Out of Many, One: Fundamental Rights, Diversity, and Arizona's English-Only Law

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NOTE

OUT OF MANY, ONE*: FUNDAMENTAL RIGHTS, DIVERSITY,
AND ARIZONA’S ENGLISH-ONLY LAW

INTRODUCTION

The American experiment continues to blend people of countless lands into a rough democracy. Yet today, social, political, and economic forces threaten common ground Americans once thought they shared. These forces fuel a familiar debate about how to maintain a united society.

Groups such as Arizonans for Official English (AOE)¹ argue that the best way to prevent America from splintering is to restrict the use of non-English languages.² Language restriction proponents assert that, without English as the official language, America will become fractionalized and politically unstable.³ Opponents, however, argue that language restrictions are unconstitutional, discriminatory, unnecessary, and un-American.⁴ Yniguez v. Arizonans for Official English (Yniguez IV)⁵ presents the conflicting approaches to maintaining national unity.

Part I of this Note provides the legal and historical setting of Yniguez IV. Part II summarizes the majority, the concurring, and dissenting opinions in the case. Part III analyzes the majority’s approach to the holding of the case and presents alternative constitutional analyses. Finally, this Note concludes that the majority in Yniguez IV reached a just outcome, albeit through an ill-chosen constitutional rationale.

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¹ E Pluribus Unum, the Latin phrase on some United States currency, is one that could not be used by public officials under Arizona’s English-only constitutional amendment.


⁴ In 1990, 43% of all foreign-born persons in the United States were Latinos from Mexico, Central America, the Caribbean, and South America. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, PAMPHLET NO. 23-183, HISPANIC AMERICANS TODAY 6 (1993). In addition, 50.7% of the nationwide Latino foreign-born population entered this country between 1980 and 1990. "Id." Arington, supra note 2, at 327. This fear is not new. In the early twentieth century, some predicted that the United States would fall prey to linguistic minorities’ attempt to establish their own states. SHIRLEY BRICE HEATH, LANGUAGE IN THE USA 8 (Charles A., Ferguson & Shirley Brice Heath eds., 1981). Time has proven these predictions untrue.

⁵ See Arington, supra note 2, at 327-28, 337-51.

⁶ See 69 F.3d 920 (9th Cir. 1995) (en banc), cert. granted, 116 S. Ct. 1316 (1996).

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I. BACKGROUND

A. History

Since its inception, the United States has tolerated and at times encouraged the use of foreign languages. For example, the Framers of the United States Constitution did not establish a national language. Instead, the Framers rejected a proposal by John Adams which would have established a national academy to promote and standardize English as the uniform language. The Framers rejected the proposal because it ran contrary to their liberty ideal. American settlers spoke their native languages in their new communities from the Colonial Period through the nineteenth century. Society encouraged and valued bilingualism for its functional purpose.

American societal attitudes concerning languages took a sharp turn in the early twentieth century. States began to prohibit the use of languages other than English. The immigration wave that began in the 1800s in part sparked these prohibitions. This wave included mostly Southern and Eastern Europeans who differed ethnically from any prior immigrant group in the United States. The outbreak of World War I also contributed to a "patriotic hysteria" that led to the imposition of language restrictions.

In 1923, however, the Supreme Court in *Meyer v. Nebraska* struck down state language restrictions by holding that a state statute prohibiting the teaching of languages other than English to schoolchildren violated the Constitution. Four years later, in *Farrington v. Tokushige*, the Court declared another statute unconstitutional because it singled out foreign language schools for stringent government control. The Court declared these English-only laws unconstitutional based on the Fourteenth Amendment's due process and equal protection guarantees.

Although both cases relied on substantive due process bases, *Meyer* and *Farrington* remain binding precedent for constitutional challenges to "Official English" laws. Over time, the Supreme Court recharacterized *Meyer* as a

6. HEATH, supra note 3, at 6-7.
7. Id. at 6.
8. Id.
9. Id.
10. Id. at 7.
11. Id.
12. Id.
13. Id.
14. See Arington, supra note 2, at 330.
15. Id.
17. 262 U.S. 390 (1923).
18. *Meyer*, 262 U.S. at 400-03.
20. *Farrington*, 273 U.S. at 298-99; see also *Eng v. Trinidad*, 271 U.S. 500, 508, 528 (1926) (holding that a law that prohibited keeping accounting books in any language except English, Spanish, or another local dialect was unconstitutional).
22. *Yniguez IV*, 69 F.3d at 945 n.29 (citing *Epperson v. Arkansas*, 393 U.S. 97 (1968);
First Amendment protection case and viewed it, together with *Bartels v. Iowa*, as a precursor to the Fourteenth Amendment's equal protection doctrine.

In *Meyer*, the Supreme Court firmly established that restrictions on private citizens' use of non-English languages unconstitutionally restrict their personal liberty. Since *Meyer* and *Farrington*, courts have rarely examined the constitutional issue presented when a state attempts to establish English as the official language. In the past ten years, however, efforts to establish English as the official language have re-emerged. At least twenty-one states and over forty cities have enacted laws declaring English as their official state language. In addition, the House of Representatives recently passed a bill establishing English as the official language of the federal government. These current laws differ from the law at issue in *Meyer* because they do not restrict private citizens' speech. Most of these laws are symbolic in that they proclaim English to be the official state language without declaring restrictions on foreign language usage. Yet some of these laws do restrict speech, most notably that of government employees. Regardless of form, these laws receive intense criticism while simultaneously garnering considerable popular support.

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24. *Yniguez IV*, 69 F.3d at 948 n.33 (discussing the link between the First Amendment and the Equal Protection Clause); see also *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).
26. *Yniguez IV*, 69 F.3d at 923.
29. *House OKs English-only Legislation*, ARIZ. DAILY STAR, August 2, 1996, at 1A. The bill passed on a 259-169 vote, illustrating its overwhelming support. The bill repeals the bilingual ballot requirements at federal elections. *Id.* The bill also requires the government to conduct all business in English with limited exceptions. *Id.* One stated purpose for the bill is to facilitate immigrants' acquisition of English. *Id.* However, throughout history, immigrants have followed a successful pattern of language acquisition without the existence of English-only laws. See Puig-Lugo, supra note 16, at 48; see also *Heath*, supra note 3, at 469-83.
30. See, e.g., ARIZ. CONST. art. XXVIII, § 1.
31. See Perea, supra note 27, at 367 (discussing the adverse impact of “symbolic” Official English laws). California passed one of the many symbolic Official English laws. See CAL. CONST. art. III, § 6. The law declares English as the official state language without specifically prohibiting the use of foreign languages by private citizens or government officials. *Id.*
32. *Yniguez IV*, 69 F.3d at 924. “English-only” laws are laws which impose speech restrictions, as opposed to the symbolic “Official English” laws. This Note will focus specifically on the English-only law passed in Arizona. The legal, political, and societal issues connected to Official English laws are beyond the scope of this Note.
33. See Perea, supra note 27, at 361-62 (discussing the difference between the popularity and constitutionality of such laws).
B. Restrictions on the Speech of Government Employees

The current focus on restricting government employees' speech enjoys more legal support than the approach that the court used in Meyer. For example, in O'Conner v. Ortega, the Supreme Court established a general principle that government can restrict the freedoms of its employees more than those of private citizens. More specifically, in Waters v. Churchill, the Court ruled that government employees are subject to stricter speech restrictions than private citizens when the government imposes those restrictions for reasons of effectiveness and efficiency.

