B) EL DRET LINGÜÍSTIC

THE IMPACT OF ENGLISH-ONLY REGULATIONS ON PUBLIC-EMPLOYEE FREE SPEECH IN THE UNITED STATES: A CONSTITUTIONAL ANALYSIS*

Manuel Triano-López**

El resum és al final de l'article.
Resumen al final del artículo.
Le résumé se trouve à la fin de l'article.

This article focuses on the validity of English-Only regulations enacted by public employers in the United States. Specifically, the article centers on the legitimacy of these regulations when the employee claims a violation of the Free-speech Clause embedded in the First Amendment to the United States Constitution. Bolstered by court decisions, the article shows that the constitutionality of adverse employment actions taken against public employees for speaking a foreign language at work will revolve around the courts' application of Garcetti v. Ceballos. That 2006 case empowered government employers to regulate employee expression that lies within the employee's official duties, even if the speech dealt with an issue of great social relevance. Moreover, even if the employee's speech were found to be unrelated to the his/her duties, it would still have to pass the four prongs of the Pickering test, which begins by requiring the employee to show that the speech dealt with a public matter.

Despite these obstacles, Garcetti does not leave public employees with-

* The author gratefully acknowledges the invaluable feedback provided by Dr. Paul Newman, Distinguished Professor Emeritus of Linguistics at Indiana University Bloomington. Any errors in this article are solely the author's responsibility.

** Manuel Triano-López, PhD, Department of Foreign Languages, Sam Houston State University
Article received: 31.01.2011; review: 21.02.2011; final version accepted: 02.03.2011.

out any legal recourse against an English-Only policy. First, Garcetti does not control prior restraints on employee speech, i.e., situations in which speech was restricted before it actually occurred. If the employee persuaded the court to follow this approach, the government would have to meet a greater burden of justification than it would under Garcetti. And second, given the high level of judicial protection traditionally enjoyed by political speech, courts would most likely strike down English-Only regulations that impinged on the free discussion of governmental affairs, even if the expression fell within the employee's official duties.

Keywords: United States of America; Constitutional Law; English-Only; Language in the public workplace; Freedom of speech.

Summary

1. Introduction
2. The First Amendment and public employment
3. Restricting foreign languages in the public workplace
   3.1. When the English-Only restriction is content-neutral
   3.2. When the English-Only restriction is content-based
4. Conclusions
Bibliography

1. Introduction

The United States has long been regarded as a beacon for peoples of all races and ethnicities. Throughout its history, the country has beckoned millions of immigrants with the expectation that they would ultimately assimilate into one nation, an ideal fittingly reflected in the national motto '*E Pluribus Unum*,' i.e., 'Out of many, one' (Sullivan 2009). These expectations have varied in their degree of tolerance towards other cultures. For instance, in the early 20th century, proponents of assimilation regarded American identity as continuously absorbing valuable traits from the immigrants' culture. This celebration of cultural diversity, however, has also competed with less pluralistic views that call on immigrants to give up, rather than contribute, their idiosyncratic traits as they attempt their transition into a monolithic culture (Lau 2007).

The debate on assimilation has permeated the most ingrained elements of culture, including language. Since the early days of the nation, different groups have found themselves caught up in an impassioned debate over the immigrants' need to assimilate linguistically. Benjamin Franklin, for example, vehemently supported official-English policies, out of concern that the growing influx of German-speaking immigrants in his home state of Pennsylvania would lead to social unrest. Conversely, Thomas Jefferson, who was fluent in French, advocated multilingual policies as a means to tap the wealth of scientific and artistic knowledge accrued by non-English-speaking countries (Perea 1992; Lamborn 2005).

Recent demographics portend an even more contentious discussion over the rights of linguistic minorities in the United States. According to the 2000 Census, 47 million people speak a language other than English at home (Camarota 2007). This figure will most likely continue to increase in the next

few decades as waves of immigrants keep pouring into the country. For instance, Latinos, a group that encompasses first-generation Spanish-speaking monolinguals, are projected to account for 30 per cent of the national population by 2050 (MSNBC 2008). These projections, however, will not necessarily lead to the displacement of English by other widely spoken languages such as Spanish or Chinese. In fact, recent studies point to an acceleration of the traditional three-generation shift into English, whereby the first generation retains its native language; the second generation becomes bilingual (using the parent's language mainly at home); and the third generation speaks only English (Leonard 2007).

Nevertheless, some groups have argued that the present level of multilingualism in the U.S. tears at the country's true social fabric. As a result, this segment of the population has been pushing for linguistic legislation to reinforce the dominance of English. For instance, the English Language Unity Act of 2009 (H.R. 997) elevates that language as 'the common thread binding individuals of differing {ethnic, cultural, and linguistic} backgrounds.' Accordingly, the Act mandates that the functions of the federal Government be conducted solely in English.

Although this and similar federal bills have never been signed into law, efforts at the state level have proven more successful. As of September 2010, thirty states had passed 'Official-English' laws, thereby arousing some concern about the curtailment of bilingual services in areas such as education or government. In some cases, the legislation hardly impacts the non-English and limited-English-speaking population. For instance, the state of Alabama continues offering its driver's license exams in different languages, even though the U.S. Supreme Court held that the state could require applicants to take the exams only in English (*Alexander v. Sandoval* 2001). In other contexts, however, English-Only legislation has emboldened the government and private entities to restrict more aggressively the use of foreign languages in different areas. One such affected area is the workplace, particularly in light of recent Bureau of Labor statistics showing that roughly 20 million Latinos (or 14 per cent of the total labor force in the United States) and 6.5 million Asians (or 4.7 per cent) were employed in 2009. Consider, for instance, the following English-Only policy:

> «We are an American company, in America, and I expect our employees to speak English whether at their desks, in the hallways, or communicating with each other by telephone . . . I will continue to pay my employees in American money, not

> pesos, but unless there is an immediate and continuing improvement, I intend to cut all vacation time in half (Ojito 23 April 1997).»

