ShortCircuit274

Mon, Feb 26, 2024 9:44AM 48:19

SUMMARY KEYWORDS

meyer, court, german, case, economic liberties, nebraska, law, supreme court, state, mullen, county attorney, german language, rights, dissent, schools, decision, years, personal liberties, history, laws

SPEAKERS

Moses, William Ross, Anthony Sanders, Susan Lawrence, Scott Bullock, Todd Gaziano, David Wagner, Jack Brown

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A Anthony Sanders 00:00

Hey everybody, welcome to Short Circuit. I'm your regular host, Anthony Sanders. But this week, we're going to do something a little irregular. And that's because we have a very special anniversary coming up. Now, we're releasing this on Friday, June 2, 2023. But in just a couple days, June 4, 2023, it will be the 100th anniversary of when the Supreme Court handed down its opinion in Meyer v. Nebraska . And that was on June 4, 1923. Now, as you may remember, from episodes from a couple months ago, when we were promoting it, we had a conference on March 31st of this year, about this anniversary and about the impact of Meyer v. Nebraska on all kinds of constitutional law over the previous century. It was a really big deal in the history of civil liberties and constitutional law more generally. We rely on it all the time at the Institute for Justice in many of our different cases across many of our pillars. So, we are happy today to be sharing the audio of our keynote speaker from that conference. In just a moment, you will first hear a brief introduction to the conference from my boss, our president, President Scott Bullock, and then a little bit from me. And then most importantly, we're going to hear from Professor William Ross of Samford University's Cumberland School of Law. He wrote the book on Meyer v. Nebraska. That book is Forging New Freedoms. It came out about 30 years ago, but you can find it today in your local law library, and there's a few used copies available on Amazon. But it is the authoritative treatment of the history of Meyer v. Nebraska and how a teacher, Robert Meyer, stood up and kept speaking German when he was inspected in their small town in rural Nebraska and took that all the way to the Supreme Court. And the Supreme Court found that the law in Nebraska that made it illegal for the teaching of a foreign language to primary school children was unconstitutional, along with similar laws and similar heroic teachers who brought their cases up in Ohio and Iowa. So in a moment, you'll hear from Professor Ross about this story. You can also find links in the show notes to the full conference where you can watch, if you want, four different panels that we had with various scholars about the history of Meyer and its impact on the last 100 years of constitutional law. And you can also find a link to Professor Ross's book. So, we'll be back next week with more regular Short Circuit programming about the federal courts of appeals. But for this episode, and for this anniversary, we want to reflect on such a momentous occasion, and that is 100 years of Meyer v. Nebraska. Thank you.

S Scott Bullock 03:52

Well, good morning, everyone. My name is Scott Bullock. I'm President and Chief Counsel of the Institute for Justice. And as many of you know, the Institute for Justice is the national law firm for liberty. We are a public interest group that is in court every day defending Americans' essential constitutional liberties. Our four areas of focus, or the pillars as we call them, are economic liberty, private property rights, free speech and educational choice. We also have two new projects we started just in the past few years: one dedicated to challenging these unfounded immunity doctrines that exist in the law, including qualified immunity and absolute immunity, and then we just started a project a few years ago to greater recognize and restore protections for Fourth Amendment rights to be free of unreasonable searches and seizures. The topic of today's conference, of course, is Meyer v. Nebraska. And welcome to all of you for attending and thank you for being here. You know, the reason why we're having this conference is not because we think of Meyer as some type of historical curiosity that we happen to be interested in. We are very interested in its origins. But Meyer is a case that we as public interest lawyers use in almost all of our work, in particular, in our work defending the right to earn a living and the right of parents to direct and control the upbringing and education of their children. But it really impacts all of the work that we do. We are inspired by its soaring rhetoric. We love the approach that it takes to the Constitution, including the recognition of unenumerated rights, which we're going to be talking about a lot today. We also like the fact that as litigators, it hasn't been overturned. It is still an active precedent; its meaning and its import is still widely debated. We're going to be talking about that, of course, today. But it is a precedent that even though it's 100 years old, has withstood the test of time. And like so many important constitutional cases, it all started with one person, Robert Meyer, who stood up for his rights against then a rising tide of xenophobia that was sweeping the nation. And by standing up for his rights, in so doing protected the rights of all Americans then and on into today. He sounds a lot like an IJ client, and if the Institute for Justice was around in 1923, we might have had the privilege of representing him like we do for so many other people who are fighting for their rights. We're really happy to have such a distinguished cast of scholars and practitioners with us here today to talk about Meyer and what it means for constitutional litigation today. And so, I want to introduce to you, Anthony Sanders, too. Anthony is really the fountainhead of this conference, and somebody you're going to be hearing from throughout the day. And Anthony heads up IJ's Center for Judicial Engagement: a really important project of IJ that is dedicated to the radical notion that judges should actually judge and that facts matter and that the courts should not just reflexively defer to government officials, whether that is a federal bureaucrat, a city planner, a state prosecutor, or a cop on the beat. Anthony, as you'll be hearing about, next month, in May, actually has a new book coming out that is very appropriate for the discussion of today's topic and also what is happening in constitutional law at the Supreme Court, especially in the last year or so. It's called Baby Ninth Amendments: How Americans Embraced Unenumerated Rights and Why It Matters. So, Anthony, we look forward to hearing from you. We look forward to the publication of the book. And thanks to everybody for coming here today and joining us to discuss this seminal constitutional Supreme Court case. Thank you.