Yet, the Supreme Court uniformly rejected the theory that an employer may subject public employees to any conditions an employer wishes, regardless of the constitutionality or reasonableness of those conditions.

Nevertheless, the government's power to restrict the speech of its employees remains substantial. The Waters/Pickering line of cases spells out when and what speech restrictions a government employer may place on its employees.

In the first case of the Waters/Pickering line, Pickering v. Board of Education, a public high school teacher wrote a letter to the editor criticizing the school board's handling of a bond issue and allocation of financial resources. The Court held that the teacher's comments were entitled to First Amendment protection, because the teacher spoke as a private citizen on a matter of public concern.

Fifteen years after Pickering, the Supreme Court ruled in Connick v. Myers that when a public employee speaks as a private citizen about an issue of personal interest, government employers are afforded wide latitude in deciding whether to allow the speech. The Connick decision established that employers may restrict public employee speech when the speech is not based on matters of public concern. The Court suggested that political and social issues constitute matters of public concern. Notwithstanding this suggestion, the Court firmly stated that the “content, form, and context” of a given speech must be considered.

35. See O'Conner, 480 U.S. at 725; see also Kelley v. Johnson, 425 U.S. 238, 248-49 (1976) (affirming a county's determination that a regulation limiting police officers' hair length does not violate the Fourteenth Amendment); United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 556 (1973) (holding that a regulation of partisan political activities as applied to federal employees does not violate the First Amendment).
36. 114 S. Ct. 1878 (1994) (plurality opinion).
37. See Waters, 114 S. Ct. at 1888.
41. Pickering, 391 U.S. at 566.
42. Id. at 574.
44. Connick, 461 U.S. at 146-47.
45. Id. at 147.
46. Id. at 146.
statement are important when determining if a statement addresses a matter of public concern.  

In *Rankin v. McPherson*, a county employee's statement that she hoped another presidential assassination attempt would succeed constituted a matter of public concern. The Court further determined that the public's interest in hearing the information should be weighed against the government's interests of promoting efficiency and effectiveness. The Court found the comment commanded First Amendment protection, because the employee's right to speak on matters of public concern outweighed the government's interests.

In *Waters*, a nurse conveyed unflattering information concerning the obstetrics department to another nurse considering transferring into the department. Consequently, the hospital discharged her. The nurse alleged that her speech was protected pursuant to the holding in *Connick*. The Court affirmed that the state's efficiency interests did not outweigh the government employee speech that constituted matters of public concern.

In the most recent case of the series, *United States v. National Treasury Employees Union*, executive branch employees challenged the constitutionality of a subsection in the Ethics in Government Act which prohibited government employees from receiving honoraria. The Court ruled that the employees' activities meriting honoraria were the actions of public employees speaking as private citizens about matters of public concern and that as a result the activities were entitled to First Amendment protection.

In summary, the *Waters/Pickering* line of cases stands for the principle that when a public employee speaks on a matter of public concern, and the state interests of promoting efficiency and effectiveness do not outweigh the speech, the speech commands First Amendment protection. Otherwise, the government has wide latitude in restricting its employees' speech, especially when the speech pertains to an internal work or personal matter.

Today, if government employee speech does not fall within the *Waters/Pickering* category of protected speech, a plaintiff can successfully challenge an English-only law based on a wide range of legal theories. These theories include the First Amendment right to freedom of speech, the Fourteenth Amendment's equal protection guarantee, and the right to vote.
C. First Amendment Protection of Public Employee Speech

The First Amendment protects the fundamental right to freedom of speech. Because the freedom of speech is a fundamental right, when a state regulates speech it must do so with extreme caution. Absent such caution, a state may carelessly enact an overbroad statute regulating speech protected by the First Amendment. An overbroad statute attempts to restrict unprotected speech but erroneously applies to protected speech as well. The overbreadth doctrine permits a plaintiff with constitutional standing to challenge a law's facial application to others who are not before the court, but whose speech commands First Amendment protection. In addition, the law facing challenge must be substantially overbroad and a court must not be able to construe it in such as way as to cure any potentially unconstitutional applications.

In Bond v. Floyd, the Court recognized that language restriction laws that apply to all government employees risk invalidation under the overbreadth doctrine simply because of their application to legislators' speech. Under Bond, "[t]he central commitment of the First Amendment . . . requires that legislators be given the widest latitude to express their views on issues of policy." In Bond, the Court relied on this principle when it held that legislators should not be subject to stricter speech standards than private citizens. Prohibiting restrictions on legislators' speech honors the principle set forth in New York Times Co. v. Sullivan that "debate on public issues should be uninhibited, robust, and wide open."

D. The Right to Vote

English-only laws that restrict legislators' speech potentially violate section 2 of the federal Voting Rights Act. Congress enacted the original Voting Rights Act of 1965 primarily to combat discrimination against African-American voters. The Act intended to "do something about

60. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.8, at 996 (5th ed. 1995).
61. See id.
63. See Virginia v. American Booksellers Ass'n, 484 U.S. 383, 397 (1988) (recognizing established First Amendment law that, when a law is subject to a narrowing construction which would make it constitutional, the court will uphold the statute); Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (holding that a law is overbroad if its overbreadth is both "real" and "substantial" when compared to its legitimate sweep). A party may challenge a statute on the same basis when it prohibits constitutionally protected conduct. See Broadrick, 413 U.S. at 615.
64. 385 U.S. 116 (1966).
66. Id. at 136.
67. Id. at 132-33.
72. See Note, 'Official English': Federal Limits on Efforts to Curtail Bilingual Services in
accumulated wrongs and the continuance of the wrongs." In 1975, Congress officially recognized the existence of discrimination against language minorities by amending the Voting Rights Act to require bilingual voting materials in specific jurisdictions. Congress found a systematic pattern of discrimination against language minorities in education, voting, and almost every other facet of life. Congress concluded that this discrimination effectively excluded language minorities from participation in the electoral process. Furthermore, the Senate record suggested that states take steps beyond prohibiting English-only elections in order to ensure language minorities access to voting and registration. These steps included addressing the adverse impact of language minorities voting in all-white areas and minorities' subjection to "law enforcement surveillance." Congress further amended the Voting Rights Act in 1982. The Supreme Court decision in City of Mobile v. Bolden broke from precedent, spurring the 1982 amendments. In Mobile, the Court required plaintiffs to prove that a voting practice intended to deny equal political opportunity and diluted voting power. The amendments restored legal precedent by relaxing the

the States, 100 HARV. L. REV. 1345, 1350 (1987).


