and termination within the state. Arkansas Statute § 6-17-1502 defines a non-probationary teacher as a teacher who has completed three continuous years of employment within the school district. According to Arkansas Statute § 6-17-1507, a teacher may be terminated while under contract only for reduction in force, "incompetent performance, conduct which materially interferes with

the continued performance of the teacher's duties, repeated or material neglect of duty, or other just and reasonable cause." If the superintendent intends to recommend a teacher for termination, the teacher must be given notice in writing, containing the grounds for the proposed termination in "separately numbered paragraphs so that a reasonable teacher can prepare a defense." Arkansas Statute § 6-17-1509 allows a teacher who has received a notice of recommended termination to request a hearing within thirty days of receiving the notice. If a hearing is requested, it must take place within five to twenty days of the request. Both parties may be represented by counsel and the board of directors may only consider the charges specified in the notice of recommended termination. Following the hearing, the board must render a decision within ten days. If the teacher is unhappy with the outcome, he or she may appeal to the circuit court of the county within seventy-five days of the board's decision.

## California

According to California Educational Code § 44929.21, a teacher is granted classification as a permanent employee at the commencement of his or her third consecutive year of teaching. California Educational Code § 44932 protects a permanent teacher from dismissal for all causes except for the ones enumerated in the statute. Just causes for the termination of a permanent teacher are: immoral or unprofessional conduct, advocating, aiding, or committing acts of terrorism, dishonesty, unsatisfactory performance, evident unfitness for service, physical or mental condition making the instructor unfit to associate with children, persistent violation or

refusal to obey school laws, conviction of a felony or crime involving moral turpitude, membership in the Communist Party, or alcoholism or other drug use which renders the instructor unfit to associate with children. According to California Educational Code § 44834, once written charges have been filed against a permanent employee, the governing board must vote in order to issue a notice to the employee of the board's intent to dismiss him or her at the end of thirty days, unless the employee requests a hearing. If the teacher is being charged with unprofessional conduct or unsatisfactory performance, the notice must include specific instances of behavior that lead to the charge so that the teacher may prepare a defense. Any rules or statutes the teacher has been charged with violating must be enumerated in the notice as well.

California Educational Code § 44938 provides further protections for teachers charged with unprofessional conduct or unsatisfactory performance. In the case of a teacher charged with unprofessional conduct, the governing board must provide the employee with written notice of the unprofessional conduct at least forty-five days before filing charges for dismissal. The notice must include specific instances of unprofessional behavior so the teacher might have an opportunity to correct the faults and "overcome the grounds for the charge." In the case of a teacher charged with unsatisfactory performance, the governing board must provide written notice to the employee ninety days prior to filing of charges. The notice must include specific examples to allow the employee to correct the faults and eliminate the grounds for the charges. California Educational Code § 44943 requires that if an employee, after receiving notice of intended dismissal, requests a hearing, the governing board must either rescind the action or schedule a hearing. California Educational Code § 44944 provides the requirement for a dismissal hearing. The hearing must take place within sixty days of the employee's request for

the hearing. Both the employee and the governing board are entitled to discovery and representation. Witnesses must testify under oath. Evidence and testimony presented at the hearing must have occurred within the last four years. The hearing is conducted by a Commission on Professional Competence. The commission must consist of three members, one selected by the employee, one selected by the governing board, and one must be an administrative law judge. The Commission on Professional Competence must render its decision by majority vote and prepare a written decision that includes the findings of fact, determination of issues, and a disposition. The decision of the commission is the final decision of the governing board. California Educational Code § 44945 allows either party to appeal the decision to “a court of competent jurisdiction,” which will examine the evidence and render an independent judgment.

## Georgia

According to the Official Code of Georgia § 20-2-942, any teacher acquires a right to continued employment after accepting a teaching contract for a fourth year of continuous service. In order to dismiss a teacher who has acquired a right to continued employment, the district must provide the teacher with written notice of the school board’s intention not to renew the teacher’s contract. The notice must conspicuously display the following paragraph:

You have the right to certain procedural safeguards before you can be demoted or dismissed. These safeguards include the right to notice of the reasons for the action against you and the right to a hearing. If you desire these rights you must send to the school superintendent by certified mail or statutory overnight delivery a statement that

you wish to have a hearing; and such statement must be mailed to the school superintendent within 20 days after this notice was mailed to you.

According to the Official Code of Georgia § 20-2-940, the notice must also include the cause for the dismissal in sufficient detail to allow the teacher to refute the charges, the names of witnesses, a summary of the evidence, the time and place of the hearing, and that the teacher may subpoena witnesses. The cause for the dismissal may not be for any reason other than incompetency, insubordination, willful neglect of duties, immorality, causing a student to violate any law or rule, reduction in force, lack of proper certification, or any other good and sufficient cause.

At the hearing, the teacher may be represented by counsel. The hearing must be held before the local school board and a transcript of the hearing must be made. All witnesses must testify under oath. The school board has five days following the hearing to render a decision. If the teacher wishes to appeal the decision, the teacher may appeal to the state board of education.

## Iowa

Iowa Code § 279.19 defines a teacher's probationary period as his or her first three years of service in the same school district. Following the probationary period, the teacher is considered to have a continuing contract. Iowa Code § 279.13 describes a continuing contract as a teacher's contract that may last no more than one school year but is automatically renewed at the end of every school year unless the contract is terminated in accordance with specified provisions.

Iowa Code § 279.15 describes the process required to terminate a teacher's continuing contract. A teacher with a continuing contract may only be terminated for just cause. The superintendent must inform the teacher in writing that he or she is recommending that the teacher's contract be terminated. The notice must include the reasons for the recommendation. The teacher may request a private hearing with the school board. Both parties must disclose their evidence and list of witnesses to the board prior to the hearing. Iowa Code § 279.16 allows the school board and the teacher to have counsel present at the hearing and to present witnesses. The superintendent and the teacher's immediate supervisors may also attend the hearing. The board must render a decision within five days of the hearing. Iowa Code § 279.17 allows a continuing contract teacher to appeal the board's decision to an adjudicator. The adjudicator reviews the record of the private hearing with the board. At the adjudicator's request, new evidence may be gathered. The adjudicator can affirm, refute, or remand the board's decision, however either the board by majority vote or the teacher in writing may reject the adjudicator's decision. Iowa Code § 279.18 allows either the school board or the teacher to appeal the adjudicator's decision to the district court of the county.

