The Constitutionality of English-Only Provisions in the Public Employee Speech Arena: An Examination of *Yniguez v. Arizonans for Official English*

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* Member, Third Year Class; B.A. 1993, University of California, Los Angeles. I dedicate this article to my father, Albert F. Pagni, and sister, Melissa P. Barnard, in gratitude for their insight and guidance throughout law school. I also thank my mother, Nancy Pagni, and sisters Michelle Stewart and Elisa Kelley for their encouragement and support. Special thanks to Susan Freitas, Kristin Mateer, Meredith Verlick and the *Constitutional Law Quarterly* staff for their patience, assistance, fashion tips, and support.

Introduction

> Spanish. Bestow great attention on this, and endeavor to acquire an accurate knowledge of it. Our future connections . . . will render that language a valuable acquisition.[1]

With the wave of anti-immigrant sentiment swelling throughout the United States, the campaign to make English the Nation's official language is gathering support among the populace as well as stimulating the antennae of congressional leaders. English-only supporters believe granting the English language official status will promote national unity and political stability and protect public confidence by eliminating the divisive influence of foreign language and culture.[2] Seventeen states already have some type of English-only statute on the books,[3] and twelve others have English-only bills pending in the Legislature.[4] While prior efforts to establish English as the official

1. THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 398 (Adrienne Koch et al. eds., 1993).

2. *See* Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1316 (1996). Interestingly, the English language is "itself a smorgasbord (Swedish) of words borrowed from foreign tongues." Gerald Parshall, *A 'glorious mongrel,'* U.S. NEWS & WORLD REP., Sept. 25, 1995, at 48. For example, a girl can be *fair* (Anglo-Saxon), *beautiful* (French) or *attractive* (Latin), while a bully may evoke *fear* (Anglo-Saxon), *terror* (French) or *trepidation* (Latin). *See id.*

3. *See* ALA. CONST. amend. 509; ARK. CODE ANN. § 1-4-117 (Michie 1996); CAL. CONST. art. III, § 6; COLO. CONST. art. II, § 30a; FLA. CONST. art. II, § 9; GA. CODE ANN. § 50-3-1 (Michie 1996); HAW. CONST. art. XV, § 4; ILL. REV. STAT. Ch. 460, para. 20 (1996); IND. CODE ANN. § 1-2-10-1 (Burns 1996); KY. REV. STAT. ANN. § 2.013 (Baldwin 1996); MISS. CODE ANN. § 3-3-31 (1996); NEB. CONST. art. 1, § 27; N.C. GEN. STAT. § 145-12 (1996); N.D. CENT. CODE § 54-02-13 (1996); S.C. CODE ANN. § 1-1-696 (Law. Co-op. 1996); TENN. CODE ANN. § 4-1-404 (1996); VA. CODE ANN. § 22.1-212.1 (Michie 1996); and WYO. STAT. ANN. § 8-6-101 (Michie 1996).

4. *See* A.B. 3017, 1995-1996 Leg., Reg. Sess. (Cal. 1995-1996); H.B. 47, 76th Leg., 2nd Sess. (Iowa 1995); H.B. 2157, 76th Leg., 2nd Sess. (Iowa 1995); H.B. 772, 88th Leg., 2nd Sess. (Mo. 1996); S.B. 665, 88th Leg., 2nd Sess. (Mo. 1996); A.B. 290, 207th Leg., 1st Sess. (N.J. 1996); S.B. 97, 207th Leg., 1st Sess. (N.J. 1996) A.B. 2432, 219th Leg., 2nd Sess. (N.Y. 1996); A.B. 6153, 219th Leg., 2nd. Sess. (N.Y. 1996); S.B. 938, 219th Leg., 2nd Sess. (N.Y.

national language have failed,[5] a sharply divided House of Representatives (259-169) passed a bill on August 1, 1996, which could establish English as the Nation's official language and prohibit the federal government from doing much business in other languages.[6] These statutes raise constitutional issues regarding whether a state has the power to require the exclusive use of the English language by its employees.

In November 1988, the citizens of Arizona adopted a ballot initiative amendment to the Arizona Constitution entitled "English as the Official Language,"[7] thereby approving what is arguably the most re-

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1996); H.B. 2054, 45th Leg., 2nd Sess. (Okla. 1996); H.B. 793, 179th Leg., Reg. Sess. (Pa. 1995-1996); S.B. 1216, 179th Leg., Reg. Sess. (Pa. 1995-1996); S.B. 2241, 1996 Leg., Reg. Sess. (R.I. 1996); H.B. 772, 99th Leg., 1st Sess. (Tenn. 1995); S.B. 128, 99th Leg., 1st Sess. (Tenn. 1995); H.J.R. 4214, 54th Leg., Reg. Sess. (Wash. 1996); S.J.R. 8209, 54th Leg., Reg. Sess. (Wash. 1996); H.B. 2378, 1996 Leg., Reg. Sess. (W. Va. 1996); S.B. 147, 1996 Leg., Reg. Sess. (W. Va. 1996); A.B. 688, 92nd Leg., Reg. Sess. (Wis. 1995-1996).

5. *See* H.R.J. Res. 81, 101st Cong., 1st. Sess. (1989); S.J. Res. 13, 100th Cong., 1st Sess. (1987).

6. *See* H.R. 123, 104th Cong., 1st Sess. (1995). President Clinton has threatened to veto the measure if it passes the Senate. Mike Dorning, *House Clears English-Only Measure After Emotional Debate*, CHI. TRIB., Aug. 2, 1996, at N3.

7. The initiative was sponsored by Arizonans for Official English. The statute reads, in pertinent part:

> 1. English as the Official Language; Applicability
> Section 1.
> (1) The English language is the official language of the State of Arizona.
> (2) As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions.
> (3)(a) This Article applies to:
> (i) the legislative, executive and judicial branches of government,
> (ii) all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities,
> (iii) all statutes, ordinances, rules, orders, programs and policies.
> (iv) all government officials and employees during the performance of government business.
> . . .
> 2. Requiring This State to Preserve, Protect and Enhance English.
> Section 2.
> This State and all political subdivisions of this State shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the state of Arizona.
> 3. Prohibiting this state from using or requiring the use of languages other than English; exceptions.
> Section 3.
> (1) Except as provided in Subsection (2):
> (a) This State and all political subdivisions of this State shall act in English and in no other language.
> (b) No entity to which this Article applies shall make or enforce a law, order, decree or policy which requires the use of a language other than English.
> (c) No governmental document shall be valid, effective or enforceable unless it is in the English language.

strictive of the state provisions regulating language rights.[8] That new provision, Article XXVIII of the Arizona Constitution ("Article XXVIII"), provides in essence that English shall be the official language of the State of Arizona, all of its political subdivisions, and all government officials and employees during the performance of government business.[9]

At the time the initiative passed into law, Maria Kelly Yniguez was an employee of the Arizona Department of Administration, where she processed medical malpractice claims asserted against the state. Yniguez, who is bilingual and frequently communicated in a combination of Spanish and English while performing her official duties, ceased speaking Spanish to claimants after the passage of Article XXVIII, fearing the new provision made her vulnerable to disciplinary action by her employer.[10]

Subsequently, in November 1988, Yniguez sought an injunction against state enforcement of Article XXVIII and a declaration that it violates the First and Fourteenth Amendments of the United States Constitution.[11] The district court upheld Yniguez's First Amendment challenge, ruling that Article XXVIII infringed on Yniguez's right to

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(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 and safety.

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

ARIZ. CONST. art. XXVIII.

8. *See* Yniguez v. Arizonans for Official English, 69 F.3d 920, 927 (1996); *see also* Note, *English Only Laws and Direct Legislation: The Battle in the States Over Language Minority Rights*, 7 J.L. & POL. 325, 337 (1991). For example, Article XXVIII would bar judges performing weddings from saying *Mazel Tov*, and prevent Arizona state universities from issuing diplomas in Latin or recognizing graduates as *summa cum laude*. *See Yniguez*, 69 F.3d at 932.

9. *See* Yniguez v. Arizona, 939 F.2d 727, 729 (9th Cir. 1991) *aff'd in part and rev'd in part sub nom.* Yniguez v. Mofford, 730 F. Supp. 309 (D. Ariz. 1990) *aff'd in part and rev'd in part sub nom.* Yniguez v. Arizonans for Official English, 42 F.3d 1217 (9th Cir. 1994), *and vacated*, 53 F.3d 1084 (9th Cir. 1995), *and reh'd en banc*, 69 F.3d 920 (9th Cir.), *and cert granted*, 116 S. Ct. 1316 (1996). The provision does, however, allow the use of languages other than English. *See supra* note 7.

10. *See Yniguez* 69 F.3d at 924.