A Anthony Sanders 08:42

Well, thank you, Scott, for that introduction. And thank you everyone for coming today. I'm very privileged to introduce to you our keynote speaker. I cannot think of a better person to be

talking about Meyer v. Nebraska at a century than Professor William Ross. He is the Albert P. Brewer Professor of Law and Ethics at Samford University's Cumberland School of Law. He's the author of numerous books on different areas, often they are on early 20th century constitutional history, but one of them especially is about this case. So he wrote the book on Meyer v. Nebraska. You often heard that term thrown around, but he literally wrote the book. And if you want to know more after today, if you do nothing else, you should find this book at your local law library, or get it through Interlibrary Loan. It's called Forging New Freedoms, published by University of Nebraska Press. It was published in 1994, and he did extensive archival research to put this together. You'll find on Lexis his earlier article that has a lot of the same material, but in the book, he really goes into detail on research for the background of Meyer that you'll hear about in just a moment, and also for Pierce v. Society of Sisters, a case we'll hear a lot about today. And even the third case in the trilogy of language cases, the Fearrington case from Hawaii from 1927. As part of the research, did interviews, and he even interviewed a man who was then in his 70s. But in 1920, when this county attorney walked into the classroom, Robert Meyer's classroom in rural Nebraska, was a man who then was 10 yeards old, Raymond Parpart. And Raymond is actually mentioned in the Supreme Court's opinion as the child who Meyer was speaking German to when the county attorney walked in and Meyer continued speaking German, and thus later, he was cited. So, I'm very pleased to hear today that we have, for want of a better term, a bit of apostolic succession from that classroom, to Raymond Parpart, to then later when Professor Ross spoke to him and interviewed and recollected what happened in the case. And then Professor Ross today, speaking to all of us, so I'm very privileged to introduce to you, Professor William Ross.

W William Ross 11:33

Thank you, Anthony, for that introduction, and very much appreciate the opportunity to speak today. I'm delighted that the Institute for Justice is marking this important occasion. It really deserves attention at the centennial, and we really should honor Mr. Meyer and all those who successfully pop the language laws. Meyer v. Nebraska, one of the most important civil liberties decisions in American history, began in a one-room schoolhouse in rural Nebraska. And when Robert Meyer, Lutheran parochial school teacher, courageously defied a law that prohibited the teaching of German to elementary school children. This statute had its origins in the anti-German hysteria that swept the nation during the First World War. During the war, as most of you probably know, there were significant attacks on German ethnicity, which often found expression in efforts to suppress the German language. The Governor of Iowa, for example, issued an edict banning any public expression of German whatsoever. And many states and localities repressed the speaking of German in various ways. The United States government had decimated the German language press by refusing to give it mailing privileges on many occasions. And then in the wake of the First World War, the nation was swept by a recrudescence of nativism, which also found reflection in these laws that restricted or prohibited the teaching of foreign languages. 23 states, shortly after the war, prohibited the teaching of foreign languages in schools, particularly German. And this had a particularly painful effect on the numerous German American Lutheran schools because in many Lutheran churches at that time, they still had services in German, and the German American children were taught the catechism in German in preparation for their confirmations. This is had a severe impact upon the ability of these parochial schools to carry out their religious mission. And so, it was in Hamilton County, Nebraska, the county attorney found that the Zion Lutheran Church was defying the law by continuing to have German lessons. On May 25, 1920, he entered Meyer's classroom, and he found Meyer teaching German to a dozen fifth grade students, including Raymond Parpart. And county attorney listened for a while, and then he