## Kansas

While there is no term within the statutes to describe the tenure system in the state, Kansas Statute § 72-5445 states that the due process rights in Kansas Statutes § 72-5438 through § 72-5443 apply to teachers who have served three consecutive years in a district school and



have been offered a contract for a fourth year. Kansas Statute § 72-5437 requires that all teaching contracts be renewed for the next school year unless the teacher has been served notice of termination or nonrenewal. Kansas Statute § 72-5438 requires that a notice of termination or nonrenewal must include the reasons for the proposed termination and that the teacher may request a hearing before a hearing officer within fifteen days. Kansas Statute § 72-5439 describes the procedural requirements for the hearing. Each party may be represented by counsel, cross-examine witnesses, and present testimony, evidence and witnesses. Kansas Statute § 72-5446 describes an alternative procedure to be used if the teacher feels that the termination is an abridgment of his or her constitutional rights. In this case, the teacher has fifteen days to notify the board after receiving termination notice. A hearing officer is chosen to determine the legitimacy of the teacher's claims. If the hearing officer decides that the teacher's claim is not substantial, the decision of the board stands. If the hearing officer decides the teacher does have a substantial case, the board must justify its decision. If the board can properly justify its reasoning, the contract may still be terminated.

## Maryland

Maryland Education Code § 6-202 defines the probationary period for a teacher as the first three years of teaching, after which the teacher has achieved tenure status. A tenured teacher may be terminated for immorality, misconduct in office, insubordination, incompetency, or willful neglect of duty. In order to terminate a tenured teacher for any of these reasons, the

county board must notify the teacher of the charges and allow the teacher an opportunity to request a hearing. If a hearing is requested, the county board must hold the hearing and allow the teacher the opportunity to be heard, represented by counsel, and bring witnesses. If the teacher disagrees with the decision of the county board, he or she may appeal to the state board.

### Massachusetts

According to the Annotated Laws of Massachusetts GL ch. 71, § 41, a teacher gains professional teacher status after having completed three consecutive years employed as a teacher in the same district. The Annotated Laws of Massachusetts GL ch. 71, § 42 allows the termination of a teacher with professional teacher status only for “inefficiency, incompetency, incapacity, conduct unbecoming a teacher, insubordination,” failure to satisfy teacher performance standards, or other just cause. After receiving notice of the commissioner’s intent to pursue dismissal, the teacher may request a hearing before an arbitrator. At the hearing, both parties may be represented by counsel, present evidence, and call witnesses. The school district bears the burden of proof. The arbitrator must render a decision within one month of the hearing. The decision must be presented to both parties in writing and contain the reasons for the decision. The arbitrator’s decision may be subject to judicial review.

## Michigan

Michigan Compiled Laws § 38.81 allows a teacher to earn continuing tenure after a probationary period of five years. This probationary period was amended from four years during the 2011 legislative session. Michigan Compiled Laws § 38.102 requires that charges against a teacher must be filed with the controlling board, which must decide whether to proceed with the charges by majority vote. If the board votes to proceed with the charges, notice must be sent to the teacher with the specific charges and the teacher's rights under law. Michigan Compiled Laws § 38.104 allows the teacher to contest the decision of the board to proceed with charges to the tenure commission. A hearing must also be conducted by an administrative law judge. The two decisions must remain separate and may not influence each other. At the hearing, both parties may be represented by counsel, subpoena witnesses, and present evidence. The administrative law judge must submit a decision within sixty days. Either party may ask the tenure commission to review the record of the hearing and render a decision based solely on the record. If either party is still unhappy with the outcome, he or she may seek further review from the court of appeals.

## Minnesota

Minnesota Statute § 122A.40 describes the tenure policies in the state of Minnesota. After a three year probationary period, a teacher is placed on a continuing contract, which will

“remain in full force and effect” except by majority vote of the board for certain defined offenses. Such grounds for termination are inefficiency, neglect of duty, persistent violation of laws or rules, conduct unbecoming a teacher, or any other good and sufficient reason that renders the teacher unfit to fulfill his or her duties. Prior to terminating a teacher’s contract, the school board must notify the teacher in writing of the proposed dismissal, the reasons for the proposed dismissal, and the teacher’s rights under the law. The teacher may request a hearing. At the hearing, both parties may be represented by counsel, present evidence, and subpoena witnesses. The school board must render a written decision “based upon competent evidence.” Either party is eligible to seek judiciary review.

House File 945, which will come for a vote during the 2012 legislative session, proposes changes to Minnesota tenure laws. The bill proposes to change Minnesota’s continuing contract for teachers to a renewable five-year contract. The decision to renew a teacher’s five-year contract at the contract term would be based on a teaching portfolio that includes “the teacher’s five-year professional growth plan based on standards of professional practice, student learning, and successful teacher evaluations.”

## Nebraska

Nebraska Revised Statutes § 79-824 and § 79-829 define a permanent certificated employee as a teacher who has completed three consecutive years of service in the same school district. Once a teacher becomes a permanent certificated employee, he or she may only be

terminated for just cause, which here is defined as incompetency, neglect of duty, unprofessional conduct, insubordination, immorality, physical or mental incapacity, failure to provide proof of professional growth, or conduct that substantially interferes with the performance of duties.

Nebraska Revised Statute § 79-831 requires that a school board wishing to terminate the contract of an employee must notify the teacher in writing of the proposed termination. The employee is entitled to a hearing. Nebraska Revised Statute § 79-832 requires that the school board provide the teacher with a list of witnesses and copies of all documents that will be used at the hearing at least five days before the hearing takes place. The teacher has a right to be represented by counsel, cross-examine witness, and present evidence. The members of the school board must render a decision by majority vote and deliver the decision to the employee in writing.

## Nevada

Nevada Revised Statute § 391.3197 allows a teacher to gain postprobationary status upon reemployment to a third consecutive year of teaching in the same district. Nevada Revised Statute § 391.312 allows the contract of a postprobationary teacher to be terminated only for inefficiency, immorality, unprofessional conduct, insubordination, neglect of duty, physical or mental incapacity, reduction in force, conviction of a crime involving moral turpitude, inadequate performance, unfitness for service, failure to comply with reasonable requirements, failure to demonstrate professional growth, advocating the overthrow of the government, teaching communism with the intent to indoctrinate students, any cause that would require the

revocation of the teacher's license, willful neglect, dishonesty, or breaching test security. Nevada Revised Statute § 391.317 requires that the superintendent provide written notice of the proposed termination prior to making the recommendation to the school board. The notice must include the grounds for the dismissal and the employee's legal right to a hearing. Nevada Revised Statute § 391.3192 requires that the hearing take place before a hearing officer. Both parties may be represented by counsel and call witnesses. Nevada Revised Statute § 391.3194 requires that within five days of receiving the recommendation of the hearing officer, the superintendent must decide whether to continue with the dismissal. If the superintendent wishes to continue the dismissal, he or she must file the recommendation with the board. The board then has fifteen days to decide on the dismissal and notify the employee. The teacher may appeal the decision to the district court.

