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PERSPECTIVE

## Vergara facts meet the test

By Ralia Polechronis  
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The California Supreme Court has the opportunity to safeguard the rights of millions of schoolchildren if it agrees to hear the landmark case *Vergara v. California*, S234741, challenging the constitutionality of the state's flawed teacher employment statutes which result in lifetime job protection for ineffective teachers at the expense of students' fundamental right to an education.

After a 10-week trial in the winter of 2014, the Los Angeles County Superior Court declared California's tenure, dismissal and seniority-based lay-off statutes unconstitutional, stating that they "impose a real and appreciable impact on students' fundamental right to equality of education and that they impose a disproportionate burden on poor and minority students." *Vergara v. California*, BC484642 (L.A. Super. Ct., June 10, 2014).

Even the Court of Appeal, which reversed this decision in a misguided ruling, called the facts revealed at trial "troubling," and said that the "challenged statutes inevitably lead to greater disruption at schools serving poor and minority students," and that the statutes may "lead to a higher number of grossly ineffective teachers being in the educational system." *Vergara v. California*, 246 Cal. App. 4th 619 (2016), reh'g denied (May 3, 2016), as modified (May 3, 2016), review filed (May 24, 2016).

These concessions beg the question: Why didn't the Court of Appeal affirm the decision declaring California's teacher employment statutes unconstitutional? Because instead of applying strict scrutiny to evaluate the infringement of the students' fundamental right to an education, the court sidestepped this duty, asserting that a supposed threshold inquiry had not been met. The intermediate court reversed based on an erroneous requirement that the plaintiffs must be members of a "sufficiently identifiable" class. The court wrote that *Vergara's* subset of students, who had been harmed as a result of having an ineffective teacher, were "nothing more than a random assortment of students"

and "subject to constant flux" which was not a sufficiently distinct group to warrant equal protection of the law.

The Court of Appeal in *Vergara* first erred by imposing a threshold requirement to plaintiffs' fundamental right equal protection claim that it erroneously repurposed from voter dilution cases. The California Constitution and the California Supreme Court acknowledge the right to education as fundamental and the infringement of that right is sufficient to state a claim under the equal protection clause where two groups are being treated differently. Indeed, in an amicus curiae letter supporting the students' petition for review, a distinguished group of constitutional law scholars explained that "in codifying a right to education in the Constitution, the people of California eliminated any basis the Court of Appeal might have had for imposing a 'common characteristic' requirement" in *Vergara*.

But even if the supposed threshold requirement applies — which it does not — the facts in *Vergara* meet the test. In *Altadena Library Dist. v. Bloodgood*, cited in the appellate court's opinion, the plaintiffs were part of a majority of voters who voted in favor of at least one new tax levy, but who lost the vote due to a statute that required a supermajority win to impose the levy. 192 Cal. App. 3d 585, 591 (1987). The *Altadena* court reasoned that the plaintiffs could not sustain their equal protection claim because they could be both within and outside the class by voting in favor of and against different tax levies in the same election. In other words, the supermajority requirement could both be an advantage and disadvantage. According to the court, this concurrent positioning created an improper fluidity in their class identity.

However, this plainly does not apply to *Vergara*. First, students subjected to ineffective teachers as a result of the challenged statutes cannot simultaneously be within and outside the class. As the plaintiffs' evidence revealed, being assigned to a single ineffective teacher causes a student to suffer long-term and permanent harm, including an average loss of approximately \$50,000



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in lifetime earnings and months of learning. Because these measures were articulated in terms of a lifetime impact, it is clear that the harm is not reversed by later or simultaneous assignments to effective teachers, whether in other subjects or other grades. Put another way, in *Vergara*, once a student has been assigned to an ineffective teacher, she is a lifetime member of the "harmed class."

Second, the class of students in *Vergara* is identifiable and directly accords with California Supreme Court precedent in matters of education. In the school closure case *Butt v. California*, the class of students harmed by a deficient education was identified by differences in educational experiences according to school district. 4 Cal. 4th 668 (1992). Correspondingly, in *Vergara*, students harmed by a deficient education are identified by differences in educational experiences according to classroom or teacher. In other words, just as the court recognized educational harm resulting from attendance in particular school districts as a distinguishing characteristic in *Butt* (and in predecessor cases like *Serrano v. Priest*), the harm suffered in the classrooms of ineffective teachers must be equally deemed a distinguishing characteristic.

Setting aside the Court of Appeal's legal analysis, the real world implications of its decision are troubling. In shutting out the students' claims, the harm suffered — which even the ap-

pellate court conceded had "a deleterious impact" on students — completely evaded judicial review. Objective judicial review is especially critical in cases like *Vergara*, where the legislative and collective bargaining process is rife with special political interests, and the persons most affected by that process — children — do not even have a seat at the table.

Put simply, the California Supreme Court should hear the students' appeal and reinstate the trial court's ruling. Public schools were created for the benefit of children, and all students deserve to be taught by effective teachers. But the current laws too often provide them with just the opposite. By applying the state's constitutional protections for public education, California's Supreme Court can uphold the rights of children and provide a brighter future for generations of students across the state.

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