RECENT CASES

GOOD FRIDAY VACATION AS AN ESTABLISHMENT OF RELIGION: *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995).

Last Term, the Supreme Court decided two Establishment Clause[1] cases[2] without either relying on or overruling the harshly criticized[3] test of *Lemon v. Kurtzman*.[4] With the status of *Lemon* unclear, lower courts have increased freedom to formulate new approaches to the Establishment Clause. The Seventh Circuit explored one approach in *Metzl v. Leininger*,[5] in which the court held that an Illinois law closing all public schools on Good Friday was an unconstitutional establishment of religion. The Seventh Circuit's reformulation of a standard for evaluating Establishment Clause cases, however, fails in its delicate but critical task "to distinguish between the real threat and mere shadow."[6] The court instead designed a test in which every shadow becomes a threat, prompting a heightened sensitivity to religious promotion and a nearly insurmountable burden of proof. Application of a more reasonable standard would have led the court to agree with the Ninth Circuit that the listing of the Good Friday Holy Day as a holiday for all students is constitutional.[7]

Andrea Metzl is a Chicago public school teacher.[8] In July of 1993, she brought suit against Robert Leininger, the Illinois Superintendent of Education, claiming that the portion of Section 24-2 of the Illinois School Code[9] that designates Good Friday as one of twelve state-mandated paid school holidays violates the Establishment Clause.[10] Illinois passed the Good Friday law in 1941

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1. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . .").

2. *See* Rosenberger v. Rector of the Univ. of Va., 115 S. Ct. 2510 (1995); Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995).

3. *See, e.g.*, STEVEN L. CARTER, THE CULTURE OF DISBELIEF 109-15 (1993).

4. 403 U.S. 602 (1971). *Lemon* held that for a law not to constitute an establishment of religion three tests must be satisfied: (1) the law must not promote religion; (2) the law must have a secular purpose; and (3) the law must not result in an excessive entanglement with religion. *See id.* at 612-13.

5. 57 F.3d 618 (7th Cir. 1995).

6. Abington v. Shempp, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring).

7. *See* Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991) (holding that a Hawaii law passed in 1941 that declared Good Friday to be a legal holiday is not an establishment of religion).

8. *See* Metzl v. Leininger, 850 F. Supp. 740 (N.D. Ill. 1994).

9. *See* ILL. REV. STAT. ch. 105, act 5, art. 24-2 (1992).

10. *See Metzl*, 850 F. Supp. at 740.

without any legislative history.[11] The only contemporary indication of legislative intent is a proclamation by the Governor issued in 1942. The proclamation stated that Good Friday was a day "charged with special meaning . . . throughout the Christian world" that had been given "appropriate statutory recognition" by the legislature.[12] The proclamation explained further to the "churchgoers and believers" of Illinois that "widespread commemoration of Good Friday" was "eminently fitting in these times of unusual [wartime] stress."[13] The district court granted Metzl's motion for summary judgment, enjoined the law's enforcement, and issued a declaratory judgment stating that the law was unconstitutional.[14]

The Seventh Circuit affirmed. Writing for a two-to-one majority,[15] Chief Judge Posner held that the holiday's religious nature, combined with the law's effect to promote Christianity, created an unconstitutional establishment of religion.[16]

Chief Judge Posner argued that a law promoting one religion over another is unconstitutional unless either the promotion is sufficiently attenuated or a secular purpose exists for the law.[17] Examining the law's effect, the court found that the designation of a Good Friday school holiday promoted Christianity by making the burden of religious observance lighter on Christians than on the votaries of other religions.[18] Whereas non-Christians were forced to miss school for religious holidays that fell on weekdays, Christians were spared this burden on Good Friday.[19] As a result, the Chief Judge observed, a Christian was spared inconveniences such as scheduling make-up exams.[20] Although the Chief Judge acknowledged that such inconveniences were slight, he concluded that they made Christianity sufficiently easier to practice

11. *See Metzl*, 57 F.3d at 619.

12. *See id.* at 624 (Manion, J., dissenting).

13. *Id.*

14. *See Metzl*, 850 F. Supp. at 740.

15. The Chief Judge was joined by Judge Cummings. Judge Manion filed a dissenting opinion.

16. *See Metzl*, 57 F.3d at 621.

17. *See id.* at 620. These two tests each are elements of the three-part *Lemon* test.

18. *See id.*

19. *See id.*

20. *See id.* at 621. The spared inconvenience of the Good Friday Law was minimized by provisions of the school code designed to allow students to miss school for religious reasons without penalty. *See* ILL. REV. STAT. ch. 105, act 5, art. 26-1(5) and 26-2b (1992).

than other religions to render the law unconstitutional absent a secular purpose.[21]

Chief Judge Posner then began his examination of the law's purpose by considering whether Good Friday was a purely religious holiday or a secularized holiday such as Christmas. The Chief Judge observed that, whereas Christmas offers the secular world shopping, Thanksgiving offers turkey, and Easter features the Easter Bunny, Good Friday does not sport comparable secular rituals.[22] Concluding that the holiday offers nothing to the non-Christian, Chief Judge Posner decided that Good Friday could be considered a distinctly religious holiday.[23]

Because Good Friday clearly is religious in nature, the Chief Judge assigned to the State the burden of proving that a secular purpose exists for the law.[24] Although no authority existed for the proposition that the State should bear the burden of proving a secular purpose,[25] Chief Judge Posner held that the State should carry the burden because the holiday's sectarian nature rendered the state's act suspect, and because the State was in the best position to furnish evidence concerning its own law's purpose.[26]