## New Jersey

New Jersey Statute § 18A:28-5 allows a teacher to earn tenure "during good behavior and efficiency" after teaching three consecutive years in the same school district. Once tenured, a teacher can only be dismissed for inefficiency, incapacity, conduct unbecoming a teacher, or other just cause. New Jersey Statute § 18A:6-11 requires that charges made against a tenured teacher must be filed with the school board's secretary. The person making such a charge must then present to the board a statement of evidence written under oath in support of the charges. The board must then provide the employee with a copy of the charges and the statement of the

evidence and provide the employee with a chance to make a statement of position and a statement of evidence under oath in response. After examining all of these documents, the school board must then decide by majority vote if there is enough evidence to support the charge and if the charge warrants dismissal. The board must then notify the employee of its decision. If the board decides to proceed with dismissal, the charges must be forwarded to the commissioner along with the board's decision for a hearing. If the charge is for inefficiency, the teacher must have been given warning and ninety days to correct the error prior to receiving notice of dismissal. New Jersey Statute § 18A:6-16 requires that the commissioner examine all of the materials concerning the charges against the teacher. The teacher has fifteen days to submit a written response to the commissioner concerning the charges. The commissioner then has fifteen days to render a decision.

New Jersey Senate Bill 1455, if passed, will change the requirements of earning tenure to include effective evaluations for three years prior to earning tenure.

## New Mexico

New Mexico legislation does not provide a term for tenure, but New Mexico Statute § 22-10A-24 provides due process protections to any teacher who has been employed by the same district for three consecutive years. A teacher who has earned these protections may only be dismissed for just cause. Prior to termination, the teacher must be given written notice of the proposed dismissal. The teacher may request a hearing before the school board at which to make

a statement about the charges. The employee may also request the reasons for the proposed dismissal. After receiving the reasons for the proposed discharge, the teacher may respond in writing to the superintendent his or her belief that the dismissal is without just cause. The statement must clearly state the grounds this belief is based on and facts that would support the belief. The local school board must then meet to hear the teacher's statement in an informal hearing. Both parties may be "accompanied by a person of his choice." The superintendent and the teacher must limit their remarks to the contents of their written statements, but both parties and the board can question witnesses. The board may only consider the evidence and testimony presented at the hearing in making its decision, which must be delivered in writing to the teacher within five days of the hearing. No record can be made of the hearing.

## North Carolina

North Carolina General Statute § 115C-325 describes North Carolina's teacher tenure laws. A teacher is eligible to obtain career status after four consecutive years of teaching in the same district. Near the end of a teacher's fourth year of service, the superintendent may recommend a teacher for career status. The teacher has a right to written notice and a hearing before the school board votes on his or her career status. Once a teacher has obtained career status, he or she may only be dismissed for inadequate performance, immorality, insubordination, neglect of duty, physical or mental incapacity, alcoholism or drug abuse, conviction of a crime involving moral turpitude, advocating the overthrow of the government,



failure to fulfill duties, failure to comply with reasonable requirements, any cause that would warrant removal of the teacher's certificate, reduction in force, failure to maintain teaching license, failure to repay money owed to the State, or providing false information. The district superintendent must provide the teacher written notice of his or her intention to recommend dismissal before making the recommendation to the board. The notice must include the grounds for dismissal. The superintendent must also meet with the teacher to provide written notice of the proposed dismissal, explain the basis of the charges, and give the teacher an opportunity to respond to the charges. After receiving notice, the teacher may request a hearing with an impartial hearing officer. The teacher and the superintendent must receive copies of all documents that will go before the hearing officer. Both parties may be represented by counsel and present witnesses. After the hearing, the hearing officer must make a finding of fact and a recommendation to the superintendent. At that point, the superintendent must choose whether to proceed with the dismissal. If the superintendent chooses to proceed, he or she must submit a recommendation to the school board. If the superintendent recommends the teacher's dismissal to the board, the teacher may request a hearing before the school board. At the hearing, the board will review the report of the hearing officer and hear oral arguments from the teacher and the superintendent. Both parties may be represented by counsel and present witnesses. Following the hearing, the board may decide to dismiss the teacher by majority vote.

## North Dakota

North Dakota Century Code § 15.1-15-01 sets the probationary period for a teacher as the first three years of employment in the district. North Dakota Century Code § 15.1-15-05 requires that a school board that does not plan to renew a teacher's contract for the following year must provide notice to the teacher of the proposed action, the reasons for the action, and the time, date, and location of the hearing. The reasons for not renewing the teacher's contract may "not be frivolous or arbitrary" and "must be sufficient to justify the contemplated nonrenewal." The reasons must also come from documented findings in the teacher's personnel file and relate to the teacher's "ability, competence, or qualifications." North Dakota Century Code § 15.1-15-06 describes the requirements of the nonrenewal hearing. The superintendent, the board, and the teacher may call witnesses, provide evidence, and cross-examine witnesses. After the board renders a decision, it must be delivered in writing to the teacher.

North Dakota Century Code § 15.1-15-07 lists the grounds for dismissal of a teacher during the term of his or her contract. Just causes for such a dismissal are immoral conduct, insubordination, conviction of a felony, conduct unbecoming a teacher, failure to perform duties, gross inefficiency, or physical or mental disability. North Dakota Century Code § 15.1-15-08 provides the due process required to dismiss a teacher during the term of his or her contract. The school board must contact the director of the office of administrative hearings for an administrative law judge to be appointed to the case. Once the administrative law judge sets the time and place of the hearing, the board must notify the teacher of the charges and the time and place of the hearing. Both parties are entitled to legal counsel. After the hearing, the

administrative law judge must provide the evidence to the school board, who must then vote on the action. The board's decision can be appealed to the district court.

## Pennsylvania

According to 24 Pennsylvania Statute § 11-1121, a teacher earns permanent tenure after three consecutive years of service in the same district. The contract of a permanently tenured teacher extends from year to year automatically. According to 24 Pennsylvania Statute § 11-1122, a teacher's contract may only be terminated for immorality, incompetency, unsatisfactory performance, intemperance, cruelty, persistent negligence, willful neglect of duties, mental or physical disability, advocacy of subversive activities, conviction of a felony, or failure to comply with school laws. According to 24 Pennsylvania Statute § 11-1127, prior to termination a permanently tenured teacher is entitled to notice of the charges and proposed dismissal and a hearing. The notice must include the time and place of the hearing and the charges against the teacher in detail. At the hearing, the teacher is entitled to be represented by counsel. The board must render a decision based on all of the testimony and evidence.

