A LESSON FROM THE NEW YORK TEACHER TENURE CHALLENGE: DISTINGUISHING LEGISLATIVE ACTION FROM INACTION WITHIN POSITIVE RIGHTS ANALYSIS

*Cadesby B. Cooper**

I. INTRODUCTION

In recent years, a growing number of states have modified teacher tenure laws governing tenure qualifications, disciplinary and removal processes, and contract renewal standards to make it easier for school administrators to fire incompetent (and competent) teachers.[1] Other states such as Idaho, South Dakota, and Florida have eliminated teacher tenure altogether.[2] While challengers in over eighteen states have sought changes to tenure laws through political avenues, others have turned to the courts.[3] In 2014, a group of California parents and students won a constitutional challenge in *Vergara v. California* that invalidated a set of state teacher tenure statutes.[4] On the heels of *Vergara*, two New York plaintiff groups ("Plaintiffs" or "*Davids* Plaintiffs") filed suit in *Davids v. New York*[5] to challenge a similar set of teacher tenure laws on the basis of the right to a "sound basic education" under the New York Constitution's

* Assistant District Attorney in New York City, alumnus of Boston College Law School.

[1] EDUC. COMM'N OF THE STATES, TEACHER TENURE OR CONTINUING CONTRACT LAWS 1 (2011).

[2] *See id.* (stating that Idaho has eliminated teacher tenure); *see also* News Desk, *Teacher Tenure Rules are in State of Flux Across the Nation*, PBS (Nov. 29, 2014, 11:37 AM), http://www.pbs.org/newshour/updates/teacher-tenure-rules-state-flux/ (stating that Florida and South Dakota have eliminated teacher tenure).

[3] *See* EDUC. COMM'N OF THE STATES, *supra* note 1, at 1, 2 tbl. 1 (listing different appeal forums, including judicial review in court).

[4] *See* Vergara v. California, No. BC484642, 2013 Cal. Super. LEXIS 450, at 3, 10–11 (Cal. App. Dep't Super. Ct. June 10, 2014). The tentative decision is available at: http://students matter.org/wp-content/uploads/2014/06/Tenative-Decision.pdf; *see also* Joshua A. Kuns, *Public School Students Sue California; Court Rules Fundamental Right to "Quality Education,"* CAL. WORKPLACE BLOG (June 12, 2014), http://www.californiaworkplacelawblog .com/2014/06/articles/public-sector/public-school-students-sue-california-court-rules-fund amental-right-to-quality-of-education-2/ (explaining that *Vergara* rules on the fundamental right to quality of education and could have lasting impacts outside the state of California).

[5] *See* Verified Amended Complaint, Davids v. New York (N.Y. Sup. Ct. July 24, 2014) (No. 101105/14) [hereinafter *Davids* Amended Complaint].

"Education Clause."[6]

The California Court of Appeals eventually reversed the trial court decision in *Vergara* on the ground that the *Vergara* plaintiffs did not sufficiently allege an equal protection claim under the California constitution.[7] The *Davids* plaintiffs, however, could succeed where those in *Vergara* failed. Even though the policy arguments for invalidating the tenure laws in both cases are essentially the same, the *Davids* plaintiffs have identified constitutional issues and arguments that are fundamentally different from those made in *Vergara*.

The California case was decided on equal protection grounds, with undercurrents of due process analysis, and both of these arguments have been foreclosed in New York by a prior New York Court of Appeals ("Court" or "Court of Appeals") decision.[8] Rather, the *Davids* plaintiffs seek a remedy through the state's Education Clause, which has been interpreted by the Court of Appeals as a distinct positive right granting a minimum quality of education to New York students.[9]

The state defendants in both cases, and some scholars, have argued that citizens through their elected representatives should decide the wisdom of teacher tenure policies rather than the courts.[10]

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[6] *See id.* at 2; *see also* Complaint for Declaratory and Injunctive Relief at 3, Wright v. New York (N.Y. Sup. Ct. July 28, 2014) [hereinafter *Wright* Complaint].

[7] Vergara v. State, 246 Cal. App. 619, 646 (Cal. Ct. App. 2016); *compare Vergara*, No. BC484642, 2013 Cal. Super LEXIS 450, at 3, 4, *with Davids* Amended Complaint, *supra* note 5, at 4.

[8] *See Vergara*, 2013 Cal. Super LEXIS 450, at 3–4; *see also* Board of Educ. v. Nyquist, 439 N.E.2d 359, 361–62 (N.Y. 1982).

[9] *See* Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 334 (N.Y. 2003); *Wright* Plaintiffs' Memorandum of Law in Opposition to Defendants' and Intervenors-Defendants' Motions To Dismiss the Action, at 4, 11, Davids v. New York (N.Y. Sup. Ct. July 24, 2014) (No. 101105/14) [hereinafter *Wright* Opposition to Motion to Dismiss]. The court in *Davids* has consolidated two claims by two distinct plaintiff classes. *See* Davids v. New York, at 1 No. 101105/14 DCM Part 6. As the *Wright* plaintiffs include all of the *Davids* claims and more, I mainly draw from the *Wright* plaintiffs' briefs.

[10] *See Wright* Opposition to Motion to Dismiss at 27 (providing defendants' arguments on justiciability in rebuttal); Derek W. Black, *The Constitutional Challenge to Teacher Tenure*, 104 CAL. L. REV. 75, 80 (2016). Professor Black primarily argues that the tenure challenges should not be dismissed on their face but for a lack of evidence to support the causal connection between the as-applied statutes and alleged educational deficiencies. *Id.* at 120. He presents an excellent critique of the social science data on this issue. *See id.* at 128–33. He explains the constitutional issues as well. *See id.* at 81–82 ("The details of educational policy, including solutions to constitutional violations, rest within the discretion of legislatures. Where more than one solution to a constitutional violation is possible or reasonable, constitutions vest legislatures with the discretion to choose among them. The potential solutions to ineffective teaching and teacher removal are multifaceted, placing them within the domain of the legislature and making them ill-suited to judicial prerogative."). This article agrees with his description of the respective abilities of the legislature and

Choosing education policy has long been the purview of state legislatures, who are best equipped to create long-sighted, comprehensive education laws.[11] In contrast to courts, legislatures have the ability to conduct research and gather data to determine the best policy outcomes, are comprised of greater numbers of people who hold diverse interests making it more likely that many competing options are vetted, the political legitimacy of being a representative body of the state electorate, and the unique power of the purse, and the insight it provides, to make fiscal compromises in a great number of competing public interest policy decisions.[12]

These arguments presume that judicial enforcement of the Education Clause, as with any state positive right, necessarily asks the courts to cross the line of judicial power by imposing a duty on a coordinate branch of government, and further, that the courts are not fit to make such decisions.[13] These arguments, however, oversimplify the issue by failing to identify separate inquiries within positive right analysis. First, while courts should respect separation of powers limits by refraining from creating a right that is not grounded in their state constitutions, such an issue is distinct from self-imposed prudential limits that only arise at the end of the positive right analysis, when a court fashions a remedy for a violation.[14] Second, the fitness of a court to decide a given issue is not determinative if the citizenry of a state have constitutionalized a duty on the court to do so. Furthermore, prudential concerns such as deferring to the wisdom of the legislature in questions of policy simply do not exist when the court is asked to invalidate a law, rather than impose a duty to act.[15] Thus, the constitutional issues in positive rights analysis do not fit neatly into the 'separation of powers' category and many of the arguments against judicial recognition of positive rights fail to make this distinction.[16]

judiciary, but proceeds on the principle that judges lack the discretion to apply only those parts of a Constitution they believe have good results. Whereas Professor Black argues that the *Davids* suit seeks a remedy that would require the court to select "one solution" or policy among many, this article argues that the court is merely asked to foreclose one possible policy option that is unconstitutional, which transfers the ultimate policy decision back to the hands of the legislature.

[11] *See* Black, *supra* note 10, at 6.

[12] *See id.*

[13] *See id.*

[14] *See* Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L.J. 1057, 1084, 1085 n.146 (1993).

[15] *See id.*

[16] *See* Black, *supra* note 10, at 6.

The New York Court of Appeals has found that the constitutional text of the Education Clause imposes a duty on the legislature to provide adequate funding for a system of common and free schools.[17] The plain language of the text reasonably supports this finding.[18] But it is not clear from Court of Appeals' Education Clause precedent, or from the plain language of the Clause, that such a duty extends beyond funding—for example, to imposing a duty on the legislature to refrain from passing laws, as the *Davids* plaintiffs allege of the tenure laws, that prevent students who attend the free and common schools from achieving minimum levels of learning.[19]

As the Court of Appeals has already decided that the Education Clause provides a self-executing right to "a sound basic education," and has applied that right to impose a duty on the legislature to maintain adequate funding for the schools, the preliminary issue in *Davids* is narrowed to whether that right extends outside of the funding context.[20] The preliminary question in *Davids* is thus whether the framers of the Education Clause in the New York Constitution intended to make it unconstitutional for the legislature to abridge the right of students to minimum levels of learning. Framed this way, the political legitimacy and separation of powers issues control only to the extent that the court should not create such a right without a constitutional basis. Whether such a basis in fact exists in the Education Clause is far from clear.[21]

Assuming that the text and history supports the extension of the right to non-funding challenges, then the *Davids* plaintiffs' claim must still survive the evidentiary requirements of the Court's established Education Clause analysis.[22] If the plaintiffs are able to meet this rigorous evidentiary burden, the court is then faced with the final part of positive right analysis—creating a remedy.[23] The propriety of a positive right remedy in turn depends on whether a plaintiff challenges government inaction or action, a framework

[17] *See* Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 328 (N.Y. 2003) (citing Bd. of Educ. v. Nyquist, 439 N.E.2d 359, 368 (N.Y. 1982)).

[18] *See* N.Y. CONST. art. XI, § 1.

[19] *See id.*; *see also Wright* Opposition to Motion to Dismiss, *supra* note 9, at 11, 12 (describing plaintiffs' claims under the New York State Constitution that the state's educational system denies students the right to a sound basic education through its tenure laws).

[20] *See Campaign for Fiscal Equity*, 801 N.E.2d at 328 (citing *Nyquist*, 439 N.E.2d at 368).

[21] *See* N.Y. CONST. art. XI, § 1; REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 693 (vol. v. 1894).

[22] *See Campaign for Fiscal Equity*, 801 N.E.2d at 330, 331, 334 (outlining the standard required in measuring a sound basic education).