Recent employment data suggest that the proliferation of English-Only regulations in the public sector will not subside in the near future. In 2006, 19.1 per cent of employed U.S.-born Latinos worked in the public sector, or 3.1 per cent higher than the rate of public employment for whites in the same period (Pastor and Carter 2009, p. 146). Moreover, Catanzarite and Trimble (2008, p.158) argue that the government «is a significant employer for native Latinos and will increase in importance as the Latino population grows and attains higher levels of education».

In light of its growing social relevance, this article will focus on the validity of English-Only regulations in the public workplace. Specifically, the article aims to cast some light upon the legitimacy of these regulations when the employee claims a violation of the Free-speech Clause embedded in the First Amendment to the United States Constitution. The article begins by outlining the scope of free expression in the United States, and then proceeds by analyzing relevant First-Amendment approaches to public employee speech. Bolstered by examples from actual court decisions, the next section examines the effect of these legal doctrines on the constitutionality of English-Only regulations when the government acts as an employer. The article concludes by summarizing the findings.

2. The First Amendment and public employment

The First Amendment to the U.S. Constitution provides, in part, that 'Congress shall make no law. . . abridging the freedom of speech.' The Amendment thus protects speakers from at least some speech regulations by the federal and state governments, particularly when the speech carries political connotations (*Mills v. Alabama* 1966, pp. 218-19). The extent of the Amendment covers the public's right not only to express but also to receive such messages. Furthermore, the protection applies not only to the spoken or written word, but also to certain forms of conduct, such as burning the American flag, which are performed in order to express a message (e.g., opposition to the government's foreign policy.)

Not all speech, however, is accorded the same level of First-Amendment protection. For instance, prior restraint (i.e., restricting expression before it occurs) carries an even higher presumption of unconstitutionality than does

punishing speakers *after* they express their message (Matrullo 2005). Likewise, speech restrictions found to be overbroad and/or vague are highly likely to be struck down. For example, a sweeping prohibition against 'pornographic language' would suppress a considerable amount of protected speech. In the same vein, a vaguely-drawn statute against the «contemptuous» treatment of the United States flag might leave speakers guessing at the meaning of «contemptuous» and thus force them to refrain from engaging in otherwise protected expression for fear of breaking the law (*Connally v. General Construction Co*. 1926; *Gooding v. Wilson* 1972).

The overbreadth and vagueness doctrines apply to a subset of laws known as 'content-based' restrictions. These laws distinguish 'favored speech from disfavored speech on the basis of the ideas or views expressed' (*Turner Broadcasting System, Inc. v. Federal Communications Commission* 1994, p. 643). By enacting these laws, the government attempts to curb speech on subject matters considered dangerous, extremely divisive, or patently offensive. The Supreme Court, however, has stressed that the government must tolerate speech that the average citizen would find outrageous, offensive, or controversial in order to provide adequate 'breathing space' to the freedoms safeguarded by the First Amendment (*Boos v. Barry* 1988, p. 322). Content-based regulations of speech might be found unconstitutional even when the government argues a compelling interest in enacting the law. For instance, although the government might have a persuasive interest in restricting the access of minors to pornographic material on the Internet, this interest could be furthered by implementing age-verification measures, rather than through a sweeping ban on online pornography (*U.S. v. Playboy Entertainment Group, Inc.* 2000).

Content-based regulations forbidding individuals to advocate a specific viewpoint have been found to be particularly damaging to First-Amendment values. For instance, a law prohibiting opinions critical of the U.S. military intervention in Iraq while allowing individuals to praise the war would constitute a viewpoint regulation of speech. The Supreme Court reasons that the government must allow all viewpoints to be heard in order to ensure the 'equality of status in the field of ideas' (*Police Dept. of Chicago v. Mosley* 1972, p. 96). By favoring one side of the argument over the other, viewpoint-based regulations therefore distort the equilibrium (Currie 1990, p. 508).

Notwithstanding the presumptive unconstitutionality of content-based regulations, the Court also ruled in *American Communications Association. v. Douds* (1950, p. 394) that freedom of speech 'does not comprehend the right to

speak on any subject at any time.' For instance, restrictions of speech on government property might pass Constitutional muster more easily (Stone 2009). As Justices Blackmun and Brennan explained in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc*. (1985, p. 815), streets, parks, and sidewalks are considered traditional public forums, since they have been devoted from time immemorial to assembly and debate. For this reason, courts review content-based regulations in these forums strictly. Conversely, forums such as office buildings and public airport terminals are not by tradition open for expressive activity (e.g., *International Society for Krishna Consciousness v. Lee* 1992). Because the government can reserve this nonpublic property for non-expressive purposes (e.g., promoting efficient air travel), any content-based regulation imposed on these forums only needs to be reasonable and viewpoint-neutral. For example, in *Marlin v. District of Columbia Board of Elections and Ethics*, the appellate Court ruled that by prohibiting the wearing of *all* political paraphernalia inside a polling place, the government was using a viewpoint-neutral regulation of speech to further a reasonable goal: preventing altercations and intimidation of voters in a nonpublic forum.

