ONE NATION DIVISIBLE BY LANGUAGE: AN ANALYSIS OF OFFICIAL ENGLISH LAWS IN THE WAKE OF *YNIGUEZ v. ARIZONANS FOR OFFICIAL ENGLISH*

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We have room for but one language here, and that is the English language, for we intend to see that the crucible turns our people out as Americans, of American nationality, and not as dwellers on a polyglot boarding house.[1]

I. INTRODUCTION

Throughout our nation's history, a debate has raged over the role of the English language in our society.[2] Once again, that debate has come to the forefront of American politics. On a national and global scale, the language debate has created a significant amount of controversy. For example, in 1996, the City of Oakland, California sought additional federal financial assistance by attempting to create a language education program for inner city students called ebonics.[3] In addition, the 1996 presidential campaign, touched on, *inter alia*, the English language debate, fueled by concerns over increased legal

[1]Robert D. King, *Should English be the Law?*, THE ATLANTIC MONTHLY, April 1997, at 55 (quoting Theodore Roosevelt). Theodore Roosevelt further stated that "[w]e must have but one flag. We must also have but one language. That must be the language of the Declaration of Independence, of Washington's Farewell address, of Lincoln's Gettysburg speech and second inaugural." *Id.*

[2]*See infra* Section II and accompanying notes.

[3]*See* Carol Innerst, *Black English Pushed For Bilingual Education*, THE WASHINGTON TIMES, Nov. 28, 1996, at A1. Ebonics is a nonstandard English dialect spoken by inner city African-American youths derived from the terms ebony and phonics. *See id.* Nationally, critics slammed the program calling ebonics the promoting of bad English. *See id.* After severe criticism at the national level, the school board eventually abandoned its attempts to train teachers to speak ebonics and apply for federal bilingual education funds. *See also* Richard L. Colvin, *No 'Ebonics' is New Oakland School Plan*, LOS ANGELES TIMES, May 6, 1997, at A1.

immigration during the first term of the Clinton Administration.[4] In June of 1997, the bilingual Hostos Community College of the City University of New York, just days before graduation, required graduating students to pass an English proficiency test in order to receive their diploma.[5] Dozens of companies throughout the United States are privately adopting English-only workplace rules.[6] On an international scale, the language debate has fueled problems in countries such as Canada and the former Soviet Union.[7]

As a result of the increasing controversy, state legislatures across the United States are taking steps to preserve the role of the English language.[8] The federal government has also intervened by introducing several versions of Official English legislation in Congress.[9] As a result, the courts are becoming pivotal players in the simmering debate. The Ninth Circuit, for example, has upheld English-only workplace rules in the face of civil rights challenges.[10] More recently, however, the Ninth Circuit struck down a referendum passed by the voters of Arizona declaring English as the official language of all government actions.[11] The Supreme Court vacated the Ninth Circuit's decision and a constitutional challenge has resurfaced in state court.[12] Ultimately, the

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[4]Former Senator Robert Dole of Kansas, the Republican Party's nominee for the Presidency in 1996, favored English as the nation's official language. *See* Rhodes Cook, *Presidential Campaign: GOP Hopefuls Gather in N.H. For First Televised Debate*, CONG. Q. WKLY. REP., Oct 16, 1995. President Clinton, however, opposed Official English, despite the fact that, as Governor of Arkansas, he signed an Official English bill into law. *See* King, *supra* note 1, at 55. President Clinton later described it as a mistake. *See* King, *supra* note 1, at 55.

[5]*See* Karen W. Arenson, *To Graduate Sunday, CUNY Students Must Pass Test*, THE NEW YORK TIMES, May 28, 1997, at B3.

[6]*See* Norman Sklarewitz, *English-Only on the Job*, 29 ACROSS THE BOARD 18 (1992).

[7]*See* Robert D. King, *Life, Liberty and the Pursuit of Official English*, MONTREAL GAZETTE, May 3, 1997.

[8]*See infra* note 28 and accompanying text.

[9]*See infra* note 27 and accompanying text.

[10]*See infra* section IV. A. and accompanying text.

[11]*See* Yniguez v. Arizonans for Official English, 69 F.3d 920, 923 (9th Cir. 1995), *vacated*, 117 S. Ct. 1055 (1997).

[12]*See id*; *see also* Ruiz v. Symington, No.1 CA-CV 94-0235,1996 WL 309512 (Ariz. Ct. App. 1996).

United States Supreme Court will decide the issue.[13]

Although controversial, Official English laws serve a unifying function. The diverse cultures of the United States should be preserved, but not at the expense of accommodating several languages and creating an unworkable standard of bilingual signs, driver's licenses and government forms. This Comment will explore the constitutional and statutory barriers to Official English legislation that mandates English as the official language of all government action. Part II details the contemporary Official English debate. Part III discusses the constitutional barriers to Official English laws, including the First Amendment's Free Speech Clause and the Fifth and Fourteenth Amendment's Equal Protection and Due Process Clauses. Part III also discusses the Ninth Circuit's analysis in *Yniguez v. Arizonans For Official English* and concludes by arguing that Official English laws, provided that they are narrowly drafted, are constitutional under the Supreme Court's current precedents. Part IV examines the federal statutory barriers to Official English laws, such as the Civil Rights Act of 1964, the Voters Rights Act of 1965, and the Bilingual Education Act of 1974, as well as case law pertaining to each statute. Part IV concludes by arguing that Official English laws do not conflict with the goals of these federal statutes provided that legislators create exceptions in the statutes text to allow compliance with federal law, such as the Voting Rights Act and the Bilingual Education Act. This Comment concludes that Official English laws must preserve the protections afforded by federal statutes such as the Voting Rights Act and the Bilingual Education Act.

II. THE CONTEMPORARY OFFICIAL ENGLISH DEBATE [14]

In 1981, 1983, and again in 1985, the English Language Amendment (hereinafter "ELA") was introduced in both houses of Congress in an effort to preserve and enhance the role of English in our nation.[15] The 1981 Senate

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[13]*See* Linda Greenhouse, *Justices Set Aside Reversal of 'English Only' Measure*, THE NEW YORK TIMES, March 4, 1997, at A17.

[14]For a detailed discussion of the history of language in America see Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992); BILL PIATT, ?ONLY ENGLISH? 3-30 (1990).

[15]*See* S.J. Res. 20, 99th Cong., 1st Sess., 131 CONG. REC. S468 (daily ed. Jan. 22, 1985); H.R.J. Res. 96, 99th Cong., 1st Sess., 131 CONG. REC. H167 (daily ed. Jan. 24, 1985); H.R.J. Res. 169, 98th Cong., 1st Sess., 129 CONG. REC. E757-58 (daily ed. March 2, 1983); S.J.Res. 167, 98th Cong., 1st Sess., 129 CONG. REC. S12,643 (daily ed. Sept 21, 1983); S.J. Res. 72, 97th Cong., 1st Sess., 127 CONG. REC. S3998-99 (1981). Two versions of the English Language Amendment were introduced in 1985. The Senate version provided:

version of the ELA was introduced by former California Senator S. I. Hayakawa,[16] the founder and Honorary Chairperson of a nonprofit organization called U.S. English. U.S. English estimates that it has over 1 million members nationwide[17] and its primary goal is to take an active role in enacting laws that declare English the official language for all government business.[18] Despite its efforts, U.S. English failed to pass the ELA.[19] Growing concern over the role of the English language in the United States, however, has recently, prompted federal, state and local governments to attempt to protect the sanctity

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> Section 1. The English Language shall be the official language of the United States. Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

S.J. Res. 20, 99th Cong., 1st Sess., 131 CONG. REC. S468-02 (daily ed. Jan. 22, 1985).

The House version provided:

> Section 1: The English language shall be the official language of the United States. Section 2: Neither the United States nor any State shall require by law, ordinance, regulation, order, decree, program, policy, the use in the United States of any language other than English. Section 3: This article shall not prohibit any law, ordinance, regulation, order, decree, program, or policy requiring educational instruction in a language other than English for the purpose of making students who use a language other than English proficient in English. Section 4: The Congress and the States may enforce this article by appropriate legislation.

H.R.J. Res. 96, 99th Cong., 1st Sess., 131 CONG. REC. H167 (daily ed. Jan 24, 1985).

[16]*See* S.J. Res. 72, 97th Cong., 1st Sess., 127 CONG. REC. 7400 (1981).

[17]*See* Andrew Phillips, *The English-Only Debate: Just Below America's Surface, Language is a Hot Issue,* MACLEANS, May 5, 1997, at 42.

[18]*See* U.S. English, *Facts and Issues - About U.S. English* (U.S. English, Washington D.C.). U.S. English supports Official English legislation that declares English the primary language of government, but not the exclusive language. Official language legislation allows for exceptions for public health and safety services, judicial proceedings, and foreign language instruction. *See* U.S. English, *Facts and Issues- What is Official English?* (U.S. English, Washington D.C.). Polls indicate that between 65 and 86 percent of Americans favor making English the official language. *See* Geoffrey Nunberg, *English-Only the Wrong Medicine for an Imaginary Disease*, SEATTLE POST-INTELLIGENCER, Aug. 26, 1997, at A9.

[19]*See* Perea, *supra* note 14, at 341.

of the English language.[20]

The Official English debate is often coupled with the immigration debate. Estimates of the number of people living in America who are not proficient in English vary, ranging from 6 million to 32 million.[21] In the 1990's, the surge of immigration has continued and it is estimated that 3 million people have immigrated to the United States so far this decade.[22] Those immigrants are overwhelmingly comprised of people whose primary language is not English.[23] Moreover, more than 22.6 million people living in the United States are foreign born, creating a greater need for bilingual services.[24]

In 1996, again with the aid of U.S. English, another form of Official English legislation, known as the Bill Emerson English Language Empowerment Act of 1996, was introduced in Congress.[25] In August 1996, the House of Representatives approved for the first time legislation that would make English the official language of the federal government.[26] The Senate did not vote on the bill, but it has been reintroduced to both houses of the 105th Congress, in several forms, including a constitutional amendment.[27]

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[20]*See infra* notes 27-28 and accompanying text.

[21]*See* Nunberg, *supra* note 18.

[22]*See* Maria Puente, *Naturalization at All-time High 1 Million New Citizens By Sept 30*, USA TODAY, July 5, 1996, at A3.

[23]The immigrants are primarily from Latin America or Asia. *See* Melissa Healy, *Changes in Law Lead to 27% Hike in Legal Immigration Population*, LOS ANGELES TIMES, Apr. 23, 1997, at A4. Annually, more than 110,000 people from almost 200 countries settle in New York City. *See* Brad Edmondson and Michael Pilgrim, *The Newest New Yorkers*, AM. DEMOGRAPHICS, July 1, 1997, at 16. Studies show that in excess of 100,000 illegal immigrants from Mexico cross the border annually. *See* Sam Dillon, *Illegal Immigration-Mexican Influx 105,000 a Year, Study Shows*, DAYTON DAILY NEWS, Aug. 31, 1997, at 11A. Estimates also suggest that nearly 5 million illegal immigrants reside in the United States. *See also* Melissa Healy, *Changes in Law Lead to 27% Hike in Legal Immigration Population*, LOS ANGELES TIMES, Apr. 23, 1997, at A4.

[24]*See* Joan Beck, *Congress Should Pass 'English-Only' Legislation*, TULSA WORLD, Mar. 12, 1997, at A17. Despite what some suggest, as a percent of our total population, this figure is in line with the historic average number of foreign born citizens. *See* Stephen Moore, *Through Gates of Opportunity*, THE WASHINGTON TIMES, May 4, 1997, at B3.

[25]*See* Lucy Chiu, *A Plea to the Senate Not to Pass the Emerson English Language Empowerment Act of 1997*, 23 J. LEGIS. 231 (1997).

[26]*See id.*

[27]The other bills introduced into Committee are the Declaration of Official Language

At the present time, 22 states have enacted Official English laws in various forms.[28] Some states merely make declarations that "English is the Official Language,"[29] while others are more restrictive.[30] Similar legislation is currently pending in several other states.[31] Moreover, several local governments are in the process of enacting Official English resolutions in their municipalities and counties despite their state legislature's refusal to create such laws.[32]

The proponents of the movement believe that bilingual programs enhance what many perceive to be growing cultural separatism between English and foreign-language speaking Americans.[33] Such separatism, they argue, threatens unity and the political stability of the United States.[34] Organizations such

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Act, the Language of the Government Act, the National Language Act, the Bill Emerson Language Empowerment Act and a proposed amendment to the Constitution. *See* 143 CONG. REC. E168-04 (daily ed. Feb. 5, 1997); 143 CONG. REC. S1383-01, S1391; H.R. 1004 105th Cong., 1st. Sess., 143 CONG. REC. H887-02 (daily ed. Mar. 11, 1997); 143 CONG. REC. E36-01 (daily ed. Jan. 7, 1997); H.J.R. 37, 105th Cong., 1st Sess., 143 CONG. REC. H282-01 (daily ed. Feb. 4, 1997).

