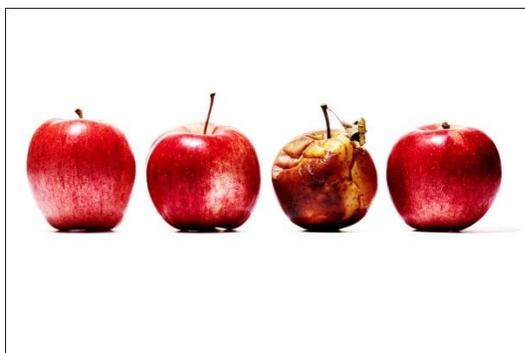


# The War on Teacher Tenure

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It's really difficult to fire a bad teacher. A group of Silicon Valley investors want to change that.

On a warm day in early June, a Los Angeles County trial-court judge, Rolf M. Treu, pink-cheeked beneath a trim white beard, dropped a bombshell on the American public-school system.

Ruling in *Vergara v. California*, Treu struck down five decades-old California laws governing teacher tenure and other job protections on the grounds that they violate the state's constitution.

In his 4,000-word decision, he bounded through an unusually short explanation of what was an unprecedented interpretation of the law. Step 1: Tenure and other job protections make it harder to fire teachers and therefore effectively work to keep bad ones in the classroom. Step 2: Bad teachers "substantially undermine" a child's education. That, Treu wrote, not only "shocks the conscience" but also violates the students' right to a "basic equality of educational opportunity" as enshrined in California's constitution.

It was the first time, in California or anywhere else, that a court had linked the quality of a teacher, as measured by student test scores, to a pupil's right to an education. What happened next was predictable: the educational establishment hit DEFCON 1. State and national teachers' unions decried the ruling as part of a subversive effort to destroy labor unions and pointed, truthfully, to the fact that the lawsuit was launched and underwritten by a Silicon Valley muckety-muck who lives in one of the fanciest ZIP codes in America. Others painted Treu, who was appointed by Republican Governor Pete Wilson, as a brazen partisan. Meanwhile, U.S. Secretary of Education Arne Duncan and former D.C. chancellor of schools Michelle Rhee praised the decision for challenging the "broken status quo." Other education reformers,

including former CNN anchor turned education activist Campbell Brown, pronounced it the most important civil rights suit in decades and filed two copycat cases in New York.

On some level, these reactions were premature. Treu's decision holds no precedent-setting power and won't affect any California law unless an appeals court upholds the ruling sometime next year. Both the state and the teachers' unions have appealed and are awaiting a trial date. But on another level, the Vergara case is a powerful proxy for a broader war over the future of education in this country.

The reform movement today is led not by grassroots activists or union leaders but by Silicon Valley business types and billionaires. It is fought not through ballot boxes or on the floors of hamstrung state legislatures but in closed-door meetings and at courthouses. And it will not be won incrementally, through painstaking compromise with multiple stakeholders, but through sweeping decisions—judicial and otherwise—made possible by the tactical application of vast personal fortunes.

It is a reflection of our politics that no one elected these men to take on the knotty problem of fixing our public schools, but here they are anyway, fighting for what they firmly believe is in the public interest. David Welch, the 53-year-old engineer and businessman behind Vergara, is the least well known of a half-dozen tech titans who are making the repair of public education something of a second career. In the past 15 years, Microsoft's Bill Gates has poured billions into everything from helping states write and implement the Common Core State Standards to building a new history curriculum.

Facebook's Mark Zuckerberg has dropped \$220 million on public schools in Newark, N.J., and the San Francisco Bay Area, while Netflix's Reed Hastings has spent millions more on buttressing the charter-school movement in California and beyond. For the past four years, PayPal's Peter Thiel has been divvying out dozens of \$100,000 "scholarships" to kids who are willing to ditch university in favor of "self-education."

This latest batch of tech tycoons turned education reformers follows in the footsteps of a long line of older magnates, from the Carnegies and Rockefellers to Walmart's Waltons, who have also funneled their fortunes into education-reform projects built on private-sector management strategies. While this newer class of tech philanthropists are in some ways similar to the older generation, they also come to school reform having been steeped in the uniquely modern, libertarian, free-market Wild West of tech entrepreneurship—a world where data and innovation are king, disruption is a way of life, and the gridlock and rules of modern politics are regarded as a kind of kryptonite to how society ought to be.

"Life in a Silicon Valley operation is, O.K., we need to change something. How do I create an agent of change?" Welch explains, sitting in a windowless boardroom at the Cupertino, Calif., headquarters of his company, Infinera, which makes fiber-optic communications technology. "But here you have the most important aspect of society, in my mind at least—the ability to educate our children—and it's incapable of change. It's failing, and it doesn't want to acknowledge that it's failing, much less do anything about it."