The ramifications of the forum doctrine reach the public workplace. In *Cornelius* v. *NAACP Legal Defense & Educational Fund, Inc*. (1985, p. 802), the Supreme Court made it clear that the government creates public forums 'by intentionally opening a nontraditional forum for public discourse.' Therefore, barring this intent, the public workplace does not qualify as a forum for public expression, thus allowing the government to restrict speech more easily. For example, in *Greer v. Spock* (1976), the U.S. Supreme Court held that because the main function of a military base is to train soldiers, a commanding officer is entitled to forbid civilians from making political speeches or distributing literature at the military installation. Similarly, in *May v. Evansville-Vanderburgh School Corporation* (1986), a group of teachers had been holding weekly meetings at their school to pray. The appellate court ruled that the school did not qualify as a public forum because the government had not invited the public 'to use its facilities as a soapbox [for the expression of their religious beliefs]' (1986, p. 1114).

Furthermore, in *Arnett v. Kennedy* (1974, p. 168), the Supreme Court underscored the government's prerogative to dismiss employees who hamper the efficient operation of its offices or agencies: 'Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the effi-

ciency of . . . [a governmental] office or agency.' In other words, the public workplace exists to accomplish the business of the government as an employer (*Cornelius* v. *NAACP* 1985).

The government, therefore, could argue a two-prong justification to restrict the speech of its personnel. First, under a public-forum analysis, the government would have to designate its property for a certain expressive purpose in order for employee speech to receive a high level of First-Amendment protection; and second, the interest of the government in delivering efficient services to the public empowers it to punish any employee speech that was disruptive enough to forestall this interest.

At the same time, however, the Supreme Court held in *New York Times Co. v. Sullivan* (1964, p. 270) that debates on public issues 'should be uninhibited, . . . [and] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' These ruling have therefore created a legal tension between two interests: on the one hand, the interest of the employee, as a citizen, in commenting upon public matters without governmental intrusion; on the other hand, the interest of the government, as an employer, in ensuring the efficiency of its public services. The Court attempted to resolve this tension in *Pickering vs. Board of Education* (1968).

The *Pickering* balancing test consists of four prongs. Courts begin by determining whether the employee spoke as a citizen on a matter of public concern. If the employee commented only upon personal matters, s/he has no First-Amendment cause of action against his/her employer. Nonetheless, if the employee did speak on an issue of public concern, courts would have to balance the employee's interests in making the statements against the government's interest in delivering efficient services to the public. If the employee's interests prevail over those of the government, the third prong requires the employee to show that the action taken against him/her (dismissal, denial of a promotion, etc.) was motivated by his/her expression. Finally, the fourth prong gives the government the opportunity to win the case by showing that the same adverse action would still have been taken absent the employee's speech.

The *Pickering* test was subsequently modified to accommodate the circumstances surrounding *Garcetti v. Ceballos* (2006) and *U.S. v. National Treasury Employee's Union* (1995). These two cases yielded opposite outcomes regarding the employee's right to free speech in the public workplace: whereas the

Garcetti ruling significantly reduces the likelihood of a successful First-Amendment claim, the *National Treasury* decision makes it more difficult for the government to restrict employee speech.

In *Garcetti*, a prosecutor claimed that his superiors had punished him after he wrote a controversial memorandum supporting the dismissal of particular case. The majority decided not to apply the *Pickering* balancing test because in *Pickering*, the public employee had made public statements outside his official duties, whereas in *Garcetti*, the public employee wrote his recommendation while fulfilling his duties as a prosecutor. The *Garcetti* majority reasoned that since he was exclusively speaking as a government employee (and not as a private citizen), his supervisors were entitled to discipline him for sending an inflammatory memorandum.

Garcetti, therefore, adds an inquiry that courts must examine before applying the four prongs of the *Pickering* test (Stafstrom 2008). In other words, before determining whether the public employee spoke on a matter of public concern, courts must consider whether s/he spoke as a citizen or as a public employee, that is, whether his/her speech occurred while s/he was performing his/her official duties. If so, the First Amendment does not protect the public employee, even if the speech dealt with an issue of great social relevance.

Scholars and jurists have fervently criticized the *Garcetti* decision. In his dissent, Justice Stevens, joined by Justices Souter and Ginsburg, argued that the First Amendment protection rests on 'the value to the public of receiving the opinions and information that a public employee may disclose' because government employees often know first-hand the problems affecting the public agencies for which they work (*Garcetti v. Ceballos* 2006, p. 428). Consequently, if these employees were not able to speak on the operations of their public employers, the community would be deprived of well-informed opinions on important public matters. In the same vein, Cooper (2006, p. 91) wonders, «What is the health inspector to do when he finds flagrant violations within his department? What is the internal auditor to do when he finds that his employer is embezzling money? . . . [Based on *Garcetti*,] the last thing they should do is report this discovery to their superiors." Furthermore, Justice Stevens and Justice Souter contended that public employees «are still citizens while they are in the office», (2006, p. 427) and thus protected by the First Amendment when commenting on matters of public concern. Put differently, *Garcetti* ignores all those employees who retain their citizen's conscience while at work (Reed, 2007, p. 123). Finally, the *Garcetti* majority did not deem it

necessary to articulate a framework for defining the employee's duties, other than noting that formal job descriptions cannot solely be relied upon to determine the scope of employment (2006, pp. 424-425). Predictably, lower courts have varied in their definitions when deciding cases under *Garcetti* (Wenell, 2007, pp. 627-628). Despite these criticisms, the *Garcetti* decision still stands at the time of writing this article.

