BYU Law Review

Volume 2001 | Issue 4 Article 4

11-1-2001

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A multitude of commentators has spoken against and written both articles and books condemning official-English and English-only[1] legislation as unwise,[2] unconstitutional,[3] racist,[4] and divisive.[5] Yet, even though few commentators support the constitutionality of English-only statutes,[6] such legislation is on the rise, mostly through

1. Throughout this paper I will use the term "English-only" rather than "official English." I am aware that many states have official-English statutes that could not fairly be termed "English-only" statutes because they do not prohibit the use of languages other than English. For example, Indiana's official-English law merely says, "The English language is adopted as the official language of the state of Indiana." IND. CODE ANN. § 1-2-10-1 (West, WESTLAW through 2000 2d Reg. Sess.). In contrast, the Arizona amendment, which is the focus of this paper, the Alaska statute, and the Utah statute each declare English to be the sole language of the government and prohibit the use of other languages. *See infra* Appendices A–C.

2. *See infra* note 5.

3. *See infra* note 20.

4. *See, e.g.*, Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293, 294 (1989) ("The leaders of the English-Only movement focus their public arguments on the goal of national unity. Hidden inside this velvet glove is the iron fist of prejudice and discrimination. The English-Only movement is actually an expression of the underlying insecurity about and prejudice towards Hispanics.").

5. Articles focusing on divisiveness or lack of wisdom in enacting English-only statutes, but not on constitutionality per se, include: Steven W. Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027 (1996); Drucilla Cornell & William W. Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish*, 84 CORNELL L. REV. 595 (1999); Joseph E. Magnet, *Language Rights as Collective Rights*, *in* PERSPECTIVES ON OFFICIAL ENGLISH: THE CAMPAIGN FOR ENGLISH AS THE OFFICIAL LANGUAGE OF THE USA 293 (Karen L. Adams & Daniel T. Brink eds., 1990) [hereinafter PERSPECTIVES ON OFFICIAL ENGLISH]; Rachel F. Moran, *Language and the Law in the Classroom: Bilingual Education and the Official English Initiative*, *in* PERSPECTIVES ON OFFICIAL ENGLISH, *supra*, at 285–92.

6. A rather exhaustive review of sources, Jose Julian Alvarez-Gonzalez, *Law, Language and Statehood: The Role of English in the Great State of Puerto Rico,* 17 LAW & INEQ. 359, 394 n.167 (1999), lists only two sources arguing that English-only provisions are constitutional: Chris Boehler, Note, Yniguez v. Arizonans for Official English*: The Struggle to Make English the Official Language*, 34 HOUS. L. REV. 1637 (1998); and Michael W. Valente, Comment, *One Nation Divisible by Language: An Analysis of Official English Laws in the Wake of* Yniguez v. Arizonans for Official English, 8 SETON HALL CONST. L.J. 205 (1997). Another source that advocates English-only provisions but does not address the question of constitutionality is Barnaby W. Zall & Sharon McCloe Stein, *Legal Background and History of the English Language Movement*, *in* PERSPECTIVES ON OFFICIAL ENGLISH, *supra* note 5, at

the ballot initiative process. "U.S. English," the Washington D.C.-based sponsor of these laws,[7] has gone from state to state collecting enough signatures to place English-only initiatives on state ballots. That scenario repeated itself in Utah in the November 2000 election. After the Utah state legislature refused to pass English-only statutes in 1997 and 1999,[8] "U.S. English" spent "hundreds of thousands of dollars" to get the measure on the Utah ballot in 2000.[9] The English-only initiative passed by approximately seventy percent.[10] Alaska, in 1998, similarly passed a very restrictive English-only initiative.[11]

In the 1988 election, Arizona passed an English-only initiative amendment to the Arizona Constitution, similar in wording and in scope to the Utah and Alaska initiatives.[12] The Arizona Amendment declared that English was the "language of the ballot, the public schools and all government functions and actions."[13] The amendment required that unless one of the few enumerated exceptions applied, "[t]his State and all political subdivisions of this State shall act in English and in no other language."[14] This prohibition on non-English languages applied to "all government officials and employees during the performance of government business."[15]

Arizona's amendment was universally recognized as "by far the most restrictively worded official-English law to date."[16] The

261–71.

7. *See* U.S. English, Inc., *Welcome to U.S. ENGLISH, Inc.*, *at* http://www.us-english.org/inc/ (last visited Nov. 19, 2001) ("In the last four years, Alaska, Georgia, Montana, New Hampshire, South Dakota, Utah, Virginia, Wyoming and Missouri have enacted some form of official English legislation with the help of U.S. ENGLISH.").

8. *The English-Only Movement in Utah*, ACLU Utah, *at* http://www.aclu-utah.org/EObackground.htm (last visited Jan. 11, 2001).

9. Dennis Romboy, *Group Ready to Defend New English-Only Law: Initiative Passed on Nov. 7 Faces a Constitutional Test* (Dec. 2, 2000), *available at* http://deseret-news.com/dn/view/0,1249,230012735,00.html.

10. Bob Bernick, Jr., *Matheson Buoys Demos: But Utah GOP in Firm Control at State Capitol* (Nov. 8, 2000), *available at* http://deseretnews.com/dn/view/0,1249, 230007305,00.html.

11. *See* Kritz v. State, No. 3DI-99-12 CI, slip op. at *1 (Alaska Super. Ct. Mar. 3, 1999) (challenging constitutionality of English-only statute).

12. *See infra* Appendix A for the Arizona amendment; Appendix B for the Utah statute; and Appendix C for the Alaska amendment.

13. ARIZ. REV. STAT. CONST. art. 28 (2001). See Appendix A for the full text of the amendment.

14. *Id.*

15. *Id.*

16. Michele Arington, *English-Only Laws and Direct Legislation: The Battle in the*

amendment was declared unconstitutional: first by a federal district court,[17] then by the Ninth Circuit,[18] and finally in 1998 by the Arizona Supreme Court.[19] All three courts found the amendment unconstitutional under the First Amendment as an abridgment of free speech.

In contrast, many, and perhaps most, commentators who have argued that English-only statutes are unconstitutional have relied primarily on the Equal Protection Clause.[20] Some have criticized the Ninth Circuit and Arizona courts for resting their English-only

States over Language Minority Rights, 7 J.L. & POL. 325, 337 (1991).

17. Yniguez v. Mofford, 730 F. Supp. 309 (D. Ariz. 1990) [hereinafter *Mofford*], *aff'd sub nom.* Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (en banc) [hereinafter *Yniguez*], *and rev'd on procedural grounds by* Arizonans for Official English v. Arizona, 520 U.S. 43 (1997). The Ninth Circuit's ruling was overturned by the United States Supreme Court for mootness. The Court also stated that the Ninth Circuit and the federal district court should have certified the question of the appropriate construction of the amendment to the Arizona Supreme Court or, alternatively, should have abstained from ruling on the constitutional issue until after the Arizona Supreme Court had construed the amendment in analogous proceedings pending in state court. *Id.* at 75–80. The Supreme Court did not reach or comment on the constitutionality of the English-only amendment.

18. *Yniguez*, 69 F.3d 920.

19. Ruiz v. Hull, 957 P.2d 984 (Ariz. 1998) (en banc).

20. *See* Alvarez-Gonzalez, *supra* note 6, at 394 n.167 (listing five books and nearly thirty law review articles concluding that English-only statutes are unconstitutional).

Sources not identified by Alvarez-Gonzalez that similarly conclude that English-only statutes are unconstitutional include Paul Bender, *The Arizona Supreme Court: Its 1997–98 Decisions*, 30 ARIZ. ST. L.J. 875, 889–96 (1998) (suggesting that the federal Equal Protection Clause is a "possible basis" for finding English-only statutes unconstitutional); Califa, *supra* note 4 (arguing that English-only statues are unconstitutional under Equal Protection Clause); Yuval Merin, *The Case Against Official Monolingualism: The Idiosyncrasies of Minority Language Rights in Israel and the United States*, 6 ILSA J. INT'L & COMP. L. 1 (1999) (arguing that English-only statutes violate the Equal Protection Clause because language rights are a fundamental right); John Trasvina, *Bilingualism and the Constitution*, *in* PERSPECTIVES ON OFFICIAL ENGLISH, *supra* note 5, at 281–84 (finding that there is no fundamental right to foreign language use, but that by restricting language, other fundamental rights may be unconstitutionally burdened under the Equal Protection Clause); Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399 (1999) (advocating a new Equal Protection Clause test and finding English-only provisions to be unconstitutional); Scott H. Angstreich, Recent Case, *Speaking in Tongues: Whose Rights at Stake?*, 19 HARV. J.L. & PUB. POL'Y 634 (1996) (arguing that English-only statutes unconstitutionally infringe on rights of the recipients); and Donna F. Coltharp, Comment, *Speaking the Language of Exclusion: How Equal Protection and Fundamental Rights Analyses Permit Language Discrimination*, 28 ST. MARY'S L.J. 149, 212 (1996) (concluding that English-only statutes should be found unconstitutional under the Equal Protection Clause "by declaring language-based discrimination to be suspect"). *See generally* LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY (James Crawford ed., 1992).

analysis on the First Amendment, stating that the courts should have invoked the Equal Protection Clause, rather than "dressing an equal protection analysis in First Amendment clothes."[21] In spite of these criticisms, there are some good reasons for the courts to have avoided the Equal Protection Clause.

First, under the Equal Protection Clause, a statute will likely be upheld as constitutional unless strict or intermediate scrutiny applies, neither of which is likely in the English-only context.[22] Second, courts may be wary of creating an affirmative fundamental right to government services in a foreign language under the Equal Protection Clause.[23] First Amendment doctrine allows a court to strike

21. Cecilia Wong, Note, *Language Is Speech: The Illegitimacy of Official English After* Yniguez v. Arizonans for Official English, 30 U.C. DAVIS L. REV. 277, 306 (1996); *see also* Bender, *supra* note 20, at 895–96 (noting that the First Amendment concerns do "not seem to be at the heart of what is wrong with the Amendment. The Amendment's devastating and unequal effect on the ability of non-English-speaking people to receive government benefits and services would, for example, appear to constitute a much more significant practical consequence."); Karla C. Robertson, Note, *Out of Many, One: Fundamental Rights, Diversity, and Arizona's English-Only Law*, 74 DENV. U. L. REV. 311, 329, 333 (1996) ("The court should have properly recognized language as a proxy for national origin and acknowledged the amendment's disparate impact on Latinos and other national origin groups by invalidating the amendment on equal protection grounds."); Martina Stewart, Recent Development, *English-Only Laws, Informational Interests, and the Meaning of the First Amendment in a Pluralistic Society*, 31 HARV. C.R.-C.L. L. REV. 539, 557 (1996) (approving of the use of the First Amendment, but then noting that the statute "raise[d] very serious equal protection concerns" and yet "neither the Ninth Circuit nor the district court mentioned the equal protection implications").

For another article claiming the illegitimacy of a First Amendment analysis for English-only statutes, but not specifically analyzing *Yniguez*, see Magnet, *supra* note 5, at 294 (stating that the First Amendment "is insecure as a foundation for language rights because language rights are not individual rights. . . . Language rights are collective rights.").

22. The Supreme Court has applied intermediate scrutiny in only a limited class of cases, such as restrictions based on gender and illegitimacy. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988). Strict scrutiny applies only if the provision in question disadvantages a "suspect class" or burdens a "fundamental right." *See* Plyler v. Doe, 457 U.S. 202, 216–17 & nn.14–15 (1982). While race is a suspect class and there is a relationship between race and non-English speakers, the Supreme Court has not ruled that the two are synonymous. *See* Hernandez v. New York, 500 U.S. 352, 371 (1991) (plurality opinion) ("It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis."). *But see* Aghazadeh v. Me. Med. Ctr., No. 98-421-P-C, 1999 WL 33117182 at *4 (D. Me. June 8, 1999) (listing contrary authority). Moreover, the Supreme Court is not likely to add a new suspect classification, particularly in the language context in which there may be legitimate reasons to have language restrictions in some circumstances.

23. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33–34 (1973); *Yniguez*, 69 F.3d at 936–37. Even some of the commentators who argue that language choice is a fundamental right attempt to avoid creating an affirmative right to government services in a

down an English-only provision as an impermissible restriction on speech without holding that language minorities have an enforceable, fundamental right to services in a foreign language.[24] Finally, unless a statute facially discriminates against a suspect class, it is likely valid under the Equal Protection Clause unless the plaintiffs can prove that those who enacted the statute acted with an improper motive or intent to discriminate.[25] By contrast, First Amendment analysis does not turn on motives.

Consequently, the First Amendment has been the judicial doctrine of choice in striking down English-only statutes. Specifically, courts have found that restrictive English-only statutes abridge (1) the free speech rights of government employees; (2) the free speech rights of legislators and elected government officials; (3) the free speech rights of the recipients; and (4) the First Amendment rights of non-English-speaking citizens to petition their government for

foreign language by stating that language choice, unlike other fundamental rights, is only available in certain circumstances. *See, e.g.*, Merin, *supra* note 20, at 46 (stating that "[u]nlike other fundamental rights . . . the prohibition of discrimination on the ground of language is not an absolute. There is no obligation for a state to conduct all of its activities in any language spoken by the inhabitants in its territory."). Another commentator attempted to avoid this problem by devising a new Equal Protection Clause test to scrutinize statutes, like English-only statutes, where a majority voted on the civic participation of minorities. This test includes looking at whether "civic participation rights [of a minority have] been severely impinged." Vargas, *supra* note 20, at 519.

24. Of course, First Amendment rights are themselves fundamental rights. Thus, if a statute burdens a First Amendment right, a court will apply strict scrutiny under the Equal Protection Clause to determine the statute's constitutionality. But invoking the Equal Protection Clause in this manner still requires a court to evaluate the statute's impact on First Amendment rights. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 93 (1972). A court wary of a First Amendment analysis gains little in invoking the Equal Protection Clause where the equal protection violation is dependent on the existence of First Amendment rights. The Arizona Supreme Court found that the Arizona amendment was also unconstitutional under the Equal Protection Clause because it burdened the fundamental right of citizens to petition the government for redress of grievances. *See* Ruiz v. Hull, 957 P.2d 984, 1000–02 (Ariz. 1998) (en banc).

25. *See* Washington v. Davis, 426 U.S. 229, 239–40 (1976); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977). While at least one commentator believes a court could find that voters acted with an improper purpose in passing an English-only provision by ballot initiative, *see* Robertson, *supra* note 21, at 331, Paul Bender noted that "a state supreme court might understandably be reluctant to make" a finding "that the Amendment was motivated by a purpose to disadvantage Hispanics or American Indians, rather than by a desire to enhance English usage," especially "about a measure enacted (however narrowly) through a statewide voter initiative." Bender, *supra* note 20, at 893; *see also* Crawford v. Bd. of Educ. of Los Angeles, 458 U.S. 527, 543–44 (1982) (holding that in a case where voters passed an amendment limiting busing for desegregation, the "claim of discriminatory intent on the part of millions of voters" was "'pure speculation'").

redress of grievances.[26] As apparent from these categories, one of the problematic aspects of a constitutional evaluation is that such legislation tends expressly to limit only the language used by the government. Government officials and employees are the only ones actually denied the ability to speak in a foreign language. The constitutionality of restricting foreign language use by elected government officials, such as legislators, has been examined in two law review articles,[27] as well as in Judge Brunetti's concurrence in the Ninth Circuit opinion.[28] Each of these analyses concludes that English-only restrictions, as applied to elected government officials, are unconstitutional under the First Amendment. By contrast, the free speech rights of hired government employees in the English-only context have been examined seriously only in the Ninth Circuit's decision, *Yniguez v. Arizonans for Official English*.[29] As will be shown, both the Ninth Circuit majority and dissents had considerable difficulty in their analyses and made rather serious errors.

In spite of the apparent difficulty of the analysis, it is important to examine the rights of government employees in the English-only context. As stated by the Ninth Circuit, the largest impact of English-only legislation is on a state's "numerous state and local public employees. In sheer number, these employees represent the most substantial target of [an English only statute's] restrictions on speech in languages other than English as they constitute the most common source of communications between the government and the public that it serves."[30]

In this Comment, I will argue that broad English-only statutes, such as the Arizona amendment, abridge the free speech rights of government employees and are, therefore, unconstitutional. Whether or not an English-only statute is constitutional is determined in large part by which First Amendment analyses and doctrines are deemed applicable. I will argue in Part I that in the English-only context, the

26. *See Yniguez*, 69 F.3d at 947; Kritz v. State, No. 3DI-99-12 CI, slip op. at *6 (Alaska Super. Ct. Mar. 3, 1999); *Ruiz*, 957 P.2d at 1000, 1002.

27. Michael Albert Thomas Pagni, Note, *The Constitutionality of English-Only Provisions in the Public Employee Speech Arena: An Examination of* Yniguez v. Arizonans for Official English, 24 HASTINGS CONST. L.Q. 247, 274–75 (1996); Robertson, *supra* note 21, at 326.

28. *Yniguez*, 69 F.3d at 950–51 (Brunetti, J., concurring).

29. *Id.* at 920.

30. *Id.* at 933.

free speech rights of employees should be examined under the test articulated in *Pickering v. Board of Education* and its progeny and that other First Amendment analyses are largely irrelevant. Part II will briefly overview the legislation concerning the Arizona statute, giving background for the analysis in Part III, where I will apply a *Pickering* and progeny analysis to an English-only provision, using the interpretation given to the Arizona statute. Part IV will discuss my conclusion that English-only statutes abridge the free speech rights of government employees.

I. *PICKERING*, *RUST*, AND TRADITIONAL FREE SPEECH DOCTRINES: WHAT MODE OF FIRST AMENDMENT ANALYSIS APPLIES?

A. Competing Analyses: An Introduction to Pickering *and* Rust

The general test for determining whether the speech rights of a public employee have been violated is found in *Pickering v. Board of Education*[31] and its progeny, specifically *Connick v. Myers*[32] and *United States v. National Treasury Employees Union* (*NTEU*).[33] In *Pickering*, an Illinois school board fired a teacher for sending a letter to a local newspaper.[34] The letter was critical of the school board's attempts to raise money through bond proposals and its allocation of previously raised funds. In *Pickering*, the Court established that

> [t]he problem in any [government employee] case 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.[35]

The school board in *Pickering* argued that the letter interfered with the efficient operation of the school system.[36] The Court found that such concerns were not substantial and that nothing indicated that

31. 391 U.S. 563 (1968).

32. 461 U.S. 138 (1983).

33. 513 U.S. 454 (1995) [hereinafter *NTEU*]. The *NTEU* analysis is applicable whenever the state issues a broad *ex ante* prohibition on government employee speech, rather than a single adverse *post hoc* employment decision for one employee's speech.

34. *Pickering*, 391 U.S. at 564.

35. *Id.* at 568.

36. *Id.* at 564.

the speech had impeded Pickering's performance as a teacher.[37] Thus, the Court found that Pickering had spoken on a matter of public concern and that his interests outweighed the employment interests of the school board.[38] His speech was protected, and the school board could not constitutionally dismiss him.

In *Connick*, the Court announced a second prong of the *Pickering* doctrine: the balancing test applied in *Pickering* (and, thus, protection of speech) would not apply "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest."[39] In *Connick*, a District Attorney had decided to transfer Myers to a different section of the criminal court. Infuriated by the transfer, Myers wrote a questionnaire to distribute to her coworkers, inquiring about the transfer policy, general morale in the office, and pressure to work in political campaigns.[40] She distributed the questionnaire at work and was subsequently fired.[41] The Court held that Meyer had spoken "as an employee" and mostly "on matters only of personal interest."[42] But the Court also found that the questionnaire contained one question, concerning pressure to work in political campaigns, that constituted speech on a matter of public concern.[43] Thus, the Court performed a complete balancing test, balancing Myers's interest in speaking on that one question of public concern with the interest of her employer in efficient and effective employment.[44] The Court found that Myers's speech had impeded her own and her coworkers' ability to perform their duties at work, had hurt working relationships in the office, and had undermined the authority of the District Attorney.[45] Thus, the interests of the employer in efficient and effective employment outweighed Myers's interest in speaking on a question of public concern, and, consequently, Myers's speech was unprotected.

Plainly, the prohibition against use of foreign languages by government employees does not fit nicely into either the *Pickering* or

37. *Id.* at 572–73.
38. *Id.* at 569–75.
39. *Connick*, 461 U.S. at 147.
40. *Id.* at 140–41.
41. *Id.* at 141.
42. *Id.* at 148–49.
43. *Id.* at 149.
44. *Id.* at 149–54.
45. *Connick*, 461 U.S. at 152–54.

Connick categories—it is not really a prohibition of speech either by "a citizen upon matters of public concern" or "an employee on matters only of personal interest." Both the Ninth Circuit majority and dissents in *Yniguez* had considerable difficulty in conducting an analysis in this area.[46] Yet the basic rule from *Pickering* and *Connick* is clear: a court is to balance the employee's interest to speak on matters of public concern with the state's interest in efficient employment. Such a test is workable in the English-only context.

The Court's decision in *NTEU* further sustains the feasibility and appropriateness of employing a *Pickering*-type balancing test to evaluate English-only restrictions on public employees. In *NTEU*, a class of federal employees below the GS-16 level challenged the constitutionality of an "honoraria ban" that prohibited all federal employees from receiving compensation for writing articles or making speeches outside their employment.[47] The honoraria ban in *NTEU* was different from all previous *Pickering* cases. Each *Pickering* case prior to *NTEU* had addressed a single employer's *post hoc* reaction to speech and the observed impact of that speech on the employer's interests. *NTEU*, in contrast, dealt with an *ex ante* general prohibition on a certain category of speech, where the precise content of the deterred speech was unknown and, because the speech had not yet been made, the adverse impact of the prohibited speech on efficient and effective employment had not been observed. The Court therefore reworked the *Pickering* test for application to an "*ex ante* prohibition"[48] on speech, a category into which English-only statutes would fall. Under the *NTEU* transformation of the *Pickering* test, the "Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation of the Government.'"[49] Furthermore, the government must provide credible proof that the prohibition alleviates the alleged harm.[50] In *NTEU*, the government argued that the honoraria ban was meant to ensure that federal employees not misuse or appear to misuse power by accept-

46. *See infra* Part III.A.

47. *NTEU*, 513 U.S. at 457.

48. *Id.* at 481 (O'Connor, J., concurring).

49. *Id.* at 468 (emphasis added) (citing *Pickering*, 391 U.S. at 571).

50. *See id.* at 472, 475.

ing compensation from parties seeking political favors.[51] But the government brought forth "no evidence of misconduct related to honoraria" by "federal employees below grade GS-16."[52] The Court thus found that the interests of the employees and audiences outweighed those of the government and so the honoraria ban was unconstitutional as it applied to employees below grade GS-16.[53]

The alternative analysis to *Pickering* and *NTEU*, particularly in the English-only context, is found in the *Rust v. Sullivan*[54] and *Rosenberger v. Rector & Visitors of University of Virginia*[55] line of cases. Both *Rust* and *Rosenberger* dealt with the government's ability to regulate the content of government-subsidized speech by private parties. *Rust* concerned the constitutionality of certain regulations of the Department of Health and Human Services. The regulations restricted parties who accepted federal subsidies for Title X programs from "provid[ing] counseling concerning the use of abortion as a method of family planning" and from being engaged in other abortion-related activities.[56] The Court consequently found that the government could regulate and dictate the content of the governmental message paid for by the government as part of a governmental program.[57] Consequently, it could prohibit subsidy recipients from using Title X subsidies to promote abortions.[58]

In *Rosenberger*,[59] a student organization, Wide Awake Productions (WAP), sued the University of Virginia. Under university guidelines, WAP qualified for a subsidy for its publication, *Wide Awake*. In accordance with a university regulation, the university denied WAP's request because of *Wide Awake*'s Christian point of view.[60] The Court held that under *Rust*, "the government [can]

51. *See id.* at 472.

52. *Id.*

53. *See id.* at 477–78.

54. 500 U.S. 173 (1991).

55. 515 U.S. 819 (1995).