## Rhode Island

Rhode Island General Law § 16-13-3 defines the probationary period of a teacher to be “three annual contracts within five successive school years” after which a teacher is considered to be in continuous service. Once under continuous service, a teacher’s contract is automatically renewed annually and may only be terminated “for good and just cause.” In order to dismiss a teacher under continuous service, the teacher must receive notice that details the cause of the termination and is entitled to a hearing and an appeal. Rhode Island General Law § 16-13-4 allows that upon notice of the proposed dismissal, a teacher may request a hearing before the full school board. At the hearing, both parties may be represented by counsel and may present witnesses. If the teacher is unhappy with the decision of the board, he or she may appeal the decision to the department of elementary and secondary education. If the teacher remains unhappy with that decision, he or she may further appeal to the superior court.

## Washington

The Revised Code of Washington § 28A405.210 requires that the contract length for every teacher may not exceed one year. If a teacher’s contract is not going to be renewed for the following year, the teacher is entitled to written notice that includes the causes for the nonrenewal. The teacher may request a hearing to determine if there is sufficient cause for the nonrenewal. This statute does not apply to provisional employees. The Revised Code of

Washington § 28A.405.220 defines a provisional teacher as a teacher who has taught fewer than three years in the district. The Revised Code of Washington § 28A.405.310 describes the procedure for the teacher's due process hearing. Any non-provisional teacher who has been given notice of "probable cause for discharge" is entitled to a hearing. The teacher may be represented by counsel and present witnesses. The hearing must take place before a hearing officer. After the appointment of a hearing officer, he or she must conduct a prehearing conference to enable discovery of evidence and allow an opportunity to subpoena witnesses. At the hearing, the hearing officer must rule on the admissibility of evidence and on law and procedure. The hearing officer then must submit findings of fact, conclusions of law, and a final decision to the school board. The Revised Code of Washington § 28A.405.320 allows the teacher to appeal the nonrenewal decision to the superior court in the county. The Revised Code of Washington § 28A.405.360 allows either party to appeal the decision of the superior court to the appellate court.

### **States with Criteria to Earn Tenure**

Some states have criteria beyond the number of years of service that a teacher must accomplish prior to earning tenure. For most states, the criteria are effective or superior evaluations. For other states there are course requirements prior to earning tenure.

## Alaska

Alaska Statute § 14.20.150 allows a teacher to acquire tenure rights after three full and continuous years of service, provided that the teacher met the district's performance standards on the evaluation conducted during the third probationary year. According to Alaska Statute § 14.20.170, any teacher, including those protected by tenure, can be dismissed for incompetency, immorality, or "substantial noncompliance with the school laws of the state, the regulations or bylaws of the department, the bylaws of the district, or the written rules of the superintendent." Alaska Statute § 14.20.175 allows school districts to subject tenured teachers to nonretention for the following school year if the district can show that it has complied completely with the requirements of Alaska Statute § 14.20.149 (which concerns evaluation procedures), and that the teacher's performance fails to meet the performance standards of the district after the completion of an improvement plan.

Alaska Statute § 14.20.180 describes the procedures required to dismiss a tenured teacher. Prior to the dismissal, the teacher must be given written notice that dismissal has been proposed and must be allowed a pretermination hearing. At the hearing, the school district must grant the teacher appropriate due process, including an explanation of the evidence, the reason for the dismissal, and a chance for the teacher to respond to the charges. Following the hearing, the district must provide the teacher with the decision in writing, including a "statement of cause and a complete bill of particulars." Within fifteen days of the decision the teacher may request a hearing before the school board. At the hearing, both parties can be represented by attorneys and cross-examine witnesses, and the teacher may subpoena the people who made statements that

influenced the dismissal decision. The hearing must be recorded and when the board renders its decision, the members must include “specific findings of fact and conclusions of law.” The teacher may appeal to the superior court, which will review the administrative record.

## Colorado

According to Colorado Revised Statute § 22-63-203, a teacher gains nonprobationary status after three consecutive years of “demonstrated effectiveness, as determined through his or her performance evaluations and continuous employment.” Colorado Revised Statute § 22-63-301 allows a nonprobationary teacher to be dismissed for “physical or mental disability, incompetency, neglect of duty, immorality, unsatisfactory performance, insubordination, the conviction of a felony or the acceptance of a guilty plea, a plea of nolo contendere, or a deferred sentence for a felony, or other good or just cause.” Colorado Revised Statute § 22-63-302 describes the procedure for dismissing a nonprobationary teacher. The process begins when the chief administrative officer recommends a teacher’s dismissal to the school board. Within three days of the meeting at which the recommendation takes place, written notice of the intended dismissal must be mailed to the teacher. The notice must include the reasons for the dismissal, a copy of this statute, and any exhibits that the chief administrative officer intends to submit to support the case. The teacher may request a hearing within five days of receiving notice if he or she objects to the reasons for the dismissal. If a hearing is requested, it must be held before an impartial hearing officer. Within three days, the hearing officer must set dates for the prehearing

conference and the hearing. The hearing officer can hear testimony, examine evidence, and subpoena witnesses. The teacher may be represented by counsel, present testimony and evidence, and cross-examine witnesses. Within twenty days of the hearing, the hearing officer must provide the school board with the findings of fact and a recommendation. The board must render its decision within twenty days of receiving the hearing officer's findings of fact and recommendation. The teacher may appeal the board's decision to the court of appeals. The court of appeals will base its decision on the record of the hearing officer. If the court holds that the dismissal was inappropriate, the case can be remanded for further hearing. Either party may appeal this decision to the supreme court on writ of certiorari.

## Delaware

Delaware has no term for teacher tenure, however 14 Delaware Code § 1403 provides due process protections to any teacher who has completed three continuous years of service with at least two satisfactory evaluations of student improvement. According to 14 Delaware Code § 1410 if the school board intends to dismiss a tenured teacher, the teacher must be given written notice that includes the grounds for the termination and a copy of this chapter. Allowable reasons for the termination of a tenured teacher are enumerated in 14 Delaware Code § 1411. A tenured teacher may be terminated for “immorality, misconduct in office, incompetency, disloyalty, neglect of duty, willful and persistent insubordination,” or a reduction in force. According to 14 Delaware Code § 1412, if a teacher does not request a hearing the notice of



proposed termination is assumed to be a notice of termination. The procedures for a hearing by the terminating board are described in 14 Delaware Code § 1413. The teacher has ten days to request a hearing after receiving notice of the proposed termination. The hearing must take place within twenty-one days of the request. A majority of the members of the governing board conduct the termination hearing. Both parties can be represented by counsel, subpoena witnesses, and cross-examine witnesses. Testimony must be given under oath, and all testimony and evidence must be confined to the grounds for termination stated in the notice of intended termination. The board must provide its decision to the teacher in writing within fifteen days of the hearing. According to 14 Delaware Code § 1414, the teacher may appeal the decision of the board to the superior court of the employing county.