74. Voting Rights Act of 1965, as amended by Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400 (codified as amended at 42 U.S.C. § 1973aa-1a(b) (1994)). The Voting Rights Act requires bilingual materials in jurisdictions where: (1) more than five percent of voting age citizens are members of a single language minority or are Native Americans living on a reservation and have limited-English proficiency; and (2) the rate of illiteracy of the language minority group is higher than the national rate. See 42 U.S.C. § 1973aa-1a(b)(2) (1994).


78. Id.


(a) No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen in the United States to vote on account of race or color, or in contravention of the guarantees set forth in § 1973b(f)(2) of this title as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity then other members of the electorate to participate in the political process and to elect representatives of their choice.


Section 1973b(f)(2) states:

No voting qualification or prerequisite to voting, or standard, practice or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.


82. Mobile, 446 U.S. at 66 (stating that the purpose of legislative apportionments must be to
Mobile intent standard to the less stringent results standard. The amendments therefore required only that language minorities prove, by the totality of the circumstances, that the practice at issue results in an unequal opportunity to participate in the political process.

The Court interpreted the 1982 Voting Rights Act amendments for the first time in Thornburg v. Gingles. In Thornburg, plaintiffs challenged North Carolina's multi-member, at-large districting system. The Court limited its discussion to districting schemes and outlined three conditions that a plaintiff must meet in order to prevail under section 2 with a multi-member districting claim.

E. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment requires that the government treat similarly situated persons in a similar manner. More-
over, the Equal Protection Clause guarantees that government classifications "will not be based upon impermissible criteria or arbitrarily used to burden a group of individuals."\(^{90}\) A plaintiff may therefore challenge an English-only law under the Equal Protection Clause.

When faced with an equal protection claim, courts apply one of three standards of review. Laws which specifically apply to suspect classes receive strict scrutiny, the most heightened level of review.\(^{91}\) Strict scrutiny requires that the law in question be narrowly tailored to further a compelling governmental interest.\(^{92}\) The second standard of review is the intermediate test, which courts have formally employed for gender and illegitimacy classifications.\(^{93}\) When applying an intermediate review, courts require that the government show an important interest, and the law at issue substantially relate to the state's proposed interests.\(^{94}\) When a law does not affect a fundamental right, and the law applies to a group of people who do not command special protection, courts employ the third standard of review: the rationality test.\(^{95}\) Under the rationality test, the court asks whether the law bears a rational relationship to a legitimate government end.\(^{96}\)

Language restriction laws will most likely receive either strict scrutiny review or rationality review, depending on the way in which the reviewing court chooses to characterize the aggrieved group(s).\(^{97}\) Since a language classification is not a per se suspect class, a plaintiff may establish that an English-only law is subject to strict scrutiny by showing that language acts as a proxy for national origin.\(^{98}\) If the court refuses to accept this proxy, a

\(^{90}\) NOWAK & ROTUNDA, supra note 60, § 14.2, at 597.

\(^{91}\) Daniel J. Garfield, Comment, Don't Box Me In: The Unconstitutionality of Amendment 2 and English-Only Amendments, 89 NW. U. L. REV. 690, 706 (1995); see also Korematsu v. United States, 323 U.S. 214, 216 (1944) (applying a strict scrutiny review to racial classifications); United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). Suspect classes are classes based on race, alienage, and national origin. See, e.g., Hernandez v. Texas, 347 U.S. 475 (1954) (applying strict scrutiny to a situation involving a suspect class).

\(^{92}\) Garfield, supra note 91, at 706-07.

\(^{93}\) See, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982) (holding that a state-funded nursing school policy denying men admission violated the Equal Protection Clause because it did not substantially relate to its proposed objective); Lalli v. Lalli, 439 U.S. 259, 275-76 (1978) (holding that a New York illegitimacy statute was constitutional because it substantially related to state interests). The Court has informally extended intermediate scrutiny to other areas of the law by not declaring a formal standard of review. See Plyler v. Doe, 457 U.S. 202 (1982). This expansion led some to argue that language-based classifications also deserve heightened scrutiny and should be subject to intermediate scrutiny. Note, supra note 72, at 1353-54 (1987).

In this case, language minorities would be classified as "quasi-suspect" classes. See id. at 1353-56. Courts have rejected "quasi-suspect" class analyses when language minorities sought an affirmative right to governmental services and information. See, e.g., Soberal-Perez v. Heckler, 717 F.2d 36, 41-42 (2d Cir. 1983). Notwithstanding, the denial of existing government services based on language presents courts with an opportunity to apply a heightened standard of review without requiring a proven link between language and national origin.


\(^{95}\) NOWAK & ROTUNDA, supra note 60, § 14.3, at 601.

\(^{96}\) Id.

\(^{97}\) See Arington, supra note 2, at 335-36.

\(^{98}\) See Yniguez IV, 69 F.3d at 947-48; see also Castaneda v. Partida, 430 U.S. 482, 486 & nn.5-6 (1977) (equating the usage of the Spanish language with people with Spanish surnames or who are Mexican-American).
plaintiff must argue that the English-only law bears no rational relationship to a legitimate governmental interest.\(^9\)

II. **YNIGUEZ V. ARIZONANS FOR OFFICIAL ENGLISH**

A. **Facts**

In 1988, a majority of Arizona citizens passed, by ballot initiative, an amendment to their state constitution proclaiming English as the official language of Arizona.\(^{100}\) Article XXVIII ("the article" or "the amendment"), also prohibited the government, with limited exceptions, from using any language other than English.\(^{101}\) The amendment states in part that "[t]his State and all political subdivisions of this State shall act in English and in no other language."\(^{102}\)

Maria-Kelley F. Yniguez worked as a government employee in the Arizona Department of Administration when the amendment passed.\(^{103}\) Yniguez spoke English and Spanish fluently and used both languages to process medical malpractice claims for monolingual English and Spanish speaking claimants prior to the amendment's passage.\(^{104}\) Following adoption of the amendment, Yniguez stopped speaking Spanish at work to avoid employment sanctions.\(^{105}\) Shortly thereafter, Yniguez filed suit in federal district court arguing that the amendment violated her rights under the First and Fourteenth Amendments of the United States Constitution.\(^{106}\) The federal district court did not reach Yniguez's Fourteenth Amendment claim, but held that the amendment unconstitutionally violated her free speech guarantee under the First Amendment.\(^{107}\) The state did not appeal.\(^{108}\) Consequently, AOE, the official sponsors of the amendment, moved to intervene to appeal the

\(^9\) NOWAK & ROTUNDA, supra note 60, § 14.3 at 601.

\(^{100}\) *Yniguez IV*, 69 F.3d at 924; *ARIZ. CONST. art. XXVIII, §§ 1-4.

