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A Progressive Visionary: Stephen Reinhardt and the First Amendment

Stephen Reinhardt is a terrific judge.¹ His opinions are always thorough, well reasoned, and models of clarity. His questions from the bench are focused and reflect his tremendous intelligence and careful preparation. His clerks and former clerks describe the incredibly long hours that he puts in day after day and week after week.

I fear, though, that this excellence gets obscured by the fact that Judge Reinhardt is best known for his ideology. He is regarded by all as a “liberal judge.” Although this phrase is never defined, in common understanding it refers to a judge whose opinions protect civil rights and civil liberties, one who tends to favor the individual over the government and the government over business. Put simply, Stephen Reinhardt’s judicial philosophy is far closer to the Warren Court than to the Roberts Court.

More subtly and more importantly, however, it is a judicial philosophy based on the view that the Constitution embodies a profound respect for human dignity and that its meaning evolves through interpretation. An illustration of this can be found in Judge Reinhardt’s en banc opinion for the

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1. At this point, I should disclose that I have had matters before him where I have prevailed and matters before him where I have failed. *See, e.g.,* Warren v. Comm’r, 302 F.3d 1012 (9th Cir. 2002) (rejecting my effort to intervene to continue a challenge to the tax exemption for ministers of the gospel, discussed *infra* at text accompanying notes 32-45); Brown v. Mayle, 283 F.3d 1019 (9th Cir. 2002) (holding that it is cruel and unusual punishment to impose a sentence of life in prison without parole for the crime of petty theft with a prior conviction, regardless of the prior offenses).

Ninth Circuit, later reversed by the Supreme Court,² upholding a constitutional right to physician-assisted death. Judge Reinhardt's opinion explained that the matter of life and death was so "central to personal dignity and autonomy" that the Constitution left it to the individual.³ He wrote:

[B]y permitting the *individual* to exercise the right to *choose* we are following the constitutional mandate to take such decisions out of the hands of the government, both state and federal, and to put them where they rightly belong, in the hands of the people. We are allowing individuals to make the decisions that so profoundly affect their very existence—and precluding the state from intruding excessively into that critical realm.⁴

Yet, labeling Judge Reinhardt as a "liberal judge" is too simplistic. It obscures the fact that he carefully follows the law and that the majority of his rulings are the same as those rendered by conservative members of his court. Moreover, what is "liberal" and what is "conservative" are, at times, uncertain. In this Feature, I focus on Judge Reinhardt's First Amendment opinions to illustrate the complexity of his judicial philosophy. The first Part of this Feature looks at Judge Reinhardt's opinions concerning freedom of speech. The second examines his opinions concerning the religion clauses of the First Amendment.

Admittedly, focusing on a judge's opinions as a way of understanding his or her judicial philosophy has advantages and disadvantages. Since any appellate judge writes opinions in only a fraction of the cases that he or she hears, this approach ignores the much larger body of decisions where the judge participates. Also, on a court that sits in multimember panels, there is no way to know the extent to which the final opinion reflects the author's personal views, as opposed to a compromise view that was needed to gain a majority. Although these qualifications are important, focusing on the opinions of a judge seems the best way to get a sense of the individual's approach to judging and judicial philosophy.

Looking at Judge Reinhardt's opinions provides a powerful reminder of what should be obvious but is all too often disputed. The ideology of judges inevitably determines how they decide at least some of the cases before them. Contrary to the assertion of now-Chief Justice John Roberts at his

2. *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996) (en banc), *rev'd sub nom. Washington v. Glucksberg*, 521 U.S. 702 (1997).

3. *Id.* at 814 (citations omitted).

4. *Id.* at 839.

confirmation hearings, judges are not like umpires who call balls and strikes.⁵ Judges inevitably must balance competing interests—such as freedom of speech and equality—and doing so requires a value choice unlike any that umpires must make. Judges must decide what is reasonable and what constitutes a compelling interest. These determinations are inevitably a product of the judge’s own life experiences and ideology. This is why Antonin Scalia or Clarence Thomas—or, on the Ninth Circuit, Diarmuid O’Scannlain or Andrew Kleinfeld—consistently reaches conservative results, while Ruth Bader Ginsburg and Stephen Reinhardt reach liberal ones. The only difference is that conservatives pretend that they are doing something different.⁶ Stephen Reinhardt is politically liberal, and inevitably this reality is often reflected in his decisions.

