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QUE, YA NO HABLAN INGLES EN ESTE PAIS?: A LOOK AT THE CONSTITUTIONALITY OF ENGLISH ONLY PROVISIONS UNDER THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT

John J. Louizos

QUE, YA NO HABLAN INGLES EN ESTE PAIS?[1]: A LOOK AT THE CONSTITUTIONALITY OF ENGLISH ONLY PROVISIONS UNDER THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT

John J. Louizos[2]

I. INTRODUCTION

As a Greek-American, I have developed a sense of pride in the cultures which embody who I am as a person. My family and I immigrated to the United States in 1975. I was three years old at the time, and the only language which I had heard up until then was Greek. From that point onward, I would learn to speak both English and Greek fluently. Although the vast majority of my communication is now done in English, I still do not feel comfortable speaking English to Greek people, whether they understand English or not. A prime example of this is my inability to speak to my father in English, even though he speaks the language fairly well, and uses it to communicate in his business affairs on a daily basis.

Over the years, I have felt at liberty to speak Greek to my family and other Greek speaking people out in public. Always focusing on using the language which I felt most at home with, I never realized that I might have made some people uncomfortable by not using the English language. It was not until the winter break of my second-year of law school that I fully became aware of this phenomenon. About a week before Christmas, my stepmother asked me to accompany her on a trip to a department store to shop for my father. Having lived in the United States for merely two years, she was still in the early stages of developing her language skills in English. Naturally, she and I walked about the store looking at various items and conversing in Greek. Continuing about with our conversation, we walked passed a woman, who, upon hearing us, whispered aloud "God damn it, doesn't anybody speak English in this country anymore?" Hearing that statement caused me to become visibly upset. I walked up to the woman, informed her that I was a law student and spoke English very well, and accused her of being racist. Up until that moment, I had not realized that she actually *said* what many people who have heard myself and others who speak a language other than English *think*: Doesn't anybody speak English in this country anymore?

Nowadays, it appears that this question is on the minds of many people. Since the founding of the lobbying group U.S. English in 1983, the English-Only movement has gathered momentum across the nation. U.S. English is a national, nonpartisan, non-profit organization dedicated to enacting laws to make English the official language of the United States government.[3] The organization has 640,000 members and is growing at the rate of 5,000 new members a month.[4] Although the United States has no official language, twenty one States have passed measures establishing one.[5] This paper addresses the question of whether a state statute or constitutional provision which declares English the official language of the state and requires English to be used to perform all official acts violates the First Amendment's Free Speech Clause. Section II examines the constitutionality of English only laws under the First Amendment's Free Speech Clause. Part A highlights the significant developments in the official English movement. Part B proposes a theory of the First Amendment's Free Speech Clause, and considers whether or not official English laws stand up under such a theory. Part C examines the constitutionality of official English laws based on an analy-

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[1] Translation: "What, they don't speak English in this country?". It is worth noting that this was the most proximate translation to "Doesn't anybody speak English in this country anymore?" that could be gotten in the Spanish language.

[2] Candidate for *Juris Doctorate*, Washington and Lee School of Law, May 1997. I wish to thank Professor Allan P. Ides for his encouragement and guidance in the development of this article and Maria Feeley for her editorial assistance.

[3] *See Constitutional Law- First Amendment- Ninth Circuit Invalidates Arizona Constitution's Official English Requirement*, 109 HARV. L. REV. 1827 (1996) [hereinafter *Constitutional Law*].

[4] *See Ninth Federal Court Ruling on Arizona's Official English is Misguided Says U.S. English*, U.S. Newswire, Oct. 5, 1995, 1995 WL 6620003.

[5] *See Constitutional Law, supra* note 3, at 1827.

sis of how the Supreme Court will decide *Arizonans for Official English v. Arizona* later this term. Part D considers the issue under the framework of the Equal Protection Caluse of the Fourteenth Amendment. Section III offers a conclusion based on the respective analyses.

II. ENGLISH ONLY LAWS AND THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT

A. *The Debate Over Official English*

1. *Developments in the Official English Movement*

Over the last decade, language has received a great deal of political attention in this country.[6] The language debate of the 1980's was similar to the language battles of the early part of the century, where appeals to patriotism and unity were made, and minorities were casted in the role of outsiders who deliberately chose not to learn the English language.[7] However, unlike the earlier period, where the issue was confined to local and state arenas, the campaign in the 1980's was orchestrated at the national level by a powerful and highly funded lobby, U.S. English.[8] The biggest spark that ignited this campaign was the aggressive enforcement by civil rights authorities of *Lau v. Nichols*.[9]

In *Lau*, officials responsible for the operation of the San Francisco school system were being challenged by 1,800 students of Chinese ancestry who were being denied supplemental courses in the English language as part of their public education.[10] At issue in the case was whether school administrators could meet their obligation under Title VI to provide "equal educational opportunities" merely by treating all students the same, or whether they were required to offer help to students unable to understand English.[11] The lower federal courts had absolved the San Francisco school district of any responsibility for minority children's "language deficiency", thereby enabling the school district to continue on with their "sink or swim" approach.[12] The Supreme Court, in a unanimous decision, disagreed. Reasoning that the failure to take measures to effectively teach English skills (which lie at the core of public school teaching) would end up making a "mockery" of public education, the Court ordered the school district to take affirmative steps to rectify the students' language deficiency.[13]

The decision establishing the right of limited-English-proficient students to special help in overcoming language barriers, and civil rights authorities were not shy about demanding the so-called *Lau* remedies. The stage was set for a decade of debate over language, and the so-called threat to the identity of the nation. What transpired was a clash of attitudes between anglo-conformity versus an appreciation of diversity. The following events, which transpired over the course of the decade, illustrate how this debate was played out in the legislative arena of the various states:

In 1980, Dade County, Florida voters approved an "anti-bilingual ordinance" prohibiting the expenditure of public funds on the use of languages other than English. Such things as fire safety information pamphlets in Spanish, and transportation signs in Spanish were prohibited.[14]

In 1981, Senator S.I. Hayakawa, himself an immigrant, introduced a constitutional English Language Amendment (S.J. Res. 72), which was the first proposal to declare English the nation's official language.[15] However, the bill died without Congressional action. During the same year, the Virginia legislature declared English the state's official language and made English the language of public instruction.[16]

In 1982, Senator Alan Simpson introduced the first version of the Immigration Reform and Control Act, which would have provided amnesty to illegal immigrants who had resided in the United States for a period of time and sanctions to employers who hired the under documented.[17] The bill passed the Senate, but failed to pass the house.

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[6] *See, e.g.*, Hiram Puig-Lugo, *Freedom To Speak One Language: Free Speech and the English Language Amendment*, 11 CHICANO-LATINO L. REV. 35 (1991).

[7] *See* Jamie B. Draper & Martha Jiminez, *A Chronology of the Official English Movement*, LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY 89 (James Crawford ed., 1992) [hereinafter LANGUAGE LOYALTIES].

[8] *Id.*

[9] 414 U.S. 563 (1974).

[10] *Id.* at 564.

[11] *Id.* at 566.

[12] *Id.*

[13] *Id.* at 568.

[14] *See* LANGUAGE LOYALTIES, *supra* note 7, at 90.