went over to Raymond and asked him to read out of the German language book. And then he asked him to translate, and then, according to Parpart's recollection, he and Meyer had a long whispered conversation. He then seized the book, which he never returned, and left the classroom. Shortly after that, Meyer was convicted of violating the language law in local court and was fined $25. He appealed to the county court, lost there, and took his case up to the U.S. Supreme Court. Meyer knew that the county attorney didn't want to make trouble with the large and thriving and otherwise law abiding German American community. And so, he knew that if he switched over to English, when the county attorney entered his classroom, the county attorney would leave him alone. And he later told his attorney, "I had my choice. I knew that he wouldn't prosecute me if I switched over to English, but I felt that I should not flinch. And I did not flinch. I went on in German." And he explained that he felt that he had the same duty as a pastor to instruct the children in the language of their forefathers so that they could learn their religion in the language of their ancestors. So, Meyer refused to pay the fine. Raymond Parpart's father put up bail so he didn't have to go to jail. The members of the congregation would have paid the fine for him, but again, he just absolutely refused. Now, I don't know exactly why, but I suspect that Meyer had to leave his job at the school because of controversy about his defiance of the law. Apparently, many members of the German community didn't want to make trouble, and Meyer's defiance of the law was somewhat controversial. And so he left that school a year later to take a job elsewhere, probably because of the controversy within the congregation. I found this also in another case that Anthony mentioned in the introduction, the Hawaiian case. The territory of Hawaii enacted a law at approximately the same time that prohibited the teaching of Asian languages in schools. And when Asian American parents defied that law, some of them were ostracized by other members of the Asian American community for making trouble. Often, persons who stand up for their rights are not honored even in their own communities. I have an example of this many years ago when a German attorney visited our school, and I thought he'd be pleased and proud to hear about the Meyer case, so I told him the story. He was absolutely dumbfounded. I mean, he was so puzzled. And he said, "Well, I don't understand. The congregation was willing to pay the fine for him. Why didn't he just pay it and shut up? Why would he take the case all the way to the U.S. Supreme Court over $25?" And I think there, you see an example of the difference of German political history and American political history, I just think that speaks volumes of the difference in the histories of the two countries. Meyer appealed this case to the Nebraska Supreme Court. And at the same time, there had been Lutheran parochial school teachers in Iowa and Ohio, who had likewise defied laws in those states. And they too, took their cases to the state Supreme Courts. And they were just as courageous as Meyer, but Meyer was lucky enough to get his name on the caption of the case. The other teachers are not nearly as well known, but probably no less courageous in their defiance of some of the laws in their states. For the schools, the challenge of these laws was really all about religion. Again, they wanted to teach the German language so that the children could prepare for their confirmations and participate in German language services. But they realized that the argument might not get very far with the state supreme courts. They relied on the state constitutions because, of course at that time, the First Amendment had not yet been incorporated into state law. None of the provisions of the Bill of Rights have yet been incorporated into state law. And so, they couldn't rely on the freedom of religion clause in the First Amendment. They had to rely on the state constitutions, which they did. They also, though, rely very heavily on a theory of property rights, recognizing that at this time in history, the courts were very protective of private property in cases involving government regulation. They argued how this violated the due process rights of the schools and the teachers and the parents, insofar as they deprive them of economic interests: the right of the teacher to pursue his occupation, the right of the parents to enter into a contract with the schools. And they also argued that these laws would diminish the economic value of the schools, insofar as it was less likely that parents would send their children to parochial school if