I. SPEECH

Of all of Judge Reinhardt’s opinions on speech, two seem to reflect best his approach to judging, generally, and to the First Amendment, in particular. In one, *Ceballos v. Garcetti*,⁷ he authored an opinion supporting the free speech claim of a government employee only to be narrowly reversed, 5-4, by the Supreme Court.⁸ In the other, he wrote an opinion rejecting the free speech claim of a student and upholding the authority of a school to prevent a student from wearing a T-shirt that contained a message condemning gays and lesbians.⁹ These two cases involved important, though very different, aspects of the First Amendment. Looked at together, they reveal a great deal about the judicial philosophy and approach of Stephen Reinhardt.

A. *Ceballos v. Garcetti*

Richard Ceballos, a supervising district attorney in Los Angeles County, concluded that a witness in one of his cases, a deputy sheriff, was not telling the truth. He wrote a memo to this effect but was told by his supervisor to

5. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55-56 (2005) (statement of John G. Roberts).

6. I discuss this in detail in ERWIN CHEREMINSKY, *THE CONSERVATIVE ASSAULT ON THE CONSTITUTION* (2010), especially in the concluding chapter.

7. 361 F.3d 1168 (9th Cir. 2004).

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

9. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006).

soften its tone and content. Ceballos refused and felt that he was required by the Constitution to disclose the memo to the defense; under *Brady v. Maryland*,¹⁰ prosecutors are compelled to turn over to the defense evidence that might show the defendant's innocence or that can be used to impeach prosecution witnesses.

Ceballos said that, as a result of his memo, his employers retaliated against him by transferring him to a less desirable position and denying him a promotion. The Ninth Circuit, in an opinion written by Judge Reinhardt, concluded that under longstanding Supreme Court precedents, Ceballos's speech was protected under the First Amendment because it involved a matter of public concern and because Ceballos's free speech interests outweighed the government's interest in promoting workplace efficiency.¹¹ Judge Reinhardt, writing for the court, explained:

In short, that Ceballos prepared his memorandum in fulfillment of a regular employment responsibility does not serve to deprive him of the First Amendment protection afforded to public employees. Not only our own precedent, but sound reason, Supreme Court doctrine, and the weight of authority in other circuits support our rejection of a per se rule that the First Amendment does not protect a public employee simply because he expresses his views in a report to his supervisors or in the performance of his other job-related obligations.¹²

Although the Ninth Circuit carefully and correctly applied the law,¹³ the Supreme Court reversed in a 5-4 decision with Justice Kennedy writing a majority opinion joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito.¹⁴ The Court drew a distinction between speech "as a citizen"¹⁵ and

10. 373 U.S. 83 (1963); see also *Giglio v. United States*, 405 U.S. 150 (1972) (finding a duty to disclose impeachment material).

11. *Ceballos*, 361 F.3d at 1173-80 (relying on *Connick v. Meyers*, 461 U.S. 138 (1983), and *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)).

12. *Id.* at 1178.

13. This is a good illustration of why reversal by the Supreme Court does not indicate that the lower court was wrong. There has been a good deal of criticism of the Ninth Circuit for, in some terms, having a high reversal rate. But here, the Ninth Circuit carefully followed Supreme Court precedent only to have the Court change the law and announce a new rule. There is no way that the Ninth Circuit could have anticipated this sudden change. Moreover, this case was initially argued in October 2005 but was reargued in the spring of 2006 after Justice Alito replaced Justice O'Connor. There is good reason to believe that had the case been decided before she left the bench, the decision would have come out the other way and the Ninth Circuit would have been affirmed 5-4.

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

speech as a public employee; the Court said that only the former is protected by the First Amendment. The majority stated that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”¹⁶

The Court created a false and unprecedented distinction between individuals speaking as “citizens” and as “government employees.” Never before has the Supreme Court held that only speech “as citizens” is safeguarded by the First Amendment. In prior decisions holding that speech by corporations is constitutionally protected, the Court emphasized the public’s interest in hearing the speech. The fact that corporations are not “citizens” did not matter because it is the right of listeners, according to the Supreme Court, that is paramount. The Court said that “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”¹⁷

The same, of course, is true when government employees—especially whistleblowers—speak out. When this occurs, the public receives valuable information that otherwise might not be available about wrongdoing within the government. Without First Amendment protection, fewer whistleblowers are likely to expose government misconduct. Moreover, an individual who exposes misconduct is acting *both* as a citizen and as a government employee; to say that a person is in one role or the other is to create a false dichotomy. A public employee does not relinquish his or her citizenship upon entering a government office building.