[28]*See* ALA. CONST. amend 509; ARIZ. CONST. art. XXVIII, §§ 1-4; ARK. CODE. ANN. § 1-4-117 (Michie 1987); CAL. CONST. art. III, §6; COLO. CONST. Art. II, §30a; FLA. CONST. art. II, §9; GA. CODE ANN. §50-3-100 (Supp. 1997); HAWAII CONST. art. XIV §4.; 5 ILL COMP. STAT. ANN. 460/20 (West 1993); IND. CODE ANN. §1-2-10-1 (West 1981); KY. REV. STAT. ANN. § 2.013 (Michie 1996); MISS. CODE ANN. §3-3-31 (1991); MONT. CODE ANN. §1-1-510 (1995); NEB. CONST. art. I, §27; N.H. REV. STAT. ANN. § 3-C:1 (Supp. 1996); N.C. GEN. STAT. §145-12 (1996); N.D. CENT. CODE §54-02-13 (1989); S.C. CODE ANN. §1-1-696-698 (Law Co-op Supp. 1996); S.D. CODIFIED LAWS §1-27-20 to 26 (Michie Supp. 1997); TENN. CODE ANN. §4-1-404 (1991); VA. CODE ANN. § 7.1-42 (Michie Supp. 1997); WYO. STAT. ANN. § 8-6-101 (Michie 1997).

[29]*See* COLO. CONST. art. II, §30a. The statute states, in its entirety, "[t]he English language is the official language of the State of Colorado." *Id.*

[30]*See* ARIZ. CONST. art. XXVIII, § 1-4; *see infra* note 66 for text.

[31]*See* Shawn Foster, *Lawmakers Move Ahead on English-Only Bill: English Only Endorsed by Committee*, THE SALT LAKE TRIB., Aug. 21, 1997 (Utah); Associated Press, *English Only Bill Held Up*, THE LAS VEGAS REV. J., May 16, 1997 (Nevada); Steven Walters, *English Language Bill*, THE MILWAUKEE J. SENTINEL, Mar. 5, 1997 (Wisconsin).

[32]*See* Basu Rekha, *English-only: At What Cost?*, THE DES MOINES REG., Aug. 8, 1997.

[33]*See* S.J.Res. 13, 100th Cong., 1st Sess., 133 CONG. REC. S7615 (daily ed. June 4, 1987).

[34]*See* S.J.Res.167, 98th Cong., 1st Sess., 129 CONG. REC. S12,640, S12,642-43 (daily ed. Sept 21, 1983); *see also* Laura A. Cordero, *Constitutional Limitations on Official English Declarations*, 20 NEW MEX. L. REV. 17, 18 (1990).

as U.S. English and English First are leading the crusade to establish English as the official language.[35] The Official English movement's strategy is two-fold: first, to enact Official English in the states, and second, to enact federal legislation making English the official language of the United States.[36]

Several private organizations, such as the Spanish American League Against Discrimination and the League of United Latin American Citizens, have mobilized to oppose the Official English movement.[37] Other groups, such as English Plus Information Clearinghouse (hereinafter "EPIC"), propose strong English proficiency plus mastery of multiple languages.[38] EPIC is a consortium of organizations whose common goal is promoting cultural pluralism and diversity.[39] The group stresses a need for an expansion of English as well as foreign language instruction.[40]

Opponents of the Official English movement maintain that Official English is a "veiled expression of racism and xenophobia."[41] Opponents also argue that in families where the primary language is something other than English, family members forget their native tongue and adopt English within two generations.[42] Moreover, opponents stress that today's immigrants are learning English faster than ever before.[43] As a result of the increased assimilation of non-English speaking citizens into our society, the anti-Official English forces view the need for Official English declarations as a "modern day myth."[44]

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[35]*See* Cordero, *supra* note 34, at 24.

[36]*See* Perea, *supra* note 14, at 341.

[37]RAYMOND TATALOVICH, NATIVISM REBORN? THE OFFICIAL ENGLISH LANGUAGE MOVEMENT AND THE AMERICAN STATES 19 (1995).

[38]*See id.* at 16-18; Cordero, *supra* note 34, at 24.

[39]*See* TATALOVICH, *supra* note 37, at 17.

[40]*See* TATALOVICH, *supra* note 37, at 17.

[41]Cordero, *supra* note 34, at 18. Xenophobia is defined as fear or hatred of strangers or foreigners. *See* WEBSTER'S NEW WORLD DICTIONARY 1544 (3d ed. 1994).

[42]*See* Martha Jiminez, *Official Use of English? No.*, A.B.A. J. Dec. 1, 1988, at 35.

[43]*See* Editorial, *English-Only Laws Slow Assimilation of Immigrants Into U.S. Culture,* THE COLUMBUS DISPATCH, Dec. 21, 1996, at A11.

[44]Michael DiChiara, Note, *A Modern Day Myth: The Necessity of English As the Official Language*, 17 B.C. THIRD. WORLD L. J. 101, 109 (1997).

III. CONSTITUTIONAL BARRIERS TO OFFICIAL ENGLISH LAWS

Due to the lack of Supreme Court precedent regarding Official English laws, courts faced with language rights issues are forced to draw analogies from established Supreme Court cases.

Official English laws touch upon several areas of constitutional jurisprudence: the Free Speech Clause of the First Amendment, the Due Process Clause of the Fourteenth Amendment, and the Equal Protection Clause of the Fifth and Fourteenth Amendments. Each of these constitutional provisions acts as a barrier to upholding Official English laws before the Supreme Court.

A. THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT

The First Amendment states, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech."[45] Scholars have long debated the intentions of the framers of the First Amendment. Some argue that the framers intended to broadly protect the "marketplace of ideas,"[46] while others argue that the framer's intent was narrower, only protecting speech that is "essential to intelligent self-government in a democratic system."[47] Official English declarations restrict the free speech rights of government employees; thus, they may abridge protections afforded by the Free Speech Clause of the First Amendment.

Official English laws raise several First Amendment issues: first, they are generally overbroad;[48] second, they implicate the content-based/content-neutral

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[45]U.S. CONST. amend. I, cl. 2.

[46]*See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §12-1, at 786 (2d ed. 1988) (citing Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting) (stating that "the best test of truth is the power of the thought to get itself accepted in the competition of the market.")).

[47]*Id.*; *see also* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (arguing that the special guarantees of the First Amendment are limited to public discussion of issues of civic importance); ALEXANDER MEIKLEJON, POLITICAL FREEDOM (1960). Still others suggest that the Freedom of Speech Clause was created to foster self-fulfillment and individual autonomy in a free society. *See* TRIBE, *supra* note 46, §12-2, at 788; *see also* Scanlon, *A Theory of Free Expression*, 1 PHIL. & PUB. AFF. 204, 205-06 (1972).

[48]Assuming the government may regulate the speech, the overbreadth doctrine focuses on how the government restricts speech. *See, e.g.*, Board of Airport Comm'rs of L.A. v. Jews For Jesus, Inc., 482 U.S. 569 (1986) (invalidating an airport rule that prohibited all First Amendment activities in airport terminal); Members of City Council of the City of

distinction;[49] finally, they restrict the speech of government employees, thus triggering a distinct constitutional analysis.[50]

1. THE OVERBREADTH DOCTRINE

Federal and state statutes are typically attacked on First Amendment grounds on an "as applied" basis.[51] The Supreme Court created the "as applied" doctrine to limit a court's own power in determining the constitutionality of statutes by confining courts to deciding the issues based on the facts at hand.[52] Conversely, the overbreadth doctrine is a facial attack that challenges the potential application of the statute's prohibitory language.[53] The doctrine is an exception to the traditional standing requirement that a party's own rights must have been violated.[54] Further, the overbreadth doctrine represents a re-

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L.A. v. Taxpayers for Vincent, 466 U.S. 780 (1983) (refusing to apply overbreadth doctrine to ordinance that prohibited posting signs on public property); Broadrick v. Oklahoma, 413 U.S. 601 (1972) (upholding statutory provision that forbid civil service employees from engaging in political fundraising); *see infra* section III. A. 1. and accompanying text.

[49]Courts analyze statutes affecting free speech differently based on whether the statute is content-based or content-neutral. Content-based restrictions are aimed at the "communicative impact" of the expression, while content-neutral restrictions, though not aimed at the "communicative impact," may have some adverse effect on communication. *See* TRIBE, *supra* note 46, §12-2, at 790; *see infra* section III. A. 2. and accompanying text.

[50]The government generally is given more deference in regulating the First Amendment rights of government employees than it is in regulating the general public. *See, e.g.*, Waters v. Churchhill, 511 U.S. 661, 675 (1994) (invalidating a discharge of nurse in public hospital for making disparaging comments about another department); Connick v. Myers, 461 U.S. 138 (1983) (upholding a discharge of assistant prosecutor for circulating questionnaire on the grounds that the speech was not of public concern); Pickering v. Board of Educ., 391 U.S. 563 (1968) (rejecting a discharge of a teacher for writing letter criticizing school board's tax policy); *see infra* section III. A. 3. and accompanying text.

[51]Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 844-45 (1970).

[52]*See id.* at 849. "As applied" attacks are adjudicated on a case-by-case basis, based on the facts before the court. *See id.*

[53]*See id.* at 912.

[54]To establish standing to litigate, a party must typically show "an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); *see also* Yniguez v. Arizonans For Official English, 117 S. Ct. 1055 (1997). When a party challenges a statute on the grounds that it is overbroad, however, that statute may not have harmed the plaintiff at all.

laxation of other barriers to review such as abstention,[55] federal interference with state proceedings,[56] and the case or controversy requirement.[57]

In fact, the plaintiff may concede that the statute, as applied to their conduct, is constitutional. The overbreadth doctrine rests on the possibility that the application of the statute to others is unconstitutional. *See* TRIBE, *supra* note 46, §12-27, at 1023. For example, in *Broadrick v. Oklahoma*, 413 U.S. 601 (1972), several state employees were charged with engaging in partisan political activities in violation of state law. The challenged portions, *inter alia*, prohibited state employees from soliciting funds for political candidates or organizations and prohibited state employees from becoming members in political organizations. *See id.* at 603-04. In a 5-4 decision, the Court upheld the statute against a challenge that the provisions were both vague and overbroad. *See id.* at 602. In so holding, the Court stated that the overbreadth doctrine permits litigants "to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statutes very existence may cause others not before the Court to refrain from constitutionally protected speech or expression." *Id.* at 612.

Therefore, the doctrine is grounded in the principle that the statute will have a "chilling effect" on the freedom of expression. *See The First Amendment Overbreadth Doctrine*, *supra* note 51, at 855 (reasoning that "[t]he cost of the chill-delay in as applied review and intervening loss of rights" are the primary reasons why the "as applied method of review is set aside in First Amendment overbreadth cases).

[55]The doctrine of abstention represents a policy whereby the federal courts, exercising discretion, restrain their authority because of a "'scrupulous regard for the rightful independence of the state governments'" and for the smooth working of the federal judiciary. Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941) (citation omitted) (applying doctrine where the resolution of a federal constitutional question might be obviated if the state courts were permitted to interpret an ambiguous state law).

[56]The policy of avoiding federal interference with state proceedings is grounded in the doctrine of federalism. The Supreme Court wrote:

> [F]ederal interference with state judicial proceedings prevents the states not only from effectuating policies but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies. Such interference also results in duplicative legal proceedings and can readily be interpreted as reflecting negatively upon state courts ability to enforce constitutional principles.

Hoffman v. Purse, Ltd. 420 U.S. 592, 603 (1975).

[57]Article III of the Constitution limits the scope of federal judicial power. *See* TRIBE, *supra* note 46, § 3-7, at 67. First, federal courts depend on acts of Congress to obtain jurisdiction. *See* TRIBE, *supra* note 46, § 3-7, at 67. Second, Article III grants subject matter jurisdiction only to "cases" or "controversies." *See* TRIBE, *supra* note 46, § 3-7, at 67. In order for a claim to be justiciable, there must be a "real and substantial controversy." Poe v. Ullman, 367 U.S. 497, 509 (1961) (Brennan, J., concurring). The overbreath doctrine represents a relaxation of the case or controversy requirement because a litigant, whose own

The Supreme Court, however, has imposed several limitations on the application of the overbreadth doctrine. First, a statute's overbreadth must be real and substantial in relation to its legitimate proscriptions.[58] While an exact definition of "substantial overbreadth" has not been provided, the Court has indicated that "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge."[59] Second, the Court has maintained that the overbreadth doctrine is "strong medicine"[60] that must be avoided where federal or state courts have construed the challenged provisions narrowly, thus negating the possibility of overbreadth.[61] Moreover, where the statute's language leaves room for a saving construction by the lower courts, the Supreme Court will not generally declare it overbroad.[62] Neither legislators draft nor courts interpret Official English laws narrowly; thus, the First Amendment overbreadth doctrine is a substantial barrier to their constitutionality.[63]

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conduct may be unprotected, is nonetheless permitted to challenge a statute that abridges the First Amendment rights of other parties. *See The First Amendment Overbreadth Doctrine*, *supra* note 51, at 803-04.

[58]*See Broadrick*, 413 U.S. at 615; New York v. Ferber, 458 U.S. 747, 769 (1982); *The First Amendment Overbreadth Doctrine*, *supra* note 51, at 859.

[59]Member of the City Council of the City of L.A. v. Taxpayers For Vincent, 466 U.S. 780, 800-01 (1983).

[60]*Broadrick*, 413 U.S. at 613.