11. *See id.* at 925.

free speech and was facially overbroad.[12] Governor Mofford, an outspoken critic of Article XXVIII, did not appeal the district court's judgment. Arizonans for Official English, the principal sponsor of the ballot initiative which eventually became Article XXVIII, intervened on the state's behalf and appealed to the Ninth Circuit.[13] A three-judge panel affirmed the district court decision,[14] but the decision was withdrawn pending further consideration en banc.[15] In *Yniguez v. Arizonans for Official English*,[16] a majority of the en banc panel affirmed the district court, concluding that Article XXVIII of the Arizona Constitution is facially overbroad in violation of the First Amendment of the United States Constitution.[17]

Yniguez presents a significant but rarely examined issue in constitutional law concerning the status of language rights and a state's power to restrict such rights among government employees.[18] Resolving such language rights issues, however, is anything but an easy task. One of the most difficult challenges that the *Yniguez* court faced was the highly semantic classification of the type of speech actually regulated by English-only provisions as this classification determines which level of scrutiny these provisions must survive to be upheld as constitutional. Unfortunately, because of the nature of language rights cases, numerous classifications could arguably apply. For example, some argue that speaking a foreign language implicates the very essence of pure speech itself, and thus is afforded full First Amend-

12. *See Mofford*, 730 F. Supp. 309. On February 6, 1990, the district court dismissed all of the defendants from the suit except Mofford.

13. *See Yniguez*, 42 F.3d 1217.

14. *See id.*

15. *See* Yniguez v. Arizonans for Official English, 53 F.3d 1084 (9th Cir. 1995). Whether Yniguez and Arizonans for Official English have sufficient standing to challenge and defend Article XXVIII, respectively, was not fully addressed by the en banc panel, although questions of standing in this case raise significant constitutional issues in themselves. *See infra* note 17. For purposes of this Comment, however, it is assumed both parties met the standing requirement.

16. 69 F.3d 920.

17. *See id.* at 924. The Supreme Court granted certiorari in March 1996 and is expected to hear arguments beginning in its October 1996 term. *See id.* at 920. The Court also requested the parties submit briefs addressing Arizonans for Official English's standing and whether there is a case or controversy with respect to Yniguez. *See* Dorning, *supra* note 6.

18. The issue has not been examined by the Supreme Court since the Court struck down laws restricting the use of non-English languages in the 1920s. *See* Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that a state law forbidding teaching of any modern language other than English in schools to any child who has not passed eighth grade violated Fourteenth Amendment due process); Bartels v. Iowa, 262 U.S. 404 (1923) (holding that a state law requiring use of English as medium of instruction in all secular subjects in all schools violated due process).

ment protection; others believe the choice to speak a non-English language is mere conduct—a nonverbal, conscious decision to speak a certain way—thereby limiting constitutional protection; still others believe that the use of non-English languages is a means of expression, simply a mode or manner implemented in the course of communication, much akin to wording and tone of voice.[19] The issue in this case is made even more complex by the fact that Yniguez is a public employee, whose on-the-job speech has traditionally been interpreted as calling for separate analysis in and of itself.

Adjudicating the constitutionality of Article XXVIII undoubtedly raises difficult questions. Unfortunately, the *Yniguez* majority failed to resolve any of them. In its conclusion, the majority failed to clearly state what *type* of speech "language rights" implicate.[20] This failure was compounded by the majority's inability to set forth the applicable standard of law for evaluating state restrictions on language rights.[21] This Comment argues that the majority's failure arises from three primary errors: (1) focusing the threshold inquiry on the illusory categorization of language rights as either pure speech or expressive conduct; (2) misapplying the overbreadth doctrine; and (3) misapplying the public employee speech doctrine to Yniguez's speech by concentrating on an otherwise irrelevant public versus private concern content distinction.

The first Part of this Comment briefly examines the *Yniguez* opinion, evaluating the lines of analysis employed and conclusions reached by the majority, concurring, and dissenting opinions. Part II focuses on speech categorization, critically examining the various classifications applied by the panel to language rights. Part III evaluates the various standards examined by the majority in light of case precedent, focusing particularly on what, if any, precedential value can be gleaned from this decision. Finally, Part IV offers the author's proposal for the best line of analysis applicable to both the overbreadth challenge of Article XXVIII as well as to Yniguez's speech specifically.

19. *See infra* Part II (discussing different classifications considered by the *Yniguez* court).

20. *See infra* Part II.

21. *See infra* Part III.A-B.

I. The *Yniguez* Opinions

The District Court held that Article XXVIII was substantially overbroad, in violation of the First Amendment.[22] As such, the district court did not reach the plaintiff's claims that Article XXVIII also violates the Fourteenth Amendment,[23] thereby limiting appellate review to Yniguez's First Amendment overbreadth challenge.[24]

A. The Majority Opinion

Judge Reinhardt's opinion for the majority[25] essentially republished the three-judge panel decision withdrawn when the case was selected for rehearing en banc,[26] adding only a few changes that addressed intervening Supreme Court cases.[27] Reinhardt focused on the classification of the speech interest at issue as well as the applicable standard of review.

Despite the contention of Arizonans for Official English that "choice of language . . . is a mode of conduct"—a "nonverbal expressive activity"[28] undertaken to symbolically communicate an idea much akin to burning draft cards or flags for expressive reasons[29]—Reinhardt concluded that "[s]peech in any language is still speech, and the decision to speak in another language is a decision involving speech alone."[30] Reinhardt, while conceding that a person does make "an

22. *See* Yniguez v. Mofford, 730 F. Supp. 309, 316 (D. Ariz. 1990). Under the overbreadth doctrine, a statute which is designed to burden or punish activities which are not constitutionally protected may be invalidated if the scope of the statute includes activities protected by the First Amendment. *See* Hill v. City of Houston, 764 F.2d 1156, 1161 (5th Cir. 1985).

23. *See Mofford*, 730 F. Supp. at 316.

24. *See* Yniguez v. Arizonans for Official English, 69 F.3d 920, 931 (9th Cir. 1996) (noting that Article XXVIII "will not be facially invalidated on overbreadth grounds unless its overbreadth is both real and substantial judged in relation to its plainly legitimate sweep, and the provision is not susceptible to a narrowing construction that would cure its constitutional infirmity"); *see also* Broadrick v. Oklahoma, 413 U.S. 601, 613-15 (1973).

25. Judge Reinhardt also wrote a colorful special concurrence directed at issues raised by Judge Kozinski's dissent. The special concurrence did not raise issues relevant to this Comment.

26. *See* Yniguez v. Arizonans for Official English, 42 F.3d 1217 (9th Cir. 1994).

27. *See Yniguez*, 69 F.3d at 924.

28. *Id.* at 934 (citing Appellant's Opening Brief at 15, 18 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 385 (1992))).

29. *See e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (burning American flag to symbolically express protest of Reagan administrative policies); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (wearing arm band to symbolically express protest of hostilities in Vietnam); United States v. O'Brien, 391 U.S. 367 (1968) (burning draft card to symbolically express opposition to Vietnam War).

30. *Yniguez*, 69 F.3d at 935-36.

expressive choice by choosing to speak one language rather than another,"[31] opined that "language, words, wording, [and] tone of voice . . . are not expressive conduct, but are simply among the communicative elements of speech."[32] Reinhardt concluded that "[t]o call a prohibition that precludes the conveying of information to thousands of Arizonans in a language they can comprehend a mere regulation of 'mode of expression' is to miss entirely the basic point of First Amendment protections."[33]

Relying on *Cohen v. California*,[34] the majority posited that Yniguez's decision to speak in Spanish was identical to Cohen's choice of language, as both implicated pure speech rights.[35] In an accompanying footnote, the *Yniguez* majority observed: "[T]o ignore the substance of speech and to look solely to form when analyzing the impact of a prohibition on speech is to be wholly mechanical and artificial."[36]

Judge Reinhardt, recognizing that the scope of Article XXVIII is limited to persons performing services for the government and that traditionally the government has a freer hand in regulating speech of such employees than regulating that of private citizens,[37] then examined the constitutionality of the restrictions of Article XXVIII on the pure speech rights of Arizona's employees. Despite recognizing that government employee speech is entitled to greater constitutional protection when the employee is speaking "as a citizen upon matters of public concern," rather than on matters of private or personal interest,[38] the majority failed to state whether Yniguez's speech was of

31. *Id.* at 935.

32. *Id.*

33. *Id.* at 936.

34. 403 U.S. 15 (1971) (holding that the offensive-conduct conviction for wearing a jacket emblazoned with the words "Fuck the Draft" was unconstitutional because it rested solely on speech, not conduct). *See* discussion *infra* notes 73-77 and accompanying text (regarding the majority's application of *Cohen*).

35. *See Yniguez*, 69 F.3d at 935-36.

36. *Id.* at 936 n.21.

37. *See id.* at 938; *see also* Waters v. Churchill, 114 S. Ct. 1878, 1866 (1994) (upholding the firing of a nurse at a public hospital for disruptive statements made at work which were critical of department); Rankin v. McPherson, 483 U.S. 378, 384 (1987) (upholding discharge of a public employee for expressing, in private conversation, hope that the President would be assassinated); Connick v. Myers, 461 U.S. 138, 154 (1983) (upholding termination of a public employee for circulating a questionnaire regarding office policy); Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (upholding dismissal of a school teacher for publishing a letter critical of school board).