[15] *Id.*

[16] *Id.*

[17] *Id.*

In 1983, U.S. English was founded by Senator Hayakawa and Dr. John Tanton, the head of the Federation for American Immigration Reform.[18] At about the same time, the California Committee for Ballots in English sponsored Proposition O in San Francisco, calling for an end to bilingual ballots. The measure passed with 63 percent of the vote.

In 1984, New York State passed educational reforms, including foreign language requirements for all students, and the ability of nonnative English speakers to receive credit for proficiency in their native language.[19] Moreover, the Education for Economic Security Act was passed by Congress, authorizing federal funding for the improvement of foreign language instruction.[20] Congress also extended the Bilingual Education Act through 1988. In so doing, it created new programs, such as developmental bilingual programs which would enable students to maintain their native tongues after learning English, academic excellence programs in bilingual education, and family English literacy programs involving parents of limited-English-proficient children.[21] However, the same year saw the approval of proposition 38 by California voters, which called for voting materials to be provided in English only.[22]

In 1986, California voters pass Proposition 63. Included within is a provision allowing an individual domiciled within the state to sue state or local governments for actions which would diminish or ignore "the role of English as the common language of the State of California."[23]

In 1987, official English measures are passed in Arkansas, Mississippi, North Carolina, North Dakota, and South Carolina.[24] Further, a Cultural Rights Amendment to the U.S. Constitution is proposed by Senator John Breaux and Representative Jimmy Hayes. The amendment would recognize "the right of the people to preserve, foster, and promote their respective historic, linguistic, and cultural origins."[25] Congress took no action on the amendment.

In 1988, an internal memorandum by Dr. John Tanton, the chairman of U.S. English, surfaced in the press. In the memo, Tanton warns of the unwanted traits which Hispanic immigrants could be importing , such as "the tradition of the mordida (bribe)", "low educability", "Catholicism", and "high birthrates".[26] Three states, Arizona, Colorado, and Florida adopt Official English amendments to their state constitutions.[27] Afterward, a rise of incidents of discrimination against minorities is reported in each of these states.[28]

In 1990, the United States District Court strikes down Arizona's Official English amendment as unconstitutional. The requirement that state actors perform their duties "in English and no other language" is held to violate free speech under the First Amendment.[29]

2. *Perspectives from Both Sides of the Issue*

The aforementioned developments were brought about in large part through the efforts of influential lobbying groups on both sides of the debate. On the one hand, groups such as U.S. English, English First, and the American Ethnic Coalition have, and will continue, to push for English only laws based on their belief that the English language keeps us in communication with one another and is the fabric of our culture as Americans. On the other hand, groups such as the English Plus Information Clearinghouse (EPIC), the National Association for Bilingual Education, and the Mexican American Legal Defense and Educational Fund focus their efforts on preserving the right to speak in their native tongue, and combating the English only movement, which they believe is motivated by racism and other anti-immigrant sentiments. These opposing viewpoints are exemplified through the dialogue of two influential figures in the debate, Senator S.I. Hayakawa and Delegate Baltasar Corrada.

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[18] *Id.*

[19] *Id.*

[20] *Id.* at 91.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 92.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 93. Further investigation also linked Tanton's funding to a eugenics foundation and a distributor of nativist propoganda. The most disturbing aspect about the Official English movement is the ease with which it can be used to cloak an underlying racist motivation, and sold to the public, so to speak, under notions of patriotism and national unity. The revelations mentioned above prompted the resignation of Dr. Tanton as chairman of U.S. English. This author wonders whether sentiments such as these still live on in the organization of today.

[27] *Id.*

[28] *Id.* Evidence such as this displays the real danger for language to be used as a weapon of discrimination against unpopular minorities.

[29] *Id.*

S.I. Hayakawa served as United States Senator for California from 1977 to 1983.[30] Senator Hayakawa, after sponsoring the original version of the English Language Amendment in 1981, helped to establish U.S. English, the lobby aimed at promoting the Amendment.[31] A speech given by Senator Hayakawa,[32] makes the case for Official English. Senator Hayakawa begins his speech by claiming that a common language has enabled the populace to become a society out of the "hodgepodge of nationalities, races, and colors represented in the immigrant hordes that people our nation."[33] Hayakawa believes that this led to the development of a new kind of human being, the "American". In his speech, he refers to a scene from Israel Zangwill's play *The Melting Pot*. In that scene, the Russian Jewish immigrant character, after escaping to New York, exclaims:

> Here you stand, good folk, think I, when I see them at Ellis Island... in your fifty groups with your fifty languages and histories, and your fifty blood hatreds and rivalries, but you won't be long like that, brothers, for these are the fires of God you've come to... A fig for your feuds and vendettas! German and Frenchmen, Irishman and Englishman, Jews and Russians- into the Crucible with you all! God is making the American.[34]

Hayakawa believes that the resistance to this "melting pot" ideal threatens the very fabric that makes us "Americans". He focuses on the resistance to this by the Hispanic speaking people, who claim that the national ideal should be "a 'salad bowl', in which different elements are thrown together but not 'melted', so that the original ingredients retain their distinctive character."[35] In contrast to such groups as Anglo-, Italian, Polish-, Greek-,Lebanese-, Chinese-, and Afro-Americans who rejoice in their ethnic diversity but still use the English language to communicate, Hayakawa feels that the overly ambitious Hispanic Caucus looks forward to the day when Spanish will be accepted as a form of communication separate from that of English.[36] He cites the following evidence in support of his belief: the Hispanic culture's lack of dissent about the fact that bilingual education programs often result in no English being taught at all, the leadership's lack of alarm over the fact that large portions of the Cuban, Puerto-Rican and Mexican American populations do not speak English and have no intentions of learning, and the public's rejoice when concessions are made, such as the Spanish-language Yellow Pages which were made available in Los Angeles.[37]

Based on his agreement with President Theodore Roosevelt's statement that "we have room for but one language here [English]... for we intend to see that the crucible turns our people out as Americans, of American nationality, and not as dwellers in a polyglot boarding house", Hayakawa concludes that the aggressive movement on the part of Hispanics to "reject assimilation and to seek to maintain- and give official status to- a foreign language" will impair our ability to unite as a nation, and possibly lead to the type of linguistic division that has torn apart nations like Canada, Belgium, and Sri Lanka.[38]

Baltasar Corrada served as the Commonwealth of Puerto Rico's nonvoting delegate in the U.S. House of Representatives from 1977 to 1985.[39] On June 12, 1984, Mr. Corrada testified before the U.S. Senate, Subcommittee on the Constitution in opposition to Official English.[40] In his testimony, Corrada sets forth his position that the people of the United States believe in freedom, and that English is the language of the United States by virtue of the people's choice, and not by governmental imposition.[41]

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[30] *See* Senator S.I. Hayakawa, *The Case for Official English*, in LANGUAGE LOYALTIES at 94.

[31] *Id.*

[32] Reprinted as *One Nation... Indivisible? The English Language Amendment* (Washington, D.C.: Washington Institute for Values in Public Policy, 1985).

[33] *Id.*

[34] *Id.* at 96.

[35] *Id.*

[36] *Id.* at 98.

[37] *Id.*

[38] *Id.* at 100. Although Senator Hayakawa perceives a potential threat from linguistic division, his speech fails to account for the effects on the threat that has existed in this country for decades: racial division. Senator Hayakawa, in making his case for Official English, may unwittingly be making the case against racial harmony.

[39] *See* Delegate Baltasar Corrada, *Viva la Roja, Blanca y Azul*, LANGUAGE LOYALTIES at 118.