## Illinois

Illinois Compiled Statute § 105 ILCS 5/24-11 allows a teacher to enter into contractual continued service after a probationary period of either four consecutive school years of “proficient” evaluations or three consecutive school years of “excellent” evaluations. Illinois Compiled Statute § 105 ILCS 5/10-22.4 allows the school board to dismiss a teacher for “incompetency, cruelty, negligence, immorality or other sufficient cause.” Illinois Compiled Statute § 105 ILCS 5/24-12 describes the process required for the dismissal of a teacher who has achieved contractual continued service. The board is first required to vote to approve the charges. Then it must provide the teacher with written notice that includes the charges against

the teacher and the teacher's right to a hearing. If the cause of the charges is considered remediable, the board must first have given the teacher warning in writing in sufficient time to allow improvement prior to the notice of dismissal. At the teacher's request, a hearing may be held before a hearing officer in which the teacher may be represented by counsel, present evidence and witnesses, and cross-examine witnesses. At the conclusion of the hearing, the hearing officer must present findings of fact and a recommendation to the school board. The school board must render its decision within forty-five days of receiving the hearing officer's recommendation.

## Indiana

Indiana Code § 20-28-6-7.5 allows a teacher to earn the status of professional teacher after receiving three effective or highly effective evaluations in five years or less. Indiana Code § 20-28-7.5-1 requires that a principal must continue a professional teacher's contract unless there is a justifiable decrease in the number of teaching positions. A professional teacher's contract may also be cancelled at any time for immorality, insubordination, incompetence, neglect of duty, conviction of a crime involving moral turpitude, or any other good or just cause. Indiana Code § 20-28-7.5-2 describes the rights of a professional teacher in the event of a possible dismissal. The principal must first notify the teacher in writing of his or her intent to dismiss the teacher and must include the reasons for this decision. The teacher may request a meeting with the superintendent. After the conference, the superintendent makes a

recommendation to the school board regarding the proposed dismissal. The teacher may then request a conference with the governing board. At the conference, the teacher may present evidence to refute the charges. The governing board has thirty days following the conference to render a decision.

## New York

New York Consolidated Law of Education § 3012 allows the superintendent to recommend tenure to any teacher who has completed a three year probationary period and has “been found competent, efficient and satisfactory.” After gaining tenure, a teacher will continue to hold his or her position “during good behavior and efficient and competent service.” Such a teacher may only be dismissed for insubordination, immoral character, conduct unbecoming a teacher, inefficiency, incompetency, physical or mental disability, neglect of duty, or failure to maintain certification. New York Codified Law of Education § 3020-a requires that charges against any tenured teacher must be filed with the secretary of the school board. After receiving the charges, the board must decide by majority vote whether to proceed with the dismissal. If the board chooses to proceed, it must issue notice to the teacher listing the charges in detail and the employee’s rights under the law. The teacher may request a hearing with a hearing officer. At the hearing, the teacher must have a “reasonable opportunity to defend himself or herself.” Both parties are entitled to legal counsel, to subpoena witnesses and to cross-examine witnesses. After the hearing, the hearing officer must send the school board the findings of fact and a

recommendation. Within fifteen days, the school board must implement the hearing officer's decision. The teacher may appeal the decision to the New York State Supreme Court.

## Ohio

Ohio Revised Code § 3319.08 allows a teacher to be issued a continuing contract after the teacher has held a teaching license for seven years and has completed thirty hours of coursework in his or her teaching field, or six semester hours of graduate work if the teacher already held a master's degree at the onset of teaching. Ohio Revised Code § 3319.16 describes the process required to terminate a teacher's contract. A teacher's contract may only be terminated for "good and just cause." Prior to the termination, the school board must provide the teacher written notice of its intent to terminate the contract which must specify the reasons for the proposed dismissal. The teacher may request a hearing. Both parties may be represented by counsel, present witnesses, cross-examine witnesses, and record the proceedings. After the hearing, the board must render a decision by majority vote and, if so decided, provide the teacher with an order of termination that specifies the grounds for the decision. If the teacher disagrees with the decision, he or she may appeal the decision to the court of common pleas of the county. Upon request for appeal, the board must turn over all documents and evidence to the court along with a transcript of the hearing. After examining the documentation, the court may request other additional evidence or hold additional hearings as it sees fit. After the court's final decision, either party may appeal the decision to the appellate court.

## Oklahoma

According to 70 Oklahoma Statute § 6-101.3 a career teacher is a teacher who has completed three consecutive years of service in the same school district and has earned “superior” ratings on at least two of the three teacher evaluations completed, or has completed four consecutive years in the same school district and has earned “effective” ratings on the last two of the four evaluations completed. According to 70 Oklahoma Statute § 6-101.22, a career teacher may only be dismissed for willful neglect of duty, repeated negligence, abuse of a child, incompetency, ineffectiveness, unsatisfactory performance, commission of an act of moral turpitude, or abandonment of contract. According to 70 Oklahoma Statute § 6-101.24, an administrator who evaluates a teacher and identifies poor performance or conduct must notify the teacher in writing and assist the teacher in correcting the problem. If the teacher has not corrected the problem within two months, the administrator must recommend the teacher’s dismissal to the superintendent. According to 70 Oklahoma Statute § 6-101.25, if a superintendent decides to recommend a teacher’s termination, he or she must do so in writing to the board of education. If the teacher is a career teacher, the superintendent’s recommendation must include the statutory grounds upon which it was made and the facts that support the recommendation. According to 70 Oklahoma Statute § 6-101.26, if a superintendent recommends a teacher’s termination to the board, the board must provide the teacher a copy of the recommendation and his or her right to a hearing. The notice must include the statutory grounds for the dismissal and the date, time, and place of the hearing. The hearing must be conducted before the district’s school board. The board must consider all evidence and

testimony prior to rendering a decision. The decision must be made by majority vote at an open meeting. The board must notify the teacher of the decision in writing.