38. *Yniguez*, 69 F.3d at 939 (quoting *Connick*, 461 U.S. at 147).

"public" or "private" concern.[39] Judge Reinhardt boldly asserted that "[t]his case does not . . . require us to attempt to resolve any broad, general questions regarding the scope of government's authority to regulate speech that occurs as part of an employee's official duties,"[40] and justified this assertion by reasoning that although the "fact that the speech occurs as a part of the performance of the employee's job . . . affects the nature of our analysis . . . [it] does not necessarily determine its outcome" in this case.[41] Despite these clear assertions, the majority subsequently muddled the issue by dropping a footnote stating that speech in this case was closer to public concern content than private.[42]

Building on recent Supreme Court decisions, the Reinhardt majority also considered the public's right to receive information in evaluating the constitutionality of Yniguez's speech, finding "public employee speech doctrine weighs heavily the public's 'right to receive information and ideas' by affording First Amendment protection to speech that the public has an interest in receiving."[43]

After examining the classification of Yniguez's speech, the Reinhardt majority identified three standards of review that could possibly apply.[44] However, the majority failed to establish clear, guiding precedent by concluding that "we need not decide what level of scrutiny or what approach to balancing is applicable here . . . [as] the result is the same [under all three tests]: The restrictions on free speech are not justified by the alleged state interests."[45]

In short, the majority reached the conclusion that Article XXVIII restricted pure speech of public concern content. It determined that the state interest in controlling the content and manner of employee

39. *See id.*, 69 F.3d at 939; *see also* discussion *infra* Part II (concluding that even though the speech did not clearly fit either category, Reinhardt opined that it seemed closer to public than private concern).

40. *Yniguez*, 69 F.3d at 939.

41. *Id.* at 940; *see infra* Part II.

42. *See Yniguez*, 69 F.3d at 939 n.23; *see infra* Part II.

43. *Id.* at 942 (quoting United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1015 (1995)); *see also* Connick v. Myers, 461 U.S. 138, 149 (1983); Pickering v. Board of Educ., 391 U.S. 563, 571-72 (1968); Piver v. Pender County Bd. of Educ., 835 F.2d 1076, 1079-80 (4th Cir. 1987).

44. *See Yniguez*, 69 F.3d at 943-44 (evaluating the strict scrutiny test applied in *Rutan v. Republican Party*, 497 U.S. 62, 70-76 & n.4 (1990), the balancing test applied in *Waters* and *Pickering* and by the dissent in *Rutan*, and the "judicial inquiry" approach adopted in *National Treasury Employees Union*, 115 S. Ct. at 1015-18).

45. *Yniguez*, 69 F.3d at 944.

speech cannot outweigh the free speech interests impaired by Article XXVIII.[46]

B. The Brunetti Concurrence

The concurrence of Judge Brunetti accepted the majority's conclusion that Article XXVIII was facially overbroad in violation of the First Amendment.[47] However, Judge Brunetti wrote separately to emphasize that the restriction of Article XXVIII on the free communication of ideas between elected officials and the people they serve was a sufficient reason in itself to strike down the provision.[48] It is this portion of Brunetti's opinion that the author believes to be the most judicially sound analysis of Yniguez's claim.[49]

Judge Brunetti observed that "[t]he manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy,"[50] and that Article XXVIII precludes legislators from "fully expressing their views to, and learning the views of, [their] constituents."[51]

Judge Brunetti also noted that the majority opinion regarding the public's interest in receiving services in Spanish could conflict with existing Ninth Circuit precedent regarding the public's right to receive such services.[52] Judge Brunetti attempted to distinguish *Yniguez* from these precedents, stating that "consideration of the public's interest in receiving Yniguez's Spanish language communications is only for the purpose of establishing *her* right to speak, not of establishing the public's right to receive."[53]

In conclusion, the Brunetti concurrence adopted the majority conclusion that Article XXVIII implicated pure speech of public concern content. While concurring that Article XXVIII was facially overbroad as applied to Yniguez, Brunetti also argued the provision was sufficiently overbroad as applied only to elected officials.

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46. *See id.* at 947.

47. *See id.* at 950 (Brunetti, J. concurring).

48. *See id.* at 951.

49. *See infra* Part IV.

50. *Yniguez*, 69 F.3d at 951 (quoting Bond v. Floyd, 385 U.S. 116, 135-36 (1966)).

51. *Id.* at 951.

52. *See id.*; *see infra* note 91 (recognizing Ninth Circuit case law denying constitutional right to receive information in Spanish).

53. *Yniguez*, 69 F.3d at 952.

C. The Fernandez Dissent

The dissent of Judge Fernandez, joined by Chief Judge Wallace and Judges Hall and Kleinfeld, disagreed with the majority's classification of the speech interest involved. Rather than focusing on the speech itself and making a threshold inquiry into whether speaking Spanish implicated pure speech or expressive conduct, as the majority did, the Fernandez dissent focused on the speaker, beginning its analysis from the starting point that Yniguez's speech interest implicated public employee speech rights.

Admitting this case presented neither a purely public nor private concern issue, the Fernandez dissent nevertheless concluded that the case was "more like a case of private concern speech."[54] Focusing on the language used, rather than the public or private concern content of that language, the Fernandez dissent interpreted Article XXVIII as a content-based restriction on the mode of expression, as opposed to the majority's pure speech analysis.[55] Citing recent Supreme Court decisions,[56] Judge Fernandez concluded that a "State can, in general, control the content and mode of its own speech, and the general public does not have a constitutional right to have the State provide services in any particular language."[57]

In sum, the Fernandez dissent analyzed Article XXVIII under the public employee speech doctrine as a content-based restriction on private concern speech. Applying rational basis review, the Fernandez dissent concluded Article XXVIII did not violate the First Amendment.[58]

D. The Wallace Dissent

Chief Judge Wallace concurred with the conclusions in the Fernandez dissent. However, Wallace wrote separately to address the majority's pure speech classification of Yniguez's speech interest.

Wallace opined that "[i]t is untenable for the majority to hold that the Article restricts pure speech yet fail to identify [any] suppressed messages,"[59] articulating "the undeniable conclusion that the Article regulates the mode of speech, not pure speech."[60] Judge Wal-

54. *Id.* at 956 (Fernandez, J., dissenting).
55. *See id.* at 957.
56. *See id.* at 957-58 (citing Rosenberger v. Rector of Univ. of Va., 115 S. Ct. 2510, 2518-19 (1995); *R.A.V.*, 505 U.S. 377; Rust v. Sullivan, 500 U.S. 173 (1991)).
57. *Yniguez*, 69 F.3d at 958.
58. *See id.* at 959.
59. *Id.* (Wallace, C.J., dissenting).
60. *Id.*

lace concluded that this classification "should end the matter, for mere regulation of government employees' mode of speech does not implicate the First Amendment or require the various balancing tests which the majority employs."[61]

Thus, while concurring in the conclusion of the Fernandez dissent, Wallace argued Article XXVIII implicated the mode of expression of public employee speech, rather than its content. As such, Wallace concluded Arizona was free to regulate Yniguez's speech under the First Amendment.

E. The Kozinski Dissent

Judge Kozinski, with whom Judge Kleinfeld joined, opined that utterances made by government employees in the course of employment implicate speech rights held by the government, not employees.[62] Judge Kozinski asserted that "Yniguez's case has nothing in common with *Pickering* because the speech here belongs to the government; there is nothing to balance."[63] Citing two recent Supreme Court decisions,[64] Judge Kozinski concluded that the State may "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."[65] Judge Kozinski ended by noting that his decision was not necessarily dispositive of Article XXVIII's constitutionality, as successful challenges may exist under the Equal Protection Clause or Title VI of the Civil Rights Act of 1964,[66] or in First Amendment claims by those whose ability to deal with the government is impaired.[67]

In short, Kozinski concluded that Article XXVIII regulated speech rights held by the government, not employees. Relying on *Rust* and *Rosenberger*, Kozinski concluded that Arizona was free to regulate the content of its own messages under the First Amendment.

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61. *Id.* at 960; *see supra* note 44 (describing the three tests).

62. *See Yniguez*, 69 F.3d at 961 (concluding that the "speech is the government's, not theirs").

63. *Id.* at 962.

64. *See* Rust v. Sullivan, 500 U.S. 173 (1991) (upholding provision which prohibited employees in federally-funded medical clinics from counseling about abortion); Rosenberger v. Rector of Univ. of Va., 115 S. Ct. 2510 (1995) (holding that a state cannot deny funding to student publication based on content because speech at issue was not government's).

65. *Yniguez*, 69 F.3d at 963.

66. 42 U.S.C. § 2000(d) (1995).

67. *See Yniguez*, 69 F.3d at 963.

II. Classification of Speech Interest at Issue in Language Rights Cases

The first inquiry a court must make when evaluating First Amendment challenges of speech restrictions is to determine what type of speech is involved. Since different constitutional standards apply to different types of speech, this initial classification of the speech interest is pivotal to the outcome of a case.