[61]*See* Osborne v. Ohio, 495 U.S. 103, 112-14 (1989). In *Osborne*, an Ohio statute prohibited the possession of nude photos of minors, while creating an exception for certain uses such as scientific and medical photos, was challenged on the grounds that it was overbroad in violation of the First Amendment. *See id.* at 112 n.8. The Court noted that the Ohio Supreme Court's interpretation of the statute's prohibition, to instances where the "nudity constitutes a lewd exhibition or involves a graphic focus on the genitals," removed constitutionally protected expression from the statute's scope. *Id.* at 113. Thus, the statute survived the overbreadth scrutiny. *See id.; see also Ferber*, 458 U.S. at 769 (noting that federal and state courts should construe "the statute to avoid constitutional problems, if the statute is subject to such a limiting construction.").

[62]*See Broadrick*, 413 U.S. at 613. Conversely, in *Board of Airport Comm'rs of L.A. v. Jesus for Jews, Inc.*, 482 U.S. 569 (1986), the Court held that an airport commission resolution, which stated that the airport terminal was "not open for First Amendment activities by any individual," was unconstitutionally overbroad. *Id.* at 572. In so holding, the Court reasoned that the resolution reached all First Amendment activity; thus, it would not be subject to a limiting construction by lower courts to save it from violating the overbreadth doctrine. *See id.* at 575.

[63]*See supra* note 66; *see, e.g.*, Yniguez v. Arizonans for Official English, 69 F.3d 920

In *Yniguez v. Arizonans for Official English*,[64] a state employee challenged a provision of the Arizona Constitution on the grounds that it violated the First Amendment.[65] The provision established English as the state's official language for all government functions and actions, with several exceptions consistent with federal law.[66] Yniguez was a bilingual employee of the Arizona De-

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(9th Cir. 1995), *vacated*, 117 S. Ct. 1055 (1997) (reversing Ninth Circuit's decision).

[64]69 F.3d 920 (9th Cir. 1995), *cert. granted,* 116 S. Ct. 1316 (1996), *vacated,*117 S. Ct. 1055 (1997) (vacated based on issues of mootness and lack of standing).

[65]On appeal to the United States Supreme Court, two other issues were raised: 1) whether the petitioner, Arizonans For Official English, had standing to maintain the action; and 2) whether there was a case or controversy with regard to Yniguez since she was no longer employed by the state. *See* Arizonans For Official English v. Arizona, 116 S. Ct. 1316 (1996). Ultimately, the Supreme Court did not reach the issue of the constitutionality of the provisions under the First Amendment, but decided the case on the standing and mootness issues. *See* Yniguez v. Arizonans for Official English, 117 S. Ct. 1055 (1997).

[66]Arizona voters passed the following constitutional provision by ballot initiative in 1988. *See Yniguez*, 69 F.3d at 924. It reads:

> ENGLISH AS THE OFFICIAL LANGUAGE
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> 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 publics schools and all government functions and actions. (3)(a) This article applies to: (i) the legislative, the executive and judicial branches of the 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, (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 English language as the official language of the State of Arizona.
>
> 3. Prohibiting This State from Using or Requiring the Use of Languages Other than English Section 3. (1) Except as provided in Subsection (2): (a) This State and all political subdivisions of this State shall act in English and

partment of Administration, who often used both English and Spanish to communicate with individuals that filed medical malpractice claims against the state.[67] Fearing disciplinary action, Yniguez sought an injunction against enforcement of the Official English provision and a declaration that the provision violated the First Amendment.[68] The Ninth Circuit, sitting *en banc*, held that the Official English provision was overbroad in violation of the First Amendment.[69] The *Yniguez* court found a threat to third party speech rights in a substantial number of instances and concluded that the provision was substantially overbroad.[70] The court reasoned that the provision applied to "speech in a seemingly limitless variety of governmental settings" and adversely affected the First Amendment rights of innumerable state and local employees.[71] Additionally, the court reasoned that the provision unduly burdened the interests of

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> 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 a part of a required or voluntary 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 in this State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection.

A.R.S. CONST. art. XXVIII §§ 1-4.

[67] *See Yniguez*, 69 F.3d at 924.

[68] *See id.* at 924-25. Additionally, Yniguez claimed that the provision violated the Fourteenth Amendment Equal Protection Clause and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000d. *See id.*

[69] *See id.* at 947.

[70] For example, the court stated that the restriction would apply to ministerial statements between office personnel, teachers in classrooms, town hall discussions, and diplomas from state universities. *See id.* at 932.

[71] *Id.*

non-English speaking Arizonans in obtaining information from the government in an understandable form.[72] The court opined that the provision was not subject to a limiting construction by the lower courts, which would negate the possibility of an overbreadth violation, and declared it unconstitutional.[73]

Official English laws by nature are generally overbroad in their proscriptions because they regulate the speech rights of an infinite number of government employees.[74] For example, Official English laws may prohibit politicians from speaking to their constituents at a town meeting or political rally in Spanish or at the extreme may even prohibit state universities from using Latin on their diplomas.[75] Official English laws promote the use of the English language, but do not require English-only. In these and similar instances, the lower courts should be given the opportunity to narrowly interpret such statutes to avoid the possibility of being invalidated by an overbreadth attack.[76] Moreover, in the context of Arizona's Amendment XXVIII, the *Yniguez* majority assumed that government employees were entitled to the same freedoms as private citizens.[77] The constitutional protections afforded public employees, even with regard to the First Amendment, are more limited.[78] As a result, restrictions on public employees are subject to a less stringent form of constitutional analysis.[79]

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[72]*See id.* As the dissent noted, the majority's view is flawed in that there is no First Amendment protection to have information conveyed in a manner that can be easily understood. *See id.* at 960. (Wallace J., dissenting). The majority could not point to any information that could only be conveyed in non-English language and thereby restricted the public from receiving information. *See id.*

[73]*See id.* at 928-29. Even though only one state court previously had the opportunity to interpret the provision, the court determined that the terms were not "readily susceptible" to a narrower interpretation. *Id.*

[74]*See id.*

[75]*See id.* at 932.

[76]*See* Osborne v. Ohio, 495 U.S. 103 (1989), *reh'g denied*, 496 U.S. 913 (1990).

[77]*See Yniguez*, 69 F.3d at 954 (Fernandez J., dissenting); *see infra* section III. A. 3. and accompanying text.

[78]*See infra* section III. A. 3. and accompanying text.

[79]*See infra* section III. A. 3. and accompanying text.

2. CONTENT-BASED/CONTENT-NEUTRAL RESTRICTIONS

Official English laws raise the complex content-based/content-neutral distinction in First Amendment jurisprudence.[80] To determine whether a statute is content-based or content-neutral, the Court employs an analysis that has been called an "arbitrary and easily manipulable process."[81] Despite its shortcomings, the content distinction will often be dispositive because it determines the appropriate level of judicial review.[82] Content-based restrictions, generally, turn on the "communicative impact" of the expression.[83] The content-based analysis is triggered, therefore, where the regulation is aimed at the ideas or information expressed or the effects produced by knowledge of the ideas or information, in other words, the content of the expression.[84] At a minimum, the Free Speech Clause prohibits the government from restricting speech based on its content.[85]

Scholars have identified several categories of First Amendment restrictions, many of which can be classified as either content-based or content-neutral restrictions.[86] One type that clearly falls within the purview of content-based restrictions are statutes that expressly restrict the communication of ideas and viewpoints.[87] Several other categories do not fit neatly within the content-

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[80]*See, e.g., Yniguez*, 69 F.3d at 957-58.

[81]*See* TRIBE, *supra* note 46, § 12-3, at 803. The content-based and content-neutral distinction has been criticized as "theoretically questionable and difficult to apply." Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981); *see also*, Mark Tushnet, *The Supreme Court and Its First Amendment Constituency*, 44 HASTINGS L.J. 881, 883 (1993) (stating that "placing a regulation in one category rather than another is as arbitrary as any formalist exercise," but the more important and more difficult aspect is defining the context of the regulation which often determines whether it is content-based or content-neutral).

[82]*See infra* notes 93-96 and accompanying text.

[83]TRIBE, *supra* note 46, §12-2, at 790.

[84]*See* TRIBE, *supra* note 46, §12-2, at 789.

[85]*See* TRIBE, *supra* note 46, §12-2, at 790.

[86]Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 197 (1983).

[87]*See id.*; *see, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (invalidating an ordinance that prohibited the display of burning crosses, swastikas, or other symbols that arouse anger on the basis of race, color, creed, religion or gender); Linmark Assoc. v. Township of Willingboro, 431 U.S. 85 (1977) (invalidating an ordinance that prohibited

based/content-neutral distinction such as statutes that are facially neutral but are applied based on the communicative impact,[88] statutes that restrict speech based on its subject-matter,[89] statutes that are content-neutral but restrict expression,[90] and speaker-based restrictions.[91] Nonetheless, even these classifications provide little guidance in classifying a statute as either content-based or

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posting real estate signs on property); Schacht v. United States, 398 U.S. 58 (1970) (invalidating a statute that permitted use of military uniforms in theatrical productions only where the portrayal did not discredit the armed forces).

[88]*See* Stone, *supra* note 86, at 234-39; *see, e.g.,* Cohen v. California, 403 U.S. 15 (1971) (invalidating a disturbing the peace statute as applied to an individual wearing a jacket bearing the phrase "Fuck the Draft").

[89]These restrictions can be classified as content-based restrictions or content-neutral restrictions depending on whether the speech occurs in a public forum. A public forum is a location that plays a vital role in communication, such as streets, sidewalks, and parks. *See* TRIBE, *supra* note 46, §12-24, at 987. When speech occurs in a public forum, the restriction is subject to strict scrutiny. When speech occurs in a private forum, however, courts apply lower level scrutiny. *See* Stone, *supra* note 86, at 239. *Compare* Widmar v. Vincent, 454 U.S. 263 (1981) (invalidating a state university policy that made school facilities available to all student groups, except those engaged in religious worship or teaching), Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (invalidating an ordinance that prohibited a utility company from inserting information addressing issues of public policy in its monthly bills) *and* Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) (invalidating an ordinance that prohibited picketing near schools, but exempted labor picketing) *with* Greer v. Spock, 424 U.S. 828 (1976) (upholding a military base policy that allowed civilian speakers to address military personnel, but prohibited partisan political speeches), Young v. American Mini Theaters, 427 U.S. 50 (1976), *reh'g denied*, 429 U.S. 873 (1976) (upholding a zoning ordinance that regulated the location of sexually explicit movie theaters) *and* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (upholding a city policy that leased advertising displays in city transit vehicles, but excluded advertising for public issues and political messages). For a more detailed discussion of subject-matter restrictions, see Stone, *supra* note 86, at 239-42.

[90]*See* Stone, *supra* note 86, at 242. *Compare* Cohen v. California, 403 U.S. 15 (1971) (invalidating a statute as applied to an individual wearing clothing bearing anti-draft phrase) *with* Federal Communication Comm'n v. Pacifica Found., 438 U.S. 726 (1978) (upholding an FCC broadcasting rule prohibiting broadcasters from airing patently offensive language). For a more detailed discussion on content-neutral statutes that restrict expression, see Stone, *supra* note 86, at 242-44.

[91]*See* Stone, *supra* note 86, at 244. *Compare* United States v. National Treasury Union Employees, 115 S. Ct. 1003 (1995) (invalidating a statute that prohibited government employees from receiving honoraria for speeches) *with* Connick v. Myers, 461 U.S. 138 (1983) (upholding a discharge of a public employee for circulating questionnaire pertaining to office policy). For a detailed discussion on speaker-based restrictions, see Stone *supra*, note 86, at 244-51.

content-neutral. Not surprisingly, Official English laws do not fit neatly into either the content-based or content-neutral category.[92]

Once it is determined that a statute is content-based, the Supreme Court applies a "two level" approach to determine whether the prohibited expression is high or low value speech.[93] Most content-based restrictions are subject to a heightened standard of judicial review and are presumed unconstitutional.[94] The primary justifications for a heightened standard of review are 1) that it is "impermissible for the government to restrict speech because it disapproves of the message conveyed;"[95] and 2) such restrictions interrupt the "marketplace of ideas" by distorting the search for the truth and limiting the information necessary to make informed decisions in a self-governing society.[96]

In *Yniguez v. Arizonans for Official English*,[97] Arizonans for Official English argued that Article XXVIII is content-neutral because "'choice of language . . . is a mode of conduct' -- a *nonverbal* expressive activity."[98] The court

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[92]*Compare* Yniguez v. Arizonans for Official English, 69 F.3d 920, 934-37 (9th Cir. 1995), *vacated*, 117 S. Ct. 1055 (1997) (opining that Official English laws are content-based) *with Yniquez*, 69 F.3d at 957-58 (Fernandez, J., dissenting) *and see id.* at 959 (Wallace, C.J., dissenting) (opining that Official English laws are content-neutral).

[93]The two-level approach has its origin in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Low value speech "are certain well-defined and narrowly limited classes of speech" that are afforded less constitutional protection. *Id.* at 571-72. Low value speech includes fighting words, obscenity, commercial speech, and defamation. *See* Stone, *supra* note 86 at 194. For a discussion on how the Court should determine whether a new class of speech is not deserving of full First Amendment protection, see Russell W. Galloway, *Basic Free Speech Analysis*, 31 SANTA CLARA L. REV. 883, 903 (1991).

[94]The standard of judicial review for content-based restrictions is strict scrutiny. *See* Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983). There must be a compelling state interest and the statute must be narrowly tailored to meet the state's interest. *See id.*

[95]Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 103 (1978).

[96]*Id.* at 101.

[97]69 F.3d 920 (9th Cir. 1995), *vacated*, 117 S. Ct. 1055 (1997).

