

NOTE

Language is Speech: The Illegitimacy of Official English After *Yniguez v. Arizonans for Official English*

INTRODUCTION

Talk of making English the official language of the United States is as old as the country itself.¹ Early attempts, however, to proclaim English the official, national language failed,² and neither the Constitution nor federal law has ever afforded English official protection.³ Nonetheless, the belief that a national

¹ See Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 287-308 (1992) (tracing official English origins to colonial period). Some commentators distinguish "official English" from "English as the common language." Juan Cartagena et al., *United States Language Policy: Where Do We Go From Here?*, 18 REV. JUR. U.I.P.R. 527, 528 (1984). They define as "official" the language receiving documented, governmental recognition as the authoritative language. *Id.* at 527. In contrast, a language's usage by a majority of speakers practically limits the number of "common" languages. *Id.* at 527-28. Professor Perea notes the further distinction between "language standardization," which creates uniformity within a single language, and "official language," which requires government sanction. Perea, *supra*, at 297 n.124. This Note refers to "official English" but incorporates "English only" to refer to the same concept.

² Perea, *supra* note 1, at 287-305.

³ *Id.* at 271-81; see also *infra* notes 21-29 and accompanying text (explaining demise of early official English impetus).

language unites a nation persists, and the official English movement has recently gained renewed momentum.⁴ Forty municipalities⁵ and twenty-two states⁶ now have official English statutes.

Challenges to official English pepper history, but the United States Supreme Court has not addressed the constitutionality of official English statutes since the 1920s.⁷ In a series of decisions, beginning in 1923 with *Meyer v. Nebraska*,⁸ the Court struck down state laws restricting the use of non-English languages.⁹

⁴ Susan Headden, *One Nation, One Language?*, U.S. NEWS & WORLD REP., Sept. 25, 1995, at 38; see also *infra* note 39 and accompanying text (discussing renewed interest in official English). On the campaign trail in the summer of 1995, Republican presidential candidate Bob Dole championed official English as a way to forestall the threat of "ethnic separatism." Julian Beltrame, *English-Only Movement On Rise; Flood Of Immigrants Prompts Bill in U.S. Congress*, MONTREAL GAZETTE, Sept. 17, 1995, at B5. In the early Twentieth Century, many who feared new immigrants and their "strange tongues" regarded the English language as socially cohesive. Laura A. Cordero, *Constitutional Limitations on Official English Declarations*, 20 N.M. L. REV. 17, 20-21 (1990). These individuals viewed English as the key to bonding ethnically diverse groups. *Id.* at 21.

⁵ See Calvin Woodward, *Officials Argue Virtues of English as Official Tongue*, COM. APPEAL, Oct. 22, 1995, at A7 (stating that numerous municipalities have enacted English-only laws). Despite the region's large Cuban community, in 1980 voters in Miami and surrounding Dade County approved an English-only law. Donna M. Greenspan, *Florida's Official English Amendment*, 18 NOVA L. REV. 891, 895-96 (1991). The ordinance required the county government to conduct meetings and print documents exclusively in English. *Id.* at 896. The ordinance even prohibited using Latin to identify zoo animals. *Id.* In 1984, county commissioners amended the ordinance to allow use of non-English languages in exceptional circumstances. Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293, 301 (1989). The exceptions to the ordinance included medical services, services for the elderly and disabled, emergency services, and promotion of worldwide tourism. *Id.* By the 1988 passage of Florida's Official English Amendment, 31 Florida cities and two counties had passed official English laws or regulations. Greenspan, *supra*, at 896 n.25.

⁶ ALA. CONST. amend. 509; ARIZ. CONST. art. XXVIII; CAL. CONST. art. III, § 6; COLO. CONST. art. II, § 30a; FLA. CONST. art. II, § 9; HAW. CONST. art. XV, § 4; NEB. CONST. art. 1, § 27; ARK. CODE ANN. § 1-4-117 (Michie 1995); GA. CODE ANN. § 50-3-100 (Supp. 1996); 5 ILL. COMP. STAT. ANN. 460/20 (West 1993); IND. CODE ANN. § 1-2-10-1 (West 1996); KY. REV. STAT. ANN. § 2.013 (Michie 1992); MISS. CODE ANN. § 3-3-31 (1991); MONT. CODE ANN. § 1-1-510 (1995); N.H. REV. STAT. ANN. § 3-C:1 (Supp. 1995); N.C. GEN. STAT. § 145-12 (1995); N.D. CENT. CODE § 54-02-13 (1989); S.C. CODE ANN. § 1-1-696 (Law. Co-op. Supp. 1995); S.D. CODIFIED LAWS § 1-27-20 (Michie Supp. 1996); TENN. CODE ANN. § 4-1-404 (1991); VA. CODE ANN. §§ 22.1-212.1 (Michie 1993 & Supp. 1996); WYO. STAT. ANN. § 8-6-101 (Michie 1996).

⁷ See *infra* notes 58-62, 75 and accompanying text (discussing Supreme Court adjudications of official English challenges).

⁸ 262 U.S. 390 (1923).

⁹ See *infra* notes 58-62, 75 and accompanying text (discussing early challenges to official English).

The Court held that the early official English statutes violated Fourteenth Amendment due process and equal protection.¹⁰ Lacking more recent guidance from the Supreme Court, lower courts have answered subsequent, indirect challenges to official English with mixed results.¹¹

The only case since the 1920s to directly test the official English movement's muscle is *Yniguez v. Arizonans for Official English*.¹² In *Yniguez*, a state employee challenged Arizona's constitutional amendment requiring all government workers to speak English exclusively.¹³ The Court of Appeals for the Ninth Circuit found that Arizona's official English statute potentially inhibits constitutionally protected free speech.¹⁴ Accordingly, the court invalidated the statute on First Amendment grounds.¹⁵

This Note examines *Yniguez's* legal precedent of applying First Amendment scrutiny to an official English statute. Part I discusses the historical foundations and contemporary revival of official English.¹⁶ Part I also discusses the legal background of official English, including pre-*Yniguez* challenges to official English provisions and applicable First Amendment doctrines.¹⁷ Part II presents the facts and procedure of *Yniguez*¹⁸ and details the court's analysis of the relationship between official English and the First Amendment.¹⁹ Part III posits that, despite rejecting Arizona's official English law, *Yniguez* limits constitutional protection of choice of language.²⁰

¹⁰ See *infra* notes 58-62, 75 and accompanying text (discussing early official English statutes' violation of Fourteenth Amendment).

¹¹ See *infra* notes 55, 67, 78 and accompanying text (discussing contrary challenges to official English in last two decades).

¹² 69 F.3d 920 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1316 (1996) (mem.).

¹³ *Id.* at 924.

¹⁴ *Id.* at 923-24.

¹⁵ *Id.* at 924.

¹⁶ See *infra* notes 21-50 and accompanying text (exploring official English antecedents and current official English trend).

¹⁷ See *infra* notes 51-86 and accompanying text (detailing legal background preceding *Yniguez*).

¹⁸ See *infra* notes 87-99 and accompanying text (discussing facts and procedure of *Yniguez*).

¹⁹ See *infra* notes 100-51 and accompanying text (discussing Ninth Circuit's disposition of *Yniguez*).

²⁰ See *infra* notes 152-229 and accompanying text (analyzing official English in wake of *Yniguez*).

I. OFFICIAL ENGLISH ORIGINS

A. *Historical Background*

The United States government has not recognized English as the official language under either the Constitution or federal law.²¹ The Framers did not provide English with special legal protection,²² and multilingualism flourished during the colonial period.²³ Significant populations continued to speak languages other than English:²⁴ Native Americans spoke roughly one thousand different languages, and substantial numbers of people spoke European languages other than English.²⁵ Recognizing and respecting this linguistic diversity, the leaders of the American Revolution issued key revolutionary documents in German, French, and English.²⁶

A nativist sentiment to homogenize language, however, coexisted with early American multilingual reality.²⁷ Despite its lack

²¹ Perea, *supra* note 1, at 271-81. Professor Shirley Brice Heath states that early political leaders recognized the close connection between language, religious, and cultural freedoms. *See id.* at 297 (discussing Congressional reluctance to establish national language academy because it was associated with monarchies and was inconsistent with principles of individual liberty). Accordingly, politicians preferred not to propose legislation that their constituents might construe as restricting those freedoms. *Id.*

On August 1, 1996, however, the United States House of Representatives voted 259-169 to establish English as the national, official language. Michael Dorning, *House Clears English-Only Measure After Emotional Debate*, CHI. TRIB., Aug. 2, 1996, at 3.

²² Frank M. Lowrey, IV, *Through the Looking Glass: Linguistic Separatism and National Unity*, 41 EMORY L. J. 223, 281-82 (1992).

²³ Perea, *supra* note 1, at 284.

²⁴ Leo Johnathan Ramos, *English First Legislation: Potential National Origin Discrimination*, 11 CHICANO-LATINO L. REV. 77, 77-78 (1991).

²⁵ Perea, *supra* note 1, at 284.

²⁶ *Id.* at 285. The leaders of the American Revolution sought to promote the allegiance of the non-English speaking population by issuing documents, such as the Bill of Rights, in multiple languages. *Id.*

²⁷ *Id.* at 287-305. Federalist John Adams viewed language as a political instrument by which state and federal governments could shape popular sentiment. *Id.* at 295-97. To entrench English in the incipient nation, he proposed that Congress establish a national language academy. *Id.* at 295-96. Adams believed such an academy would "refine, correct, improve, and ascertain" the English language. *Id.* at 295. Adams further hoped the success of a national language academy would foster international regard for the new American government. *Id.* Congress never acted upon nor debated Adams's idea. *Id.* at 296. According to Professors Heath and Perea, because a centralized language academy smacked of monarchism and collided with individual liberty, it was destined to fail. *Id.* at 297.

Benjamin Franklin displayed nativist sentiment in his regard for German colonists,

of official status, the newly formed republic chose English as its primary language.²⁸ English was the language most commonly spoken in the nascent country, as well as the language the Framers used to draft the United States Constitution.²⁹

In the Nineteenth Century, linguistic chauvinism for English spread with the purchase and conquest of territories from France, Spain, and Mexico.³⁰ For example, Louisiana won statehood only after its constitution specified that all government records would be in the English language.³¹ After the United States acquired Puerto Rico in the Spanish American War, federal authorities mandated English as the sole language of instruction in Puerto Rican schools.³² Likewise, despite its 1849 constitutional decree respecting both English and Spanish as official state languages, California subsequently required English in both the classroom and voting booth.³³

whom he despised for their perceived ignorance. *Id.* at 287-88. In a series of disparaging letters, he claimed the Germans' difference in language evidenced a difference in knowledge and in understanding of "Liberty." *Id.* Franklin feared loss of political control to German-speakers. *Id.* Franklin's fear, that those who are culturally different and speak a different language threaten the established government, recurs throughout American history. *Id.* at 288.

²⁸ Lowrey, *supra* note 22, at 282. One commentator states that social custom, not legal prescription, has ensured the prevalence of English as the national language. Note, "Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States, 100 HARV. L. REV. 1345, 1348 (1987) [hereinafter Note, *Official English*].

²⁹ Lowrey, *supra* note 22, at 282.