[23] *See id.* at 344–45.

which the Court of Appeals has implicitly adopted in its Education Clause precedent.[24]

In the New York public school funding cases, the plaintiffs challenged the legislature's inaction.[25] This led the court to impose a remedy that ordered the legislature to act by providing a constitutional minimum amount of funding to the public schools.[26] While the court took note of jurisprudential concerns in imposing such an order, it nevertheless justified the result as extending from the constitution's Education Clause.[27] In *Davids*, however, the plaintiffs challenge legislative action.[28] The *Davids* plaintiffs allege that a collection of tenure policies enacted through collective bargaining agreements incidentally abridge the right of New York students to receive a minimally adequate education.[29] The *Davids* court will not be faced with prudential concerns at the remedial stage because the plaintiffs ask for the court to merely invalidate an allegedly unconstitutional law. Such challenges to legislative action do not ask courts to select a policy, but to eliminate one that is unconstitutional.[30] Thus, positive right remedies turn on this action-inaction dichotomy, which, in turn, determines whether a court will face prudential concerns in ordering a coordinate branch to adopt a policy that the court has selected.[31]

This article analyzes the constitutional issues that the *Davids* court will face in deciding the reach of the Education Clause and briefly notes the evidentiary obstacles to the plaintiffs' claim. This article then applies the Court of Appeals' action-inaction framework to the *Davids* tenure challenge to argue that jurisprudential issues will not arise in the court's remedial analysis. Part I summarizes the allegations and legal arguments in and procedural history of the *Davids* case. Part II provides the legal context of the *Davids* claim and the background and history of the Education Clause. Part III analyzes the *Davids* claim as a new issue of New York constitutional law, according to the text and history of the Education Clause and the Court of Appeals' sound basic education test. Part IV identifies an implicit remedial framework for positive rights analysis in the

[24] *See id.*
[25] *See id.*
[26] *See id.* at 348.
[27] Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50, 58 (N.Y. 2006) (citing Cohen v. State, 720 N.E.2d 850, 854 (N.Y. 1999)); *see Campaign for Fiscal Equity*, 801 N.E.2d at 346.
[28] *See Wright* Opposition to Motion to Dismiss, *supra* note 9, at 4.
[29] *See id.* at 8, 14–15.
[30] *See* Feldman, *supra* note 14, at 1084, 1085 n.146.
[31] *See id.*

Court's Education Clause cases, and argues that this framework demonstrates that the *Davids* teacher tenure challenge is a justiciable question of law.

II. *DAVIDS V. NEW YORK*: PROCEDURAL HISTORY AND SUMMARY OF ALLEGATIONS

In July 2014, two groups of parents ("Plaintiffs" or "*Davids* plaintiffs") filed separate complaints against the State of New York and several of its education agencies on behalf of their children who attend public schools in New York City, Rochester, and Albany.[32] The trial court thereafter merged the two complaints into *Davids v. New York*.[33] The Plaintiffs challenge three sets of statutes that implement tenure qualifications and evaluations, tenure disciplinary process, and seniority based terminations.[34] On March 12, 2015, the trial court denied the defendants' motion to dismiss the claims, finding that the allegations set forth a cognizable claim under the Education Clause, and that the claim is justiciable on its face.[35]

Before the Appellate Division scheduled the parties' oral arguments on this ruling, the legislature enacted modifications to several of the teacher tenure statutes.[36] The defendants renewed their motion to dismiss based on these changes, arguing the case had become moot, and again the trial court denied the motion.[37] On October 22, 2015, the trial court found that the "legislature's marginal changes affecting, e.g., the term of probation and/or the disciplinary proceedings applicable to teachers" were "insufficient"

[32] *Davids* Amended Complaint, No. 101105/14, *supra* note 5, at 1, 18; *Wright* Complaint, *supra* note 6, at 1, 2, 5.

[33] *See generally* Diane C. Lore, *Now It's 'Davids v. Goliath' in New York Teacher Tenure Lawsuit*, SI LIVE (Sept. 11, 2014), http://www.silive.com/news/index.ssf/2014/09/now_its_davids_v_goliath_in_ne.html (noting contention between the two plaintiff parties).

[34] *Wright* Opposition to Motion to Dismiss, *supra* note 9, at 4, 6, 9. While merged, the *Wright* plaintiffs apparently challenge all three sets of statues, while the *Davids* plaintiffs challenge only the disciplinary and seniority based termination statutes. *Compare Davids* Plaintiffs' Memorandum of Law in Opposition to Defendants' and Intervenor-Defendants' Motions to Dismiss the Action at 3, Davids v. New York (Dec. 5, 2014) (No. 101105-2014) [hereinafter *Davids* Opposition to Motion to Dismiss], *with Wright* Opposition to Motion to Dismiss, *supra* note 9, at 1. As the *Wright* plaintiffs challenge these statues *and* the tenure qualification statutes, I mainly draw from the *Wright* plaintiffs' briefs.

[35] *See* Order Denying Defendants' Motion to Dismiss at 15, 16, Davids v. New York (N.Y. Sup. Ct. Mar. 12, 2015) (No. 201415-A-043).

[36] *See* Order Denying Defendants' Renewed Motion to Dismiss at 4, Davids v. New York (N.Y. Sup. Ct. Oct. 22, 2015) (No. 101105/14).

[37] *Id.*

to warrant reconsideration.[38] Noting the potential for vast and costly discovery, the trial court stayed all further proceedings until the Appellate Division ruled on the issues.[39]

A. Challenge to the Tenure Qualification Statutes

Education Law sections 2509, 2573, and 3012 ("Qualification Statutes") provide that the superintendent of the schools "shall make a written report to the board of education or the trustees of a common school district recommending for appointment on tenure those persons who have been found competent [and] efficient and satisfactory," in at least three of the four years that make up each teacher's "probationary term."[40] This four-year probationary term starts on the date that the teacher was hired.[41] The Statute authorizes the board of regents to determine the evaluation methods that determine whether a teacher is "competent, efficient and satisfactory."[42]

The Statute also sets forth the required components of these evaluation methods in the "Annual Professional Performance Review" ("APPR"), assigning a "numerical score every year and one of four ratings: 'Highly Effective,' 'Effective,' 'Developing,' or 'Ineffective.'"[43] The APPR system takes into account two general measures: teacher observation and student performance.[44] More specific criteria of the APPR are further negotiated by each school district with collective bargaining representatives.[45] Ultimately, the numerical score and rating that each district's APPR assigns to a given teacher is "meant to be a significant factor in employment decisions, including tenure, retention, and termination."[46] Twenty

[38] *Id.*

[39] *Id.* at 5.

[40] N.Y. EDUC. LAW § 3012(2)(b) (McKinney 2016); *see* N.Y. EDUC. LAW §§ 2509(1)(a)(ii), 2573(5)(b) (McKinney 2016); *Wright* Opposition to Motion to Dismiss, *supra* note 9, at 4. These sections correspond to school districts of different sizes. *See id.*

[41] *See* N.Y. EDUC. LAW §§ 2509(1)(a)(ii), 2573(1)(a)(ii), 3012(1)(a)(ii) (McKinney 2016).

[42] *Id.* §§ 2509(2)(b), 2573(5)(b), 3012(2)(b).

[43] *Wright* Opposition to Motion to Dismiss, *supra* note 9, at 4, 5; *see* N.Y. EDUC. LAW §§ 3012-c(2)(a)(1), 3012-d(3); *Wright* Plaintiffs' Memorandum of Law in Opposition to Defendants' and Intervenors-Defendants' Motions for Leave to Renew, to Dismiss, and for a Stay of Proceedings Pending Appeal at 6, 7, Davids v. New York (N.Y. Sup. Ct. June 26, 2015) (No. 101105/2014) [hereinafter *Wright* Opposition to Renewed Motion to Dismiss].

[44] *See* N.Y. EDUC. LAW § 3012-d(4); *Wright* Opposition to Renewed Motion to Dismiss, *supra* note 43, at 7.

[45] *See* N.Y. EDUC. LAW § 3012-d(10); *Wright* Opposition to Renewed Motion to Dismiss, *supra* note 43, at 7.

[46] *Wright* Opposition to Motion to Dismiss, *supra* note 9, at 4–5.

percent of a teacher's rating is derived from "[s]tate-developed measures of student growth, such as test results," and another twenty percent is derived on "locally-selected measures of student achievement."[47] The remaining sixty percent is derived from other "[l]ocally-determined evaluation methods, such as classroom observations by administrative staff."[48]

Plaintiffs primarily challenge the New York Legislature's delegation of authority through the Qualification Statutes to interpret "competent, efficient and satisfactory," focusing on the education agencies' APPR's rating system.[49] Plaintiffs allege that the APPR ratings, and further delegation of discretionary ratings to local districts and administrators, do "not adequately identify teachers who are truly 'Developing' or 'Ineffective.'"[50] Citing statistical studies, the Plaintiffs allege that in 2012 "only 1% of teachers were rated 'Ineffective'[,]" while "91.5% of . . . teachers were rated 'Highly Effective' or 'Effective,' [and] only 31% of students taking the English Language Arts and Math standardized tests met the standard for proficiency."[51] Additionally, from 2010 to 2013, "only 2.3% [of New York City teachers] received a final rating of 'Ineffective,' . . . even though 8% of the teachers had low attendance . . . and 12% . . . had low value added."[52] Therefore, the Plaintiffs argue, "[i]t is less likely that so few teachers are ineffective than that the ratings of many ineffective teachers are inflated and the ineffective performance by teachers is roundly ignored."[53]

B. Challenge to the Disciplinary Statutes

Education Law section 3020 ("Disciplinary Statute") provides that a tenured teacher can be removed only for "just cause" and sets

[47] N.Y. EDUC. LAW § 3012-c(e); *Wright* Opposition to Motion to Dismiss, *supra* note 9, at 5.

[48] N.Y. EDUC. LAW § 3012-c(h); *Wright* Opposition to Motion to Dismiss, *supra* note 9, at 5.

[49] *See Wright* Complaint, *supra* note 6, at 9, 11. Plaintiffs originally challenged the administrative practice of evaluating tenure eligibility of teachers at the completion of three years of teaching and, in practice, two years of performance data. *Id.* at 10. Plaintiffs used studies to argue that the effectiveness of a teacher cannot be accurately determined until the completion of four years of teaching. *Id.* at 12. The New York Legislature thereafter modified the policy in issue by requiring administrators to make tenure determinations based on at least four years of teaching experience. N.Y. EDUC. LAW § 2509(1)(a)(ii). Accordingly, Plaintiffs have seemingly abandoned this argument. *See Wright* Opposition to Renewed Motion to Dismiss, *supra* note 43, at 6–8.

[50] *Wright* Complaint, *supra* note 6, at 11.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 12; *see Wright* Opposition to Renewed Motion to Dismiss, *supra* note 43, at 6–7.

forth a disciplinary process for just cause removals.[54] Just cause includes "insubordination, immoral character or conduct unbecoming a teacher; . . . inefficiency, incompetency, physical or mental disability, or neglect of duty; . . . [or] failure to maintain [required] certification."[55] The statutorily imposed processes include "investigations, hearings, improvement plans, arbitration processes, and administrative appeals," and a high standard of proof.[56]

First, administrators must "partake in the development and execution of a teacher improvement plan . . . for Developing and Ineffective teachers."[57] The plan must be "mutually agreed upon by the teacher and principal" and must identify areas in which the teacher needs to improve, a timeline for such improvement, the "manner in which improvement will be assessed," and other support by the administration.[58] Second, the statute imposes a "three-year limit for bringing charges against a teacher," during which the principal must gather sufficient evidence for later hearings.[59] Third, after charges, the statute requires that the teacher be provided a hearing. Fourth, the statute incorporates "alternate disciplinary procedures contained in a collective bargaining agreement," thus permitting the standard hearing to be modified by contract.[60] One such contract requires that arbitrators for the hearing be appointed only by mutual agreement of the teacher union and administration.[61] Finally, if an arbitrator finds that a teacher is "ineffective, incompetent, or has engaged in misconduct," then the administration can only terminate the teacher after proving that "the school has undertaken sufficient remediation efforts, that all remediation efforts have failed, and that they will continue to fail indefinitely."[62]

The Education Law modifications introduced a relatively streamlined process for administrators to bring charges against teachers who receive at least two consecutive "Ineffective" ratings.[63] This process still requires administrators to first implement a