Chief Judge Posner subsequently rejected the state's secular justification for the law. The State argued that the closing was necessary to prevent the waste of educational resources that would result from keeping the schools open on a day in which many students and teachers would be absent.[27] In the absence of a factual showing that enough Christians observe Good Friday in each school district to result in waste in every district state-wide;[28] however, Chief Judge Posner concluded that the State had failed to meet its burden of proof.[29] The court concluded that the holiday's purpose was religious, and cited the Governor's 1942 letter recommending the observance of the holiday as further proof

21. *See Metzl*, 57 F.3d at 621.
22. *See id.* at 620-21.
23. *See id.* at 620.
24. *See id.* at 622.
25. *See id.*
26. *See Metzl*, 57 F.3d at 622.
27. *See id.* at 623.
28. *See id.*
29. *See id.* at 621. *But cf.* Cammack v. Waihee, 932 F.2d 765, 778 (9th Cir. 1991) (holding that "[n]o endorsement of religion is implicated" by a Good Friday closure law that reflects the legislature's cognizance of the fact that "[m]any Christians presumably will take at least part of the day off anyway").

that the law was intended to promote Christianity.[30] Finding that the law promoted Christianity and was motivated solely by a religious purpose, the court affirmed the trial court's ruling that the law was unconstitutional.

Writing in dissent, Judge Manion objected to the majority's assignment to the State of the burden of proof.[31] Forcing the burden upon the State, Judge Manion contended, allowed Metzl to upset a fifty year-old law based simply on the day's religious nature and a single Gubernatorial letter issued during wartime one year after the law's passage.[32] Although he acknowledged that the state's evidence of a secular purpose was weak, Judge Manion argued that striking down the law required speculation into the motives of the State that no evidence supported.[33] In the absence of strong evidence on either side, Judge Manion would have upheld the law's disputed provision.[34]

Chief Judge Posner's reformulation of the conjunctive three-part *Lemon* test into a disjunctive two-part inquiry is ultimately unsatisfying. Chief Judge Posner's incarnations of the surviving purpose and promotion prongs of *Lemon* are applied so harshly that they provide more of a wall than a test. The resulting analysis disregards both prudence and precedent to strike down the challenged law.

Placing the burden of proof on the State to prove a secular purpose ignores the Supreme Court's marked reluctance to find a religious purpose in challenged laws.[35] The Supreme Court has invalidated a law due to its religious purpose only three times in over forty cases since *Lemon*,[36] and then only when the law's reli-

30. *See Metzl*, 57 F.3d at 621.

31. *See id.* at 625 (Manion, J., dissenting).

32. *See id.* at 627. Judge Manion dismissed the Governor's proclamation as a political platitude. *See id.*; *cf.* Allegheny v. ACLU, 492 U.S. 573, 671 (1989) (Kennedy, J., concurring in the judgment and dissenting in part) (noting that Presidents have been making religiously-worded announcements about holidays such as Christmas and Thanksgiving since the days of George Washington).

33. *See Metzl*, 57 F.3d at 626 (Manion, J., dissenting).

34. *See id.* at 627.

35. *See* Bowen v. Kendrick, 487 U.S. 589, 604 (1988); Mueller v. Allen, 463 U.S. 388, 394-95 (1983); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1210-11 (2d ed. 1988) (noting that the Court has found religious purpose to be dispositive to the law's constitutionality only when the law was "candidly religious"); Gregory J. Blackburn, Comment, *Government, The Holiday Season, and the Establishment Clause: A Perspective on the Issues*, 20 STETSON L. REV. 217, 224 (1990) (arguing that the Court's analysis of religious purpose "fail[s] to go beyond anything more than a superficial review of the government's stated purpose").

36. *See* Diana McCarthy, Comment, *The Establishment Clause and Good Friday as a Legal holiday: Has Accommodation Run Amok?*, 65 TEMP. L. REV. 195, 201 (1992). The three cases

gious motivation was "beyond purview."[37] Chief Judge Posner's assignment of the burden of proof to the State combined with his unusually high evidentiary barrier flouts this tradition. By demanding that the State prove that a sufficient number of students in every school district would miss Good Friday classes to justify closing every district state-wide, Chief Judge Posner has crafted a secular purpose test that the State is sure to fail.[38]

Chief Judge Posner's analysis of the law's religious purpose is further unconvincing because he hinges the burden of proof on an unstable fulcrum: the ability to distinguish a genuinely religious holiday from a "secularized" religious one. This distinction is circular because a secular reliance will develop whenever a religious holiday is recognized in the form of a school vacation. Whether the holiday is Christmas, Good Friday, or the Sabbath, most students, teachers, and parents outside of the holiday's religious tradition view the event as a welcome and well-deserved vacation to be enjoyed by traveling, shopping, or resting.[39] Attempts to classify one holiday as religious and another as secular often will require the legal equivalent of calling one glass half-empty and the other half-full.[40] Of course, placing the burden of proof on such an unstable fulcrum does serve a functional pur-

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are Edwards v. Aguillard, 482 U.S. 578 (1987) (invalidating a Louisiana law requiring the teaching of creation science in public schools); Wallace v. Jaffree, 472 U.S. 38 (1985) (invalidating Alabama's one-minute moment of silence in the public schools); and Stone v. Graham, 449 U.S. 39 (1980) (invalidating a Kentucky statute requiring the posting of the Ten Commandments on school room walls).