The opinions in *Yniguez* considered over seven different classifications of the speech interest regulated by Article XXVIII.[68] Remarkably, the majority failed to apply even one. Notwithstanding extensive examination of numerous First Amendment cases, the majority failed to clearly identify which category of speech English-only provisions fall under, leaving confusion and guesswork for judges as well as legislators hoping to avoid the pitfalls suffered by Article XXVIII.

A. Initial Classification of Language Rights as Speech or Conduct

Before addressing the specific facts of Yniguez's claim or the explicit language of Article XXVIII, the majority made the general determination that restrictions on non-English communications involved speech, not conduct.[69] This Comment argues that the majority erred in structuring its analysis in such a manner, as the "speech/conduct" distinction is indeterminate and unavailing in the language rights context, and leads to conclusory results of little analytical or precedential value.

1. The Majority's Conclusion that Article XXVIII Implicated Pure Speech

Arizonans for Official English asserted that "choice of language . . . is a mode of conduct"—a "*nonverbal* expressive activity"[70] similar to that engaged by plaintiffs in other "symbolic speech" cases. In support of this view, Chief Judge Wallace concluded in his dissent that the Article XXVIII regulates mode of expression and held that

68. *See supra* Part I. The majority opinion considered pure speech, symbolic speech, expressive conduct, the right to receive information, and both private and public concern content of government employee speech. In addition, the Fernandez dissent considered Article XXVIII as both a manner- and content-based restriction on public employee speech. The Wallace dissent classified Article XXVIII as a restriction on mode of expression. The Kozinski dissent classified the speech interest as the government's, not Yniguez's.

69. *See Yniguez*, 69 F.3d at 936.

70. *Id.* at 934.

any conclusion that it regulates pure speech is simply untenable.[71] The majority concluded, however, that categorizing and analyzing Yniguez's speech as a mode of expression is erroneous.

The majority concedes that "a bilingual person does, of course, make an expressive choice by choosing to speak one language rather than another."[72] But, the majority found the Supreme Court's holding in *Texas v. Johnson* disposed of any such reasoning.[73] In *Johnson*, the Court held that "[i]n deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'"[74] In this case, it is clear that Yniguez did not intend to convey any message by merely choosing to speak in Spanish. This conduct in no way symbolized or expressed any substantive communication she hoped to convey.[75]

Therefore, the majority logically turned to *Cohen v. California,* which "emphatically reject[ed] the suggestion that the decision to speak in a language other than English does not implicate pure speech concerns, but is instead akin to expressive conduct."[76] In *Cohen*, the Supreme Court recognized the First Amendment status of choice of language when it reversed the conviction of a man who walked through a courthouse corridor wearing a jacket bearing the words "Fuck the Draft."[77] California argued, much like Arizonans for Official English does here, that Cohen's choice of profane language was conduct similar to "symbolic speech."[78] The Court in *Cohen* held that "[t]he only 'conduct' which the State sought to punish is the fact of communication."[79] The Court, therefore, concluded that the "conviction rest[ed] solely upon speech, . . . not upon any separately identifi-

71. *See id.* at 959 (Wallace, C.J., dissenting).

72. *Id.* at 935 (footnote omitted).

73. *See* 491 U.S. 397, 404 (1989).

74. *Id.* (quoting Spence v. Washington, 418 U.S. 405, 410-411 (1974)).

75. *See id.* at 397 (burning an American flag to symbolically convey a message of protest); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (wearing an arm band to symbolically convey a message of protest); United States v. O'Brien, 391 U.S. 367 (1968) (burning a draft card to symbolically communicate protest of war); Brown v. Louisiana, 383 U.S. 131, 141-42 (1966) (communicating protest of segregation through a sit-in).

76. Yniguez v. Arizonans for Official English, 69 F.3d 920, 936 (9th Cir. 1996).

77. Cohen v. California, 403 U.S. 15, 26 (1971) (holding California's "offensive conduct" provision unconstitutional).

78. *Id.* at 18.

79. *Id.*

able conduct which allegedly was intended by Cohen to be perceived by others as expressive of particular views."[80] As Yniguez's use of a non-English language was not intended to be "perceived by others as expressive of particular views," the majority rejected Chief Judge Wallace's dissenting analysis on this point.

2. Artificiality of Speech/Conduct Distinction

The major flaw in the structure of analysis adopted by the majority and the dissent is that both seek to identify a speech/conduct distinction that is indeterminate and inevitably false, leading to conclusory results that fail to provide any insight or guidance for analyzing future language rights issues.[81] Frequently, courts struggle to classify First Amendment issues as either speech or conduct. The problem with making such a distinction is that it has less determinate value than assumed. All communication, be it verbal, written or otherwise, contains some element of conduct—so too, is most conduct expressive.[82] As one commentator has noted:

> To some extent expression and action are always mingled; most conduct includes elements of both. Even the clearest manifestations of expression involve some action, as in the case of holding a meeting, publishing a newspaper, or merely talking. At the other extreme, a political assassination includes a substantial mixture of expression.[83]

A speaker's decision to use certain words, tone of voice, wording, body language, and mannerisms all contain elements of both speech and conduct. As Tribe illustrated, "[e]xpression and conduct, message and medium, are thus inextricably tied together in all communicative behavior; expressive behavior is '100% action and 100% expression.'"[84] It is not surprising, therefore, that the Supreme Court has

80. *Id.*; *cf.* Stromberg v. California, 283 U.S. 359 (1931).

81. *See* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-7, at 827 (2d ed. 1988).

82. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (burning an American flag); Buckley v. Valeo, 424 U.S. 1 (1976) (contributing money to political campaign); Spence v. Washington, 418 U.S. 405 (1974) (displaying flag with peace symbol attached); *Cohen*, 403 U.S. 15 (wearing a jacket with "Fuck the draft" written on the back); Schact v. United States, 398 U.S. 58 (1970) (wearing a uniform); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (wearing an arm band); Edwards v. South Carolina, 372 U.S. 229 (1963) (conducting a sit-in demonstration); NAACP v. Button, 371 U.S. 415 (1963) (litigating as a form of political expression); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (requiring a compulsory flag salute); Thornhill v. Alabama, 310 U.S. 88 (1940) (picketing); *Stromberg*, 283 U.S. 359 (displaying red flag).

83. *See* THOMAS IRWIN EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION, 84 (1970).

84. TRIBE, *supra* note 81, § 12-7, at 827 (citations omitted).

failed to articulate any rational basis for making such a distinction. Any attempt to shoehorn speech and conduct into distinct categories would prove unworkable, as any communicative effort could "be hung almost randomly on the 'speech' peg or the 'conduct' peg as one sees fit."[85]

The artificiality of the speech/conduct distinction induces courts to advocate exclusively those facts which will justify whatever conclusion is most convenient to the ultimate holding.[86] For this reason, some scholars have concluded that "[a]ttempts to determine which element 'predominates' will therefore inevitably degenerate into question-begging judgments about whether the activity should be protected."[87] *Yniguez* illustrates this paradox perfectly.

The majority initially focuses on the communicative nature of language and the use of language to convey meaning or a message, reasoning that "[l]anguage, words, wording, tone of voice—are not expressive conduct, but are simply among the communicative elements of speech."[88] The court acknowledges that "vibrating one's vocal chords, moving one's mouth and thereby making sounds, or . . . putting pen to paper, or hand to keyboard" is clearly expressive conduct, but dismisses it with the tautological rationale that such conduct is shaped by language, and language by definition is speech.[89] The fact that the majority must go to such irrational lengths only proves the indeterminability of speech/conduct distinctions. Any attempt to distinguish that which cannot be distinguished inevitably leads to such inarticulable justifications as demonstrated above. Such conclusions, being so easily and frequently manipulable, provide no precedential guidance to attorneys, legislators or the judiciary.

The majority also relies to some degree on the public's "right to receive information and ideas"[90] to justify a pure speech categorization. Unfortunately, in so doing, the majority opinion "confuses its evaluation of the interests favoring First Amendment protection,"[91]

85. *Id.*

86. *See* Stephanie M. Kaufman, *The Speech/Conduct Distinction and First Amendment Protection of Begging in Subways*, 79 GEO. L.J. 1803, 1821 (1991).

87. John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1495 (1975).

88. Yniguez v. Arizonans for Official English, 69 F.3d 920, 935 (9th Cir. 1996).

89. *Id.* at 934.

