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PERSPECTIVE

Progress begins with dissent

By Ralia Polechronis
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As lawyers, we are driven by facts and their application to the law. At times, however, no matter how compelling the facts, no matter how clear the problem is, our laws — and judges' interpretations of them — are slow to provide the proper remedy. Ensuring an adequate and equal public education for every student in this nation persists as one of the most critical issues of our time. And yet, the California Supreme Court, in a 4-3 decision, denied the plaintiffs' petition to review *Vergara v. California*, a groundbreaking case that revealed significant inequities in teacher quality throughout California's public schools.

In *Vergara*, nine student-plaintiffs were the first to challenge teacher tenure, dismissal and quality-blind layoff laws as violating their constitutional rights with compelling facts acknowledged by every level of the California court system. The trial court proclaimed that the evidence of detrimental effects caused by grossly ineffective teachers "is compelling" and "shocks the conscience." The Court of Appeal, even in its decision to reverse the trial court, called the facts "troubling" and acknowledged that they showed "deplorable staffing decisions ... that have a deleterious impact on poor and minority students in California's public schools." And with the California Supreme Court's decision to deny the plaintiffs' petition for review, two of the three dissenting justices issued lengthy and strongly worded opinions, which not only disagreed with the court's failure to review, but also highlighted the egregious facts revealed in the trial court and the errors of law in the intermediate court's reversal of the plaintiffs' trial victory.

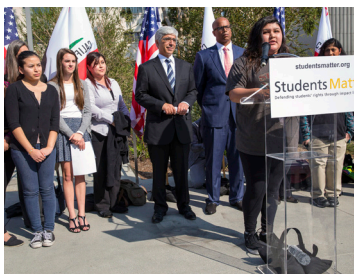
Justice Mariano-Florentino Cuéllar recognized that the "harmful consequences to a child's education caused by grossly ineffective teachers — the evidence for which the tri-

al court found compelling — are no less grave than those resulting from a shortened period of instruction or financial shortfalls." Justice Goodwin Liu's statement asserted that "there is no basis in law or in logic for the Court of Appeal's central holding in this case" and that the case warranted review due to "the gravity of the trial court's findings," "the apparent error in the Court of Appeal's equal protection analysis," and "the undeniable statewide importance of the issues presented."

Vergara was a case of first impression, and it is not uncommon under these circumstances that courts may disagree on how to apply the law. However, the California Supreme Court's dissenting opinions provide strong affirmations that challenges to these laws must continue. Like other strong dissenting opinions that have shaped our nation's history, the words of Justices Liu and Cuéllar plot a path forward.

Although lacking the force of law, dissents have historically provided an indication that the status quo must shift. Justice Marshall Harlan's dissent in *Plessy v. Ferguson*, where he explained how racial segregation violated the Constitution, paved the road for the Supreme Court to declare de jure racial segregation a violation of the equal protection clause of the 14th Amendment in *Brown v. Board of Education*. Similarly, Justice Harry Blackmun's dissenting position in *Bowers v. Hardwick* was adopted as the rule of law in *Lawrence v. Texas*, when the court invalidated state sodomy laws in the United States as invasions of vital interests in liberty and privacy protected by the due process clause. And Justice Harlan Stone's dissent in *Minersville School District v. Gobitis*, in which he declared religious rights of public school students must be upheld, was accepted as law just three years later in *West Virginia State Board of Education v. Barnette*.

In each of these instances, and the many others that have shaped our



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nation's history, a social movement provides the momentum for such dissenting views to evolve into majority opinions. In the past, activists for civil rights and religious freedom have propelled these dissenting views forward. For *Vergara*, the education reform movement has similarly taken root, with parents around the country asking courts to review similar laws.

There are currently lawsuits pending in New York and Minnesota challenging laws similar to those in *Vergara*. In 2014, New York families filed *Wright v. New York*, alleging that teacher tenure, dismissal and quality-blind layoff laws result in some or all students receiving less than the "sound basic education" guaranteed by the New York Constitution. In 2016, Minnesota families filed *Forslund v. Minnesota*, which in addition to equal protection claims also raises a direct claim under the Education Article of the Minnesota Constitution, as well as a due process claim.

All the California judges who opined in *Vergara* agreed about the facts presented — they were deplorable. It is only a matter of time until the application of law will lead

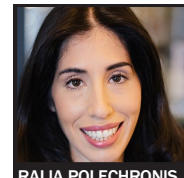
to a majority opinion affirming the unconstitutionality of outsized job protections that keep chronically ineffective teachers in classrooms. In New York and Minnesota, where the courts are considering both similar and different legal claims as those raised in *Vergara*, the foundation has been laid for this change to take root.

Every movement of social progress starts with a dissenter — the person or group that is brave enough to stand up and declare that the status quo is not working. Beatriz Vergara and her eight co-plaintiffs were the first to bring this issue to the courts, and the affirmation of their cause from the dissenting California Supreme Court justices will be furthered by the *Wright* plaintiffs in New York, the *Forslund* plaintiffs in Minnesota, and other brave parents and students who continue to push forward until a student's right to an equal and adequate education is not subordinated to laws protecting ineffective teachers.

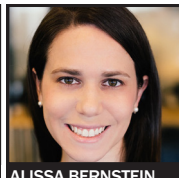
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