³⁰ Hiram Puig-Lugo, *Freedom to Speak One Language: Free Speech and the English Language Amendment*, 11 CHICANO-LATINO L. REV. 35, 37 (1991). During this same period, however, Pennsylvania, New Mexico, and California officially recognized languages other than English. Perea, *supra* note 1, at 309-27. By either statute or constitutional decree, these states required publication of laws in more than one language. *Id.*

³¹ Puig-Lugo, *supra* note 30, at 37. Prior to statehood, the territory of Louisiana, Orleans, was bilingual in French and English. DENIS BARON, *THE ENGLISH-ONLY QUESTION* 83 (1990). Despite its 1812 constitutional provision decreeing the language of government records as English, Louisiana published its laws in French until the constitutional convention of 1864. *Id.* at 85-87.

³² Carol Schmid, Comment, *Language Rights and the Legal Status of English-Only Laws in the Public and Private Sector*, 20 N.C. CENT. L.J. 65, 68 (1992).

³³ Perea, *supra* note 1, at 317-19. The evolution of California's constitution illustrates how multilingualism has converged with the nativist sentiment to homogenize language. *Id.* The constitution's 1849 publication was in both Spanish and English, but prohibition of non-English languages followed in the 1879 publication. *Id.* at 317, 319. An 1894 amendment required English literacy to vote, and 1897 brought the repeal of authority to publish laws in Spanish. *Id.* at 319. Finally, in 1986, California voters passed an initiative amending the constitution that declared English the official state language. *Id.*

In the early Twentieth Century, increased opposition to linguistic diversity accompanied increased immigration from eastern and southern Europe.³⁴ Many English-speaking Americans feared that the new immigrants threatened the linguistic supremacy of English.³⁵ Beginning in 1906, Congress required the ability to speak English as a prerequisite for immigrants seeking citizenship.³⁶ Prompted by anti-German sentiment following World War I, fifteen states passed laws restricting school instruction to English.³⁷ By 1923, thirty-four states had codified English-only requirements for their schools.³⁸

Similar ethnocentric concerns drive the official English movement today.³⁹ Increased Latin American and Asian immigration

³⁴ Lowrey, *supra* note 22, at 282. A militant spokesman for "one hundred percent Americanism," Theodore Roosevelt in 1917 drafted and circulated a statement proclaiming the imperative of one, national language — English. Stephen T. Wagner, *America's Non-English Heritage*, 19 SOC'Y 37, 41 (1981). Roosevelt also vigorously disparaged foreign-language newspapers as "our most dangerous foe." *Id.* In May of 1918, the governor of Iowa, William Lloyd Harding, forbade the use of any language but English in public places and over the telephone. BARON, *supra* note 31, at 111. Ignoring constitutional separation of church and state, Governor Harding even declared English the official language of religion. *Id.* To disenfranchise its large Yiddish-speaking Jewish population, New York amended its constitution in the early 1920s to condition the right to vote upon the ability to read and write English. Joseph Leibowicz, Current Topics, *The Proposed English Language Amendment: Shield or Sword?*, 3 YALE L. & POL'Y REV. 519, 536 (1985).

³⁵ See Cordero, *supra* note 4, at 20-21 (tracing official English movement to social, political, and economic forces linked to increased non-Anglo-Saxon immigration); Note, *Official English*, *supra* note 28, at 1349 (linking rise in immigration by certain groups to hostility toward non-English languages).

³⁶ Act of June 29, 1906, Pub. L. No. 338, § 8, 34 Stat. 596, 599 (current version at 8 U.S.C. § 1423 (1994)). The Act of June 29, 1906, provided as follows: "[N]o alien shall hereafter be naturalized or admitted as a citizen of the United States who can not speak the English language." *Id.* Immigrants currently seeking to naturalize must demonstrate "an understanding . . . including an ability to read, write, and speak words in ordinary usage in the English language." 8 U.S.C. § 1423 (1994).

³⁷ Leibowicz, *supra* note 34, at 536.

³⁸ Cordero, *supra* note 4, at 21; Bernard J. McFadden, *Bilingual Education and the Law*, 12 J.L. & EDUC. 1, 7 (1983). One account reports as many as 18,000 were charged in the Midwest with violating English-only statutes during and immediately after World War I. BARON, *supra* note 31, at 111.

³⁹ See Headden, *supra* note 4, at 40 (stating that English-only advocates believe that accommodating three hundred-plus languages in United States undercuts incentives to learn English and, by association, to become American). English Language Advocates, an official English advocacy group, warns that ethnic tensions will increase due to governmental failure to proclaim English the "language of government." Robert D. Park, Editorial, *English-Only Poorly Defined*, ARIZ. REPUBLIC, Oct. 11, 1995, at B4. According to English First, another official English advocacy group, bilingual education divides American

to the United States since 1965 has resulted in a pool of new immigrants.⁴⁰ Echoing the official English upsurge earlier this century, English-speaking majorities have once more targeted the new immigrants' linguistic differences to spur the official English movement.⁴¹ A recent poll revealed that seventy-three percent of United States residents think English should be the official language.⁴²

Correspondingly, the number of states with official English laws has grown.⁴³ The laws range from declaratory⁴⁴ to obliga-

children on the basis of language or ancestry. Jim Boulet, Jr., Commentary, *Official English Advantages . . . and Drawbacks; Bilingual Mythology*, WASH. TIMES, Oct. 8, 1995, at B4. Official English proponents claim that future generations should enjoy the benefit of belonging to a nation of immigrants united by a common tongue. *Id.* English Language Advocates and other official English proponents cite the practical necessities of an official language, including economic incentives. Park, *supra*, at B4. English First claims bilingual ballots are not only in low demand, inaccurate, and exorbitantly costly, but also insult new citizens who have worked "so hard to learn English." Cynthia Mark, Commentary, *Keep Momentum for Official English*, CHI. TRIB., Sept. 28, 1995, at 16.

⁴⁰ STEPHEN H. LEGOMSKY, IMMIGRATION LAW AND POLICY 119-20 (1992).

⁴¹ Note, *Official English*, *supra* note 28, at 1349.

⁴² Kimberly Crockett, *Language; Official English Is Self-Defeating*, PHOENIX GAZETTE, Sept. 21, 1995, at B9; Headden, *supra* note 4, at 38. In 1995, the House of Representatives reintroduced two official English bills. Tim Poor, *Give It To Us In Plain English, Lawmakers Say*, ST LOUIS POST-DISPATCH, Sept. 14, 1995, at B5. Republican Representative Bill Emerson has framed his bill in positive terms. *Id.* His bill aims to protect the English speaker's access to government services, assistance, or facilities. *Id.* Emerson further claims that proficiency in English is a responsibility of citizenship as well as economically beneficial. *Id.* Emerson's introduction of similar measures in each of the two previous terms failed. *Id.* In contrast, his 1995 bill won 182 cosponsors and a committee meeting. *Id.* On August 1, 1996, the House adopted Emerson's bill recognizing English as the official language of government business. H.R. 123, 104th Cong. (1996) (unenacted). Beyond making English the official language, Republican Representative Toby Roth's bill proposed to ban bilingual education and ballots. Beltrame, *supra* note 4, at B5.

⁴³ See Headden, *supra* note 4, at 38 (linking new flood of foreign speech to renewed strength in campaign for official English); Woodward, *supra* note 5, at A7 (identifying goals underlying efforts to officialize English as speeding assimilation, upending "linguistic ghettos," and discouraging immigration).

⁴⁴ See HAW. CONST. art. XV, § 4 (declaring both English and Hawaiian official state languages); ARK. CODE ANN. § 1-4-117 (Michie 1995) (pronouncing English official language of state); GA. CODE ANN. § 50-3-100 (Supp. 1996) (designating English official state language); 5 ILL. COMP. STAT. ANN. 460/20 (West 1993) (declaring English official language of Illinois); IND. CODE ANN. § 1-2-10-1 (West 1996) (adopting English as official state language); KY. REV. STAT. ANN. § 2.013 (Michie 1992) (designating English as Kentucky's official language); MISS. CODE ANN. § 3-3-31 (1991) (declaring English official state language); MONT. CODE ANN. § 1-1-510 (1995) (declaring English official and primary language of Montana and local governments); N.C. GEN. STAT. § 145-12 (1995) (declaring English North Carolina's official language); N.D. CENT. CODE § 54-02-13 (1989)

tory.⁴⁵ Some laws, such as North Carolina's, are only symbolic, equating the status of English as the official language with the state flower or bird.⁴⁶ Typically, legislatures in states with large English-speaking populations have enacted symbolic official English laws.⁴⁷ Such laws lack enforcement provisions and, accordingly, do not invite legal challenge.⁴⁸ Other laws, however, con-

(designating English as official state language); N.H. REV. STAT. ANN. § 3-C:1 (Supp. 1995) (designating English as official state language); S.C. CODE ANN. § 1-1-696 (Law Co-op. Supp. 1995) (declaring English official state language); S.D. CODIFIED LAWS § 1-27-20 (Michie Supp. 1996) (designating English as official state language); VA. CODE ANN. § 22.1-212.1 (Michie 1993 & Supp. 1996) (stating that English is Virginia's official language); WYO. STAT. ANN. § 8-6-101 (Michie 1996) (designating English as official language of Wyoming).

⁴⁵ See ALA. CONST. amend. 509 (granting right to enforce official English to any resident or person doing business in state); ARIZ. CONST. art. XXVIII, § 1 (requiring state and all political subdivisions to preserve, protect, and enhance English and granting right to enforce official English to any resident or person doing business in state); CAL. CONST. art. III, § 6 (requiring legislature to enforce official English through appropriate legislation and granting any resident or person doing business in state standing to sue for enforcement); COLO. CONST. art. II, § 30a (stating that section is self-executing, but reserving right of General Assembly to enact laws for implementation of official English); FLA. CONST. art. II, § 9 (reserving right to enact enforcement legislation); NEB. CONST. art. 1, § 27 (requiring English language for all official proceedings, records and publications, and instruction in all schools); TENN. CODE ANN. § 4-1-404 (1991) (requiring English language for all communications, publications, and instruction in public schools and colleges).

In contrast, some jurisdictions protect bilingualism. See, e.g., TEX. ELEC. CODE ANN. § 272.005 (West 1986) (requiring bilingual voting materials in Spanish and English); P.R. LAWS ANN. tit. 3, § 941 (1978) (requiring publication and distribution of general official reports in both English and Spanish). Oregon's legislature has denounced official English legislation as "impair[ing] our pluralistic ideals." S.J. Res. 16, 65th Leg. (Or. 1989).

⁴⁶ N.C. GEN. STAT. § 145-12 (1995). North Carolina categorizes its official English statute with the state flower, bird, tree, shell, mammal, fish, insect, stone, reptile and rock, beverage, historical boat, dog, military academy, tartan and watermelon festival. *Id.* § 145. To preserve, protect, and strengthen the English language is the statute's stated purpose. *Id.* § 145-12. The statute expressly states that official recognition of English is not intended to supersede any individual's constitutional rights. *Id.*

⁴⁷ See, e.g., GA. CODE ANN. § 50-3-100 (Supp. 1996) (declaring English official state language by General Assembly resolution); KY. REV. STAT. ANN. § 2.013 (Michie 1992) (designating English official state language through legislative adoption); see also Rachel F. Moran, *Irritation and Intrigue: The Intricacies of Language Rights and Language Policy*, 85 NW. U. L. REV. 790, 793 n.12 (1991) (book review) (noting that, in states with small linguistic minorities, official English provisions lack fanfare and constituents are unconcerned with use of English in state).