[40] *Id.*

[41] *Id.* In the modern era, economic reality, in and of itself, yields support for the position that individuals will learn English on their own volition. In our nation, ones competitiveness in the job market depends more and more upon an ability to communicate in English given the fact that we have become an intensely information oriented society. Moreover, in the international business arena, there is no question about the prominent role that English plays and the resulting opportunities which are available to one who speaks the language.

Contrary to Hayakawa's premise, Corrada does not believe that establishing English as the official language would yield a "positive impact on our social, economic, and political life."[42] Corrada testifies that America's greatness is based on the fact that its people are united by fundamental principles such as freedom, justice, equal opportunity for all, fairness and democracy, and equates the argument that the country would be made stronger by making it "U.S. English" to that of making it "U.S. white".[43] Corrada also made it clear before the Subcommittee his belief that a governmental imposition of the English language on an individual would be "a frontal attack on the right to freedom of speech provided in the First Amendment to the Constitution."[44]

With the aforementioned developments and viewpoints in mind, we turn to a consideration of the issue within the context of freedom of expression under the First Amendment.

B. *The Underlying Theory of Freedom of Expression*

The First Amendment to the United States Constitution reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech, or of the press;* or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[45] (emphasis added). The language regarding the freedom of expression is open ended in and of itself. This has led to much discussion among legal scholars as to the rationale behind the First Amendment's speech and press clauses. In this part of the article, we examine some of these writings in order to uncover a plausible rationale behind the respective clauses, and to apply this rationale to the issue at hand. We consider essays by Vincent Blasi and Thomas I. Emerson in turn.

In *The Checking Value in First Amendment Theory,*[46] Vincent Blasi analyzes the history of the Speech and Press clauses in an attempt to ascertain their primary purpose. Blasi focuses on the fact that political thought has always been aimed at the tendency of public officials to abuse their power, in coming up with what he believes to be the primary purpose: checking government as a means of guarding against abuse.[47] He begins his analysis by noting some of the writings from the English essayists of the eighteenth-century. Blasi believes that the most important influence came from the writings of "Cato", which was the pen name of co-authors John Trenchard and Thomas Gordon, and John Wilkes.[48]

Cato's letter entitled "Of Freedom of Speech" emphasizes the people's need for recourse against government officials gone astray. Cato writes: "Whoever would overthrow the Liberty of a Nation must begin by subduing the Freeness of Speech; a Thing terrible to public Traytors."[49] Wilkes also espoused this point in the first published issue of the *North Briton,* where he wrote:

> The liberty of the press is the birth-right of a Briton, and is justly esteemed the firmest bulwark of the liberties of this country. It has been the terror of all bad ministers; for their dark and dangerous designs, or their weakness, inability, and duplicity, have thus been detected and shewn to the public, generally in too strong and just colours for them long to bear up against the odium of mankind.[50]

Blasi argues that the First Amendment was an outgrowth of this body of thought, and cites the eighteenth-century American writings on freedom of speech and freedom of the press as evidence.[51] Based on this evidence, he concludes that the primary purpose of the Speech and Press Clauses of the First Amendment is to "check the inherent tendency of government officials to abuse the power entrusted to them."[52]

Assuming that Blasi is correct in interpreting the First Amendment as a means of enabling the governed to check abuses by those who govern them, the question remains as to how a state statute or constitutional provision adopting English as the official language would hold up under such theory. For purposes of discussion, let us assume that state X has adopted such a statute. Let us also assume that a large percentage of the population of state X is made up of Hispanic speaking people who have

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[42] *Id.* at 119.
[43] *Id.* at 121.
[44] *Id.* at 120.
[45] U.S. CONST. amend. I.
[46] Vincent Blasi, *The Checking Value in First Amendment Theory,* 1977 A.B.F. RES. J. 521.
[47] *Id.*
[48] *Id.* at 528.
[49] *Id.* at 530.
[50] *Id.* at 533.
[51] *Id.* at 534-536. Blasi focuses on the writings of such influential figures in the framing of the Constitution as James Madison, Thomas Jefferson, and Alexander Hamilton.
[52] *Id.* at 538.

yet to develop their skills in English to the point where they can communicate effectively in that language.

The statute which is in effect prohibits any "state actor" from conducting official business in a language other than English. As a result, agencies in state X, such as the department of motor vehicles, environmental protection agency, department of revenue, zoning administration, department of corrections, etc. . ., would be proscribed from engaging in activities such as publishing and distributing information regarding its procedures, activities and/or regulations in a language other than English, and publishing forms and/or other documentation used for official business in a language other than English.

Given the inherent make-up of state X's population, the query arises as to the ability of a significant portion of its population to check against governmental abuse under such circumstances. The inability to receive information regarding areas of government that affect the rights, duties and liberties of these individuals as citizens militates against their ability to effectively participate in the democratic process. The fact of the matter remains that we, as a nation, are made up of many states with population structures similar to state X's. Although most of these population groups do, over time, develop their skills in English[53], a state statute or constitutional amendment limiting their ability to receive information during the time span when they cannot communicate in English would strip them of the ability to check against abuses in government. Accordingly, under Blasi's theory of the First Amendment, such laws would clearly be in violation of the First Amendment to the Constitution.

In *Toward a General Theory of the First Amendment,*[54] Thomas I. Emerson outlines what he believes is the theory of freedom of expression in its modern form. Emerson suggests that society deems a system of free expression necessary for four main reasons: (1) assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in the society.[55] Emerson takes up each of the four reasons in turn.

Emerson begins by stating his belief that the primary justification for freedom of expression is "the right of an individual purely in his capacity as an individual."[56] He bases this on the fundamental premise of Western thought, which emanates from a human being's desire to realize his or her character and potentialities. Emerson writes:

> Man is distinguished from other animals principally by the qualities of his mind. He has powers to reason and to feel in ways that are unique in degree if not in kind. He has the capacity to think in abstract terms, to use language, to communicate his thoughts and emotions, to build a culture. He has powers of imagination, insight and feeling. It is through development of these powers that man finds his meaning and his place in the world.[57]

As a result, any form of restraint over expression is deemed to be consistent with Milton's statement that "[it is] the greatest displeasure and indignity to a free and knowing spirit that can be put upon him."[58]

The second justification for freedom of expression is what Emerson calls the "attainment of truth".[59] This theory is based on a widespread application of Socratic dialogue. For instance, Emerson states that "the soundest and most rational judgment is arrived at by considering all facts and arguments which can be put forth in behalf of or against any proposition."[60] Conversely, he feels that suppression of information prevents the formation of rational judgment and tends to perpetuate error.[61]

The third function of freedom of expression strikes at the core-purpose of a democratic society. Emerson labels this the "participation in decision making" function.[62] He believes that this function is crucial, given that we adhere to a governmental process which is wholly dependent upon the flow of information. Emerson refers to the premise of the Declaration of Independence in support of this. He argues that because our government derives "[its] just powers from the consent of the governed", the

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[53] A natural incentive to learn English stems from the difficulty inherent in surviving economically without such proficiency.

[54] Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963)[hereinafter Emerson].

[55] *Id.* at 878-879.

[56] *Id.* at 879.

[57] *Id.*

[58] *Id.* at 880.

[59] *Id.* at 881.