### **"Why Isn't Anyone Fixing This?"**

Of all the Silicon Valley tycoons you might expect to make headlines, Welch is near the bottom of the list. Even in the geeky back alleys of Palo Alto, his name doesn't always ring a bell. He doesn't give TED talks, he doesn't headline coding conferences, and his company is hardly a

well-known brand. The unassuming father of three, who has bushy eyebrows and the well-ironed, air-conditioned look of the well-to-do, earned a Ph.D. from Cornell in electrical engineering and made his many millions working at two startups in Silicon Valley. Neither a Democrat nor a Republican, he clearly prefers a world of concrete facts to taking sides. “I don’t believe in putting on a jacket that says I’m red or blue,” he says. “I believe in identifying the topics that are important to me and then figuring out the right way to talk about them.”

As the youngest of seven children growing up outside Annapolis, Md., Welch went to public school and then to the University of Delaware. He didn’t think much about how the system actually functioned, or malfunctioned, until his own children were born in the ’90s and went on to have “some public experiences and some private-school experiences.” (Welch, as a rule, doesn’t talk about his children’s lives.) He then became involved in the NewSchools Venture Fund, which invests in charter schools and other entrepreneur-led education ventures targeting under-served students, and StudentsFirst, the controversial nonprofit founded by Michelle Rhee. But even by the early 2000s he’d homed in on what he saw as the root of the systemic failure of California’s public schools: the state’s laws on teacher tenure and other job protections, which are among the strictest in the country.

It seemed crazy to Welch that teachers in California receive tenure—permanent employment status designed to protect them from unfair dismissal—after less than two years on the job and that principals are often required to lay off the least experienced teachers first, no matter which ones are the best. It seemed even crazier to him that in some districts it takes years and tens of thousands of dollars to fire a teacher who isn’t doing a good job. Welch remembers asking a big-city California superintendent to tell him the one thing he needed to improve the public-school system. The answer blew Welch away. The educator didn’t ask for more money or more iPads. “He said, ‘Give me control over my workforce,’” Welch said. “It just made so much sense. I thought, Why isn’t anyone doing something about that? Why isn’t anyone fixing this?”

In early 2010, Welch decided, as he puts it, to “jump off the cliff” and do something about it. His first move was to meet with Kathleen Sullivan, a constitutional lawyer whose name is sometimes whispered to be on the Democrats’ short list of nominees for the U.S. Supreme Court. He pitched her what was at the time a rather unformed idea. “I said, ‘Here’s my premise—if children are being harmed by these laws, then something, somewhere, is being done that’s illegal,’” Welch says. After about six months, Sullivan and a small team of lawyers in San Francisco delivered a draft of the legal theory that would become the foundation for Vergara.

Welch’s next move, in April 2011, was to hire a jack-of-all-trades public relations firm, which is now called Rally. It launched a nonprofit, Students Matter—branded in the bright yellow and black of a No. 2 pencil—that was tasked with two missions. The first was to build a coalition of supporters and funders and create a public campaign surrounding the case. The second was to find a team of lawyers who were willing to reverse engineer a lawsuit on the basis of an untested legal theory on behalf of plaintiffs who didn’t yet exist.

### **Building on Brown**

Before states began passing tenure laws in the early 20th century, a teacher could be fired for holding unorthodox political views or attending the wrong church, or for no reason at all if the local party boss wanted to pass on the job to someone else. But what began as a popular idea has become increasingly controversial as countless stories of schools and districts being unable to fire bad teachers have populated the news. In a story that hit headlines in 2009, the L.A. Unified School District was legally barred from firing a teacher who told an eighth-grade student

who had recently tried to slit his own wrists to “carve deeper next time.” Episodes like that help explain why even in California, where the electorate votes overwhelmingly Democratic and is often sympathetic to unions, recent polls show that voters are skeptical of tenure.

Part of Students Matter’s job was to take this commonly held but abstract idea—that tenure and other job protections do not serve the public-school system—and essentially personify it in the form of students on whose behalf the case would be filed.

Among the nine plaintiffs, who ranged from elementary-school to high-school age, were Beatriz and Elizabeth Vergara, sisters from Pacoima, Calif., who were 15 and 16 years old when they took the witness stand this year. Beatriz, the lead plaintiff, testified about three of her middle-school teachers, describing them as apathetic, verbally abusive or simply ineffective. “It was always loud in there, and [he] would even sleep during class,” Beatriz said of her sixth-grade math teacher. “He didn’t even teach, and he couldn’t control his class. I couldn’t hear anything because of how loud it was.”