[98]*Id.* at 934 (emphasis in original) (citation omitted). The petitioners, Arizonans For Official English, compared Article XXVIII to cases involving "expressive conduct" or "symbolic speech." *Id.* at 934. Generally, the government has wider latitude in regulating expressive conduct. Such restrictions are subject to intermediate level scrutiny, rather than the more exacting strict scrutiny utilized for content-based restriction. *See* United States v. O'Brien, 391 U.S. 367 (1968); *see infra* notes 125-141 and accompanying text.

rejected this argument.[99] Relying on *Cohen v. California*,[100] the *Yniguez* court opined that "the regulation of any language is the regulation of speech," and held that Article XXVIII was a content-based restriction.[101] As a result, the court subjected Article XXVIII to a heightened level of scrutiny and found it unconstitutional.[102]

Article XXVIII, however, is more analogous to a content-neutral restriction because it limits communication without regard to the message conveyed.[103] As distinguished from the statute in *Cohen*, Article XXVIII does not seek to suppress ideas or viewpoints, but rather, restricts a mode of expression.[104] Statutes that restrict a mode of expression or expressive conduct are subjected to lower level scrutiny.[105] Defined in the proper context, Article XXVIII limits a mode of expression that only affects the speech of government employees in the performance of their official duties.[106] Even if choice of language is

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[99]*See Yniguez*, 69 F.3d at 934. The majority opinion did recognize, however, that a bilingual person makes a choice to speak one language rather than another. *See id.* at 935. Further, the majority conceded that the choice does not reduce language to "conduct." *Id.* "Language, words, wording, tone of voice are not expressive conduct, but are simply among the communicative elements of speech." *Id.* Choice of language is often based on a desire to have information conveyed in a way that the receiver understands. *See id.* at 935-36. As the dissent points out, there is no right to have information conveyed in a manner that one understands. *See id.* at 960 (Wallace, C.J., dissenting).

[100]403 U.S. 15 (1971). In *Cohen*, an individual, who was wearing a jacket bearing the words "Fuck the Draft" in a county courthouse, was convicted for violating California Penal Code § 415, which prohibited disturbing the peace by "offensive conduct." *Id.* at 16. The Court held that, as applied to the facts of the case, the statute violated the First Amendment. *See id.* at 17. In so holding, the Court reasoned that the conviction "rest[ed] solely upon speech" because it was based on the offensiveness of the words. *Id.* at 18. The Court then determined that the proscribed speech did not fall within the limited class of low value speech, thus, it was subject to heightened scrutiny. *See id.* at 19-20; *see supra* note 93-94 and accompanying text. Finally, recognizing the emotive function of certain words, the Court stated that the state's interest in making the public display of "offensive words" a criminal offense created "a substantial risk of suppressing ideas" and was inconsistent with the First Amendment. *Cohen*, 403 U.S. at 26.

[101]*Yniguez*, 69 F.3d at 935.

[102]*See id.* at 936.

[103]*See id.* at 959 (Wallace, C.J., dissenting).

[104]*See id.* at 958 (Fernandez, J., dissenting).

[105]*See infra* notes 119-124 and accompanying text.

[106]*See Yniguez*, 69 F.3d. at 955 and 958; *see supra* note 66 and accompanying text.

content-based, the *Yniguez* majority failed to recognize the government's interests in controlling the content of its employee's speech.[107] In such cases, the Supreme Court has permitted the government to regulate the content of their employee's speech when the government is the speaker.[108]

On the other hand, content-neutral restrictions do not turn on the "communicative impact" of the expression, but nonetheless, may have some adverse effects on communication.[109] While content-neutral restrictions often have some effect on communication, the effects are "more remote and less direct than when the restriction is explicitly content-based."[110] In reviewing content-neutral restrictions, the Supreme Court balances the substantiality of the government interests served by the restriction against the First Amendment interests of effective communication.[111] As the interference with communication increases, so does the government's burden in justifying the restriction.[112] Similar to content-based restrictions, content-neutral restrictions fall into several categories including time, place and manner restrictions,[113] symbolic speech restrictions,[114] and restrictions that have an incidental impact on speech.[115]

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[107]*See Yniguez*, 69 F.3d at 956-57 (Fernandez, J., dissenting); *see infra* section III. A. 3.

[108]*See Yniguez*, 69 F.3d at 957 (Fernandez, J., dissenting) (citing Rosenberger v. Rector and Visitors of Univ. of Va., 115 S. Ct. 2510, 2519 (1995) (stating that the government is permitted to make content-based distinctions when it is the speaker)).

[109]TRIBE, *supra* note 46, §12-2, at 790.

[110]Stone, *supra* note 95, at 103.

[111]*See* Stone, *supra* note 86, at 190.

[112]*See* Stone, *supra* note 86, at 191.

[113]*See, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 648 (1981) (upholding a state fair rule that prohibited the distribution of printed material except from duly licensed booths on the fairgrounds); Cox v. New Hampshire, 312 U.S. 569, 574 (1941) (upholding an ordinance that required parade permits).

[114]*See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376 (1968) (upholding a statute that prohibited the burning of draft cards).

[115]*See, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), *reh'g denied*, 475 U.S. 1132 (1986) (upholding an ordinance that prohibited adult theaters from locating within a certain distance of residential areas because the statute regulated the secondary effects of the theaters); *see also* Note, *Content-Based Regulation on Speech: A Comparison of the Categorization and Balancing Approaches to Judicial Scrutiny*, 18 U. DAYTON L. REV. 593, 616 (1993).

Official English laws are more analogous to a restriction on a mode of expression or symbolic conduct, thus subjecting them to a relaxed scrutiny.[116] Generally, the government has a "freer hand in restricting expressive conduct than it has in restricting . . . [pure speech]."[117] In *Texas v. Johnson*,[118] the Supreme Court set forth the framework for the First Amendment analysis of symbolic-conduct.[119] As a threshold issue, the Court must determine whether the proscribed activity constitutes expressive conduct within the scope of the First Amendment.[120] In answering this question, the Supreme Court has rejected the view that a "limitless variety of conduct [is] labeled speech whenever the person engaging in the conduct intends thereby to express an idea."[121] If the conduct is expressive, the Court then asks whether the "State's regulation is related to the suppression of free expression."[122] If the regulation is related to the suppression of free expression, strict scrutiny applies, otherwise, the less stringent *O'Brien* [123] standard applies.[124]

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[116]*See* Yniguez v. Arizonans For Official English, 69 F.3d 920, 957 (9th Cir. 1995) (Fernandez, J., dissenting), *vacated,* 117 S. Ct. 1055 (1997).

[117]Texas v. Johnson, 491 U.S. 397, 406 (1988).

[118]*Id.*

[119]*See id.* While participating in a political demonstration, Johnson doused a flag with kerosene and set it on fire. *See id.* at 399. Several observers were offended by his conduct and Johnson was arrested, charged and convicted in violation of Section 42.09 of the Texas Penal Code, which prohibited an individual from "intentionally or knowingly desecrat[ing] . . . a state or national flag." *Id.* at 400. The statute defined desecrate as "deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons . . . " *Id.* By a 5-4 margin, the Court held that the statute prohibited expressive conduct and was inconsistent with First Amendment protections. *See id.* at 399. In so holding, the court reasoned that the state's interest was not in preserving the physical integrity of the flag, but to protect against expressive conduct that was offensive to others. *See id.* at 408-411.

[120]*See id.* at 403.

[121]United States v. O'Brien, 391 U.S. 367, 376 (1968).

[122]*Johnson*, 491 U.S. at 403.

[123]*See O'Brien*, 391 U.S. at 376. In *O'Brien*, the Court articulated the test to determine the constitutionality of a restriction that prohibits conduct that combines both "speech" and "non-speech" elements. *Id.* at 376. In *O'Brien*, an individual, who was trying to influence others to adopt his anti-war beliefs', was convicted of burning his draft card in violation of 50 U.S.C. § 462 (b), which prohibited the knowing destruction or mutilation of registration cards. *See id.* at 370. Rejecting the argument that O'Brien's conduct was protected "symbolic speech," the Court held that the regulation was constitutional both as enacted and

A strong argument can be made for classifying choice of language as expressive conduct.[125] Thus, any regulation of choice of language is subject to less stringent First Amendment analysis. Assuming choice of language is expressive conduct, the Court must determine whether the government, through the enactment of Official English laws, is attempting to suppress expression.[126] Official English laws regulate the choice of language, not the content of language. The distinction is subtle but important. Although an individual's choice of language may incidentally affect the content of the expression, it is expressive conduct.[127] The regulation of language is not related to the suppression of ideas, rather, it is related to the conduct. Because Article XXVIII is the most restrictive Official English law,[128] Arizona's justifications for enacting an Official English law must be scrutinized. Arizona claims that Article XXVIII promotes important non-discriminatory state interests of state and national unity.[129] Arizona further asserts that Article XXVIII creates an incentive to learn English, thereby providing our diverse community with the key to opportunity in the United States.[130] Arizona's interests are not related to the suppression of free expression because the regulation is limited to the conduct of government employees the choice of language.[131] Official English laws, therefore, should be subject to the less stringent *O'Brien* standard.

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as applied to his conduct. *Id.* at 376-77. In so holding, the Court set forth the test to determine the constitutionality of restrictions on "symbolic speech" as follows: to be deemed constitutional 1) the government restriction must be within the constitutional powers of the government; and 2) it must further an important or substantial state interest and; 3) the restriction must be unrelated to the suppression of free expression and 4) the effect on First Amendment freedoms is incidental and no greater than necessary to further the state interest. *Id.* at 377.

[124]*See Johnson*, 491 U.S. at 403.

[125]*See* Yniguez v. Arizonans For Official English, 69 F.3d 920, 957-58 (9th Cir. 1995) (Fernandez, J., dissenting), *vacated*, 117 S. Ct. 1055 (1997).

[126]*See Johnson*, 491 U.S. at 403.

[127]*See Yniguez*, 69 F.3d at 958. (Fernandez, J., dissenting).

[128]*See supra* notes 28-30, 66 and accompanying text.

[129]*See* Brief for Petitioner at 36-37, Yniguez v. Arizonans For Official English, 117 S. Ct. 1055 (1997) (No. 95-974); *see also Yniguez*, 69 F.3d at 944.

[130]*See Yniguez*, 69 F.3d at 944.

[131]*See supra* note 66.

First, in applying the *O'Brien* standard to Article XXVIII it is important to note that the government has a freer hand in controlling the speech of its employees.[132] Second, Arizona's interests include promoting the use of English and creating an incentive for immigrants to learn and use English.[133] These interests are important and substantial because of the influx of non-English speaking immigrants.[134] The state has an additional interest in controlling the speech of its employees in the performance of their official duties.[135] Moreover, the fiscal and administrative burdens of maintaining government forms in multiple languages, in an era of ever expanding government budget deficits, is an important government interest. In this instance, the regulation and the state's interests are unrelated to the suppression of free expression. Rather, they are related to the secondary effects of increased illegal and legal immigration in a region plagued by border problems.[136] Indeed, any statute requiring the general public to use only English would be unconstitutional and severely effect First Amendment interests.[137] In the context of regulating the speech of government employees in the performance of their official duties, however, such regulations only incidentally effect First Amendment freedoms and are

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[132]*See infra* section III. A. 3. and accompanying text.

[133]*See Yniguez,* 69 F.3d at 944.

[134]*See supra* notes 21-24 and accompanying text.

[135]*See infra* section III. A. 3. and accompanying text.

[136]The Supreme Court has permitted the government to regulate where the statute dealt with the secondary effects of the activity and not the expression. For example, in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the owner of several adult motion picture theaters challenged a city ordinance, which prohibited adult theaters within a specified distance of any residential zone, church, park or school, on First and Fourteenth Amendment grounds. *See id.* at 43. The town justified the ordinance on the grounds that adult theaters have a severe impact on the surrounding businesses and communities. *See id.* at 44. Describing the ordinance as a time, place and manner regulation, the Court explained that content-neutral restrictions, such as the city's ordinance, "are acceptable so long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication." *Id.* at 46-47. In so reasoning, the Court noted that the ordinance does not conflict with the fundamental principle that underlies the Courts concern about content-based restrictions: that the government may not restrict speech where it finds the views unacceptable or controversial, but instead was designed to deal with the "secondary effects" of the activity. *Id.* at 48-49. In conclusion, the Court upheld the ordinance as a valid response to the problems created by adult theaters. *See id.* at 54.

[137]*See generally* Farrington v. Tokushige, 273 U.S. 284 (1927); Meyer v. Nebraska, 262 U.S. 390 (1922).

sufficiently narrow in scope to survive constitutional scrutiny.[138] Furthermore, Article XXVIII includes exceptions in order to comply with federal law pertaining to education and voting,[139] protecting the public health and safety, and protecting the rights of criminal defendants.[140] Thus, the interests of non-English speaking Arizonans in obtaining essential government services is preserved.[141]

3. PUBLIC EMPLOYEE SPEECH

As previously noted, unique First Amendment issues are raised by Official English laws because the laws regulate the conduct of government employees.[142] Although it has been clearly established that government employees do not relinquish their constitutionally protected rights as a condition of their government employment,[143] the government does have a freer hand in regulating its employees than it does in regulating the general public.[144] As a result, government employees may be subject to restrictions that are necessary to meet the government's interests as an employer, even by a means that would be held unconstitutional if applied to the general public.[145]

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[138]As the dissent points out, the majority fails to identify the content of the speech suppressed and is "unable to show the public's interest in the unique content and meaning [that] can only be conveyed in Spanish." *Yniguez*, 69 F.3d at 959-60 (Wallace, C.J., dissenting).