the parochial schools did not provide instruction in the German language. And all of these arguments lost at the state court level. All three of the states, Nebraska, Ohio and Iowa, said that the schools had failed to present sufficient evidence, that the economic value of schools had been diminished by these laws. They also rejected, almost out of hand, the religion arguments and said that there was no reason why religion had to be taught in German; it could be taught just as easily in English. And all three of the states relied very heavily upon a theory of police power that the other states had an interest in assimilating ethnic communities and inculcating patriotism in young children, which could better be done in the English language. And so, having lost at the state levels, these cases were all three appealed to the United States Supreme Court. The Supreme Court, in its decision in Meyer on June 4, 1923, ruled, of course, in favor of Meyer. In sweeping language, it said that the 14th Amendment's Due Process Clause is not altogether clear. But it does denote the right to contract, the right to engage in the common occupations of life, the right to acquire useful knowledge, the right to marry, the right to have children and raise a family, the right to worship God according to the dictates of one's own conscience and the right to engage in those occupations of life are long recognized by the common law, which is essential to the happiness of free persons. Meyer's attorney, Arthur Mullen, rejoiced and said he felt like the father of septuplets. He asked the Court for one liberty, the right to teach German, and the Court and given them seven. And he described this as a fenceless land of freedom. Well, some people might want at least some fences, particularly if the Supreme Court is going to be the surveyor. But in any event, the program today is going to discuss just how far these freedoms go and what they mean. Meyer is a strange decision in many ways because I probably could call it Janus-faced. In one way, it looks back to the old doctrine of economic due process, at least to some extent, it seems to be based on economic liberties. And yet, at the same time, it looks forward to the Court's emerging role as a guardian of noneconomic personal liberties. By the way, since I'm here at the Institute for Justice, I'd like to say what I always say to my classes, that very often, constitutional scholars distinguish between economic liberties and personal liberties. And I think one of the glories of the Meyer case is it recognizes the connection between the two: that economic liberties and personal liberties are in many ways one in the same. So, I like to use the phrase noneconomic personal liberty to emphasize economic liberties to our personal liberties. It's interesting that the Court doesn't distinguish strictly between the economic liberties and the personal liberties at length: the right to contract, the right to engage in the common occupations of life, which are economic liberties. It places those together with the right to raise children, the right to worship. There's kind of this indivisible skein of liberty that's enunciated by Court in Meyer v. Nebraska, which is still very important and has had such enormous consequences, as we'll see later today. So, the decision was particularly important at the time because there was a nationwide effort to repress nonpublic schools. The Court's decision was recognized by Arthur Mullen, Roman Catholic lay person, as important in his efforts to try to stop states from enacting laws that would have essentially put parochial and secular private schools out of business. The one of the most interesting aspects of the Meyer case is why the Court used such broad language. Where did this come from? The Court could have ruled on much narrower grounds. It could have treated this just as a another economic due process case. It could have said that the liberty of the teacher, liberty of contract, liberty of the teacher, liberty of the parents to enter into contracts had been abridged. But instead, Justice McReynolds' opinion went much farther than it really needed to, and one of the issues that I explored in the book is why the Court did this. At the time that Meyer was decided, the Court was under widespread attacks by progressives and labor unions for its decisions striking down economic regulatory legislation and restricting the rights of trade unions. Just two months before the Meyer case was decided, the United States Supreme Court in the Adkins decision had struck down a District of Columbia Law that regulated the wages of women. And this decision created a firestorm of criticism. This was a classic, substantive due process decision. This was in line with the Lochner decision, and