⁴⁸ See Moran, *supra* note 47, at 793 n.13 (predicting that, without enforcement provisions, such laws will prompt few demands for vigorous enforcement). Professor Moran posited that purely declaratory official English statutes that lack enforcement provisions are unlikely to significantly impact linguistic minorities. *Id.* at 791. She defined

tain specific enforcement language.⁴⁹ In states with larger linguistic minorities, popular initiatives or referenda are largely responsible for laws providing for enforcement of official English.⁵⁰

B. Legal Background

Without more, to declare English a state's official language does not offend the Constitution.⁵¹ In contrast, to absolutely prohibit speaking languages other than English violates constitutional principles.⁵² Whether officially promoting English violates the Constitution, however, is unclear.⁵³

Prior to *Yniguez v. Arizonans for Official English*,⁵⁴ challenges to official English laws relied upon the Fourteenth Amendment and related federal statutes to protect language rights.⁵⁵ In con-

"linguistic minority" as an individual or group of individuals whose primary language is not English. *Id.* at 791 n.7.

⁴⁹ See, e.g., ALA. CONST. amend. 509 (granting right of enforcement to any resident or person doing business in state); ARIZ. CONST. art. XXVIII, § 2 (requiring state and all political subdivisions to preserve, protect, and enhance English and granting enforcement right to any resident or person doing business in state); CAL. CONST. art. III, § 6 (requiring legislature to enforce section through appropriate legislation and granting any resident or person doing business in state standing to sue for enforcement).

⁵⁰ See, e.g., ARIZ. CONST. art. XXVIII, § 1 (adopting English as Arizona's official language by ballot initiative); CAL. CONST. art. III, § 6 (adopting English as official state language by initiative measure); FLA. CONST. art. II, § 9 (mandating official use of English through popular initiative); see also Moran, *supra* note 47, at 791-92 (suggesting that, despite federal requirements curtailing practical effects of official English, official English laws have potentially adverse impact on substantial numbers of non-English speakers). Professor Moran further explained that, given the ambiguous language of the official English laws, state and local administrators have tended to preserve existing bilingual services. *Id.* at 792. She concluded that the uncertain impact of these laws on linguistic minorities enables official English amendments to win voter approval and to remain in force. *Id.*

⁵¹ See Cordero, *supra* note 4, at 18 (stating that mere declaration of English as official language, without reference to subsequent enforcement provision, lacks practical effect).

⁵² See *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (stating that Constitution protects speakers of all languages); *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 937 (9th Cir. 1995) (asserting that states may not forbid citizens from speaking in chosen tongue) *cert. granted*, 116 S. Ct. 1316 (1996) (mem.).

⁵³ See Moran, *supra* note 47, at 792 (stating that federal bilingual services requirements indeterminately bar state implementation of official English provisions); Puig-Lugo, *supra* note 30, at 41 (stating that right to speak certain language does not exist in United States).

⁵⁴ 69 F.3d 920 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1316 (1996) (mem.).

⁵⁵ See *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1490 (9th Cir. 1993) (finding that private employer's English-only rule did not violate 1964 Civil Rights Act by discriminating

trast to *Yniguez's* facial challenge, these cases presented "as applied"⁵⁶ challenges to official English.⁵⁷ Earlier this century with *Meyer v. Nebraska*,⁵⁸ the Supreme Court heralded a brief era of successful Fourteenth Amendment attacks on official English.⁵⁹ At issue in *Meyer* was a state statute prohibiting instruction in languages other than English.⁶⁰ The Court stated that teachers have the constitutional right to teach, and students have the equivalent right to receive, foreign language instruction.⁶¹ Rejecting Nebraska's statute for violating equal protec-

against bilingual employees on basis of national origin); *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1039-40 (9th Cir. 1988), *vacated*, 490 U.S. 1016 (1989). (finding municipal court's English-only rule for employees contrary to 1964 Civil Rights Act prohibition against national origin discrimination); *Soberal-Perez v. Heckler*, 717 F.2d 36, 41-42 (2d Cir. 1983) (proclaiming English as national language of United States and asserting that Title VI does not apply to state's failure to provide notice and service in Spanish); *Garcia v. Gloor*, 618 F.2d 264, 272 (5th Cir. 1980) (finding that rule restricting employee's use of Spanish did not implicate Title VII); *Frontera v. Sindell*, 522 F.2d 1215, 1220 (6th Cir. 1975) (finding that compelling state interest in conducting civil service exam exclusively in English did not violate equal protection); *see also infra* notes 58-78 and accompanying text (discussing other English-only challenges).

⁵⁶ GERALD GUNTHER, CONSTITUTIONAL LAW 1191-92 (12th ed. 1991). Under the third party standing rule, a plaintiff challenging a law "as applied" may not challenge the law as it applies to others. *Id.* at 1191. When a plaintiff challenges a law as applied, the court examines the law's constitutionality only as it applies to that particular plaintiff. *Id.* Accordingly, in an as applied challenge, a court may void only the particular application of the law which the plaintiff contests. *Id.* at 1192.

⁵⁷ *See supra* note 55 and accompanying text (discussing Fourteenth Amendment challenges to official English).

⁵⁸ 262 U.S. 390 (1923).

⁵⁹ *See Farrington v. Tokushige*, 273 U.S. 284, 299 (1927) (finding Hawaii legislative provision restricting instruction at foreign language schools unconstitutional under Fourteenth Amendment); *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 524-25 (1926) (rejecting Philippine act criminalizing bookkeeping in Chinese language as violation of Fourteenth Amendment due process and equal protection); *Bartels v. Iowa*, 262 U.S. 404, 411 (1923) (declaring Ohio and Iowa legislative provisions, which prohibited instruction of foreign languages in all schools, unconstitutional under Fourteenth Amendment).

⁶⁰ *Meyer*, 262 U.S. at 397.

⁶¹ *Id.* at 400.

tion and due process, the Court recognized the right of individuals to speak non-English languages as fundamental under the Constitution.⁶²

More recently, federal statutes have provided the Supreme Court with a means by which to uphold as applied challenges to official English.⁶³ In *Katzenbach v. Morgan*,⁶⁴ a New York law qualified the right to vote with the ability to read and write English.⁶⁵ The Voting Rights Act of 1965, however, forbids states from conditioning the right to vote on the ability to read, write, understand, or interpret English.⁶⁶ Accordingly, the Court rejected New York's English literacy requirement for denying equal voting privilege to those not literate in English.⁶⁷

The Court similarly relied upon a federal statute to bar official English in another case.⁶⁸ In *Lau v. Nichols*,⁶⁹ the Court outlawed an English language curriculum under Title VI of the

⁶² *Id.* at 400-01. Specifically, the Court held that the Nebraska statute, by forbidding foreign language instruction, was arbitrary and did not reasonably relate to any end within the competency of the state to regulate. *Id.* at 403. The Court acknowledged that a state has legitimate interests in promoting the civic development of its citizens. *Id.* at 401. The Court further acknowledged that a uniform language might aid this promotion. *Id.* The Court concluded, however, that the Nebraska statute abrogated the fundamental, individual right of choice of language. *Id.* Despite its desirable ends, the Nebraska statute employed prohibited means that exceeded the State's power. *Id.* at 402. The discriminatory Nebraska law, as applied, thus deprived teachers and students of their liberty without due process of law. *Id.* at 400-02.

⁶³ See Cordero, *supra* note 4, at 35-41 (equating English-only declarations to impermissible voting and educational barriers); Lowrey, *supra* note 22, at 297 (stating that federal statutes would prohibit curtailment of bilingual services for linguistic minorities under state official English decrees).

⁶⁴ 384 U.S. 641 (1966).

⁶⁵ *Id.* at 643-44.

⁶⁶ Voting Rights Act, Pub. L. No. 89-110, 79 Stat. 445 (1965) (codified as amended at 42 U.S.C. § 1973(a)-(b)(2) (1988)). The plaintiffs in *Morgan* relied upon section 4(e) of the Voting Rights Act in bringing their suit against the state. *Morgan*, 384 U.S. at 643. Section 4(e) forbids literacy tests that disqualify from voting anyone who has completed sixth grade in an American school where the predominant language is not English. *Id.*

⁶⁷ *Morgan*, 384 U.S. at 658. At least two lower courts, however, have departed from the Supreme Court's analysis of official English in relation to voting rights. See *Montero v. Meyer*, 13 F.3d 1444, 1446 (10th Cir. 1994) (stating that Voting Rights Act does not provide liberty interest sufficient to challenge initiative petitions making English Colorado's official language); *Delgado v. Smith*, 861 F.2d 1489, 1498 (11th Cir. 1988) (holding Voting Rights Act inapplicable to initiative petitions to make English Florida's official language).

⁶⁸ See *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974) (relying on Title VI of 1964 Civil Rights Act).

⁶⁹ 414 U.S. 563 (1974).

1964 Civil Rights Act.⁷⁰ The plaintiffs in *Lau* were non-English-speaking minority students.⁷¹ The Court held that the school district's failure to provide special instruction to the plaintiffs denied them the meaningful opportunity to participate in public education conducted exclusively in English.⁷² This discriminatory exclusion, the Court concluded, violated the students' civil rights.⁷³ In *Lau* and *Morgan*, the Court rejected official English

⁷⁰ *Id.* at 568-69.

⁷¹ *Id.* at 564.

⁷² *Id.* at 568. The Court first noted that only 1,000 of the 2,856 non-English-speaking students in the school system received supplemental courses in the English language. *Id.* at 564. The Court then observed that, while specifying English as the "basic language of instruction," the California Education Code also permits a school district to give bilingual instruction. *Id.* at 565.

⁷³ *Id.* at 568-69. In bringing their suit, the plaintiffs in *Lau* relied upon a federal regulation that the department of Health, Education, and Welfare (HEW) issued under Title VI of the 1964 Civil Rights Act. *Id.* at 566-67. The regulation requires school districts to ensure that national-origin minority students, who are unable to speak and understand English, can participate effectively in each district's instructional program. *Id.* at 568. Congress codified the HEW regulation statement the same year the Supreme Court decided *Lau*. Equal Education Opportunity Act, 20 U.S.C. § 1703 (1994); Bilingual Education Act, 20 U.S.C. § 3281 (1994) (current version at 20 U.S.C. § 7410 (1994)).