37. *Wallace*, 472 U.S. at 75 (O'Connor, J., concurring); *see* TRIBE, *supra* note 35, at 1210.

38. Judge Manion discusses the difficulty of meeting such an evidentiary charge in his dissent. *See Metzl*, 57 F.3d at 626 (Manion, J., dissenting).

39. In fact, the impetus for declaring Good Friday a holiday is often pressure applied by public-employee unions who want to increase the number of paid vacations enjoyed by government employees. *See* McCarthy, *supra* note 36, at 195.

40. For example, Chief Judge Posner considers the fact that Good Friday commemorates the execution of the Christian Messiah to be strong evidence that Good Friday is purely religious, *see Metzl*, 57 F.3d at 620, but ignores that the Christmas holiday that he uses as an example of a secularized religious holiday commemorates the *birth* of the same Christian Messiah. The Chief Judge's religious-secular distinction also relies on his claim that non-Christians partake of rituals during secularized holidays such as Christmas. However, what Chief Judge Posner may consider secular rituals—such as buying a Christmas tree, visiting Santa, or holding a Christmas dinner—are customs that practicing Jews do not follow because they consider them to be Christian. *Cf.* County of Allegheny v. ACLU, 492 U.S. 573, 639 (1989) (Brennan, J., concurring in part and dissenting in part) (asserting that the majority's characterization of a Christmas tree as a purely secular symbol was an unconvincing "attempt to take the Christmas out of the Christmas tree"). The instability of the secular-religious distinction is further illustrated by the fact that the Ninth Circuit, in upholding Hawaii's fifty year-old Good Friday law, concluded that Good Friday was a secularized holiday. *See* Cammack v. Waihee, 932 F.2d 765, 776, 778-79 (9th Cir. 1991).

pose; it provides a much-needed justification for why a mandatory school closing on Good Friday can be struck down without casting doubt on Christmas vacation. Justifications notwithstanding, however, the distinction fails to provide a useful or convincing constitutional guide.

Chief Judge Posner's conclusion that the law promotes Christianity also is questionable. The School Code awards a holiday to *all* students and teachers, who are free to use the day however they please. Christians benefit because they avoid missing school for a religious obligation, and non-Christians benefit from an extra day of demand-free vacation. The Chief Judge assumes that the law promotes Christianity by lowering the "cost" of church attendance; however, this is true only if students and teachers value a day of school higher than a day of vacation. We may all hope this to be true, but it may not be.[41] Considering that the day of vacation could feature special events such as Good Friday sales that raise the opportunity cost of church attendance, it becomes possible under Chief Judge Posner's framework that granting a vacation on Good Friday could as easily discriminate against Christianity in the minds of students as promote it.

Even if one accepts Chief Judge Posner's assumption that the law promotes Christianity by lightening the burden of Christian religious observance, such a promotion is far too attenuated to be recognizable under the Constitution.[42] In *McGowan v. Maryland*,[43] the Court upheld a Sunday Closure Law despite the fact that the law imposed a serious burden to Judaic observance relative to Christian observance. In *McGowan*, the closure law forced religious Jews to limit their workweek to five days, although everyone else could enjoy the profit and productivity of a six-day week. The relative burden placed upon religious non-Christian students in Illinois—the slight inconvenience of having to schedule make-up exams and borrow notes from other students—is trivial by comparison. Further, the fact that this burden is borne by *every* student who misses school for a religious reason creates a paradox. If the law's relative inconvenience to religious non-Christians promotes Christianity, then the law's absence also violates the Establishment Clause because the same inconvenience is now

41. For example, most students see school closings caused by snow storms to be a blessing, not a curse.

42. *See* TRIBE, *supra* note 35, at 1215 (noting that passage of the Court's effects tests simply requires that "any non-secular effect be remote, indirect, and incidental").

43. 366 U.S. 420 (1961).

borne by all nonatheists, promoting atheism.[44] To avoid promoting atheism, all public schools would need to close on every holiday of every religion. Such a bowing to religious whims of all stripes, however, would itself be an unconstitutional establishment of religion under *Thornton v. Caldor*.[45]

The Good Friday holiday's symbolic state recognition of Christianity likewise is insufficient to create an Establishment Clause violation.[46] The Supreme Court has described de minimis political accommodations of majority religious practices and its corresponding disadvantage to minority religions as "unavoidable consequence[s] of democratic government."[47] In *Zorach v. Clauson*,[48] the Court applauded state efforts to adjust the schedule of the public schools to sectarian needs, calling them measures that "follow the best of our traditions."[49] The inclusive context of the Illinois School Code confirms that Illinois's Good Friday law is the product of such an effort. Numerous provisions of the code reflect an attempt to facilitate religious observance for students of every faith.[50] In this context, it is unlikely that an objective observer would see the inclusion of Good Friday on a list of school holidays as a state endorsement of Christianity.[51]

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44. *Cf.* Everson v. Board of Educ., 330 U.S. 1, 15-16 (1946) ("No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.").

45. 472 U.S. 603 (1985) (holding that a state law allowing observers of every faith to absent themselves from work on whatever day they observed the Sabbath violated the Establishment Clause because it forced all employees to be inconvenienced by the religious observance of every religious group).

46. *But see* McCarthy, *supra* note 36, at 222 (arguing that state recognition of a holiday implies favoritism of one religion over another).