A First-Amendment claim could fare better for the public employee under the *National Treasury* analysis. In particular, the case focused on an honoraria ban that prohibited federal employees from accepting payment for making speeches. *National Treasury* thus dealt with a prior restraint on employee speech, i.e., a situation in which speech was restricted *before* it actually occurred. For this reason, the *National Treasury* test only applies the first two prongs of the *Pickering* test, thus disposing of the employee's final burden of proof, and the government's final defense (Hill *et al*. 2009). Therefore, courts begin to apply the *National Treasury* test by determining whether the employee expression would have touched upon a matter of public concern. If the expression meets this first prong, the test then pits the government's interests in efficiency against those of potential audiences and present and future employees whose speech may be affected by the prior restraint (Roe and Witzel 2004). In short, the *National Treasury* test imposes a greater burden of proof on the government than does *Pickering*.

The preceding paragraphs have summarized the current legal frameworks for analyzing governmental restrictions on public employee speech. The next section will continue exploring this subject matter by focusing more narrowly on the governmental efforts to restrict foreign languages in the public workplace.

3. Restricting foreign languages in the public workplace

The non-English and limited-English-speaking populations in the United States are entitled to the rights and freedoms enshrined by the federal Constitution. This protection was recognized by the Supreme Court in *Meyer v. Nebraska* (1923). From this ruling it follows that public employees who use a foreign language at work could in principle challenge an English-only restriction as violating their constitutional right to free speech. Whether these employees can prove that such a violation will depend on the scope of the English-Only restriction, the content of their speech, and the legal doctrines on

which they base their claim. The following lines will analyze how the interplay of these factors could affect the outcome of the employees' claim.

3.1. When the English-Only restriction is content-neutral

Most of the English-Only provisions at the state and municipality level are symbolic, and thus fall short of requiring that English be solely used in certain areas. For instance, Indiana Code Annotated § 1-2-10-1 adopts the English language as the official language of the state of Indiana, but this section appears next to provisions naming the state's official bird, stone, and river. Even more detailed official-English laws leave some room for the use of foreign languages. For example, Montana's official-English law explicitly gives government officers or employees «acting in the course and scope of their employment» ample leeway to communicate in a foreign language (Montana Code Annotated, § 1-1-510). Since these symbolic statutes do not require English to be the only language of government, they rarely become the subject of litigation (Hill et al. 2009).

3.2. When the English-Only restriction is content-based

Other English-Only provisions in state statutes and constitutions constrain foreign-language use more tightly. When the provision explicitly details the areas affected by the linguistic restriction, it becomes more apparent that content is being targeted (Mackin 2008). As mentioned above, courts typically review content-based restrictions of speech with heightened scrutiny. This stringent standard of review is most evident in the case of political speech, precisely one of the most conspicuous targets of restrictive English-Only legislation. The opinions in *Yniguez v. Arizonans for Official English* (1995), and *Ruiz v. Hull* (1998), two cases involving a 1988 Arizona constitutional amendment, will illustrate how the restriction of political speech would impinge on the validity of English-Only regulations in state statutes and constitutions.

Unlike other, more symbolic English-Only provisions, the Arizona amendment directed all government officials and employees performing government business to act exclusively in English. Furthermore, the amendment prohibited all state and local entities from enacting or enforcing any law, order, decree or policy that allowed the use of a foreign language. The restrictions led to *Yniguez* and *Ruiz*, two cases filed by Spanish-speaking public employees who claimed that the amendment prevented them from speaking Spanish while performing their duties.

Yniguez, the only case regarding an English-Only law to reach the U.S. Supreme Court, provides insufficient guidance on whether similar provisions would pass constitutional muster. The Court vacated the opinion of the Court of Appeals for the Ninth Circuit without addressing the constitutionality of the amendment because the employee no longer worked for the State of Arizona. Since *Yniguez* was ultimately decided on procedural grounds, the validity of the amendment will be discussed primarily with reference to the Arizona Supreme Court's analysis in *Ruiz*.

As the *Ruiz* majority noted, the English-Only mandate inhibited the free discussion of governmental matters in two ways. First, it prevented limited- and non-English-speaking people from participating in the political process. As the Court noted, for a substantial number of Arizonans, English is not their primary language. These citizens may therefore experience insurmountable difficulties in conveying «their political beliefs, opinions, or needs to their elected officials» (1998, p. 998). Second, with a few exceptions, the English-Only mandate impaired the ability of elected officials and public employees to communicate with their constituents and the public at large while performing governmental duties. In short, the Arizona amendment hampered any meaningful communication between Arizonan constituents and their elected representatives. In light of these broad restrictions, the *Ruiz* Court agreed with the ruling of the Court of Appeals in *Yniguez* that the English-Only mandate violated the First Amendment to the U.S. Constitution.

Ruiz and *Yniguez* suggest that the English-Only mandate would have also been found unconstitutional under *Pickering* and its progeny. First, the *Ruiz* Court likened the mandate's prohibition to the prior restraint struck down in *National Treasury* because both prohibitions chilled potential speech by numerous speakers. The chilling effect on speech was even more pronounced in the case of the Arizona amendment because Section 4 allowed any Arizona resident or anyone conducting business in the state to sue elected officials and state employees for violating the English-Only mandate.

Second, even if the mandate had not amounted to a prior restraint on speech, it would have most likely failed the traditional *Pickering* balancing test for two reasons. First, as the Court held in *Yniguez*, the mandate would have affected communications between government employees and Arizona residents on important issues of public concern. Second, the government would have failed to show that the employee speech would have frustrated the effi-

cient administration of the public workplace. As the *Yniguez* and *Ruiz* courts noted, the use of Spanish actually enhanced the communications between government employees and the public. The English-Only mandate, if anything, hindered the state's interest in efficiency.