[139]*See supra* note 66; *see also infra* section IV.

[140]*See supra* note 66.

[141]*See supra* note 66.

[142]*See, e.g., Yniguez*, 69 F.3d at 920.

[143]*See* Perry v. Sindermann, 408 U.S. 592, 597 (1972).

[144]*See* Waters v. Churchill, 511 U.S. 661 (1994) (upholding a dismissal of public employee for disruptive statements critical of her department); Connick v. Myers, 461 U.S. 138 (1983) (upholding a dismissal of public employee for circulating a questionnaire regarding office policy); Pickering v. Board of Educ., 391 U.S. 563 (1968) (invalidating a dismissal of public employee for commenting on matters of public concern).

[145]While the First Amendment protects certain types of speech, such as verbal tumult and even offensive utterances as byproducts of a "uninhibited, robust, and wide-open " debate, the government may bar employees from using such utterances to members of the public or fellow employees. *See Waters*, 511 U.S. at 672 (quoting Cohen v. California, 403 U.S. 15, 24-25 (1971) and New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

Pursuant to *Pickering v. Board of Education*[146] and its progeny, the Supreme Court employs a two part test in order to determine the constitutionality of a regulation that allegedly restricts a government employee's First Amendment interests.[147] First, the speech must address a matter of public concern.[148] A public employee's work-related speech is not protected by the First Amendment unless it relates to a matter of public concern.[149] Even where the speech is a matter of public concern,[150] the Court has deferred to the state's judgment when it believes that the speech may disrupt the workplace.[151] The Supreme

[146]391 U.S. 563 (1968). In *Pickering*, a teacher was dismissed for sending a letter, which criticized the local school board, to a local newspaper. *See id.* at 564. The teacher filed suit claiming that his actions were protected by the First Amendment. *See id.* In an opinion by Justice Marshall, the Court held that the statute violated the plaintiff's right to freedom of speech. *See id.* at 565. As an initial matter, the Court determined that the content of the letter, which dealt with the funding of the school system, though erroneous, was a matter of public concern. *See id.* at 572-73. Turning to the balancing test, the *Pickering* Court found that the public employee's interests in contributing to public debate outweighed the school board's interest in the efficient operation of the school system. *See id.* The Court reasoned that the comments did not disrupt close working relationships. *See id.* at 570. Moreover, the comments did not affect the performance of his duties as a teacher or the operation of the schools. *See id.* at 573.

[147]*See Waters*, 551 U.S. at 668 (1994).

[148]A matter of public concern is determined by the "content, form and context" of the speech. *Connick*, 461 U.S. at 147-48; *see also* United States v. National Treasury Union Employees, 115 S. Ct. 1003, 1013 (1995) (finding that speech addressed to public audiences, outside the workplace, are a matter of public concern).

[149]*See Connick*, 461 U.S. at 140. In *Connick*, a disgruntled assistant district attorney, who objected to her supervisor's decision to transfer her, was fired for circulating a questionnaire asking for comments on office policy, office moral and the confidence level in supervisors. *See id.* at 141. In a suit brought under 42 U.S.C. § 1983, the terminated employee claimed that the district attorney wrongfully terminated her for exercising her First Amendment right to free speech. *See id.* at 141. In addressing the claim, the Court emphasized that the *Pickering* balancing test only applied to matters of public concern. *See id.* at 143. The government argued that the employee's comments disrupted the office by undermining her supervisors authority and destroying close working relationships within the office. *See id.* at 151-52. Determining that the topics of the questionnaire touched upon matters of public concern only in a limited sense, the Court held that government's interests in the administration of a government office outweighed the limited First Amendment interests of the public employee. *See id.* at 154.

[150]*See id.* Even where the speech touches on a matter of public concern, the First Amendment does not require the government, as employer, to tolerate conduct that would "disrupt the office, undermine [its] authority, and destroy close working relationships." *Id.*

[151]*See id.*

Court in *Connick v. Myers,* wrote:

> when [an] employee['s] expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials [ ] enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment . . . . We hold that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest . . . a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency.[152]

Second, the Court must balance the state's interests as an employer,[153] against the public employee's interests,[154] as a citizen, in commenting on matters of public concern.

In *Yniguez v. Arizonans for Official English*, the Ninth Circuit addressed the issue of public employee speech.[155] Noting that Official English laws do not fit neatly into the public/private concern distinction, the *Yniguez* court stated that the fact that the speech occurs while performing official duties is not determinative of the public/private concern issue.[156] The *Yniguez* majority explained that the speech banned by Article XXVIII was of public concern because it pertained to government services and information, and unless it is in

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[152]*Id.* at 146-47.

[153]The state's interest include promoting the efficiency and effective operation of public services and preventing disruptions in the workplace. *See Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). In *Waters v. Churchill*, the Court wrote:

> The governments interest in achieving it's goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as a sovereign to a significant one when it acts as employer . . . [W]here the government is employing someone for the very purpose of effectively achieving it goals, such restrictions may well be appropriate.

Waters v. Churchill, 511 U.S. 661, 675 (1994).

[154]The public employee's interests, as a citizen, include allowing free and open debate vital to informed decision-making in a democratic society. *See Pickering*, 391 U.S. at 568.

[155]*See* Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995), *cert. granted,* 116 S. Ct. 1316 (1996), *vacated,* 117 S. Ct. 1055 (1997).

[156]*See id.* at 939.

an understandable form, many citizens would be deprived of essential public benefits.[157]

Continuing, the court performed the *Pickering* balancing test.[158] In measuring the employee's interests, the court focused on the practical effects of the Official English provisions and the public's interest in receiving information that can easily be understood.[159] Turning to the government's interests as an employer, the court found that the state lacked any interest in efficiency and effectiveness.[160] In fact, the court found that the Official English restriction decreased efficiency.[161] Moreover, the Ninth Circuit noted that the state's broader interests in unity and common language did not support the burdens imposed on First Amendment rights.[162] As a result, the court held that Article XXVIII violated the First Amendment because the employee's interests in free and open debate on issues of public concern outweighed the state's interests, as an employer, in the efficient and effective operation of the workplace.[163]

The *Yniguez* majority opinion, however, failed to adequately recognize the

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[157]*See id.* at 940. For example, the court noted that monolingual non-English speaking citizens would not be able to obtain information from government employees about a landlord's wrongful retention of security deposits, or how and where to file small claims complaints, as well as limit the ability of legislators to effectively communicate with their constituents. *See id.* at 941.

[158]The *Yniguez* majority opined that *United States v. National Treasury Union Employees*, 115 S. Ct. 1003 (1995) imposes a heavier burden on the government in justifying the regulation. *See Yniguez,* 69 F.3d at 942. The majority failed to recognize the significance of the distinction. In *National Treasury Employees Union*, the regulation prohibited government employees from receiving honorarium for appearances, speeches, or written articles *outside* the workplace. *See National Treasury Union*, 115 S. Ct. at 1009 (emphasis added). On the other hand, in *Yniguez*, Article XXVIII required government employees to speak English *during* the performance of their official duties. *See Yniguez,* 69 F. 3d at 924 (emphasis added). The government's interest as an employer is far greater in the *Yniguez* case because the speech occurs in the workplace. *See id.* at 960-61 (Kozinski, J., dissenting).

[159]*See id.* at 941-42.

[160]*See id.* at 942-43.

[161]*See id.* at 942. In *Yniguez*, the parties stipulated that the plaintiff's use of Spanish in the course of performing her duties contributed to the efficient and effective operation of the state. *See id.*

[162]*See id.* at 944-45.

[163]*See id.*

government's interest as an employer. As the dissent noted, "the issue involves language used, not the public or private concern content of the language."[164] Even if choice of language changes the content of the language, the government still has a right to control what is said by those who are acting on its behalf.[165] Yniguez merely disagreed with a policy instituted by her employer, the citizens of Arizona, that required her to speak English in performing her job.[166] The voters of Arizona, informed of the ramifications, passed Article XXVIII.[167] Article XXVIII is one of a plethora of restrictions that are placed on government employees. The Ninth Circuit's decision transforms these important policy decisions normally reserved to the legislature or the electorate into constitutional questions decided by the courts.[168]

B. FIFTH AND FOURTEENTH AMENDMENTS

1. THE EQUAL PROTECTION CLAUSE

The Equal Protection Clause of the Fourteenth Amendment states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[169] This constitutional guarantee requires states to treat similarly situated individuals in a similar manner.[170] The Supreme Court applies the

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[164]*Id.* at 955-56 (Fernandez, J., dissenting).

[165]*See id.* at 956-57 (Fernandez, J., dissenting); *see also* Rust v. Sullivan, 500 U.S. 173 (1991). In *Rust*, a statute that prohibited federally funded medical clinics from counseling about abortion was challenged on the grounds that it violated the clinics' First Amendment free speech rights. *See id.* at 181. The *Rust* Court upheld the statute. *See id.* at 178. According to the Court, individual employees must perform their duties in accordance with the government's restrictions. *See id.* at 198. "The employees remain free, however, to pursue abortion related activities when they are not acting under the auspices of the project." *Id.* at 198; *see also* Rosenberger v. Rector and Visitors of Univ. of Va., 115 S. Ct. 2510, 2518-19 (1995) (stating that [w]hen the state is the speaker, it may make content-based choices. . . . [the government is permitted] "to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.").

[166]*See Yniguez*, 69 F.3d at 956 (Fernandez, J., dissenting).

[167]*See id.* at 961 (Kozinski, J., dissenting).

[168]*See id.* at 961-62 (Kozinski, J., dissenting).

[169]U.S. CONST. amend. XIV, § 1.

[170]*See* Eisenstadt v. Baird, 405 U.S. 438, 446-47 (1971) (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

Constitution's requirement of equal treatment under the law differently depending upon the context of the classification.[171]

In analyzing equal protection based classifications, the Court employs a three-tier system: rational basis, intermediate scrutiny, and strict scrutiny.[172] Classifications based on social or economic factors are subject to rational basis review.[173] Rational basis review merely requires that the classification be "rationally related to a legitimate state interest."[174] Classifications based on gender or illegitimacy are subject to intermediate scrutiny.[175] To withstand intermediate scrutiny, the classification "must serve important governmental objectives and must be substantially related to achievement of those objectives."[176] The highest level of review, strict scrutiny, is employed when the classification is based on "suspect classes"[177] or "impermissibly interferes with

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[171]*See infra* notes 172-184 and accompanying text.

[172]*See* Donna F. Coltharp, *Speaking The Language of Exclusion: How Equal Protection and Fundamental Rights Analysis Permit Language Discrimination*, 28 ST. MARY'S L.J. 149, 165-66 (1996).

[173]*See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (invalidating a municipal ordinance requiring a special use permit for operation of mentally retarded group home); New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (upholding a transit authority policy precluding methadone users from employment).

[174]New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

[175]*See, e.g.*, Orr v. Orr, 440 U.S. 268 (1979) (invalidating a statute that authorized courts to impose alimony requirements on men only); Craig v. Boren, 429 U.S. 190 (1976) (invalidating a statute that set different legal drinking ages for males and females).

[176]Clark v. Jeter, 486 U.S. 456, 461 (1988).

[177]The "suspect class" designation was formulated to invalidate government action tainted by "prejudice against discrete and insular minorities . . . which tends to seriously curtail the operation of those political processes ordinarily to be relied upon to protect minorities" within our nation. United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938). The Supreme Court has recognized the characteristics of a "suspect class" as follows, the class: 1) is saddled with "an immutable characteristic determined solely by the accident at birth"; Frontiero v. Richardson, 411 U.S. 677, 686 (1973); 2) has been subject to a history of purposeful unequal discrimination; and 3) has "regulated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Indep. Sch. Dis. v. Rodriguez, 411 U.S. 1, 28 (1972) (rejecting the argument that wealth classification implicates "suspect class"); *see also* Romer v. Evans, 116 S. Ct. 1620 (1996) (rejecting the argument that homosexuals are a "suspect class"); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (rejecting the argument that mentally challenged are a "suspect class").

the exercise of a fundamental right."[178] Suspect classes include race,[179] alienage,[180] and national origin.[181] Statutes subject to strict scrutiny are presumed unconstitutional.[182] To withstand strict scrutiny,[183] the classification must be narrowly tailored to meet a compelling government interest.[184]

Official English laws may be challenged on the grounds that they are classifications based on national origin.[185] State action based on national origin is subject to strict scrutiny.[186] Although a strong argument can be made that lan-

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[178]Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976). For equal protection purposes, the United States Supreme Court has recognized several "fundamental rights." *See* Bullock v. Carter, 405 U.S. 134 (1972) (protecting the right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (protecting the right to interstate travel); Williams v. Rhodes, 393 U.S. 23 (1968) (protecting the rights guaranteed by the First Amendment); Skinner v. Oklahoma, 316 U.S. 535 (1942) (protecting the right to procreate).

[179]*See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) (striking down a state law that prohibited interracial marriages); Brown v. Board of Educ., 347 U.S. 483 (1954) (invalidating legally compelled segregation in public schools).

[180]*See, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971) (invalidating a state statute denying welfare benefits to resident aliens).

[181]*See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944) (applying strict scrutiny to military order excluding Americans of Japanese origin from west coast areas).