56. *Rust*, 500 U.S. at 180–81. The recipients were prohibited from "engaging in activities that 'encourag[ed], promot[ed] or advocat[ed] abortion as a method of family planning'" and were required to have their governmental projects "'physically and financially separate' from prohibited abortion activities." *Id.*

57. *See id.* at 193–95.

58. *See id.*

59. 515 U.S. 819.

60. *See id.* at 826. WAP had acquired university status as a "Contracted Independent Organization" (CIO) and so could submit a request for reimbursement for its publication

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 messages*" through government subsidies.[61] But, on the other hand, the government cannot regulate *private* messages through government subsidies.[62] Consequently, the government could not dictate the content or viewpoint of a student-opinion publication, and the regulation was unconstitutional.[63]

In their dissents in *Yniguez*, Judges Fernandez and Kozinski cited *Rust* and *Rosenberger* to support the constitutionality of the Arizona English-only amendment. They argued that "the State has the right to control the content of what it is paying for; it can control what is said by those who are acting on its behalf."[64] Thus, if language is indeed content based, as seems to have been argued by the *Yniguez* plaintiffs,[65] the statute is constitutional because an English-only statute concerns the delivery of a government message by a government-paid employee and, under *Rust*, the government can regulate the "content" (here meaning the language) of its own messages.

Pickering, with its interest-balancing test, and *Rust*, with its bright-line rule that government can dictate its own messages, represent the competing analyses for evaluating the free speech rights of government employees under an English-only restriction. The determination of which test should apply is critical. If *Pickering* and *NTEU* articulate the applicable test, then a court will weigh the respective interests and might find that an English-only statute is an unconstitutional abridgment of public employee speech. But if *Rust* applies, then the English-only statute is constitutional, and the speech interests of employees and non-English-speaking recipients are not considered—in fact, they are deemed nonexistent.

costs. The regulation stated that certain CIO activities would not be reimbursed, particularly religious activities, defined as "any activity that 'primarily promotes or manifests a particular belief in or about a deity or an ultimate reality.'" *Id.* at 825. The university had not characterized WAP as a "religious organization." Had it done so, WAP would not have been deemed a CIO and would not have been able to seek reimbursement. *See id.* at 826.

61. *Id.* at 833–35 (emphasis added).

62. *See id.*

63. *See id.* at 824–25.

64. *Yniguez*, 69 F.3d 920, 957 (9th Cir. 1995) (en banc) (Fernandez, J., dissenting); *see also id.* at 962–63 (Kozinski, J., dissenting).

65. *See id.* at 956 (Fernandez, J., dissenting).

B. The Appropriate Test: Pickering *and Progeny*

The Supreme Court has established a single test for analyzing the constitutionality of restrictions on the speech of government employees: the balancing test from *Pickering* and its progeny.[66] As stated in Justice O'Connor's concurrence in *NTEU*, "[t]he time-tested *Pickering* balance, most recently applied in *Waters*, provides the governing framework for analysis of *all* manner of restrictions on speech by the government as employer."[67] Even for statutory restrictions, such as an English-only statute or the honoraria ban in *NTEU*, the Court has "established that the Government must be able to satisfy a balancing test of the *Pickering* form to maintain a statutory restriction on employee speech."[68] Additionally, the Supreme Court has not suggested an alternative analysis to *Pickering* for analyzing a restriction on public employee speech.

In spite of these statements, it is arguable that *Pickering* should not apply to English-only restrictions on government employees. In all the *Pickering* cases, even where the employee makes the prohibited speech while he is on the job, the speaker is not delivering a message from the government, but is giving his own ideas on a matter of public concern.[69] By contrast, in the English-only context, the

66. Both the Supreme Court and the circuit courts have repeatedly, either explicitly or implicitly, stated that for "all" restrictions on the speech of government employees, "there is no dispute" that the appropriate analysis is the basic *Pickering* and progeny test. *NTEU*, 513 U.S. at 481 (O'Connor, J., concurring); Waters v. Churchill, 511 U.S. 661, 668 (1994) (stating that "[t]here *is no dispute* in this case *about when speech by a government employee is protected by the First Amendment*," and then summarizing the *Pickering* test) (emphasis added). *See also NTEU*, 513 U.S. at 465–66 (stating that "[w]hen a court is required to determine the validity" of "restraints on the job-related speech of public employees," the court "must" apply the *Pickering* balancing test); Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 284 (1977) (stating that the "question of whether speech of a government employee is constitutionally protected expression *necessarily entails* striking" the *Pickering* balance) (emphasis added); Tucker v. Cal. Dep't of Educ., 97 F.3d 1204, 1210 (9th Cir. 1996) (concluding, after examining various First Amendment analyses, that, "[c]asting these red herrings aside, we look instead to applicable doctrine, which is found in the case law governing employee speech in the workplace," and then performing a *Pickering* and *NTEU* analysis); Weaver v. United States Info. Agency, 87 F.3d 1429, 1439 (D.C. Cir. 1996) (finding *Pickering* to be the applicable test in a public employment context when confronted with alternative analyses); Sanjour v. EPA, 56 F.3d 85, 90, 99 (D.C. Cir. 1995); Milwaukee Police Ass'n v. Jones, 192 F.3d 742, 749–50 (7th Cir. 1999).

67. *NTEU*, 513 U.S. 454, 480 (1995) (O'Connor, J., concurring) (emphasis added).

68. *Id.* at 467 (citing United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO, 413 U.S. 548, 564 (1973)).

69. *See, e.g.*, *NTEU*, 513 U.S. at 457 (prohibited honoraria speech was unrelated to

employee is delivering a governmental message. On its face, this seems to be more akin to the *Rust* cases, where the subsidized private speaker is being paid to deliver a governmental message—especially in light of the *Rosenberger* dictum that the government can dictate "what is or is not expressed *when it is the speaker* or when it enlists private entities to convey its own message."[70] In fact, the Fourth Circuit has construed the *Pickering* test to apply only when an employee is speaking "as a citizen" and not when speaking in his official capacity "as an employee."[71] As Judge Fernandez char-

government work); Rankin v. McPherson, 483 U.S. 378, 381 (1987) (speech made on the job concerned employee's own feelings about the attempted assassination of President Reagan); Connick v. Myers, 461 U.S. 138, 141 (1983) (speech made on the job to coworkers concerned employee's personal complaints); Pickering v. Bd. of Educ., 391 U.S. 563, 564 (1968) (speech concerned teacher's own opinion about school bond).

70. *Rosenberger*, 515 U.S. at 833. The Ninth Circuit majority attempted to reply to the dissenters' argument by pointing out that *Rust* and *Rosenberger* are inapplicable because they deal with government-subsidized speech and not with government employee speech. *Yniguez*, 69 F.3d at 940 n.24. While a true distinction between the cases, it is a fairly weak rebuttal, for it seems likely that if the government can control the content of its message when it is subsidizing a governmental message, it likely can control the content of a governmental message when paying for its delivery by its own employees. The Rosenberger dictum seems to say exactly that.

71. *See* Urofsky v. Gilmore, 216 F.3d 401, 406–08 (2000). The Fourth Circuit held that if speech is made "as an employee," in the employee's official capacity, then *Pickering* is inapplicable. The court implied that *Rust* applies instead. *Id.* at 408 n.6. The Fourth Circuit's argument is not persuasive because the Supreme Court has not held the "as a citizen" language to be a threshold requirement for protection under *Pickering*. Rather, the threshold requirement under *Pickering* and *Connick* is whether the speech could "be fairly characterized as constituting speech on a matter of public concern." Connick v. Myers, 461 U.S. 138, 146 (1983). As explained by Judge Murnaghan's dissent in *Urofsky*, the majority's rule is contrary to *Connick* itself, where the Court found that Myers spoke "as an employee." Yet because one part of her questionnaire was on a matter of public concern, the Court conducted a complete *Pickering* analysis, balancing the interests of Myers in making the speech with the government's interest in efficient employment. *See Urofsky*, 216 F.3d at 435–36 (Murnaghan, J., dissenting). Judge Wilkinson also points out that *Connick* requires a court to examine the "content, form, and context" of the speech, and the majority's rule makes one prong of the analysis dispositive. *Id.* at 426–27 (Wilkinson, J., dissenting). *Urofsky* concerned a content-based Internet restriction for state employees, including college and university professors. Thus, Judge Wilkinson was also concerned that "[b]y embracing the . . . view that all work-related speech by public employees is beyond public concern, the majority sanctions state legislative interference in public universities without limit." *Id.* at 429–30; *see also* Boring v. Buncombe County Bd. of Educ., 136 F.3d 364, 379 (4th Cir. 1998) (Motz, J., dissenting) (noting that "the majority's holding is grounded in misreading *Connick* to make the role in which a public employee speaks determinative of whether her speech merits First Amendment protection," and such is contrary to previous Supreme Court and circuit rulings and to *Connick* itself).

acterized the problem in his *Yniguez* dissent: "[N]one of the Supreme Court [*Pickering*] decisions . . . involved an employee who was hired to speak for the government and who performed that function in a manner contrary to her instructions."[72]

But *Rust* is even more inapposite to the English-only context than *Pickering*. In *Rust*, the subsidy recipients were not allowed to counsel patients about abortion as a method of family planning. They were paid to give a governmental message, and they were not allowed to change the content. In contrast, the employee restricted by an English-only provision (who gives the same governmental message he gives to everyone else but chooses to do so in Spanish in order to communicate to a non-English-speaking recipient) does not materially change the content of the governmental message he was hired to give—even if the Spanish words have slightly different nuances.[73] He thus does not violate the rule of *Rust* and *Rosenberger*. He gives the same message he was hired to give to the very people to whom he was hired to give the message—that is, to citizens who need information and help from their government. Such a situation is clearly distinguishable from those in which the Supreme Court has found that the government can control the content of, meaning the ideas conveyed by, a governmental message.[74]

Additionally, in the English-only context, an employee is speaking "as an employee" and yet is not changing the content of the governmental message and so is not violating the rule of *Rust*. The fact that an employee is speaking "as an employee" does not mean the employee is necessarily changing the content of a governmental message, nor does it mean that his speech is or is not on a matter of public concern.

The fact that the employee speaks in the workplace as an employee affects the *Pickering* analysis at two other points: (1) in determining whether the speech is of public concern; and (2) in determining whether the speech intrudes on the government's interest in efficiency. *See infra* Parts III.A.3 & III.B.

72. *Yniguez*, 69 F.3d at 956 (Fernandez, J., dissenting).

73. When the Court held in *Rust* that the government can control the content of the message given by the medical counselors and that the counselors cannot change that content by counseling women to have abortions, it is unlikely that the Court used content to mean "nuances" between words. Would the Court have ruled the same in *Rust* if the counselors were giving the exact message that the government wanted them to give, in a considerate and orderly fashion, but sometimes different employees in describing procedures used slightly different words that may or may not have had somewhat different nuances, but which made no difference in meaning so that the overall content of the message remained the same? Such is the "content" difference between using English and Spanish. Nuances of specific words is not the "content" being discussed in *Rust*. *See Rust*, 500 U.S. 173 (1991).

74. *See id.*, 500 U.S. 173 (1991); Regan v. Taxation With Representation, 461 U.S. 540 (1983); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

Even though both *Rust* and *Pickering* are distinguishable from the English-only scenario, *Pickering* and its progeny should be applied rather than *Rust* because (1) the *Pickering* test adequately takes into account the government's interests that are protected by *Rust*; (2) the *Rust* test does not take into account the speech interests of the recipients or the employees that are protected by *Pickering* and *NTEU*; (3) application of the *Rust* test in an English-only context would foreclose communication between the bilingual employee and the recipient without providing an alternative method for the speech as required by *Rust*; and (4) application of *Rust* in an English-only situation would propagate discrepancies in the governmental messages given to the public, which is one of the problems *Rust* was intended to eradicate.

The Supreme Court has stated that *Rust* protects the state's interests in defining the scope of its programs, "allocat[ing] scarce resources," and disseminating a specific governmental message in such a way as "to ensure that its message is neither garbled nor distorted by the grantee."[75] The *Pickering* and *NTEU* test adequately protects the same governmental interests. The speech interests of employees are protected only when they outweigh the government's interests in efficient and effective employment. All of the governmental interests protected by *Rust* affect the efficiency and effectiveness of governmental employment and so would be considered under *Pickering*.