[54] N.Y. EDUC. LAW § 3020(1); *see id.* § 3020-a.
[55] *Id.* § 3012(2)(a).
[56] *Wright* Complaint, *supra* note 6, at 14.
[57] *Id.* at 15; *see* N.Y. EDUC. LAW § 3012-c(4).
[58] *Wright* Complaint, *supra* note 6, at 15 (quoting N.Y. EDUC. LAW § 3012-c(4)).
[59] *Wright* Complaint, *supra* note 6, at 15; *see* N.Y. EDUC. LAW § 3020-a(1).
[60] *Wright* Complaint, *supra* note 6, at 17 (quoting N.Y. EDUC. LAW § 3020(1)).
[61] *Wright* Complaint, *supra* note 6, at 17–18.
[62] *Id.* at 18.
[63] N.Y. EDUC. LAW § 3020-b(2).

teacher improvement plan, and provides charged teachers with rights to a hearing and appeal, and paid leave during suspension.[64]

Plaintiffs argue that these processes are "consuming and expensive hurdles that make the dismissal of chronically ineffective, tenured teachers almost impossible."[65] The "difficulty, cost, and length of time associated with removal" deter administrators from initiating disciplinary proceedings and from giving an ineffective rating in the first place.[66] Plaintiffs also relied on statistical studies that showed almost half of New York school districts considered bringing charges, "but did not."[67] Hearings, the Plaintiffs allege, take 502 days on average for Ineffective based proceedings, and 830 days on average for Incompetency proceedings.[68] Teachers receive pay during these processes, and the processes themselves cost the state $313,000 per teacher.[69]

Furthermore, Plaintiffs argue that the streamlined disciplinary process for teachers who are consecutively rated Ineffective does not work in practice.[70] The effectiveness of this process is premised on the flawed APPR system that fails to identify incompetent teachers.[71] A system that cannot reliably rate incompetent teachers as Ineffective once, Plaintiffs argue, cannot rate them Ineffective twice or more, which makes the expedited disciplinary process a moot point.[72]

C. Challenge to the Seniority-Based Termination Statutes

Education Law section 2585 ("Seniority-based Termination Statute") provides that "[w]henever a board of education abolishes a position . . . the services of the teacher having the least seniority in the system within the tenure of the position abolished shall be discontinued."[73] During district wide layoffs, school districts must fire the last teachers hired.[74]

The 2015 Education Law modifications introduced an exception to the Seniority-based Termination Statute for schools with the "lowest

[64] *Id.*
[65] *Wright* Complaint, *supra* note 6, at 14.
[66] *See id.* at 14.
[67] *Id.* at 15.
[68] *Id.* at 16.
[69] *Id.*
[70] *See Wright* Opposition to Renewed Motion to Dismiss, *supra* note 43, at 10.
[71] *See id.* at 7.
[72] *Id.* at 10.
[73] N.Y. EDUC. LAW § 2585(3) (McKinney 2016).
[74] *Id.*; *see Wright* Complaint, *supra* note 6, at 19.

achieving five percent of public schools in the state."[75] Such schools may fire teachers based on their APPR rating instead of seniority.[76]

The Plaintiffs allege that had "New York City . . . conducted seniority-based layoffs between 2006 and 2009, none of the New York City teachers that received an Unsatisfactory rating during those years would have been laid off."[77] "Seniority is not an accurate predictor of teacher effectiveness," argue the Plaintiffs, and studies show "that a teacher's effectiveness generally levels off of returns to experience after five to seven years."[78] Invariably, "school administrators discontin[ue] the employment of top-performing teachers with lower seniority, and retain[] low-performing teachers with greater seniority."[79] The Plaintiffs argue this system affects "children at struggling schools the most, because lower-performing schools generally have a disproportionate number of newly-hired teachers."[80]

Further, the Plaintiffs allege that the exception to the Seniority-based Termination Statute leaves a broken system in place.[81] During layoffs, ninety-five percent of New York schools must retain "ineffective senior teachers" in their classrooms "while junior effective teachers are dismissed."[82]

III. HISTORICAL CONTEXT AND LEGAL BACKGROUND

The federal constitution does not contain an education clause. In 1973, the U.S. Supreme Court held in *San Antonio Independent School District v. Rodriguez* that the right to education is not a fundamental right under the Due Process Clauses of the Fifth and Fourteenth Amendments and that poor students are not a "suspect class" under the Fourteenth Amendment's Equal Protection Clause analysis.[83] All fifty state constitutions, however, contain education clauses with slightly varying language that articulate the right to a

[75] *Wright* Opposition to Renewed Motion to Dismiss, *supra* note 43, at 13 (quoting N.Y. EDUC. LAW § 211-f(1)).

[76] *Wright* Opposition to Renewed Motion to Dismiss, *supra* note 43, at 13; *see* N.Y. EDUC. LAW § 211-f(7)(b).

[77] *Wright* Complaint, *supra* note 6, at 20.

[78] *Id.* at 19.

[79] *Id.* at 20.

[80] *Id.*

[81] *Wright* Opposition to Renewed Motion to Dismiss, *supra* note 43, at 13.

[82] *Id.*

[83] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28, 29, 30, 31 (1973); Black, *supra* note 10, at 30–31.

system of common schools.[84]

After *Rodriguez*, several waves of education reform litigation hit the state courts.[85] All of these cases involved challenges to the disparity or adequacy of public school funding.[86] State courts upheld some of these claims on various theories, including fundamental right and equal protection analyses.[87] Many courts denied disparity claims, however, refusing to find that the inequality in funding arising from different local property tax bases was unconstitutional because the remedy would have a redistributive effect among districts, making all students feel the effect of poor funding equally.[88] In 1989, the Kentucky Supreme Court "became the first to fully articulate a qualitative right to education," holding that an "'efficient' education" required "specific skills and outcomes in each of the major subjects of school curriculum."[89] Thereafter, litigants began challenging the adequacy of total state funding to public schools, arguing for the courts to impose a constitutional floor state wide, rather than challenging the inequality of funding created by the dual system of local and state funding.[90]

In 1982, the New York Court of Appeals recognized that the Education Clause in New York's constitution provided a right to a "sound basic education," but denied the plaintiffs' challenge because it was based on the disparity of funding theory, and the court refused to strike down the dual funding system between the state and local governments, or redistribute funding from rich to poor districts.[91] From 1995 to 2006, the Court of Appeals issued a series of decisions in the watershed case *Campaign for Fiscal Equity, Inc. v. State of New York*, in which the court defined and refined the right to a "sound basic education" and held that the right imposed a duty on the state to provide public school funding that is minimally

[84] *See* William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1661 (1989); *see also* Molly A. Hunter, *State Constitutional Education Clause Language*, PA. B. ASS'N CONST. REV. COMM'N, http://pabarcrc.org/pdf/Molly%20Hunter%20Article.pdf (last updated Jan. 2011) (listing the language from each state's education clause).

[85] Black, *supra* note 10, at 30–31, 32.

[86] *See id.* at 31.

[87] *See id.*; *see also* Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1976) (finding that education is a fundamental right which is violated by funding inequities); Washakie Cty. Sch. Dist. v. Herschler, 606 P.2d 310, 333 (Wyo. 1980) (finding that the education is a fundamental right).

[88] *See* Black, *supra* note 10, at 30–31, 31.

[89] *Id.* at 32; *see* Rose v. Council for Better Educ., 790 S.W.2d 186, 208, 212, 213 (Ky. 1989).

[90] *See* Black, *supra* note 10, at 32.

[91] *See* Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 364, 366, 369 (N.Y. 1982).

adequate.[92]

A. The History and Text of the Education Clause

In colonial times, the British paid little attention to public education in New York.[93] The colonial legislators created several public grammar and general schools during the eighteenth century, but few students could attend.[94] The Revolution of 1776 wrought havoc on the state's finances, and "early public schools were too impoverished to offer anything more than a crude education to poor children."[95] Beginning in 1786, Governor George Clinton "embraced the goal of public schooling and made it his foremost ambition."[96] Over the course of the next twenty-five years, Governor John Jay supplicated the legislature to create and fund a system of common schools throughout the state.[97] After enacting several statutes that gave small sums to local districts for common school funding, the legislature enacted a statute in 1812 that created a comprehensive system of common schools, dividing the state into school districts, providing for elected administrators, and creating teacher qualifications.[98] Funding for the system came from the state and local levels; where funds were insufficient, the statute created the "rate bill," which required non-indigent parents to subsidize the salaries of the teachers.[99]

Thus, after 1812, the New York public education system was common but not free.[100] The imposition of the rate bill meant that "many common schools at the time were not entirely free because . . . [m]any parents were unwilling to be publicly adjudged indigent or too willing to overlook their children's truancy."[101] The rate bill therefore had the "effect of keeping thousands of children away from the common schools."[102]

The ensuing years brought a series of legislation that expanded the

[92] *See* Campaign for Fiscal Equity, Inc. v. State of N.Y., 861 N.E.2d 50, 59, 60 (N.Y. 2006); Campaign for Fiscal Equity, Inc. v. State of N.Y., 801 N.E.2d 326, 348, 349 (N.Y. 2003); Campaign for Fiscal Equity, Inc. v. State of N.Y., 655 N.E.2d 661, 666–67 (N.Y. 1995).

[93] Paynter v. State of N.Y., 797 N.E.2d 1225, 1238 (N.Y. 2003) (Smith, J., dissenting).

[94] *Id.*

[95] *Id.* at 1239.

[96] *Id.*

[97] *See id.* at 1239–40.

[98] *See id.* at 1240, 1241.

[99] *Id.* at 1241.

[100] *See id.* at 1241, 1242.

[101] *Id.* at 1242.

[102] *Id.*

tiers of schooling and attempted to better finance the common schools and ease the burden of the rate bill's effect.[103] Finally, in 1867, the legislature "eliminated the rate bill . . . thus allowing all students in the state to attend school for free without any out-of-pocket contributions."[104] The termination of the rate bill brought a flood of new students into the schools and "greater regularity" in student attendance.[105]

The constitutional convention of 1867 proposed an education clause, but ultimately disbanded due to an "unrelated political controversy" before enacting any amendments.[106] In 1894, the subsequent constitutional convention enacted the Education Clause.[107] The record of the convention's education committee sheds some light on the framer's intent and the purpose of the Clause.[108] As to the reason for constitutionalizing the right, the education committee stated:

> It may be urged that no imagination can picture this State refusing to provide education for its children, and for this reason the declaration which your committee have reported in section one might, no doubt, be omitted without endangering the stability of our present system of education. But the same reasoning would apply to many other matters though fundamental.[109]

The education committee also explained that the brevity of the Education Clause "should [not] prevent the adoption of an enactment declaring in the strongest possible terms the interest of the State in its common schools."[110] On the purpose of the right to the system of free common schools, the committee stated:

> Whatever may have been their value heretofore, and language has been strained to the utmost in applying to them terms of praise, their importance for the future cannot be overestimated. The public problems confronting the rising generation will demand accurate knowledge and the highest development of reasoning power more than ever

[103] *See id.* at 1243, 1244.
[104] *Id.* at 1245.
[105] *See id.*
[106] *Id.*
[107] *Id.*
[108] *See id.*
[109] *Id.* (citing REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, *supra* note 21, at 695 (alteration in original)).
[110] *Paynter*, 797 N.E.2d at 1245 (citing REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, *supra* note 21, at 695).