At least 20 states have bilingual education statutes. *See, e.g.*, ALASKA STAT. § 14.30.400 (Michie 1995) (providing for bilingual-bicultural education program for pupils of limited English-speaking ability); ARIZ. REV. STAT. ANN. § 15-752 (West 1991) (providing for bilingual instruction for pupils who have limited English proficiency); CAL. EDUC. CODE §§ 52160-52186 (West 1989 & Supp. 1996) (providing for bilingual-bicultural education); COLO. REV. STAT. § 22-24-101 (1995) (providing for bilingual education); CONN. GEN. STAT. ANN. § 10-17A (West 1996) (providing foreign language instruction for pupils with reading difficulties and problems understanding English); DEL. CODE ANN. tit. 14, § 122(c)(4) (1993) (providing for bilingual education); 105 ILL. COMP. STAT. ANN. 5/14C-1 to -13 (West 1993 & Supp. 1996) (providing bilingual education to ensure equal educational opportunities); IND. CODE ANN. §§ 20-10.1-5.5-1 to -9 (West 1995) (providing for bilingual-bicultural education); KAN. STAT. ANN. §§ 72-9501 to -9510 (1992) (providing for bilingual education); LA. ADMIN. CODE tit. 17, §§ 272-273 (1982) (providing for bilingual education); MASS. GEN. LAWS ANN. ch. 71A, § 6 (West 1996) (providing for bilingual education); MICH. COMP. LAWS § 380.1153 (1988) (providing for bilingual instruction); MINN. STAT. §§ 126.262-.269 (1988) (providing for bilingual education); N.H. REV. STAT. ANN. § 189:19 (1989) (providing for bilingual educational programs); N.Y. EDUC. LAW § 3204 (McKinney 1995) (providing for bilingual education); 24 PA. CONS. STAT. ANN. § 15-1511 (West 1992) (providing for bilingual education program); R.I. GEN. LAWS § 16-54-1 (1988) (providing for bilingual-bicultural education); WASH. REV. CODE § 28A.180.010 (West Supp. 1996) (providing for bilingual education); WIS. STAT. ANN. § 115.95 (West 1991) (providing for bilingual-bicultural education); TEX. EDUC. CODE ANN. § 21.451 (West 1987) (providing for bilingual education and special language programs) (repealed 1995). Six of these states also have official English statutes. *E.g.*, ARIZ. CONST. art. XXVIII; CAL. CONST. art. III, § 6; COLO. CONST. art. II, § 30a; 5 ILL. COMP. STAT. ANN. 460/20 (West 1993); IND. CODE ANN. § 1-2-10-1 (West 1996); N.H. REV. STAT. ANN. § 3-C:1 (Supp. 1995).

for interfering with educational and voting entitlements in violation of federal statutes.⁷⁴

Lau and *Morgan* typify pre-*Yniguez* challenges to official English, which neither address First Amendment rights nor attack a state's official English statute.⁷⁵ By employing Fourteenth Amendment scrutiny to vindicate federal statutory rights, courts have merely voided official English as applied to specific contexts in these cases.⁷⁶ Reliance on the Fourteenth Amendment to protect language rights has thus yielded inadequate,⁷⁷ and sometimes inconsistent,⁷⁸ results.⁷⁹

⁷⁴ See Cordero, *supra* note 4, at 45 (stating that Supremacy Clause preempts official English for interfering with federal statutory guarantees); *supra* notes 63-73 and accompanying text (discussing *Morgan* and *Lau*).

⁷⁵ See, e.g., *Lau*, 414 U.S. at 568-69 (enforcing school district's obligation to provide English-language instruction under Title VI of 1964 Civil Rights Act); *Morgan*, 384 U.S. at 658 (applying Voting Rights Act to literacy analysis); *Farrington v. Tokushige*, 273 U.S. 284, 298-99 (1927) (applying due process analysis to restriction against foreign language instruction); *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 524 (1926) (applying due process and equal protection analysis to bookkeeping restriction); *Bartels v. Iowa*, 262 U.S. 404, 411 (1923) (applying due process analysis to prohibition against foreign language instruction); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (applying due process and equal protection analyses to prohibition against foreign language instruction); *Montero v. Meyer*, 13 F.3d 1444, 1446 (10th Cir. 1994) (stating that Voting Rights Act is insufficient to grant standing to challenge official English initiative petition); *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1490 (9th Cir. 1993) (dismissing civil rights claim against private employer's English-only rule); *Delgado v. Smith*, 861 F.2d 1489, 1498 (11th Cir. 1988) (stating that Voting Rights Act does not apply to initiative petitions for official English); *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1053 (9th Cir. 1988), (upholding civil rights claim against municipal English-only rule) *vacated*, 490 U.S. 1016 (1989); *Soberal-Perez v. Heckler*, 717 F.2d 36, 42 (2d Cir. 1983) (dismissing Title VI claim challenging state's English-only notice and service requirement); *Garcia v. Gloor*, 618 F.2d 264, 272 (5th Cir. 1980) (dismissing Title VII claim as inapplicable to private employer's English-only rule); *Frontera v. Sindell*, 522 F.2d 1215, 1220 (6th Cir. 1975) (dismissing equal protection claim against state's English-only civil service exam).

⁷⁶ See *supra* notes 54-75 and accompanying text (detailing pre-*Yniguez* challenges to official English).

⁷⁷ See *supra* notes 63-75 and accompanying text (detailing recent Fourteenth Amendment challenges to official English).

⁷⁸ Compare, e.g., *Gutierrez*, 838 F.2d at 1048 (upholding equal protection claim against English-only rule) with *Garcia*, 618 F.2d at 269 (dismissing equal protection claim against English-only rule).

⁷⁹ See Leila Sadat Wexler, *Official English, Nationalism and Linguistic Terror: A French Lesson*, 71 WASH. L. REV. 285, 291-92 (1996) (discussing unsatisfactory nature of equal protection analysis of language rights). Professor Wexler likens the equal protection approach of equating language with national origin to "fitting a square peg (language) into a round hole (national origin)." *Id.* at 291-92 n.16. She concludes that such attempts result in artificial analysis. *Id.*

*Yniguez v. Arizonans for Official English*⁸⁰ represents the only direct First Amendment challenge to a state's official English statute.⁸¹ By linking protection of language rights to laws prohibiting racial, ethnic, or national origin discrimination, previous challenges have upset official English only as applied to specific contexts.⁸² In contrast, *Yniguez* attacked the facial validity⁸³ of Arizona's Article XXVIII under the First Amendment.⁸⁴ This challenge enabled the Ninth Circuit⁸⁵ to invalidate Arizona's

⁸⁰ 69 F.3d 920 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1316 (1996) (mem.).

⁸¹ See "English-only" Law To Be Struck Down, SAN DIEGO UNION-TRIB., Oct 5, 1995, at A-8 (identifying *Yniguez* as only case to test official English movement's "potential muscle").

⁸² See *supra* note 75 and accompanying text (summarizing pre-*Yniguez* official English challenges).

⁸³ *Yniguez*, 69 F.3d at 925. A facial attack questions the constitutional validity of the statute as a whole. See JEROME A. BARRON & C. THOMAS DIENES, CONSTITUTIONAL LAW: PRINCIPLES & POLICY 758 (2d ed. 1982) (describing overbroad or vague laws as facially unconstitutional no matter how narrowly applied).

⁸⁴ *Yniguez*, 69 F.3d at 925. The First Amendment overbreadth doctrine concerns precision of the law. BARRON & DIENES, *supra* note 83, at 758. The overbreadth doctrine is distinct from vagueness. *Id.* An overbroad law might be clear, yet sweep too broadly, thus prohibiting both unprotected and protected expression. *Id.* Professor Tedford explains overbreadth as "burning down the barn in order to get rid of the mice." THOMAS L. TEDFORD, FREEDOM OF SPEECH IN THE UNITED STATES 404 (2d ed. 1993). Professor Bogen defines overbreadth as the unnecessary prohibition of expression to accomplish governmental purposes. David S. Bogen, *The Supreme Court's Interpretation of the Guarantee of Freedom of Speech*, 35 MD. L. REV. 555, 558-59 n.21 (1976). Before declaring a law unconstitutionally overbroad, a court must first determine its overbreadth to be both real and substantial in relation to the law's plainly legitimate sweep. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). If a substantial danger of unconstitutional application of the law exists, a court may invoke the substantial overbreadth doctrine. *Id.* Second, for overbreadth scrutiny to apply, the area that the challenged law affects must substantially involve interests that the First Amendment protects. See *id.* at 615 (stating that function of overbreadth adjudication attenuates where statute primarily proscribes unprotected expression). Finally, before invalidating a state law, a federal court must consider whether the law is "readily susceptible" to an authoritative narrowing construction that would cure its unconstitutional overbreadth. *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988); *Broadrick*, 413 U.S. at 613.

⁸⁵ On March 26, 1996, the Supreme Court granted certiorari to Arizonans for Official English's petition. *Arizonans for Official English v. Arizona*, 116 S. Ct. 1316 (1996) (mem.). The petition presented the following questions: (1) whether a state may require English in performance of official acts without violating the First Amendment and (2) whether a state employee has a free speech right to choose the language in which to perform those acts. Brief for Petitioner at 1, *Yniguez v. Arizonans for Official English* 69 F.3d 920 (9th Cir. 1995), *cert. granted*, 116 S.Ct. 1316 (1996) (mem.) (no. 95-974). In addition to the questions presented by the petition, the Court requested that the parties brief and argue the issues of standing and mootness. See *infra* note 98 and accompanying text (discussing Court's *sua sponte* order).

official English amendment and all of its potential applications.⁸⁶

II. YNIGUEZ V. ARIZONANS FOR OFFICIAL ENGLISH

A. Facts and Procedure

In October 1987, Arizonans for Official English,⁸⁷ an English-language advocacy organization, initiated a petition drive to make English the official language of Arizona.⁸⁸ The successful petition drive resulted in Proposition 106, which sought to amend Arizona's Constitution by adding Article XXVIII.⁸⁹ When Proposition 106 passed in the Arizona general election in 1988,⁹⁰ Maria-Kelly Yniguez was an Arizona Department of Ad-

⁸⁶ *Yniguez*, 69 F.3d at 934, 949. Rather than identifying and excising unconstitutional applications as they arise, overbreadth analysis condemns the entire statute. BARRON & DIENES, *supra* note 83, at 768-69. Wholesale condemnation prevents a generally chilling or deterrent effect on the exercise of protected rights. *Id.* Implicit in overbreadth analysis is the balancing of governmental interests in prohibiting expression against the social value of the restricted activity. See, e.g., Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 911 (1970) [hereinafter Note, *First Amendment Overbreadth*] (describing traditional balancing as weighing governmental interests served against personal and societal interests prohibited).

⁸⁷ *Yniguez*, 69 F.3d at 924. Arizonans for Official English (AOE) sponsored the ballot initiative codified as Arizona's Article XXVIII. *Id.* The Ninth Circuit analogized AOE's relationship to Article XXVIII with a state legislature's relationship to a state statute. *Id.* at 926.

⁸⁸ *Id.* at 924.

⁸⁹ *Id.* This Note refers to Arizona's official English law primarily as "Article XXVIII" and "the amendment." This Note references the broader term, "official English law," to incorporate state constitutional amendments and statutes that accord English official status.

⁹⁰ ARIZ. CONST. art. XXVIII (1995) (Interim update). Voters approved the initiative measure in the November 8, 1988 general election. *Id.* The initiative passed by one percentage point. *Yniguez*, 69 F.3d at 924. The measure became effective December 5, 1988. ARIZ. CONST. art. XXVIII. Article XXVIII reads as follows:

§ 1. ENGLISH AS THE OFFICIAL LANGUAGE; APPLICABILITY

Section 1. (1) The English language is the official language of the State of Arizona.

(2) As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions.

(3)(a) This Article applies to:

- (i) the legislative, executive and judicial branches of government,
- (ii) all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities,
- (iii) all statutes, ordinances, rules, orders, programs and policies,

ministration claims agent.⁹¹ Her job included communicating in Spanish with monolingual Spanish-speaking claimants and in a combination of Spanish and English with bilingual claimants.⁹² Fearing employment sanctions for failure to obey the state constitution, she immediately stopped speaking Spanish on the job.⁹³

(iv) all government officials and employees during the performance of government business.

(b) As used in this Article, the phrase "This State and all political subdivisions of this State" shall include every entity, person, action or item described in this Section, as appropriate to the circumstances.

§ 2. REQUIRING THIS STATE TO PRESERVE, PROTECT AND ENHANCE ENGLISH

Section 2. This State and all political subdivisions of this State shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the State of Arizona.

§ 3. PROHIBITING THIS STATE FROM USING OR REQUIRING THE USE OF OTHER LANGUAGES OTHER THAN ENGLISH; EXCEPTIONS

Section 3. (1) Except as provided in Subsection (2):

(a) This State and all political subdivisions of this State shall act in English and in no other language.

(b) No entity to which this Article applies shall make or enforce a law, order, decree or policy which requires the use of a language other than English.