An English-Only mandate like the one embedded in the Arizona amendment would also have been struck down by *Garcetti* because of two factors: the long-standing commitment of the judiciary to the free flow of democratic expression, and the absence of a sound justification for disciplining those employees who violate the English-Only mandate. Unlike *Garcetti*, *Ruiz* did not involve an allegedly inflammatory memorandum, but rather communications on issues squarely related to the foundations of self-government. Moreover, because the use of Spanish by Arizona employees actually safeguarded the public's right to access to government, the State would have found itself in a difficult position to justify, in the interests of efficiency, an adverse employment action against those employees who disregarded the English-Only mandate.

However, it should not be inferred from the previous discussion that any English-Only regulation would fail a traditional *Pickering* or *Garcetti* analysis. Constitutions and statutes are not the only legal means through which the government may regulate the use of foreign languages in the public workplace, nor is political speech the only type of expression that could be affected by an English-Only restriction. Consequently, other governmental efforts could lawfully curtail the amount of foreign language used in the public workplace. This point will be illustrated below.

According to McCarthy and Eckes (2008, p. 219), post-*Garcetti* decisions involving public educators have made it easier for employers to discipline school employees for speaking pursuant to a job duty. Although the commentators do not mention any cases dealing with English-Only restrictions, the analysis of a pre-*Garcetti* case seems to support their claim. Specifically, *California Teachers Association v. State Board of Education* (2001) constitutes the most recent case regarding an English-Only policy aimed at teachers working for a public institution. This case focused on a California statute requiring all children in California public schools to be placed in classrooms in which the language of instruction used is 'overwhelmingly' English. Moreover, the statute granted aggrieved parents legal standing to sue any educator who 'willfully and repeatedly' refused to abide by the statute. Since a teacher's duties involve delivering instructional speech, a *Garcetti*-based analysis would have

given the state free rein to implement the English-Only policy. Furthermore, as long as the teacher is acting in his/her official capacity, *Garcetti*'s reach would extend to a number of situations involving non-instructional speech. For instance, *Garcetti* would allow public institutions to forbid their teachers from speaking foreign languages when supervising students on the playground, and when taking them on field trips, to name a few of the activities that teachers are expected to perform. The prohibition would not necessarily be limited to teacher-student interactions; it might also ban teacher exchanges with other interlocutors on matters of public concern.

Likewise, language switches by bilingual public employees would not necessarily be protected, despite widespread agreement among sociolinguists (Myers-Scotton 1993; Mahootian 2005; and Gardner-Chloros 2009, to name a few) that content may be communicated not only through words, but also through language choice. Specifically, sociolinguists claim that switching between languages may serve a number of social functions, such as establishing solidarity with the addressee(s), marking differences in status among the interlocutors, or emphasizing the speaker's ethnic identity. In fact, some courts have agreed with sociolinguists that language choice can convey such a powerful message. For instance, as the majority in *Asian American Business Group* concisely held, choice of one language over another constitutes «an expression of culture, [national origin, and ethnicity]» (1989, p. 1330). The U.S. Supreme Court strengthened this claim in *Hernández v. New York* (1991, p. 371) by arguing that

> [j]ust as a shared language can serve to foster community, language differences can be a source of division. Language elicits a response . . . ranging from admiration and respect, to distance and alienation, to ridicule and scorn. Reactions of the latter type all too often result from or initiate racial hostility.

Nevertheless, *Maldonado v. City of Altus* (2006) shows that other courts do not necessarily assume an inextricable link between content and language choice. In that case, heard four months before *Garcetti*, non-Spanish-speaking public employees complained that certain co-workers were speaking Spanish on the City radio. The City followed up by requiring work-related and business communications to be conducted in English in order «to prevent misunderstandings and . . . promote and enhance safe work practices». Some bilingual employees alleged that their speaking in Spanish constituted speech about ethnic pride, which they considered a matter of public concern. Moreover, they claimed that the English-Only policy inhibited future communications

protected by the First Amendment. Consequently, the employees reasoned, their choice of Spanish over English should have been protected under doctrines governing prior restraints on speech, such as *National Treasury*. However, the Court's majority applied the traditional *Pickering* test, which shows more deference to the government.

In its analysis, the *Maldonado* majority focused on two issues: the words spoken and the choice of Spanish over English to speak them. First, with regard to the content of the speech, the majority held that if the bilingual employees had been allowed to speak Spanish, their speech would not have covered issues of public concern, but rather «mundane . . . conversation» (2006, p. 1310). Second, regarding the form of the speech, the majority underscored the distinction between *feeling* something and *expressing* that feeling: «[A]n immigrant may be very proud that she can speak the language of her new country, but one would be surprised to learn that when she conducts a transaction . . . in English, she is communicating [her] pride in America» (2006, p. 1311). In the court's view, the Spanish-speaking employees failed to show that they were expressing Hispanic pride through the use of Spanish. Having established that language choice did not communicate a clearly discernible message, the court did not address whether ethnic pride constituted a matter of public concern, and, therefore, dismissed the employees' claim.

Therefore, excluding political speech, *Garcetti* and *Maldonado* erect a hurdle that bilingual public employees may find too high to clear. First, if the content of the speech pertained to the employee's duties, courts would found for the government under *Garcetti*. Second, even if the speech were unrelated to the employee's duties, it would still have to pass *Pickering*'s four prongs, the first of which requires that the speech deal with a public matter. As *Maldonado* showed, public employees may not convince courts to rule that language choice in itself expresses a matter of public concern, much less ethnic pride. Third, *Maldonado* also seems to indicate that an alternate approach based on the public-forum doctrine will most likely weaken the employee's argument, regardless of the public relevance of his/her expression. As explained above, courts will not rule that a public forum was created absent the government's explicit intent. For example, public school grounds are meant to be reserved for educational, not expressive, purposes. Similarly, military bases are primarily built to train soldiers, not to hold debates. This potential hurdle manifested itself, albeit indirectly, in *Maldonado*. Although the case was not addressed from a public-forum standpoint, the majority hinted that the city

property where the bilingual employees spoke Spanish constituted a nonpublic forum. Therefore, this analysis would have made it easier for the English-Only policy to survive judicial scrutiny. In fact, it would seem impractical for governments, local or otherwise, to reserve a forum so that public employees may voice their opinions on race or ethnic pride, regardless of whether these views were expressed via words or through the choice of a foreign language. More likely, the government might be inclined to steer away from such forums, since exchanges on a controversial issue might escalate into heated altercations, which, in turn, might compromise governmental efficiency.