For example, in his *Yniguez* dissent, Judge Kozinski suggested a list of adverse consequences of striking down an English-only statute and thus allowing government employees to change the "content" of governmental messages. Perhaps in an effort to rally unexpected supporters to upholding English-only statutes, Judge Kozinski invoked hypotheticals in which a government employee is supposed to give a relatively liberal government message (bilingualism, working mothers, teaching evolution in school, criminal rights, and affirmative action) but changes the content and gives an ultra-conservative message instead (monolingualism, stay-at-home mothers, teaching creation myths, refusing to give Miranda warnings, discouraging minority applicants at a state university).[76]

75. *Rosenberger*, 515 U.S. at 833 (citing *Rust*, 500 U.S. at 196–200); *see Rust*, 500 U.S. at 194.

76. *See Yniguez*, 69 F.3d at 961–62 (Kozinski, J., dissenting).

These illustrations are irrelevant in the English-only context, as noted before, because in each hypothetical, the government employee is seeking to change the content of the government's message to one entirely opposed to the content the government wishes to disseminate. In contrast, English-only statutes restrict bilingual government employees from giving to non-English-speaking citizens the *same* governmental message that the employee disseminates to everyone else. But even if the illustrations were on point, the *Pickering* test would adequately protect the government's interests. *Pickering* requires a balancing of the government's interests in efficient and effective employment with the employee's interest in free speech.[77] In all of Judge Kozinski's hypotheticals, the employees were frustrating the government's interest in efficient and effective employment by giving a message contrary to the one they were employed to give and contrary to what other employees are giving and other citizens are receiving. Thus, if any of Judge Kozinski's hypotheticals were tested under a *Pickering* balancing test (rather than under *Rust*), a court would rule in favor of the government because the employee's acts seriously inhibit the efficiency and employment interests of the government. Thus, even under *Pickering*, the government's interests espoused in *Rust* and its progeny would be protected.

In contrast, the *Rust* doctrine would not adequately protect the speech interests of recipients or employees in the English-only context. Under *Pickering* and *NTEU*, a court must weigh the interests of both the recipients and the employees against the interests of the government. But *Rust* has no analogous balancing requirement. In *Rust* itself, the Court did not take into account the interest of potential audiences in receiving, or the speakers in giving, information about abortions for family planning.

Yet the Court recognized that the restriction in *Rust* did "not deny[] a benefit to anyone" because the "regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities."[78] In fact, the Court distinguished *Rust* from cases where such restrictions had been deemed "unconstitutional conditions." In the "unconstitutional conditions" cases, the restriction had "effectively prohibit[ed] the recipient from engaging in the

77. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

78. *Rust*, 500 U.S. at 196.

protected conduct."[79] In contrast, the Court found that in *Rust* the speakers and recipients had alternative means of communicating. In the English-only context, the government employee is "effectively prohibited" from providing governmental services and information to non-English recipients, and the recipients are "effectively prohibited" from receiving governmental services and information. Thus, by applying *Rust* to an English-only restriction, both speakers and recipients would be foreclosed from speech without an adequate alternative, and *Rust* indicates that an alternative is necessary.

Finally, *Pickering* should be applied in the English-only context in order to support the result of the *Rust* cases, namely, that by prohibiting subsidy recipients from altering the content of the message, the government will be able to give the same message to all citizens. The rule from *Rust* thus emphasizes uniformity in the message given. However, if *Rust* were applied to uphold an English-only restriction, it would cause bilingual employees to give, rather than prevent them from giving, disparate messages to English-speaking and non-English-speaking recipients. Namely, bilingual employees would give the entire message to one citizen and no message to another. Thus, the only way to adequately protect all of the interests involved in the English-only context—the interests of the bilingual employee, the non-English-speaking recipient, and the government—is to apply a *Pickering* analysis.

C. Traditional Doctrines Under the Pickering/NTEU *Test: Speech or Conduct, Content Based or Content Neutral*

In applying the *Pickering* analysis, the Ninth Circuit majority and dissents in *Yniguez* analyzed the English-only restrictions to determine whether or not the statute restricted speech, mode of expression, or conduct. The majority determined that the Arizona amendment restricted speech, relying primarily (and erroneously) on *Cohen v. California*.[80] Judges Fernandez and Wallace argued in dissent that the Arizona amendment merely restricted a mode of expression.[81] Additionally, Judge Fernandez in his dissent argued that the English-only restriction, if content based as had been argued by the parties,[82]

79. *Id.* at 197.

80. *See Yniguez*, 69 F.3d at 934–36.

81. *See id.* at 958 (Fernandez, J., dissenting); *id.* at 959–60 (Wallace, J., dissenting).

82. *See id.* at 957 (Fernandez, J., dissenting) (noting that the parties argued that the

was constitutional because under *Rust* and *Rosenberger* the government can control the "content" of its message.[83] He implied that if, on the other hand, the restriction were content neutral, it would be constitutional under a traditional First Amendment analysis.[84] Thus, in his view, either way an English-only statute was categorized—whether content based or content neutral—it was constitutional.

What the Ninth Circuit majority and dissent failed to realize is that these traditional First Amendment doctrines are not relevant in the public employee context in which a *Pickering* and *NTEU* analysis is applied.

1. An introduction to First Amendment doctrines

a. Speech, mode of expression, or conduct? Under traditional First Amendment analysis, whether the restriction is on speech, mode of expression, or conduct will determine the level of scrutiny applied to a restriction.[85] If a regulation is not on speech, but on conduct that has both "speech" and "non-speech" aspects, then a Court applies a lower level of scrutiny under the standard articulated in *United States v. O'Brien*.[86]

The Ninth Circuit majority argued that the restriction prohibited "speech," and the dissent argued that it prohibited "mode of expression," akin to conduct. It is worth noting briefly that an English-only restriction is indeed a restriction on speech. The Ninth Circuit, the only court to analyze this issue thoroughly, missed the obvious point that the way in which speech differs from conduct is that speech is direct communication between people through the medium of written or spoken language.[87] In describing the dichotomy between conduct and speech, the Supreme Court stated that "[t]he

statute was content based). *Cf.* Ruiz v. Hull, 957 P.2d 984, 990 (1998) (noting that party argued "that the Amendment is a content-based regulation of speech"). In *Ruiz*, the Arizona Supreme Court seemed to agree that the amendment was content based but did not analyze the issue. *Id.* at 999 ("Even if the Amendment were characterized as a content- and viewpoint-neutral ban, and we hold such a characterization does not apply. . . .").

83. *Yniguez*, 69 F.3d at 957.

84. *See id.* at 956–57.

85. *See* United States v. O'Brien, 391 U.S. 367, 376–77 (1968).

86. *Id.*

87. The majority did make a footnote of the fact "that a monolingual person does not have the luxury of making the expressive choice to communicate in one language or another," but focused its analysis on *Cohen* and on a bilingual person's expressive choice of language and the nuances between languages. *See Yniguez*, 69 F.3d at 935 n.19.

government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word [that is, speech]."[88] It seems implausible that any court would find that non-English languages somehow do not qualify as "the written or spoken word" by virtue of not being English. Foreign languages, both written and spoken, as with English, are used precisely to communicate ideas or information. The Arizona statute directly prohibited both written and spoken language and thus was a prohibition on speech and speech alone.

Although conduct may be communicative, it is by definition non-speech—no written or spoken word (that is, speech) is involved. For example, in *Street v. New York*[89] the Supreme Court reversed the conviction of a man who had both burned a flag and made denigrating comments about the flag. The Court reversed the conviction because it was unclear whether he had been convicted for his words or his act. The Court found he could not be convicted for his words, without reaching the issue of whether the flag-burning conduct was protected expression or not.

The Supreme Court has provided some protection for expressive conduct when there are communicative or speech aspects mingled with prohibited non-speech and non-communicative conduct.[90] If language is to be construed as conduct, one wonders what the "non-communicative" and "non-speech" and non-expressive aspects of that conduct are.[91] To go a step further, if language is non-communicative conduct and the *ideas* only are "speech" or expression, then there is no such thing as a "pure speech" case. The entire dichotomy of speech and conduct is destroyed. For surely if speaking in Spanish to a monolingual Spanish speaker is conduct, speaking in English to a monolingual English speaker is conduct as well. The reason conduct is conduct rather than speech is that it entails aspects that we normally do not consider speech. It is hard to make such an argument for language.

The Ninth Circuit correctly found that choice of language is speech rather than conduct, but erroneously based its conclusion almost entirely on *Cohen v. California*.[92] The *Yniguez* majority stated

88. Texas v. Johnson, 491 U.S. 397, 406 (1989) (citations omitted).

89. 394 U.S. 576 (1969).

90. *See O'Brien*, 391 U.S. at 381–82.

91. *Id.* at 376, 382.

92. 403 U.S. 15 (1971).

that "[t]he Supreme Court recognized the First Amendment status of choice of language in somewhat different circumstances when it ratified a speaker's freedom to say 'fuck the draft' rather than 'I strongly oppose the draft.'"[93] The Ninth Circuit then went on to point out that just as California could not "excise . . . 'one particularly scurrilous epithet from the public discourse,'" Arizona could not excise "entire vocabularies" of foreign languages.[94]

The *Yniguez* majority should not have relied on *Cohen* as the crux of its argument that language was speech. *Cohen* stands for the proposition that use of written and spoken words are "speech" even when there are alternative modes of expressing that speech. *Cohen* concerned the freedom of choosing one (arguably more "emotive") word over another to convey the same message—the message in *Cohen* being contempt for the draft. As the Supreme Court in *Waters v. Churchill* explained, according to *Cohen*, the "First Amendment demands a tolerance of 'verbal tumult, discord, and even offensive utterance.'"[95] While that proposition is true for the public at large, the government is free to restrict what words government employees will use to convey a government message, as long as the restriction promotes the government's interest in efficient and effective employment.[96] As stated in *Waters v. Churchill*, "[W]e have never expressed doubt that a government employer may bar its employees from using Mr. Cohen's offensive utterance to members of the public."[97]

Yet *Cohen* is not on point with English-only restrictions. Bilingual employees under an English-only statute are not seeking to express their ideas in a more "emotive" way or to use "offensive utterances" in performing their duties. Rather, bilingual employees are seeking to communicate a message in a language comprehensible to the recipient. *Cohen* would be on point if the Arizona amendment merely provided that Arizonan officials could not use non-English

93. *Yniguez*, 69 F.3d at 935 (citing *Cohen*, 403 U.S. 15 (1971)).

94. *Id.* The Ninth Circuit also defended the use of foreign languages as "speech" by noting the difference in meanings of words in Spanish and English, and the "expressive effect" of choosing to speak Spanish rather than English with bilingual people, signifying "solidarity" and "comfortableness." *Id.*

95. Waters v. Churchill, 511 U.S. 661, 672 (1994) (plurality opinion) (quoting *Cohen*, 403 U.S. at 24–25).

96. *See infra* Part I.C.2.

97. *Waters*, 511 U.S. at 672.

profanities, rather than restricting the entirety of all non-English languages. Arizona's English-only amendment prohibited communication *of the entire message*—whether or not the words used were profane or courteous, emotive or dispassionate—as long as the message was given in non-English. The Arizona Supreme Court mostly avoided these problems by characterizing the restriction as a complete prohibition on "communication" and explained that "First Amendment protection is afforded to the communication, its source, and its recipient."[98]

In *Yniguez*, Judge Wallace argued in dissent that language is a mode of expression because "the majority can point to no bit of information about medical malpractice claims which can only be communicated in a non-English language—and which [the Arizona amendment] would thereby restrict Yniguez from communicating and the public from receiving."[99] Thus,

> If Yniguez is able to identify to us in English the messages that the Article suppresses, she would thereby communicate those messages which she claims only Spanish can convey. . . . It is untenable for the majority to hold that the Article restricts pure speech yet fail to identify suppressed messages. This difficulty strengthens the undeniable conclusion that the Article regulates the mode of speech, not pure speech. This conclusion should end the matter, for mere regulation of government employees' mode of speech does not implicate the First Amendment . . . ."[100]

The "bit of information about medical malpractice claims"—the "suppressed message" that Yniguez was restricted from communicating to monolingual Spanish speakers whom she was responsible to help—is easy to identify; it is the entire message.[101] There is nothing about medical malpractice that she can communicate to a segment of the citizenry because she is not allowed to speak in Spanish, and the monolingual Spanish population cannot understand English. Unlike *Cohen*, English-only statutes do not deal with the mere choice of a mode of speech or a particular emotive way of expressing a message; rather, it is the difference between communicating or not communi-

98. Ruiz v. Hull, 957 P.2d 984, 997 (Ariz. 1998) (en banc) (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 756–57 (1976).

