

# Vergara: Teacher Tenure Is Not Necessarily an Equal Protection Issue

This week a petition for review was filed in *Vergara v. State of California* (S234741), potentially setting the stage for SCOCA to settle the great matter pending in education law today. The issue in that case is framed as whether teacher tenure violates students' right to an effective education. As we explain below, that is not the real question, and teacher tenure is only one factor in evaluating an education right claim based on equal protection.

The California constitution protects an individual right to an education. As our colleague Anne Gordon explained in her article, *California Constitutional Law: The Right to an Adequate Education*, there are important unanswered questions regarding that right: what is the proper qualitative measure of that right, and how are courts to compare different educations to judge whether equality exists? Anne's article covers the first question, arguing for a "citizenship" approach in which courts evaluate whether schools provide enough education to teach students to be citizens. Here we address the second question: how to sort and evaluate the variables when comparing two educations.

On the first question, concerning the qualitative measure of the right, the basic problem is one of definition. What *kind* of education does the right guarantee? Consider two high school students, David and Erin. David attends a large metropolitan vocational school with a high student-to-teacher ratio, few extracurricular activities, and little funding. Erin attends a small suburban college-prep school with a low student-to-teacher ratio, many extracurricular options, and substantial funding. Both graduate. They both have diplomas, but their educational programs were starkly distinct. For now, let's define an education's "quality" as how well it prepares a new graduate to participate in civil society. David's education mainly prepared him to be an auto mechanic, while Erin's focused on sending her to college. Despite the programmatic differences, it is difficult to say that this was an

equal protection violation—after all, both have high school diplomas, and both will be contributing members of society. Yet it is clear that these two students were presented with very different outcome-determinative programmatic opportunities. If Erin wanted to work on cars, and David wanted to go to college, those futures were largely foreclosed to them. Were these students entitled to a specific kind of education, or just the basics?

Turning to the second question concerning the metrics for comparison, which matter and how can they be normalized to permit fair comparisons? Consider two students at the same high school, Anna and Richard. Anna is diligent and studious, achieving numerous accolades on her way to graduating summa cum laude as valedictorian. Richard has a bad attitude, daydreams during class, and barely qualifies to graduate. Both have the same diploma from the same school and were presented with the same educational opportunities, but the two educational experiences are distinct. Anna may have achieved a better outcome than Richard. But presently there is no test for determining whether they received the same education. Should a court look to the real-world value of knowledge gained from the classroom, the percentage of graduates who are pursuing post-secondary education or are readily employed, or a standardized graduation exit examination score as a metric for readiness to participate in society? There is no constitutional indication in favor of any one approach. Nor does common sense provide the answer—any of those approaches may be reasonable.

To make matters worse, there is an analytical black hole to be avoided here: should the analysis account for individual experience? In the traditional equal protection analysis, opportunities or outcomes for two groups are compared with binary simplicity to reveal an impermissible disparity: whites may attend school X, nonwhites may not; heterosexual couples may marry, others may not.[1] But here using equal protection to true up the educations provided to two individuals necessarily invokes far harder definitional and qualitative questions than traditional equal protection analysis is equipped to handle. That is especially true if subjective factors are considered.

A court attempting to distill the metrics for comparing two outcomes will struggle with this inherent dilemma between the seductively objective outcome indicators,

and the rabbit hole of accounting for an individual's subjective experience. We think that the only justifiable approach here is an objective one. And while we love the clarity of bright-line rules as much as anyone, the reality that so many potential factors exist here naturally calls for a multi-factor balancing test. To resolve education right cases based on an equal protection argument, we suggest the following approach.

A court should focus on comparing objective, empirical outcome indicators for the relevant schools, for example: funding, standardized test scores, graduation and dropout rates, class sizes (graduating and average per-classroom), teacher-student ratios, college matriculation rates, post-graduation employment rates, and extracurricular programs. To prevent anomalous results from comparing outliers, schools as a whole should be considered, not outcomes for individual students.[2] The ultimate question is this: considering all the objective factors, on balance, are the two educational programs sufficiently similar to be substantially comparable?