[60] *Id.*

[61] *Id.*

[62] *Id.*at 882.

governed must have full freedom of expression in forming both individual judgments and the common judgment.[63]

Lastly, Emerson cites the "balance between stability and change" as a function of freedom of expression.[64] This function is based on the idea that suppression of information leads to an unstable society by virtue of concealing the real problems which confront it and leaving the suppressed apathetic or desperate.[65] The proper balance is achieved, according to Emerson, when dissidents are allowed to "let off steam" through the process of open discussion.[66]

The task at hand is to hold up our hypothetical "English only" provision to Emerson's theory of freedom of expression under the First Amendment in an effort to ascertain its constitutionality. We take up the analysis according to each of the four respective functions in turn. First off, the question becomes how, if at all, does an "English only" provision play on "an individual's realization of his character and potentialities as a human being?"[67]

The answer to the question posed seems quite clear. Up until the point where a member of the Hispanic population in state X develops his or her English skills well enough to communicate effectively, his or her "thoughts, emotions, insight, and feelings"[68] are constricted by virtue of the "English only" provision. The individual's self-fulfillment can only be maximized up to the point of his or her understanding in the native tongue. For instance, a member of this population would not have the ability to develop an insight as to such things as the history of the United States due to the fact that the provision would proscribe funding for the teaching of this subject in Spanish. Only after the individual attended English class could he or she begin to develop his or her thoughts and feelings regarding this and other topics. Similarly, it is not far-fetched to assume that such person's development of "his or her potentialities as a human being"[69] would be restrained by virtue of the inability to obtain a driver's license because the provision would prohibit the administration of a driving test in a language other than English. Although one may point out that alternative modes of transportation would be available to such person up until the time when he or she could pass the test in English, anyone who has ever taken the bus can surely understand how difficult it would be to conduct the activities that are a part of our daily lives under such constraints. Simple things, such as the ability to gather at the home of a friend for a holiday celebration, attending lectures, festivals and other cultural events, and the capacity to take ones family out of town for a vacation, would become virtually infeasible for a significant number of state X's population for an indefinite amount of time.

In terms of the thoughts, feelings and emotions of an individual subject to such a provision, the overwhelming effect could very well be indistinguishable from a law mandating, for instance, that people of a certain race or ethnic background ride in the back of the bus. The likelihood is strong that an "English only" provision such as the one we have postulated would have a debilitating effect on the very thing that we pride ourselves on as a Western culture: the right of an individual to pursue his or her self-fulfillment. As a result, such a provision is contrary to one of the primary functions of freedom of expression under the First Amendment.

The analysis of the next two functions identified by Emerson, the "attainment of truth" and the "participation in the decision making process", can be performed concurrently. The benefits of the ability to engage in "Socratic dialogue" and the "effective participation in a democratic process" are both dependent on one thing: the free flow of information. What an "English only" provision does is streamline the flow of information to a select group of the population. Citizens who are capable of speaking English would have access to information regarding the daily activities, rules, and regulations under which they are governed, and would indeed have the ability to communicate their thoughts and impressions regarding such matters. However, citizens without this capability would effectively be shunned from the very core of the democratic process up until the time when they learned the English language. In effect, such people are held to "good citizenship" without the state providing for their understanding of what it is that that means. A state with an "English only" provision effectively requires its non-English speaking citizens to run before they have learned how to walk. The "training wheels", so to speak, are never provided in such states. Voting registration documents are drafted only in English. Tax forms are published only in English. Agencies publish their rules and regulations only in English.

[63] *Id.* at 883.
[64] *Id.* at 884.
[65] *Id.*
[66] *Id.* at 885.
[67] *Id.* at 879.
[68] *Id.*
[69] *Id.*

Based on an unrealistic fear that non-English speaking people will refuse to develop their skills in English if assistance is provided to them in their native tongue, states with English only provisions would be, willingly, ebbing the flow of information to a significant amount of their citizens. As we have seen, the free flow of information lies at the core of the democratic process. Given the curtailing effect that an English only provision would have on this flow, such provisions must be deemed to violate freedom of expression under the First Amendment.

Lastly, an examination of Emerson's fourth function of freedom of expression brings us to a similar conclusion. Emerson identified this last function as the "balance between stability and change." Of note in this discussion is Emerson's statement that suppression of expression "drives opposition underground, leaving those suppressed either apathetic or desperate. It thus saps the vitality of the society or makes resort to force more likely."[70] States which adopt "English only" provisions will surely breed clusters of apathetic and/or desperate people given the isolating effect of such a provision. Passed according to such idealistically "patriotic" beliefs as those expressed by Senator Hayakawa,[71] the real effect of English only laws will be to drain the moral of those who do not fit the ideal immigrant mold. For instance, an immigrant who is not up to speed on his English skills could be disenchanted from mastering the English language by virtue of the existence of such a law. Feeling persecuted against, this person may choose to continue on with the exclusive use of his or her language, and could possibly limit his or her activities to those where he would be able to continue to do so. This very well may lead to clusters of ethnic populations where the citizens would deliberately choose to use English as little as possible.

Contrary to Hayakawa's dream of a populace bonded together through a uniform language, the practical effect could be that by disabling the immigrants' ability to "let off steam"[72] through the use of a language other than English on occasion, he will choose to completely turn his back on the English language and the government imposing such constraints upon him. In this sense, suppressing such freedom of expression throws off what could otherwise be a stable populace. Instead of allowing for such group's natural progression in mastering the English language, and providing a helping hand along the way, a state adopting an English only provision invidiously discriminates against a group of its citizens. Contrary to U.S. English and Senator Hayakawa's prediction, such laws will actually increase the likelihood that the populace of this country will not share a common language bond.

C. *Kelly's Case: The Future of English-Only Provisions After Arizonans for Official English v. Arizona*

1. *Background*

Presently, twenty one states have decided to adopt English as their official languages.[73] Of particular importance to the present discussion is Article XXVIII of the Arizona Constitution. Unlike the majority of states, whose English only provisions are primarily symbolic,[74] the amendment to the Arizona Constitution carries the potential to significantly impede upon individuals' freedom of speech rights.[75] In 1987, Arizonans for Official English initiated a petition drive to amend the Arizona constitution to include a provision prohibiting the government's use of a language other than English.[76] The measure passed with a mere fifty and five-tenths percent (50.5%) of the vote. Article XXVIII, "English As The Official Language"[77] opens with an announcement that English is the official language of the State of Arizona. As the official language of the state, it is deemed to be the language of the ballot, public schools, and all government functions and

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[70] *Id.* at 884.

[71] *See supra* text accompanying notes 30-42.

[72] *See* Emerson, *supra* note 54, at 885.

[73] *See Yniguez v. Arizonans for Official English*, 69 F.3d 920, 928 (9th Cir. 1994) (Besides Arizona, states that have adopted English only provisions are: Alabama, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Mississippi, Nebraska, North Carolina, North Dakota, South Carolina, Tennessee, and Virginia).

[74] *See, e.g.*, CAL. CONST. art. III, § 6 (provision establishes English as the official language without imposing any prohibition on other languages or affecting their use in the functioning of state government); *See also, Puerto Rican Org. for Political Action v. Kusper*, 490 F.2d 575, 577 (7th Cir. 1973) (noting that official-English law appears with laws naming state bird and state song, and does not restrict use of non-English languages by state and city agencies).

[75] *See Yniguez*, 69 F.3d at 928 (federal district court determined that Arizona provision prohibited the use of any language other than English by all officers and employees of all political subdivisions while performing their official duties).

[76] *Id.* at 924.