90. *Id.* Arizonans for Official English had alleged that "the state may not be compelled to provide information to all members of the public in a language they can comprehend." *Id.*

91. *Id.* at 960 (Wallace, C.J., dissenting). Judge Brunetti's concurrence even took great pains to clarify the majority's analysis, emphasizing "consideration of the public's interest

muddling the public's alleged interest "in the unique content and meaning which Yniguez can only convey in . . . Spanish"[92] and the public preference that "Yniguez speak in a mode they can understand."[93] Moreover, the Ninth Circuit has long recognized that "individual citizens have no constitutional right to require that state services be performed in any particular language."[94]

Finally, the majority attempts to support its conclusion by reasoning that choice of language may "simply be based on a pragmatic desire to convey information."[95] The majority even cites *Cohen* for support, a case that arguably had more difficulty with the speech/conduct dichotomy than *Yniguez*.[96]

In an approach similar to that taken by the majority, the Wallace dissent willfully molds the facts to support its expressive conduct categorization. The Wallace dissent claims that the majority's difficulty in identifying the content of the speech that Article XXVIII suppresses is indicative that the true speech interest at issue is mode of expression, not pure speech.[97] Wallace concludes that because the majority cannot clearly identify the "meaning conveyed" by Yniguez's speaking in Spanish, rather than English, it confuses its evaluation of the speech interest.[98] This reasoning erroneously assumes that speech/conduct categories are mutually exclusive; that is, since the majority's justification for classifying the interest involved as pure speech was erroneous, the speech interest is *ipso facto* conduct. The dissent struggles in its attempt to categorize language rights for the same reason as the majority. The classification is illusory. The manipulability of the speech/conduct distinction and its indeterminate content render any

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in receiving Yniguez's Spanish language communication is only for the purpose of establishing her right to speak, not of establishing the public's right to receive." *Id.* at 952.

92. *Id.* at 960.

93. *Id.*

94. *Id.* at 958 (Fernandez, J., dissenting) (citing Guadalupe Org., Inc. v. Tempe Elementary Sch. Dist., 587 F.2d 1022, 1026-27 (9th Cir. 1978); Carmona v. Sheffield, 475 F.2d 738, 739 (9th Cir. 1973)). Despite this precedent, the majority considered the public's interest in receiving information to be an important element of its analysis. The majority argued that the Supreme Court decision in *National Treasury Employees Union* "makes it clear that public employee speech doctrine . . . afford[s] First Amendment protection to speech that the public has an interest in receiving." *Id.* at 942 (citing Connick v. Myers, 461 U.S. 138, 149 (1983); Pickering v. Board of Educ., 391 U.S. 563, 571-72 (1968)); *see also* United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1015 (1995).

95. *Yniguez*, 69 F.3d at 935.

96. Justice Blackmun's dissent characterized Cohen's claim as "mainly conduct and little speech," Cohen v. California, 403 U.S. 15, 27 (1971) (Blackmun, J. dissenting), while the majority stated Cohen's conviction rested "solely on speech," *id.* at 18.

97. *See Yniguez*, 69 F.3d at 959.

98. *See id.* at 960.

such distinction by the *Yniguez* court erroneous and misleading. Therefore, any determination that Yniguez's Spanish communications are pure speech or expressive conduct "must be seen at best as announcing a conclusion of the Court, rather than as summarizing in any way the analytic processes which led the Court to that conclusion."[99]

Aside from its futility, the speech/conduct distinction is simply unnecessary in this case. Article XXVIII is not aimed directly at ideas or information, but rather seeks a goal independent of communicative content by restricting the speech of government employees.[100] Rather than focusing in the abstract on speech or conduct, the majority should have begun its analysis by examining the facts of the case. Yniguez challenged Article XXVIII as a public employee. Thus, this Comment argues that any analysis of the speech interest at issue must begin with the public employee speech doctrine.

B. The Majority's Application of the Public Employee Speech Doctrine

After categorizing the speech interest as pure speech, the majority then turned its analysis to the public employee speech doctrine, focusing on whether Yniguez's speech was a matter of public or private concern. Relying on *Pickering* and *Waters*, the majority concluded that the content of Yniguez's speech involved matters of public concern.[101] This conclusion was in error. The majority misapplied precedent by forcing Yniguez's speech into the public versus private concern dichotomy when it clearly did not fall within the traditional definitions.

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99. TRIBE, *supra* note 81, § 12-7, at 827.

100. *See* TRIBE, *supra* note 81, § 12-23, at 977-80. Tribe argues that any First Amendment analysis should focus on the government, as historically posited by traditional speech cases. *See* United States v. O'Brien, 391 U.S. 367 (1968). Tribe analyzes free speech issues with a two-tier approach. If the regulation is aimed at the "communicative impact" or substance of an act, then analysis follows under the first tier, where the government bears the burden of showing restricted speech poses a "clear and present danger" or otherwise falls within that class of nonprotected speech. TRIBE, *supra*, § 12-2, at 791. Government acts, like Article XXVIII, though not aimed at ideas or information per se, seek a goal independent of communicative content or impact and have the indirect result of constricting the flow of information or ideas. Evaluation of these types of acts follows under the second tier. *Id.* § 12-23, at 977. On this tier, free speech values and the government's regulatory interest are balanced, and a regulation will be upheld so long as it does not unduly restrict the flow of information and ideas. *Id.* § 12-2, at 792.

101. *Yniguez*, 69 F.3d at 939 n.23 (conceding "the speech cannot be easily pigeonholed," the majority concluded "the speech prohibited by Article XXVIII . . . more closely resembles public concern than private concern speech"); *see infra* notes 128-34 and accompanying text.

1. The Majority's Conclusion

Historically, the Supreme Court has held that public employee speech could be restricted by terms of employment. The Court in *Waters* held that "even many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees."[102] As Justice Holmes stated, "[a police officer] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[103] In 1968, however, the Court began to recognize that public employees could no longer be "subjected to any conditions, regardless of how unreasonable."[104] The Supreme Court has examined the public employee speech doctrine in several decisions, of which the majority focused on *Pickering, Connick, Waters, Rutan* and *National Treasury Employees Union.*

In *Pickering v. Board of Education*, the Supreme Court examined the constitutionality of a decision by the Illinois Board of Education to dismiss a teacher for writing and publishing a letter critical of the Board's allocation of school funds.[105] The Supreme Court stated that how a school system raises and spends revenue is the type of issue about which "free and open debate is vital to informed decision-making by the electorate."[106] Thus, "it is essential that [public employees] be able to speak out freely on such questions without fear of retaliatory dismissal."[107] In reversing the dismissal, the Supreme Court established a balancing test to be applied to First Amendment challenges by government employees regarding restrictions on their freedom to speak out on matters of public concern:[108] "The problem . . . is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[109]

102. Waters v. Churchill, 114 S. Ct. 1878, 1886 (1994). As one commentator noted, "the public employee speech doctrine has long recognized the uneasy, yet necessary trade-off between the free and lively exchange of ideas and the efficient and proper functioning of our public institutions." Terence Cawley, *'Great Subtleties of Judgment': The Fourth Circuit's Approach to the Public Employee Speech Doctrine in Jackson v. Bair*, 67 N.C. L. REV. 976, 976 (1989).

103. McAuliffe v. Mayor of New Bedford, 29 N.W. 517, 517-18 (1892).

104. Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1967).

105. 391 U.S. 563, 564 (1968).

106. *Id.* at 571-72.

107. *Id.* at 572.

108. *See id.* at 569.

109. *Id.* at 566.

In *Connick v. Myers* the Court announced a standard for assessing the *Pickering* public concern content prong.[110] In *Connick*, an employee of the district attorney was terminated for circulating a questionnaire soliciting the views of her fellow workers regarding office transfer policy, morale, and general office administration.[111] The Court upheld the termination because the limited First Amendment interest involved did not require the district attorney to tolerate disruptive office behavior.[112] The Court stated, "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."[113] The Supreme Court has applied the test "only when the employee spoke 'as a citizen upon matters of public concern' rather than 'as an employee upon matters only of personal interest.'"[114] The Court has generally "refrained from intervening in government employer decisions that are based on speech that is of entirely private concern."[115] Thus, any application of what the majority refers to as the "*Waters/Pickering*" standard requires a preliminary determination of content.