> before, and in view of the State's policy as to higher education, to which reference will presently be made, too much attention cannot be called to the fact that the highest leadership is impossible without intelligent following, and that the foundation of our educational system must be permanent, broad and firm, if the superstructure is to be of real value.[111]

The language of the Education Clause as enacted states: "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."[112]

B. The New York Court of Appeals' Interpretation of the Education Clause

The New York Court of Appeals first interpreted the Education Clause in *Levittown v. Nyquist*.[113] There, the court held that the disparities in funding between property rich and property poor school districts did not violate the equal protection clauses of the federal or state constitutions, the right to education is not a fundamental right under the due process clause of the New York constitution, and the Education Clause does not provide a right to equal funding among school districts.[114] The claim arose from the nature of the state's dual funding system that derives money from local and state tax bases; the amount of state funding is based on a number of factors such as population and student attendance and the amount of local funding is based on the property value of the local districts.[115]

The plaintiffs alleged "property-rich districts have an ability to raise greater local tax revenue enabling them to provide enriched education programs beyond the fiscal ability of the property-poor districts."[116] The court first noted that "[n]o claim is advanced" by the plaintiffs that "the educational facilities or services provided in the school districts that they represent fall below the State-wide minimum standard of educational quality and quantity fixed by the

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[111] *Paynter*, 797 N.E.2d at 1245–46 (citing REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, *supra* note 21, at 695 (alteration in original)).

[112] N.Y. CONST. art. XI, § 1.

[113] *See* Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 368, 369 (N.Y. 1982).

[114] *Levittown*, 439 N.E.2d at 363, 366, 368.

[115] *Id.* at 361, 362.

[116] *Id.* at 362.

Board of Regents."[117] Instead, the plaintiffs challenged the disparities arising from the allocation of funding in the existing budget that "lead to education unevenness above the minimum standard."[118]

Turning to the Education Clause claim, the court interpreted the Clause's language in light of its history and the record of its adoption at the 1894 Constitutional Convention.[119] First, the court found significant the fact that "more than 11,000 local school districts in the State, with varying amounts of property wealth offering disparate educational opportunities" existed at the time of the Clause's adoption.[120] Furthermore, the text and the record make no mention "to any requirement that the education to be made available be equal or substantially equivalent in every district."[121]

As to the quality of the right, the court found that "[i]f what is made available by this system . . . may properly be said to constitute an education, the constitutional mandate is satisfied."[122] The word "education," the court found, means "a sound basic education."[123] In conclusion, the court held that the plaintiffs' disparity claim did not allege that the funding system failed to provide such an education.[124]

In its first *Campaign for Fiscal Equity v. State of New York* ("CFE I") decision, the Court of Appeals reinstated the plaintiffs Education Clause claim over the Appellate Division's dismissal order.[125] First, the court reiterated the "sound basic education" standard of *Levittown*, explaining that it assured "minimal acceptable facilities and services."[126] This means that the State must provide the essentials: "minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn," minimally adequate "instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks," and "minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those

[117] *Id.* at 363.
[118] *Id.*
[119] *See id.* at 368.
[120] *Id.*
[121] *Id.*
[122] *Id.* at 369.
[123] *Id.*
[124] *See id.*
[125] Campaign for Fiscal Equity v. State, 655 N.E.2d 661, 667, 668 (N.Y. 1995).
[126] *Id.* at 665 (citing *Levittown*, 439 N.E.2d at 368, 369).

subject areas."[127] Facilities, instrumentalities, and teaching are "minimally adequate" if they provide the opportunity for students to acquire the "basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury."[128]

The court then found that the plaintiff-parents sufficiently alleged that their children were being denied such an opportunity due to inadequate statewide funding.[129] The court found that the plaintiffs could rely on statistics showing that students were failing "standardized competency examinations" that measured "minimum education skills," but that such performance levels are only "helpful" and should "be used cautiously" as there are "a myriad of factors which have a causal bearing on test results."[130] The plaintiffs would still have to prove the causal link between funding and poor performance, the court concluded, but the allegations were sufficient for the pleading stage of the litigation.[131]

Eight years later, the Court of Appeals issued a second decision in *CFE*, affirming the trial court's "sound basic education" analysis and holding that the trial court correctly determined that the plaintiffs' right was violated by the state.[132] First, the court found that a "sound basic education" entitles children to "minimally adequate" physical facilities, instrumentalities, and teaching.[133] Facilities, instrumentalities, and teaching are "minimally adequate" if they provide children with the *opportunity* to learn the basic skills necessary to "eventually function productively as civic participants capable of voting and serving on a jury" and effectively participate in the modern service economy.[134]

The court then adopted the trial court's input-output test to measure whether the education system fails to provide children with the opportunity to learn these skills.[135] The input-output test requires plaintiffs to prove that deficient education inputs, such as buildings, books, and teachers, cause deficient outputs, such as poor

[127] *Campaign for Fiscal Equity,* 655 N.E.2d at 666.

[128] *Id.*

[129] *See id.* at 667–68.

[130] *Id.* at 666.

[131] *Id.* at 666 ("We do not attempt to definitively specify what the constitutional concept and mandate of a sound basic education entails . . . [g]iven the procedural posture of this case.").

[132] Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 328, 329 (N.Y. 2003).

[133] *Id.* at 331–32 (citing *Campaign for Fiscal Equity*, 655 N.E.2d at 666).

[134] *Campaign for Fiscal Equity*, 801 N.E.2d at 330 (quoting *Campaign for Fiscal Equity, Inc.*, 655 N.E.2d at 666).

[135] *See Campaign for Fiscal Equity*, 801 N.E.2d at 332.

test performance and "graduation and dropout rates."[136] Next, the test requires plaintiffs to prove that inadequate funding causes the deficiency of the education inputs.[137]

In analyzing education inputs, the court accepted the plaintiffs' use of statistics of teacher certification rates, test results, and experience levels to demonstrate that New York City teacher quality was inadequate, and that teacher quality "correlate with student performance."[138] Turning to school facilities and classroom quality, the court found that plaintiffs did not sufficiently demonstrate a "measurable correlation" between deficient school infrastructure and poor student performance.[139] Plaintiffs did, however, present "measurable proof" that such facilities had "excessive class sizes, and that class size affects learning."[140] Next, the court found that instrumentalities include "classroom supplies, textbooks, libraries and computers."[141] The plaintiffs sufficiently demonstrated "school libraries are old and not integrated with contemporary curricula," and that New York City schools had "half as many computers" as schools elsewhere in the state."[142] Accordingly, the plaintiffs sufficiently demonstrated that inputs were deficient and that such inputs were sufficiently correlated with student performance.[143]

The court then analyzed the allegedly deficient education outputs.[144] Again accepting the plaintiffs' use of statistics, the court found that New York City school completion rates were low and that dropouts "are not prepared for productive citizenship . . . ."[145] Moreover, the court rejected that other causes such as immigrant teenagers did not account for the high dropout rates in high schools because "'education is cumulative'" and the evidence demonstrated that students were exposed to education deficiencies early, and such early exposure likely caused the vast majority of dropouts.[146] Next, the court examined New York City students' test results, finding that

[136] *See id.*

[137] *See id.* at 340 (citing *Campaign for Fiscal Equity*, 655 N.E.2d at 667).

[138] *See Campaign for Fiscal Equity*, 801 N.E.2d at 334.

[139] *Id.*

[140] *Id.* at 335.

[141] *Id.*

[142] *Id.* at 336.

[143] *Id.* ("A showing of good test results and graduation rates among these students—the 'outputs'—might indicate that they somehow still receive the opportunity for a sound basic education. The showing, however, is otherwise.").

[144] *See generally id.* at 336–40.

[145] *Id.* at 337.

[146] *See id.* at 337–38 (citing Campaign for Fiscal Equity v. State of New York, 719 N.Y.S.2d 475, 517 (N.Y. Sup. Ct. 2001)).

particular grades scored dramatically below those of other districts in the state.[147] Poor test results in English and math demonstrated that New York City children were not provided the opportunity to learn the "basic literacy, calculating, and verbal skills" necessary to "fit with the goal of productive citizenship."[148]

Turning to causation, the court found that plaintiffs sufficiently proved "a correlation between funding and educational opportunity . . . a causal link between the present funding system and any proven failure to provide a sound basic education to New York City school children."[149] The court noted that "many causal links" may exist for any single outcome, but nothing in the Court's *CFE I* opinion required plaintiffs to "'search for a single cause of the failure of New York City schools."[150] Accordingly, plaintiffs met the causation element by demonstrating that both "increased funding can provide better teachers, facilities and instrumentalities of learning" and that "such improved inputs yield better student performance."[151]

Last, the court addressed the issue of remedy.[152] The court recognized that the judiciary has the responsibility to "defer to the [l]egislature in matters of policymaking," and that the court has "neither the authority, nor the ability, nor the will, to micromanage education financing."[153] The duty and prerogative of the judiciary, however, is to "define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them."[154] Ultimately, the court modified the trial court's remedial order, requiring the state to "ascertain the actual cost of providing a sound basic education in New York City."[155] Afterward, reforms should address the identified shortcomings of the school financing system and ensure "that every school in New York City [has] the resources necessary for providing the opportunity for a sound basic education."[156] Finally, the court directed the state to "ensure a system of accountability to measure whether the reforms actually

[147] *Campaign for Fiscal Equity*, 801 N.E.2d at 338.

[148] *Id.* at 339 (citing *Campaign for Fiscal Equity*, 655 N.E.2d at 666).

[149] *Campaign for Fiscal Equity*, 801 N.E.2d at 340 (quoting *Campaign for Fiscal Equity, Inc.*, 655 N.E.2d at 667).

[150] *Id.* at 341 (quoting *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 535).

[151] *See Campaign for Fiscal Equity*, 801 N.E.2d at 340 (citing *Campaign for Fiscal Equity*, 719 N.Y.S.2d at 520).

[152] *See Campaign for Fiscal Equity*, 801 N.E.2d at 344.

[153] *Id.* at 345.

[154] *Id.*

[155] *Id.* at 348.

[156] *Id.*

provide" such an opportunity.[157] The court required the state to "implement the necessary measures" within one year.[158]

In *CFE III*, the Court of Appeals held that the state had complied with the part of the court's *CFE II* order that required the state to estimate the actual cost of providing New York City school children with a sound basic education.[159] In response to *CFE II*, the governor of New York issued an executive order establishing a commission to calculate the budgetary need of New York City schools.[160] The commission selected several methods of calculation, which, depending on the criterion used, determined that "the estimated spending gaps for New York City" could "range from $1.93 billion to $2.53 billion and the statewide spending gaps from $2.45 billion to $3.39 billion."[161] The governor then "convened the [l]egislature in extraordinary session . . . and proposed a program bill to the [s]enate."[162] The senate passed an amended bill that selected the commission's lower estimate of $1.93 billion to reflect the "actual costs of providing a sound basic education."[163] Yet neither bill was enacted.[164]

After the one-year deadline that had been set in *CFE II* had passed, the trial court "set out to determine whether the measures . . . had been carried out" by the state.[165] The trial court "appointed a blue-ribbon panel of referees" to review the commission's budgetary-need estimates.[166] Ultimately, the trial court rejected the commission methodology based on the panel's determination that the $1.93 billion estimate was too low.[167] The appellate division reversed the trial court's budgetary finding but ordered the governor and legislature to implement a $4.7 billion capital improvement plan for the city's education system.[168]

The Court of Appeals affirmed the appellate division's decision that overturned the trial court's budgetary finding and rejected the

[157] *Id.*
[158] *See id.* at 348–49.
[159] Campaign for Fiscal Equity, Inc. v. State of New York, 861 N.E.2d 50, 52 (N.Y. 2006).
[160] *Id.* at 54.
[161] *Id.* at 54, 55.
[162] *Id.* at 55.
[163] *Id.*
[164] *Id.*
[165] *Id.* at 55–56.
[166] *Id.*
[167] *See id.*
[168] *Id.* at 26 (citing Campaign for Fiscal Equity, Inc. v. State, 814 N.Y.S.2d 1, 6, 11 (App. Div. 2006)).