4. Conclusions

The outcome of future cases dealing with foreign-language restrictions in the public workplace (other than those amounting to prior restraint) will revolve around the courts' application of *Garcetti*. That case empowered government employers to regulate employee expression that lies within the employee's official duties. Consequently, if the ruling were followed closely, the government, acting in the interests of efficiency, could compel its employees to use only English when discharging their duties. Nevertheless, given the relatively short time elapsed since the ruling, its actual repercussions on employee speech can only be speculated.

Political speech constitutes the only area that can be confidently predicted to remain impervious to *Garcetti*. As the analysis of the Arizona amendment showed, requiring the government to act solely in English cannot be justified under *Garcetti*. This point has been bolstered by subsequent opinions regarding a ballot measure in Alaska (*Alaskan for a Common Language, Inc. v. Kritz* 2007), and an initiative petition in Oklahoma (*In re Initiative Petition No. 366* 2002).

First, the restriction would prevent non-English speakers from receiving crucial information about government, and precluded legislators and other elected officials from communicating with their constituents. Second, the measure would prevent employees from speaking freely on matters of public concern. Third, the restriction would pave the way for prior restraint because some voices would be silenced, some ideas would remain unspoken, and some ideas would remain unchallenged (*Alaskan for a Common Language, Inc. v. Kritz* 2007, p. 216). And fourth, even if the government's interest in preserving and strengthening the English language were found to be compelling, the

government could use less restrictive means to achieve this goal without penalizing employee speech, such as creating and funding programs promoting English as a second language.

Without any *Garcetti*-based precedents, the validity of English-Only regulations in areas other than government becomes difficult to ascertain. Nevertheless, it can be inferred from a number of lower-court opinions that foreign-language restrictions in the academic workplace would be upheld under *Garcetti* at least in some contexts. For instance, the English-Only policy could restrict not only instructional expression (the speech used by teachers to present the curriculum to their students), but also those instances of teacher expression which, while non-instructional, are nevertheless related to the teacher's duties: from disciplining students to informing them about safety regulations (*California Teachers Association v. State Board of Education* 2001).

These potential outcomes do not necessarily indicate that *Garcetti* would leave linguistic minorities in the U.S. with absolutely no legal recourse against an English-Only policy. Depending on the circumstances, public employees could at least use two approaches, the vagueness doctrine and the *National Treasury* test, both of which would rely on the U.S. Supreme Court's historical aversion to content-based prior restraint. First, the government would have to word the terms of the policy carefully in order to keep employees from guessing what constitutes 'official' conversations. Otherwise, these employees might not be able to tell when a particular situation precludes or allows the use of a foreign language. This uncertainty could in turn lead to substantial self-censorship among employees for fear of a disciplinary action, thus raising the possibility of prior restraint (Mackin 2008). Second, the employees could argue that *Garcetti* does not apply because the government chilled legitimate employee speech *before* it happened. If the court agreed to proceed with *National Treasury*, the employees' first and only proof would involve showing that those future communications would touch upon a matter of public concern, whereas the government would have to meet a greater burden of justification than it would if *Garcetti* were followed.

Bibliography

Bureau of Labor «Employed Persons by Detailed Occupation, Sex, Race, and Hispanic or Latino Ethnicity: 2009», n.d., www.bls.gov/cps/cpsaat11.pdf (accessed 2 October, 2010)

Camarota, S. «Nov. 2007 Immigrants in the United States, 2007: A Profile of America's Foreign-Born Population», 2007, http://www.cis.org/articles/2007/back1007.pdf (accessed 1 June 2009).

Catanzarite, L.; Trimble, L. «Latinos in the United States Labor Market», in Rodríguez, H., Sáenz, R. and Menjívar, C. (eds), *Latinas/os in the United States: Changing the Face of América*, New York, Springer, pp. 149-67, 2008.

Cooper, K. «*Garcetti v. Ceballos*: The Dual Threshold Requirement Challenging Public Employee Free Speech», *Loyola Journal of Public Interest Law*, Volume 8, 2006, pp. 73-95.

Currie, D. *The Constitution in the Supreme Court: The Second Century, 1888-1986*, Chicago, University of Chicago Press, 1990.

Gardner-CHloros, P. *Code-Switching*, Cambridge, Cambridge University Press, 2009.

Hill, J. *et al.* «Survey: Watch your Language! The Kansas Law Review Survey of Official-English and English-Only Laws and Policies», *Kansas Law Review,* Volume 57, 2009, pp. 669-737.

Lamborn, R. «The Fiber of the Common Bond», *George Mason Law Review*, Volume 13, 2005, pp. 367-410.

Leonard, J. «Title VII and the Protection of Minority Languages in the American Workplace: The Search for a Justification», *Missouri Law Review*, Volume 72, 2007, pp. 745-92.

Lau, H. «Pluralism: A Principle for Children's Rights», *Harvard Civil Rights-Civil Liberties Law Review*, Volume 42, 2007, pp. 317-72.

Mackin, A. «Lost without Translation: The Official English Movement and the First Amendment», *First Amendment Law Review*, Volume 6, 2008, pp. 341-77.