Judge Kozinski's dissent, however, argues that by limiting its analysis to the *Waters/Pickering* line of inquiry, the majority ignores two more recent approaches to the public employee speech doctrine.[116] Kozinski argues that "[t]he majority masks the enormity of its departure [from precedent] by pretending this is just another employee-speech case like *Pickering* . . . or *Waters*"[117] and fails to recognize the speech at issue here is the government's speech, not Yniguez's. In this respect, Judge Kozinski correctly addresses the very distinction the majority missed, concluding that Yniguez is merely speaking words for the government when she performs her official duties, and thus has no personal stake in those words.[118] Unfortunately, Kozinski's next

110. 461 U.S. 138, 147-48 (1983).
111. *See id.* at 141.
112. *See id.* at 147-48.
113. *Id.*
114. United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1013 (1995) (quoting *Connick*, 461 U.S. at 147).
115. Waters v. Churchill, 114 S. Ct. 1878, 1887 (1994).
116. *See* Yniguez v. Arizonans for Official English, 69 F.3d 920, 963 (9th Cir. 1996) (Kozinski, J., dissenting). Judge Kozinski concluded that the majority ignored the Supreme Court's language and common sense by dismissing these cases as "dealing with entirely different circumstances." *Id.* Kozinski further concluded that "[s]ince government 'is the speaker' only through its employees, [the standards of law in] *Rust* and *Rosenberger* clearly encompass Yniguez's situation." *Id.*
117. *Id.* at 962.
118. *See id.*

step is in error, as he considers two recent Supreme Court cases that, because of their content-based standards, are distinguishable from *Yniguez*.[119]

In *Rust v. Sullivan*, private employees in federally funded medical clinics asserted that a federal provision which prohibited them from counseling about abortion violated their First Amendment rights.[120] The Supreme Court held the provision did not offend the First Amendment because "[t]he employees remain free . . . to pursue abortion-related activities when they are . . . acting as private individuals."[121] In *Rosenberger v. Rector and the University of Virginia*, a student newspaper alleged that denial of university funding on grounds the publication "promotes or manifests a particular belief in or about a deity or ultimate reality" in violation of the university's student activities fund guidelines violated the First Amendment.[122] The Supreme Court recognized that "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee,"[123] but concluded that the denial of funds was unconstitutional in this case because the speech at issue was the private speech of students, and not government speech.[124]

Judge Kozinski argues that Yniguez, like Rust, is free to "speak out against Article XXVIII on her own time" as a private individual.[125] His observation is irrelevant to this case. Yniguez, unlike Rust or Rosenberger, does not disagree with the government's position on an issue. She does not wish to convey her own opinions on a subject matter while on the job. As even Kozinski notes, she merely wishes to convey the government's message in a different language. Unlike *Yniguez*, the speech interest in both *Rust* and *Rosenberger* involved employees expressing opinions on substantive issues highly debated in the public arena.[126] Yniguez was not conveying any opinion or view in the spirit of *Rust* and *Rosenberger* by merely speaking Spanish.

119. *See* Widmar v. Vincent, 454 U.S. 263 (1981) (holding that a university's exclusionary policy prohibiting use of grounds for religious worship and teaching violates principle that state regulation should be content-neutral).

120. *See* Rust v. Sullivan, 500 U.S. 173, 177-81 (1991).

121. *Id.* at 198-99.

122. Rosenberger v. Rector and the Univ. of Va., 115 S. Ct. 2510, 2513 (1995).

123. *Id.* at 2519 (citing *Rust*, 500 U.S. at 196-200).

124. *Id.* at 2524-25.

125. Yniguez v. Arizonans for Official English, 69 F.3d 920, 962 (9th Cir. 1996).

126. *See Rust*, 500 U.S. 173 (counseling about abortion provided by employees); *Rosenberger*, 115 S. Ct. 2510 (publishing student newspaper on religious views).

Simply put, the content of her message is not at issue. Moreover, *Rust* and *Rosenberger* are limited to regulations involving "government subsidization of speech by private parties," which is not the case here.[127] Thus, these are simply irrelevant to Yniguez's speech interest.

2. *The Majority's Erroneous Analysis Under the Public Versus Private Concern Content Distinction*

Despite conceding "the speech [here] does not fit easily into any of the categories previously established in the case law,"[128] the majority nevertheless felt compelled to pigeonhole the speech into a *Pickering* category.[129] The result of this erroneous application of the *Waters/Pickering* standard is an obfuscated, nebulous categorization of Yniguez's speech interest that has little precedential value. Moreover, the convoluted inquiry could have easily been avoided by merely focusing on the public concern content of elected officials' speech.

The majority's classification of the speech interest is murky, owing in part to tensions between the adopted language of the three-judge panel decision and the footnotes added by the majority. After concluding the speech is not of private concern, the adopted language recognizes that the speech interest cannot precisely be classified as public concern because Yniguez is not commenting on a public issue and, more to the point, Yniguez is actually performing her official duties in speaking.[130] This language seems to imply that as Yniguez's comments are "addressed to a public audience, [are] made outside the workplace, and do involve[ ] content largely unrelated to [her] government employment,"[131] they must fall outside the definition of public concern speech. The majority, on the other hand, concludes in foot-

127. *Yniguez*, 69 F.3d at 940 n.24. "Neither *Rosenberger* nor *Rust* concerned the authority of the state to penalize the speech of its public employees, let alone to adopt a general prohibitory rule of sweeping applicability regarding such speech." *Id.*

128. *Id.* at 939. *See* Waters v. Churchill, 114 S. Ct. 1878, 1878 (1994); Rutan v. Republican Party, 110 S. Ct. 2729; Pickering v. Board of Educ., 391 U.S. 563, 564 (1968).

129. The Fernandez dissent falls into the same trap. Fernandez begins its analysis by opining "the issue involves the language used, not the public or private concern content of the language.... The language does not, in the sense used here, change the content at all." *Yniguez*, 69 F.3d at 955-56. Notwithstanding this logical interpretation of Yniguez's speech interest, the dissent still feels compelled to pigeonhole the speech into a *Pickering* category. Despite admitting this "is not a public concern speaking-out case... [nor]... exactly a private concern case" the Fernandez dissent concludes the interest here "is more like a case of private concern speech." *Id.* at 956. The Fernandez dissent reasons that because "Yniguez, for her own private reasons, does not wish to obey [the state] determination" that its work be done in English, the speech interest necessarily falls under private concern. *Id.*

130. *See id.* at 956.

131. United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1013 (1995).

note 23 that "the speech prohibited by Article XXVIII . . . more closely resembles public concern than private concern speech,"[132] citing as support for its conclusions the reasons previously discussed in the adopted language. However, the adopted language subsequently concludes:

> That the fact that the speech occurs as a part of the performance of the employee's job functions affects the nature of our analysis but does not necessarily determine its outcome. The context in which the speech occurs must be weighed along with the other relevant factors when we balance the conflicting interests . . . .[133]

Thus, despite claiming the speech interest was neither public nor private, the adopted language implicitly applied the *Pickering* balancing test, thereby evaluating the speech interest as public concern speech.[134]

To force the speech interest of Yniguez into a public or private concern classification "ignores the cases which define 'matter of public concern,'" because those cases focus on the content of public employees' speech to see whether it contributes to public debate.[135] Yniguez's speech is distinguishable from the speech interests at issue in traditional public employee speech cases.

Unlike the defendants in *Pickering*, *Connick*, and *Waters*, Yniguez did not criticize the policies or decisions of the state, either within the workplace or without. Nor was Yniguez exercising her right as a citizen to speak outside the workplace on matters of public interest, as in *National Treasury Employees Union*. Rather, Yniguez communicated government information at the workplace in a foreign language. Her speech was not disruptive to other employees. Simply put, Yniguez did not speak out as a citizen on matters of public concern, nor did she speak as an employee upon matters only of personal interest.[136] Rather, she performed her official duties in a manner the state found offensive.

In addition, unlike the provisions evaluated in these traditional cases, Article XXVIII is content-neutral. Article XXVIII does not chill Yniguez from expressing any view or opinion on a given subject;

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132. *Yniguez*, 69 F.3d at 939 n.23.

133. *Id.* at 940.

134. The majority fails to state clearly whether the *Pickering* test applies here (though it cites it in the preceding sentence), or that the *National Treasury Employees Union* approach applies. *See infra* Part III. This failure no doubt derives from the majority's inability to clearly classify the speech interest at issue.

135. *Yniguez*, 69 F.3d at 960.

136. *Cf.* Connick v. Myers, 461 U.S. 138, 146-47 (1983).

rather, it merely regulates the means of communication she may employ in performing her official duties.[137]

In conclusion, by erroneously focusing on the speech/conduct dichotomy as well as misapplying precedent under the public employee speech doctrine, the majority's classification of Yniguez's speech as pure speech of public concern failed to accurately define the speech interest at issue. Moreover, this line of analysis was unnecessary, as the speech interest of elected officials provided sufficient basis to determine the constitutionality of Article XXVIII.

III. Determination of the Applicable Constitutional Standard of Review

Having erroneously classified the speech interest, the majority, not surprisingly, subsequently struggled to find the correct standard of review. In typical First Amendment challenges, determining the applicable standard of review is relatively simple once the type of speech interest is identified. In *Yniguez*, however, the majority's broad identification of the speech interest was so amorphous and internally inconsistent .that it was subsequently faced with three different standards that could arguably apply. Consequently, the majority failed to determine which of the three divergent constitutional approaches applied.

A. Constitutional Standards Considered

In evaluating the various standards, the majority focused on the justifications of the state's interest in restricting Yniguez's choice of language. The first interest considered was the state's interest in efficiency and effectiveness.[138] Because the majority considered the speech to be more like public concern, the first step in its analysis required "a weighing and balancing process similar to that conducted in the more traditional [public concern] cases,"[139] thereby implicating

137. The government clearly has some interest in regulating the substance of ideas and information that reflect official State position on various issues. Waters v. Churchill, 114 S. Ct. 1878, 1886 (1994) (noting that government might prohibit employees "from being 'rude to customers'") (citations omitted); *see also Yniguez*, 69 F.3d at 939-40. The Supreme Court has "never expressed doubt that a government employer may bar its employees from using Mr. Cohen's offensive utterance to members of the public." *Waters*, 114 S. Ct. at 1886. The mere fact that it is necessary for employees or representatives to communicate those views to the public does not diminish this interest. Article XXVIII, however, is wholly unconcerned with the content of the information Yniguez communicates to the public.