\(^{101}\) *ARIZ. CONST. art. XXVIII § 3 (allowing the state to act in a non-English language when: (1) teaching English to non-proficient English speakers; (2) complying with federal laws; (3) teaching a foreign language course; (4) protecting public health or safety; and (5) protecting criminal defendants' and crime victims' rights).*

\(^{102}\) *Id.* § 3(1)(a).

\(^{103}\) *Yniguez IV*, 69 F.3d at 924.

\(^{104}\) *Id.* In addition to Yniguez, the amendment affected tens of thousands of others. The United States ranks as the fourth largest Spanish speaking country in the world following three others: Mexico, Spain, and Colombia, all of whose dominant national language is Spanish. Puig-Lugo, *supra* note 16, at 47. Approximately 80% of the children enrolled in bilingual programs are Spanish speakers. *Id.* Out of the 310 jurisdictions required to provide multilingual ballots, Spanish speakers are the dominant linguistic majority in 281. *Id.* at 47-48. Furthermore, 97% of Spanish speakers are of Latino origin. *Id.* Arizona claims the fourth largest population of Latino residents in the United States. See Epstein, *supra* note 28, at 3A.

\(^{105}\) Nineteen percent of all Arizona residents are of Latino origin. *Id.* Relevant demographic figures are as follows: 18.78% of the Arizona population are of Latino origin, 14.17% are Spanish speaking, and 50.7% of the nationwide foreign born population entered this country between 1980 and 1990. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PAMPHLET No. 23-183, HISPANIC AMERICANS TODAY (1993).

\(^{106}\) *Yniguez IV*, 69 F.3d at 924.


\(^{108}\) *Yniguez v. Arizona*, 939 F.2d 727, 730 (9th Cir. 1991) (*Yniguez I*).
district court's ruling, but the court denied the motion.\textsuperscript{109} The Ninth Circuit reversed the district court's denial of AOE's motion and allowed AOE to intervene as plaintiffs.\textsuperscript{110}

On appeal, a three-judge panel unanimously affirmed the district court's decision to strike down the amendment.\textsuperscript{111} The Ninth Circuit reheard the case \textit{en banc} and affirmed the previous decision.\textsuperscript{112} The court rereleased the unanimous three-judge panel opinion with only minor changes, and reaffirmed Article XXVIII violated the First Amendment.\textsuperscript{113} On March 25, 1996, the United States Supreme Court granted \textit{certiorari}.\textsuperscript{114} In addition to the questions set forth in the petition, the Court will consider whether AOE possesses the requisite standing for the action and whether the action involves a case or controversy regarding Yniguez.\textsuperscript{115}

\textbf{B. \textit{Majority Opinion}}

In striking down Article XXVIII, the Ninth Circuit rested its holding on the First Amendment.\textsuperscript{116} The majority accepted the federal district court's broad construction of the article and applied an overbreadth analysis.\textsuperscript{117} The court ruled that a limiting construction would be at odds with the article's plain meaning and would require performing a "face lift" upon the amendment.\textsuperscript{118} The majority also determined that the amendment should be invalidated as a whole if one part were found unconstitutional, as the article did not contain a severability clause.\textsuperscript{119}

Once the court determined that the amendment could not be severed, it proceeded to analyze whether the amendment was unconstitutionally overbroad.\textsuperscript{120} The majority reasoned that Yniguez properly brought an overbreadth challenge because the amendment potentially restricted the free speech rights of all public employees and officials.\textsuperscript{121} The court also stated that the article was subject to facial invalidation because it broadly related to a single subject and was based on a single premise.\textsuperscript{122}

\begin{itemize}
  \item \textsuperscript{109} \textit{Id}.
  \item \textsuperscript{110} \textit{Yniguez} \textit{I}, 939 F.2d at 740 (additionally allowing the Attorney General to intervene for the purpose of arguing the merits of the case).
  \item \textsuperscript{111} \textit{Yniguez} \textit{v. Arizonans for Official English}, 42 F.3d 1217, 1243 (9th Cir. 1994) (unanimous decision).
  \item \textsuperscript{112} \textit{Yniguez} \textit{IV}, 69 F.3d at 924.
  \item \textsuperscript{113} \textit{Id}.
  \item \textsuperscript{114} Arizonans for Official English \textit{v. Arizona}, 116 S. Ct. 1316 (1996).
  \item \textsuperscript{115} \textit{Id}.
  \item \textsuperscript{116} \textit{Yniguez} \textit{IV}, 69 F.3d at 924.
  \item \textsuperscript{117} \textit{Id}. at 931-32.
  \item \textsuperscript{118} \textit{Id}. at 931.
  \item \textsuperscript{119} \textit{Id}. at 933 (citing \textit{Brockett v. Spokane Arcades, Inc.}, 427 U.S. 491, 506 (1985)). A severability clause is a statutory provision which allows the balance of a statute to remain intact if one part is declared unconstitutional. \textit{BLACK'S LAW DICTIONARY} 1343 (6th ed. 1990) (defining saving clause).
  \item \textsuperscript{120} \textit{Yniguez} \textit{IV}, 69 F.3d at 931-32.
  \item \textsuperscript{121} \textit{Id}. at 932.
  \item \textsuperscript{122} \textit{Id}. at 932-33.
\end{itemize}
The majority then disposed of two arguments put forth by AOE. AOE argued that the amendment regulated conduct and consequently did not impair free speech protections. The court disagreed, stating that because the meaning of words and phrases vary in different languages, language restrictions compromise the meaning of spoken words. AOE also argued that Yniguez sought the affirmative right to require that government operate in foreign languages. The court rejected this argument by differentiating between an affirmative and a negative right. While acknowledging that non-English speakers are not affirmatively entitled to government services in their native languages, the majority concluded that Yniguez did not attempt to compel the government to provide multilingual information. Instead, Yniguez rightfully sought to enforce the negative right: to prohibit the gagging of governmental employees. Thus, on a basic level, the court distinguished between requiring government officials to speak in a foreign language and allowing them to do so.

In its analysis of the potentially unconstitutional restriction on free speech rights, the court distinguished between public employees and private citizens. The majority acknowledged that while Arizona has a constitutional right to impose stricter restrictions on public employees’ free speech rights than those of private citizens, the state cannot arbitrarily impose such restrictions simply because the government is the employer. The court concluded that Yniguez’s speech did not fit into the protected category of speech by a private citizen on a matter of public concern. Nor did the speech fit into the category of a public employee’s speech on a personal matter. Relying on the fact that the recipient motivated the foreign language communication, the court found the speech to be “unquestionably of public import,” requiring analysis under the Waters/Pickering line of cases.

