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## Vergara is an invitation for collaboration

**William S. Koski** is a professor and Stanford Law School and Stanford Graduate School of Education. He is the director of the Youth & Education Law Project at Mills Legal Clinic.



Only 16 pages long, Judge Rolf Treu's opinion in *Vergara v. California*, 484642 (Los Angeles County Super. Ct., filed May 14, 2012), sent shockwaves throughout California and the nation as it struck down five statutes that provide fundamental employment protections for teachers: tenure, due process protections and

seniority-based, reduction-in-force rules. Treu concluded that the challenged statutes "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." While the injunctive orders have been stayed pending appeal and thus will have no direct and immediate impact on our schools, the case will no doubt influence the ongoing political and policy debates surrounding the best ways to improve the quality of our teaching force and close the "teacher quality gap" between poor and affluent schools. The ruling may also have opened the door to other lawsuits that seek to reform California's public schools.

Throughout California and the nation, conservatives and more than a few ("reform") progressives, including U.S. Secretary of Education Arne Duncan, lauded Treu's decision as a further step toward loosening the grip of teacher unions and providing greater discretion to administrators for hiring, firing and assigning teachers. But that enthusiasm may be dampened when the legal standard and the logic of the decision is applied well beyond teacher employment protections. Citing the landmark *Serrano v. Priest*, 18 Cal. 3d 728 (1976) (*Serrano II*), and *Butt v. California*, 4 Cal. 4th 668 (1992), decisions, Treu emphasized that the *Vergara* plaintiffs' claim was directed at the *quality* of the educational experience and any policy that adversely affects the quality of a child's education should be subjected to strict scrutiny. And this makes sense: Without ensuring a level of educational quality, the fundamental right to an education is meaningless.

But what challenges will go to court after teacher quality? Do exclusionary school discipline policies that disproportionately impact poor and minority children stand up to strict scrutiny? Does the fundamental right to an education include quality preschools the way it includes "effective" teachers?

Elsewhere conservatives have lamented the lengthy involvement of the courts in educational policymaking and reform, such as the New Jersey Supreme Court's epic *Abbott* series of cases (*Abbott XX* at last count). There, the court has not only directed increased spending in the 31 low-income plaintiff districts, it has episodically ordered specific educational policy reforms, including the implementation of whole-school reform models and preschools. With *Vergara* in hand, reformers may similarly turn to California's courts to advance their agendas. One can hear the conservative cries of "judicial activism" already.

*Vergara* will also have impact beyond the courtroom, as it will be injected into the ongoing debate over closing the teacher quality gap. Nearly everyone agrees that teachers are the most important school resource that affect student performance. It's also beyond dispute that schools with high percentages of low-income, African-American and Latino students have less experienced and less qualified teachers than those schools with affluent and white students. According to a recent California study, students in high-minority schools are five times more likely to have an underprepared teacher than their peers attending low minority schools.

There is heated disagreement, however, over the cause of the teacher quality gap.

### U.S. Court of Appeals for the 9th Circuit State election law on initiative's backers overturned by 9th Circuit

Corporations or associations can hide the identity of individual backers as they collect signatures to place initiatives on the ballot, a divided 9th U.S. Circuit Court of Appeals panel held on Monday in overruling a California election law

### Criminal

#### High court to decide on warrantless cell phone search case

The U.S. Supreme Court's upcoming ruling in *Riley v. California* would not only impact arrests across the country, but could signal the court's developing attitude toward technology and the law, legal observers say.

### U.S. Supreme Court

#### Justices give cops too much deference

**Erwin Chemerinsky** on how the U.S. high court has made it extremely difficult to successfully sue police for their conduct in high-speed chases, even when they cause the deaths of innocent people.

### Mergers & Acquisitions

#### Dealmakers

A roundup of recent mergers and acquisitions and financing activity and the lawyers involved.

### California Courts of Appeal

#### Demand letter threat is extortion, state appellate court rules

A disgruntled employee crossed the line into extortion when he threatened to expose his boss for criminal malfeasance unless he settled a lawsuit, a state court of appeal ruled Monday.

### Government

#### Boost planned for high-speed rail, but suits loom

California's beleaguered High Speed Rail project may get a \$250 million boost from this year's budget. But the plan, which would send "carbon tax" revenue to the \$68 billion transportation project, may be challenged in court.

### Mergers & Acquisitions

#### Skadden, Wilson Sonsini handle SanDisk's acquisition of Fusion-io

SanDisk Corp. made a \$1.1 billion bid to bolster its data center business with the acquisition of flash memory technology developer Fusion-io Inc., a deal announced Monday.

### U.S. Court of Appeals for the 9th Circuit Truck drivers are not independent contractors, 9th Circuit rules

A Southern District trial court got it wrong when deciding a group of truck drivers were properly classified as independent contractors, a 9th U.S. Circuit Court of Appeals panel ruled in a decision Monday.

### Civil Rights

#### Unusual settlement resolves min



Some argue that schools require more resources to attract bright, young minds to the teaching profession and that poor and minority schools particularly need more resources and better working conditions to attract and retain high quality teachers. For them, the issue is one of additional funding to improve the teaching workforce, improve the working conditions in poor schools, and create incentives to teach in the hardest-to-staff schools.