47. Employment Div. v. Smith, 494 U.S. 872, 890 (1990); *see also* Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 338 (1987) (declaring that "[t]here is ample room for accommodation of religion under the Establishment Clause").

48. 343 U.S. 306 (1952) (upholding a state program in which students were dismissed from school to attend religious class, but nonparticipants were required to remain in class).

49. *Id.* at 314.

50. This is illustrated by provisions allowing students whose religious beliefs forbid secular activity on a given day to miss school without penalty, *see* ILL. REV. STAT. ch. 105, act 5, art. 26-1(5) (1992), and provisions excusing students from examinations and homework on days of religious observance and making it the responsibility of the teachers and administrators to ensure that "adverse or prejudicial effects" do not result to any child who misses school for a religious reason, *see* ILL. REV. STAT. ch. 105, act 5, art. 26-2b (1992). Individual school districts also have the discretion to close for any religious holiday if the district has reason to suspect that many students would be absent on that day. *See Metzl*, 57 F.3d at 626. As a result, several Illinois School districts close on the Jewish High Holidays of Rosh Hashanah and Yom Kippur. *See Metzl*, 850 F. Supp. at 741.

51. *Cf.* Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring) ("The relevant issue is whether an objective observer, acquainted with the text, legislative his-

Although Chief Judge Posner took pains to downplay the significance of the *Metzl* opinion,[52] his prudence hardly seems warranted. The Seventh Circuit's conclusion that state-wide public school closure on Good Friday is unconstitutional casts doubt on the laws of the remaining States that recognize the holiday[53] and creates a split in the circuits[54] that only the Supreme Court is able to resolve. And perhaps most unfortunately of all, it did so using a conceptually untenable analysis that only adds to the disarray of Establishment Clause jurisprudence.

Orin S. Kerr

SPEAKING IN TONGUES: WHOSE RIGHTS AT STAKE? *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (en banc).

The establishment of an official language typically reflects a majority group's desire for cultural control[1] and often is the subject of political conflict.[2] Although the United States has no official language,[3] eighteen States have passed measures establishing one.[4] In *Yniguez v. Arizonans for Official English* (*Yniguez IV*),[5] an en banc panel of the Ninth Circuit held that an amendment to

tory, and implementation of the statute, would perceive it as a state endorsement of [religion] in public schools.").

52. *See Metzl*, 57 F.3d at 623 ("We do not want to exaggerate the importance or likely impact of our decision.").

53. *See, e.g.*, DEL. CODE ANN. tit. 1, § 501 (Supp. 1990); HAW. REV. STAT. § 8-1 (1988 & Supp. 1991); N.C. GEN. STAT. § 103-4 (Supp. 1991).

54. *See* Cammack v. Waihee, 932 F.2d 765 (9th Cir. 1991).

1. *See, e.g., Slovaks Further Curb Use of Hungarian Language*, N.Y. TIMES, Nov. 16, 1995, at A10 (describing a law stipulating that all public employees must speak Slovak); *see also* Alan Riding, *'Mr. All-Good' of France, Battling English, Meets Defeat*, N.Y. TIMES, Aug. 7, 1994, § 1, at 6 (recounting a failed effort to purge English terms from the French language).

2. *See, e.g.*, Paul L. Montgomery, *Belgian King Asks Prime Minister to End Impasse*, N.Y. TIMES, May 7, 1988, § 1, at 28 (stating that Belgians created self-governing areas according to language). At times, language is the cause of physical, as well as political, conflict. *See* Steven R. Weisman, *When the Language Barrier Becomes a Barricade*, N.Y. TIMES, Jan. 14, 1987, at A4 (reporting on violence in India over perceived imposition of Hindi on non-Hindi speaking southern India).

3. *See* Hiram Puig-Lugo, *Freedom to Speak One Language: Free Speech and the English Language Amendment*, 11 CHICANO L. REV. 35, 37 (1991) (observing that the Framers chose not to establish a national language and rejected John Adams's proposal for an American Academy to promote the uniform use of English).

4. The States are Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Mississippi, Nebraska, North Carolina, North Dakota, South Carolina, Tennessee, and Virginia. *See* Donna M. Greenspan, *Florida's Official English Amendment*, 18 NOVA L. REV. 891, 892-93 n.6 (1994). Each of the above-mentioned States has made English its official language, except for Hawaii, which recognizes English and Hawaiian as official languages. *See id.*

Arizona's constitution mandating the use of English by "all government officials and employees during the performance of government business"[6] violated the First Amendment's Free Speech Clause.[7] Although recognizing that the government can place more stringent restrictions on the speech of public employees than on that of private citizens,[8] the court mistakenly focused on the distinction between speech on matters of public concern and speech on matters of private interest.[9] This error prevented the court from addressing the real issue—a private citizen's interest in receiving information from the government—and spurred a bitter exchange between two judges on the panel.[10]

In 1987, Arizonans for Official English (AOE) initiated a petition to amend Arizona's constitution to prohibit the government's use of languages other than English, except in limited circumstances.[11] In 1988, the initiative received 50.5% of the votes cast and became Article XXVIII of Arizona's constitution.[12] Yniguez, a bilingual Hispanic woman, worked for the Arizona Department of Administration and handled medical malpractice claims asserted against Arizona.[13] After Article XXVIII's enactment, Yniguez ceased speaking Spanish, even to monolingual

5. 69 F.3d 920 (9th Cir. 1995) (en banc), *petition for cert. filed sub nom.* Arizonans for Official English v. Arizona, 64 U.S.L.W. 3439 (U.S. Jan. 2, 1996) (No. 95-974).