The court concluded that public employees’ speech interests outweighed Arizona’s alleged state interests of promoting civic unity, encouraging a common language, and protecting public confidence. Although it recognized the importance of national unity and democracy, the court relied on Meyer and Farrington to hold that Article XXVIII was an inappropriate

123. Id. at 934-37.
124. Id. at 934.
125. Id. at 935.
126. Id. at 936.
127. Id. at 936-37.
128. Id. at 936. The majority’s analysis of affirmative versus negative rights should not be read to apply to situations where federal law or the Constitution mandate foreign language services. For example, criminal defendants, as acknowledged by Article XXVIII itself, are entitled to the affirmative right of foreign language assistance. See Ariz. Const. art. XXVIII, § 3(2)(e).
129. Yniguez IV, 69 F.3d at 936.
130. Id. at 938 (citing Waters, 114 S. Ct. 1878; Rankin, 483 U.S. 378; Connick, 461 U.S. 138; Pickering, 391 U.S. 563).
131. Id.
132. Id. at 939.
133. See id.
134. Id. at 939-42.
135. Id. at 944-45 (citing National Treasury, 115 S. Ct. at 1015-18, and Rutan v. Republican Party, 497 U.S. 62, 70 n.4 (1990)).
approach to promoting these interests. In addition, the state's interests in efficiency and effectiveness were "wholly absent." Based upon this analysis, the court concluded that Article XXVIII's restriction of public employees' speech rights rendered it unconstitutionally overbroad.

C. Concurring Opinion: Judge Brunetti

Judge Brunetti wrote separately to state that the restriction on an elected official's speech would, by itself, be a sufficient basis to find that Article XXVIII was facially overbroad and unconstitutional. Judge Brunetti reasoned that because "communication between candidates and voters is at the core of all political action," Article XXVIII's interference with that communication represented an attempt to manipulate the political process. Judge Brunetti also argued that Article XXVIII interfered with voting and political representation and chilled elected officials' speech. Judge Brunetti cited Bond v. Floyd to support the proposition that Article XXVIII interfered with incumbent candidates' ability to communicate with voters during re-election.

D. Dissenting Opinion: Judge Fernandez

Judge Fernandez began by acknowledging that Article XXVIII was subject to a broad construction, and that arbitrary conditions cannot be applied to public employment. Judge Fernandez argued that Yniguez's speech rights were not restricted, because her speech occurred while she performed official duties. Judge Fernandez agreed with the majority that Yniguez's situation was not easily characterized as either that of a public employee speaking out as a citizen on a matter of public concern or as an employee speaking on matters of personal interest. However, Judge Fernandez asserted that the Yniguez IV case was more like a private concern speech case, because Yniguez decided for her own private reasons not to obey the state constitution. Consequently, Judge Fernandez reasoned that Yniguez did not have a constitutional right to speak Spanish on the job.

136. See id. at 945 (citing Farrington, 273 U.S. 284 and Meyer, 262 U.S. 390).
137. Id. at 942.
138. Id. at 947.
139. Id. at 950 (Brunetti, J., concurring).
140. Id. at 950-51.
141. Id. at 951.
142. 385 U.S. 116 (1966) (holding that the disqualification of an elected legislator because of his statements to the media opposing the Vietnam War violated the legislator's right to freedom of speech under the First Amendment).
143. Yniguez IV, 60 F.3d at 950-51 (Brunetti, J., concurring).
144. Id. at 955 (Fernandez, J., dissenting).
145. See id.
146. Id. at 956.
147. Id.
148. See id. at 957.
For the sake of argument, Judge Fernandez also agreed that choice of language constituted speech. Judge Fernandez asserted that because the government has a right to control the messages communicated to the public and language usage determines what messages are communicated, the government has a right to disallow foreign language communication.

E. Dissenting Opinion: Chief Judge Wallace

Chief Judge Wallace joined Judge Fernandez in dissent and wrote separately to argue that the majority misclassified the choice of language communication as speech instead of conduct. To support this argument, the Chief Judge referred to the lack of case authority in the majority opinion supporting the assertion that language is, in and of itself, speech. Although he agreed that a percentage of Arizonans would probably prefer to speak Spanish with a public employee, the Chief Judge rejected this as a valid basis to evoke First Amendment protections. Chief Judge Wallace also asserted that the majority ruled contrary to case authority in determining that Yniguez's on the job communication constituted a matter of public concern.

F. Dissenting Opinion: Judge Kozinski

Because Judge Kozinski believed the amendment might well be unconstitutional, his dissent focused on the majority's approach rather than its conclusion. The judge faulted the majority for using the Waters/Pickering line of cases where it did not apply. According to Judge Kozinski, Yniguez IV had nothing in common with the Waters/Pickering cases. Judge Kozinski distinguished Yniguez IV by noting that the speech at issue occurred when public employees performed official duties, arguing that when an employee spoke to fulfill an official duty, the employee did not possess an interest in the speech. Instead, Judge Kozinski suggested that the employee communicated solely a government message. The judge then predicted that the Yniguez IV decision will be a costly one, because the courts will be subject to a flood of litigation by disgruntled public employees who have no grounds for a constitutional challenge. Judge Kozinski suggested that an equal protection challenge would be more successful and appropriate.
G. Special Concurrence: Judge Reinhardt

In addition to writing the majority opinion, Judge Reinhardt wrote specially in response to Judge Kozinski’s dissenting opinion. The special concurrence criticized Judge Kozinski’s dissent for its mean-spiritedness and absence of concern for the less fortunate. Additionally, Judge Reinhardt accused Judge Kozinski of placing government powers beyond constitutional reach by asserting that the government can require public employees to say anything in the course of their official duties. Judge Reinhardt warned that if Judge Kozinski’s views became law, government employees would be forced to relay hateful slogans and messages to non-English speakers. At the same time, non-English speakers would be relegated to second class citizenship as a result of the deprivation of information necessary to fulfill basic life functions.

III. Analysis
A. Free Speech: A Just Ruling Based on Shaky Ground

Unfortunately, the Ninth Circuit failed to recognize Yniguez IV as a case of first impression. Instead, as discussed above, the court relied on the Waters/Pickering series to support its holding that Article XXVIII violated the First Amendment. The Waters/Pickering line of cases, however, established First Amendment protections for an entirely different type of speech than that restricted by Article XXVIII. When the court forced the restricted speech in Yniguez IV into the Waters/Pickering line, it attempted to put a square peg in a round hole.

As Judge Fernandez correctly stated in his dissent, the Waters/Pickering line of cases “look[s] to the content of public employee speech to see whether it contributes to public debate.” For example, the most recent case in the Waters/Pickering line, National Treasury Employees Union found that the challenged speech deserved constitutional protection because it was “addressed to a public audience, made outside the workplace, and involved content largely unrelated to their government employment.” Moreover, the other cases in the Waters/Pickering line did not protect speech that occurred as part of an official duty. Yet the Ninth Circuit majority insisted on forcing the restricted speech of Arizona public employees into this category.