Mahootian, S. «Linguistic Change and Social Meaning: Codeswitching in the Media», *International Journal of Bilingualism*, Volume 9, 2005, pp. 361-75.

Matrullo, J. «*People v. Bryant* and Prior Restraint: The Unsettling of a Settled Area of Law», *Connecticut Public Interest Law Journal*, Volume 4, 2005, pp. 353-77.

McCarthy, M.; Eckes, S. «Silence in the Hallways: The Impact of *Garcetti v. Ceballos* on Public School Educators», *The Boston University Public Interest Law Journal*, Volume 17, 2008, pp. 209-235.

MSNBC «America in 2050: Even Older and more Diverse», http://www.msnbc.msn.com/id/26186087, 2008, (accessed 14 August 2008).

Myers-Cotton, C. *Social Motivations for Codeswitching: Evidence from Africa*, Oxford, Clarendon Press, 1993.

Ojito, M. «Bias Suits Increase over English-Only Rules», *The New York Times*, Section B, 23 April 1997, p. 1.

Pastor, M.; Carter, V. «Conflict, Consensus, and Coalition: Economic and Workforce Development Strategies for African Americans and Latinos», *Race and Social Problems*, Volume 1, 2009, pp. 143-56.

Reed, J. «From *Pickering* to *Ceballos*: The Demise of the Public Employee Free Speech Doctrine», *New York City Law Review*, Volume 11, 2007, pp. 95-125.

Roe, A.; Witzel, K. «Public Employees, Expert Testimony and the First Amendment Right», *The Lawyers Journal*, Volume 6, 2004, pp. 6-15.

Perea, J. «Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English», *Minnesota Law Review*, Volume 77, 1992, pp. 269-373.

Stone, G. «Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century», *Pepperdine Law Review*, Volume 36, 2009, pp. 273-99.

Stafstrom, Jr., S. «Government Employee, are you a «Citizen»?: *Garcetti v. Ceballos* and the «Citizenship» Prong to the *Pickering/Connick* Protected Speech Test», *Saint Louis University Law Journal*, Volume 52, 2008, pp. 589-630.

Sullivan, L. «Press One for English: To Form a more Perfect Union», *South Texas Law Review*, Volume 50, 2009, pp. 589-616.

Wenell, J. «*Garcetti v. Ceballos*: Stifling the First Amendment in the Public Workplace», *William & Mary Bill of Rights Journal*, Volume 16, 2007, pp. 623-648.

Cases

Alaskans for a Common Language, Inc. v. Kritz, 170 P.3d 183 (Alaska 2007).

Alexander v. Sandoval, 532 U.S. 275 (2001).

American Communications Association v. Douds, 339 U.S. 382 (1950).

Arnett v. Kennedy, 416 U.S. 134 (1974).

Asian American Business Group v. City of Pomona, 716 F. Supp. 1328 (C.D. Cal. 1989).

Boos v. Barry, 485 U.S. 312 (1988).

California Teachers Association v. State Board of Education, 271 F.3d 1141 (9th Cir. 2001).

Connally v. General Construction Co., 269 U.S. 385 (1926).

Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788 (1985).

Garcetti v. Ceballos, 547 U.S. 410 (2006).

Gooding v. Wilson, 405 U.S. 518 (1972).

Greer v. Spock, 424 U.S. 828 (1976).

Hernández v. New York, 500 U.S. 352 (1991).

In re Initiative Petition No. 366, 46 P.3d 123 (Oklahoma 2002).

Maldonado v. City of Altus, 433 F.3d 1294 (10th Cir. 2006).

May v. Evansville-Vanderburgh School Corp., 787 F.2d 1105 (7th Cir. 1986).

Meyer v. Nebraska, 262 U.S. 390 (1923).

Mills v. Alabama, 384 U.S. 214 (1966).

New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

Pickering vs. Board of Education, 391 U.S. 563 (1968).

Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972).

Ruiz v. Hull, 957 P.2d 984 (Ariz. 1998).

Turner Broadcasting System, Inc. v. Federal Communications Commission, 512 U.S. 622 (1994).

U.S. v. National Treasury Employee's Union, 513 U.S. 454 (1995).

U.S. v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000).

Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (en banc), vacated as moot, 520 U.S. 43 (1997).

Statutes

California Education Code, §§300-340 (West 2002 & Supp. 2006).

Indiana Code Annotated, § 1-2-10-1 (2009).

Montana Code Annotated, § 1-1-510 (2009).

Bills

U.S. House of Representatives *2009 H.R. 997: English Language Unity Act of 2009*, http://www.govtrack.us/congress/billtext.xpd?bill=h111-997, 2009, (accessed 1 September 2009).

Resum

L'impacte de la normativa de «l'ús exclusiu de l'anglès» en la llibertat d'expressió dels empleats públics als Estats Units: una anàlisi constitucional

Manuel Triano-López

Aquest article se centra en la validesa de les normatives de «l'ús exclusiu de l'anglès» establertes per la funció pública als Estats Units. En concret, l'article se centra en la legitimitat d'aquestes normes quan l'empleat al·lega una violació del dret a la llibertat d'expressió recollit a la Primera Esmena de la Constitució dels Estats Units. Reforçat per les decisions judicials, l'article demostra que la constitucionalitat de les accions dutes a terme contra un empleat públic per parlar una llengua estrangera a la feina depèn de la sentència a *Garcetti v. Ceballos*. Aquest cas, del 2006, autoritza els organismes governamentals a regular l'expressió dels seus empleats en l'exercici de les seves funcions, fins i tot quan l'expressió tracti d'un assumpte d'una gran rellevància social. A més, en el supòsit que l'expressió no tingués res a veure amb les funcions de l'empleat, encara hauria de passar la prova de *Pickering*, començant pel requisit que el contingut de l'expressió ha de ser d'interès públic.