99. *Yniguez*, 69 F.3d at 960 (Wallace, J., dissenting).

100. *Id.* at 959–60 (Wallace, J., dissenting).

101. *Id.*

cating. The majority in *Yniguez* concluded their somewhat flawed analysis by attempting to make this point: "To 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."[102]

b. Content based or content neutral? In its First Amendment analysis, the Supreme Court has differentiated between content-based and content-neutral provisions. Content-based provisions "are presumptively invalid" because "[t]he government may not regulate use based on hostility—or favoritism—towards the underlying message expressed."[103] Content-neutral laws regulate the time, place, or manner of expression and are subject to a lower level of scrutiny.[104]

According to the Supreme Court, content-based laws are generally defined as "laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed" or laws whose "manifest purpose is to regulate speech because of the message it conveys."[105] In other words, the government regulation is aimed at suppressing a particular message. Content-neutral laws are generally those "laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed."[106] Under this general definition, English-only statutes would be considered "content neutral" because the government does not distinguish between favored and disfavored speech on the basis of the message, inasmuch as the employee is able to give that same message in English.

102. *Id.* at 936.

103. R.A.V. v. City of St. Paul, 505 U.S. 377, 382, 386 (1992) (citations omitted).

104. In GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 400 (1999), the authors explain that the Supreme Court has recognized that content-neutral limitations can be unconstitutional infringements of free speech, but that the level of scrutiny applied with content-neutral restrictions varies from case to case:

> The Court generally tests content-neutral restrictions with an implicit balancing approach: The greater the interference with the opportunities for free expression, the greater the burden on government to justify the restriction. When the challenged restriction has a relatively severe effect, the Court invokes strict scrutiny. When the challenged restriction has a significant, but not severe, effect, the Court employs intermediate scrutiny. And when the restriction has a relatively modest effect, the Court applies deferential scrutiny. [However, t]here are exceptions to this pattern.

Id. (citations omitted).

105. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643, 645 (1994); *see also R.A.V.*, 505 U.S. 377.

106. *Turner*, 512 U.S. at 643.

As a content-neutral regulation of the time, place, or manner of expression, an English-only statute would likely be subject to a medium or low level of scrutiny under conventional First Amendment analysis.[107] However, time, place, and manner provisions are only valid if they (1) are content neutral, (2) are narrowly tailored to serve a significant government interest, and (3) "leave open ample alternative channels of communication."[108] While some have argued that English-only statutes are valid time, place, or manner provisions,[109] English-only provisions fail to leave open any alternative and often are not narrowly tailored to a government interest.[110] Thus, they are not valid time, place, or manner provisions.

107. *See supra* note 104.

108. United States v. Grace, 461 U.S. 171, 177 (1983); *see* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); *see also* RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 702–03 § 20.54 (3d ed. 1999) (quoting *Grace*, 461 U.S. at 177). If any of these three prongs is lacking, the restriction is not an appropriate time, place, or manner restriction.

109. Both of the student law review pieces that argue that English-only statutes are constitutional do so by arguing that they are valid time, place, and manner provisions. *See* Boehler, *supra* note 6, at 1658–64; Valente, *supra* note 6, at 223–24.

110. Even though English-only statutes are content neutral, they could not pass muster under the other two prongs. So far, two of the courts reviewing English-only statutes have found that the state actually had no valid interest that could be substantiated by any evidence. *See Yniguez*, 69 F.3d. at 942–47; *infra* note 239 and accompanying text. Even assuming that a state was able to show that it had a significant government interest, English-only statutes are not sufficiently narrowly tailored because, as broad *ex ante* prohibitions on speech, such statutes certainly "burden substantially more speech than is necessary to further" the interest and it is quite questionable whether the stated government interest "is served in a direct and effective way by the requirement." *Ward*, 491 U.S. at 799, 801. But even if it could be shown that a significant governmental interest existed and that an English-only statute was sufficiently tailored to that interest, English-only statutes would still not be valid under traditional First Amendment analysis because they leave no adequate alternative for communicating with non-English-speaking citizens. The Arizona Supreme Court noted that the effect of an English-only statute "cannot be characterized as merely a time, place, or manner restriction because such restrictions, by definition, assume and require the availability of alternative means of communication." Ruiz v. Hull, 957 P.2d 984, 998 (Ariz. 1998) (en banc) (citing *Ward*, 491 U.S. at 802; Members of City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789 (1984)); *see also R.A.V.*, 505 U.S. 377.

2. First Amendment dichotomies are irrelevant under a Pickering *or* NTEU *analysis*

Although the Ninth Circuit struggled with whether an English-only statute restricted speech or mode of expression, and although an English-only statute is arguably content neutral, these determinations are irrelevant in the public-employee setting and do not affect the level of scrutiny applied. The analysis under *Pickering* and *NTEU* is the same whether the restriction is content based or content neutral and whether it is based on speech or on conduct. For example, the honoraria ban in *NTEU* itself was content neutral. The ban prohibited employees from receiving compensation for off-the-job speeches and articles no matter the content. Additionally, the majority and dissent make explicit mention of the prohibition's content neutrality.[111] And yet the Court performed a *Pickering* analysis; in fact, because it was an *ex ante* broad restriction on speech, the Court heightened the government's burden from what it had been in *Pickering* in defending this content-neutral restriction.[112]

The rule that traditional dichotomies of free speech are irrelevant in the government employment context was not new with *NTEU* in 1995. As early as 1973, only five years after the *Pickering* decision, the Court in *United States Civil Service Commission v. National Ass'n of Letter Carriers*, restated the *Pickering* test as applying equally to both "conduct" and "speech."[113] This was true even though traditional First Amendment doctrine declared that "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word [that is, speech]."[114] In *Waters v. Churchill*,[115] Justice O'Connor explained

111. *See NTEU*, 513 U.S. 454, 467 n.11, 468 (1995) ("Although [the restriction] neither prohibits any speech nor discriminates among speakers based on the content or viewpoint of their messages, its prohibition on compensation unquestionably imposes a significant burden on expressive activity."); *id.* at 490 (Rehnquist, C.J., dissenting) ("[T]he honoraria ban is neither content nor viewpoint based."); *see also* United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO, 413 U.S. 548, 564 (1973), where the Court applied a *Pickering* test to the provisions of the Hatch Act, even though the restrictions "are not aimed at particular parties, groups, or points of view, but apply equally to all partisan activities." In other words, the restrictions were content neutral.

112. *See infra* Part III.B.1.

113. *Nat'l Ass'n of Letter Carriers*, 413 U.S. at 564.

114. Texas v. Johnson, 491 U.S. 397, 406 (1989).

115. 511 U.S. 661 (1994) (plurality opinion).

why these First Amendment doctrines do not apply in the *Pickering* context. That reason requires an understanding of the government's power to restrict the speech of government employees. As Justice O'Connor explained:

> The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.[116]

Consequently, the government can disregard most of the fundamental free speech doctrines when it is acting as employer as long as the government's restrictions on free speech would promote the government's interest in effective and efficient employment. For example, if an employee makes a statement that disrupts efficient or effective employment, then the government can dismiss that employee—even if the dismissal under traditional First Amendment analysis would be content based and thus "presumptively invalid."[117] As Justice O'Connor explains, the government employer does not have to inquire, as he would under a traditional First Amendment regime, whether "this dismissal would somehow be narrowly tailored to a compelling governmental interest."[118] Rather, the only inquiry the government employer has to make is whether "a quieter subordinate would allow [the employer] to do this job more effectively."[119] Thus, "many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees."[120]

In most situations, the fact that First Amendment doctrines are irrelevant in the public employment setting will benefit the government and not the employee. For the government employer can enact restrictions, as long as they promote efficient and effective employ-

116. *Id.* at 675.

117. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (citations omitted).

118. *Waters*, 511 U.S. at 675.

119. *Id.*

120. *Id.* at 672.

ment, that are content based, regulate speech, are vague, restrict offensive utterances, etc.[121] The only limit on the government employer's ability to enforce such restrictions is that his employment interests must outweigh the employee's interest in speaking on matters of public concern.[122] But the Court made clear in *NTEU* that the rule is a two-edged sword. For just as traditional free speech doctrines do not restrict government employers from burdening free speech, conversely, traditional free speech doctrines cannot save government restrictions from being found unconstitutional when either (1) the restrictions on speech do not promote the government's legitimate interests in efficient and effective employment, or (2) the interests of the employee in speaking on matters of public concern outweigh the government's employment interests. As stated in *NTEU*: "Our *Pickering* cases *only* permit the Government to take adverse action based on employee speech that has adverse effects on 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"[123] Though it may appear in retrospect that the *Pickering* cases prior to *NTEU* involved content-based adverse employment decisions,[124] the *NTEU* majority explained that in each of these cases the relevant issue was not whether the restriction was "viewpoint based," but was whether "the government employer could demonstrate that such expression disrupted workplace efficiency."[125]

121. Justice O'Connor makes explicit mention of the irrelevance of vagueness and offensive utterances. *See id.* at 672–73; *see also supra* notes 111, 113.

122. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

123. *NTEU*, 513 U.S. at 467 n.11 (emphasis added).

124. In each case, the employee expressed an idea and was subsequently fired, presumably because the employer disagreed with the content. *See, e.g.*, Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 411–12 (1979) (involving employee discharged after expressing concerns to her principal); Connick v. Myers, 461 U.S. 138, 141 (1983) (addressing dismissal of employee who had distributed questionnaire to coworkers); Pickering v. Bd. of Educ., 391 U.S. 563, 564 (1968) (involving teacher dismissed for writing letter to the editor).

125. *NTEU*, 513 U.S. at 467 n.11. The dissent argued that viewpoint and content neutrality, even if they do not make the prohibition constitutional, "are important factors" in evaluating whether the speech is protected under *Pickering*. *Id.* at 500 n.6 (Rehnquist, C.J., dissenting). The Second Circuit, in *Harman v. City of New York*, 140 F.3d 111, 119 (2d Cir. 1998), took into account in balancing the competing interests the fact that the restriction was "broader than the honoraria ban struck down in *NTEU*" because the *NTEU* ban merely "placed a burden on employee speech by denying compensation," but the restrictions in *Harman* "directly regulate[d] speech."

Thus, Judge Fernandez's implication in *Yniguez* that an English-only restriction is constitutional if it is content neutral (and thus subject to lower level scrutiny) is defeated by the facts of *NTEU* itself. For the ban in *NTEU* "neither prohibit[ed] any speech nor discriminate[d] among speakers based on the content or viewpoint of their messages."[126] More importantly, *NTEU* declared that public employment restrictions on free speech are to be analyzed under the same standard, whether they are content based or content neutral[127] and whether they restrict speech or conduct.[128] The only differentiation in the standard applied in the *Pickering* line of cases is that the government has a higher burden to justify *ex ante* prohibitions under *NTEU* than it has for *post hoc* employment decisions under *Pickering*. In a *Pickering* and *NTEU* analysis, the only considerations to take into account are (1) the interests of the employee in speaking out and the interests of the potential audience in receiving speech on a matter of public concern,[129] and (2) the interest of the government as an employer in efficient and effective employment.[130]

II. A BRIEF OVERVIEW OF THE INTERPRETATION OF AND THE ADJUDICATIONS CONCERNING THE ARIZONA ENGLISH-ONLY AMENDMENT

Having determined in Part I that the proper legal framework for evaluating the constitutionality of an English-only statute is found solely in the *Pickering* and *NTEU* analyses, in this section I will briefly review the adjudications concerning the Arizona amendment. The decisions of the three courts and their interpretation of the amendment will provide context for the analysis of English-only statutes under the *Pickering* and *NTEU* test in Part III.

126. *NTEU*, 513 U.S. at 468.