how the Supreme Court in more recent years had seemed to become somewhat more amenable. The economic regulatory legislation seemed to have backed away at least a little bit from economic due process. And then, along came Adkins, and the Court seemed to have returned with full force to its very strict scrutiny of economic regulatory legislation. So, in the wake of Adkins, there were many proposals, many of which we're seeing today, for curtailment of the institutional powers of the Supreme Court. Senator La Follette of Wisconsin, just the previous year, had introduced legislation to allow Congress to overturn Supreme Court decisions by a two-thirds vote, and Senator Borah, shortly before the Meyer decision was decided, had introduced legislation to require a seven to two majority for the Supreme Court to strike down any legislation, state or federal. And the Court, of course, as always, is very keenly aware that it has neither the power of the person or the power of the sword. My theory is that the breath of the language in Meyer was partly a response to the criticism of the Court at that time. In an earlier published book about these attacks on the Court during this period, what I found is that defenders of judicial review, particularly political conservatives, for lack of a better word, argued that the same power of the Court to strike down economic regulatory legislation could be used to protect the most cherished noneconomic personal liberties, particularly, freedom of speech and freedom of religion. Yet, the problem was there weren't any cases like that, so the defenses of the Court are just replete with this argument that the Court can strike down wages and hours, a law, but the Court can also protect your freedom of religion, but there weren't any cases. And then, along comes Meyer. So finally, there is a case in which the Court actually does invoke the Due Process Clause of the Fourth Amendment to protect noneconomic personal liberties. And so, I think that's part of the reason why the language of the Court is so sweeping. I think in a way, this is an answer to the critics of the Court at the time. And that raises another question: why not simply incorporate the freedom of a religion or freedom of speech or freedom of assembly provisions of the Bill of Rights at this time? And the Court began to do that, curiously enough, just two years later. Just a week after the Pierce decision, the Supreme Court for the first time held that freedom of speech and freedom of the press apply to the states, so it looks like the Court could have easily hastened that process by using Meyer as the occasion for incorporating at least freedom of religion, and maybe freedom of speech and freedom of assembly into state law. There really is no particular answer as to why the Court didn't take that step. It obviously wasn't ready to do it yet. It wasn't ready for another two years. And, I think part of it may be that the Court did not, at a time when there was widespread fear of political radicalism, the Court did not want to seem to give license to political radicals. It was safer to simply invoke the Due Process Clause in the Fourteenth Amendment, in this case, than to open the door to greater liberties of speech, although, of course, the Court was willing to do that just just two years later. In any event, after the Court began to incorporate the Bill of Rights in state law just two years later, the Bill of Rights became the primary basis for protection of noneconomic personal liberties for another 40 years until the Court began to rely on substantive due process again as a protection of personal noneconomic liberties. So, the case again was important in terms of the growing effort to try to suppress parochial and secular private schools. And just a few months before the Meyer decision, the state of Oregon had enacted a law that required all children to attend public schools. And how that law was challenged, of course, led to Pierce v. the Society of Sisters in 1925. The Meyer case was cited heavily in the Pierce case. When the attorney for the plaintiffs in the Pierce case asked Chief Justice Taft if they could have more time to argue the case, he said, "Why? This is just Meyer all over again." Pierce is better known than Meyer, and I think part of that is because the facts are more dramatic. To require all children to attend public schools is a much more radical measure than to simply say that German can't be taught in schools, but the doctrinal foundation was very much laid in the Meyer case. And so Meyer is obviously an important decision and one that has, as we'll see this afternoon, been used in

many different ways, cited in numerous Supreme Court cases often in support of both the majority and dissenting opinion. One can find almost anything in Meyer, and its enduring legacy is the subject of today's conference. So, I guess there's time for questions.

D David Wagner 33:39

Hi, I'm David Wagner, Free Family Foundation. I'll be speaking later this afternoon. I want to say that your judicial janus article was one of the most important and helpful pieces that I encountered in my research. And you've done the deep dive not only the Nebraska arguments but also the Supreme Court oral argument. Do I recall correctly, that at one point, Chief Justice Taft pressed Mr. Mullen on are you asking us to help find that the Free Exercise Clause applies to the states? I'm wondering if you can address that because my recollection is that Mr. Mullen didn't want to seem to be making too big an ask. On the other hand, he didn't want to divert the Court in case it didn't want to go down that way. So just how did that cash out?

M Moses 34:19

Mullen actually did advocate incorporation of the freedom of religion into state law in his argument before the Supreme Court. That argument was also raised in some of the briefs at the state level, but I think they knew that it was a losing argument. As I think you suggest, maybe they were looking to the future, maybe Mullen obviously hoped that the freedom of religion would be incorporated, along with other provisions in the Bill of Rights. In a way, even though he realized he probably wouldn't succeed, he at least wanted to raise the issue if nothing else would give it perhaps more legitimacy, in hopes of eventually succeeding.

W William Ross 35:25

Really both. Of the 23 state laws, some of them prohibited only the teaching of German, while others prohibited the teaching of foreign languages generally. And so, it was a combination of anti-German feelings and also a kind of xenophobia and nativism, as well. So, different laws reflected different aspects of that.