[182]*See* TRIBE, *supra* note 46, §16-6, at 1451.

[183]It is rare, but possible, that a regulation will survive strict scrutiny. In a widely criticized opinion, in the wake of World War II, the United States Supreme Court held that a classification based on national origin [Japanese ancestry] survived strict scrutiny. *See* Korematsu v. United States, 323 U.S. 214, 217-18 (1944) (upholding military order denying citizens of Japanese ancestry access to the west coast military area on the grounds that there was a compelling need to prevent espionage and that there was no practical way to determine the true alliances of citizens of Japanese ancestry); *see also* TRIBE, *supra* note 46, §16-6, at 1452 (stating that the *Korematsu* decision "represents the nefarious impact that war and racism can have on institutional integrity and cultural health").

[184]*See* Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983).

[185]*See* Sandra Guerra, *Voting Rights and the Constitution: The Disenfranchisement of Non-English Speaking Citizens*, 97 YALE L.J. 1419, 1425 (1988) (arguing that in cases affecting language rights, courts should, at the very least, employ intermediate scrutiny for equal protection claims because the vast majority of non-english speakers are derivative suspect classes, namely racial and ethnic minorities).

[186]*See* Hernandez v. Texas, 347 U.S. 475 (1954) (overturning criminal conviction on allegation of state's systematic exclusion of Mexican-Americans from jury).

guage discrimination is a proxy for national origin discrimination,[187] classifications based on language have traditionally received rational basis review.[188] Furthermore, courts have not recognized language rights as a fundamental right which also triggers strict scrutiny.[189]

The Supreme Court has, in a limited sense, recognized language rights and struck down laws that abridge the rights of non-English speaking individuals.[190] For example, in *Yu Cong Eng v. Trinidad*,[191] a businessman was charged with violating a statute that, in pertinent part, prohibited "any person . . . [from] keep[ing] its books in any language other than English, Spanish, or any local dialect."[192] The petitioner was a merchant who kept the financial records of his business in Chinese.[193] The Court concluded that the statute effectively prevented Chinese citizens and other similarly situated individuals from conducting business.[194] As a result, the Supreme Court held that the statute denied Chinese merchants equal protection of the law.[195]

In *Katzenbach v. Morgan*,[196] the Supreme Court addressed the issue of language rights. Several New York City registered voters brought suit to challenge the constitutionality of Section 4(e) of the Voting Rights Act of 1965 in-

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[187]*See* Guerra, *supra* note 185, at 1425 n.35.

[188]*See infra* notes 209-217 and accompanying text.

[189]*See* Bill Paitt, *Toward Domestic Recognition of A Human Right to Language*, 23 HOUS. L. REV. 885, 899 (1986) (suggesting the "country should choose to recognize some degree of 'official bilingualism,' at least as regards the Spanish language.").

[190]Most cases recognizing language rights are in the context of the Civil Rights Act of 1964 and the Fourteenth Amendment. *See, e.g.*, Lau v. Nichols, 414 U.S. 563 (1974) (holding that failure to provide supplemental English instruction for non-English speaking Chinese violated the Civil Rights Act of 1964); Yu Cong Eng v. Trinidad, 271 U.S. 500 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

[191]271 U.S. 500 (1925).

[192]*Id.* at 508. The purpose of the statute was to address the problem of sales tax avoidance by Chinese businessmen. *See id.* at 512.

[193]*See id.* at 508.

[194]*See id.* at 524-25.

[195]*See id.* at 528.

[196]384 U.S. 641 (1966).

sofar as it prohibited the enforcement of New York laws conditioning the right to vote on the ability to read and write English.[197] The Voting Rights Act of 1965, in pertinent part, prohibited "the States from conditioning the right to vote of [persons educated in American-flag schools in which the primary language was other than English] on the ability to read, write, understand, or interpret any matter in English."[198] The New York law had the effect of denying thousands of immigrants the right to vote.[199] In *Morgan*, the Supreme Court upheld Section 4(e) of the Voting Rights Act as a proper exercise of Congress' powers under Section Five[200] of the Fourteenth Amendment.[201] Although Section 4(e) was upheld, the *Morgan* Court abstained from deciding the constitutionality of New York's English literacy requirement.[202]

The Supreme Court has indeed recognized language rights to some extent in cases like *Yu Cong Eng* and *Morgan,* but the statutes challenged in those cases can be easily distinguished from Official English laws like Arizona's Article XXVIII.[203] Unlike *Yu Cong Eng*, where the statute prohibited all citizens from keeping their financial records in a language other than English thereby denying them the opportunity to operate their businesses,[204] Arizona's Article XXVIII only requires Arizona state employees to speak English in their official capacity.[205] Article XXVIII neither prevents bilingual employees from speaking foreign languages outside the workplace nor prohibits them from operating their private businesses.[206] In addition, the decision in *Morgan* upholding Section 4(e) of the Voting Rights Act is inapposite. *Morgan* dealt with the funda-

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[197]*See id.* at 643-44.

[198]Voters Rights Act, 42 U.S.C. 1973b(e) (1982); *see infra* section IV. B. and accompanying text .

[199]*See Morgan*, 384 U.S. at 644.

[200]Section Five states, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

[201]*See Morgan*, 384 U.S. at 646.

[202]*See id.* at 649.

[203]*See supra* note 66.

[204]Yu Cong Eng v. Trinidad, 271 U.S. 500, 508 (1925).

[205]*See supra* note 66.

[206]*See supra* note 66.

mental right to vote and enforcement of the Equal Protection Clause via the Voting Rights Act.[207] Arizona's Article XXVIII does not implicate a fundamental right nor does it conflict with federal law because Article XXVIII creates exceptions to allow compliance with federal law.[208]

Several circuit courts have addressed the issue of language rights in different contexts than those addressed by the Supreme Court in *Morgan* and *Yu Cong Eng*, and upheld them in the face of equal protection challenges. Despite the Supreme Court's opinions in *Yu Cong Eng* [209] and *Morgan*,[210] the circuit courts in *Soberal-Perez v. Heckler*,[211] *Frontera v. Sindell*,[212] and *Guadalupe*

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[207]*See Morgan*, 384 U.S. at 644-45.

[208]*See supra* note 66.

[209]*Yu Cong Eng*, 271 U.S. at 500.

[210]*Morgan*, 384 U.S. at 641.

[211]717 F.2d 36 (2nd Cir. 1983), *cert. denied*, 466 U.S. 929 (1984). The Second Circuit, in *Soberal-Perez* was faced with the question of whether the Secretary of Health and Human Service's failure to provide written notices, oral instructions, information, and advice in Spanish denied the plaintiffs equal protection of the law. *See id.* at 37. The plaintiffs were denied social security claims via a notice written in English. *See id.* Because of the plaintiff's inability to understand these notices, the Secretary determined that they waived their right to a hearing and appeal. *See id.* The Second Circuit held that the Secretary had not denied the plaintiff equal protection of the law. *See id.* at 41.

Addressing the equal protection claim, the court stated that while Hispanics represent a suspect class, the Secretary's failure to provide Spanish language assistance "does not on its face make any classification with respect to Hispanics as an ethnic group." *Id.* The court further stated: "[a] classification is implicitly made, but it is on the basis of language, *i.e.* English-speaking versus non-English-speaking-individuals, and not on the basis of race, religion, or national origin. Language, by itself, does not identify members of a suspect class." *Id.* For a facially-neutral policy to constitute discrimination in violation of the Equal Protection clause, the plaintiff must show an intent to discriminate against the suspect class. *See id.* at 42. At most, the court stressed, the Secretary's actions reflect a preference for English over other languages. *See id.* The court found that the secretary had a rational basis for printing and giving instructions in English on the grounds that "English is the national language of the United States;" thus, no equal protection violation. *Id.*

[212]522 F.2d 1215 (6th Cir. 1975). In *Frontera*, the Sixth Circuit addressed an English-only policy with regard to civil service exams. A prospective employee failed a civil service exam and claimed that the government's failure to disseminate and administer the civil service exam in Spanish denied him equal protection of the law. *See id.* at 1216. The court held that the Fourteenth Amendment does not require civil service exams to be administered in a manner that a non-English speaking applicant understands. *See id.* at 1218. In so holding, the Sixth Circuit relied on the Civil Service Commission's justifications for giving the exam in English. *See id.* at 1219. Among other things, the Commission contended that it would

Organization, Inc. v. Temple Elementary School[213] applied mere rational basis review to government actions favoring the English language. For example, in *Gaudalupe*, students of Mexican-American and Yaqui Indian origin claimed that the school district violated their right to equal educational opportunities by failing to provide bilingual education.[214] Applying rational basis review, the court held that the school district fulfilled its equal protection duty by adopting a means to cure the language deficiencies of non-English speaking students.[215] In so holding, the court reasoned that the Equal Protection Clause imposed no constitutional duty to provide bilingual education.[216] The court further explained that:

> [l]inguistic and cultural diversity within the nation-state, whatever may be its advantages from time to time, can restrict the scope of the [nation-state]. Diversity limits unity. Effective action by the nation-state rises to its peak of strength only when it is in response to aspirations unreservedly shared by each constituent culture and language group. As affection which a culture or group bears toward a particular aspiration abates, and as the scope of sharing diminishes, the strength of the nation-state's government wanes . . . Whatever may be the consequences, good or bad, of many tongues and cultures coexisting within a single nation-state, whether the children of this Nation are taught in one tongue and about primarily one culture or in many tongues and about many cultures cannot be determined by reference to the Constitution . . . Such

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be unreasonable and burdensome to provide exams in all of the various languages reflected in the community. *See id.* The nation's policy favors the English language and dealing with the nation in a common language. *See id.* at 1220. Many states, the court noted, recognize English as their official language. *See id.*; *see also supra* note 28. Moreover, our laws are printed in English, our legislature conduct their hearings and votes in English, and English language literacy is a condition to become a naturalized citizen. *See Frontera,* 522 F.2d at 1220. Thus, the court found that the Commission's actions survived rational basis review and were free from invidious discrimination. *See id.* at 1219. Generally, facially-neutral policies will be upheld unless it is shown that the state intentionally acted to discriminate against the class. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 240 (1976).

[213]587 F.2d 1022 (9th Cir. 1978).

[214]*See id.* at 1024.

[215]*See id.* at 1026-27. In *Guadalupe*, the school district provided non-English speaking students with remedial instruction in English. *See id.* at 1029.

[216]*See id.* at 1027.

matters are for the people to decide. [217]

Similarly, courts may apply rational basis review to Official English laws.[218] Under rational basis review, most Official English laws will survive equal protection challenges because they apply equally to English and non-English speakers alike. Moreover, the justifications for such laws, promoting unity and lessening fiscal and administrative burdens, are rational and legitimate; thus, satisfying rational basis review.[219] An argument, however, can be made that it is appropriate to apply a heightened level of review because of the close correlation between language and national origin.[220] Language discrimination against different groups has been a recurring theme in our nation's history.[221] Because the discrimination has shifted to different groups in different periods, it is unlikely that classifications based on language will be found to constitute a "suspect class."[222] In any event, heightened review, in the form of intermediate scrutiny may be warranted.[223]

2. SUBSTANTIVE DUE PROCESS

The Due Process Clause of the Fourteenth Amendment states that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[224] Rights protected under substantive due process are known as "liberty interests." When a statute burdens a liberty interest protected by due process, it is subject to strict scrutiny; otherwise, it is subject to rational

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[217] *Id.*

[218] *See supra* notes 209-17 and accompanying text.

[219] *See supra* notes 173-74 and accompanying text.

[220] *See* Karla C. Robertson, *Out of Many, One: Fundamental Rights, Diversity, and Arizona's English Only Law*, 74 DENV. U. L. REV. 311 (1996) (arguing that Official English laws should be recognized as a proxy for national origin discrimination); *see also* Caltharp, *supra* note 172 (arguing language discrimination deserves a higher level of scrutiny under the Fourteenth Amendment).

[221] *See* Perea, *supra* note 14, at 284-309.

[222] *See supra* note 177 and accompanying text.

[223] *See supra* notes 175-76 and accompanying text; *see also* Robertson, *supra* note 220.

[224] U.S. CONST. amend. XIV, § 1, cl 3.

basis review.[225] For example, the Supreme Court has recognized the right to privacy,[226] as well as the right of a competent individual to refuse medical treatment [227] as protected liberty interests.[228]

Official English laws are also subject to challenge on the grounds that they violate due process.[229] In *Meyer v. Nebraska*,[230] the Supreme Court addressed the use of foreign languages in education. A school teacher was charged with teaching a foreign language in violation of state law.[231] The teacher claimed

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[225]*See* Coltharp, *supra* note 172, at 181.

[226]*See* Roe v. Wade, 410 U.S. 113 (1973) (finding that a penumbra of constitutional rights affords individuals a right to privacy); Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating a state law that prohibited married couples from using contraceptives).

[227]*See* Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261 (1990) (upholding a statute that required clear and convincing evidence of an incompetent's desire to withdraw life sustaining treatment).

[228]The Supreme Court has explained:

> [the liberty interest protected by the due process clause of the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. [This] liberty may not be interfered with . . . by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.

Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923). "Liberty interests" have also been described as liberties that are "deeply rooted in the Nation's history and tradition." Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

[229]*See* Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995), *cert. granted,* 116 S. Ct. 1316 (1996), *vacated,*117 S. Ct. 1055 (1997); *see also Meyer*, 262 U.S. at 401. In *Meyer*, the Supreme Court rested its decision on the right to engage in any common occupations of life and the right for parents to control their children, rather than recognizing language rights as a protected liberty interest. *See id.*

[230]262 U.S. 390 (1922); *see also* Farrington v. Tokushige, 273 U.S. 284 (1926) (holding that state law that controlled the operation of foreign language schools and denied parents a "fair opportunity" to procure instruction for their children in violation of the Due Process Clause of the Fourteenth Amendment).

[231]*See Meyer*, 262 U.S. at 396. Nebraska state law prohibited any individual from

that the statute denied him a "liberty interest" protected by the Fourteenth Amendment.[232]

The *Meyer* Court held that the statute violated the Due Process Clause of the Fourteenth Amendment.[233] In so holding, the Court reasoned that liberty includes the right "to engage in any of the common occupations of life."[234] The Court found that the statute materially interfered "with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own."[235]

Commentators argue that language rights should be recognized as a fundamental right,[236] and, at the very least, *Meyer* limits a state's ability to proscribe the use of foreign languages.[237] The *Meyer* Court, however, decided the case based on the right to enjoy "common occupations of life," rather than expanding the holding to include language rights among the constitutionally protected "liberty interests."[238] In the context of Official English laws such as Arizona's Article XXVIII, the issue becomes distorted because Arizona is attempting to regulate the language of state employees performing in their official capacity, rather than the language rights of the general citizenry.[239] Although the *Meyer* Court protected language rights, the current Supreme Court is unlikely to further expand the fundamental right analysis and hold that the general citizen has the right to be provided with information in a language they understand.[240] Unless the Court expands the fundamental rights analysis, the Court would

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teaching a language other than English to a child until the child had successfully attained eighth grade. *See id.* at 397.

[232]*See id.*

[233]*See id.* at 401.

[234]*Id.* at 399.

[235]*Id.* at 401.

[236]*See* Paitt, *supra* note 189, at 901.

[237]*See* Valerie A. Lexion, Note, *Language Minority Voting Rights and the English Language Amendment*, 14 HASTINGS CONST. L.Q. 657, 665 (1987).

[238]*Meyer*, 262 U.S. at 399.

[239]*See supra* note 66.

[240]*See e.g.*, Vacco v. Quill, 117 S. Ct. 2293, 2302 (1997) (refusing to expand fundamental right analysis to right to physician assisted suicide).

likely apply mere rational basis review to Official English provisions and the provisions would consequently be upheld.[241]

IV. STATUTORY BARRIERS TO OFFICIAL ENGLISH LAWS

Official English laws implicate the following federal statutes: the Civil Rights Act of 1964, the Voters Rights Act of 1965, the Bilingual Education Act of 1968, and the Equal Educational Opportunity Act of 1974.

A. CIVIL RIGHTS ACT OF 1964

Title VII of the Civil Rights Act of 1964 protects individuals against employment discrimination on the basis of race, color, religion, sex, or national origin.[242] Official English laws, such as Arizona's Article XXVIII, are subject to challenge by an employee as violative of the Civil Rights Act of 1964 on the basis of national origin discrimination.[243] Although the circuit courts do not

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[241] *See supra* notes 224-228 accompanying text.

[242] *See* Title VII of the Civil Rights Act of 1964, §§ 701-718, 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. 1995). The Civil Rights Act states in pertinent part:

> It shall be an unlawful employment practice for an employer-
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

[243] *See, e.g.*, Yniguez v. Arizonans For Official English, 69 F.3d 920 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1316 (1996), *vacated*, 117 S. Ct. 1055 (1997). A plaintiff alleging discrimination under Title VII may proceed under two theories: disparate treatment or disparate impact. Disparate treatment theory requires proof of discriminatory intent, while intent is irrelevant under the disparate impact theory. *See* Pullman Standard v. Swint, 456 U.S. 273, 289 (1982); *see also* Steven I. Locke, *Language Discrimination and English-Only Rules in the Workplace: The Case for Legislative Amendment to Title VII*, 27 TEX. TECH. L. REV.

equate language discrimination with national origin discrimination,[244] the Equal Employment Opportunity Commission (hereinafter "EEOC") has adopted this position.[245] The EEOC Guidelines on Discrimination Because of National Origin "defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group."[246]

33, 62 (1996) (arguing Congress should amend Title VII to include language discrimination); Jeanne M. Jorgensen, *"English-Only" In the Workplace and Title VII Disparate Impact: The Ninth Circuit's Misguided Application of "Ability to Comply" Should Be Rejected In Favor of the EEOC's Business Necessity Test*, 25 SW. U. L. REV. 407, 410 (1996) (discussing methods of proving discrimination).

[244]*See infra* notes 252-263 and accompanying text.

[245]Administrative interpretations of an Act by the enforcing agency, in the form of interpretative guidelines, "constitute a body of experience and informed judgment to which courts and litigants may properly resort." Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1985). The courts, however, are not bound by the Guidelines. *See* Esponoza v. Farah Mfg. Co., Inc., 414 U.S. 86, 94 (1973).

[246]29 C.F.R. 1606.1. Additionally, the EEOC interpretative Guidelines with regard to English rules provide:

> (a) *When applied at all times.* A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation, and intimidation based on national origin which could result in a discriminatory working environment. [ ] Therefore, the Commission will presume that such a rule violates [T]itle VII and will closely scrutinize it.
>
> (b) *When applied only at certain times.* An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.
>
> (c) *Notice of the rule.* It is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language. Therefore, if an employer believes it has a business necessity for a speak-English-only rule at certain times, the employer should inform its employees of the general circumstances when speaking only in English is required

In *Lau v. Nichols*,[247] the Supreme Court addressed a language restriction in the context of the Civil Rights Act of 1964. A group of non-English speaking Chinese students claimed that the school system's failure to provide supplemental courses in English language violated the Civil Rights Act of 1964.[248] The *Lau* Court held that the failure to provide the additional language courses denied Chinese speaking students a meaningful opportunity to participate in the educational program in violation of the Civil Rights Act.[249] Writing for the majority, Justice White relied on the Department of Health, Education and Welfare's[250] regulations, which prohibit federally funded schools from denying the benefits of any educational program on the count of national origin.[251]

Despite the holding in *Lau*, several circuit courts have upheld English-only workplace rules.[252] For example, in *Garcia v. Spun Steak Company*,[253] a

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> and of the consequences of violating the rule. If an employer fails to effectively notify its employees of the rule and makes an adverse employment decision against an individual based on a violation of the rule, the Commission will consider the employer's application of the rule as evidence of discrimination on the basis of national origin.

29 C.F.R. 1606.7; *see also* David T. Wiley, *Whose Proof?: Deference to EEOC Guidelines on Disparate Impact Discrimination Analysis of "English-Only Rules*, 29 GA. L. REV. 539, 544-45 (1995).

[247]414 U.S. 563 (1973).

[248]*See id.* at 564. The suit was brought under 42 U.S.C. § 2000d, which excludes from federal financial assistance programs any group or organization that discriminates on race, color, religion, sex or national origin. *See id.* at 565. Additionally, the plaintiffs claimed that the failure to provide supplemental English courses violated the Fourteenth Amendment. *See id.* at 564. The *Lau* Court, however, did not address the Fourteenth Amendment claim. *See id.* at 566.

[249]*See id.* at 568.

[250]*See id.* at 568-69. The Department of Health, Education and Welfare had authority to promulgate regulations prohibiting discriminatory practices in federally assisted school systems. *See id.*

[251]*See id.* at 567-68.

[252]*See, e.g.*, Garcia v. Spun Steak Co., 998 F.2d 1480 (9th Cir. 1993), *reh'g denied*, 13 F.3d 296, *cert. denied*, 512 U.S. 1228 (1994); Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), *reh'g denied*, 625 F.2d 1016 (1980), *cert. denied*, 449 U.S. 1113 (1981).

[253]998 F.2d 1480 (9th Cir. 1993), *reh'g denied*, 13 F.3d 296, *cert. denied*, 512 U.S. 1228 (1994). In *Gutierrez v. Municipal Court of South East Judicial Dist.*, 838 F.2d 1031 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989), the Ninth Circuit reviewed, with a

group of Spanish speaking employees challenged the company's English-only rule on the grounds that it violated the Civil Rights Act of 1964.[254] Spun Steak Company instituted the English-only rule in an effort to prevent bilingual employees from harassing other workers in a language they could not understand.[255] The Ninth Circuit held that the English-only work rule did not violate the Civil Rights Act of 1964.[256]

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different result than *Garcia*, an English-only workplace rule for municipal court employees. *See id.* at 1036. The court adopted the EEOC's position on language discrimination, which in essence states that English-only rules violate the Civil Rights Act unless justified by the business necessity defense. *See id.* at 1040. The *Gutierrez* Court reasoned that because primary language and culture are derived from national origin, rules that have adverse effects on bilinguals may be pretext for national origin discrimination. *See id.* at 1039. Moreover, the court rejected the employer's justifications under the business judgment standard. *See id.* at 1041-44. The *Gutierrez* decision, however, has no precedential value and the courts are not bound by its reasoning because it was vacated as moot. *See* Gutierrez v. Municipal Court, 490 U.S. 1016 (1989). In *Guadalupe Org. Inc. v. Temple Elem. Sch.*, 587 F.2d 1022 (9th Cir. 1978), the Ninth Circuit again confronted the issue of English-only workplace rules. A group of students claimed, among other things, that the school district's failure to implement a bilingual education program instructed by bilingual teachers violated the Civil Rights Act of 1964. *See id.* at 1024. The court noted, however, that the school district did provide remedial English instruction to non-English speaking students in compliance with *Lau*. *See id.* at 1029. As a result, the court held that non-English speaking students were not "'effectively foreclosed from any meaningful education'" in violation of Title VII. *Id.* at 1029 (quoting Lau v. Nichols, 414 U.S. 563, 566 (1973)); *see also* Jurado v. Eleven-Fifty Corp., 813 F.2d 1406 (9th Cir. 1988) (holding that employer rule prohibiting bilingual disc jockey from using Spanish words on the air did not violate the Civil Rights Act of 1964).

[254] *Garcia*, 998 F.2d at 1483. The Hispanic employees claimed that the policy had a disparate impact on Spanish speaking employees. *See id.* The employees argued that the policy 1) denied them the ability to express their cultural heritage on the job; 2) denied them the privilege of employment enjoyed by monolingual English employees; and 3) created an atmosphere of inferiority, isolation, and intimidation. *See id.* at 1486-87. The Ninth Circuit rejected the plaintiff's arguments. *See id.* at 1487. First, the court stated that the Civil Rights Act does not confer substantive rights; therefore, it does not protect an employee's ability to express their culture at work. *See id.* Moreover, employees must often sacrifice self expression in the workplace. *See id.* Second, it is the employer's prerogative to define and limit their employee's ability to converse on the job. *See id.* Bilingual employees can comply with the rule and, at the same time, converse on the job. *See id.* An employee could not be adversely affected if he could easily comply with the rule. *See id.* Last, the court refused to adopt a *per se* rule that English-only workrules always amount to a hostile or abusive work environment and rejected the EEOC's guidelines on English-only rules. *See id.* at 1489; *see supra* note 246 and accompanying text.

[255] *See Garcia*, 998 F.2d at 1483. The policy stated "[i]t is hereafter the policy of this company that only English will be spoken in connection with work." *Id.*

[256] *See id.* at 1490.

Similarly, the Fifth Circuit, in *Garcia v. Gloor*,[257] upheld a similar English-only work rule. In *Gloor*, a bilingual employee challenged an employer rule that prohibited employees from speaking Spanish on the job, unless they were communicating with Spanish speaking customers, on the grounds that it violated the Civil Rights Act of 1964.[258] The Fifth Circuit held that the English-only work rule did not violate the Civil Rights Act of 1964.[259] In so holding, the court reasoned that choice of language did not equate with national origin discrimination.[260] The court noted that workplace rules, absent collective bargaining,[261] are determined by the employer and no authority exists to grant employees the right to speak the language of their choice at work.[262] While language may be used as a pretext for national origin discrimination, the *Gloor* court found that was not the case under these facts.[263]

Official English laws requiring government employees to perform their official duties in English are quite analogous to English-only rules imposed by private employers. Should other circuits follow the lead of the Fifth and Ninth Circuits, challengers of Official English laws will have little success bringing a civil rights claim. On the other hand, if other circuits adopt the EEOC's position,[264] which requires such a rule to be justified by business necessity,[265] a

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[257]618 F.2d 264 (5th Cir. 1980), *reh'g denied*, 625 F.2d 1016 (1980), *cert. denied*, 449 U.S. 1113 (1981).

[258]*See id.* at 266. The rule did not apply to Gloor's employees who worked outside the shop. *See id.* Additionally, it did not apply during work breaks or lunches. *See id.* The employer justified the rule on the grounds that: 1)English speaking customers objected to communications between employees that they could not understand; 2) it would improve the English language skills of employees; and 3) it provided supervisors, who spoke only English, a better opportunity to oversee their employee's work. *See id.* at 267.

[259]*See id.* at 266.

[260]*See id.* at 268.

[261]Collective bargaining is defined as a procedure by which an employer and an accredited representative of the employees form agreements concerning wages, hours, and other conditions of employment. *See* BLACK'S LAW DICTIONARY 263 (6th ed. 1990).

[262]*See Gloor*, 618 F.2d at 268-69.