127. The circuit courts have applied the same stringent standard set out for the content-neutral statute in *NTEU* to content-based statutes. *See, e.g.*, Hoover v. Morales, 164 F.3d 221, 227 (5th Cir. 1998) (content-based restriction); Sanjour v. EPA, 56 F.3d 85, 96 (D.C. Cir. 1995) (same).

128. *See supra* notes 113–120 and accompanying text. Additionally, in none of the Supreme Court's *Pickering* and *NTEU* cases has the court evaluated whether the restriction was content based or content neutral, on speech or on conduct. The Supreme Court merely mentions these doctrines in *NTEU* and *National Ass'n of Letter Carriers* but performs no exacting analysis to determine what category the restrictions fall into. The dichotomies are not even mentioned in the other *Pickering* cases. *See id.*

129. *See NTEU*, 513 U.S. at 468, 470.

130. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

In the 1988 general election, the citizens of Arizona added an English-only provision to the Arizona Constitution.[131] The Arizona Attorney General issued an interpretation of the amendment, finding that it did "not prohibit the use of a language other than English to facilitate the delivery of governmental services," nor did it "prohibit the use of other languages when they are reasonably required in the day-to-day operation of government."[132] The Arizona Supreme Court, the federal district court, and the Ninth Circuit all rejected the Attorney General's construction because the statute was not "readily susceptible" to that interpretation[133] but was "in effect a 'remarkable job of plastic surgery upon the face of the ordinance.'"[134] All three courts interpreted the statute to prohibit "the use of any language other than English by all officers and employees of all political subdivisions in Arizona while performing their official duties" unless one of the "limited exceptions" outlined in the statute applied.[135]

The Ninth Circuit majority found that the prohibition on use of foreign languages was a prohibition on speech.[136] The focus of its analysis was on the speech rights of public employees, who were prohibited from speaking to citizens in languages other than English. The court applied the *Pickering* line of analysis, balancing the interests of the speaker and of the government, to determine if the amendment was a constitutional limitation on employee speech.[137] The majority determined it was unconstitutional.[138] Judges Fernandez and Wallace, in separate dissents, argued that the prohibition on

131. The full text of the amendment is included as Appendix A.

132. Ariz. Op. Atty. Gen. No. I89-009, 1989 WL 407503, at *1 (Jan. 24, 1989). The Attorney General construed the statute in this way so that it would be "compatible with the United States Constitution and federal laws." *Id.*

133. *Yniguez*, 69 F.3d at 929 (citing Va. v. Am. Booksellers Ass'n, 484 U.S. 383, 397 (1988)); *Mofford*, 730 F. Supp. 309, 315 (D. Ariz. 1990) (same); *Ruiz*, 957 P.2d at 992 (same).

134. *Mofford*, 730 F. Supp at 316 (quoting Shuttlesworth v. City of Birmingham, 394 U.S. 147, 153 (1969)); *Yniguez*, 69 F.3d at 931 (same); *Ruiz*, 957 P.2d at 992 (same).

135. *Yniguez*, 69 F.3d at 928 (quoting *Mofford*, 730 F. Supp. at 314); *Ruiz*, 957 P.2d at 993 (determining that the statute "is plainly written in the broadest possible terms, declaring that the 'English language is the language of . . . *all government functions and actions*' and prohibiting all 'government officials and employees' at every level of state and local government from using non-English languages '*during the performance of government business*.'").

136. *See Yniguez*, 69 F.3d at 934–36.

137. *See id.* at 933, 937–47.

138. *See id.* at 947.

foreign languages was a prohibition on a mode of expression or conduct.[139] Judges Kozinski and Fernandez, again in separate dissents, argued that the relevant test was not *Pickering* and progeny but *Rust* and *Rosenberger*, and thus the amendment was constitutional.[140] The Supreme Court vacated the Ninth Circuit's opinion and ordered the dismissal of the suit as moot.[141]

In 1998, the Arizona Supreme Court found the Arizona English-only amendment to be an unconstitutional abridgment of free speech and also to violate the Equal Protection Clause because it burdened fundamental First Amendment rights, specifically the right to petition the government for redress of grievances.[142] The court found that the provision unconstitutionally abridged the free speech rights "of the public, of public employees, and of elected officials."[143] The court also found that the statute was not a valid time, place, and manner provision, and could not be characterized as a "content- and viewpoint-neutral ban" because "the amendment effectively bar[red] communication itself"[144] and thus left no available "alternative means of communication."[145] Unfortunately, the Arizona Supreme Court performed no in-depth analysis of the First Amendment issues.

III. ABRIDGING THE SPEECH RIGHTS OF GOVERNMENT EMPLOYEES: AN ANALYSIS UNDER *PICKERING/NTEU*

For the sake of the following analysis, I will assume a construction of an English-only statute like that given to the Arizona amendment, namely, as prohibiting "the use of any language other than English" by public employees "while performing their official duties."[146]

139. *See id.* at 958 (Fernandez, J., dissenting); *id.* at 959–60 (Wallace, J., dissenting).

140. *See id.* at 955–57 (Fernandez, J., dissenting); *id.* at 960–63 (Kozinski, J., dissenting).

141. Arizonans for Official English v. Ariz., 520 U.S. 43 (1997). The Court also stated that the Ninth Circuit and the federal district court should have certified the question of the appropriate construction of the amendment to the Arizona Supreme Court or, alternatively, should have abstained from ruling on the constitutional issue until after the Arizona Supreme Court had rendered a construction of the amendment in analogous proceedings pending in state court. *See id.* at 75–80.

142. *See* Ruiz v. Hull, 957 P.2d 984, 1002 (Ariz. 1998) (en banc).

143. *Id.*

144. *Id.* at 999.

145. *Id.* at 998.

146. *Yniguez*, 69 F.3d 920, 928 (9th Cir. 1995) (en banc) (quoting *Mofford*, 730 F.

A. Speech of Public Concern or Private Concern?

The *Pickering/NTEU* case law only protects an employee's interest in speaking and an audience's interest in receiving speech on public concern. Thus the first issue in any *Pickering/NTEU* analysis is whether the speech is of public concern or of private concern.

The Ninth Circuit in *Yniguez* struggled over this issue, stating that the speech barred by an English-only amendment "does not fit easily into any of the categories previously established in the case law."[147] The majority recognized that the speech is not like the personal speech in *Connick*, which dealt with a complaint by the employee about internal transfer procedure and morale in a District Attorney's office.[148] Nor is it speech like that in *Pickering* or most of the other cases, where an employee speaks out by giving his own personal opinion on a public issue.[149] In neither of these *Connick* or *Pickering* scenarios does the government employee seek to disseminate a government message (rather than his own opinion) contrary to the wishes of his employer. However, the case law, both in the Supreme Court and the circuit courts, is plain: in the public employee context, public concern speech is defined to include any speech of public import or interest, while private speech includes only issues dealing with interoffice complaints.[150] The Ninth Circuit majority concluded that because the speech prohibited by the English-only statute was of public import, the speech was, therefore, of public concern. While their conclusion was correct, the court failed to fully analyze the issue under the test set out in *Connick*.

In *Connick*, the Supreme Court explained that "[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."[151] In *NTEU*, the Supreme Court added another factor to the mix: the interest of the recipients in receiving the information.[152]

Supp. 309, 314 (D. Ariz. 1990)); *see also supra* note 135 and accompanying text.

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

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

149. *See* Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

150. *See infra* notes 153–56 and accompanying text.

151. *Connick*, 461 U.S. at 147–48.

152. *See NTEU*, 513 U.S. 454, 468–70 (1995).

1. Content of the speech

Because an English-only statute is an *ex ante* prohibition on speech by governmental employees in a foreign language, it is not like the *Pickering* and *Connick* cases in which the court can examine the exact content of the speech that led to the firing of the employee. But the very nature of an English-only restriction on government employees reveals what the basic content of the vast majority of the restricted speech will be: governmental information and discussion surrounding governmental services.

The Supreme Court has not provided a precise definition for what content constitutes speech of public concern, but the Court has made clear what speech is of merely private and not public concern. For example, in *Connick*, the Court found that the speech was private concern speech "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community."[153] English-only statutes restrict employees from providing governmental information and services to non-English-speaking citizens. Such information and provision of basic government services certainly "relat[es] to any matter of political, social, or other concern to the community" and is thus speech of public concern rather than of private concern. As stated by the *Yniguez* majority: speech prohibited by the English-only provision was "unquestionably of public import. It pertains to the provision of governmental services and information. Unless that speech is delivered in a form that the intended recipients can comprehend, they are likely to be deprived of much needed data as well as of substantial public and private benefits."[154]

Additionally, in *Connick*, the Court found that part of the speech was protected because it "[was] a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal."[155] Again, government information and services would be "of interest to the [non-English-speaking] community." Thus, under the Supreme Court's definition of public concern speech in *Connick*, the speech restricted by English-only statutes, namely, governmental informa-

153. *Connick*, 461 U.S. at 146.

154. *Yniguez*, 69 F.3d 920, 940 (9th Cir. 1995) (en banc).

155. *Connick*, 461 U.S. at 149.

tion and services, is public concern speech.[156]

The Fernandez dissent in *Yniguez* carefully avoided the government content of Yniguez's speech. Judge Fernandez argued that the issue merely involved "the language used, not the public or private concern content of the language. An employee might well speak out on a matter of public concern in any language, or might simply engage in private-concern grumbling or disruption in any language."[157] But the *Connick* test requires that a court examine the content of the message when possible, and the content of the message that Yniguez was prohibited from giving non-English speakers was clear: governmental information and services. Additionally, in *NTEU*, where the court also could not determine the exact content of the speech at issue, Justice O'Connor noted in her concurrence that the restriction "doubtless inhibit[ed] some speech on matters of substantial public interest."[158] In the English-only context, the far majority of the prohibited speech would be government information and services—"speech on matters of substantial public interest."

156. Based on *Connick* and other Supreme Court cases, the federal circuit courts have articulated their own tests for whether or not speech is of public concern. Under any of these tests, the governmental information and services that bilingual employees are restricted from giving to non-English-speaking recipients is speech of public concern. According to the Fourth and Tenth Circuits, "[s]peech involves a matter of public concern when it involves an issue of social, political or other interest to a community." Urofsky v. Gilmore, 216 F.3d 401, 406 (4th Cir. 2000) (citing *Connick*, 461 U.S. at 146); *see also* Horstkoetter v. Dep't of Pub. Safety, 159 F.3d 1265, 1271 (10th Cir. 1998) (stating that public concern speech is speech "of interest to the community, whether for social, political, or other reasons") (quoting Lytle v. City of Haysville, 138 F.3d 857, 863 (10th Cir. 1998)). In fact, the Second Circuit has found that *information* regarding social services was public concern speech because it was "of considerable importance to the public." Harman v. City of New York, 140 F.3d 111, 118 (2d Cir. 1998). The Ninth and D.C. Circuits have "defined public concern speech broadly to include almost *any* matter other than speech that relates to internal power struggles within the workplace." Tucker v. Cal. Dep't of Educ., 97 F.3d 1204, 1210 (9th Cir. 1996). The D.C. Circuit has said "the 'public concern' criterion" refers "not to the number of interested listeners . . . but to whether the expression relates to some issue of interest beyond the employee's bureaucratic niche." That is, public versus private concern is defined as the difference "between issues of external interest as opposed to ones of internal office management." Nat'l Treasury Employees Union v. United States, 990 F.2d 1271, 1273 (D.C. Cir. 1993), *aff'd in relevant part, rev'd in part on other grounds*, *NTEU*, 513 U.S. 454 (1995), *quoted in Tucker*, 97 F.3d at 1204; *see also Connick*, 461 U.S. at 148 n.8. According to Justice O'Connor's concurrence in *NTEU*, private concern speech is speech that "relate[s] to 'internal office affairs' or the employee's status as an employee." *NTEU*, 513 U.S. at 480 (O'Connor, J., concurring).

157. *Yniguez*, 69 F.3d 920, 955–56 (9th Cir. 1995) (en banc) (Fernandez, J., dissenting).

158. *NTEU*, 513 U.S. at 482 (O'Connor, J., concurring).