appellate division's capital improvement plan.[169] First, the court found that the trial court should not have commissioned a "de novo review of the compliance question" and should have instead limited its review to "whether the [s]tate's proposed calculation of that cost [was] rational."[170] The court's rationality deference rested on prudential and practical concerns and respected the judiciary's separation of powers limitation.[171] The court reasoned that limiting the judiciary's review of a duty imposed on coordinate branches of the state government would prevent intrusion by the courts into "'the policy-making and discretionary decisions that are reserved'" to those other branches.[172] Second the court rejected the appellate division's capital improvement plan because it was "unnecessary" in light of "recently enacted legislation designed to allow the [s]tate to remedy inadequacies in New York City schools facilities."[173]

The Court of Appeals has applied the right to a sound basic education in several other cases that further delineate the right.[174] In *Paynter v. New York*, the court affirmed the lower court's dismissal of a sound basic education claim.[175] There, plaintiffs claimed that the state's "practices and policies . . . resulted in . . . high concentrations of racial minorities and poverty" in the Rochester school district, which led to "abysmal student performance."[176] The court rejected this "novel" claim because the plaintiffs did not "allege that the substandard academic performance in their schools stem[ed] from any lack of funds or inadequacy in the teaching, facilities or instrumentalities of learning," but rather a "failure to mitigate demographic factors that may affect student performance."[177]

Similarly, in *New York Civil Liberties Union v. New York*, the Court of Appeals similarly held that the plaintiffs did not state a claim under the Education Article.[178] Unlike *Paynter*, the plaintiffs alleged deficiencies in both inputs and outputs—but only in specified schools within the district.[179] The court found this allegation

[169] *Campaign for Fiscal Equity*, 861 N.E.2d at 57.
[170] *Id.*
[171] *Id.* at 58.
[172] *See id.* (quoting Klostermann v. Cuomo, 463 N.E.2d 588, 596 (N.Y. 1984)).
[173] *Campaign for Fiscal Equity*, 861 N.E.2d at 57.
[174] *See, e.g.*, Hussein v. State of New York, 973 N.E.2d 752, 754 (N.Y. 2012) (Ciparick, J., concurring); N.Y. Civil Liberties Union v. State, 824 N.E.2d 947, 949 (N.Y. 2005); Paynter v. State of New York, 797 N.E.2d 1225, 1226 (N.Y. 2003).
[175] *Paynter*, 797 N.E.2d at 1226–27.
[176] *Id.* at 1226.
[177] *Id.* at 1226–27.
[178] *N.Y. Civil Liberties Union*, 824 N.E.2d at 949.
[179] *Id.* at 951.

inadequate because it did not satisfy the causation element of the education claim: "In identifying individual schools that do not meet minimum standards, plaintiffs do not allege any district-wide failure."[180] By altering the scope of the causation requirement, plaintiffs were asking the court to "subvert local control" from districts by ordering the state to intervene on a school-by-school basis, which the court refused to do.[181]

IV. ANALYSIS OF THE TEACHER TENURE CHALLENGE IN *DAVIDS V. NEW YORK*

The plaintiffs' ("Plaintiffs" or "*Davids* plaintiffs") teacher tenure claim in *Davids v. New York* is a new issue of law for the New York courts.[182] Rather than challenging the adequacy of funding, as in *Levittown Union Free School District v. Nyquist* and its progeny, the *Davids* plaintiffs challenge a set of teacher tenure statutes that are much narrower in their reach.[183] The first relevant issue is whether the text and history of the Education Clause supports a claim that is not directed at a lack of funding.[184] As the issue is new nationwide, the New York courts will not have the benefit of relying on a horizontal review of other state appellate court analyses.[185] Second, if the court finds that the Education Clause supports a non-funding claim, the court will probably analyze the tenure challenge under the input-output test affirmed by the New York Court of Appeals in its 2003 decision in *Campaign for Fiscal Equity, Inc. v. New York* ("*CFE II*").[186] Accordingly, the plaintiffs will have the difficult task of proving not only that the tenure statutes cause the alleged deficient inputs, but that the deficient inputs themselves cause deficient outputs.[187] Finally, while the issue of remedy is analyzed last in the Court of Appeal's Education Clause opinions, the issue clearly colored

[180] *Id.*

[181] *See id.*

[182] *See Wright* Opposition to Motion to Dismiss, *supra* note 9, at 30, 31; *Wright* Complaint, *supra* note 6, at 21.

[183] *See* Campaign for Fiscal Equity, Inc. v. State of New York, 861 N.E.2d 50, 53 (N.Y. 2006); Campaign for Fiscal Equity, Inc. v. State of New York, 801 N.E.2d 326, 327 (N.Y. 2003); Paynter v. State of New York, 797 N.E.2d 1225, 1226 (N.Y. 2003); Campaign for Fiscal Equity, Inc. v. State of New York, 655 N.E.2d 661, 665 (N.Y. 1995); Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 361 (N.Y. 1982).

[184] *See Levittown*, 439 N.E.2d at 368 (beginning a discussion with the text and history of the Education Clause).

[185] *See* Black *supra* note 10, at 80 (noting that "no high court" has determined the issue of tenure).

[186] *See Campaign for Fiscal Equity*, 801 N.E.2d at 332.

[187] *See id.*

the Court's analyses from beginning to end.[188] While I analyze the remedy issue separately, it is likely that a court will approach the case with notions of the judiciary's prudential limitations in mind.[189]

A. Analyzing the Davids *Claim According to the Text and History of the Education Clause*

The Education Clause of the New York constitution states that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."[190] With the command "shall," the text identifies the "legislature" as having the duty to create and maintain a system of schools to educate "all" children of the state.[191] Although the language is clear that such a system must be free and common, it does not clearly necessitate a particular quality of education.[192]

The relational structure of the constitution also sheds light on the "duty" imposed on the legislature in the Education Clause. Both the "shall" command and the "may" permissive are used throughout, implying that the framers intended the distinction to be of significance.[193] For example, in section 1 of Article XV, the word "shall" appears in the text to direct the legislature to refrain from disposing of particular canals and section 2 of the Conservation Article states that "[t]he legislature may . . . provide for the use of" certain lands for the construction of reservoirs.[194]

Although this comparison suggests the Education Clause's "shall" does indeed impose a duty on the legislature, the relation of the Education Clause with the Conservation Article suggests that a violation of that duty has no remedy in court.[195] The Conservation Clause provides various declarations and obligatory language concerning environmental issues and, unlike the Education Clause, contains a particular clause entitled: "Violations of article."[196] There,

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[188] *Campaign for Fiscal Equity*, 861 N.E.2d at 58; *Campaign for Fiscal Equity*, 655 N.E.2d at 665 (citing *Levittown*, 439 N.E.2d at 363); *see Levittown*, 439 N.E.2d at 369.

[189] *See Campaign for Fiscal Equity*, 861 N.E.2d at 58 (quoting Matter of 89 Christopher, Inc. v. Joy, 318 N.E.2d 776, 781 (N.Y. 1974)).

[190] N.Y. EDUC. LAW § 1 (McKinney 2016).

[191] *See id.*

[192] *See id.*

[193] *See* N.Y. EDUC. LAW §§ 1, 2, 3; *see, e.g.*, N.Y. CANALS LAW §§ 1, 2, 3, 4; N.Y. ENV. CONSERVATION LAW §§ 1, 2, 3, 4, 5.

[194] *See* N.Y. CANALS LAW § 1; *see* N.Y. ENV. CONSERVATION LAW § 2.

[195] *Compare* N.Y. EDUC. LAW §§ 1, 2, 3 (suggesting from the use of the word "shall" that the legislature owes a duty), *with* N.Y. ENV. CONSERVATION LAW § 5 (suggesting that a violation of that duty has no remedy in court).

[196] *See* N.Y. ENV. CONSERVATION LAW § 5.

the text provides that a "violation of any of the provisions of [the Conservation Article] may be restrained at the suit of the people or, with the consent of the supreme court in appellate division, on notice to the attorney-general at the suit of any citizen."[197] Such a provision is absent from the Education Clause.[198]

The Court of Appeals, however, clearly resolved this issue in *CFI I*, holding that the Education Clause is self-executing and that citizens may bring suit when the state fails to provide the right "to a sound basic education."[199] What is not clear is whether that right extends beyond the funding context.[200] The language of the Clause directs the legislature to provide a system of schools that is free to the children who attend.[201] Implicit in the directive is that the legislature, which has the constitutional power of the purse, shall use its power to fund the system. The language therefore is pregnant with the idea of funding alone, and that the level of funding be adequate to support such a system.[202]

The history of the Education Clause also demonstrates that the crux of education policy leading up to the enactment of the Clause focused on the two elements of the Clause: a common system and free schooling.[203] Indeed, the historical record strongly suggests that the state's impetus for the enactment of the Clause was to constitutionalize the repeal of the rate bill, and thus constitutionalize free schooling.[204] A narrow reading of the history thus could lead the court to cabin the right to education under the Clause to the adequacy of public funding for education, which, in turn, would bar the *Davids* plaintiffs' claim on appeal.[205]

On the other hand, a broader reading of the history and purpose of

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[197] *Id.*

[198] N.Y. EDUC. LAW § 1. The same framers adopted all of the foregoing language at the 1894 convention. *See Article XIV of the New York State Constitution*, NEW YORK STATE DEP'T OF ENVTL. CONSERVATION, http://www.dec.ny.gov/lands/55849.html (last visited Apr. 9, 2015). The disparity in language, therefore, is not by incident of different framers. The Education and Conservation Clauses were both adopted by the 1894 convention. *See id.* The language referring to the maintenance of canals was originally part of the Conservation Clause, but was later transferred to a separate Article. *See id.*; N.Y. CANALS LAW.

[199] *See* Campaign for Fiscal Equity, Inc. v. State of New York, 655 N.E.2d 661, 665 (N.Y. 1995) (finding that the Education Article does not have 'hortatory' language and sets forth a duty on the legislature).

[200] *See id.* (providing no mention of whether it extends beyond the funding context).

[201] *See* N.Y. EDUC. LAW § 1.

[202] *See id.*

[203] *See Paynter*, 797 N.E.2d at 1238, 1239, 1242 (Smith, J., dissenting) (providing detailed historical overview of the common free school movement in New York).

[204] *See id.* at 1245 (noting that the rate bill was repealed in 1867 after strong lobbying and that the Constitutional Convention of that same year drafted the first Education Clause).

[205] *See id.*

the enactment could lead the *Davids* court to the opposite conclusion.[206] The historical purpose of New York's common system of free schools movement was not to create such a system in and of itself, but to create and fund one in order to provide an education that nurtured and cultivated children into able, well-informed, upright citizens.[207] The education committee's report on the purpose of the Clause's enactment similarly rings of a higher purpose, stating that the "importance [of the state's children] for the future cannot be overestimated," because "[t]he public problems confronting the rising generation will demand accurate knowledge and the highest development of reasoning power more than ever before."[208] The Court of Appeals reflected this purpose in interpreting the Clause as providing the right to a "sound basic education," which reaches further than the text and a narrow reading of the history might suggest.[209] In further interpreting the term "education," the Court of Appeals stated: "Such an education should consist of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury."[210] Thus, the court hearing the *Davids* claim on appeal can rely on both the historical purpose of the Clause and the broad interpretation of the Clause by the Court of Appeals to find that laws, such as the teacher tenure statutes that allegedly preclude such an education, give rise to a claim under the Education Clause.[211]

B. Analyzing the Davids *Claim under the CFE Input-Output Test*

The Court of Appeals' articulation of the Education Clause's

[206] *See id.* at 1238, 1239, 1240, 1241,1242, 1243, 1245; STATE OF NEW YORK IN CONVENTION: DOCUMENTS, REPT. NO. 62, at 1 (1894) (providing the committee report of the 1894 enactment of the Education Clause); PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 2856 (vol. iv. 1868) (providing the committee record of the 1867 draft of the Education Clause).