Gibson, Dunn & Crutcher, a white-shoe firm based in Los Angeles, then built the case on a foundation of *Brown v. Board of Education*—the 1954 U.S. Supreme Court decision that ruled that separate is not equal—and California Supreme Court cases from the 1970s and 1990s. Each of the California cases interpreted the equal-protection clause in the state constitution to mean that one group of students should not receive an education inferior to that offered to another group.

For example, in a 1992 case, *Butt v. State of California*, the California Supreme Court found that when a school district with a budget shortfall decided to save money by dismissing students for summer vacation six weeks early, it violated the state constitution, since students at the schools with the shorter school year received an education that was inferior to that of students at schools with full school years.

The argument in *Vergara v. California* took that same idea but added a controversial twist. Instead of examining the equality of students’ educational opportunities by comparing discrete facts—like the amount of time spent in class or the amount of funding a school receives per student—Welch’s lawyers made the case that the court should compare the quality of students’ in-class learning experiences. They argued that students who are stuck in classrooms with bad teachers receive an education that is substantially inferior to that of students who are in classrooms with good teachers.

Laws that keep bad teachers in the classroom, they concluded, therefore violate the equal-protection clause of the state constitution. They also argued that poor and minority students, who are more likely to be in classrooms with bad teachers, endure a disproportionate burden, making the issue a matter of civil rights as well.

Happily for Welch’s lawyers, their innovative argument happened to coincide with a flood of new academic research on teacher quality that could serve as evidence in court. A three-year study led by Harvard education expert Thomas Kane, with funding from the Bill & Melinda Gates Foundation, found that a bad teacher, as measured by his or her students’ test scores, could set a student’s educational progress back by 9.54 months.

In December 2011, another study, by Harvard University’s Raj Chetty and John Friedman with Columbia University’s Jonah Rockoff, looked at school records, test scores and tax returns for

2.5 million children and young adults from the past two decades. Using a controversial tool called value-added measures (VAM) to control for factors like race and poverty rates, they found that replacing a poorly performing teacher with an excellent one could increase students' lifetime earnings by \$250,000 per classroom. "The fact that we could show how students were actually harmed by bad teachers—that changed the argument," says Marcellus McRae, an attorney on the case.

The Vergara trial began in January of this year and stretched over two months in court. More than a few times, teachers and administrators called by the defense to represent the position of the teachers' unions found themselves in cross-examination inadvertently buttressing Students Matter's case instead. As Judge Treu later noted, nearly every witness agreed under oath that competent teachers are among the most important components of a child's in-school educational experience and that "grossly ineffective teachers substantially undermine the ability of that child to succeed in school." The trial ended March 27, and on June 10, Treu handed down his tentative decision.

In his 19 years on the bench, Treu's opinions rarely made news, but this one would be an exception. If roughly 1% to 3% of California teachers are in the bottom 5% of competence, Treu wrote, citing witness testimony, that means there are between 2,750 and 8,250 such teachers currently in California classrooms. That population, Treu wrote, "has a direct, real, appreciable and negative impact on a significant number of California students, now and well into the future for as long as said teachers hold their positions." In the law office near the courthouse, Welch and dozens of supporters erupted in celebration, hugging and kissing and crying.

#### **What Comes Next?**

The Vergara decision has been the source of outsize drama in California's election cycle this year, playing out on stages both small and large. The battle for state superintendent of public instruction—not the kind of race that usually garners the big bucks—has already attracted as much as \$10 million from state and national teachers' unions on one side and wealthy donors on the other.

Union-backed incumbent Tom Torlakson, who has decried the Vergara decision as a soulless attack on teachers and vowed to see it overturned on appeal, is now within a hairbreadth of losing to Marshall Tuck, a Silicon Valley-backed reformer, who has celebrated Vergara as a major win for California kids. Tuck's deep-pocketed supporters spent \$4.5 million in just the first two weeks of October. Meanwhile, Governor Jerry Brown, who is up for re-election in November and counts the teachers' unions among his biggest political backers, has negotiated a careful middle road. While he has dutifully appealed Treu's decision in the case, he was careful to avoid earning the ire of the Silicon Valley set. "Changes of this magnitude, as a matter of law and policy, require appellate review," Brown's office wrote in the notice of appeal, an exercise in blandness.