Indeed, the *Serrano II* court itself noted the power of resources to improve teacher quality, as "high wealth districts [have] a substantial advantage in obtaining higher quality staff, program expansion and variety, beneficial teacher-pupil ratios and class sizes, modern equipment and materials, and high quality buildings." But, some 40 years after *Serrano II*, California's cost-adjusted per-pupil funding has plummeted to 49th in the nation, while our teacher and staff-to-student ratios are at the bottom of national rankings.

For others, including the *Vergara* plaintiffs, the causes of the teacher quality gap are the teacher employment protections and seniority rules that tie the hands of administrators and prevent them from hiring, firing and assigning teachers to meet the needs of their students. (N.B., the California Teachers Association (CTA), and the California Federation of Teachers (CFT) argued in *Vergara* that those protections encourage promising young minds to become teachers, despite the poor pay.) This group, which includes the *Vergara* plaintiffs' supporting organization, Students Matter, and its primary benefactor, Silicon Valley entrepreneur David Welch, as well as former D.C. schools chancellor Michelle Rhee, has taken its case to legislatures, the media and now the courts. Their aim is to remove the legal and contractual barriers to not only hiring, firing and assigning teachers, but also those barriers to compensating teachers for performance.

It may be the case that certain teacher employment protections exacerbate the teacher quality gap and therefore should be reformed. It may also be the case that greater flexibility to reward teachers for performance or for taking on the toughest assignments might help to close the gap. Yet changing teacher employment rules may be a necessary condition for reform, but it is hardly sufficient. Without additional resources to attract teachers to failing schools, we won't be able to fire our way out this problem. Equally important, finding the right mix of administrative discretion and financial incentives is a difficult, often context-dependent policy question that ought to be addressed in Sacramento and school boardrooms, not a Los Angeles courtroom.

And those questions are being addressed. For instance, although the State Board of Education ultimately rejected the proposal, the San Jose Unified School District recently joined its teachers union to request that the current length of time to tenure be increased from two to three years. Moreover, at least three bills have been introduced in Sacramento to streamline the teacher dismissal process, particularly for those who have engaged in egregious misconduct.

So how will *Vergara* affect those conversations? It's entirely possible that the lawsuit and Treu's decision will further polarize an already super-heated debate making collaborative reform impossible. But I'm going to be a Pollyanna. I take *Vergara* as an invitation to the CTA and CFT to come to the table and talk seriously about addressing those aspects of California law and collective bargaining agreements that unduly hinder experimentation and reform. Perhaps some districts and their teacher unions could agree on reforms to teacher evaluation to include meaningful peer review, student-performance-based measures, and high quality observational methods. Perhaps some could revisit the step-and-column salary schedule that rewards teachers only for years of experience and level of education, not the difficulty of assignment or the responsibilities they undertake. Perhaps three or four years to tenure - instead of two - would benefit both newbie teachers who are struggling in the classroom and administrators who feel that two years is not enough time to evaluate those newbies. I don't know whether any of this is possible or whether it will be effective, but it strikes me that collaborative efforts toward reform and retaining control over the outcome sure beat a trial.

I also take Treu's decision as an invitation to the *Vergara* plaintiffs and their supporters to deploy their legal talents, media machinery and resources to support those who are fighting for greater resources for our public schools. Improving the quality of California's schools and closing the teacher quality gap is what's motivating their advocacy agenda. But should they refuse to advocate for other ways to improve the quality and equality of teaching in our schools that professed agenda begins to look like a cynical smokescreen for something else. Teachers and would-be teachers, like the rest of us, are motivated by financial incentives, better working conditions and visionary leadership. This is what improves schools. I can only hope that these central tenets can unite all sides of this critical debate.

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### **voting lawsuit**

In a rare settlement of a voting rights case, the Santa Clarita Community College District will now elect board of trustee members through a "cumulative" system, allowing people to cast multiple votes for one candidate.

### **Bankruptcy**

#### **Heller ruling aids partner mobility**

A California court recently ruled that a dissolved law firm is not entitled to a share of the profits realized by a successor firm on "unfinished business." By **Gary M. Kaplan**

### **Education**

#### ***Vergara* is an invitation for collaboration**

The decision is an invitation for unions to come to the table and talk seriously about addressing those aspects of collective bargaining agreements that unduly hinder experimentation and reform. By **William S. Koski**

#### **The first steps of education reform?**

While *Vergara* works its way through the appeals process, AB 215 is waiting for the governor's signature. By **Michele M. Goldsmith**

### **Perspective**

#### **State laws fail to keep up with the billowing cloud**

California's consumer protection laws are failing to keep up with the inevitable advances in data management and storage. By **Brian Kabateck and Shant Karnikian**

### **Judicial Profile**

#### **Amy M. Pellman**

Superior Court Judge Los Angeles County (Edmund D. Edelman Children's Court)

### **Legal Ethics & Professional Responsibility**

#### **Mind Over Matter: Law schools add meditation techniques to curricula**

Across the country, a small but growing corps of law faculty are using the technique or creating courses that include instruction in what has become known as "mindfulness."

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