6. ARIZ. CONST. art. XXVIII, § 1(3)(a)(iv). A nationwide version of Arizona's amendment would contradict the example of the Continental Congress, which issued the Articles of Confederation in German and French, as well as in English. *See* Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 286 (1992).

7. *See Yniguez IV*, 69 F.3d at 924; *see also* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

8. *See Yniguez IV*, 69 F.3d at 938; *e.g.*, Waters v. Churchill, 114 S. Ct. 1878, 1886 (1994) (O'Connor, J., plurality opinion); Connick v. Myers, 461 U.S. 138, 147 (1983); Pickering v. Board of Educ., 391 U.S. 563, 568 (1968).

9. *See Yniguez IV*, 69 F.3d at 940; *id.* at 951 (Brunetti, J., concurring); *id.* at 956 (Fernandez, J., dissenting); *id.* at 960 (Wallace, C.J., dissenting). Only Judge Kozinski, in his dissent, rejected the "public concern"-"private interest" distinction. *Id.* at 962 (Kozinski, J., dissenting).

10. *See id.* at 952 (Reinhardt, J., concurring specially); *id.* at 960 (Kozinski, J., dissenting).

11. Article XXVIII allows the "State and all [its] political subdivisions" to use a language other than English only to: (a) teach English to those not proficient in the language; (b) comply with federal laws; (c) teach a foreign language in schools; (d) protect public health or safety; and (e) protect rights of criminal defendants or victims of crime. ARIZ. CONST. art. XXVIII, § 3(2). Ironically, Arizona has at least two laws that mandate the use of Spanish. *See, e.g.*, ARIZ. REV. STAT. ANN. § 6-651 (1993) (requiring lenders to post signs in English and Spanish notifying borrowers of their right to request disclosure terms in Spanish); ARIZ. REV. STAT. ANN. § 12-2406 (1982) (requiring process servers to provide notice of legal actions in Spanish).

12. *See Yniguez IV*, 69 F.3d at 924.

13. *See id.*

Hispanic claimants, out of fear that Article XXVIII prohibited this conduct.[14]

Shortly after the English-only amendment passed, Yniguez filed an action against Arizona and its Governor, its Attorney General, and the Director of its Department of Administration.[15] The district court limited Yniguez's claim to Governor Rose Mofford, as only she both had the authority to enforce Article XXVIII and had sufficiently threatened to do so for Yniguez to maintain an action against her in accordance with *Ex parte Young*.[16] The district court granted declaratory relief, holding that Article XXVIII infringed on speech protected by the U.S. Constitution, but denied injunctive relief because no enforcement action was pending.[17] Governor Mofford, an outspoken critic of Article XXVIII, declined to appeal the judgment.[18]

AOE moved for postjudgment intervention in order to appeal. The district court denied this motion, along with the Attorney General's motion to intervene.[19] The Ninth Circuit allowed AOE and the Attorney General to intervene, the latter only for the limited purpose of arguing the constitutionality of Article XXVIII.[20] Upon finally hearing the case on the merits, a unanimous three-judge panel affirmed the district court's finding of

14. *See id. But see* Joyce Price, *Court Rejects Arizona's Ban on Foreign Speech by State Workers: Voters Approved English-Only Measure Six Years Ago*, WASH. TIMES, Dec. 9, 1994, at A1 (reporting AOE's attorney's statement that Yniguez admitted under cross-examination that "her primary motive in challenging the law was her desire to write [official] reports in Spanish [which her supervisor could not read]"). Had the judges addressed this issue, it is unlikely that they would have found an Arizona law preventing Yniguez from writing her official reports in Spanish to violate the First Amendment.

15. *See Yniguez IV*, 69 F.3d at 925.

16. *See* Yniguez v. Mofford, 730 F. Supp. 309, 313 (D. Ariz. 1990); *see also Ex parte* Young, 209 U.S. 123, 157 (1908) (holding that suits against state officers acting in their official capacity are not barred by the Eleventh Amendment if the officers have some connection to the enforcement of the allegedly unconstitutional state law). Jamie Gutierrez, a Hispanic state senator, joined as a plaintiff, claiming that Article XXVIII prevented him from speaking Spanish with his constituents. The District Court ruled that all of his claims were barred with respect to all defendants under *Ex parte Young*. *See Yniguez*, 730 F. Supp. at 311.

17. *See Yniguez*, 730 F. Supp. at 317.

18. *See Yniguez IV*, 69 F.3d at 926.

19. *See* Yniguez v. Mofford, 130 F.R.D. 410, 416 (D. Ariz. 1990). The district court also denied the Attorney General's motion to amend the judgment because it did not rule on Governor Mofford's prior motion to certify to the Arizona Supreme Court the question of Article XXVIII's proper interpretation. *See id.*

20. *See* Yniguez v. Arizona (*Yniguez I*), 939 F.2d 727 (9th Cir. 1991). Arizona argued that the issue was moot because Yniguez no longer worked for the State. The court rejected Arizona's contention. *See* Yniguez v. Arizona (*Yniguez II*), 975 F.2d 646 (9th Cir. 1992). The court also allowed Arizonans Against Constitutional Tampering and its chairman, the principle opponents of the initiative that became Article XXVIII, to intervene as plaintiff-appellees. *See Yniguez IV*, 69 F.3d at 927.

unconstitutionality, but reversed and remanded on the issue of nominal damages.[21] The court granted a rehearing en banc.[22]