(c) No governmental document shall be valid, effective or enforceable unless it is in the English language.

(2) This State and all political subdivisions of this State may act in a language other than English under any of the following circumstances:

(a) to assist students who are not proficient in the English language, to the extent necessary to comply with federal law, by giving educational instruction in a language other than English to provide as rapid as possible a transition to English.

(b) to comply with other federal laws.

(c) to teach a student a foreign language as part of a voluntary or required educational curriculum.

(d) to protect public health or safety.

(e) to protect the rights of criminal defendants or victims of crime.

§ 4. ENFORCEMENT; STANDING

Section 4. A person who resides in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of this State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection.

Id.

⁹¹ *Yniguez*, 69 F.3d at 924.

⁹² *Id.* Maria-Kelly Yniguez was bilingual — fluent in both English and Spanish. *Id.*

⁹³ *Id.* Although an outspoken, personal critic of the amendment, Governor Rose Mofford stated that she intended to comply with Article XXVIII and that she expected that all state employees would do the same. *Id.* at 925-26. The district court characterized Yniguez's decision to refrain from speaking Spanish while performing her job as a

Yniguez then filed suit in federal district court against the State of Arizona, the Arizona Governor, the Arizona Attorney General, and the Director of the Arizona Department of Administration.⁹⁴ She sought to enjoin state enforcement of Article XXVIII and to obtain a declaration that it violated the First and Fourteenth Amendments of the United States Constitution and federal civil rights laws.⁹⁵ Finding that Article XXVIII violated the First Amendment, the district court granted declaratory relief.⁹⁶ Specifically, the court held that Arizona's official English amendment was capable of infringing First Amendment-protected expression without being capable of supporting a narrowed, saving construction.⁹⁷ Because no enforcement action

legitimate reaction to Article XXVIII's proscriptions. *Yniguez v. Mofford*, 730 F. Supp. 309, 315 (D. Ariz. 1990), *aff'd*, 69 F.3d 920 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1316 (1996) (mem.).

⁹⁴ *Yniguez*, 69 F.3d at 925.

⁹⁵ *Id.* The Ninth Circuit noted that the district court, having found that Article XXVIII violated the First Amendment, did not reach Yniguez's other constitutional and statutory challenges to the amendment. *Id.* at 925-26. Yniguez later amended her complaint to include as a plaintiff Arizona state senator Jaime Gutierrez who claimed that Article XXVIII prevented him from speaking Spanish with his Spanish-speaking constituents. *Id.* Recognizing various jurisdictional bars, the district court dismissed all defendants in the original action except the governor who the court found had the authority to enforce Article XXVIII against Yniguez and had sufficiently threatened to do so. *Id. Ex Parte Young*, 209 U.S. 123 (1908), the court ruled, barred Gutierrez's claims against all defendants. *Id.*

⁹⁶ *Yniguez*, 730 F. Supp. at 316-17.

⁹⁷ *Id.* at 312. The statute, therefore, appropriately triggered an overbreadth analysis. *Id.* The court determined that Article XXVIII indiscriminately prohibited the use of any language but English in the workplace. *Id.* at 314. *See also supra* notes 83-84, 86 (discussing First Amendment overbreadth doctrine).

was pending, however, the court denied injunctive relief.⁹⁸ The Court of Appeals for the Ninth Circuit affirmed.⁹⁹

B. *The Ninth Circuit's Holding and Rationale:
Article XXVIII and the First Amendment*

The Ninth Circuit found that Article XXVIII's literal wording could curtail expression that the First Amendment protects.¹⁰⁰ Guided by the Supreme Court's declaration in *Meyer v. Nebraska* that the Constitution protects *all* languages,¹⁰¹ Judge Reinhardt, writing for the majority, rejected Article XXVIII's sweeping prohibition of non-English languages.¹⁰² The *Yniguez* court thus facially invalidated Arizona's official English amendment.¹⁰³

⁹⁸ *Yniguez*, 730 F. Supp. at 315. Arizona Governor Mofford decided not to appeal the district court's judgment. *Yniguez*, 69 F.3d at 926. AOE and Arizona Attorney General moved to intervene postjudgment for purposes of appeal. *Id.* The district court denied these motions. *Id.* The court of appeals reversed the district court, allowing AOE and the Arizona Attorney General to intervene. *Yniguez v. Arizona*, 939 F.3d 727, 740 (9th Cir. 1991). Had AOE and the Arizona Attorney General not intervened to pursue the appeal, the case would have concluded with the district court's decision. *Yniguez*, 69 F.3d at 926.

Due to *Yniguez's* resignation from the Arizona Department of Administration in April 1990, the State filed a suggestion of mootness. *Id.* The court of appeals rejected the mootness suggestion, stating that *Yniguez* had the right to appeal the district court's denial of nominal damages. *Id.* In 1994, the court of appeals allowed *Arizonans Against Constitutional Tampering*, the principal opponent of the ballot initiative codified as Article XXVIII, to intervene as plaintiff-appellees. *Id.* at 927. In its order granting certiorari, the Supreme Court seemed to note the unusual procedural posture of the case. *See Arizonans for Official English v. Arizona*, 116 S. Ct. 1316 (1996) (mem.) (requesting *sua sponte* that, in addition to questions presented by petition, parties brief and argue (1) AOE's standing and (2) mootness with respect to *Yniguez*).

At Oral Arguments on December 4, 1996, the Justices of the Supreme Court questioned the parties exclusively on the procedural issues surrounding the case. *See Steve Lash, First Amendment English-Only Case Becomes High Court Debate on Standing*, WEST'S LEGAL NEWS, Dec. 5, 1996, available in 1996 WL 692725 (reporting Supreme Court's apparent definition of *Arizonans for Official English v. Arizona* as "discourse on civil procedure" rather than First Amendment).

⁹⁹ *Yniguez v. Arizonans for Official English*, 42 F.3d 1217, 1242-43 (9th Cir. 1995), *aff'd*, 69 F.3d 920 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1316 (1996) (mem.).

¹⁰⁰ *Yniguez*, 69 F.3d at 947.

¹⁰¹ *Meyer v. Nebraska*, 262 U.S. 390, 400-01 (1923).

¹⁰² *Yniguez*, 69 F.3d at 923-24.

¹⁰³ *Id.* at 924. A three-judge panel of the Ninth Circuit affirmed the district court's conclusion that Article XXVIII employed a means of promoting English contrary to the First Amendment. *Id.* Recognizing how this case implicated the state's power to restrict language rights, the Ninth Circuit reconsidered the question en banc. *Yniguez v. Arizonans for Official English*, 53 F.3d 1084, 1084-85 (9th Cir. 1995) (en banc). In a six-to-five vote, the

The court divided its First Amendment analysis of Article XXVIII into three parts.¹⁰⁴ First, the court analyzed Article XXVIII to determine whether it was overbroad.¹⁰⁵ Second, the court reviewed the defendants' preliminary arguments in support of Article XXVIII.¹⁰⁶ Finally, the court examined Article XXVIII's regulation of and effect on protection of public employee speech.¹⁰⁷

1. Overbreadth

As the threshold inquiry triggering its overbreadth analysis, the Ninth Circuit identified the need to establish whether the sweep of the suspect amendment was both real and substantial.¹⁰⁸ The court first determined that Article XXVIII's broad language banned speech in a seemingly limitless variety of governmental settings.¹⁰⁹ By chilling the speech of innumerable employees at all levels of Arizona's state and local governments, in addition to restricting Yniguez's speech, Article XXVIII realistically endangered speech rights in a substantial number of instances.¹¹⁰ The further burden of Article XXVIII on non-English speaking Arizonans increased its scope.¹¹¹ Thus, Article XXVIII warranted overbreadth analysis.¹¹²

Because overbreadth analysis incorporates third party challenges, the court could properly invalidate all of Article XXVIII's

court affirmed its original decision invalidating Arizona's official English amendment. *Yniguez*, 69 F.3d at 923.

¹⁰⁴ *Yniguez*, 69 F.3d at 931-48.

¹⁰⁵ See *infra* notes 108-16 and accompanying text (examining Ninth Circuit's overbreadth analysis of Article XXVIII).

¹⁰⁶ See *infra* notes 118-27 and accompanying text (discussing Ninth Circuit's disposition of defendants' preliminary arguments).

¹⁰⁷ See *infra* notes 129-51 and accompanying text (discussing Ninth Circuit's examination of Article XXVIII's regulation of government employee speech).

¹⁰⁸ *Yniguez*, 69 F.3d at 931. The substantial potential for unconstitutional applications to arise is a prerequisite to a proper overbreadth analysis. Note, *First Amendment Overbreadth*, *supra* note 86, at 858-59. See also *supra* note 84 (detailing First Amendment overbreadth doctrine).

¹⁰⁹ *Yniguez*, 69 F.3d at 932. The court stated that Article XXVIII's ban could "hardly be more inclusive" in limiting the speech of governmental employees in a wide range of contexts. *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

potential applications without a case-by-case analysis.¹¹³ The court found that Yniguez's challenge to Article XXVIII incorporated the speech rights of countless parties not before the court.¹¹⁴ Finding that Article XXVIII constituted an integrated whole, the court further reasoned that its lack of a severability provision required the amendment's facial invalidation.¹¹⁵ Correspondingly, the court stated that, to the extent that it was unconstitutional, Article XXVIII would be unconstitutional in all its applications.¹¹⁶ The court next reviewed the defendant's two preliminary arguments in support of Article XXVIII.¹¹⁷

2. Speech Versus Expressive Conduct and Affirmative Versus Negative Rights

The court rejected both preliminary contentions of the defendants, namely, that the decision to speak in a non-English language is a matter of expressive conduct and that Yniguez was seeking to compel the government to provide non-English language communications.¹¹⁸ Addressing the defendants' first contention, the court agreed that speech in any language requires "expressive conduct" in order to produce sound or to write.¹¹⁹ Yet, the court reasoned, the fact that language shapes such conduct defines it as speech.¹²⁰ Thus, the "expressive choice" to speak a particular language does not reduce that choice to "conduct."¹²¹ Because words import emotive as well as cognitive

¹¹³ *Id.* In other words, a court employing overbreadth analysis may consider third-party claims not before the court. GUNTHER, *supra* note 56, at 1192. Thus, even where the challenger's behavior is unprotected, the court may strike down the statute because of its potential to curtail protected conduct. *Id.*

¹¹⁴ *Yniguez*, 69 F.3d at 932.

¹¹⁵ *Id.* at 936.

¹¹⁶ *Id.* at 934.

¹¹⁷ *Id.* The court qualified its review of the defendants' preliminary contentions by stating that this review did not affect the court's ultimate disposition of this case. *Id.*

¹¹⁸ *Id.* at 934-37.

¹¹⁹ *Id.* at 934.

¹²⁰ *Id.* at 935.