In this case, Ceballos was revealing a serious problem: misconduct by a deputy sheriff that he believed led to an invalid warrant for a search in violation of the Fourth Amendment. The long history of misconduct by police within Los Angeles shows why it is so important that those like Ceballos be protected when they reveal wrongdoing. That Ceballos suffered adverse consequences from speaking out surely means that other government employees, in similar situations, will be chilled from exposing misconduct. The Court’s decision in *Garcetti v. Ceballos* is terribly misguided because it says that the speech of government employees within their jobs is not protected even if the speech involves a matter of public concern and even if the government’s interests are outweighed by the public benefits.

15. *Id.* at 416-21.

16. *Id.* at 421.

17. *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978); *see also* *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010).

Government employees like Ceballos who expose wrongdoing should be rewarded, not punished. The Constitution and courts should provide protection when the government lashes out against the speaker—regardless of whether this is due to bureaucratic defensiveness or malevolence. That was exactly the underlying rationale of Judge Reinhardt’s opinion and the point that was lost on a majority of the Supreme Court.

This case clearly reflects the inevitable role of ideology in judging. Whether the First Amendment protects the speech of government employees on the job cannot be determined based on the original understanding of the First Amendment. Not even the originalist Justices on the Supreme Court purported to defend their conclusion on this basis. Instead, a choice needed to be made as to whether to favor government power or individual rights. It is not surprising, then, that both the Ninth Circuit and the Supreme Court split exactly along ideological lines.¹⁸ Yet, putting it in these terms obscures what is most striking about Judge Reinhardt’s opinion in this case: its thoroughness and its careful review of all of the precedents from both the Supreme Court and the Ninth Circuit concerning free speech protections for government employees.

B. Harper v. Poway Unified School District

Garcetti v. Ceballos should have been an easy case under the existing law and as a matter of the underlying principles of the First Amendment. By contrast, *Harper v. Poway Unified School District* presented a very difficult case.¹⁹ Tyler Harper, a student at Poway High School, wore a T-shirt on the school’s Day of Silence with the message handwritten on it: “I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED” and “HOMOSEXUALITY IS SHAMEFUL ‘Romans 1:27.’” Administrators apparently did not see this shirt and the next day he wore a T-shirt with the handwritten message, “BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED,” and “HOMOSEXUALITY IS SHAMEFUL ‘Romans 1:27.’”²⁰

A teacher saw Harper’s shirt and asked him to remove it. Harper refused, and asked and was permitted to see an administrator. After speaking with several administrators about the inflammatory nature of his shirt, Harper still refused to remove it. He was sent to sit in a school conference room for the rest

18. Judge Reinhardt was joined by Judge Fisher, a Clinton appointee; Judge O’Scannlain, one of the most conservative judges on the Ninth Circuit, concurred in the judgment.

19. 445 F.3d 1166 (9th Cir. 2006), *vacated and remanded*, 549 U.S. 1262 (2007).

20. *Id.* at 1171.

of the day. He did not receive a suspension nor was a disciplinary note placed in his record. He was given full attendance credit for the day.

Harper sued the school district and its administrators for violating his First Amendment rights to free speech and to free exercise of religion. Harper sought a preliminary injunction, which was denied by the federal district court.²¹ The issue before the Ninth Circuit thus became whether the district court abused its discretion in denying the preliminary injunction.

The Ninth Circuit affirmed in a 2-1 decision, with Judge Reinhardt writing for the majority and Judge Kozinski writing the dissent. Both opinions are striking for their length and persuasiveness. Both the majority and the dissent focused on the tension between the desire to protect speech and the desire to advance equality in schools. The majority emphasized the school's interest in creating an atmosphere that was tolerant and not hostile to gay and lesbian students. It noted that the leading Supreme Court precedent concerning student speech, *Tinker v. Des Moines Independent Community School District*,²² allows schools to restrict student speech if the speech would "intrude upon . . . the rights of other students."²³ The Ninth Circuit concluded that Harper's speech did indeed intrude upon the rights of gay and lesbian students and would create a hostile environment. Judge Reinhardt, writing for the court, explained:

Speech that attacks high school students who are members of minority groups that have historically been oppressed, subjected to verbal and physical abuse, and made to feel inferior, serves to injure and intimidate them, as well as to damage their sense of security and interfere with their opportunity to learn.²⁴

After carefully presenting studies about the effect of a demeaning environment on the education of gay and lesbian students, Judge Reinhardt concluded:

Those who administer our public educational institutions need not tolerate verbal assaults that may destroy the self-esteem of our most vulnerable teenagers and interfere with their educational development. . . . To the contrary, the School had a valid and lawful basis for restricting Harper's wearing of his T-shirt on the ground that his

21. *Id.* at 1173.