[263]*See id.* at 268. Pretext is defined as a false justification for an individual's true motive. *See* BLACK'S LAW DICTIONARY 1187 (6th Ed. 1990).

[264]*See supra* note 246 and accompanying text.

[265]For a discussion of the defense of business necessity see MICHAEL J. ZIMMER, ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION, 487-502 (4th ed. 1997).

conflict among the circuits will exist creating an opportunity for the Supreme Court to decide the issue. Though language is closely related to national origin, it is not an immutable characteristic like race or national origin. Consequently, courts should avoid invalidating Official English laws under the Civil Rights Act, unless intentional discrimination is established. Likewise, judges should avoid second guessing an employer's business judgment that is both neutral on its face and not intended to be discriminatory.[266]

B. VOTING RIGHTS ACT OF 1965

The Voting Right Act of 1965 [267] was designed to eliminate discriminatory "test[s] or device[s]"[268] that effectively disenfranchised voters based on race and national origin. Congress passed the Voting Rights Act as a direct result of the restrictive reading of constitutionally protected voting rights in *Lassiter v. Northhampton County Board of Elections*.[269] Additionally, the 1975 Amendments to the Voting Rights Act mandate multilingual assistance for non-English speaking voters in geographic areas that qualify under the statute.[270]

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[266]*See Gloor*, 618 F.2d at 271.

[267]Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§1971, 1973 to 1973 bb-1 (1994)).

[268]42 U.S.C. § 1973b(e) prohibits "the States from conditioning the right to vote of [persons educated in American schools where the predominant language was other than English] on the ability to read, write, understand, or interpret any matter in English." *Id.*

[269]360 U.S. 45 (1959). In *Lassiter*, a voter challenged a state law that required all voters "to read and write any section of the Constitution in the English language" on the grounds that it violated the guarantee of equal protection of the law. *See id.* at 47. The Supreme Court upheld the statute as a valid exercise of the state's power. *See id.* at 53. The Court reasoned that the states are given broad power "to determine the conditions under which the right of suffrage may be exercised," provided that they are non-discriminatory and do not contravene restrictions imposed by Congress. *Id.* at 50-51. In this case, the statute applied to members of all races; thus, no discriminatory intent was inferred, even though a large portion of voters were unable to vote as a result of the literacy requirement. *See id.* at 53.

[270]*See* 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 (1994)). In order to qualify for multilingual assistance, over 5% of the eligible voters in a jurisdiction must belong to a single language minority and the rate of illiteracy of the language minority group must be higher than the national rate. *See* 42 U.S.C. § 1973aa-1a(b)(2) (1994); *see also* Guerra, *supra* note 185, at 1423 (arguing that the multilingual ballot requirement is inadequate because in large jurisdictions tens of thousands of non-English speaking people may be denied multilingual voting assistance).

In *Katzenbach v. Morgan*,[271] the Supreme Court upheld the Voting Rights Act as a proper exercise of Congress' power under Section Five of the Fourteenth Amendment.[272]

Official English laws are typically passed through the initiative and referendum process.[273] In several cases, voters have challenged, without success, such initiatives on the grounds that the circulation of the petitions, which were written only in English, violated the Voting Rights Act.[274]

Indeed, the Voting Right Act is a valuable piece of legislation that protects racial and linguistic minorities' fundamental right to vote.[275] Official English laws, such as Arizona's Article XXVIII, in order to be upheld must not affect the exercise of the right to vote for several reasons. First, state Official English laws must comply with federal law or they will conflict with the Voting Rights Act thereby violating the Supremacy Clause.[276] Second, most statutes

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[271]384 U.S. 641 (1966).

[272]*See id.*

[273]*See* Michele Arlington, *English-Only Laws and Direct Legislation: The Battle In the States Over Language Minority Rights*, 7 J.L. & POL. 325, 342-51 (1991) (criticizing the use of direct legislation, in general, and the use of direct legislation to pass Official English laws that implicate minority rights). The initiative process is defined as an electoral process whereby designated percentages of the electorate may initiate legislative or constitutional amendments through the filing of formal petitions to be acted on by the legislature or the total electorate. *See* BLACK'S LAW DICTIONARY 784 (6th ed. 1990). The referendum process is defined as a process of referring to the electorate for approval of a proposed constitutional amendment or law passed by the legislature. *See* BLACK'S LAW DICTIONARY 1281 (6th ed. 1990). Arizona's Official English amendment was passed via the initiative process. *See* Yniguez v. Arizonans for Official English, 69 F.3d 920, 924 (9th Cir. 1995), *vacated*, 117 S. Ct. 1055 (1997).

[274]*See, e.g.*, Delgado v. Smith, 861 F.2d 1489 (11th Cir. 1988); *reh'g denied*, 864 F.2d 1274 (1988), *cert. denied*, 492 U.S. 918 (1989) (holding that Voting Right Act does not apply to initiative petitions); Montero v. Meyer, 861 F.2d 603 (10th Cir. 1988), *on remand*, 790 F. Supp 1531 (D. Colo 1992), *rev'd*, 13 F.3d 1444 (10th Cir. 1994), *cert. denied*, 513 U.S. 888 (1994) (holding that bilingual provisions do not apply until measure was certified to be placed on ballot and petitions were not initiated by state so as to implicate bilingual provisions).

[275]*See generally,* Dunn v. Blumstein, 405 U.S. 330 (1972) (invalidating a state voter qualification based on duration of residence); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (invalidating a state statute that limited the right to vote to owners of taxable property); Harper v. Virginia Bd. of Election, 383 U.S. 663, 665 (1966) (invalidating a state poll tax).

[276]The Supremacy Clause states "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land[.]"

that inhibit the right to vote, a fundamental right, will be subject to strict scrutiny by the courts.[277] Two of the Official English laws introduced in Congress explicitly call for the repeal of the Voting Rights Act,[278] however, such a result may impair a non-English speaking citizen's right to vote. Repeal would have the effect of disenfranchising a large number of voters. Non-English speaking citizens would be unable to perform their civic duty, while simultaneously attempting to become proficient in the English language. Thus, Official English laws on the federal level must preserve the bilingual requirements of the Voting Rights Act.

C. BILINGUAL EDUCATION ACT OF 1968 / EQUAL EDUCATIONAL OPPORTUNITY ACT OF 1974

State and local governments are given broad discretion in designing and implementing educational programs. Currently, education is not recognized as a fundamental right.[279] Nonetheless, the federal government has intervened due to a perceived failure to address the needs of linguistic minority students via the Bilingual Education Act of 1968 (hereinafter "BEA").[280] The BEA's

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U.S. CONST. art. VI, cl. 2. Congress may preempt state regulation in three ways: 1) expressly; 2) by enacting a regulation that makes it impossible to comply with both federal and state law *i.e.*, "conflict preemption," or 3) by "occupying the field", which means the federal government's regulations are so detailed that they displace state regulation, even where no conflict exists. Pacific Gas & Elec. v. State Energy Resources Conservation Comm'n, 461 U.S. 190 (1983).

[277]*See* Lexion, *supra* note 237 (concluding that adoption of English Language Amendment would "abrogate current statutory and constitutional voting rights protections afforded to language minorities").

[278]*See* Chui, *supra* note 25.

[279]The Supreme Court has held that the right to education is not a "fundamental right" within the meaning of the Fourteenth Amendment. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

[280]*See* Bilingual Education Act of 1968, 20 U.S.C. § 3281 to 3283 (1995) ("BEA"). The statute provides that because of the large number of students with limited English proficiency it is:

> the policy of the United States, in order to establish equal educational opportunity for all children and to promote educational excellence (A) to encourage the establishment and operation, where appropriate, of educational programs using bilingual educational practices, techniques, and methods, (B) to encourage the establishment of special alternative instructional programs for students of limited English proficiency in school districts where the establishment of bilingual edu-

purpose is to promote "full participation by linguistic minorities in the nation's political, social, and economic life."[281] The Supreme Court's decision in *Lau* provoked Congress to enact the Equal Educational Opportunities Act of 1974,[282] which endorsed the opinion's approach to language based discrimination.[283]

In *Guadalupe Organization, Inc. v. Temple Elementary School District*,[284] the Ninth Circuit addressed whether the Equal Educational Opportunity Act (hereinafter "EEOA") required school districts to provide non-English speaking students with bilingual education programs staffed with bilingual instructors. The Ninth Circuit held that "appropriate action"[285] within the meaning of

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> cation programs is not practicable or for other appropriate reasons, and (C) for those purposes, to provide financial assistance to local educational agencies, and, for certain related purposes, to State educational agencies, institutions of higher education, and community organizations.

Id. at §3282(a). To achieve the goal of establishing bilingual education programs, the BEA provides grants to assist in the education of limited English proficient children. *See id.* at § 3291.

[281]*See* Note, *Bilingual Education: Discretion, Educational Decision-making, and Problems of Exclusion: The Tug of War Over the Curriculum for Linguistic Minority Students*, 76 CAL. L. REV. 1251, 1261 (1988).

[282]*See* Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701 to 1710 (1995). Section 1703 provides in pertinent part:

> [n]o state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by-
>
> (a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools; . . .
>
> (f) the failure by an educational agency to take *appropriate action* to overcome language barriers that impede equal participation by its students in its instructional programs.

Id. (emphasis added).

[283]*See* Note, *supra* note 281.

[284]587 F.2d 1022 (9th Cir. 1987).

[285]*See supra* note 282.

the EEOA does not require bilingual-bicultural education.[286] As the court noted, the EEOA requires schools to overcome language barriers, but does not mandate bilingual education.[287]

Bilingual education programs are intended to provide students with the benefits of an education and aid in placing non-English speaking students on equal footing with other students.[288] Due to the increase in non-English speaking citizens, the importance of bilingual education has increased.[289] Official English laws proposed on the federal level would repeal the Bilingual Education Act.[290] Alternatively, the federal government should allocate more funds to bilingual education programs to assure that non-English speaking students become proficient in English thereby preventing bilingual programs from becoming a detriment to these students. Such programs tend to perpetuate the English illiteracy problem by failing to provide non-English speaking students with adequate English instruction.[291] Undeniably, education is among the most vital of services provided by the states.[292] Compromising the education of non-English speaking students, in the name of unity, would be counterproductive. Congress, therefore, should draft Official English laws that preserve the BEA.

V. CONCLUSION

The role of the English language in our society has incited a heated debate. The stage has been set and the forces are prepared for a battle founded on fundamental constitutional concerns. As more and more states pass Official English legislation, the probability that the Supreme Court will eventually determine the fate of these laws increases. Whether challenged as violative of the Free Speech Clause,[293] the Equal Protection Clause,[294] or the Due Process

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[286] *See Guadalupe*, 587 F.2d at 1033.

[287] *See id.*

[288] *See* Note, *supra* note 281 at 1261.

[289] *See supra* notes 22-25 and accompanying text.

[290] *See* Chui, *supra* note 25.

[291] *See* DiChiara, *supra* note 44, at 123.

[292] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29-30 (1973) (recognizing the importance of education to both the individual and society).

[293] *See supra* section III. A. and accompanying text.

Clause,[295] a divergence of opinions exists as to the constitutional doctrines that apply to such laws.

The courts have traditionally afforded a significant amount of deference to the government in matters pertaining to the regulation of speech and conduct of government employees. This deference should continue. In the context of Official English laws, the government has a substantial interest as an employer in regulating the conduct of its employees as well as regulating the messages conveyed by it's employees on its behalf. In this setting, the government's interests must override the free speech interests implicated. Otherwise, every important government policy runs the risk of becoming a constitutional question.

As for the Fifth and Fourteenth Amendments, monolingual non-English speaking citizens may be temporarily deprived of important public information while becoming proficient in English. As the dissent in *Yniguez* noted, however, there is no constitutional right to have information conveyed in an understandable form. Moreover, circuit courts have upheld the governments policy of providing information in English-only. Therefore, unless the Supreme Court expands either the fundamental or liberty interests jurisprudence, it is unlikely that challenges based on the Equal Protection or Due Process Clauses will be successful.

Official English laws should be narrowly drafted in order to preserve the protections afforded non-English speaking citizens in statutes such as the Voting Rights Act and the Bilingual Education Act. For instance, Official English statutes that preserve bilingual ballots will allow non-English speaking citizens to perform their civic duty, on an informed basis, while simultaneously becoming proficient in the English language. Continuing bilingual education programs will have a similar effect. The education function provided by the states is crucial to the productivity and success of our nation in the next millennium. Through our educational system, children in bilingual programs are given the key to success -- knowledge. To compromise this vital function in the name of unity would be counterproductive.

Our great nation was founded on the principles of freedom and diversity. Indeed, our rich diversity has been an integral part of the success of our country. Likewise, in the global marketplace our diversity will be the key ingredient to success in the next century but, as a nation, we must reject separation and isolation within our own land based on language. Ever increasing immigration has led to a fractionalized society based on language. An unworkable standard that permits, for example, the use of government forms in multiple

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[294] *See supra* section III. B. and accompanying text.

[295] *See supra* section III. C. and accompanying text.

languages and road signs in several tongues reduces our common bonds as citizens of one nation. Our nation must have a common bond, other than the fact that we live under one flag. For as our common bonds wane so does our strength as a nation.[296] By promoting English as the universal language of the United States, Official English laws promote unity through a common bond -- the English language.

[296]*See* Guadalupe Org., Inc. v. Temple Elem. Sch. 587 F.2d 1022, 1027 (9th Cir. 1978).