¹²¹ *Id.*

force, the court concluded that the decision to speak in a language other than English necessarily implicates pure speech concerns.¹²² Accordingly, the court rejected the defendants' attempt to liken choice of language to expressive conduct.¹²³

The defendants' second contention similarly failed to persuade the court.¹²⁴ The defendants, the court stated, misinterpreted the facts in contending that Yniguez sought the affirmative right to government in non-English languages.¹²⁵ The court defined the right Yniguez claimed as a negative right, which simply forbids the state from gagging employees currently providing public information in languages other than English from continuing to do so.¹²⁶ Distinguishing Article XXVIII's prohibition of non-English speech from a state's failure to provide public information in multiple languages, the court dismissed the defendants' second contention.¹²⁷ Having dismissed the defendants' preliminary contentions, the court then turned to the heart of its opinion — determining whether Article XXVIII validly regulated public employee speech.¹²⁸

3. Regulation of Government Employee Speech

Analyzing whether the First Amendment permits restricting government employees' speech to English, the court first observed that a state cannot restrict the language choice of private persons.¹²⁹ To promote efficiency and effectiveness, however, government traditionally enjoys a freer hand in regulating the speech of its employees than that of private citizens.¹³⁰ Accord-

¹²² *Id.* at 935 (citing *Cohen v. California*, 403 U.S. 15, 26 (1971)). The court noted that, beyond banning single words, Article XXVIII would effectively repress entire vocabularies. *Id.*

¹²³ *Id.* The court further defined the essence of the First Amendment as the protection of the very speech rights that the State, through Article XXVIII, was attempting to repress. *Id.* at 935-36. "Speech in any language," the court declared, "is still speech, and the decision to speak in another language is a decision involving speech alone." *Id.* at 936.

¹²⁴ *Id.* at 936-37.

¹²⁵ *Id.* at 936.

¹²⁶ *Id.* at 936-37.

¹²⁷ *Id.* at 937. The court further stated that to refrain from terminating the "normal and cost-free" use of other languages by public employees was entirely distinguishable from providing multilingual services. *Id.*

¹²⁸ *Id.* at 937-48.

¹²⁹ *Id.* at 937 (citing *Meyers v. Nebraska*, 262 U.S. 390, 401 (1923)).

¹³⁰ *Waters v. Churchill*, 114 S. Ct. 1878, 1888 (1994). The court noted that whereas the

ingly, the government's interest in efficiency and effectiveness usually defeats the public employee's right to speak on matters of private concern.¹³¹ Nevertheless, public employees do not abandon their First Amendment rights upon entering the public workplace.¹³² When a public employee speaks on matters of public concern, the government's interest in efficiency and effectiveness no longer determines its ability to regulate that speech.¹³³

While public employee speech on matters of public concern deserves greater protection than speech on private concerns,¹³⁴ the court declined to categorize the speech at issue in this case as either of public or private concern.¹³⁵ Instead, the court stated that the context of the contested speech merely constituted one factor in calibrating its constitutional protection.¹³⁶ Other factors that may also overcome the government's interests are an employee's interest in speaking freely, the public importance of the speech involved, and the practical effects of the restriction.¹³⁷ The court found that, by mandating English, Article XXVIII obstructed the free flow of information, thus burdening both public employees and private citizens.¹³⁸ Further, the court found that the practical, expansive, and significant burden

state, as sovereign, may not restrict the speech of the public at large in the name of efficiency, the state, as employer, may restrict the speech of its employees. *Yniguez*, 69 F.3d at 938-39.

¹³¹ *Yniguez*, 69 F.3d at 939. Public employee speech involving "internal working conditions, affecting only the speaker and co-workers" exemplifies speech on matters of private concern that federal courts rarely protect. *Id.* (quoting *O'Connor v. Steeves*, 994 F.2d 905, 914 (1st Cir. 1993)).

¹³² *Id.* at 938.

¹³³ *Id.* at 939. Thus, when a public employee speaks on matters of public concern, the court will employ a traditional balancing test, weighing the government's interest in efficiency and effectiveness against the employee's interest in speaking freely. *Id.* at 939, 942. The alternative test is strict scrutiny. *Id.* at 942 n.27. Strict scrutiny review requires that the state law at issue be narrowly tailored to serve a compelling state interest. *R.A.V. v. St. Paul*, 505 U.S. 377, 403 (1992) (White, J., concurring).

¹³⁴ *Connick v. Myers*, 461 U.S. 138, 147 (1983).

¹³⁵ *Yniguez*, 69 F.3d at 939 n.23.

¹³⁶ *Id.* at 939-40. The court recognized the difficulty of categorizing the speech as either private or public concern. *Id.* at 939. Instead, the court simply noted that the speech occurred as part of the performance of the public employee's job. *Id.* at 940.

¹³⁷ *Id.* at 940-41.

¹³⁸ *Id.* at 942.

of conducting government exclusively in English hinders, rather than promotes, efficiency and effectiveness.¹³⁹

Finally, the court evaluated the broader, societal justifications for Article XXVIII.¹⁴⁰ Proponents of Article XXVIII claimed that a common language protects democracy by encouraging unity, public stability, and confidence.¹⁴¹ Article XXVIII's sweeping language, however, deterred broad categories of expression by massive numbers of potential speakers.¹⁴² Such expansive restriction required the court's heightened scrutiny of alleged state interests.¹⁴³

The court stated that both the amendment itself and the record, including Proposition 106's materials and publicity pamphlets, lacked evidentiary support for allegations that mandating English promotes democracy.¹⁴⁴ Furthermore, neither extensive hearings nor careful legislative analysis attended Article XXVIII's birth by ballot initiative.¹⁴⁵ Accordingly, the court determined that the broad societal interests alleged in support of Article

¹³⁹ *Id.* at 941-43. Citing the plaintiff's own prior use of Spanish in communicating with non-English speaking citizens, the *Yniguez* court asserted that using non-English languages enhanced efficiency and effectiveness. *Id.* at 942. The court further stated that "elementary reason" demonstrates that improved efficiency and effectiveness result when government employees speak languages that members of the public can understand. *Id.* The court noted that both parties conceded that conducting government exclusively in English was burdensome. *Id.*

¹⁴⁰ *Id.* at 944-47. The court noted that under a traditional balancing test, AOE would lose. *Id.* at 943. A traditional balancing test confines consideration of government interests to efficiency and effectiveness, and the speech at issue did not impinge on those interests. *Id.* Beyond the government interest in an efficient workplace, the broader justifications for Article XXVIII relate to more general societal interests. *Id.* These societal justifications underlie the official English movement as a whole. *See also supra* notes 21-50 and accompanying text (explaining historical origins and contemporary revival of official English); *infra* notes 218-21 and accompanying text (discussing current justifications for official English).

¹⁴¹ *Yniguez*, 69 F.3d at 944.

¹⁴² *Id.*

¹⁴³ *Id.* Stating only that the alleged state interests did not justify Article XXVIII's free speech restrictions, the court carefully refused to specify either the applicable level of scrutiny or the approach to balancing in this case. *Id.*

¹⁴⁴ *Id.* at 945. A common language, AOE asserted, promotes unity and political stability, as well as public confidence in the government. *Id.* at 944.

¹⁴⁵ *Id.* at 945; *see* Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47, 52-53 (1995) (noting that minority of state's adult population typically compose voting majorities in constitutional initiatives); Perea, *supra* note 1, at 362 (stating that initiative's popularity is not equivalent to its constitutionality).

XXVIII did not deserve the deference courts customarily give to legislative findings.¹⁴⁶

The court acknowledged the concern of some Arizonans over the use of non-English languages in government business.¹⁴⁷ Notwithstanding this concern, the court ruled that no basis existed for prohibiting the use of these languages.¹⁴⁸ Following Supreme Court precedent banning language restrictions,¹⁴⁹ the court concluded that, by coercing a common language, Article XXVIII failed to promote not only efficiency but also democracy.¹⁵⁰ Ultimately, the court invalidated Article XXVIII.¹⁵¹

III. ANALYSIS

Despite its many alleged justifications, Arizona's official English amendment failed to pass constitutional muster.¹⁵² Official English laws, whether unduly restrictive or facially neutral, strive to protect the linguistic supremacy of English.¹⁵³ Official English, thus, necessarily restrains individual choice of language.¹⁵⁴ By equating choice of language with constitutionally protected speech, the *Yniguez* court seemingly established strict First Amendment scrutiny of future official English statutes.¹⁵⁵ Only in dictum, however, did the court recognize choice of language as a constitutionally protected freedom.¹⁵⁶ The court qualified

¹⁴⁶ *Yniguez*, 69 F.3d at 945. The court further remarked that deference is less appropriate when First Amendment rights are at stake. *Id.*

¹⁴⁷ *Id.* at 947. Judge Reinhardt also acknowledged the legitimacy of promoting unity and democracy through encouraging a common language. *Id.* at 946.

¹⁴⁸ *Id.* at 947.

¹⁴⁹ See *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927) (rejecting state law limiting foreign language instruction); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (rejecting state law prohibiting foreign language instruction).

¹⁵⁰ *Yniguez*, 69 F.3d at 947; see also *id.* at 946 (declaring that "state cannot achieve unity by prescribing orthodoxy"); *supra* notes 58-62 and accompanying text (discussing *Meyer* and progeny).

¹⁵¹ *Yniguez*, 69 F.3d at 947.

¹⁵² *Id.*

¹⁵³ See Note, *Official English*, *supra* note 28, at 1347 (stating that majority's unease with minority languages has been historical impetus behind official English movement).

¹⁵⁴ See *Perea*, *supra* note 1, at 363 (analogizing unconstitutional coercion of government-sponsored religion to government mandated choice of language); *Puig-Lugo*, *supra* note 30, at 52 (stating that official English restricts content of expression).

¹⁵⁵ *Yniguez*, 69 F.3d at 934-36.

¹⁵⁶ *Id.*

this recognition as having no effect on its ultimate decision to find Article XXVIII unconstitutional.¹⁵⁷ Thus, although the *Yniguez* precedent appears appealing, procedural and substantive complications limit future courts' ability to apply First Amendment strict scrutiny to official English laws.¹⁵⁸

A. Procedural Complications

Two procedural issues complicate the Ninth Circuit's holding in *Yniguez*.¹⁵⁹ First, challenging a state law initially in federal court, as *Yniguez* did, does not necessarily invalidate the law.¹⁶⁰ Particularly when no state court has construed the new state law, a federal court must approximate that state's courts' interpretation of the law.¹⁶¹ Thus, a successful federal challenge to that law may not stand in subsequent state court litigation.¹⁶² An Arizona state court may rehabilitate Article XXVIII.¹⁶³ For example, in *Yniguez*, the Ninth Circuit dismissed both the Arizona Attorney General's narrowing construction of Article XXVIII and request for abstention and certification.¹⁶⁴ Although the Ninth

¹⁵⁷ *Id.* at 934.

¹⁵⁸ *See id.* at 942, 944 (refusing to specify appropriate level of scrutiny and declining to decide applicable approach to balancing).

¹⁵⁹ *See infra* notes 160-70 and accompanying text (discussing *Yniguez's* procedural complications).

¹⁶⁰ *See* WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW 1247 (9th ed. 1993) (stating that second-guessing of state court is especially troublesome when challenged law is newly enacted and state courts have not construed it). Plaintiff *Yniguez* challenged Article XXVIII immediately after its enactment, before Arizona courts could construe the amendment. *Yniguez*, 69 F.3d. at 924-25.

¹⁶¹ *See* Secretary of State v. Joseph H. Munson Co., Inc., 467 U.S. 947, 974-75 (1984) (Stevens, J., concurring) (stating that state court's construction of its own statute substantially determines that statute's legitimate sweep). One author has suggested that narrowly construing state law exceeds the authority of a federal court. Norman M. Monhait, Note, *Federal Declaratory Relief from Unconstitutional State Statutes: The Implications of Steffel v. Thompson*, 9 HARV. C.R.-C.L. L. REV. 520, 552 n.191 (1974). Thus, the author concluded, a federal court that does not abstain in the case of an ambiguous state law must declare the law unconstitutional for overbreadth or vagueness. *Id.*

¹⁶² *Steffel v. Thompson*, 415 U.S. 452, 483 (1974) (Rehnquist, J., concurring). Justice Rehnquist noted that, unlike a federal court in the same jurisdiction, a state court need not defer to lower federal court decisions under the doctrine of *stare decisis*. *Id.* at 482 n.3. Justice Rehnquist suggested that the most weight a state court might assign a lower federal court decision is high persuasion. *Id.*

¹⁶³ *See* David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U. L. REV. 759, 767 (1979) (asserting state court's ability to revive state statute which lower federal court has voided).