In a six-to-five decision, the Ninth Circuit affirmed its previous decision.[23] Writing for the en banc majority,[24] Judge Reinhardt adopted the district court's broad construction of Article XXVIII.[25] He also declined to abstain or to certify questions to the Arizona Supreme Court. Turning to the merits, Judge Reinhardt employed an overbreadth analysis.[26] From both the Article's broad scope—encompassing all persons in government service—and its single subject and premise—the ban of languages other than English—Judge Reinhardt concluded that the Article would be facially invalid if it infringed First Amendment rights.[27] Further, Judge Reinhardt read Article XXVIII as an integrated whole and also noted the lack of a severability clause, which suggested to him that should part of the Article be found unconstitutional, the drafters did not intend the rest to survive.[28]

Before turning to Article XXVIII's impact on First Amendment rights, Judge Reinhardt considered two of AOE's arguments. First, he rejected the claim that Article XXVIII regulated a mode of conduct—language—and not pure speech rights—content.[29] Second, he dismissed AOE's argument that Yniguez sought "an affirmative right to have government operations conducted in a foreign tongue."[30] Judge Reinhardt addressed this claim in two forms, rejecting both: (1) Yniguez claimed that Ari-

21. *See* Yniguez v. Arizonans for Official English (*Yniguez III*), 42 F.3d 1217 (9th Cir. 1994). Judge Reinhardt wrote the opinion for a panel that also included Judges Tang and Fletcher.

22. *See* Yniguez v. Arizonans for Official English, 53 F.3d 1084 (9th Cir. 1995) (authorizing rehearing en banc of *Yniguez III*).

23. *See Yniguez IV*, 69 F.3d at 924.

24. Judge Reinhardt was joined by Judges Hug, Pregerson, Wiggins, Brunetti, and Hawkins. *See id.* at 920 The opinion in Yniguez III was withdrawn when the court decided to rehear en banc and is "[i]n almost all respects . . . identical" to the en banc majority opinion. *Id.* at 924.

25. *See id.* at 927-30. "Article XXVIII plainly does not set forth an innocuous, pragmatic rule that tolerates the use of languages other than English whenever beneficial to the public welfare. . . . The use of languages other than English is banned except when expressly permitted." *Id.* at 930.

26. *See* Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503-04 (1985).

27. *See Yniguez IV*, 69 F.3d at 931-34.

28. *See id.* at 933.

29. *See id.* at 934-36. "To call a prohibition that precludes the conveying of information to thousands of Arizonans in a language they can comprehend a mere regulation of 'mode of expression' is to miss entirely the basic point of First Amendment protections." *Id.* at 936.

30. *Id.* at 936. *But cf.* Price, *supra* note 14, at A1 (reporting that Yniguez's primary goal was to write official reports in Spanish).

zona was obligated to provide information in a language that citizens could understand;[31] and (2) Yniguez claimed the right to speak in any language she desired.[32] Yniguez's claim, Judge Reinhardt concluded, was for the protection of speech by a public employee.[33]

Accordingly, Judge Reinhardt invoked the *Waters-Pickering* line of cases, which differentiates between "public concern" and "private interest" speech.[34] Although the government has greater authority to control the speech of its employees than that of its citizens, when employees speak as citizens on matters of public concern they are entitled to greater constitutional protection than when they speak upon matters of private interest.[35] Although Yniguez's speech did not fit easily into either of the categories, Judge Reinhardt held it to be "unquestionably of public import"[36] and found the government's justifications to lack any "basis in the record."[37] Judge Reinhardt concluded that "Article XXVIII is not a valid regulation of the speech of public employees and is unconstitutionally overbroad."[38]

Of the various dissents and concurrences,[39] Judge Kozinski's dissent[40] and Judge Reinhardt's special concurrence are of the

31. *See Yniguez IV*, 69 F.3d at 936.

32. *See id.* at 939-40.

33. *See id.* at 938 ("For nearly half-a-century, it has been axiomatic in constitutional law that government employees do not simply forfeit their First Amendment rights upon entering the public workplace.").

34. *See* Waters v. Churchill, 114 S. Ct. 1878, 1884 (1994) (O'Connor, J., plurality opinion); Pickering v. Board of Educ., 391 U.S. 563, 573-74 (1968).

35. *See Waters*, 114 S. Ct. at 1887 (O'Connor, J., plurality opinion). Speech is of public concern when the employee has "a strong, legitimate interest in speaking out on public matters." *Id.* Speech appears to relate solely to private interests in all other instances. *See id.*

36. *Yniguez IV*, 69 F.3d at 940.

37. *Id.* at 944. The justifications included: (1) protecting democracy by encouraging unity and political stability; (2) promoting a common language; and (3) protecting public confidence. Judge Reinhardt characterized these claims as assertion and conjecture. *See id.* at 945 (quoting Landmark Communications, Inc. v. Virginia, 435 U.S. 839, 841 (1978)).

38. *Id.* at 947.

39. *See id.* at 950 (Brunetti, J., concurring) (arguing that Article XXVIII's regulation of the speech of elected officials is sufficient to render it unconstitutional); *id.* at 954 (Fernandez, J., dissenting) (concluding that regulation of Yniguez's speech is constitutional because it is more like private concern speech). Judge Fernandez was joined by Chief Judge Wallace and by Judges Hall and Kleinfeld. Chief Judge Wallace also dissented separately. *See id.* at 959 (Wallace, C.J., dissenting) (arguing that the majority has never identified the content of the speech at issue but is only dealing with the form).