[77] *See* ARIZ. CONST. art. XXVIII.

actions. The article specifies which entities will be affected by its terms. Among these are the legislative, executive and judicial branches of the state, political subdivisions, departments, agencies, organizations and instrumentalities in their entirety, and officials and employees of the state while in performance of government business. Under section 2 of the Article, the State is given the sweeping power to take all reasonable steps to "preserve, protect, and enhance" the role of English as the official language of the state. The Article does, however, go on to provide exceptions for some limited situations. Section 3 permits the State to act in a language other than English in order to: (1) assist students who are not proficient in English, (2) to comply with other federal laws, (3) to teach students a foreign language as part of an educational curriculum, (4) to protect public health and safety, and (5) to protect the rights of criminal defendants or victims of crime. Even with these exceptions, the core language strikes at a wide array of governmental activities and the persons who conduct them.

2. *Yniguez v. Arizonans for Official English*

Maria-Kelley Yniguez (Kelly) was one of the individuals who was immediately affected by the passage of Article XXVIII. When the article was passed, Kelly was employed by the Arizona Department of Administration.[78] She was charged with handling medical malpractice claims asserted by either the State of Arizona or physicians for whom the state provided insurance.[79] Prior to the passage of the article, Kelly, a Hispanic fluent and literate in both English and Spanish, communicated in Spanish with monolingual Spanish-speaking claimants, and in a combibation of English and Spanish with bilingual claimants.[80] She would frequently conduct interviews in Spanish for monolingual Spanish-speakers in addition to documenting and communicating administrative decisions regarding claims in Spanish.[81] Furthermore, Kelly would often speak Spanish to persons who spoke both English and Spanish in order to facilitate expression of ideas and feelings which could not otherwise be expressed through the use of English.[82] Kelly discontinued these practices immedialtely when she became aware of the content of Article XXVIII. As an employee of the state, she was sworn to obey the Constitution and the laws of Arizona.[83] Moreover, Kelly was convinced that she would be subject to sanctions, including the possibility of termination, if she continued to use Spanish on the job.[84] Based on this fear, Kelly restricted her on-the-job vocabulary to English and filed suit pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 2000(d).[85] Later, Kelly amended her complaint to add State Senator Jaime Gutierrez, a bilingual State Senator representing a district of non-English citizens with whom he often communicated in Spanish regarding governmental matters of interest to them.[86] The complaint, as amended, sought an injunction against state enforcement of Article XXVIII and a declaration that the article violated the First and Fourteenth Amendments of the Constitution.[87] It named the State of Arizona, Governor Rose Mofford, and Arizona Attorney General Robert Corbin, amongst others, as the defendants.[88] The Federal District Court for the district of Arizona granted motions to dismiss for the State and Robert Corbin.[89] However, the court found that Kelly could maintain an action against Governor Mofford given that she possessed the authority to enforce the article, and had expressed a willingness to do so.[90] Upon reaching the merits of the case, the district court read Article XXVIII broadly, finding that it effectively bars all state officers and employees from using any language other than English in performing their official duties.[91] Thus construed, the court found that the article infringed on constitutionally protected speech and was facially overbroad in violation of the First Amendment.[92] Governor Mofford, as the only remaining defendant and an outspoken critic of the article, decided not to appeal the judgment.[93] Arizonans for Official English (A.O.E.), the lobby group principally responsible for the ballot initiative which led to the pas-

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

[79] Brief for Respondent at 7 (1996 WL 426410).

[80] *Id.*

[81] *Id.*; *see also, Id.* at 34 (The State of Arizona has stipulated that its operations are enhanced by permitting service employees to communicate with citizens of the State in languages other than English where the citizens are not proficient in English).

[82] *Id.* at 7.

[83] *Id.* at 8.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *See Yniguez*, 69 F.3d at 925.

[88] *See* Brief for Respondent at 6-7.

[89] *Id.* at 7.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.* at 8.

sage of the article, responded to Governor Mofford's decision not to appeal with a motion to intervene post-judgment pursuant to Federal Rule of Civil Procedure 24(a).[94] The district court denied their motion to intervene.[95]

On July 19, 1991, the Court of Appeals for the Ninth Circuit reversed the district court's denial of A.O.R.'s intervention motion. The court based its decision on the idea that A.O.R.'s relationship to Article XXVIII was analogous to that of a state legislature to a state statute in that they had a "strong interest in the vitality of a provision of the state constitution which [it had] proposed and for which [it had] vigorously campaigned."[96] A.O.E. filed its Notice of Appeal 15 months later.[97]

On December 7, 1994, a three-judge panel of the 9th Circuit affirmed the district court's decision on the merits.[98] The 9th Circuit decided to rehear the case en banc, and in a six-to-five decision, affirmed the holding of the three judge panel. Of the various opinions in the case, Judge Reinhardt's majority and special concurring opinion, and Judge Kozinski's dissenting opinion are worthy of mention. Judge Reinhardt begins the decision by analyzing the district court's broad construction of Article XXVIII. Viewing the article as "by far the most restrictively worded official-English law to date," Judge Reinhardt goes on to adopt the district court's interpretation: that the article is not limited in its application to mere "official acts" of governmental entities, but applies to all government officials and employees during the performance of their duties.[99]

Upon reaching the merits, Judge Reinhardt conducted an overbreadth analysis. Under the overbreadth doctrine, an individual whose own speech may constitutionally be prohibited is permitted to challenge the facial validity of a provision because of the threat that the speech of third parties not before the court will be chilled.[100] Based on the fact that the article applied to all individuals in government service and focused explicitly on languages other than English, Judge Reinhardt concluded that the article would be facially invalid if it infringed upon First Amendment rights.[101]

A.O.E. set forth two arguments regarding Article XXVIII's impact on the First Amendment. First, A.O.E. claimed that the court should apply the same level of First Amendment scrutiny as that in "symbolic speech" cases.[102] Judge Reinhardt dismissed the claim that Article XXVIII regulated only conduct, reasoning that "language is by definition speech, and the regulation of any language is the regulation of speech."[103] Second, A.O.E. claimed that what Kelly was actually seeking to establish was an affirmative right to have government operations conducted in a foreign tongue.[104] Judge Reinhardt quickly dismissed this argument, finding that Kelly's claim was for the protection of speech by a public employee.[105]

In ultimately deciding upon the article's impact on First Amendment rights, Judge Reinhardt invoked the authority of *Waters v. Churchill*[106] and *Pickering v. Board of Educ.*[107] *Waters-Pickering* established a distinction between "public concern" and "private interest" speech.[108] The government, even with its inherent authority to control the speech of its employees to a greater extent than that of citizens, is still subject to the greater constitutional protection given to the employees when they speak on matters of public concern.[109] Even though Kelly's speech did not fit easily into the categories, Judge Reinhardt found that her speech was of the kind that was "unquestionably of public import".[110] Judge Reinhardt identified some of the harmful effects that would occur if such speech were proscribed. He stated that, for example:

> monolingual Spanish-speaking residents of Arizona cannot, consistent with the article, communicate effectively with employees of a state or local housing office about a landlord's wrongful retention of a rental deposit, nor can they learn from clerks of the state court about how

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[94] *Id.*

[95] *See Yniguez v. Mofford*, 130 F.R.D. 410 (D.Ariz. 1990).

[96] *See Yniguez v. Arizona*, 939 F.2d 727, 733 (9th Cir. 1991).