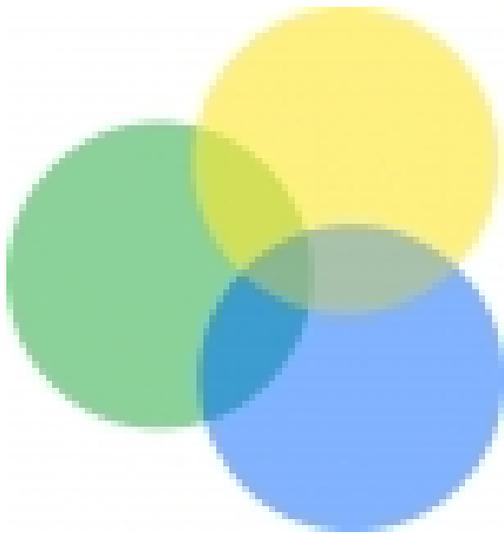
We recognize a problem that will persist with this approach: other environmental factors, particularly socioeconomic status and parental support, can significantly impact these "objective" outcomes independent of education or school quality. For example, a parent's ability to pay for a premium SAT course can have a far greater impact on test scores than education "quality," and that can mitigate the negative effect of other variables to result in improved college matriculation. Even if these environmental factors are not included in the analysis (due to being hard to quantify, or as too subjective), they still may impact the empirical outcome indicia even when comparing schools on the whole. This problem of environmental X-factor impact is a choice of two imponderables: how to account for the unquantifiable effect of a student's environment, versus omitting that effect precisely because it is so difficult to account for. The better course is to exclude the non-quantifiable subjective environmental variables (such as at-home support); to do otherwise would destroy the test's objectivity. And environmental factors with quantifiable measures (such as parental income or number of hours children are home alone each day) can be controlled for in the analysis so that the outcome measure more closely identifies "education quality." [3]

Returning to *Vergara*, in light of this analysis it becomes apparent that teacher

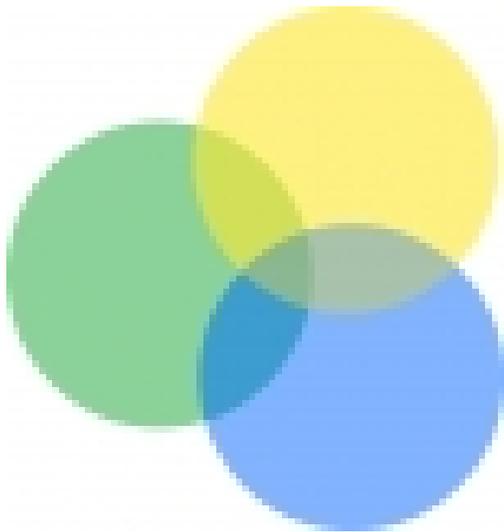
tenure is neither the main issue, nor even an important one, for resolving the great matter. Instead, whether teachers at a given school have tenure is only one of several factors a court could consider when comparing the education provided at that school against the education provided at a school that hires teachers by the hour. And there are the evidentiary problems of proving that variation in the objective factors exists, and that it was caused by tenure. Thus, viewed from the macro perspective, *Vergara* is only one piece of a larger puzzle. Commentators reacting to the news of the petition for review being filed are skeptical that SCOCA will grant review. But this case could be a good vehicle for the court to take up the great matter, clarify the scope of the education right, and give courts guidance on how to compare different educations.

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[1] True, even in the usual equal protection analysis there can be definitional issues (What percent white qualifies as nonwhite? What does “white” mean anyway?) and qualitative questions (Are civil unions or domestic partnerships the same as marriage, or is that separate but equal?), but let’s keep it simple.

[2] It is easy to envision an approach that permits one-to-one comparisons of individuals at the same school (or across different schools or school districts) quickly evolving into a new constitutional tort. And one can anticipate comparisons being made with ever-increasing focus, zooming in from a district, to a school, to a program, to a class, to an individual classroom. Thus, while the right may be individual, to maintain the test’s objectivity the focus should stay on the programmatic features of each school as a whole.

[3] Quantifiable environmental factors can be factored out with an analysis of variance or regression analysis, improving the overall measure of education quality without those confounds.