¹⁶⁴ *Yniguez*, 69 F.3d at 931. The doctrine of abstention permits a federal court, in its

Circuit rejected the Attorney General's interpretation of Article XXVIII, an Arizona state court may still adopt the Attorney General's reading or an alternative saving construction, thereby revitalizing the defunct statute.¹⁶⁵

Second, a federal court's grant of declaratory relief does not bind state courts.¹⁶⁶ In *Yniguez*, the court of appeals affirmed the district court's declaratory judgment, denying injunctive relief because no state enforcement action was pending.¹⁶⁷ State officials may elect to seek guidance from a federal court, but no threat of contempt or other sanctions compels the state to adhere to the federal declaratory judgment.¹⁶⁸ Essentially immune from the Ninth Circuit's judgment, Arizona state officials may enforce Article XXVIII's terms.¹⁶⁹ The *Yniguez* decision thus stands reduced to mere symbol, lacking force and effect.¹⁷⁰

discretion, to relinquish jurisdiction when necessary to avoid needless conflict with a state's administration of its own affairs. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941). Certification to state court requires the federal court to abstain from deciding a state law question until the highest court of the state can rule on the question certified. *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 212 (1960), *vacating* 265 F.2d 522 (5th Cir. 1959), *remanded*, 319 F.2d 505 (5th Cir. 1963), *rev'd*, 377 U.S. 179 (1964). The court commented that the nonbinding nature of the Attorney General's opinion was the threshold reason to decline his construction. *Yniguez*, 69 F.3d at 928-29. Considering the disparity between the court's understanding of Article XXVIII's "clear terms" and the Attorney General's more constraining approach, the court gave weight to AOE's broader construction. *Id.* at 929. Further, the court concluded that neither abstention nor certification was proper because the article was not susceptible to a narrowed construction. *Id.* at 931. Noting the absence of mitigating circumstances favoring certification, the court determined that constitutional necessity required federal adjudication of the statute. *Id.* See also *Yniguez*, 730 F. Supp. at 316 (declaring that abstention is generally inappropriate in First Amendment cases when state court has not had opportunity to narrow allegedly unconstitutional statute).

¹⁶⁵ See *supra* notes 160-63 and accompanying text (explaining state court's ability to circumvent federal court's disposition of state law).

¹⁶⁶ *Steffel*, 415 U.S. at 482 (Rehnquist, J., concurring).

¹⁶⁷ *Yniguez*, 69 F.3d at 925-26.

¹⁶⁸ *Steffel*, 415 U.S. at 482 (Rehnquist, J., concurring).

¹⁶⁹ See *id.* (stating that, absent an injunction, declaratory judgments lack all binding power over state authorities).

¹⁷⁰ See *id.* (equating declaratory judgments to mere statements of rights).

B. Substantive Complications

Beyond procedural complications are substantive issues that limit *Yniguez*'s holding.¹⁷¹ Voiding the amendment for overbreadth relieved the court of defining the constitutional parameters of officially promoting English.¹⁷² By expressly confining its holding to the broad language of Article XXVIII, the court itself eschewed the precedential value of its decision.¹⁷³

Yniguez neglects to define the degree of overbreadth an official English law may possess and still survive facial invalidation.¹⁷⁴ Application of *Yniguez* might rescue other potentially overbroad official English laws from facial invalidation.¹⁷⁵ Consequently, challenging an official English statute after *Yniguez* might require resorting to the piecemeal, as applied approach of the earlier, Fourteenth Amendment claims.¹⁷⁶

The court concluded its First Amendment analysis of Article XXVIII by recalling *Meyer v. Nebraska*'s constitutional prohibition against language restrictions.¹⁷⁷ The court's reliance on *Meyer*'s prohibition, however, assumes *Meyer*'s applicability to the First Amendment.¹⁷⁸ Decided two years before the Court incorporated the First Amendment into the Fourteenth Amendment,¹⁷⁹ *Meyer*'s protection of speech is arguably incidental.¹⁸⁰

¹⁷¹ See *infra* notes 172-209 and accompanying text (discussing *Yniguez*'s substantive complications).

¹⁷² See *Yniguez*, 69 F.3d at 928-29 n.11 (stating that Ninth Circuit's holding in *Yniguez* does not express any view regarding constitutionality of other official English provisions within same circuit).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 944.

¹⁷⁵ See, e.g., BARRON & DIENES, *supra* note 83, at 769 (noting overbreadth doctrine's ability to vindicate rights that narrowly drawn statute would not implicate). The court suggested that, without more, the sheer number of public employees, whose speech Article XXVIII restricted, constituted the required substantial number of instances to make the amendment vulnerable to overbreadth attack. *Yniguez*, 69 F.3d at 932. Thus, an official English law which similarly but more specifically restricted public employee speech might survive facial invalidation. See *id.* at 929 (discussing Arizona Attorney General's narrowing construction of Article XXVIII which urges official English only for "official acts" of state).

¹⁷⁶ See *supra* notes 54-79 and accompanying text (detailing pre-*Yniguez* challenges to official English).

¹⁷⁷ *Yniguez*, 69 F.3d at 945-48 (citing *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923)).

¹⁷⁸ See *id.* at 945 n.29 (stating that Supreme Court has explicitly recharacterized *Meyer* as protecting First Amendment freedoms).

¹⁷⁹ *Gitlow v. New York*, 268 U.S. 652 (1925).

¹⁸⁰ See Howard O. Hunter, *Problems in Search of Principles: The First Amendment in the*

Despite its reference to *Meyer*, the *Yniguez* court explicitly defined its holding to exclude choice of language as constitutionally protected speech.¹⁸¹ Judge Reinhardt stated that language is speech.¹⁸² He couched this essential statement, however, within the express confines of dictum.¹⁸³ By relegating such a pronouncement to dictum, the court takes away with one hand that which it had granted with the other, and *Yniguez*, accordingly, provides only dubious precedent within Arizona¹⁸⁴ and the Ninth Circuit.¹⁸⁵

Rather than broadly designating choice of language as constitutionally protected speech, the *Yniguez* majority ruled only on the constitutionality of restricting government employee speech to English.¹⁸⁶ In dissent, Chief Judge Wallace focused on the majority's failure to identify which speech Article XXVIII suppresses.¹⁸⁷ Framing the issue strictly as one of public employee speech in which the only relevant consideration is the content of that speech, Chief Judge Wallace stated that the majority could not hold that Article XXVIII restricts pure speech rights without identifying the messages that the amendment suppresses.¹⁸⁸

Chief Judge Wallace attacked the majority's failure to identify the meaning that using one language instead of another conveys.¹⁸⁹ This failure, he continued, confused the application of

Supreme Court from 1791-1930, 35 EMORY L.J. 59, 128 (1986) (stating that *Meyer* does not offer speech any particular protection).

¹⁸¹ See *Yniguez*, 69 F.3d at 934 (stating that court's position on language as speech does not affect ultimate holding on merits).

¹⁸² *Id.* at 934-35. Judge Reinhardt underscored the inherent difficulty and artificial rigidity of a strict conduct/speech distinction by using the example of American Sign Language wherein conduct is speech. *Id.* at 935 n.18.

¹⁸³ *Id.* at 934-35.

¹⁸⁴ See *supra* notes 159-70 and accompanying text (discussing procedural complications that limit *Yniguez*).

¹⁸⁵ See *supra* notes 172-73 and accompanying text (discussing *Yniguez* court's own intra-circuit limitation of its holding).

¹⁸⁶ See *supra* notes 129-51 and accompanying text (detailing court's examination of government's attempt to regulate employee speech).

¹⁸⁷ *Yniguez*, 69 F.3d at 959 (Wallace, C.J., dissenting); see *id.* at 939 (stating that government employee speech at issue did not fit easily into categories of protected speech); *id.* at 940 (dismissing need to define context of employee speech).

¹⁸⁸ *Id.* at 959 (Wallace, C.J., dissenting); see also *id.* at 957 (Fernandez, J., dissenting) (defining state's right, as speaker, to control content of speech).

¹⁸⁹ *Yniguez*, 69 F.3d at 957 (Fernandez, J., dissenting). In the principal dissent, in which

First Amendment protection.¹⁹⁰ Chief Judge Wallace defined choice of language as a mere preference in mode of expression, and the public's interest in a civil servant's particular mode of communication, he concluded, does not warrant First Amendment protection.¹⁹¹

By rigidly drawing the line of First Amendment protection around "meaning," however, Chief Judge Wallace ignored the practical effect of unintelligible communication.¹⁹² Fundamental to communication is bilateral intelligibility, in which a speaker speaks and the audience understands the words spoken because their language is common.¹⁹³ When language is not common, communication is unintelligible; content is suppressed, and all meaning is lost. It is in this context that words become babble.¹⁹⁴ By requiring bilingual employees, in the face of non-English speaking members of the public, either to speak in a language unintelligible to that public or to remain mute, Article XXVIII mandates a meaningless end.¹⁹⁵

Perhaps more than its failure to assign language constitutional stature as speech, it is the court's First Amendment treatment of

Chief Judge Wallace concurred, Judge Fernandez conceded the difficulty of characterizing the speech at issue as either public or private concern. *Id.* at 956 (Fernandez, J., dissenting). Nonetheless, he concluded that the case more closely resembled a private concern case because Yniguez "for her own private reasons" wished not to speak in the state's chosen tongue. *Id.*

¹⁹⁰ *Id.* at 957 (Fernandez, J., dissenting).

¹⁹¹ *Id.*

¹⁹² *See id.* at 941 (stating that delivering speech in incomprehensible form deprives recipients of much needed data as well as substantial benefits).

¹⁹³ *See id.* at 942 (discussing Article XXVIII's stifling of vital speech that individuals desire both to hear and to provide).

¹⁹⁴ *See id.* (discussing Article XXVIII's requirement of replacing intelligible with incomprehensible). Official English affects the deaf. Amy A. Murphy, *Official English Kills Deaf Culture*, DET. NEWS, Oct. 4, 1995, at 18. American Sign Language, a language completely different from English, is the fourth most used language in the United States. *Id.* Logically, official English mandates would outlaw sign language, thereby dispossessing a significant population of Americans. *Id.*

¹⁹⁵ *Yniguez*, 69 F.3d at 942.

Article XXVIII that itself flaws *Yniguez*.¹⁹⁶ Recognizing the functional equivalence of language to national origin,¹⁹⁷ Judge Reinhardt cautioned that language restrictions often house discriminatory intent against specific national origin groups.¹⁹⁸ Furthermore, Judge Reinhardt noted that Article XXVIII would impact racial and ethnic minorities almost exclusively.¹⁹⁹ The judge opened and closed the majority's opinion by emphasizing a diverse and multicultural society's need for strength in tolerance of difference.²⁰⁰ Indeed, the nativist origins of official English solicit equal protection scrutiny of the resulting laws.²⁰¹ While First Amendment treatment of Article XXVIII circumvented the perils of a Fourteenth Amendment resolution,²⁰² *Yniguez* nonetheless illustrates the discomfort of dressing an equal protection analysis in First Amendment clothes.²⁰³

Given its reliance on the First Amendment, the *Yniguez* majority should have designated choice of language as constitutionally protected speech in order to prevent the draconian result Article XXVIII requires.²⁰⁴ Instead, *Yniguez* rejects only those official English laws which are as broad and restrictive as Arizona's Article XXVIII.²⁰⁵ Article XXVIII sought to confine to English

¹⁹⁶ See *id.* at 948 (acknowledging equal protection ramifications of Article XXVIII's restrictive impact). Because it found Article XXVIII void for overbreadth, the district court did not reach *Yniguez*'s Fourteenth Amendment and federal civil rights claims. *Id.* at 926 n.7. Cf. *Asian Am. Bus. Group v. City of Pomona*, 716 F. Supp. 1328, 1330, 1332 (1989) (striking down restrictive language law as both impermissible regulation of content and overt discrimination on basis of national origin).