### South Carolina

South Carolina Code § 59-26-40 allows a teacher to become eligible for a continuing contract after having completed the formal evaluation process under annual contract during the teacher's four year probationary period. Once under continuing contract, the teacher is entitled to due process protections prior to termination. South Carolina Code § 59-25-430 requires that a continuing contract teacher may only be dismissed for incompetence, neglect of duty, willful violation of rules, drunkenness, conviction of a violation of the law, gross immorality, dishonesty, or illegal use, sale, or possession of drugs. South Carolina Code § 59-25-460 requires that, prior to termination, a continuing contract teacher must receive notice of the intent to dismiss, including the causes of the recommendation. The notice must include the teacher's right to request a hearing. At the hearing, the teacher may present witnesses. South Carolina Code § 59-25-470 allows the teacher to be represented by counsel at the hearing, to cross-examine witnesses, and offer any evidence or witnesses necessary to defend against the charges. The board must render a decision within ten days by majority vote.

## Tennessee

Tennessee Code § 49-5-504 allows a teacher to earn tenure after serving for five years as a probationary teacher and earning either “above expectations” or “significantly above expectations” for the last two years of the probationary period. Any teacher who has previously acquired tenure and earns two consecutive evaluations of “below expectations” or “significantly below expectations” must be returned to probationary status until the teacher has received two evaluations of “above expectations” or “significantly above expectations.” Tennessee Code § 49-5-511 allows a teacher to be dismissed only for “incompetence, inefficiency, neglect of duty, unprofessional conduct and insubordination.” Any charges brought against a teacher must be made in writing to the board of education, specifying the offenses committed by the teacher. If the board believes the charges warrant dismissal, it must provide the teacher with a copy of the charges and the teacher’s rights under the law. Tennessee Code § 49-5-512 allows a teacher who has received notice of proposed dismissal to request a hearing before an impartial hearing officer. At the hearing, both parties may be represented by counsel, subpoena witnesses, and cross-examine witnesses. Following the hearing, the hearing officer must supply the board and the teacher with the findings of fact, conclusions of law, and a decision. The teacher may appeal the decision to the school board. The board will examine the record of the hearing and the teacher and counsel may present arguments to the board. The board must render a decision by majority vote. If the teacher remains unhappy with the outcome, he or she may appeal to the chancery court of the county. Tennessee Code § 49-5-513 allows the teacher to further appeal to the appellate court.

## Virginia

Virginia Code § 22.1-303 allows a teacher to be placed on continuing contract after three years of continuous service in the same district after the teacher has completed training on instructional strategies and intervention for at risk students. Virginia Code § 22.1-307 allows a teacher to be dismissed only for “incompetency, immorality, noncompliance with school laws and regulations, disability,” conviction of a crime of moral turpitude, or any other good and just cause. Virginia Code § 22.1-309 requires a superintendent wishing to dismiss a continuing contract teacher to notify the teacher in writing of the proposed dismissal and the teacher’s rights under the law. The teacher may request that the superintendent provide the reasons for the proposed discharge. If the teacher requests a hearing, the teacher or his or her counsel may obtain a copy of the teacher’s personnel file and any other documents supporting the proposed dismissal. Virginia Code § 22.1-310 allows a teacher to request a hearing before a fact-finding panel prior to a decision by the school board. Virginia Code § 22.1-312 requires that the fact-finding panel consist of three impartial members. At the hearing, both parties may be represented by counsel, present witnesses and evidence, and cross-examine witnesses. The panel is charged with judging the “relevancy and materiality of the evidence.” The panel must make findings of fact and a recommendation to the school board. Virginia Code § 22.1-311 entitles a teacher to a hearing before the school board. The teacher may be represented by counsel, present witnesses, and provide evidence. The board may vote to dismiss the teacher and decide whether to recommend the removal of the teacher’s license to the Board of Education. Virginia Code § 22.1-313 requires that the school board provide a written decision to the teacher. If the teacher



requested a hearing before a fact-finding panel, the school board may choose to either base their decision on the record of the hearing or to conduct a new hearing. The board must render a decision by majority vote. Virginia Code § 22.1-314 allows a teacher to appeal the school board's decision to the appropriate circuit court.

## CHAPTER IV

### SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

#### Summary of the Review of Literature

In 1909, when New Jersey accepted the National Education Association's recommendation and enacted the first teacher tenure law, the legislature hardly believed that they were relinquishing control over education. While the law would protect teachers from arbitrary dismissal, the legislators likely believed that it would still be relatively easy to terminate a bad teacher; after all, in 1909 most teachers could not vote. In the intervening 103 years, the teachers' unions have become a powerful political force and a look through case law shows that the courts consistently have supported teachers' rights.

The majority of the court cases concerning education focus on due process rights or academic freedom. The United States Supreme Court has been fairly consistent in its requirements for due process prior to the termination of a teacher. In *Indiana Ex Rel. Anderson v. Brand, Trustee (1938)*, the court held that any tenured teacher could be terminated only for just cause and not political or personal reasons. *Perry v. Sindermann (1972)* conferred due process rights to teachers working under a de facto tenure system, where the property rights were implied but not explicit. The court also held here that schools could not deny a teacher employment for constitutionally protected behavior. *Cleveland Board of Education v.*

*Loudermill et al. (1985)* defined appropriate due process as notice of the proposed termination and an informal hearing.

Academic freedom, however, has been the most prolific reason for tenure cases to go into the court system. One of the major purposes for enacting tenure was to ensure that teachers would be able to teach as they saw fit without fear of reprisal from those who would disagree with their lessons. In this area the courts have faced a very difficult question. At what point does the state's interest in proscribing an appropriate curriculum and maintaining an orderly and efficient learning environment outweigh the teacher's constitutional right to free speech? Surprisingly, the courts have set the bar very high and most often side with the teacher. Beginning with *Meyer v. State of Nebraska (1923)*, the United States Supreme Court held that any restriction of the content of a teacher's lesson must have a rational relationship to a legitimate state goal. *Sweezy v. New Hampshire (1957)* extended first amendment rights to free speech, expression, and association to include a right to lecture, thus requiring the school district to prove a compelling state interest for violating that right. *Keyishian v. Board of Regents (1967)* established teachers' rights to teach about unpopular or illegal abstract concepts without being terminated for participating in such behavior.

The state courts also have heard a number of cases concerning academic freedom, and again have most often supported the teacher's right over the state's interest. In *Keefe v. Geanakos (1969)*, *Parducci v. Rutland (1970)*, *Webb v. Lake Mills Community School District (1972)*, *Dean v. Timpson Independent School District (1979)* and *Stachura v. Truszkowski (1985)* the courts upheld the teachers' rights to select materials they deemed appropriate even if other educators might disagree. *Mailloux v. Kiley (1971)* and *Kingsville Independent School District v.*

*Cooper (1980)* supported a teacher's right to choose the delivery method of lessons in responsible good faith even if other educators would not recognize the approach as appropriate teaching.