[97] *See* Brief for Respondent at 10.

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

[99] *See Yniguez*, 69 F.3d at 929.

[100] *Id.* at 931 (citing *Board of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 574 (1987)).

[101] *See Yniguez*, 69 F.3d at 931-934.

[102] *Id.* at 934; *see also, Texas v. Johnson*, 491 U.S. 397 (1989), *United States v. O'Brien*, 391 U.S. 367 (1968).

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

[104] *Id.* at 936.

[105] *Id.* at 938.

[106] 511 U.S. 661 (1994).

[107] 391 U.S. 563 (1968).

[108] *See Waters*, 511 U.S. at 661; *Pickering*, 391 U.S. at 563, 573-574.

[109] *See Waters*, 511 U.S. at 670.

[110] *See Yniguez*, 69 F.3d at 941.

> and where to file small claims court complaints. They cannot obtain information regarding a variety of state and local social services, or adequately inform the service-givers that the governmental employees involved are not performing their duties properly or that the government itself is not operating effectively or honestly.[111]

Given such an impediment to First Amendment rights, Judge Reinhardt ruled that the article was unconstitutionally overbroad.[112]

In dissent, Judge Kozinski premised his comments on the idea that the ruling in the case created the risky notion that "government employees have a personal stake in the words they utter when they speak for the government."[113] Judge Kozinski points out that "government has no mouth, it has no hands or feet; it speaks and acts through people. Government employees must do what the state can't do for itself because it lacks corporeal existence; in a real sense, they are the state."[114] Judge Kozinski stated his belief that the case was governed by the principles set forth in *Rust v. Sullivan.*[115] Consistent with *Rust*, Kozinski felt that because the employee was speaking in her official capacity, the government could rightfully determine what she would or would not be permitted to say.[116]

The approach taken by Judge Kozinski sparked Judge Reinhardt to write a special concurring opinion in order to attack it. In that opinion, Judge Reinhardt argued that Judge Kozinski's approach would foster an "Orwellian world where Big Brother could compel its minions to say War is Peace and Peace is War, and public employees would be helpless to object."[117] He also went on to note what he believed to be one of the main protections of the First Amendment; the public's interest in receiving "information of vital importance from the government."[118]

A recent article by Scott H. Angstreich published in the *Harvard Journal of Law and Public Policy* suggests that this latter point was the real issue in *Yniguez*. Angstreich claims that if any of Kelly's free speech rights were implicated, it was by virtue of the audience that she was speaking to and *their* interest in the content of her communication.[119] He believes that Judge Reinhardt erred in trying to squeeze the situation into the *Waters-Pickering* analysis, based on what he sees as a clear understanding that her speech was neither a matter of public concern (which normally refers to speaking as a citizen about government policy) nor merely a matter of private interest.[120] Angstreich concludes that this approach, coupled with the application of the "unconstitutional conditions doctrine" which acts to prevent the government from asking an individual to surrender by agreement rights that the government could not take by direct action, must be taken in gauging the constitutionality, or lack thereof, of the English only movement.[121]

The approach taken[122] in resolving the issue should become evident later in the term. The Supreme Court has granted A.O.E.'s petition for certiorari, and oral arguments are set for December 4, 1996.[123] The remainder of the article will discuss the arguments presented by both sides, and predict the outcome of the case based upon the briefs presented by both sides and an analysis of the questions asked by the respective justices upon oral arguments.

3. *Arizonans for Official English v. Arizona*

a. *Legal arguments before the Court*

On March 26, 1996, the United States Supreme Court granted A.O.E.'s petition for certiorari.[124] The questions before the Supreme Court are as follows: 1) whether a State constitutional provision declaring English the official language of the State and requiring English to be used to perform official acts violates the Free Speech Clause of the First Amendment, 2) whether a government employee has a Free Speech right to disregard the official language of her employer and choose the language in which to perform official actions, 3) whether petitioners (A.O.E.) have standing to maintain the action, and 4) whether a case or controversy exists with respect to respondentYniguez? The parties were requested to brief and argue the third and fourth questions by

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[111] *Id.* at 947.
[112] *Id.* at 962.
[113] *Id.* at 960.
[114] *Id.* at 962.
[115] 500 U.S. 173 (1991).
[116] *See Yniguez*, 69 F.3d at 953.
[117] *Id.* at 952.
[118] *Id.*
[119] *See* Scott H. Angstreich, *Speaking in Tongues: Whose Rights at Stake?*, 19 HARV. J.L. & PUB. POL'Y 634, 639 (1995).
[120] *Id.* at 639.
[121] *Id.* at 642.
[122] Assuming a decision is rendered on the merits.
[123] *See* 64 U.S.L.W. 3635 (No. 95-974).
[124] *Id.*

order of the Court, dated March 25, 1996.[125] For purposes of the discussion in this part of the article, we assume that the Court will answer the procedural questions in the affirmative, and thus reach the merits of the case. We focus the analysis instead on the arguments brought forth by each side regarding the substantive questions presented.

The analysis of the parties' arguments with respect to the first two questions presented can be grouped together. Petitioners (A.O.E.) base their argument regarding these issues on a two pronged attack. Specifically, they claim that a) the judiciary has traditionally reserved choices about the use of language for the political branches, and b) that the Court should apply the standard of review from *Kelley v. Johnson,*[126] *Waters v. Churchill,*[127] and *Rosenberger v. Rector and Visitors of Univ. of Va.*[128] because, as in those cases, the *government* is the party speaking. Under such a standard, the government's choice would only be overturned if it were so irrational that it would be branded 'arbitrary'.

With respect to the first prong of their argument, petitioners cite *Guadalupe Org., Inc. v. Temp Elementary School Dist. No. 3*[129] and *Carmona v. Sheffield*[130] as evidence of the judiciaries' willingness to leave choices about language to the political branches.[131] They claim that one reason for the courts' deference is the sheer number of languages which confront policymakers.[132] A.O.E. posed the question of whether Arizona could "respond to service requests in Spanish and not in several of the native American languages that so enrich the State?"[133] They assert that such things as requiring the state to produce documents in numerous languages or provide translations would create an enormous burden.[134] The effectiveness of this argument, however, is dependent upon the Court's response to the second prong of their argument; specifically, is it the *government* or the *individual* who is doing the talking? If the Court believes that it is the latter, it may very well be the case that the effects of the article are viewed as prior restraints on speech content. If that were the case, the state would have a hard time meeting the standard of review applied by the court with those so called burdens.

Both sides make forceful arguments regarding whose speech is at stake. Petitioners make the broad assertion that Arizona has the right to choose the language in which it will speak.[135] They cite *C.B.S., Inc. v. Democratic National Committee,*[136] for the proposition that "the purpose of the First Amendment is to protect *private expression* and nothing in the guarantee precludes the government from controlling *its own expression or that of its agents.*"[137] (emphasis added). Petitioners conclude that because speech uttered by government employees during the course of performing their official duties is, for all intents and purposes, "property" of the government, Article XXVIII cannot possibly infringe upon the First Amendment's Free Speech Clause. Moreover, under such reasoning, government employees would not have the right to choose the language in which to perform their official actions.[138] Petitioners argument misses the point. In cases like *Waters*, where the Court held that, unlike members of the public, governemnt employees could be barred from using offensive words, the government had an interest in creating an effcient and user friendly environment for its citizens. Unlike *Waters*, however, in the present case the State has stipulated to the fact that Kelly's use of a non-English language actually contributed to the efficient operation and administration of the State.[139] Based on this, the State will be hard pressed to convince the Court that a legitimate reason exists for suppressing Kelly's right to continue to communicate in Spanish. The same holds true for Senator Gutierrez, the other respondent in the case. Not only might the Court find that inefficiencies could result by disallowing him to communicate to his constituents in Spanish, but the opportunity would present itself for the Court to latch on to Scott Angstreich's point: that the infringement upon the recipients' right to receive information is the most obvious First Amendment violation.[140]

Respondents structure their argument regard-

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[125] *Id.* at 3639.