Judge Wallace, in his *Yniguez* dissent, quoted *Connick* out of context that "not 'all matters which transpire within a government office are of public concern.'"[159] But the Court's statement in *Connick* referred to an employee complaining about the transferring procedure in a District Attorney's office. The Court concluded that these trivial events concerning "a personal employment dispute" were not automatically of public concern merely because they "transpire[d] within a government office."[160] The Court was not saying, however, that information about basic government services was not of public concern. Public concern speech has been defined in *Pickering* and *Connick* as including those matters "vital to informed decision-making by the electorate,"[161] or "relating to any matter of political, social, or other concern to the community."[162] Providing governmental services and information to citizens falls within both of these Supreme Court definitions.

2. Form of the speech

Connick also gave weight to the "form of speech" at issue. In context, "form" seems to refer to whether or not the speaker intended to disseminate information to the public. If so, the Court indicated that the speech is more likely to be public concern speech. In *Connick*, the Court found that "Myers did not seek to inform the public" about problems in the Attorney General's office.[163] By contrast, in *NTEU*, the court found that the speech "addresse[d] . . . a public audience."[164] Employees seeking to disseminate governmental

159. *Yniguez*, 69 F.3d at 956 (Fernandez, J., dissenting) (quoting *Connick*, 461 U.S. at 149).

160. *Connick*, 461 U.S. at 148 n.8, 149.

161. Pickering v. Bd. of Educ., 391 U.S. 563, 572 (1968); *see also* Rankin v. McPherson, 483 U.S. 378, 395 (1987) (Scalia, J., dissenting) (quoting *Pickering*).

162. *Connick*, 461 U.S. at 146.

163. *Id.* at 148.

164. *NTEU*, 513 U.S. 454, 466 (1995). In *NTEU*, 513 U.S. at 466, the Court found that the speech "addressed to a public audience [i.e., form], [was] made outside the workplace [i.e., context], and involved content largely unrelated to government employment [i.e., content]." Judge Wallace, in his *Yniguez* dissent, equated these findings with the criteria for public-concern speech. He stated, "The most recent Supreme Court case on point found that speech is of public concern when it 'addresse[s] a public audience, [is] made outside the workplace, and involve[s] content largely unrelated to . . . government employment.' . . . The purportedly suppressed speech here does not fit this description." *Yniguez*, 69 F.3d at 960 (Wallace, J., dissenting) (quoting *NTEU*, 513 U.S. at 466). In *NTEU*, the Court makes this finding as a summation of its form, context, and content analysis; it is not saying that any of

information and services to the public are by definition attempting to "inform the [non-English-speaking] public" and "address[] a public audience." Thus, the prohibited speech is made to the public, weighing in favor of categorizing speech as speech of public concern.[165]

Judge Fernandez, in his *Yniguez* dissent, said that if he were "forced" to categorize the speech as either public or private concern, "it is more like a case of private concern speech. The simple fact is that the State . . . has determined that its work will be done in English, and Yniguez, for her own private reason, does not wish to obey that determination."[166] Judge Fernandez failed to properly assess the form of the speech. Yniguez was not speaking Spanish to monolingual Spanish or semi-English-proficient speakers for "her own private reasons." Rather, she communicated in a non-English language in order to communicate important information to the public about their government and about governmental services—information that she was hired to disseminate to the public. In all of the *Pickering* cases, including *Pickering* itself, it could be stated that the person spoke out for their "own private reasons," against the will of the government—but that not-so-private reason happens to be the

these specific findings are required for speech to be of public concern. In fact, previous cases show that public concern speech is not required to have content "unrelated to government employment." For example, in *Pickering*, it was precisely because the teacher's speech was related to his employment as a teacher that the court felt his speech should be protected: "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." *Pickering*, 391 U.S. at 572. The court did not find that there was no free speech protection because the school budget was "related" to the teacher's employment. *See also Connick*, 461 U.S. at 149 (the one question found to be public concern speech directly asked about conditions of government employment); Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 413 (1979) (teacher's public concern speech about "employment policies and practices at [the] school" directly related to her employment); Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 282 (1977) (teacher's public concern speech was reading contents of "a memorandum relating to teacher dress and appearance" to a radio station disc jockey); Perry v. Sindermann, 408 U.S. 593 (1972) (public concern speech for professor to advocate change to four-year college). In all of these cases (*Pickering*, *Connick*, *Givhan*, *Mt. Healthy*, and *Perry*), the speech was directly related to the speaker's government employment.

165. In two cases by the Fourth and Fifth Circuits, respectively, the courts have partially based their holding that the speech was not of public concern on the fact that the employee did not attempt to speak to the public. *See* Holland v. Rimmer, 25 F.3d 1251, 1256 (4th Cir. 1994); Terrell v. Univ. of Tex. Sys. Police, 792 F.2d 1360, 1362–63 (5th Cir. 1986). English-only, by contrast, specifically prohibits dissemination to the general non-English-speaking public.

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

dissemination to the public of information or an opinion about the government, and so the speech is a matter of public concern.

3. Context of the speech

The fact that the employee speaks in the workplace as an employee affects two different points of the analysis:[167] (1) when determining whether the speech should be protected as public concern speech, and (2) when determining whether the speech intrudes on the government's interest in efficiency.[168]

In *Connick*, the Court observed: "Also relevant is the manner, time, and place in which the questionnaire was distributed."[169] The Court then analyzed the relevance of context to the facts of *Connick*: "Here the questionnaire was prepared, and distributed at the office; the manner of distribution required not only Myers to leave her work but for others to do the same in order that the questionnaire be completed."[170] In *Connick*, the fact that the speech was performed on the job cut against First Amendment protection because it "support[ed] Connick's fears that the functioning of his office was endangered," that is, it contributed to inefficiency in the office.[171]

In contrast, speech given in violation of an English-only statute constitutes communication of a governmental message to someone in a language the citizen understands. Such conduct would not necessarily disrupt the efficiency of the office.[172] In fact, it would likely add to the efficiency of the government's office because multilingual employees would be able to give the same message to everyone regardless of whether or not the listener was fluent in English. Thus,

167. However, just because the speech was made as an employee rather than as a citizen does not conclusively end the analysis. *See supra* note 71 and accompanying text.

168. Justice Brennan objected to analyzing the context of the speech both in determining whether it was of public concern and in determining whether the speech adversely affected the government's interests in effective and efficient employment. *See Connick*, 461 U.S. at 157–58 (Brennan, J., dissenting).

169. *Id.* at 152.

170. *Id.* at 153.

171. *Id.*

172. There may be situations in which publishing and conducting business in multiple languages would not be efficient. For example, a requirement that the government hire bilingual employees would likely impair efficient and effective employment. But the Arizona amendment prohibited employees who happened to be bilingual from even speaking to citizens in foreign languages. In such circumstances, the alternative is either to turn non-English-speaking citizens away or to speak to them in a language they cannot understand. Neither adds to the effective and efficient delivery of governmental services.

the majority in *Yniguez* determined that "the context actually militates in favor of protecting the speech involved" because it added to the efficiency of the office.[173]

4. Speech interests of the recipients

In *NTEU*, the Supreme Court added a new factor to the analysis not previously mentioned in the *Pickering* line of cases—the interest of the recipients in receiving the prohibited speech.[174] The Supreme Court incorporated this idea from *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, a case concerning commercial speech and the right of citizens to receive advertisements announcing the prices of prescription drugs.[175] This addition to the *Pickering* case law led the Ninth Circuit in *Yniguez* to conclude that the information prohibited by the English-only statute was public concern speech because, "mundane though it may be," the governmental information and services prohibited by the statute are "of far more direct significance to the public than was the speech referred to in [*NTEU*]."[176] In *NTEU*, the speech that the Supreme Court found the public had a right to receive included employees' writings and speeches that were made to receive honoraria and money outside the employees' regular employment.[177] In contrast, English-only restrictions infringe on the free speech interests of non-English speakers in participating in, communicating with, and receiving services and information from their government. The Ninth Circuit majority concluded on this side of the equation:

> Here, the full costs of banning the dissemination of critical information to non-English speaking Arizonans cannot readily be calculated. . . . The range of potential injuries to the public is vast. Much of the information about essential governmental services that, but for the initiative, would be communicated in a manner that non-English speaking Arizonans could comprehend may not be susceptible to timely transmission by other means.[178]

173. *Yniguez*, 69 F.3d 920, 940 (9th Cir. 1995) (en banc).
174. *NTEU*, 513 U.S. 454, 468–70 (1995).
175. 425 U.S. 748 (1976).
176. *Yniguez*, 69 F.3d at 942.
177. *See NTEU*, 513 U.S. at 457.
178. *Yniguez*, 69 F.3d at 947.

Judge Brunetti, who concurred in the majority's opinion in *Yniguez*, was concerned that the majority's decision might be construed to "create an independently enforceable public right to receive information in another language."[179] He specifically wrote to ensure recognition of the fact that "[c]onsideration 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."[180]

But Judge Brunetti's concern—that if the speech rights of the recipients are recognized, then the public may sue the government in order to require materials in any language—is misplaced, though proponents of English-only provisions like to emphasize this concern.[181] Finding that recipients have speech rights does not bring that fear to fruition—as demonstrated by *Virginia State Board* itself.

The Court in *Virginia State Board* explained that there was a precondition to finding speech rights of recipients: "Freedom of speech presupposes a willing speaker."[182] One could no more sue to get a document in Cambodian based on a free speech "right to receive," than one can sue to have any speech made that is not made. If the speakers do not exist or do not desire to speak, a person has no right to receive. "But where a speaker exists," as is the case in the English-only context, "the protection afforded is to the communication, to its source and to its recipients both."[183] Thus, in *Virginia State Board*, "the First Amendment entitles the user of prescription drugs to receive information that pharmacists wish to communicate to them."[184] In the English-only context, the non-English speaker has a right "to receive information" that government employees and

179. *Id.* at 951 (Brunetti, J., concurring).

180. *Id.* at 952.

181. For example, in a news article in Utah, a proffered justification for the English-only statute was avoiding lawsuits by citizens demanding government services in one of the 120 languages spoken in Utah. *See* Dennis Romboy, *Activists Defend English-Only* (Nov. 3, 2000), *available at* http://deseretnews.com/dn/view/0,1249,225007232,00.html.

182. *Va. State Bd.*, 425 U.S. at 756.

183. *Id.*

184. *Id.* at 754. The court does note that Virginia can still make appropriate time, place, and manner restrictions. As shown above, the English-only statutes are not valid time, place, and manner restrictions, since they neither allow for ample alternatives to the communication, nor are they narrowly tailored to the governmental interests. *See supra* note 110 and text accompanying note 108. Also, Virginia can make restrictions against disseminating false and misleading information—but again an English-only statute alleviates no such danger. *See Va. State Bd.*, 425 U.S. at 770–73.

elected and appointed officials "wish to communicate to them."[185] The *Virginia State Board* Court cites numerous other cases where the Supreme Court has recognized this right to receive.[186]

The reason the recipient should also be given free speech rights in addition to those held by the speaker is because freedom of speech is not a freedom of speech in the air. If government could allow speech but could somehow restrict the audience from receiving that speech, the speech would be useless. True, the speaker would be allowed to speak, but if it is only to himself, the free flow of ideas and the purpose of freedom of speech are entirely eviscerated. That is exactly the situation with English-only statutes. The bilingual employee is able to speak, but only in a form incomprehensible to a listener who has limited or no English proficiency. This infringes on both the right of the employee to use a foreign language and thus communicate, and the right of the listener to receive the message from a willing and able speaker.

The rationales given in *Virginia State Board* for finding a right to receive are even stronger in the English-only context than they were on the facts of *Virginia State Board*. The Court cited "the recipients' great need for the information sought,"[187] meaning the price of prescription drugs. Surely, provision of governmental services and information, as well as being part of the political process—the essence of democracy itself—constitute an even greater need to the public than do prescription drug prices. The Court in *Virginia State Board* also cited the "strong interest in the free flow of commercial information."[188] However strong that interest may be, the free flow of political and governmental information is arguably stronger and is the heart of First Amendment protection. Lastly, the Court stated that Virginia could require professional standards of its pharmacists and make certain restrictions to inhibit competition, "[b]ut it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering."[189] Likewise, a government should not be allowed to keep the non-English public in ignorance of government information and provision of services that bilingual

185. *Id.* at 754.