[207] *See Paynter*, 797 N.E.2d at 1244 (Smith, J., dissenting). For example, in enacting an early funding measure leading up to the repeal of the rate bill, the Legislature took note of an annual report emphasizing that to "[e]ducate every child, 'to the top of his faculties,' . . . not only secure[s] the community against the depredations of the ignorant and the criminal, but [] bestow[s] upon it, instead, productive artisans, good citizens, upright jurors and magistrates, enlightened statesmen, [and] scientific discoverers and inventors." *Id.*

[208] STATE OF NEW YORK IN CONVENTION: DOCUMENTS, REPT. NO. 62, *supra* note 206, at 4; *see Paynter*, 797 N.E.2d at 1244 (Smith, J., dissenting) (providing an excerpt of the committee report).

[209] *See* Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 666 (N.Y. 1995).

[210] *Id.*

[211] *See id.*; *Wright* Complaint, *supra* note 6, at 21, 22; *Wright* Opposition to Motion to Dismiss, *supra* note 9, at 11–12, 14, 17.

purpose is lofty and the Court's input-output test is seemingly broad enough to apply the "sound basic education" standard outside of the funding context.[212] Yet the facts associated with the court's holdings are narrowly focused on the funding challenges and can be easily distinguished from the facts of *Davids*.[213] One prominent obstacle is that the pervasive effects of inadequate funding easily meet the causation requirement of the court's input-output test because the input deficiencies, such as the poor quality of teachers, buildings, and books, is easily traceable to a lack of money in the budget.[214] The policies implemented by the teacher tenure statutes in *Davids*, however, are much more specific and their reach more narrow, and could therefore prove much more difficult to causally link to deficient inputs and outputs.[215]

Moreover, the court's articulation of the input-output test in the funding cases identified several inputs beyond the quality of teaching, all of which were found by the court to be negatively affected by inadequate funding.[216] For example, the court found in *CFE II* that inadequate funding was to blame not only for poor teaching, but also for smaller buildings with larger class sizes, insufficient library resources, and too few computers.[217] The court did not seem to require that the three identified inputs—teaching, facilities, and instrumentalities—each be demonstrably deficient in order to bring an education claim.[218] Yet the fact that the *CFE II* plaintiffs alleged that each input was deficient likely bolstered the plaintiffs' causation claim.[219] The *Davids* plaintiffs, however, have only alleged that the tenure statutes cause poor quality teaching.[220] If the plaintiffs could also claim the tenure statutes thereby preclude

[212] *See* Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 330, 333–40 (N.Y. 2003); STATE OF NEW YORK IN CONVENTION: DOCUMENTS, REPT. NO. 62, *supra* note 206, at 4.

[213] *See* Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50, 52, 54–55, 57, 58–59, 60–61 (N.Y. 2006); *Paynter*, 797 N.E.2d at 1228, 1229; *Campaign for Fiscal Equity*, 801 N.E.2d at 340, 341, 344; *Campaign for Fiscal Equity*, 655 N.E.2d at 667; *Wright* Opposition to Motion to Dismiss, *supra* note 9, at 1, 2, 4, 5, 6, 7, 8, 9–10.

[214] *See Campaign for Fiscal Equity*, 801 N.E.2d at 340, 341–42, 344 (discussing causation).

[215] *Compare Wright* Opposition to Motion to Dismiss, *supra* note 9, at 4, 6, 9, *with Campaign for Fiscal Equity*, 801 N.E.2d at 340–44 (comparing the policies implemented by teacher tenure statutes).

[216] *See, e.g.*, *Campaign for Fiscal Equity*, 801 N.E.2d at 333, 334, 335, 336, 337, 338. The court, however, found that the input on which the *Davids* plaintiffs focus—teaching—is "surely [the] most important input." *Id.* at 333.

[217] *See id.* at 335, 336.

[218] *See id.* at 332, 336.

[219] *See id.* at 340.

[220] *See Wright* Complaint, *supra* note 6, at 21, 22; *Wright* Opposition to Motion to Dismiss, *supra* note 9, at 12.

the effective use of facilities and instrumentalities, because their effective employment requires effective teachers, then they might more easily demonstrate that the statutes ultimately cause the allegedly deficient outputs, such as poor student test scores.[221]

Additionally, the *Davids* plaintiffs can distinguish their case from *Paynter v. State* and *New York Civil Liberties Union v. State* ("*NYCLU*") because they allege that the tenure statutes cause a systematic failure across districts due to poor quality teachers.[222] In *Paynter*, the court rejected the claim that the state's failure to equalize demographic and economic student compositions across districts caused deficient outputs.[223] Such a claim did not "rest[] . . . on a lack of education," and the Court found the causation between one of the state's subsidized housing laws and the alleged disparities to be too "attenuated."[224] In contrast, the plaintiffs in *Davids* claim that the statutes directly bearing on teacher qualifications cause deficient teaching, which the court has recognized as an important part of the education claim.[225] The *Davids* remedy would not require socio-economic redistribution among tax bases which colored the *Paynter* court's opinion.[226] Moreover, unlike the allegations in *NYCLU*, the *Davids* plaintiffs allege that the tenure statutes cause poor quality teaching across school districts, rather than causing deficient inputs in specific schools.[227] Finally, the *Davids* plaintiffs claim would not require the court to "subvert local control" by mandating "the [s]tate to intervene on a school-by-school basis."[228] Rather, the *Davids* plaintiffs ask the court to strike down a set of statutes that implement state policies whose effects are systemic.[229]

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[221] *See Campaign for Fiscal Equity*, 801 N.E.2d at 334.

[222] *See* N.Y. Civil Liberties Union v. State, 824 N.E.2d 947, 951 (N.Y. 2005); Paynter v. State, 797 N.E.2d 1225, 1226–27 (N.Y. 2003); *Wright* Complaint, *supra* note 6, at 21, 22; *Wright* Opposition to Motion to Dismiss, *supra* note 9, at 11, 12.

[223] *See Paynter*, 797 N.E.2d at 1227–28.

[224] *See id.* at 1227, 1231.

[225] *See Campaign for Fiscal Equity*, 801 N.E.2d at 333 ("The first and surely most important input is teaching."); *Wright* Complaint, *supra* note 6, at 21, 22; *Wright* Opposition to Motion to Dismiss, *supra* note 9, at 14.

[226] *See Paynter*, 797 N.E.2d at 1227, 1230 ("[H]olding that students must be allowed to attend schools outside their districts at no additional cost . . . would likewise diminish local control and participation, as the residents of more attractive districts would end up having to provide for students from other districts."); *Wright* Complaint, *supra* note 6, at 22–23; *Wright* Opposition to Motion to Dismiss, *supra* note 9, at 30–31, 32.

[227] *See N.Y. Civil Liberties Union*, 824 N.E.2d at 951; *Wright* Complaint, *supra* note 6, at 21, 22; *Wright* Opposition to Motion to Dismiss, *supra* note 9, at 11.

[228] *See N.Y. Civil Liberties Union*, 824 N.E.2d at 951; *Wright* Complaint, *supra* note 6, at 21–22; *Wright* Opposition to Motion to Dismiss, *supra* note 9, at 30–32.

[229] *See Wright* Complaint, *supra* note 6, at 21, 22; *Wright* Opposition to Motion to Dismiss, *supra* note 9, at 30–31, 32.

Finally, the part of the *Davids* claim that challenges teacher tenure qualifications, under Education Law sections 2509, 2573, and 3012 ("Permanent Employment Statutes"), poses an additional complication.[230] Unlike the other challenged statutes, the Permanent Employment Statutes do not implement the challenged tenure policies.[231] Instead, the Qualification Statutes grant rulemaking authority to the Board of Regents, which then created the challenged tenure qualification policies under a regulatory implementing scheme.[232] Thus, the trial court might be unwilling to extend the clear directive of the Education Clause, which only imposes a duty to act on the legislature, to an administrative agency that allegedly created an unwise policy.[233] The court might instead dismiss that part of the claim, and require the plaintiffs to challenge the agency's rules under New York's administrative procedure act.[234]

V. THE NEW YORK GUIDE TO POSITIVE RIGHT ANALYSIS: A REMEDIAL FRAMEWORK DISTINGUISHING STATE ACTION/INACTION

When analyzing an appropriate remedy in the Education Clause cases, the New York Court of Appeals focused on plaintiffs' challenges to government inaction in the face of a constitutional duty to act in a certain way—i.e., provide a particular quality of education. In contrast, the plaintiffs in *New York v. Davids* ("Plaintiffs" or "*Davids* plaintiffs") challenged a government action as abridging that right. The action-inaction distinction is significant because it determines the scope of a court's remedy. The scope of the judicial remedy is, in turn, relevant to understanding the separation of powers and prudential issues that lie at the heart of the Education Clause analysis, and more generally, at the heart of the controversy of state positive right analyses.

A. Judicial Application of State Positive Rights Can Raise Prudential Concerns but Do Not Threaten the Separation of Powers

The United States Constitution originally "created a federal

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[230] *See* N.Y. EDUC. LAW §§ 2509(2)(a), 2573(5)(a), 3012(2)(a) (McKinney 2016); *Wright* Opposition to Motion to Dismiss, *supra* note 9, at 4, 5.

[231] *See* N.Y. EDUC. LAW §§ 2509(2)(a), 2573(5)(a), 3012(2)(a).

[232] *See* N.Y. EDUC. LAW §§ 3012(2), 3012-c(2)(a)(1).

[233] N.Y. CONST. art. XI, § 1; *see Wright* Opposition to Motion to Dismiss, *supra* note 9, at 4–5.

[234] *See* N.Y. A.P.A. LAW § 202(8).

government of limited powers."[235] The federal government is circumscribed to those powers enumerated in the Articles of the Constitution in order for states to establish a system of governments of unlimited powers.[236] The powers of the states are curtailed only by fundamental rights and to the extent they are preempted by federal powers.[237] Similarly, the federal Bill of Rights originally enumerated fundamental rights to individuals that the federal government could not abridge.[238] The Bill of Rights articulates these rights negatively—they tell the federal government what it cannot do.[239] Thus, the Bill of Rights both emphasizes the individual rights that the founders deemed most important and clarified the outer limits of the federal government's powers provided in the Articles.[240] These fundamental rights were not the *only* rights that citizens had under the federal constitution, but those the founders deemed important enough to emphasize as concomitant limitations on the federal government's powers.[241]

The Supreme Court eventually incorporated most of the rights enumerated in the Bill of Rights into the Due Process Clause of the Fourteenth Amendment. This has provided protection to citizens from their state governments equal to that which the same rights afford them under the Bill of Rights from the federal government. Yet nothing in this progression precludes states from adopting additional rights under their state constitutions. Indeed, the original concept of dual federalism intended for states to constitutionalize

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[235] *See* U.S. CONST. art. I, § 1; *id.* art. II, § 1, cl. 1; *id.* art. III, § 1; *id.* amend.; United States v. Morrison, 529 U.S. 598, 618 n.8 (2000) ("[T]he principle that '[t]he Constitution created a Federal Government of limited powers,' while reserving a generalized police power to the States is deeply ingrained in our constitutional history." (quoting New York v. United States, 505 U.S. 144, 155 (1992))).

