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Teacher-Tenure Decision Is NOT an Abuse of Judicial Power

Vergara precedents are multiple, judge's actions restrained

In June, a judge declared California's seniority protection laws unconstitutional. Citing the 1954 *Brown* decision, Judge Rolf Treu, in *Vergara v. California*, declared the laws in violation of the equal protection clause of the California state constitution because they limited minority access to effective teachers.

Teachers unions are aghast that a judge has interfered with their special privileges. Their close ally, Michael Rebell, who has filed multiple adequacy lawsuits against state legislatures, told a reporter, "It is basically unprecedented for a court to get into the weeds of a controversial education policy matter like this." Invoking judicial restraint doctrine, he expects other judges to "defer to the legislative branch, which...knows more about the workings of these policies."

Given Rebell's connections to teachers unions, his conversion to judicial restraint doctrine is only to be expected. More surprising are the criticisms of *Vergara* voiced by *Education Next's* own judicial observers, Martha Derthick and Joshua Dunn. Also calling for judicial restraint, they argue that the principles enunciated in *Vergara* could allow any child to file suit against his teacher. The reaction of Frederick Hess, of the American Enterprise Institute and *Education Next*, is no less apocalyptic: "If courts decide that civil-rights claims can be stretched to dictate personnel management in education, it's hard to see where they would stop."

But Judge Treu did not dictate to the California legislature; he said only that its current policies are unconstitutional. Nor does he require any specific new remedy, leaving that job to the legislature.

This is hardly the first California education law to be declared unconstitutional. In the famous *Serrano* case (1977), the court ruled the state's spending formula unconstitutional on disparate-impact grounds. Subsequently, Rebell and other union-backed attorneys persuaded state courts from Kentucky and New Jersey to New York and Washington to declare state expenditure policies unconstitutional on the grounds that they are "inadequate," a standard so vague and amorphous as to make *Vergara* seem as precise as a mathematical equation.

Nor have the courts balked at ordering legislatures to spend millions—even billions—more. At Rebell's request, a trial

court judge in 2006 ordered the New York legislature to send New York City an additional \$4.7 billion (or more than \$5,000 per student).

Judicial restraint became a celebrated doctrine when Oliver Wendell Holmes said laws should not be declared unconstitutional without considering them "in the light of our whole experience." That phrase was used by Felix Frankfurter to defend New Deal legislation at a time when President Franklin Roosevelt found himself at loggerheads with the Supreme Court.

But since *Brown*, courts have felt no compulsion to defer to the legislature when they identify violations of civil liberties and civil rights. The Supreme Court has told schools they must allow free speech, even when duly elected school boards think students are there to learn, not to proclaim. When students are accused of disrupting the school, boards cannot suspend them for more than a few days unless the student has been given the right of counsel and cross-examination. If judges can dictate the mechanisms of discipline enforcement, certainly they can review laws affecting student access to effective teachers.

Nor does Treu violate Holmes's injunction to look at the case "in light of our whole experience." The plaintiffs detailed the many ways in which seniority protection placed teacher interests ahead of those of minority students.

Judicial action is most appropriate when legislatures have been captured by special interests. Just as the *Brown* decision broke the segregation logjam, so *Vergara* provides an opportunity to break the union stranglehold over teacher-tenure policy. Similar suits are popping up in New York, Connecticut, and New Jersey. The U.S. Department of Education has just asked states to demonstrate the ways in which they are ensuring equal student access to effective teachers. Public opposition to teacher tenure outweighs support by a 2:1 margin. All of a sudden, the powerful California Teachers Association is on the defensive. The court has done its job.

A handwritten signature in black ink that reads "Paul E. Peterson". The signature is fluid and cursive.

Paul E. Peterson

MISSION STATEMENT In the stormy seas of school reform, this journal will steer a steady course, presenting the facts as best they can be determined, giving voice (without fear or favor) to worthy research, sound ideas, and responsible arguments. Bold change is needed in American K-12 education, but *Education Next* partakes of no program, campaign, or ideology. It goes where the evidence points.