Classifying the speech as “unquestionably of public import” served an important purpose for the majority. It allowed the majority to base its ruling

163. Id. at 952 (Reinhardt, J., concurring specially).
164. See id. at 952-53.
165. Id. at 953.
166. Id. at 954.
167. Id.
168. Id. at 960 (Fernandez, J., dissenting).
170. See supra notes 39-58 and accompanying text.
171. See Yniguez IV, 69 F.3d at 939.
on a widely accepted and legally sound body of law addressing public employee speech restrictions. If the court had correctly described the speech as a tool to communicate a government message, it would have had little case law to support its holding.172 In addition, the majority admitted that the government generally can regulate the messages its employees communicate to the public.173 “To say that in most circumstances the government may regulate content by compelling or prohibiting on-the-job delivery of a particular message is a truism.”174

Unfortunately, forcing public employees’ restricted speech into a category in which it did not belong confused the doctrine of constitutionally protected public employee speech, downplayed the amendment’s egregious impact on elected officials’ First Amendment rights, and subjected the court’s just conclusion to criticism and skepticism. The dissenters presented cogent arguments that the majority could have defeated by finding the amendment unconstitutional as it specifically applied to legislators’ speech rights.

B. A Just Ruling Based on Solid Ground

The court in Yniguez IV correctly concluded that the amendment was “not a valid regulation of the speech of public employees and is unconstitutionally overbroad.”175 However, the court erred in the approach it used to reach its conclusion. While the court properly outlined the First Amendment overbreadth doctrine, it should have declared the amendment unconstitutional based specifically on its application to legislators’ speech rights.176

The court in Yniguez IV acknowledged that the amendment is the most restrictive English-only law to date.177 The majority should have followed that acknowledgement with an adequate analysis of the article’s most clearly unconstitutional application: the restriction of legislators’ speech rights.

Adequate representation requires open communication with constituents about their needs, desires, and expectations.178 Restricting legislators’ speech rights impairs their ability to fulfill their obligations.179 Such restrictions “undermin[e] the ‘public good’ by interfering with the rights of the people to representation in the democratic process.”180 One fundamental principle of

172. Id. at 940 (stating that “there are few First Amendment precedents in this area” when discussing constitutional regulation of employee speech used to convey a government message).
173. Id. at 939-40. See generally Rosenberger v. University of Virginia, 115 S. Ct. 2510, 2518-19 (1995) (recognizing that the government is entitled to regulate government-subsidized private party speech); Rust v. Sullivan, 500 U.S. 173, 194 (1991) (recognizing that a government is entitled to say what it wants through a private party when the private party’s speech is subsidized by the government).
174. See Yniguez IV, 69 F.3d at 940 n.24.
175. Id.
176. See, e.g., id. at 950 (Brunetti, J., concurring) (writing separately “to emphasize that the article’s unconstitutional effect on Arizona’s elected officials would alone be sufficient reason to strike the provision down.”).
177. See id. at 927 (citing Arington, supra note 2, at 337).
178. See Bond, 385 U.S. at 136-37.
179. See id.
the electoral system is that legislators and constituents should engage in free
and uninhibited political exchange. Legislators' speech protections exist in
part to "bring about political and social changes desired by the people." Restricting legislators' usage of Spanish, for example, would prevent at least
one notable constituency in Arizona—monolingual Spanish speakers—from
engaging in political debate and communication with their elected
representatives. Therefore, the amendment's overly broad restriction on the
speech of legislators alone should have rendered it unconstitutional.

A holding incorporating the constitutionally protected conduct precedent
would have strengthened the court's position by sufficiently addressing the
calls raised by Chief Judge Wallace. The majority could and should
have relied on binding authority which states that an overbreadth analysis is
appropriate when constitutionally protected conduct is at issue.

C. Article XXVIII's Violation of the Voting Rights Act

1. Restriction of Legislators' Speech Rights

By restricting legislators' speech rights, the amendment compromised
language minorities' political participation and therefore violated section 2 of
the Voting Rights Act. Congress intended the Voting Rights Act to protect
a broad notion of the political process. The legislative history of the
amendment, the cases upon which Congress relied when amending the

from imposition of court sanctions).

181. See Stromberg v. California, 283 U.S. 359, 369-70 (1931) (finding unconstitutional a statute which criminally penalized the display of a red flag because the statute infringed upon "free political discussion"); see also Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) (stating that a fundamental principle of our American government is the fulfillment of the political duty which is to engage in public discussion), overruled on alternative grounds by Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).


183. Any holding which invalidated Article XXVIII on First Amendment grounds would be subject to criticism by Chief Judge Wallace. Chief Judge Wallace argued in dissent that language restrictions pertain to conduct, not speech, and consequently are not entitled to First Amendment protection. Yniguez IV, 69 F.3d at 959 (Wallace, C.J., dissenting). The majority inadequately addressed Wallace's criticism by responding with a circular argument that "[l]anguage is by definition speech." Id. at 935.

184. See Broadrick, 413 U.S. 601. In Broadrick, the Supreme Court reasserted that a facial overbreadth claim is appropriate when a statute regulates the "manner of expressive or communicative conduct." Id. at 612-13; see also Grayned v. City of Rockford, 408 U.S. 104, 114 (1972). Communication which creates a "'cognitive content' in the listener" or expresses an idea qualifies as protected conduct. See Elliot F. Krieger, Protected Expression: Toward a Speaker-Oriented Theory, 73 DENVER U. L. REV. 69, 73 (1995). Spanish language communication, for example, creates cognitive content in a monolingual Spanish listener different from that created by English communication. As demonstrated, language meets the test for expressive conduct. Therefore, even if Judge Wallace were correct, language still is entitled to First Amendment protection.


Act, and the references to protections of political participation throughout the Act itself all illustrate this congressional intent.

The restrictions on legislators' speech rights deny language minorities equal opportunity to be active and influential participants in the political process. Of course, the restrictions do not per se prevent a language minority from casting a ballot. However, government-imposed language barriers do cause the "disproportionate effect of purging laws on non-English speaking citizens." For example, if a language minority appeared at a PTA, veterans, or union meeting in order to share opinions and information with a legislator, the legislator would be prohibited either from responding to concerns or acknowledging that the constituent's concerns were heard. Language minority constituents would be denied opportunities to negotiate with an incumbent legislator in the days before and following an election, when voters traditionally vie for recognition of their positions. Language minorities would also be denied equal opportunity to effectively lobby at the capitol. These activities, along with countless others, constitute political participation. Each activity affects the outcome of legislation and the ability to make an informed choice at the polls. The restrictions on legislators' speech would give language majorities an upper hand in influencing legislation and cause language minorities to arrive at the polls on unequal footing, if they arrived at all.

For almost fifteen years the Court has focused on applying § 2 to districting arrangements. This approach began with Thornburg, the case in which the Court interpreted the 1982 Voting Rights Act amendments for the first time. An interesting omission from the Thornburg opinion is a discussion of § 2's application to political participation outside the districting context. Following Thornburg, the Court continued to abstain from this discussion. Existing case law, however, does not preclude unique claims by language minorities. Rather, language minority claims of first impression present courts with the opportunity to honor legislative intent and recognize the viability of a § 2 claim outside a districting context.