22. 383 U.S. 503, 508 (1969).

23. *Harper*, 445 F.3d at 1177 (quoting *Tinker*, 383 U.S. at 509).

24. *Id.* at 1178.

conduct was injurious to gay and lesbian students and interfered with their right to learn.²⁵

The tension between equality and speech is particularly thorny and can arise in countless contexts. Can a school require that officially recognized student groups refrain from discriminating on the basis of race, gender, religion, or sexual orientation? How is the school's interest in equality to be balanced against the freedoms of speech and association of the students?²⁶ Does an employer's interest in ensuring equality in the workplace justify restricting employee speech that is sexist or homophobic?²⁷ Judge Reinhardt's opinion in *Harper* reveals the inevitable role of ideology in judging. No answer to this case can be found in the original understanding of the First Amendment or in Supreme Court precedent. A value choice inescapably needed to be made. The case further exemplifies the role of compassion and the concern for the dignity of the individual, which are characteristic of Stephen Reinhardt's judicial philosophy.

C. Other Cases

These, of course, are just two examples of Judge Reinhardt's many free speech decisions. In *San Diego Committee Against Registration & the Draft v. Governing Board*, Judge Reinhardt concluded that a school district violated the First Amendment by refusing to publish advertisements from a group that offered counseling to male students to help them understand their alternatives to registering for the draft.²⁸ In *Cinevision Corp. v. City of Burbank*, the Ninth Circuit, in an opinion by Judge Reinhardt, found that Burbank violated freedom of speech in refusing to allow some types of music to be performed in its concert hall.²⁹ The court applied Supreme Court precedent and found that the city's policy was an impermissible content-based restriction of speech.³⁰ In *Tovar v. Billmeyer*, Judge Reinhardt, writing for the court, held that a district court erred in granting summary judgment in favor of a city's zoning ordinance regulating adult entertainment; the issue of whether there was an improper

25. *Id.* at 1179-80 (citation omitted).

26. The Supreme Court recently addressed this issue in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), and held, 5-4, that such a policy is constitutional.

27. See, e.g., Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1 (1990).

28. 790 F.2d 1471 (9th Cir. 1986).

29. 745 F.2d 560 (9th Cir. 1984).

30. *Id.* at 571-77.

motive on the part of city officials was a question of fact that should have gone to the jury.³¹

All of these cases reflect common characteristics of Judge Reinhardt's opinions. All are carefully grounded in Supreme Court and Ninth Circuit precedent. The caricature of Stephen Reinhardt is that he is simply imposing his liberal values. But no one who reads these opinions could see them as anything other than carefully reasoned decisions based on prior decisions of his court and the Supreme Court. Any reader would be struck by their thoroughness and the clarity of the explanations.

To be sure, his published opinions more often have sided with the free speech interests than with the government. But Reinhardt's decision in *Harper* sided with the school, not the student speaker. It shows the complexity of the issues and the inevitable judgment that is the core of judging.

II. RELIGION CLAUSES

In the area of religion, like speech, I focus primarily on two cases. In one, Judge Reinhardt raised and then refused to decide an important Establishment Clause issue: whether the parsonage exemption of the tax code, which provides a huge tax benefit for "ministers of the gospel," violates the First Amendment. In the other, Judge Reinhardt took a position—once by concurring in a majority opinion and once in dissent—that was wildly unpopular: voting that the words "under God" in the Pledge of Allegiance violated the Establishment Clause.

A. Warren v. Commissioner

In December 2001, I received a call from a staff attorney at the Ninth Circuit. She said that a panel of the Ninth Circuit had just heard oral argument in a case involving the parsonage allowance and wanted to know if I was available to accept an appointment to be a friend of the court and to write a brief assessing its constitutionality. She explained that the parsonage allowance was a provision of the tax code that allowed "ministers of the gospel" to be paid a tax-free housing allowance. The issue to be briefed was whether this benefit for clergy violated the Establishment Clause of the First Amendment. Although I confessed that I had never heard of the parsonage allowance, I said that, of course, I would accept the appointment.

31. 721 F.2d 1260 (9th Cir. 1983).