¹⁹⁷ *Yniguez*, 69 F.3d at 947-48; see also *Hernandez v. New York*, 500 U.S. 352, 412-23 (1991) (stating that proficiency in particular language should be treated as surrogate for race in equal protection analysis).

¹⁹⁸ *Yniguez*, 69 F.3d at 947-48.

¹⁹⁹ See *id.* at 947 (noting adverse, disparate impact of Article XXVIII on Hispanics and other national origin minorities).

²⁰⁰ *Id.* at 923, 948.

²⁰¹ See *supra* notes 21-50 and *infra* notes 218-21 and accompanying text (tracing nativist origins and contemporary revival of official English).

²⁰² See *supra* notes 55-79 and accompanying text (discussing Fourteenth Amendment scrutiny of official English).

²⁰³ See *Yniguez*, 69 F.3d at 948 n.33 (admitting that First Amendment cases comparable to *Yniguez* contain implicit equal protection component).

²⁰⁴ See *supra* notes 171-203 and accompanying text (explaining ramifications of *Yniguez* majority's failure to designate choice of language as constitutionally protected speech).

²⁰⁵ *Yniguez*, 69 F.3d at 947-48.

all government employee speech.²⁰⁶ To date, however, no other state's official English statute restricts such broad categories of speech as Article XXVIII.²⁰⁷ Thus, the majority of official English laws would withstand constitutional review under the *Yniguez* standard.²⁰⁸ *Yniguez* therefore provides only a narrow bulwark against official English.²⁰⁹

C. Symbolic Impact

By failing to designate choice of language as constitutionally protected speech, *Yniguez* provides inadequate precedential authority to strike down official English laws.²¹⁰ Ultimately, *Yniguez* may be more of a symbolic victory than a precedent-setting case.²¹¹ It strikes, however, at the heart of what official English seeks to limit: an individual's choice of language.²¹² This limitation attacks freedom of expression, the core of what the First Amendment protects.²¹³

Coupled with the First Amendment's guarantee of free expression, the development of the English language in the United States belies legal protection of English.²¹⁴ The language is a "multicultural smorgasbord of borrowed words."²¹⁵ Indeed, three out of four American English dictionary words are foreign-

²⁰⁶ See *supra* notes 108-17 and accompanying text (discussing overbreadth).

²⁰⁷ See Michele Arington, Note, *English Only Laws and Direct Legislation: The Battle in the States Over Language Minority Rights*, 7 J.L. & POL. 325, 337 (1991) [hereinafter Note, *Direct Legislation*] (stating that Article XXVIII is most restrictive official English law to date); see also *supra* notes 43-50 and accompanying text (detailing official English laws).

²⁰⁸ See Note, *Direct Legislation*, *supra* note 207, at 339 (stating that, unlike Article XXVIII's absolute prohibition, ambiguous terms of most official English laws permit narrower interpretation, thus allowing these laws to survive constitutional review).

²⁰⁹ See *supra* notes 129-208 and accompanying text (discussing limitations of *Yniguez*).

²¹⁰ See *supra* notes 171-209 and accompanying text (discussing substantive limitations of *Yniguez*).

²¹¹ See *supra* notes 159-70 and accompanying text (discussing force of *Yniguez*).

²¹² Note, *Official English*, *supra* note 28, at 1347-48.

²¹³ *Yniguez*, 69 F.3d at 934-36; see *supra* notes 129-38 and accompanying text (discussing core of First Amendment protection).

²¹⁴ See Perea, *supra* note 1, at 371 (stating that language standardization offends principles of individual liberty).

²¹⁵ Gerald Parshall, A "Glorious" Mongrel, U.S. NEWS & WORLD REP., Sept. 25, 1995, at 48. Parshall calls English "[t]he most cheerfully democratic and hospitable language that ever existed . . ." *Id.*

born.²¹⁶ Moreover, the celebrated legacy of tolerance in the United States has enabled the English language to flourish.²¹⁷

Historically, the English-speaking majority's desire to disenfranchise non-English speaking minorities has characterized movements to mandate English.²¹⁸ Proponents of official English, however, claim that requiring a common language promotes harmony and reduces racial tension.²¹⁹ Stating that language symbolizes and provides access to the nation's ideals, official English advocates fault beleaguered multilingual and bilingual programs for preventing immigrants from assimilating into the mainstream culture.²²⁰ Official English, some say, is the most "pro-immigrant policy ever devised."²²¹

Opponents of official English equate mandating English to forcing assimilation, the results of which include further isolating minority groups and creating a subclass of citizens.²²² Official

²¹⁶ *Id.*

²¹⁷ See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943) (stating that forced "Americanization" violates American tradition of liberty and toleration); *Yniguez*, 69 F.3d at 923 (explaining that distinction between encouraging use of English and repressing use of other languages is critical to tradition of American tolerance); Cordero, *supra* note 4, at 19 (discussing Founders' fundamental belief in promoting democratic spirit through individual choice of language).

²¹⁸ See Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 CAL. L. REV. 321, 341, 345-50 (1987) (stating that decision-makers have used official language designation to manipulate and control politics and society); Perea, *supra* note 1, at 350 (defining language as both principal means of communication and social symbol); *supra* notes 21-50 and accompanying text (detailing history of official English movement).

²¹⁹ See Califa, *supra* note 5, at 312, 322-25 (summarizing arguments in support of adopting official English to include linguistic discord and separatism that has plagued other multilingual countries); Thomas D. Elias, *English Spurned by Flood of Citizenship Applicants*, WASH. TIMES, Dec. 30, 1995, at A1 (quoting Executive Director of Federation for American Immigration Reform, Dan Stein, who calls English "grand pillar of American assimilation").

²²⁰ See Susan Headden, *Tongue-Tied in the Schools*, U.S. NEWS & WORLD REP., Sept. 25, 1995, at 44 (reporting that \$10 billion-per-year bilingual education bureaucracy not only fails to teach children English but also potentially harms them); *New York's Bilingual Prison*, N.Y. TIMES, Sept. 21, 1995, A22 (stating that bilingual programs reinforce students' dependency on native languages and "then makes escape impossible").

²²¹ *Making English the Official U.S. Language: Before the Subcomm. on Early Childhood, Youth and Families of the House Comm. on Econ. and Educ. Opportunities*, 104th Cong. (1995), available in 1995 WL 11095783 (statement of the Honorable John T. Doolittle).

²²² See *Yniguez*, 69 F.3d at 947-48 (stating that language restrictions may mask national origin discrimination or conceal nativist sentiment); Califa, *supra* note 5, at 297-99 (stating that prejudice and fear are motives underlying official English movement); Perea, *supra* note 1, at 347-48 (identifying official English movement's principal goal as eliminating

English opponents state that restrictive language laws serve no laudable purpose when the incentive for all Americans, especially immigrants, to learn English is already strong.²²³ The economic infirmity of limiting choice of language in today's global marketplace aside,²²⁴ a free government should invest in improving communication, not sanctioning the confusion and isolation that mandating English promises.²²⁵

Yniguez advances recognition of the importance of language rights.²²⁶ It renews the debate over whether government should regulate choice of language.²²⁷ It does not, however, grant that choice constitutional protection.²²⁸ Having escaped constitutional prohibition, official English, after *Yniguez*, may continue to prosper.²²⁹

multilingual ballots); Gregory M. Balmer, Comment, *Does the United States Need an Official Language?: The Examples of Belgium and Canada*, 2 IND. INT'L & COMP. L. REV. 433, 447 (1992) (stating that repression of linguistic minorities will only lead to divisive backlash).

²²³ See *English as Official Language: Hearings on H.R. 356 Before the Senate Comm. on Gov'tal Affairs*, 104th Cong. (1996), available in 1995 WL 7135995 (statement of Juan F. Perea, Professor of Law, Univ. of Fla. College of Law) (stating that majoritarian dislike of unpopular immigrant and ethnic groups has historically been manifested in restrictive language laws that neither help immigrants to assimilate nor capitalize on economic opportunities).

²²⁴ See Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 882-83 (1993) (discussing competitive advantages of multicultural approach in increasingly interdependent global economy).

²²⁵ See Greenspan, *supra* note 5, at 911 (stating that English-only mandates are unconstitutionally vague); Perea, *supra* note 1, at 372 (stating that language choice should substantially and properly extend beyond control of national government); Wexler, *supra* note 79, at 368-69 (stating that French experience demonstrates futility of endangering First Amendment in pursuit of elusive goal of cultural harmony or national unity); Note, *Official English*, *supra* note 28, at 1360-62 (denouncing as xenophobic declarations limiting rights of language minorities).

²²⁶ See *Yniguez*, 69 F.3d at 923 (noting that *Yniguez* required re-examination of important area of constitutional law which governs language rights).

²²⁷ See *id.* ("[*Yniguez*] raises troubling questions regarding the constitutional status of language rights and, conversely, the state's power to restrict such rights.").

²²⁸ See *supra* notes 171-209 and accompanying text (discussing *Yniguez*'s substantive limitations).

²²⁹ See, e.g., Caren Benjamin, *English Only Supporters Renew Effort for Signatures*, LAS VEGAS REV. J., June 26, 1996, at 7B (stating that renewed momentum for official English has begun in Nevada).

CONCLUSION

Many people are once again attempting to promote English to the exclusion of all other languages.²³⁰ Although not without complications, *Yniguez* propounds a First Amendment antidote to this resumed industry.²³¹ *Yniguez* is the first case to successfully challenge a state's official English statute.²³² The law *Yniguez* challenged was particularly expansive in its restrictions, making it an easy target for facial invalidation.²³³ Other, more vaguely written official English laws might not fit the *Yniguez* rubric and could accordingly escape overbreadth invalidation.²³⁴ The *Yniguez* court recognized the inherent discriminatory impact of official English.²³⁵ Official English, by definition, legitimates exclusion and, accordingly, should not stand.²³⁶

Cecilia Wong

²³⁰ See *supra* notes 39-42 and accompanying text (discussing revival of official English movement).

²³¹ See *supra* notes 100-51 and accompanying text (discussing holding and rationale of *Yniguez*).

²³² See *supra* notes 80-86 and accompanying text (explaining *Yniguez*'s unique posture).

²³³ See *supra* notes 100-51 and accompanying text (discussing Article XXVIII's breadth).

²³⁴ See *supra* notes 44-46 and 171-209 and accompanying text (explaining substantive limitations of *Yniguez* and summarizing contents of state official English laws).

²³⁵ See *supra* notes 197-201 and accompanying text (discussing *Yniguez* majority's recognition of Article XXVIII's disparate impact).

²³⁶ See Wexler, *supra* note 79, at 288-89 (stating that official English proponents seek to eliminate use of other languages); *supra* notes 141, 150, 154, 197-201, 222-25 and accompanying text (explaining adverse effects and exclusionary reality of official English).