Malgrat aquests obstacles, el cas *Garcetti* no deixa els empleats públics sense empara legal enfront d'una política d'«ús exclusiu de l'anglès». En primer lloc, el cas *Garcetti* no inclou els casos de censura prèvia, és a dir, d'aquelles normes que restringeixen l'expressió «abans» que es produeixi. Si l'empleat aconseguís convèncer el tribunal perquè seguís aquest darrer enfocament, el govern hauria d'adduir una justificació de major pes per a la seva política d'«ús exclusiu de l'anglès» del que s'exigeix seguint *Garcetti*. I, en segon lloc, atès l'alt nivell de protecció judicial cap a les expressions de caràcter polític, és molt probable que un tribunal invalidés una norma «d'ús exclusiu de l'anglès» que interferís en la lliure circulació de les esmentades opinions, fins i tot quan aquestes estiguessin lligades a l'exercici de les funcions oficials de l'empleat.

Paraules clau: Estats Units d'Amèrica; dret constitucional; «ús exclusiu de l'anglès»; llengua en el lloc de treball públic; llibertat d'expressió.

Resumen

El impacto de la normativa de «Sólo inglés» en la libertad de expresión en la función pública en los Estados Unidos: un análisis constitucional

Manuel Triano-López

El presente artículo se centra en la validez de las políticas de «Sólo inglés» establecidas en la función pública en los Estados Unidos. Para ser más concretos, el artículo aborda la legitimidad de estas normas cuando el trabajador argumenta una violación del derecho a la libertad de expresión recogido en la Primera Enmienda de la Constitución del país. Apoyándose en sentencias judiciales, el artículo muestra que la constitucionalidad de las acciones llevadas a cabo contra un trabajador por hablar un idioma extranjero en el lugar de trabajo depende de la sentencia en *Garcetti v. Ceballos*. Emitida en 2006, la sentencia de este caso autoriza a los organismos públicos estadounidenses a regular la expresión de sus trabajadores en el ejercicio de sus funciones, incluso cuando la expresión trate de un asunto de gran relevancia social. Además, en el supuesto de que la expresión no guardara relación con las funciones del empleado, aún tendría que pasar la prueba de *Pickering*, comenzando por el requisito de que el contenido de la expresión debe ser de interés público.

A pesar de estos obstáculos, la sentencia en *Garcetti* no deja sin amparo legal a los trabajadores de la función pública frente a una política de «Sólo inglés». En primer lugar, *Garcetti* no abarca los casos de censura previa, es decir, de aquellas normas que restringen la expresión *antes* de que ocurra. Si el trabajador consiguiera persuadir al tribunal para que adjudicara el caso por esta vía, el gobierno tendría que aducir una justificación de mayor peso para su política de «Sólo inglés» de lo exigido por el caso *Garcetti*. Y, en segundo lugar, dada la alta protección del sistema judicial estadounidense hacia las expresiones de carácter político, es muy probable que un tribunal invalidara una norma de «Sólo inglés» que interfiriera en la libre circulación de dichas opiniones, incluso cuando éstas estuvieran ligadas al desempeño de las funciones del trabajador.

Palabras clave: Estados Unidos de América; derecho constitucional; «Sólo inglés»; lengua en la función pública; libertad de expresión.

Résumé

L'impact des réglementations « seulement en anglais » sur la libre parole des employés des services publics aux États-Unis: une analyse constitutionnelle

Manuel Triano-López

Cet article met l'accent sur la validité des réglementations « seulement en anglais » promulguées par les employeurs publics aux États-Unis. L'article se centre tout particulièrement sur la légitimité de ces réglementations quand les employé(e)s prétendent qu'il s'agit d'une violation de la clause de libre parole inscrite dans le Premier Amendement de la Constitution des États-Unis. En s'appuyant sur des décisions de cour, l'article montre que la constitutionalité des actions d'employeurs entreprises contre des employé(e)s du secteur public pour avoir parlé une langue étrangère au travail tournera autour de l'application que feront les tribunaux du cas *Garcetti* v. *Ceballos*. Celui-ci, qui date de 2006, a habilité les employeurs gouvernementaux à réguler l'expression de leurs employé(e)s qui repose sur les devoirs officiels des employés, même si le discours était en rapport avec un thème d'une grande importance sociale. Plus encore, même s'il a été considéré que le discours de l'employé(e) était sans rapport avec ses responsabilités, il devrait cependant passer sous les fourches caudines du test *Pickering*, qui requiert que le discours concerne une question publique.

En dépit de ces obstacles, le cas *Garcetti* ne laisse pas les employé(e)s du secteur public sans aucun recours légal contre la politique du « seulement en anglais ». Tout d'abord, ce cas ne détermine pas les entraves antérieures au discours de l'employé(e), c'est-à-dire les situations dans lesquelles le discours était limité *avant* qu'il se soit produit effectivement. Si l'employé(e) pouvait convaincre le Tribunal de suivre cette approche, le gouvernement devrait alors trouver un plus grande charge de justification qu'il l'aurait fait sous *Garcetti*. Ensuite, étant donné le haut niveau de protection judiciaire dont jouit habituellement le discours politique, les Tribunaux anéantiraient plutôt les réglementations « seulement en anglais » qui affectent la libre discussion des affaires gouvernementales, même si l'expression devait retomber dans le cadre des devoirs officiels des employé(e)s.

Mots-clés: États-Unis d'Amérique, Loi constitutionnelle, seulement en anglais, langue dans les lieux de travail publics, liberté de discours.