[236] *See id.*

[237] *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Thomas B. McAffee, *The Federal System As Bill of Rights: Original Understandings, Modern Misreadings*, 43 VILL. L. REV. 17, 29 (1998) ("[The Tenth Amendment] makes explicit what was already implicit in Article I of the Constitution: the federal government was to be a government of limited, rather than general, powers, and the states would continue to exercise power over the vast range of matters over which the national government was not granted authority.").

[238] *See* Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489, 494 (2011) ("[The Bill of Rights has] limited national powers.").

[239] *See id.*

[240] *See* Archibald Cox, Foreword, *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 93 (1966) ("The original Bill of Rights was essentially negative. It marked off a world of the spirit in which government should have no jurisdiction.").

[241] *See id.* at 93.

individual rights.[242] Moreover, the dual federalism concerns behind the precision and negative articulation of the Bill of Rights do not exist for state constitutions because the power of state governments are only limited by fundamental rights and federal preclusion.[243] Thus, rights in state constitutions need not be articulated *negatively* because they are not attempting to delineate the outer bounds of the state government.[244] Rights under state constitutions can also be articulated *positively* if state citizens wish to constitutionalize the provision of a social entitlement by the state.[245]

In contrast to the Federal Constitution, every state constitution contains positive rights that address "social and economic concerns."[246] When these positive right entitlements are expressed as specific directives to the legislature or executive to act, such as the New York Education Clause, state courts can point to the constitutional text to justify a remedy that orders a coordinate branch to act.[247] Federal courts lack the textual basis for positive rights interpretation, which partly explains the refusal by federal courts to find implied positive rights in the Due Process Clauses of the Fifth and Fourteenth Amendments.[248]

When applying the positive rights found in their state constitutions, however, state courts have been reluctant to diverge from the extremely deferential rationality review with which federal courts have analyzed the negative rights found in the federal

[242] THE FEDERALIST NO. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961) ("The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State."); *see* Thomas V. Van Flein, *The Baker Doctrine and the New Federalism: Developing Independent Constitutional Principles Under the Alaska Constitution*, 21 ALASKA L. REV. 227, 231 (2004).

[243] *See* United States v. Morrison, 529 U.S. 598, 618 n.8, 619 (2000) (first quoting New York v. United States, 505 U.S. 144, 155 (1992); then quoting City of Boerne v. Flores, 521 U.S. 507, 517 (1997)); Van Flein, *supra* note 242, at 231.

[244] *See Morrison*, 529 U.S. at 618 n.8 (quoting *New York*, 505 U.S. at 155); Van Flein, *supra* note 242, at 231.

[245] THE FEDERALIST NO. 45, *supra* note 242, at 313; Cox, *supra* note 240, at 93.

[246] Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1135 (1999); *see* Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 873 (2001) ("While the rights recognized in the [Federal] Constitution are not perfectly negative, they are overwhelmingly oriented that way."). Among the rare federal rights interpreted by the Supreme Court to impose a duty on Congress and state legislature to *provide* something is the right to counsel. *See* Gideon v. Wainwright, 372 U.S. 335, 339–40 (1963). Yet the right to counsel is unique in the sense that it is an action that the courts could coerce the legislature into taking—by dismissing cases where the right is not provided.

[247] *See* Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 893 (1989).

[248] *See id.* at 893, 895.

constitution.[249] The purpose of federal rationality review is to limit "government authority by policing the outer boundaries of power," thereby preserving the federal government as an institution of limited powers.[250] The purpose and justification of rationality review lie in dual federalism concerns and the democratic legitimacy of unelected federal judges.[251] State court judges, however, are predominantly elected by popular vote, and state governments are only constrained by federal preclusion, fundamental rights, and the limitations set forth in their own constitutions.[252] The constitutional justifications that federal courts rely upon in narrowly construing federal negative rights, therefore, do not exist for state courts faced with the duty of interpreting state positive rights.[253]

While state positive rights are not based on original dual federalism limitations, and do not generally raise political legitimacy concerns, they can create practical difficulties for courts attempting to create a remedy for their violation.[254] The practical difficulty of constitutionalizing social entitlements is that they impose an affirmative duty on state governments to act in a particular way.[255] For example, the positive right in the New York Education Clause

[249] *See* Hershkoff, *supra* note 246, at 1136–37.

[250] *See id.* at 1137. Professor Hershkoff cites Professor Monaghan for the proposition that, "rationality review is concerned with ultra vires acts, and not with promoting the public good." *See id.* at 1137 & n.25; *see also* Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 33 (1983) (discussing the need to confine the government to its issued powers).

[251] *See* Hershkoff, *supra* note 246, at 1137, 1157.

[252] *See id.* at 1158 ("[J]udicial election . . . alter[s] the political vulnerability of state judges, subjecting them to a kind of popular veto that in theory sets a boundary or tether on judicial decisionmaking."); Adam Liptak, *Rendering Justice, With One Eye on Re-Election*, N.Y. TIMES (May 25, 2008), http://www.nytimes.com/2008/05/25/us/25exception.html?pagewanted=all ("Nationwide, 87 percent of all state court judges face elections, and 39 states elect at least some of their judges, according to the National Center for State Courts."); *see also Methods of Judicial Election: New York*, NAT'L CTR. FOR ST. CTS., http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=NY (last visited Mar. 30, 2016) (stating that New York trial courts are popularly elected while the appellate courts are appointed by the governor from a nominating committee, and in the case of the Court of Appeals, with the additional requirement of Senate consent).

[253] *See* Neuborne, *supra* note 247, at 893, 895 (arguing that unlike federal courts, state courts can justify the interpretation and application of positive rights on with a textual basis, tradition, that allows a local government to have flexibility to narrow rights locally and for democratic legitimacy).

[254] *See* Robin West, *A Response to Goodwin Liu*, 116 YALE L.J. POCKET PART 157, 160 (2006). Professor West describes positive rights as being unenforceable by the courts "as a practical matter." *See id.* I argue, however, that this is not always the case, as when plaintiffs challenge government conduct that is "action" rather than "inaction."

[255] *See* Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN ST. L. REV. 923, 934–35 (2011).

requires the legislature to pass legislation that provides a right to an entitlement.[256] If the legislature had originally refused to pass legislation that created a workable administrative system to provide the entitlement and accompanying funding, however, the New York courts could not have made the legislature act.[257] Rather, the state court could only declare the legislature's inaction unconstitutional or both declare the inaction unconstitutional *and* direct the legislature on how to act to cure the deficiency.[258] Courts, therefore, have no coercive power to make the legislature act to cure a constitutional deficiency in a vacuum, i.e., when there is an absence of state action.[259] In contrast, courts examining the constitutionality of traditional fundamental rights, expressed as what the government cannot do, can declare the government action unconstitutional and thereafter refuse to hear a suit. When a court strikes down a law, the practical effect returns the state of the law to constitutional equilibrium and prohibits enforcement of the stricken law through the courts. The courts do not have this option when the absence of a law is at issue.[260]

To be clear, the practical limitations on the judiciary's remedial power in positive right cases are the *expression* of the separation of governmental powers provided in state constitutions.[261] It is wrong to characterize a court's remedial directive to the executive or legislature to cure a positive right deficiency as necessarily commandeering the exercise of those branches' sole constitutional authority to enforce or legislate, respectively.[262] Rather, the practical limitations on the court's remedial power demonstrate that the court

[256] *See* Campaign for Fiscal Equity v. State, 655 N.E.2d 661, 666 (N.Y. 1995).

[257] Hershkoff & Loffredo, *supra* note 255, at 934–35.

[258] *Compare* Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 349 (N.Y. 2003) (defending specificity of remedial order), *with id.* at 368 (Read, J., dissenting) (characterizing the majority's remedy as "extraordinary" and "unprecedented" because it went beyond simply specifying constitutional deficiencies and imposed a focused remedial order on the legislature and executive to act in a specified manner).

[259] *See* Hershkoff & Loffredo, *supra* note 255, at 935.

[260] *See id.*

[261] *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 (1995) ("[T]he doctrine of separation of powers is a structural safeguard rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features (of which the conclusiveness of judicial judgments is assuredly one) it is a prophylactic device.").

[262] *See* Elbert P. Tuttle & Dean W. Russell, *Separation of Powers: Preserving Judicial Integrity: Some Comments on the Role of the Judiciary Under the "Blending" of Powers*, 37 EMORY L.J. 587, 588, 589–90 (1988) (noting that the original conception of the separation of powers involved some "blending" of powers around the periphery, to a make a more efficient government, as long as the separation of the core powers of each branch remained intact); *see also* Hershkoff & Loffredo, *supra* note 255, at 935 (noting that courts are incapable of enforcing an order that directs a coordinate branch to act).

is incapable of intruding into the purview of the coordinate branches.[263] What is at issue in some positive right cases, therefore, is not the elimination of the separation of powers, but the court's prudential concerns to preserve political capital and the integrity of the judiciary's office by not issuing directives that can simply be ignored, and otherwise respecting the functions of the coordinate branches and recognizing that those branches have unique resources that allow them to better determine which of many competing policy options best addresses a given issue at or above the constitutional minimum.[264]

Even these prudential concerns, however, are not present in all cases in which a court is required to fashion a remedy for a coordinate branch's violation of a positive right. State constitutions articulate rights in the negative and positive.[265] When a right is expressed positively, it imposes a duty on the legislature or executive to act in a particular way that provides an entitlement.[266] By implication, such a right also imposes the duty on both the legislature and executive to refrain from abridging the right to that entitlement once it is provided through incidental legislation or executive orders.[267] Accordingly, the practical limitations of the judicial remedy for the violation of a state's constitutionalized entitlement depend on whether plaintiffs challenge state action or inaction. Whereas challenged state inaction under a positive right claim gives rise to prudential concerns, challenged state action does not because courts can use the traditional negative-right remedy of statutory invalidation, striking the law down as unconstitutional and thereafter refusing to enforce the stricken law through the courts.[268]

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[263] *See* Hershkoff & Loffredo, *supra* note 255, at 935.

[264] *See* Hershkoff & Loffredo, *supra* note 255, at 968–70, 981 (arguing that states should not approach state positive right analysis with federal jurisprudential concerns); Ellen A. Peters, *Getting Away From the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1558–59 (1997) (explaining state jurisprudential concerns in the context of positive state rights); *see also* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1891–92 (2001) ("Institutional capacity, however, is in part an empirical question; in some states the legislature is at a comparative disadvantage to state courts.").

[265] *See* Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459, 1461 (2010).

[266] *See, e.g.*, State *ex rel.* Morrison v. Sebelius, 179 P.3d 366, 381 (Kan. 2008) ("To enforce a positive right, courts must mandate a positive remedy by requiring the state government to act and thereby fulfill the constitutional right.").

[267] *See* Archie v. Racine, 847 F.2d 1211, 1221, 1222 (7th Cir. 1988) (explaining the converse of this concept in the context of federal rights).

[268] *See Morrison*, 179 P.3d at 381.