187. Id. According to Abrams each case Congress relied on—White, 412 U.S. 755; Zimmer, 485 F.2d 1297; Kirksey, 554 F.2d 139—emphasized the importance of political opportunity both before and after an election. See Abrams, supra note 186, at 459.

188. See supra notes 71-85 and accompanying text. The Senate record states that "[s]ection 2 protects the right of minority voters to be free from election practices, procedures, or methods, that deny them the same opportunity to participate in the political process as other citizens enjoy." S. REP. NO. 97-417, at 28 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206.


190. See Abrams, supra note 186, at 489.

191. Id.

192. See, e.g., Shaw v. Hunt, 116 S. Ct. 1894, 1905 (1996); Johnson v. De Grandy, 114 S. Ct. 2647, 2651 (1994); Shaw v. Reno, 509 U.S. 630, 655 (1993). Litigants most often, bring § 2 claims not as individuals but as members of an identifiable group (i.e. race or language minority). See Abrams, supra note 186, at 453-54. Vote dilution claims under § 2 provide relief when the voting arrangement at issue makes the votes or political participation of minority group members less effective. Id. at 454.

193. Thornburg, 478 U.S. at 34.

194. See Montero v. Meyer, 13 F.3d 1444 (10th Cir. 1994).

195. See Su Sun Bai, Comment, Affirmative Pursuit of Political Equality for Asian Pacific
In context, therefore, the amendment violates the Voting Rights Act. First, the amendment disproportionately and severely affects language minorities' opportunities in the electoral process. Second, the restrictions require a lack of responsiveness by elected officials.

2. Article XXVIII Facially Violates the Voting Rights Act

The amendment specifically proclaimed English to be the official language of the ballot. Yet the amendment did not specifically allow the usage of non-English languages in order to comply with the Voting Rights Act. Therefore, the amendment facially violates the provision of the Act which requires bilingual voting materials.

The amendment included a disclaimer that a non-English language may be used to avoid violating federal law. Yet, at the same time, the amendment specifically declared English as the official language of the ballot and required the legislative branch and all of its officials to act only in English. If the amendment intended to abide by the Voting Rights Act, it should have specifically stated this exception along with the four others listed in the amendment. Without further clarification, the amendment becomes too difficult to apply in its current form or renders a large part of the amendment obsolete. Furthermore, because the amendment did not contain a severability clause, under the overbreadth doctrine it is entirely unconstitutional.

Government constructed obstacles to language minorities' political participation are illegal and unfair. Requiring equal opportunity is not the same as compelling elected officials to speak foreign languages. Finding the amendment in violation of the Voting Rights Act does not create an affirmative right. Instead, it honors the principle that each person deserves an equal opportunity to participate in the political process.

D. Equal Protection

The court also should have found that Article XXVIII unconstitutionally violated the Fourteenth Amendment Equal Protection Clause. The court recognized the validity of a Fourteenth Amendment approach when it stated

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196. See ARIZ. CONST. art. XXVIII, § 1(2).
198. ARIZ. CONST. art. XXVIII, § 3(2)(b).
199. Id. §§ 1, 3.
200. See supra notes 116-38 and accompanying text.
201. See Yniguez IV, 69 F.3d at 937 (explaining that the state could neither order a government official to speak a foreign language nor preclude an elected official from discussing official state business to constituents in whatever language she sees fit). A California election candidate filed suit claiming that the Voting Rights Act violated his First Amendment rights because he was required to translate his election speech into Spanish before sending it to voters. Reich v. Larson, 695 F.2d 1147, 1148 (9th Cir. 1983). The trial court dismissed his claim for lack of jurisdiction and the appellate court affirmed. Id. at 1149-51. However, the suit illustrates that even a candidate's election statement is considered to be a significant component of the political and electoral process.
202. Yniguez IV, 69 F.3d at 940.
that Article XXVIII's equal protection ramifications strongly supported its ruling.\textsuperscript{203} A ruling based upon the equal protection doctrine would have legally recognized one of the amendment's most unjust applications, its discriminatory impact on national origin groups. In fact, the court stated that the real issue of the case was that the amendment "drastically affects not only public employees but also countless Arizonans who need desperately to communicate with their government."\textsuperscript{204}

Unfortunately, the court's handling of the amendment's equal protection ramifications was superficial and misguided. The court did not note how the amendment adversely affected non-English speakers, specifically Latinos, until their cursory mention in its conclusion.\textsuperscript{205} Furthermore, the court misdirected its analysis when it discussed the amendment's unconstitutional application to non-English speaking populations based on the "right to receive"\textsuperscript{206} doctrine instead of the equal protection doctrine.

The premise underlying an equal protection challenge is that language serves as a proxy for national origin. Courts have sustained equal protection challenges to language discrimination as a proxy for suspect class discrimination in various contexts.\textsuperscript{207} The language restrictions in the amendment do not per se denote disparate treatment against a particular group, because the amendment applies equally to English and non-English speakers.\textsuperscript{208} Facialy neutral laws are subject to rationality review instead of strict scrutiny.\textsuperscript{209} However, the Supreme Court has held that facially neutral laws command strict scrutiny when: (1) they are sufficiently linked to a

\textsuperscript{203} See id.
\textsuperscript{204} Id. at 940 n.24.
\textsuperscript{205} Id. at 947 (stating that "Article XXVIII's overbreadth is especially egregious because it is not uniformly spread over the population, but falls almost entirely upon Latinos and other national origin minorities").
\textsuperscript{206} Id. at 940 n.24; see also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756-57 (1976) (defining the "right to receive" doctrine as protecting the communication between a willing speaker and recipient, and further stating that, in the case of a willing speaker, the source and recipient of the communication are afforded protection as well). The private entity "right to receive" doctrine had been adapted to the public employment context only when a public employee speaks on matters of public concern. National Treasury Employees Union, 115 S. Ct. at 1015.
\textsuperscript{207} See Hernandez v. New York, 500 U.S. 352, 363 (1991) (plurality opinion) (examining language as proxy for race in jury selection process); Yu Cong Eng v. Trinidad, 271 U.S. 500, 524-25 (1926) (holding that Chinese merchants were denied equal protection by a statute allowing only English and Spanish languages to be used in account books); Meyer v. Nebraska, 262 U.S. 390 (1923) (invalidating a language restriction statute in large part because it targeted the state's German-American community); Olagues v. Russoniello, 797 F.2d 1511, 1520-21 (9th Cir. 1986) (en banc) (stating that people of different ethnic groups "are often distinguished by a foreign language"), vacated as moot, 484 U.S. 806 (1987). But see Soberal-Perez v. Heckler, 717 F.2d 36, 41 (2d Cir. 1983) (stating that Spanish speakers' lack of an affirmative right to Spanish speaking social security notices did not constitute discrimination against Latinos), cert. denied, 466 U.S. 929 (1984); Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980) (stating that the Equal Employment Opportunity Act "does not support an interpretation that equates the language an employee prefers to use with his national origin"), cert. denied, 449 U.S. 1113 (1981).
\textsuperscript{208} Garfield, supra note 91, at 706 n.72. Under Washington v. Davis, 426 U.S. 229 (1976), the amendment would be considered a facially neutral law.
\textsuperscript{209} See, e.g., Pennell v. City of San Jose, 485 U.S. 1 (1988) (applying rationality review to a facially neutral ordinance).
suspect class, and (2) the state decisionmaker in question in part intentionally acted to discriminate against the suspect class.\(^{210}\)