S Susan Lawrence 35:53

Hi, Susan Lawrence. I want to thank you, too, for your extraordinary work on the history of Meyer. How did Mr. Meyer afford to get all the way to the Supreme Court? I mean, surely, even in 1923, it cost more than $25 to get to watch it. And I realized that, you know, the $25 isn't why he was unwilling to pay it. But how? This is a question that always interests me. I've had a long history of interest in public interest litigation and how litigants actually get to the Court.

W William Ross 36:31

Meyer was a member of the Lutheran Church Missouri Synod, which was the largest German American denomination. It was very concerned, not only about the language laws, but also like the Roman Catholics and other religions that maintained parochial schools, about the growing

anti-parochial and private school movement. And so it financed litigation for him.

S Scott Bullock 37:00

In looking at the history of this again, and I think this is right, but you will certainly know, that Justice Sutherland was in dissent.

W William Ross 37:09

Yes.

S Scott Bullock 37:10

Which seemed surprising, given what he was doing with unenumerated rights and just kind of his general reaction toward it, but I don't think he wrote the opinion for it. Why do you think that is the case?

W William Ross 37:22

Well, Justice Sutherland joined Justice Holmes in dissent. I'm so glad you mentioned that because one of the ironies of Meyer is that Justice McReynolds, the strong conservative, for lack of a better word, wrote the decision, and Justice Holmes, now who's known as an icon of civil liberties, was in dissent. But the grounds, of course, was a very strong opponent of economic regulatory legislation, and, I think, had very strong libertarian tendencies. And so, he was offended by a law that interfered with property rights, and I think he was also offended by a law that interfered in this way with the civil liberties. Justice Holmes, on the other hand, said in his dissent that he didn't agree with the law, but he nevertheless deferred to the legislature. So, I think this is a classic example of Justice Holmes' philosophy of judicial restraint. Sutherland also, I think, went along with, with Holmes partly out of a belief in judicial restraint, but also perhaps because of a fear that the Court was expanding civil liberties farther than he liked to see, particularly since that could have been used, was used by political radicals at a later time. It was very easy to infer the Court in a way to sustain the civil liberties of farming people who represented no threat to the social or political or economic order. The Court was bolder, later on, in defending the rights of persons who cared.

A Anthony Sanders 39:13

One other question about the oral argument that I learned from your book was, of course, we all know reading tea leaves of oral argument is a bit of a fool's errand. But it seemed like early on, it was very questionable which way the Court would go and that made Reynolds really perk up when, I think it might have been Mullen, started talking about how this makes us more like Soviet Russia.

W William Ross 39:37

William Ross 39:37

Yes.

A Anthony Sanders 39:37

And there was this response to that, and of course, this is very early in the Red Scare period. So how did those geopolitics maybe play into this?

W William Ross 39:48

I think that Justice Reynolds found this to be far too intrusive, and I think it did remind him of what the Soviets were doing at that time, interfering with families and personal liberties. I mentioned my encounter with Mr. Parpart. I went to Zion Lutheran Church in Hampton in 1990 to interview him and arranged the meeting through the pastor. He rode to the church in a tractor; he was still farming to the age of 81. He brought with him a man named Clarence Height who had been a student at the other school. I'd never done this before, but Zion actually had two schools, and the teacher in the other school started speaking in English as soon as the county attorney entered his classroom that day. He wasn't as bold as Meyer was. And so I asked Parpart what the Meyer case meant to him, and he said that it shows that the government can't just make up any law it wants to force people to do what they don't want to do. It shows how valuable our Constitution really is, and I think that's probably as good a summary of Meyer I've ever heard, right there from Raymond himself.

T Todd Gaziano 41:23

Thank you, Todd Gaziano from Pacific Legal Foundation, and I have at least one other colleague here and hope a few others for this very, very fine conference. Your answer to Scott intrigued me. I want to hear a little bit more about Holmes' dissent. I'm going to read the entire opinion and some others that I don't know that I've ever read. I certainly am well aware of Holmes' judicial restraint or pro-democracy and economic liberties, but I would have thought this may have been a bridge too far. So did he draw no lines? Did he, in his dissent, hint how far could you go? What else does it say about Holmes? What else did he say in his dissent as to why this didn't cross the line?