B. The New York Court of Appeals' Implicit Action-Inaction Remedial Analysis Model in the Education Clause Cases

First, when plaintiffs successfully challenge state "inaction," the court may create a remedy that either imposes a duty to act specifically on the legislature or executive, i.e., *CFI II*, or issue a generalized pronouncement that the state inaction has caused a constitutional deficiency, with the hope that the other branches will figure out what that deficiency is and how to resolve it.[269] The former option is preferable because while both carry the same risk that a coordinate branch of government might ignore the court's order, a specific remedial order produces a more efficient result.[270] Imposing a duty that is precise allows the legislature and executive to more quickly and effectively produce an action that meets the constitution minimum.[271] The New York State Court of Appeals expressed this policy in *CFE II* while defending the specificity of its remedial order.[272] There, the court noted the lamentable "experience of . . . the New Jersey Supreme Court, which in its landmark education decision 30 years ago simply specified the constitutional deficiencies," rather than "focused directives."[273] The New Jersey court's vague order resulted in years of extended litigation over the course of more than "a dozen trips to the court."[274]

The downside of a court imposing either a duty to act, whether it be a specific directive or a general pronouncement, on a coordinate branch of government is that those branches might not comply with the order, and courts have no means to enforce it.[275] Thus, anytime a court interprets an obligation in its state constitution to be self-executing, and in turn, imposes on the legislature or executive a duty to act (rather than a duty to refrain from acting), the court must necessarily confront separation of powers limitations.[276] The more specific the act, however, the more likely that the court is not only imposing a duty on a coordinate branch to fulfill its constitutional obligation, but is also taking on one of the coordinate branch's roles

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[269] *Compare* Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 348–49 (N.Y. 2003) (taking the former position), *with id.* at 368 (Read, J., dissenting) (advocating for the latter position).

[270] *See id.* at 349 (majority opinion).

[271] *See id.*

[272] *See id.*

[273] *Id.*

[274] *See id.*

[275] *See* Hershkoff & Loffredo, *supra* note 255, at 935.

[276] *See id.* at 935, 936–37.

by selecting one of many competing policies, all of which might be constitutional.[277] Therefore, while a specific remedy in this context is most efficient, it is also the most risky, because it is most likely to intrude too far into the purview of a coordinate branch of state government, and thus, most likely to raise prudential concerns.[278]

Second, when plaintiffs challenge a government "action" as abridging a positive right, then a court need not delineate a specific duty to act at all, but may merely strike the law down as not meeting the constitutional minimum.[279] This judicial remedy does not impose any duty to act on a coordinate branch of government even though the constitutional language from which the duty is derived is articulated in the state constitution as an affirmative obligation on the state to act in a certain way.[280] Again, any affirmative obligation on the legislature or executive that is found in a state constitution includes *both* the duty to provide the specified right and, by implication, the duty to not abridge that right once it has been provided.[281] Because "action" rather than "inaction" is challenged in this scenario, there is no void to fill, no duty to act for the court to impose, and no risk of the court selecting one policy-based directive and thereby foreclosing other competing policy options that all also meet the constitutional minimum.[282] Rather, the court is asked simply to exercise traditional judicial review by determining whether the state has abridged a constitutional right, and if so, to declare that action unconstitutional.[283] While the court eliminates one policy-based directive as unconstitutional, it transfers the decision to the legislature or executive to select the best solution remaining among many.[284]

The input-output test adopted by the New York State Court of Appeals in *CFE II* implicitly contemplates this remedial framework.[285] The input-output test filters through only those cases

[277] *Compare Campaign for Fiscal Equity*, 801 N.E.2d at 349 (defending specific remedial order to coordinate branch), *with id.* at 368 (Read, J., dissenting) (criticizing such an order in favor of a general pronouncement).

[278] *See id.* at 368 (Read, J., dissenting).

[279] *See* Feldman, *supra* note 14, at 1084, 1085 & n.146.

[280] *See id.*

[281] *See* Hershkoff, *supra* note 246, at 1156 ("These positive rights are not simply structural limits on governmental power; they are also prescriptive duties compelling government to use such power to achieve constitutionally fixed social ends.").

[282] *See* Feldman, *supra* note 14, at 1084, 1085 & n.146.

[283] *See id.*

[284] *Id.* at 1084, 1085.

[285] Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 332, 335, 336, 338, 341 (N.Y. 2003).

in which a remedy can be attained.[286] For example, in the absence of an identifiable "input" that is causally related to the outputs that allegedly fall below the constitutional minimum, the court would be in the untenable position of having only the option to declare that a constitutional violation has occurred, and perhaps, that the legislature or executive should 'fix it,' whatever 'it' is.[287] Once a case has run the input-output gauntlet, only those constitutional deficiencies having been caused by an identified government action or inaction remain, which the court can then approach according to the remedial framework identified above.[288]

C. Analyzing the Davids *Case under the New York Positive Right Framework*

On appeal, the *Davids* plaintiffs must first successfully argue for the court to find that the right to a sound basic education under the New York Education Clause is applicable in the non-funding context.[289] Second, the plaintiffs must successfully argue that the teacher tenure challenge passes the input-output test.[290] Third, the plaintiffs will have to successfully argue that the teacher tenure challenge is not a political question that is best left to resolution by the legislature.[291]

In arguing this third point, plaintiffs should carefully dissect the separation of powers issue. First, it must be stressed that the right is one provided in the state constitution.[292] The issue of whether the Education Clause actually encompasses non-funding challenges is a wholly separate issue.[293] Once the court determines that the Education Clause includes such a right, it is the court's duty to apply it to the facts of the case.[294] If the court finds that the Education Clause imposes a duty on the legislature, then the court must recognize that it is the citizenry who imposed such a duty.[295] It is

[286] *Id.* at 334, 335, 343.

[287] *See id.* at 335, 340, 341; N.Y. Civil Liberties Union v. State, 824 N.E.2d 947, 950 (N.Y. 2005) ("An Education Article claim, however, requires a clear articulation of the asserted failings of the State, sufficient for the State to know what it will be expected to do should the plaintiffs prevail.").

[288] *See, e.g.*, *id.*

[289] *See supra* notes 22, 184–86 and accompanying text.

[290] *See supra* notes 186–87 and accompanying text.

[291] *See supra* notes 201–02, 204–05, 211, 221 and accompanying text.

[292] N.Y. CONST. art. XI, § 1.

[293] *See supra* text accompanying notes 22–24, 186–87.

[294] Campaign for Fiscal Equity v. State, 655 N.E.2d 661, 665 (N.Y. 1995) (citing Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 363 (N.Y. 1982)).

[295] *Id.*; ALEXANDER HAMILTON ET AL., THE FEDERALIST AND OTHER CONSTITUTIONAL

elementary that a constitutional provision has greater political legitimacy than a legislative provision. When the people have constitutionalized a right, it is the judiciary's prerogative and duty to uphold that right over the legislation, when the two conflict.[296] To hold otherwise would "affirm . . . that the representatives of the people are superior to the people themselves."[297]

By clarifying the challenged action and its relation to the requested remedy, the *Davids* plaintiffs can further ease the court's prudential concerns. This can be accomplished by distinguishing their case from the funding cases. Whereas the funding cases involved a challenge to government inaction, the *Davids* plaintiffs challenge government action.[298] By distinguishing their challenge of state action—in the form of the tenure statutes—from the challenged inaction in the funding cases, the *Davids* plaintiffs can demonstrate to the court that the prudential concerns inherent in inaction cases are not present in their own.[299] The *Davids* plaintiffs are not asking the court to select a substitute for the teacher tenure policies, nor are they asking the court to impose a duty on the legislature to act.[300] Rather, the *Davids* plaintiffs are merely asking the court to strike down a law and thereby cure a constitutional deficiency.[301] The constitutional viability of "teacher tenure" as an abstract policy is not at issue in *Davids* because the suit merely challenges the specific manifestation of teacher tenure in the New York tenure statutes. Were the court to invalidate the tenure laws, the legislature would still be able to implement any one or more of a multitude of variations of teacher tenure policy above the constitutional minimum—for example, adopting a similar set of teacher tenure laws while supplementing them with a more selective hiring process and greater compensation.[302] The *Davids* plaintiffs, therefore, ask the court to exercise the traditional judicial tool of judicial review, rather than

PAPERS 426 (E. H. Scott ed., 1898).

[296] HAMILTON ET AL., *supra* note 295, at 426.

[297] *Id.*

[298] *Compare Wright* Complaint, *supra* note 6, at 21, 22 (challenging statutes), *with Campaign for Fiscal Equity*, 655 N.E.2d at 655 (discussing challenges to legislative inaction).

[299] Feldman, *supra* note 14, at 1084, 1085 & n.146; *compare Wright* Complaint, *supra* note 6, at 21, 22, (challenging statutes), *with Campaign for Fiscal Equity*, 655 N.E.2d at 665 (discussing challenge to legislative inaction).

[300] *See Wright* Complaint, *supra* note 6, at 22–23.

[301] *Id.*

[302] *See generally* CTR. FOR AM. PROGRESS, *Ringing the Bell for K-12 Teacher Reform* 7 (Feb. 2010), https://www.americanprogress.org/wp-content/uploads/issues/2010/02/pdf/teacher_tenure.pdf (providing possible reform measures that do not eliminate teacher tenure).

selecting what policy must fill a void of government inaction.[303]

Finally, the funding cases did not merely challenge government inaction, but specifically the legislature's failure to use its power of the purse to provide a certain amount of funding in the education budget.[304] Such a provocative remedy is not required in the *Davids* case.[305] In many ways, therefore, the *Davids* case can be articulated as a narrower extension of the funding cases, and the *Davids* remedy not only avoids hurdling the dividing line between state powers, but also avoids the prudential concerns that arise in the positive right cases involving challenged government inaction.[306]

VI. CONCLUSION

Whether the Education Clause and the "right to a sound basic education" actually contain a right to something more than adequate public school funding is a *preliminary* issue that might preclude the *Davids* court from ever deciding the remedial issue. Thus, whether the right exists in the first place, and whether the *Davids* plaintiffs can surmount their evidentiary burden are difficult but distinct issues from the question of remedy. Separating these issues is essential to maintaining a robust state constitutional jurisprudence that preserves protective avenues for state citizens to place checks on their legislatures. State positive rights critics primarily direct their arguments at the remedy, but build their arguments on premises that question the distinct preliminary issues of interpretation and evidence. Courts should avoid this hodgepodge argument and analyze each stage of positive right analysis separately.

When courts proceed in this manner, the ironic flaw in the position of the positive rights critics is laid bare. Assuming that a positive right clearly exists, and the evidence supports the claim, positive rights critics are left with nothing to argue except: positive constitutional rights themselves reflect poor public policy because they constitutionalize nontraditional public policies that the state courts risk deciding incorrectly, therefore courts should selectively apply their constitutions to decide traditional policies familiar to the

[303] *Id.*; Feldman, *supra* note 14, at 1084, 1085 & n.146.

[304] *See Campaign for Fiscal Equity*, 655 N.E.2d at 682 (Simons, J., dissenting) (arguing that the majority's approach would lead to a judicially imposed remedy that encroached on the "[l]egislature's power to order [s]tate priorities and allocate the [s]tate's limited resources.").

[305] *See id.*; *Wright* Complaint, *supra* note 6, at 21, 22.

[306] *Campaign for Fiscal Equity*, 655 N.E.2d at 682 (Simons, J., dissenting); *Wright* Complaint, *supra* note 6, at 21, 22; Feldman, *supra* note 14, at 1084, 1085 n.146.

courts under fundamental rights analysis while leaving all others to the sole decision-making of the other branches of government.

At best, this practice ignores the greater political legitimacy of the constitution to give effect to the lesser political legitimacy of legislation for the dubious purpose of protecting the citizenry from harming themselves through poorly thought out constitutional amendments. At worst, it removes an increasingly critical means for citizens to constrain the selfish motives of their elected representatives beyond elections. In any case, the action-inaction remedial analysis makes clear that positive right action challenges do not require the courts to choose any policy at all. While practical limits may curb the effectiveness of judicial remedies for legislative and executive inaction, state courts nonetheless have the duty to apply their states' constitutions, and not decide the wisdom of underlying constitutional policies.