The majority in \textit{Yniguez IV} recognized that language was, in this case, a proxy for national origin and that language restrictions can mask national origin discrimination.\(^{211}\) Article XXVIII's ban on non-English communication between government employees and citizens is easily linked to discrimination against at least one national origin group, people of Latino origin.\(^{212}\) The burden of the article falls exclusively on non-English speakers, the overwhelming majority of whom are Spanish speakers.\(^{213}\) As mentioned above, not only are most Spanish speakers Latino, but Arizona has the fourth highest number of Latinos in America.\(^{214}\) These objective figures prove the inextricable link between language and national origin.

Proving that the majority of Arizona voters who approved the amendment had a discriminatory intent is a more difficult task. Some courts have been receptive to looking at the totality of the circumstances as proof of discriminatory intent.\(^{215}\) It is clear that the amendment would have a disproportionate impact on monolingual Spanish speakers by preventing them from receiving vital government information and services and shutting them out of the political process. In fact, the Amendment passed during a time of a marked increase in immigration, a fact which may suggest that Arizonans cast votes with discriminatory motives.\(^{216}\) Furthermore, the fact that voters approved Article XXVIII, notwithstanding an Arizona publicity pamphlet stating the article would potentially create an inefficient and ineffective government,\(^{217}\) shows that Arizona voters did not approve the amendment with the best interests of their government in mind. The totality of the circumstances shows that the amendment was passed at least in part due to discriminatory motives. Consequently, the amendment should have received strict scrutiny.\(^{218}\)

\textit{Footnotes:}

\(^{210}\) See \textit{Arlington Heights v. Metropolitan Hous. Dev. Corp.}, 429 U.S. 252, 265-66 (1977) (noting that discriminatory intent must be at least one motive, not necessarily the sole motive, of a law's passage); \textit{Washington}, 426 U.S. at 240 (requiring a showing of discriminatory purpose).

\(^{211}\) See \textit{Yniguez IV}, 69 F.3d at 947-48.

\(^{212}\) See \textit{Hernandez v. Texas}, 347 U.S. 475, 477-78 (1954) (recognizing that Mexicans constitute a distinct national origin group for the purposes of an equal protection analysis).

\(^{213}\) Puig-Lugo, \textit{supra} note 16, at 47. As mentioned above, Spanish speakers constitute the largest group of Arizonan non-English speakers. The group of Native American Speakers, the second largest group, is approximately one fourth the size of the number of Spanish speakers. \textit{BUREAU OF THE CENSUS, U.S. CENSUS OF POPULATION & HOUSING, 1990, Summary Tape File 3C104P28} (Washington: The Bureau 1992); \textit{see supra} notes 2, 104.

\(^{214}\) See \textit{supra} note 104.


\(^{216}\) See \textit{supra} notes 2, 104.

\(^{217}\) See \textit{Yniguez IV}, 69 F.3d at 961 (Kozinski, J., dissenting) (discussing the Arizona publicity pamphlet).

\(^{218}\) When a law or classification is subject to strict scrutiny, the court must find that the law or classification is narrowly tailored to further a compelling or overriding state interest. See, \textit{e.g.}, \textit{Harper v. Blumenthal}, 478 F. Supp. 176, 181 (D.D.C. 1979). It is next to impossible for the government to meet the burden of proving that discrimination against the suspect class serves a compelling state interest. \textit{See Garfield, supra} note 91, at 707 (stating that the Supreme Court has only upheld two laws to which it applied strict scrutiny, and noting that these laws were enacted during wartime).
The amendment did not further a compelling state interest. The litigating parties stipulated that Yniguez's use of Spanish contributed to a more efficient and effective workplace. Consequently, the traditional compelling state interest necessary to justify regulating employee speech is absent in this case. Furthermore, the majority found an absence of a substantial connection between a public employee's job performance and the alleged state interests of encouraging a common language, promoting Americanism and democracy, and protecting public confidence. Therefore, under a strict scrutiny analysis, Article XXVIII violated the Fourteenth Amendment's Equal Protection Clause.

Based on case authority and the aforementioned analysis by the Yniguez IV majority, it is possible that the amendment violates the Equal Protection Clause even under a rationality review. Although courts give great deference to state actions when using a rationality review, it may be argued that the amendment does not bear a rational relationship to any legitimate state objectives. Courts most often uphold language classifications under a mere rationality review based upon the state's declared interests of efficiency and safety. However, in Yniguez IV, these state interests are absent. Also, the court held that Article XXVII could not lawfully serve the alleged state interest. Therefore, even giving great deference to state actions, Article XXVIII violates the Fourteenth Amendment's Equal Protection Clause.

CONCLUSION

The majority arrived at a legally sound and just conclusion: Article XXVIII is "not a valid regulation of the speech of public employees." The court's approach to this conclusion, however, was misguided. Instead of appropriately analyzing the case as one of first impression, the court erroneously applied the Waters/Pickering precedents. This approach distorted and confused precedent while ignoring the amendment's most clearly unconstitutional application: the restriction of legislators' speech rights.

By restricting legislators' speech rights and consequently compromising language minorities' opportunities for political participation, the amendment also violated the Voting Rights Act. Although the Supreme Court has not provided direction for language minority plaintiffs alleging § 2 violations, the legislative history, the language of the Act itself, and case law addressing political participation provide support for such a claim.

Moreover, the Ninth Circuit should be commended for its recognition of the equal protection issues implicated by the amendment. However, the court insufficiently analyzed the amendment's discriminatory impact on national

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219. Yniguez IV, 69 F.3d at 924.
220. Id. at 944-45.
221. See Garfield, supra note 91, at 706 n.68.
223. See Yniguez IV, 69 F.3d at 942. The litigants supporting the amendment have never asserted that safety is a legitimate state issue in this case. Id.
224. Id. at 946.
225. Id. at 947.
origin groups. The court should have properly recognized language as a proxy for national origin and acknowledged the amendment's disparate impact on Latinos and other national origin groups by invalidating the amendment on equal protection grounds.

Language restrictions are not valid attempts at maintaining a unified nation. Restrictions on the use of non-English languages act as tools for discrimination and result in language minorities receiving unequal and unfair treatment. Gloria Anzaldúa, a distinguished advocate for non-English speaking populations, writes, "[w]ho is to say that robbing a people of its language is less violent than war?"226

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