40. *See id.* at 960 (Kozinski, J., dissenting). Judge Kozinski was joined by Judge Kleinfeld. Ironically, had Judge Tang, who served on the original three-judge panel, not died two days prior to the oral argument, Judge Kozinski would not have heard *Yniguez IV*. *See Yniguez IV*, 69 F.3d at 924 n.3.

most interest. According to Judge Kozinski, this case created the constitutional right to "haul [an] employer into federal court and force it to prove that the law's advantages outweigh [one's] right to say what [one] pleases."[41] Judge Kozinski argued that Yniguez's claim to speak Spanish was similar to many other claims—such as that of a Deputy Attorney General who contradicts department policy by filing a brief against the death penalty—and would make "*Lochner* . . . seem like a paean to judicial restraint."[42] The fault in the majority opinion, Judge Kozinski continued, was "the dangerous notion that government employees have a personal stake in the words they utter when they speak for the government."[43] *Yniguez IV*, however, was different from *Pickering* and *Waters* and had far more in common with *Rust v. Sullivan*.[44] Because Yniguez was speaking in an official capacity, the government, or the people of the State, can determine what she should have been permitted to say.[45] Although Judge Kozinski refused to find that Article XXVIII violated Yniguez's free speech rights, he did state that a proper challenge on the ground of impairment of access to government could be raised.[46]

Judge Reinhardt's special concurrence raised the vitriol level to eleven, arguing that Judge Kozinski would allow the Government to compel its workers to say anything, "no matter how racist or abhorrent."[47] He characterized Judge Kozinski's world as "an Orwellian [one] in which Big Brother could compel its minions to say War is Peace and Peace is War, and public employees would be helpless to object."[48] Substantively, Judge Reinhardt did observe that the First Amendment's protections include the

41. *Yniguez IV*, 69 F.3d at 961 (Kozinski, J., dissenting).

42. *Id.* at 962 (citing Lochner v. New York, 198 U.S. 45 (1905)).

43. *Id.*

44. 500 U.S. 173 (1991) (holding that the government may choose to value childbirth over abortion and may implement that judgment by the allocation of public funds). Judge Reinhardt addresses *Rust* in a footnote, distinguishing it on the grounds that *Yniguez IV* concerns the authority of the State to penalize the speech of public employees. *See Yniguez IV*, 69 F.3d at 940 n.24.

45. *See Yniguez IV*, 69 F.3d at 963 (Kozinski, J., dissenting). "Since [the people of Arizona] were paying Yniguez's salary, I had assumed it was their call whether Yniguez spent her work-time processing claims, promoting English or twiddling her thumbs." *Id.* at 961.

46. *See id.* at 963.

47. *Id.* at 953 (Reinhardt, J., concurring specially).

48. *Id.* Judge Kozinski is no more respectful, writing, "Confronted with recent Supreme Court cases [*Rust* and Rosenberger v. Rector of the Univ. of Va., 115 S. Ct. 2510 (1995)], that cut the heart from its analysis, the majority responds with . . . a footnote. And what a footnote!" *Id.* at 963 (Kozinski, J., dissenting) (citations omitted).

interest of the public in receiving "information of vital importance from the government."[49]

It is this final point, tentatively raised in various parts of Judge Reinhardt's two opinions, that is the actual crux of *Yniguez IV*. If Article XXVIII implicates any of Yniguez's free speech rights, it can only be those that arise by virtue of her audience and their interest in the content of her communication. Clearly, she has no right to say anything she wants while at her job.[50] Similarly, Arizona would not act unconstitutionally in disciplining Yniguez for insisting on speaking Spanish to a citizen who only spoke English. Her speech, however, was neither a matter of public concern—which typically refers to speaking as a citizen about government policy[51]—nor merely of private interest. When Yniguez spoke Spanish to monolingual Spanish-speaking citizens, she did not do so for her own benefit or because only Spanish could carry the nuances of her message[52]—she did so because they would not have understood her had she spoken English.

Nevertheless, citizens do not have a right to have government officials speak their language.[53] However, those citizens who only speak one language, which is not English, do have a vital interest in receiving information from the government on, for example, how and where to vote or what they must do to file a claim against the State. Although Arizona may not have an obligation to employ and provide an official who can speak Spanish, Urdu, or Russian, if someone who speaks that language already is employed in the relevant office,[54] then to deny that person the ability to speak to citizens in a language that the citizens can understand is, at best, counterproductive[55] and, at worst, wholly

49. *Id.* at 952 (Reinhardt, J., concurring specially).

50. *See, e.g.*, Waters v. Churchill, 114 S. Ct. 1878, 1886 (1994) (O'Connor, J., plurality opinion) ("[S]urely a public employer may . . . prohibit its employees from being 'rude to customers' . . . .").

51. "These cases [dealing with "public concern" speech] look to the content of public employees' speech to see whether it contributes to public debate." *Yniguez IV*, 69 F.3d at 960 (Wallace, C.J., dissenting).

52. *See id.* at 957 (Fernandez, J., dissenting).

53. *See, e.g.*, Soberal-Perez v. Heckler, 717 F.2d 36 (2d Cir. 1983) (holding that limited-English speakers have no right to Social Security notices and services in Spanish), *cert. denied*, 466 U.S. 929 (1984); Guadalupe Org., Inc. v. Tempe Elementary Sch. Dist. No. 3, 587 F.2d 1022, 1024 (9th Cir. 1978) (holding that Mexican-American and Yaqui Indian students have no right to bilingual education).