[126] 425 U.S. 238 (1976).

[127] 511 U.S. 661 (1994).

[128] 115 S.Ct. 2510 (1995).

[129] 587 F.2d 1022 (9th Cir. 1978).

[130] 475 F.2d 738 (9th Cir. 1973) (California's choice to deal only in English in the provision of forms and services has a reasonable basis).

[131] *See* Brief for Petitioner at 18 (1996 WL 272394).

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.* at 19.

[136] 412 U.S. 94 (1973).

[137] *Id.* at 20.

[138] *Id.* at 21; *see also, Waters v. Churchill,* 511 U.S. 661 (1994).

[139] *See* Brief for Respondent at 34 (1996 WL 426410).

[140] *See supra,* discussion pp. 25-26.

ing the questions presented as follows: a) Article XXVIII acts as a prior restraint on speech content because the government effectively promotes speech which it deems to be more valuable (speech in English) while suppressing speech it deems less valuable (speech in any other language),[141] and b) any right the government might have in communicating in a given language needs to be balanced against the First Amendment rights of its employees and the recipients of the communication.[142]

With respect to the first part of its argument, respondents focus on the appropriate standard of review that the Court should apply towards Article XXVIII. Citing cases such as *44 Liquormart v. Rhode Island*,[143] and *Asian American Bus. Group v. Pomona*,[144] respondents assert that the Court must apply strict scrutiny to Article XXVIII. In support of this, they state that Article XXVIII acts as a prior restraint by virtue of the fact that it chills such things as "government employee speech on all levels, including speech that informs the public about the political process, government wastefulness, and misconduct by public officials," all of which lie at the core of the First Amendment.[145] In the alternative, respondents ask that the "heightened balancing test from *United States v. National Treasury Employees Union*,[146] be applied. This test was established by the Court to evaluate non-content based ex-ante restrictions on speech which merely deter, rather than ban, public employees' speech.[147] Under this standard, a court is charged with balancing both the interests of the employee in communicating freely and the interests of future employees and possible recipients of present and future communications. For reasons already discussed,[148] Arizona will have a hard time passing either one of these tests should they be implemented.

Moving on to the second part of their argument, respondents propose that both the government employees and the recipients of their communication have First Amendment rights in the speech being communicated.[149] They cite *Givhan v. Western Line Consol. Sch. Dist.*,[150] and *Johnson v. Multnomah County*,[151] in support of the proposition that government employees have speech interests in their job-related communications. Although the employees' interest alone may not be sufficient to outweigh the government's interest in such things as "efficiency", "unity", and "the preservation of English", coupling that with the impairment on the First Amendment rights of recipients clearly tips the scales against the government. On this latter point, respondents point out that "the public's right to receive communication involving ideas and information has long been recognized to be a necessary corollary to enumerated First Amendment freedoms, including the right to assemble and petition for redress of grievances."[152] Based on said effects on both employees and recipients, respondents claim that Article XXVIII should be struck down by virtue of its violation of the First Amendment to the Constitution. Once again, it is important to note that the approach which the Court may adopt inherently depends upon whether it views the speech as the "property" of the government, or that of the individuals providing and or receiving the communication. The final section will attempt to predict the approach that the Court will take, if any, based upon an analysis of the questions asked by the Justices upon oral argument.

b. *Oral arguments before the Supreme Court*

The United States Supreme Court heard oral arguments for 95-974, *Arizonans for Official English v. Arizona* on Wednesday, December 4, 1996. From the start, it was evident that it was going to be a long day for the petitioners (A.O.E.and Robert D. Park)[153] given that Chief Justice Rehnquist immediately made it clear that the Court was greatly inter-

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[141] *Id.* at 23.

[142] *Id.* at 22; *see also, New York Times Co. v. Sullivan*, 376 U.S. 254, 270-271 (1964).

[143] 116 S.Ct. 1495, 1514 (1996) (speech restrictions cannot be treated as simply another means that the government may choose to achieve its ends).

[144] 716 F.Supp. 1328, 1330 (C.D. Cal. 1989) (because language used is an expression of natural origin, culture, and ethnicity, regulation of language is a regulation of content).

[145] *See* Brief for Respondent at 22.

[146] 115 S.Ct. 1003, 1013 (1995).

[147] *Id.*

[148] *See supra* text accompanying notes 129-134.

[149] *Id.* at 25.

[150] 439 U.S. 410, 414 (1979) (public employee does not forfit his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly).

[151] 48 F.3d 420 (9th Cir. 1995) (government employees are afforded first amendment protections when they speak about non-private issues during the scope of their duties).

[152] *Id.* at 26; *see also, Board of Educ. v. Pico*, 457 U.S. 853, 867 (1982).

[153] Mr. Park is the Chairman of Arizonans for Official English. A.O.E. was a major proponent of the ballot initiative which led to the passage of Article XXVIII. The

ested in hearing arguments respecting the procedural issues,[154] and advised counsel[155] to spend the majority of his time addressing these matters as opposed to the questions on the merits.[156] A few minutes into counsel's opening statement, Justice Ginsberg interrupted with a question regarding petitioners' standing before the Court. She and Justice Briar found it difficult to accept the 9th Circuit's reasoning in granting petitioners standing before that court, based on the notion that their relationship to Article XXVIII was analagous to that of a state legislature to a state statute.[157] Justice Ginsberg asked counsel whether, under such rationale, and given the fact that the measure in question was passed by a ballot initiative, a citizen who had voted in favor of the initiative would have standing before the Court to challenge the proceedings below. Counsel was hesitant to answer this question, and finally conceded that such would not be the case. This interplay effectively resolved the standing issue. When the Court decides the case later in the term, it will most likely hold that petitioners did not have standing to be before the Court.[158]

Holding true to Chief Justice Rhenquist's initial statement, the rest of petitioner's time[159] was devoted to answering the remaining procedural question: whether a case or controversy existed with respect to the respondent?[160] Justice Scalia took command of this line of questioning. Summarizing the proceedings below, Justice Scalia wondered aloud whether a case or controversy ever existed for the proceedings before the ninth circuit.[161] Over and over, Justice Scalia asked how a case or controversy could have existed, and can now exist, given that the adversarial party in the case (Governor Mofford) refused to appeal the Federal District Court's decision.[162] Justice Scalia stated to counsel his belief that the case was over then, and seemed unconvinced by counsel's attempts to indicate otherwise. At this point in the proceedings, it was evident that the case had been resolved. When the decision is rendered, the Court will most likely have vacated the proceedings below on the ground of a lack of a viable case or controversy.[163]

D. *A Brief Look at the Constitutionality of English-Only Provisions Under the Fourteenth Amendment's Equal Protection Clause*

The Fourteenth Amendment to the U.S. Constitution provides that "[n]o State shall. . . deny to any person within its jurisdiction the equal protec-

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organization is said to have expended more than $300,000 and thousands of hours in volunteer time in the promotion of the initiative. *See* Brief for Petitioner at 11 (1996 WL 272394).