That being said, the courts have set limits to the extent of academic freedom. *Beilan v. Board of Public Education (1958)* and *Ambach v. Norwick (1979)* supported the rights of school districts to judge the fitness of teachers. *Mt. Healthy City School District Board of Education v. Doyle (1977)*, *Fern v. Thorp Public School (1976)*, *Martin v. Parrish (1986)*, *Fowler v. Board of Education of Lincoln County (1987)*, and *Spanierman v. Hughes (2008)* established the right of the school district to terminate a teacher for conduct that a reasonable person would find inappropriate. Additionally, *Carey v. Board of Education (1979)* and *Webster v. New Lenox School District (1990)* upheld the compelling interest of the school district in proscribing the curriculum for courses.

The current controversy over teacher tenure, however, has nothing to do with academic freedom. The No Child Left Behind Act has given rise to data-driven decision making and with that has come the need to make decisions about teachers who fail to increase student achievement. Legislators are now pushing for tenure reform arguing that it is nearly impossible to fire a teacher who just cannot teach. The case law as discovered in this research, however, does not support that theory. None of these court cases has questioned the effectiveness of the teacher. Case after case has concerned the contents of a teacher's lesson and the teacher's behavior both inside and outside the classroom, but not one has concerned the teacher's ability to produce student achievement. Perhaps a teacher has never been terminated for such a reason, but more likely one would argue that the courts have simply refused to hear those cases. If that is

true, then tenure does not protect ineffective teachers from being terminated, because if the school principal can convince the school board that the teacher is ineffective, then the school board's decision is final. As if to illustrate that point, in many of the cases concerning academic freedom, the judges pointed to the teachers' effective evaluations as backing for their judgment. Their meaning was clear; if these were bad teachers who could not make students learn, then their judgment of appropriate lessons might be in question. Effective teachers, however, who are helping students achieve, should be allowed the freedom to choose the materials and delivery methods most appropriate for their students. The Supreme Court further upheld the concept in *Mt. Healthy v. Doyle (1977)* when the justices ruled that while the school district could not use Doyle's memo to the radio station as a reason for termination, if the school district could still make a case that he was a bad teacher without that memo in consideration, then the school district could proceed with the termination as it wished. Nothing in the case law suggests that any court would have difficulty in ruling that pure inability to teach would constitute just cause for the termination of a tenured teacher provided that the teacher is given notice of the proposed dismissal and an informal hearing.

### **Summary of State Tenure Laws**

As seen in the pertinent case law, the Supreme Court has put few restrictions on the termination of a tenured teacher. *Indiana Ex Rel. Anderson v. Brand, Trustee (1938)* requires that a tenured teacher may be terminated only for just cause. *Cleveland Board of Education v.*

*Loudermill et al. (1985)* requires that the school district provide a tenured teacher with notice of the proposed termination and an informal hearing prior to termination. Interestingly, even though there consistently has been controversy over tenure during the past century, the majority of state tenure laws exceed these requirements.

Of the 47 states that currently have tenure laws, only 13 limit the reasons for the termination of a tenured teacher to “just cause.” Every other state provides a list of infractions a teacher must commit in order to be terminated or non-renewed. Such infractions include insubordination, immorality, misconduct in office, conduct inappropriate of a teacher, act of moral turpitude, inefficiency, and ineffectiveness. The problem with legislating the allowable reasons for dismissal is that doing so opens up the reasons for argument. If the termination is challenged in court, the judge will question whether a reasonable person would know that he or she was committing one of those infractions. As in the case *Dean v. Timpson Independent School District (1979)*, the court may rule that the reason is too vague to be valid and that a reasonable teacher may not know when he or she steps over that line.

Additionally, only 17 states limit the required due process to notice and an informal hearing. Thirty states allow a teacher a full evidentiary hearing prior to dismissal. In a full evidentiary hearing, the teacher may be represented by a lawyer, subpoena witnesses, present evidence, and cross-examine witnesses. Of those states, 25 have legislated avenues for appeal if the teacher is unhappy with the decision of the school board. For legislators arguing that the cost of terminating a tenured teacher is exorbitant, these unnecessary steps could well be the reason why.

Most disturbingly, only 11 states require that the teacher show signs of effective teaching prior to being offered tenure. The other 36 states grant tenure automatically to any teacher whose contract is renewed for the year following the probationary period, regardless of whether the teacher is qualified or merely a babysitter in a difficult to fill position.

### **Conclusions**

1. State tenure laws are in flux. At least six states have bills under consideration during the 2012 legislative session that if passed will change the tenure laws in those states. In Florida, a case is working its way through the court system that questions the constitutionality of the statute that ended teacher tenure.

2. There are only two years remaining until the 2014 deadline of the *No Child Left Behind Act* that requires that 100 percent of students must be working at grade level in reading and math. The penalty for failure will be the loss of funding from the federal government. The goal is unreachable and the punishment is catastrophic. As a result, President Obama issued exemptions from that requirement to ten states in February, 2012. Those states, Colorado, Florida, Georgia, Indiana, Kentucky, Massachusetts, Minnesota, New Jersey, Oklahoma, and Tennessee, were granted these waivers by demonstrating a plan for continued student improvement in reading.

3. The *Race to the Top* grant has offered significant rewards to states that use student achievement data to determine teacher effectiveness and that use this information to inform personnel decisions.

4. Teacher tenure laws around the nation are being altered or eliminated due to the widely held belief that tenure protects ineffective teachers. This belief is not supported by case law.

5. Ineffective teachers remain in classrooms around the nation for two reasons:

a. “The Widget Effect,” a theory that developed from the 2009 New Teacher Project, during which the researchers found that only one percent of teachers receive unsatisfactory evaluations. Forty percent of administrators surveyed admitted that they had never denied a teacher tenure because of poor performance, even in schools that were chronically underperforming. Eighty-six percent of administrators surveyed admitted that they had not pursued dismissal of a poorly performing teacher because of the time consuming nature of the process (Weisberg, 2009).

b. It could be argued that every school has one or two teachers who are poorly performing and should be terminated. If these teachers were to be dismissed, 320,000 new teachers would have to be found to replace them. It is unlikely that, even if 320,000 people nationwide are searching for teaching jobs, that they would be considered exemplary teachers when hired (Kwalwasser, 2012).