About a week later, I received another phone call from the staff attorney saying that there was division within the panel as to how to proceed. She said that I should wait before doing any work. Several weeks later, she said that the panel had approved my appointment as an amicus by a 2-to-1 vote in a published opinion, with Judge Reinhardt writing the concurrence.³² A briefing schedule was set, with each side required to file its briefs by May 6, 2002 and response briefs due on May 20, 2002.

The case, *Warren v. Commissioner*,³³ involved a prominent minister in Orange County, California. In each of the taxable years at issue, all or a significant part of the compensation provided to Rick Warren by Saddleback Valley Community Church for ministerial services took the form of a cash housing allowance. Each year, he claimed approximately \$80,000 as a tax-free housing allowance. The IRS challenged this claim, arguing that Warren was entitled only to the reasonable rental value of his property. The Tax Court ruled in favor of Warren, holding that he could claim all of his housing costs as a tax-free parsonage allowance.³⁴ The IRS appealed to the Ninth Circuit.

At oral argument, the judges raised the question of whether the parsonage exemption violated the Establishment Clause.³⁵ The panel then decided to ask for additional briefing on two questions: (1) whether the provision was unconstitutional and (2) whether the court had authority to raise the issue on its own.³⁶ The court was concerned that neither party would raise the constitutional issue; the minister surely would not challenge a provision that benefitted him, and the United States would not argue that a federal law was unconstitutional.

Briefs were filed in the Ninth Circuit on May 6, 2002. Shortly thereafter, the House of Representatives unanimously passed the Clergy Housing Allowance Clarification Act of 2002.³⁷ The expressly stated purpose of the law was to moot the *Warren* case.³⁸ The House bill provided that, for all years prior to 2002, clergy could receive a tax-free allowance for all of their housing costs. But for 2002 and later years, the parsonage exemption would be restricted to

32. See *Warren v. Comm'r*, 282 F.3d 1119 (9th Cir. 2002).

33. 114 T.C. 343 (2000).

34. *Id.* at 351.

35. 282 F.3d at 1123 (Tallman, J., dissenting).

36. *Id.* at 1123-24.

37. 148 CONG. REC. H1306-07 (daily ed. Apr. 16, 2002).

38. *Id.* at H1299-H1301.

reasonable rental value of the property.³⁹ Accordingly, Warren would prevail for the tax years in question, but the IRS would get what it wanted for future years. Neither side would have reason to continue the litigation, thus mooting the case before the Ninth Circuit. The legislative history is explicit that the goal of the law is to protect \$500 million in benefits provided by the parsonage exemption for religious institutions and the clergy whom they employ.⁴⁰

Congressman Ramstad, the sponsor of the bill, described the Ninth Circuit's action in asking for briefing as to the Establishment Clause issue and stated:

[I]n one of the most obvious cases of judicial overreach in recent memory, the Ninth Circuit Court of Appeals in San Francisco is poised to inflict a devastating tax increase on America's clergy. Unless Congress acts quickly, the [eighty-one]-year-old housing tax exclusion for members of the clergy will be struck down by judicial overreach on the part of America's most reversed and most activist circuit court. . . . [T]his is judicial activism at its worst. The legislation on the floor today will stop the attack on the housing allowance by resolving the underlying issue in the tax court case.⁴¹

The Senate quickly passed the Act without dissent.⁴²

On Monday, May 20, 2002, President Bush signed it into law. On May 22, attorneys for the government and Reverend Warren filed a stipulated dismissal in the Ninth Circuit. On the same day, I filed an opposition to stipulated dismissal and a notice of motion to intervene. I argued that I had standing as a taxpayer to challenge the parsonage allowance, as amended, as an impermissible violation of the Establishment Clause. Both the government and Warren opposed my intervention. The Ninth Circuit agreed with them and ruled that intervention was not to be granted.⁴³ The court said that if I wished, I could file a taxpayer action in district court.⁴⁴

I disagree with the Ninth Circuit and Judge Reinhardt. The matter was fully briefed, including the filing of seven amicus briefs. The Supreme Court has specifically said that taxpayers have standing to challenge government

39. See Clergy Housing Allowance Clarification Act of 2002, Pub. L. No. 107-181, § 2, 116 Stat. 583 (2002).

40. 148 CONG. REC. H1299 (daily ed. Apr. 16, 2002).

41. *Id.* at H1299-H1300.

42. 148 CONG. REC. S3887 (daily ed. May 2, 2002).