But the Vergara case, despite topping out—so far—in a lowly state trial court, reaches well beyond California's border. In New York, Campbell Brown's Vergara-style lawsuit, along with a similar suit filed by the New York City Parents Union, has become yet another political lightning rod and ignited discussions among activists who are impatient to file a similar case in other states like Connecticut, Oregon and New Jersey.

The debate over Vergara and its copycats highlights the broader landscape of education reform in a time of highly polarized politics, gridlocked legislatures and soaring inequality. When traditional avenues of reform seem increasingly impassable, those with vast amounts of money

or simply an ingenious legal theory—or both—can seem like the only forces capable of effecting change. Some, like Welch, believe that's part of the natural growth, disruption and innovation of a healthy society, and he applauds the "bold actions" of the wealthy few. "Thank God that people like Bill Gates and the Walton family feel the moral responsibility to put their assets toward what they think is right," he says.

But others worry that the means of reform are as important as the ends. Michael Petrilli, who runs the Thomas B. Fordham Institute, a conservative education think tank, says that while he generally does not support teacher tenure and job-protection laws, he is concerned that the recent spate of education litigation in California and New York sets an adversarial tone at a time when reformers need teachers to buy into other large-scale reform efforts, like implementing the Common Core State Standards in classrooms.

Fellow conservative Michael McShane, an analyst at the American Enterprise Institute, also pointed to the problem of using litigation to solve civil rights issues. "Courts are really good at saying, 'That's unconstitutional. It's out,'" McShane says, but in the wake of such decisions, there's usually a flood of related cases that require the courts to act as arbiter of the minutiae of a developing policy. "If it's now unconstitutional to allow a 'grossly ineffective' teacher in the classroom, then that raises more questions. How do you define 'grossly ineffective'? Using what measures?" After all, judging a teacher's quality can be tricky business. During the Vergara trial, one of the plaintiffs described her middle-school teacher as ineffective and undeserving of tenure; that same teacher had been previously named Pasadena's Teacher of the Year.

### **Testing Wars**

The question of how to judge a teacher's value gets to a fundamental irony in the national war over education reform today. Welch's unexpected victory in Vergara, which hinges on the necessity—and feasibility—of measuring a teacher's effectiveness, comes just as a broad range of educational experts have begun to question the validity of the tests and evaluations on which those teacher-effectiveness measures are based.

American policymakers' love affair with quantitative accountability tools is relatively new. It wasn't until 1994 that the Clinton Administration began requiring states to develop their own standardized tests for some subjects, and in the early 2000s, President George W. Bush doubled down on that initiative with No Child Left Behind. The Obama Administration built on that foundation, using Race to the Top funds and No Child Left Behind waivers to encourage states to use test scores to evaluate teacher performance. Today, most states have teacher evaluations that already are or may soon be tied to tenure, layoff decisions and merit-pay bonuses.

This two-decade trend has not, of course, been free of controversy. But what began with protests over "high-stakes testing" and cheating scandals in various public-school districts in the mid-2000s has morphed in the past six months into an outright mutiny, driven in large part by the controversial rollout of Common Core State Standards, which are linked to new state curriculums, more-difficult tests and new teacher evaluations. Teachers in Florida, Colorado, New York, Texas and Tennessee have filed lawsuits against their states, alleging unfair testing expectations; in New Mexico, teachers have burned their evaluations in protest, demanding better in-class support and job training instead. Many argued that policies focusing on cold, statistical measures fail to take into account the messy, chaotic reality of teaching in communities where kids must contend with poverty and violence.

A growing number of studies appear to support that point of view. In April, the American Statistical Association released a statement questioning whether VAM, the methodology that undergirds the Chetty study, adequately measures a teacher's total value to a student's education. In May, the American Educational Research Association found a "surprisingly weak" correlation between teachers' VAM scores and their actual skills, as evaluated by surveys and expert observations. In July, the Department of Education found that VAM scores varied wildly depending on what time of day tests were administered or whether the kids were distracted. Even the Silicon Valley reformers appear willing to dial back the emphasis on testing and evaluations, at least for a bit.

In June, the Gates Foundation called for a moratorium on tying consequences to evaluations based on Common Core standards until 2016, and in August, the Education Department announced that states could delay using student test scores in teacher evaluations for two years. This month, the Council of Chief State School Officers and the Council of the Great City Schools called for state and district leaders to cut back on unnecessary testing and test preparation.

David Welch says he's undeterred. While he's received an informal crash course in the unforgiving politics of education reform in this country in the past year, the back-and-forth doesn't interest him. "I look at this as my responsibility to help and improve the society I live in," he says. "And I'm willing to fight that battle as long as I have to fight that battle."