6. Herbert Spencer addressed this same issue in *Over-Legislation* in 1853, only he was discussing the shipping industry in Great Britain. If the current laws legislate all aspects of education, including teaching qualifications, teacher tenure, teacher evaluations, and the due



process for termination, but as only one percent of administrators are obeying these laws, the problem does not lie within the legislation. Rewriting the statutes will not fix the problem and may cause more collateral damage in effects that legislators could not possibly predict. A change in tenure laws or teacher evaluation systems is not necessary as the current laws are thorough. Instead, encouragement and oversight is needed to ensure that educators are accurately performing their jobs, such as administrators when they evaluate teachers.

7. States eliminating teacher tenure may be at risk of a teacher shortage as the job security is an important benefit for college graduates entering into a historically low-paying profession.

8. Attacking teacher quality is a roundabout way to legislate student achievement, which cannot be affected directly by legislation.

## **Discussion**

Teacher tenure is under attack across the county due to the misguided belief that tenure protects ineffective teachers. Case law does not support this belief, nor does some of the most recent research in teacher evaluation practices. The case law shows that few, if any, teacher terminations for poor performance make it to the appellate courts. The conclusion that can be drawn from that is that the courts generally uphold the school board's determination of effective teaching and its right to terminate ineffective teachers. The question remains then, why do ineffective teachers still teach. The Widget Effect indicates that more than 99 percent of teachers

are rated satisfactory by their administrators. This is a surprisingly large number given that 81 percent of administrators believe that there is a teacher in their building who is poorly performing (Weisberg, 2009). From this, one might conclude that it is the evaluation system, and not tenure, that protects ineffective teachers. However, the year before The New Teacher Project conducted this study, Florida legislators added student performance data as part of the teacher evaluation system. Even with that requirement in place, still less than 1 percent of teachers in Florida received an unsatisfactory evaluation (Cohen & Walsh, 2010). The implication then would be that even with the most thorough laws in place, educational policies are not being implemented at the school sites. In order to improve the situation, greater accountability is needed at the administrative level to ensure that proper teacher evaluations are being conducted. Additionally, among the statutory reasons for terminating a teacher, states should include performance criteria based on teacher evaluations.

### **Recommendations**

1. Either maintain tenure laws or increase teachers' salaries. Bright and talented college graduates need an incentive to enter the education field.
2. Increase the length of the probationary period before a teacher can acquire tenure to seven years. A longer probationary period would allow administrators to make a better informed decision about quality of the teacher's work prior to the tenure decision.

3. Require that teachers demonstrate effective teaching prior to earning tenure. A teacher should be able to provide evidence of student achievement, effective evaluations, and exemplary lesson plans prior to earning tenure.

4. Provide more training for administrators in evaluating teachers and provide better oversight to ensure that the job is done correctly. Encourage more accurate evaluations by providing administrators the time and skills to complete the task thoroughly.

5. Streamline the process required for districts to terminate a tenured teacher. Case law requires only that a teacher be terminated for just cause and that he or she be given notice and an informal hearing before the school board. Requiring more than this process is costly and time consuming.

6. Provide an extra administrative unit to schools with no other duties than personnel supervision. Even if the administrator was shared between a few schools, he or she would still have more time to conduct appropriate evaluations and pursue termination if needed than current administrators who have a myriad of duties.

7. Create a professional organization for teachers, separate from the unions and the school board, that would oversee teacher quality and discipline. Both the Bar Association and the American Medical Association allow professionals in the field to police its members and set standards of behavior. Teachers can and should be held to the same high standards as doctors and lawyers, and elevating teaching to those standards would increase respect for the teaching profession.

## **Recommendations for Future Research**

1. Research the number of teachers entering the teaching field over the next three years in states that have eliminated tenure and compare it to the numbers of teachers who entered the teaching field in the three years prior to the elimination of tenure.
2. Compare the quality of teachers entering the teaching field over the next three years in states that have eliminated tenure to the quality of the teachers who entered into the teaching field in the three years prior to the elimination of tenure.
3. Compare the qualifications of people who are seeking teaching positions but have not been hired by a school district to the qualifications of the district's poorest performing teachers to determine if the promised increase in student achievement is possible if the bottom ten percent of teachers were dismissed.
4. Compare student achievement data in the 11 states that require teachers to demonstrate effective teaching prior to earning tenure to the remaining states that do not have that requirement to determine if this requirement leads to more effective teaching and thus greater student achievement.
5. Compare student achievement data in states that offer tenure after only three years to those that offer tenure after five to seven years to determine if this requirement leads to more effective teaching and thus greater student achievement.

**APPENDIX A:**

**SAMPLE LETTER TO THE STATE ATTORNEY GENERALS**

Honorable (First Name) (Last Name), Attorney General  
Office of the Attorney General  
(Street Address)  
(City), (State) (Zip)

February 10, 2012

Dear (Title) Attorney General:

As a doctoral student at the University of Central Florida in Orlando, Florida, I am conducting research for a dissertation concerning *Teacher Tenure Legislation in the Fifty States*. My research includes case law and state and federal statutes.

To verify that these data are complete, accurate, and current, I am requesting from the Attorney General of each state a copy of that state's most recent legislation concerning teacher tenure.

I greatly appreciate any help your office can provide for my research. I hope to have a positive impact on this very important and current topic.

Please return all information in the enclosed self-addressed stamped envelope or via e-mail at [bruckmeyer@earthlink.net](mailto:bruckmeyer@earthlink.net). I can be reached by telephone at (321) 917-9665.

Thank you in advance for your time and consideration.

Sincerely,

Barbra F. Bruckmeyer

**APPENDIX B:**

**SAMPLE LETTER TO THE STATE CHIEF SCHOOL OFFICERS**

Honorable (First Name) (Last Name)  
(Title)  
State Department of Education  
(City), (State) (Zip)

February 10, 2012

Dear (Title) (Last Name):

As a doctoral student at the University of Central Florida in Orlando, Florida, I am conducting research for a dissertation concerning *Teacher Tenure Legislation in the Fifty States*. My research includes case law and state and federal statutes.

My data concerning the State of (State) are not as complete as I would like. I, therefore, am requesting from your office a copy of the pertinent statute(s).

I greatly appreciate any help your office can provide for my research. I hope to have a positive impact on this very important and current topic.

Please return all information in the enclosed self-addressed stamped envelope or via e-mail at [bruckmeyer@earthlink.net](mailto:bruckmeyer@earthlink.net). I can be reached by telephone at (321) 917-9665.

Thank you in advance for your time and consideration.

Sincerely,

Barbra F. Bruckmeyer



**APPENDIX C:**  
**TABLE OF CASES**

## United States Supreme Court Cases

*Adler v. Board of Education*, 342 U.S. 485; 72 S. Ct. 380; 96 L. Ed. 517; 1952 U.S.

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