138. *See Yniguez*, 69 F.3d at 938-39 (quoting *Waters*, 114 S. Ct. at 1088).

139. *Id.* at 942.

the *Waters/Pickering* standard. Under *Waters/Pickering*, the Court applied a "less stringent scrutiny [than] is ordinarily justified in reviewing restrictions on public employee speech."[140] The government's concern with efficiency and effectiveness must be balanced against the public employee's First Amendment interest in speaking.

Applying this approach to *Yniguez*, the majority concluded that "the efficiency and effectiveness considerations that constitute the fundamental governmental interest . . . are wholly absent."[141] The majority opined that Yniguez's use of Spanish *increased* state efficiency and effectiveness, recognizing, however, that "public employees have no right to speak in another language when to do so would hinder job performance."[142] The majority concluded that since the *Waters/Pickering* standard was limited to considerations of efficiency and effectiveness, and since the speech interest in this case did not "adversely affect the state's interest in efficiency and effectiveness," Arizonans for Official English would therefore lose by default were the court to apply this standard.[143]

The second state interest the majority examined involved "broader concerns that the government might have in the structure and functioning of society as a whole,"[144] a line of inquiry usually reserved for cases involving patronage practices.[145] These broad societal interests were analyzed in light of two different standards: the balancing test of *National Treasury Employees Union*, and the strict scrutiny test established in *Rutan*.

National Treasury Employees Union, decided five years after *Rutan*, remarkably did not even mention *Rutan* or refer to any specific level of scrutiny.[146] As the *Yniguez* majority noted, the *Rutan* Court decided not to "[fix] on superficially precise legal labels or formulae that are easily manipulated by sophisticated lawyers and judges," but rather chose to conduct "a thorough and judicious examination of the practical impact of the legislation . . . and its effect on constitutionally protected interests."[147] Applying such reasoning to this case, the ma-

140. *Id.* at 938.
141. *Yniguez*, 69 F.3d at 942.
142. *Id.* at 943.
143. *Id.*
144. *Id.* (quoting Rutan v. Republican Party, 497 U.S. 62, 70 n.4 (1990)).
145. *See Rutan*, 110 S. Ct. at 2735-37 (finding interests in preventing excessive political fragmentation and strengthening the party system); Civil Serv. Comm'n v. Letter Carriers, 413 U.S. 548, 565 (1973) (finding an interest in preventing development of powerful and corrupt political machine).
146. *See* United States v. National Treasury Employees Union, 115 S. Ct. 1003 (1995).
147. *Yniguez*, 69 F.3d at 944.

jority concluded "[t]here is no basis in the record to support the proponents' assertion that [unity and political stability, a common language, or public confidence] . . . are served by the provisions of Article XXVIII,"[148] opining that Arizonans for Official English offers nothing more than assertion and conjecture to support its claim.

In *Rutan*, the Court applied a strict scrutiny standard to restrictions on public employees' political activities. The *Yniguez* majority concluded that "there was no reason to relax the strict scrutiny ordinarily applied to restrictions on speech" because the government's interest in Yniguez's speech was not "employment-related."[149] As the asserted state interests were held unconstitutional under the relaxed balancing test of *National Treasury Employees Union*, the majority concluded "[a] fortiori, that the article could never survive a traditional strict scrutiny test [like *Rutan*]."[150]

B. Determination of Applicable Standard

After evaluating the facts under the three alternative constitutional approaches, the majority balked when it came time to decide which applied in this case. Unbelievably, the majority concluded it "need not decide what level of scrutiny or what approach to balancing is applicable"[151] because Article XXVIII patently fails all three:

> Whether we apply strict scrutiny as suggested by *Rutan*, whether we use a form of balancing test similar to that advocated by the *Rutan* dissenters and modelled on the . . . *Waters/Pickering* line of cases, or whether we follow the course chosen by the Court in *National Treasury Employees Union*, the result is the same: The restrictions on free speech are not justified by the alleged state interests.[152]

The inability of the majority to identify what standard of law applies probably stems from its failure to clearly identify what type of speech interest is involved.

This failure is in sharp contrast to the dissenting opinions. The Fernandez dissent classified the speech interest as private concern content of public employee speech, and subsequently applied *Connick* to conclude that Article XXVIII is constitutional.[153] The Fernandez dissent argued in the alternative that even if the speech interest were

148. *Id.* at 944-45.
149. *Id.* at 944 (citing *Rutan*, 497 U.S. at 70 n.4).
150. *Id.* at 947.
151. *Id.* at 944.
152. *Id.*
153. *See id.* at 956.

identified as having public concern content, as the majority seems to imply at one point, the *Rosenberger* standard would apply, mandating the same constitutional determination.[154] The Kozinski dissent identifies the interest as government speech, not Yniguez's, and also calls for the application of the "*Rust/Rosenberger*" standard of review.[155]

Chief Judge Wallace's dissent concluded that Article XXVIII regulated the mode of speech, rather than pure speech.[156] Accordingly, Wallace asserted that such a "conclusion should end the matter, for mere regulation of government employees' mode of speech does not implicate the First Amendment or require the various balancing tests which the majority employs."[157]

C. Absence of Precedential Value

The majority's conclusion renders the decision of little value to legislators or future courts faced with deciding on the constitutionality of less restrictive English-only provisions. The speech interest involved in *Yniguez* is sufficiently narrow to warrant more definite guidelines, as undoubtedly such issues exist in other states.[158] While it may be true that the facts in this case were so egregious that Article XXVIII patently failed all three standards posited, what will happen in the next case? The standards considered range anywhere from strict scrutiny[159] to a simple balancing test without any identifiable level of scrutiny.[160] If the legal system is founded on the Constitution and precedents that properly apply it, what guidance exists for the legislator or district court judge regarding a provision that falls somewhere in between these standards?

In conclusion, despite considering three possible constitutional standards, the majority failed to state which standard applies to language rights issues. This failure to identify the applicable standard, in conjunction with the majority's erroneous determination of the speech

154. *See id.* at 957.

155. *See id.* at 963.

156. *See id.* at 959-60.

157. *Id.*

158. The Tenth Circuit recently addressed an amendment to the Colorado Constitution designating English as the State's official language. *See* Montero v. Meyer, 13 F.3d 1444 (10th Cir. 1994). However, review in *Montero* was limited to the constitutionality of the procedure employed by the Secretary of State in submitting the initiative to the Colorado ballot. As such, the court has yet to reach the substantive merit of the amendment.

159. *See Rutan*, 497 U.S. at 70.

160. *See* United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1015-18 (1995).

interest at issue, results in a confusing decision which provides absolutely no guidance for legislators, advocates or the judiciary.

IV. Alternative Resolutions

The majority's failure to author a case of any significant precedential value could have been avoided. Prior First Amendment adjudication provides sufficient means to decide and analyze this case in such a manner so as to have jurisprudential merit, regardless of whether the court focused on the overbreadth of Article XXVIII as applied to the speech interest of elected officials or whether the court limited review to Yniguez's speech interest.

A. Elected Officials' Speech Interest

To be faithful to precedent and to provide a clear decision for legislators and lower courts, the court should have limited its analysis to the chilling effects Article XXVIII had on the speech of elected officials. While Yniguez's speech may not fall within the public versus private concern classification, that does not preclude other employee speech from meeting this definition. Because Article XXVIII was challenged as facially overbroad, the court must also consider whether the provision threatens the protected speech of others not before the court.[161] Thus, inquiring into the regulation's effects on the speech rights of third-party government officials within the legislative, executive, and judicial branches of Arizona[162] was clearly within the scope of legitimate adjudication. Judge Brunetti recognized this interest by focusing his opinion on Arizona's elected officials.

When addressing overbreadth challenges, the court must inquire whether the challenged provision "sweeps within its ambit other activities that constitute an exercise" of protected speech or expression.[163] Article XXVIII applies to all branches of government and "all government officials and employees during the performance of government business."[164] Article XXVIII's restrictions clearly applied to the

161. *Thornhill*, 310 U.S. at 97. "An individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985).

162. *See* ARIZ. CONST. art. XXVIII.

163. *Thornhill*, 310 U.S. at 97; *see also* discussion *supra* note 139.

164. *See* ARIZ. CONST. art. XXVIII, §§ 3(a)(i), 3(a)(iv).

speech of elected officials and thus any overbreadth challenge of the provision required examination of elected officials' speech rights.

Unlike Yniguez's, the speech interest of elected officials represents a readily identifiable category of speech that fits easily within traditional public employee speech doctrine. If matters of public concern include expressions relating to any political, social or other concern of the community,[165] then clearly communications between elected officials and their constituents fall within this category. Since the category of speech is readily identifiable, so too is the applicable standard of review. In this case, the court need merely determine whether Article XXVIII restrictions were "employment related" under *Rutan*.[166] If so, strict scrutiny must be employed; if not, the balancing approach of *Waters/Pickering* controls.