[154] *See* 64 U.S.L.W. 3635. In addition to the questions presented on the merits, the Supreme Court specifically asked petitioner to address the following procedural questions: i) do petitioners have standing to maintain the action, and ii) is there a case or controversy with respect to respondent Yniguez?

[155] Mr. Barnaby W. Zall of Williams & Jensen, P.C. acted as Counsel of Record for petitioners.

[156] *See* 64 U.S.L.W. 3635. The questions presented on the merits are as follows: i) does a state constitutional provision declaring English the official language of the state and requiring English to be used to perform official acts violate the First Amendment's Free Speech Clause?, and ii) does a government employee have a free speech right to disregard the official language in which to perform official actions? *Id.*

[157] *See* Brief for Respondent at 8 (1996 WL 426410). The 9th Circuit reasoned that like a state legislature, petitioners had a strong interest in the vitality of a provision of the state constitution which it had proposed and for which it had vigorously campaigned. *Id.*

[158] The case was decided on March 3, 1997, four days prior to the final revision of this article. *See Arizonans for Official English v. Arizona*, 1997 WL 84990 (U.S.). With respect to standing, the Court followed the approach from *Burke v. Barnes*, 479 U.S. 361, 363 (1987) (leaving question of standing unresolved, temporarily, in order to first inquire as to whether a valid case or controversy still exists). *See Arizonans*, 1997 WL 84990, *13 (U.S.).

[159] Counsel for petitioner did, however, reserve two minutes upon which time he addressed the merits. Specifically, counsel made arguments regarding whose speech is at stake (government versus individual) and overbreadth.

[160] *See Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (to qualify as a case fit for federal- court adjudication, actual controversy must be extant at all stages of review).

[161] *See generally, Yniguez v. Arizonans for Official English*, 939 F.2d 727 (9th Cir. 1991); *Yniguez v. Arizonans for Official English*, 975 F.2d 646 (9th Cir. 1992); *Yniguez v. Arizonans for Official English*, 42 F.3d 1217 (9th Cir. 1994); *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995).

[162] *See Yniguez v. Arizona*, 730 F.Supp. 309 (D.Ariz. 1990).

[163] *See Arizonans*, 1997 WL 84990, *17 (U.S.) (exceptional circumstances present in case and the federalism concern led Court to conclude that vacatur down the line was the equitable solution). In cases brought before a federal court, it is settled law that the court has the discretion to abstain and refer the matter to a respective state tribunal. *See, e.g., Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941); *Quackenbush v. Allstate Ins. Co.*,

tion of the laws."[164] The argument can be made that, in addition to the First Amendment infirmities, English-only provisions violate the Equal Protection Clause. The Supreme Court has traditionally applied three standards of review under the Equal Protection Clause to statutory or administrative classifications in which similarly situated people are treated differently. These standards of review are strict scrutiny,[165] intermediate scrutiny,[166] and rational basis.[167]

In a recent law review article,[168] Daniel J. Garfield suggests that, under the traditional interpretation of the Equal Protection Clause, the Court would most likely find English-only amendments constitutional because they would not be deemed to discriminate against a suspect class on their face, and would not be found to abridge a recognized fundamental right.[169] However, Garfield sets forth two persuasive arguments for rendering such laws unconstitutional. First, he states that, regardless of whether or not there is a suspect class, English-only provisions are not constitutional given the fact that they do affect a fundamental right: the right to participate equally in the political process.[170] Second, he argues that English-only provisions may be unconstitutional because they are simply using language as a proxy for discriminating on the basis of ethnicity.[171]

Garfield's first argument is most persuasive. Although the Supreme Court did not feel it necessary to hear arguments regarding the constitutionality of Article XXVIII under the Equal Protection Clause at the orals, the respondents fashioned an argument similar to Garfield's in their brief to the Court.[172] Specifically, they claimed that Arizona's adoption of Article XXVIII severely limited the discourse between its citizens and their government by virtue of the fact that it targeted a minority of the Arizona population who lacked English language skills and prohibited them from communicating with their representatives and elected officials.[173] Had the Court been willing to consider the merits of the case, it very well could have found Article XXVIII's limitation on its citizens incompatible with the notion of a republican form of government.

III. CONCLUSION

To answer the question which was on the mind of the woman in the department store, and the respective lobby groups which are still pushing for the passage of English-only provisions such as Article XXVIII, I suggest that we need look no further than the natural incentives which exist for the use and evetual mastery of the English language. Query as to how anyone can worry about the demise of this language given that we live in an increasingly global economic environment which relies heavily on the English language, and provides ample rewards to those who have developed their skills in the same. In the domestic setting, English is and will continue to be the foundation of our society given that our "Western culture" revolves around all aspects of communication, including, but not limited to, the InterNet, Television, Radio, Newspapers , and other forms of mass media.

I propose that the real question is not whether anybody speaks English in this country anymore, but, rather, whether anyone can afford not to pursue their

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116 S.Ct. 1712 (1996). The Arizona Supreme Court has before it, in *Ruiz v. State*, the question: What does Article XXVIII mean? The question remains whether this state tribunal will provide a narrower interpretation of Article XXVIII than that of the Federal District Court, thereby enabling it to fall within the confines of the First Amendment. *See Yniguez v. Arizona*, 730 F.Supp. 309 (D.Ariz. 1990).

[164] U.S. CONST. amend. XIV, §1.

[165] The Court will apply strict scrutiny when a statute discriminates against a suspect class, or infringes upon a fundamental right implicit in the Equal Protection Clause. Strict scrutiny review requires the state to show that the classification furthers a compelling state interest in the least restrictive way possible. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 217 (1982).

[166] Intermediate scrutiny will be applied for quasi-suspect classifications. In order to meet this standard, the state must show that the law is substantially related to an important governmental interest. *See e.g., Craig v. Boren*, 429 U.S. 190 (1976).

[167] This standard requires that the statute be rationally related to a legitimate state interest. *See, e.g., Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

[168] *See* Daniel J. Garfield, *Don't Box Me In: The Unconstitutionality of Amendment 2 and English-Only Amendments*, 89 NW. U. L. REV. 690 (1995).

[169] *Id.* at 692-693.

[170] *Id.* at 739. The Court's explicit recognition of the right to participate equally in the political process would, at a minimum, ensure that minorities can attempt to affect the outcome of a political process that substantially affects their lives. *Id.*

[171] *Id.* at 740. *See also*, Juan F. Perea, *Demography and Distrust: An Essay on American Lamguages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 281 (1992) (Stating that language is fundamentally an ethnic trait).

[172] *See* Brief for Respondent at 30-31 (1996 WL 426410).

[173] *Id.* at 31.

knowledge of the English Language. Everybody speaks English in this country! Although those who have just immigrated will need some time to develope their skills, they too will speak English. Realizing the "American dream" will be more than enough incentive to do do.

English-only provisions, such as Arizona's Article XXVIII, are based on nothing more than unsupported fears and nativist ideals. Such laws are not necessary in a land such as our own, which is on the long but steady path to achieving ethnic and racial harmony. Not only are these provisions unnecessary, but, more importantly, they are unconstitutional. English-only provisions infringe upon the free speech rights under the First Amendment, and, arguably, upon equal protection under the Fourteenth Amendment.