54. Although the record does not indicate this, it is probable that Yniguez was hired at least in part because she could speak Spanish.

55. "[T]he deliberate choice to speak to someone in a language that he or she does not understand may convey a strong message of exclusion." *Yniguez IV*, 69 F.3d at 936 n.20.

nonsensical.[56] In the absence of claims of efficiency[57] or other justifications,[58] the citizens' interest[59] in understanding their government is a sufficient basis on which Yniguez may litigate her claim.[60]

Judge Reinhardt did recognize the importance of the citizens' interest:

> The employee speech banned by Article XXVIII . . . pertains to the provision of governmental services and information. Unless that speech is delivered in a form that the intended recipients can comprehend, they are likely to be deprived of much needed data as well as of substantial public and private benefits. . . . Indeed, it is most often the recipient, rather than the public employee, who initiates the dialogue in a language other than English.[61]

Despite acknowledging the citizens' interest at stake, Judge Reinhardt apparently felt bound by the *Waters-Pickering* line and, like most of his fellow judges, attempted to force *Yniguez IV* into that doctrinal pattern. On free speech grounds, the result in *Yniguez IV* is defensible only if Yniguez's right derives from outside the "public concern" doctrine and the court recognizes that citizens' interest in receiving information often will provide a sufficient basis for a claim against laws that interfere with that interest.[62]

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56. This is not a case, as Chief Judge Wallace contends, of citizens' interest in receiving a message "in a mode which they can *easily* understand," it is an interest in receiving the message in a language that they can understand *at all*. *Id.* at 960 (Wallace, C.J., dissenting) (emphasis added).

57. The typical reason for allowing the government to regulate the speech of its employees, even on matters of public concern, is efficiency. *See* Waters v. Churchill, 114 S. Ct. 1878, 1887-88 (1994) (O'Connor, J., plurality opinion). In *Yniguez IV*, Arizona stipulated that its interest in efficiency "runs directly counter to Article XXVIII's restriction on public employee speech." *Yniguez IV*, 69 F.3d at 942.

58. Such as those made in this case, which the Court found to be wholly unsupported by evidence in the record. *See supra* note 37.

59. This interest is not so strong as to create an insurmountable affirmative right that would require the government to hire a person who speaks the language that any one citizen speaks. Restricting the speech of already hired multilingual employees, however, contravenes a significant interest of monolingual, non-English speaking citizens and ought only be overridden by countervailing government claims. *See supra* notes 57-58.

60. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-19, at 137 (2d ed. 1988) ("[A] litigant should always have standing to claim . . . that complying with a duty imposed upon him would prevent another from exercising a constitutional right . . . ."); Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 433 (1974) (stating that whether enforcement of the duty does infringe a constitutional right is a question of fact); *see also* Maness v. Meyers, 419 U.S. 449, 468 (1975) (holding that a lawyer is not subject to contempt for advising his client, in good faith, of his Fifth Amendment rights).

61. *Yniguez IV*, 69 F.3d at 940.

62. This is very similar to the point Judge Kozinski raises at the end of his dissent. *See supra* note 46 and accompanying text. Judge Kozinski, however, vastly overreads the scope

The court could have reached the same result in *Yniguez IV* by combining the unconstitutional conditions doctrine[63] with the speech interest of the citizens at issue in this case. Had Arizonans amended their constitution to exclude those citizens who cannot speak English from government services or from speaking with their elected officials, the court scarcely would have hesitated to strike down the amendment.[64] Although Article XXVIII restricts the government official or employee instead of the citizen, the effect is identical. The inability to understand English would preclude citizens from speaking to their elected representatives and to government bureaucrats,[65] preventing the citizens from obtaining government services to which they otherwise were entitled. Article XXVIII thus accomplishes indirectly that which Arizona cannot do directly, rendering it unconstitutional.

Yniguez IV presented the Ninth Circuit with the opportunity to clarify the rights and interests at issue when citizens speak to government employees and officials. By forcing *Yniguez IV* into the *Waters-Pickering* distinction between "public concern" and "private interest" speech, the court missed this opportunity and instead produced a series of opinions that gave short shrift to, and in some cases virtually ignored, the central issue. The addition of open hostility and hyperbole in two of the judges' opinions further detracted from an already poorly-argued decision.

The move toward establishing English as the official language of the United States continues.[66] A new approach—one that either recognizes the weight of citizens' interest in receiving information from the government or applies the unconstitutional

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of the right upheld in Judge Reinhardt's opinion and ignores that Yniguez could have been treated as bringing a claim to protect the interests of others.

63. *See* Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 7 (1988) ("[T]he doctrine prevents the government from asking the individual to surrender by agreement rights that the government could not take by direct action."); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

64. *Cf.* United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973) (invalidating the placing of conditions on food stamps limiting receipt only to those living in households with people related to them).

65. Clearly, they could speak past each other as one spoke Spanish and the other was precluded from doing so. They could not engage in public dialogue in the meaningful sense that the First Amendment was designed to protect if they merely spoke but did not communicate.

66. *See America Needs No Language Law*, N.Y. TIMES, Nov. 25, 1995, § 1, at 22 (recording that the Emerson-Shelby bill to require the federal government to do almost all of its business in English has 18 Senators and nearly 200 Representatives as cosponsors).

conditions doctrine—is needed to assess the constitutionality, or lack thereof, of this movement.

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