Article XXVIII restricts candidates for re-election from discussing issues voters may consider critical in making informed ballot decisions. In addition, the provision prevents elected officials from properly representing their constituents by precluding representatives from "expressing their views to, and learning the views of, those constituents."[167] Communication between citizens and the electorate is at the heart of representative democracy—without it, the concept of government by representation ceases to exist. Moreover, as Judge Brunetti notes, ethnic and cultural diversity are "inextricably intertwined" with the democratic and political processes.[168] To restrict input from culturally diverse groups is to impose political conformity: Republican government should have "zeal for different opinions concerning religion, concerning Government and many other points."[169] "The harm to society from such unconstitutional interference with the democratic process"[170] provides sufficient grounds in itself to strike Article XXVIII as unconstitutional.[171]

Article XXVIII is facially overbroad when analyzed in this manner. Despite the fact that elected officials represent a small number of government employees, when applied to elected officials, Article XXVIII strikes at the very foundation of the democratic process. It

165. *See* Connick v. Myers, 461 U.S. 138, 146 (1983).

166. *See* Rutan v. Republican Party, 497 U.S. 62, 70 n.4 (1990) (concluding that because the government's interests were not "employee-related" there was no reason to relax strict scrutiny traditionally applied to speech restrictions).

167. Yniguez v. Arizonans for Official English, 69 F.3d 920, 951 (9th Cir. 1996) (Brunetti, J., concurring).

168. *Id.*

169. THE FEDERALIST No. 10, at 44 (James Madison) (Garry Willis ed., 1982).

170. *Yniguez*, 69 F.3d at 950.

171. *See* discussion *infra* Part III.

denies citizens the fundamental right to participate in the political process. "[I]nformative inquiry and advocacy by elected officials"[172] is essential to the effective operation of our political process. As the Supreme Court has noted, "[t]he manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy."[173] The harm to society from such unconstitutional interference with the democratic process is sufficient to find Article XXVIII unconstitutionally overbroad.[174]

B. Yniguez's Speech Interest

Simply stated, traditional applications of the public employee speech doctrine as seen in *Pickering, Waters, Rutan,* and *Rosenberger* do not apply to Yniguez's speech interest. These applications of the doctrine are all content-based, while Yniguez's choice to speak in a non-English language is wholly independent of the content spoken. Both the majority and dissenting opinions recognize this, but they fail to take the next step and explore alternate means to resolve the problem.[175]

Though such inquiry is unnecessary, if the court felt compelled to address the merits of Yniguez's speech it could have resolved the issue consistently with the underlying rationale of the public employee speech doctrine.

The goal of the public employee speech doctrine is to recognize the government interest in regulating employee speech by limiting the breadth of freedom such employees enjoy outside the workplace. The government may have a wide berth when regulating employee speech, such speech is still subject to First Amendment protection. Although Yniguez's speech did not fit traditional public versus private concern content of employee speech, her speech was still protected by the First Amendment. Any resolution of Yniguez's claim must strike a balance between Arizona's interest in regulating its employees and Yniguez's First Amendment right to free speech. Therefore, the court should have addressed Yniguez's speech rights along one of two possible lines: (1) by applying the "time, place and manner" test established in *Clark v. Community for Creative Non-Violence*;[176] or (2) by explicitly

172. *Yniguez*, 69 F.3d at 951 (Brunetti, J., concurring).
173. Bond v. Floyd, 385 U.S. 116, 135-36 (1966).
174. *See Yniguez*, 69 F.3d at 951 (Brunetti, J., concurring).
175. *See supra* notes 128-29 and accompanying text.
176. 468 U.S. 288 (1984).

recognizing the two-tier analysis adopted by traditional speech cases as posited by Tribe.[177]

Article XXVIII clearly regulates public employee speech, and there can be little doubt that Yniguez, as a public employee, "does not have a full panoply of freedoms to do what she likes when she is performing her job."[178] But it is equally clear that Yniguez's speech interest does not fit within the traditional public versus private concern distinction of *Waters/Pickering*. Public employee cases are rooted in the rights of employees to participate in public affairs. The *Pickering* test applies to subjects upon which free and open debate are vital to informed decision-making by the populace, and "comes into play only when a public employee's speech implicates the government's interests as an employer."[179] The public versus private concern distinction is "relevant to the constitutional inquiry only when the [subjects]—by virtue of their content or the context in which they were made—may have an adverse impact on the government's ability to perform."[180] The subject of Yniguez's speech did not address any matter relevant to public debate. The content of her communications changed every time she spoke because in each instance it was addressed to the questions and concerns of the citizen seeking her assistance in processing medical claims. Her speech did not seek to convey any opinion nor to inform the public of any matter vital to the free and open debate of an informed electorate. The provision, in short, restricted the manner of her expression.

The government generally has authority to regulate the manner of speech used by employees when performing their official duties. The Court in *Connick* recognized that "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[181] That does not mean that Yniguez's speech, "even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment."[182] Any type of expression, whether it is oral, written or symbolized by conduct, "is subject to reasonable time, place, or

177. *See* TRIBE, *supra* notes 81, § 12-7, at 100.

178. *Yniguez*, 69 F.3d at 955 (Fernandez, J., dissenting).

179. Connick v. Myers, 461 U.S. 138, 157 (1983) (Brennan, J., dissenting).

180. *Id.* at 157.

181. *Id.* at 146.

182. *Id.* at 147.

manner restrictions."[183] Under the time, place or manner test, "restrictions are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."[184] In this case, Article XXVIII fails the narrowly tailored prong.

To be narrowly tailored, a regulation must promote "a substantial government interest that would be achieved less effectively absent the regulation."[185] In the present case, the state interest in efficiency and effectiveness is wholly absent. Common sense illustrates that an office performs more effectively and efficiently when it is able to provide services in a language customers can understand. The parties even conceded that Article XXVIII runs counter to the effectiveness of its employees.[186] As the majority noted, "if the purpose of Article XXVIII were to promote efficiency, it would not impose a total ban but would provide that languages other than English may be used . . . only when they facilitate such business and not when they hinder it."[187] As for the broader societal interests asserted by the state,[188] no basis exists to support the assertion that unity and political stability, a common language, or public confidence are served by Article XXVIII.[189] In short, "there is no substantial nexus between the alleged governmental interest[s] and job performance."[190] The state "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."[191] Therefore, failing the narrowly tailored prong of *Clark* is sufficient to find Article XXVIII facially overbroad.

Alternatively, the court could have explicitly recognized the two-tier approach applied by traditional speech cases, rather than trying to wedge the speech interest into an arbitrary, illusory category. Under the two-tier approach, a provision "aimed entirely at harms unconnected with the *content* of any communication, may be invalid if it leaves too little breathing space for communicative activity, or leaves people with too little access to channels of communication,

183. *Id.*
184. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).
185. Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989).
186. *See* Yniguez v. Arizonans for Official English, 69 F.3d 920, 924 n.4 (9th Cir. 1996).
187. *Id.* at 942-43.
188. *See supra* notes 144-49 and accompanying text.
189. *See supra* note 147 and accompanying text.
190. *Yniguez*, 69 F.3d at 943.
191. Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989).

whether as would-be speakers or as would-be listeners."[192] The court balances the values, interests or rights asserted by the government in support of the restriction against the extent to which communicative activity is inhibited. In other words, the court balances the government justifications for Article XXVIII against the burden on Yniguez's free speech rights. Rather than obscuring the issue in the mire of speech/conduct analysis, the court should have explicitly recognized the balancing approach as applicable to public employee language rights issues. Ultimately, this is the approach the majority takes, albeit implicitly.

Conclusion

By attempting to classify Yniguez's speech interest as either pure speech or expressive conduct at the outset, the majority was distracted by an erroneous line of reasoning from which it was unable to recover. Subsequent efforts to analyze the public employee speech doctrine failed as well, due to misapplication of precedent and unnecessary focus on an irrelevant public versus private concern content distinction. The patent failure to clearly identify the speech interest at issue led to continued difficulty in determining the applicable standard of review. Despite examining three reasonable alternatives, the majority failed to determine which applied. The result is a decision that fails to identify what type of speech language rights restrictions fall into and what level of scrutiny English-only provisions will be held to. Because of this failure, the issue will remain, for all intents and purposes, one of first impression for the next court faced with adjudicating the constitutionality of an English-only provision.

This result could have been avoided. Whether the court chose to focus on Article XXVIII's chilling effect on third parties or whether it felt compelled to address Yniguez's speech interest, sufficient means existed to determine the constitutionality of Article XXVIII in such a manner as to provide at the very least some semblance of direction or guidance to legislators and lower courts, while still remaining true to precedent. Sadly, the *Yniguez* decision failed to do either.

192. TRIBE, *supra* note 81, § 12-23, at 978.