43. Warren v. Comm'r, 302 F.3d 1012, 1015-16 (9th Cir. 2002).

44. *Id.*

expenditures as violating the Establishment Clause.⁴⁵ This case, however, belies the impression that Judge Reinhardt always will come to the liberal result and never practices “judicial restraint.” The issue of the constitutionality of the parsonage exemption had been fully briefed, yet Reinhardt chose not to decide it and dismissed my attempt to intervene.

B. The Pledge of Allegiance

Through the coincidence of random assignment, Judge Reinhardt has been on both Ninth Circuit panels dealing with the constitutionality of the words “under God” in the Pledge of Allegiance. In *Newdow v. U.S. Congress*, he was in the majority (although he did not write the opinion) that held that this language violated the Establishment Clause when the Pledge of Allegiance was recited in public schools.⁴⁶ After the Supreme Court reversed on standing grounds,⁴⁷ a new lawsuit was filed and the Ninth Circuit, by a 2-1 vote, rejected the constitutional challenge.⁴⁸ Judge Reinhardt wrote a seventy-five-page dissent, which left no doubt that under clearly established law the words violated the First Amendment. He traced the history of the Pledge of Allegiance to show the clear purpose of adding these words was to advance religion.⁴⁹ Moreover, as he persuasively demonstrated, there is no credible secular reason for having students say each day that this is a nation “under God.”

Judge Reinhardt concluded his dissent by declaring:

Today’s majority opinion will undoubtedly be celebrated by a large number of Americans as a repudiation of activist, liberal, Godless judging. That is its great appeal; it reaches the result favored by a substantial majority of our fellow countrymen and thereby avoids the political outcry that would follow were we to reach the constitutionally required result. Nevertheless, by reaching the result the majority does, we have failed in our constitutional duty as a court. Jan Roe and her child turned to the federal judiciary in the hope that we would vindicate their constitutional rights. There was a time when their faith in us

45. See, e.g., *Flast v. Cohen*, 392 U.S. 83 (1968) (allowing taxpayer standing to challenge government expenditures as violating the Establishment Clause).

46. 328 F.3d 466, 490 (9th Cir. 2003).

47. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

48. *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007 (9th Cir. 2010).

49. *Id.* at 1048-57.

might have been well placed. I can only hope that such a time will return someday.⁵⁰

Judge Reinhardt's dissenting opinion is characteristic of his judging. He comes to a liberal result, one that expresses great concern for the individuals, but he does so in a very thorough opinion, carefully grounding his conclusion in precedents from the Supreme Court and the Ninth Circuit.

C. Other Religion Cases

Judge Reinhardt, of course, has written a number of other opinions concerning the religion clauses of the First Amendment. In *Paul v. Watchtower Bible and Tract Society of New York, Inc.*, he authored an opinion holding that the religious practice of "shunning" is protected under the Free Exercise Clause and that tort liability for shunning would overly burden this constitutional right.⁵¹ In *Tucker v. State of California Department of Education*, the Ninth Circuit, in an opinion by Judge Reinhardt, ruled that it violated the First Amendment to prohibit a government employee from displaying religious symbols in the workplace.⁵² In *Canell v. Lightner*, Judge Reinhardt wrote an opinion for the court ruling against a Muslim prisoner who claimed that proselytizing by a Christian minister violated the First Amendment.⁵³

The religion cases described above show the complexity of Judge Reinhardt's jurisprudence and just how much of judging is contextual. Judge Reinhardt does not consistently rule for or against religion. He rules narrowly, often going out of his way to avoid constitutional issues. But in this area, as in others, his opinions are models of thoroughness and clarity.

CONCLUSION

Stephen Reinhardt fits the description of what any lawyer wants in a judge. He is always superbly prepared, and the number of drafts that his opinions go through before publication is the stuff of legend. He is scrupulous in following the law and precedent. He cares deeply about the Constitution and enforcing it. Undoubtedly, he brings a progressive vision to the task of judging. It is a vision

50. *Id.* at 1116.

51. 819 F.2d 875 (9th Cir. 1987).

52. 97 F.3d 1204 (9th Cir. 1996).

53. 143 F.3d 1210 (9th Cir. 1998).

founded on the importance of individual freedom and on ensuring the protection for the dignity of each person.

If it were a better world, I would be writing about Justice Stephen Reinhardt. But to acknowledge that is not to diminish either his tremendous accomplishments as a federal court of appeals judge or the hope that he will continue to be in this role for many years to come.