W William Ross 42:14

One of the central issues in the case was the scope of the police power. To what extent can the state prohibit teaching a foreign language in order to promote assimilation and to encourage so called American values? The proponents of the law claim that German language employees disrupted children. They said, "This is the language of the kaiser." And of course, the opponents of the law said, "It's the language of the kaiser, but it's also the language of Bach and Beethoven and Gerda and Schiller and Kant." So, in a way, this was kind of a balancing test. I think everyone agreed that the states could promote assimilation, but how far can the state go in doing that? And Holmes' dissent, I think, was fairly limited in that respect. He said that although he thought the laws were wrongheaded, he thought that people should be allowed to learn language at an early age. The state nevertheless did have legitimate interest in fostering

so called Americanization, and that this particular law did not go too far. Now, in the Pierce case, he was in the majority. So, I guess that answered, in a way, your question: was the bridge too far? Well, shutting down parochial schools, as opposed to not allowing them to teach German.

A Anthony Sanders 43:43

Just a follow up, Bill. He did mention that the Ohio law, right, which specifically spelled out German, was too far for him.

W William Ross 43:52

Yes.

A Anthony Sanders 43:53

He doesn't really say why.

W William Ross 43:54

Yes, so the law that specifically prohibited German.

A Anthony Sanders 44:00

Sorry, organizer's prerogative here. One other question: you talk about in your book, that kind of back and forth in several states, but especially in Nebraska, of the legislature and the courts. And there was a first round that went to the Nebraska Supreme Court where they didn't use the state or federal Constitution, but they kind of went out of their way to read the law to give the churches a little bit of wiggle room.

W William Ross 44:29

Yes.

A Anthony Sanders 44:30

But then it seems like they gave up after that, if you could tell a little bit about that.

W William Ross 44:35

So actually, the Nebraska Supreme Court had already adjudicated the constitutionality of the law at the time that Meyer was prosecuted. And so, immediately after the law was passed, the

Missouri Senate challenged it, and the Nebraska Supreme Court sustained the constitutionality but did so in a way that essentially tried to allow the schools to continue teaching German by saying that the law only prohibited the teaching of German during regular school hours, thereby suggesting the schools could teach German at some other time. And so, many of the schools, including the Zion Church School, started teaching German during the recess period. The Zion Church extended the research period by half an hour, from one hour to an hour and a half, and then used that extra half hour to teach German. And so, how they contended that they were technically within the law by doing that, and the county attorney disagreed. Ultimately, the state supreme court, when the case came back to the court, the seventh, that was just too clever by half, that's not what it meant originally. This would have to be strictly outside of school hours, as opposed to during the recess period. And so, the court essentially revisited and expanded upon many of the issues that it had addressed originally.

J Jack Brown 46:10

Hi, Jack Brown. I'm also from Pacific Legal Foundation. Reading the case, it always kind of struck me that teaching any kind of foreign language is a form of speech, occupational speech, but it is still a form of speech. So, I was wondering if you had any insight into why, I guess a First Amendment argument didn't play more of a role in the case, or if you had any insight into that? That would be appreciated. Thank you.

W William Ross 46:34

Thank you. Yes, there was some discussion of free speech in some of the briefs presented to the three state supreme courts, but the focus on noneconomic personal liberties was primarily on religion because that's what the schools were primarily concerned about. But again, the schools' emphasize their economic rights more than their noneconomic personal rights, particularly religion here, because they just thought they'll probably get more traction. It turned out it didn't, but they thought it probably would, which made sense at a time when the Court was striking down laws on the basis of economic due process and had not yet assumed its modern day rule as the protector of liberties prescribed in the Bill of Rights. Given curiosity, you will never know why the Court began to incorporate the Bill of Rights just a week after Pierce, when they had such a good opportunity to do it in both Pierce and Meyer. That's, in a way, a better opportunity because both Pierce and Meyer had not involved political radicals. Of course, the Gitlow case did, the case in which the Court finally began to incorporate the Bill of Rights and involve the prosecution of a left wing radical. It seems like a strange occasion for beginning the incorporation process when the Court could have done it two years earlier, but for whatever reason, the Court just wasn't ready yet.