186. *See id.* at 757 (listing cases that stand for the proposition that there must be a speaker for the recipient to have a right to receive).

187. *Id.*

188. *Id.* at 764.

189. *Id.* at 770.

government employees and officials are offering and are allowed to give to the public in general. Interestingly, the Court in *Virginia State Board* found that even though the state can regulate the information (because it "'affects the public health, safety and welfare'"[190]), the First Amendment protection is "enjoyed by the appellees as recipients of the information, and not solely, *if at all*, by the advertisers themselves who seek to disseminate that information."[191] The plaintiffs in *Virginia State Board* were the listeners and not the speakers. Thus, even if a court were to find that government employees could be restricted by an English-only statute, non-English recipients who could show that there were ready and willing speakers could still invoke their right to receive, as did the plaintiffs in *Virginia State Board*. For the First Amendment right "is enjoyed by the [non-English speakers] as recipients of the information, and not solely, if at all, by the [employees]."[192]

B. The Other Half of the Equation: The State's Interests

Pickering requires a court to balance the interests of the employee in speaking on a matter of public concern with the interests of the government in efficient and effective employment. Three threshold questions arise in determining the government's interest: (1) What is the government's burden in proving its interests under *NTEU*?; (2) What are the state's legitimate concerns in efficiency and effectiveness?; and (3) What are the state's other interests and may a court consider them?

1. Increased burdens for the government

In *NTEU*,[193] the Court noted that the prior *Pickering* cases "involve[d] a post hoc analysis of one employee's speech and its impact on that [one] employee's public responsibilities."[194] The Court realized that a *Pickering* analysis would have to be analyzed differently for a "sweeping statutory impediment to speech"—that is, where the

190. *Va. State Bd.*, 425 U.S. at 753 (quoting Patterson Drug Co. v. Kingery, 305 F. Supp. 821, 824–25 (W.D. Va. 1969)).

191. *Id.* at 756.

192. *Id.*

193. *See supra* text accompanying notes 47–53 (discussing the facts and holding of *NTEU*).

194. *NTEU*, 513 U.S. at 467.

government had enacted "a wholesale deterrent to a broad category of expression by a massive number of potential speakers."[195] The Court recognized that a court "normally accord[s] a stronger presumption of validity" to a legislative enactment "than to an individual executive's disciplinary action."[196] Yet the Court found that in the context of *ex ante* statutory prohibitions on the speech of government employees, "the Government's burden is greater" than it is in a regular *Pickering* case involving "an isolated disciplinary action."[197] The Court explained that the reason for the heightened burden was that "unlike an adverse action taken in response to actual speech, [an *ex ante*] ban chills potential speech before it happens."[198]

NTEU heightens the government's burden in two different ways. First, the government must show a stronger interest than it was required to show under the straight *Pickering* analysis. As the *NTEU* Court explained, "[t]he Government must show" that its stated interests *outweigh* "the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression."[199] Second, the government must prove that its interests and concerns are real and not merely conjectural. Again, the Court has heightened the burden from *Pickering*. In a regular *Pickering* case dealing with a *post hoc* employment decision in response to employee speech, the Supreme Court has given "deference to government predictions of harm used to justify restriction of employee speech."[200] But where the government has created an *ex ante* restriction on speech, the government "must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[201] In her concurrence, Justice

195. *Id.*

196. *Id.* at 468.

197. *Id.*

198. *Id.*

199. *Id.*

200. Waters v. Churchill, 511 U.S. 661, 673 (1994) (plurality opinion).

201. *NTEU*, 513 U.S. at 475 (quoting Turner Broad. Sys. v. FCC, 512 U.S. 662, 664 (1994)); *see also id.* at 468 (stating that the government must show the prohibited "expression's 'necessary impact on the actual operation' of the Government," (quoting *Pickering*, 391 U.S. at 571)); *id.* at 472 (holding that the Government had not met its burden of proof where "the Government cites no evidence of misconduct related to [the prohibited speech] in the vast rank and file of federal employees below grade GS-16").

O'Connor noted that when the Supreme Court has previously allowed *ex ante* restrictions on First Amendment rights, specifically with the Hatch Act,[202] it was "only after canvassing nearly a century of concrete experience with the evils of the political spoils system."[203] She concluded that "[t]he bare assertion of interest in a wide-ranging prophylactic ban here, without any showing that [the government] considered empirical or anecdotal data pertaining to abuses by [public employees], cannot suffice to outweigh the substantial burden on the 1.7 million affected employees."[204]

2. The interests in efficiency and effectiveness

The *Pickering* test balances the employee's interest in speaking on a matter of public concern with "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[205] As stated in *Rankin v. McPherson*, "the state interest element of the [*Pickering*] test focuses on the effective functioning of the public employer's enterprise."[206] Thus, the government cannot simply name any state interest that the restriction will serve. Rather, the government is restricted to its interest in efficient and effective employment. *NTEU* did not change this requirement, and, in fact, the *NTEU* Court stated the government's burden was to demonstrate the expression's "'necessary impact on the actual operation' of the Government."[207]

For example, in *Pickering*, the Court found that the School Board did not have a legitimate interest in precluding publication of a teacher's letter concerning a school bond where the statements "are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the

202. Section 9(a) of the Hatch Act prohibited federal employees from "tak[ing] an active part in political management or in political campaigns" or from using their "official authority or influence for the purpose of interfering with or affecting the result of an election." United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO, 413 U.S. 548, 550 (1973).

203. *NTEU*, 513 U.S. at 483 (O'Connor, J., concurring).

204. *Id.* at 485.

205. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

206. Rankin v. McPherson, 483 U.S. 378, 388 (1987).

207. *NTEU*, 513 U.S. at 468 (quoting *Pickering*, 391 U.S. at 571); *see also supra* note 123 and accompanying text.

schools generally."[208] The Court noted that the statements made were not directed at any particular person with whom the employee regularly worked, that the job itself did not require "personal loyalty [to] and confidence" in the employee's supervisor, and that there was no need for confidentiality of the information.[209] Thus, the Court found that the employer's interest in efficiency and effectiveness did not outweigh the employee's interest in speech.

In contrast, in *Connick*, the Court found that the government's interest outweighed the employee's interest. But in *Connick*, Myers distributed a questionnaire critical of her employer, at the office, to other employees. The Court found that the employer did not have to allow "disruption of the office and the destruction of working relationships" or the threatening of the employer's authority to run the office.[210]

Allowing bilingual employees to communicate in a foreign language to monolingual non-English speakers at the office does not disrupt the efficiency of the office. Unlike Myers, who distributed the questionnaire on work time, a bilingual employee helping a foreign-speaking citizen does not infringe on the ability of other employees to complete their work. A bilingual employee does not threaten his employer's authority by using a foreign language to help non-English-speaking citizens. He is not destroying working relationships with either his employer or his co-employees. Also, as in *Pickering*, it is hard to see how the use of a foreign language by a bilingual employee impedes the employee's performance of his duties. And, as in *Pickering*, there is no special need for the employer to keep the information confidential. In fact, the employee is giving exactly the same message that he gives to every English-speaking citizen and that he is employed to give to every citizen. By allowing the employee to communicate with non-English-speaking citizens, the employee actually adds to the efficiency of the office and contributes to, rather than detracts from, the "government's interest in the effective and efficient fulfillment of its responsibilities to the public."[211] That public includes English- and non-English-speaking citizens

208. *Pickering*, 391 U.S. at 572–73.

209. *Id.* at 570 & n.3.

210. Connick v. Myers, 461 U.S. 138, 152 (1983).

211. *Id.* at 150. I am not arguing that the government has an obligation to hire bilingual employees, only that it should allow those who happen to be bilingual to use their second language.

alike.

In fact, the Ninth Circuit found that Arizona had no efficiency and effectiveness interests with respect to the English-only statute—perhaps an distorted finding, considering that the defendants, Arizona and Arizonans for Official English had stipulated to it.[212] Even without the stipulation, the *Yniguez* record and "elementary reason" supported the conclusion that a governmental office would be more efficient, not less, if bilingual employees were allowed to communicate with citizens needing government services in languages other than English.[213] The court found that a prohibition against such was absolutely unreasonable.[214] The Ninth Circuit majority qualified the finding by stating:

> [W]e emphasize that by ruling that the state cannot unreasonably limit the use of non-English languages, we do not imply that the state is therefore forced to allow inappropriate or burdensome language uses. In short, we do not suggest that a public employee has a "right" to speak in another language when to do so would hinder job performance.[215]

The Ninth Circuit noted, however, that if the English-only provision's drafters really had efficiency as their goal, they "would not impose a total ban but would provide that languages other than English may be used in government business only when they facilitate such business and not when they hinder it," something the Arizona statute "plainly does not" do.[216] The Supreme Court used this same analysis in *NTEU* in order to determine the sincerity of the

212. *See Yniguez*, 69 F.3d 920, 942 (9th Cir. 1995) (en banc); *see also infra* note 213. The Arizona Supreme Court in *Ruiz* made no findings on the interests of the government in the regulation. As noted before, the Arizona Supreme Court conducted all of its First Amendment analysis summarily. Its only analysis of the *Pickering/NTEU* cases is a statement that the amendment "violates the employee's" rights, citing to *NTEU*. Ruiz v. Hull, 957 P.2d 984, 998 (Ariz. 1998) (citing *NTEU*, 513 U.S. at 465–66).

213. *Yniguez*, 69 F.3d at 942. The parties had stipulated that Yniguez's "use of Spanish in the course of her official duties contributed to the efficient and effective administration of State." *Id.* But the court also found, "[m]ore generally, the facts of this case, as well as elementary reason, tell us that government offices are more efficient and effective when state and local employees are permitted to communicate in languages other than English with consumers of government services who are not proficient in that language." *Id.*

214. According to *NTEU*, the government cannot place an unreasonable restriction on employee speech. *NTEU*, 513 U.S. 454, 476 (1995) ("The Government has not persuaded us that [the restriction] is a reasonable response to the posited harms.").

215. *Yniguez*, 69 F.3d at 943.

216. *Id.* at 942–43.

government in its purported interests in the speech restriction. The Court found that if the government were really interested in avoiding the appearance of unethical work where government employees were paid extra just by virtue of being governmental employees, then the government would have tailored the law to that end by only restricting conduct that had a nexus with government employment.[217] However, the government had failed to so tailor the prohibition, and, consequently, the Supreme Court found almost no governmental interest in *NTEU*, as did the Ninth Circuit in *Yniguez*.[218]

The Ninth Circuit properly concluded that "the efficiency and effectiveness considerations that constitute the fundamental governmental interest" in *Pickering* cases "are wholly absent."[219] Where half of the equation is zero, the balancing test becomes quite easy, and the free speech rights of both the employees and their potential audiences automatically trump the nonexistent interests of the government. Perhaps in another case, a court might find that a state had some efficiency or effectiveness interest.[220] But no state has yet successfully proffered such an interest in support of its English-only statute. Even if a valid interest were stated, the state would be required to show that that interest outweighed "the interests of both potential audiences and a vast group of present and future employees"[221] in speaking to the public on matters of public concern. Additionally, the government would have to be able to support that interest with credible evidence that the prohibited speech interfered with the interest. Mere prediction or conjecture would not suffice.[222]

3. The government's other interests

Under all the *Pickering* cases, including *NTEU*, the Court has considered only the state's interests in effective and efficient employment. In *Yniguez*, the Ninth Circuit examined the state's other possible interests outside of the employment context. The Ninth

217. *See NTEU*, 513 U.S. at 474.

218. *Id.* at 475–76.

219. *Yniguez*, 69 F.3d at 942.

220. Conducting business or publishing in multiple languages could feasibly interfere with the efficiency of an office. However, it is hard to see how a statute like the Arizona amendment that prohibits even oral communication with a non-English-speaking citizen could promote efficiency. *See supra* note 172.

221. *NTEU*, 513 U.S. at 468.

222. *See id.* at 472, 475; *see also supra* notes 200–204 and accompanying text.

Circuit likely erred in so doing according to current Supreme Court law.

In *Rutan v. Republican Party of Illinois*, which arose in the related context of government restrictions on public employees' political party affiliation, the Supreme Court debated whether a state's non-employment interests should be given any weight in either party affiliation cases or in *Pickering* cases. The majority stated that the government may have interests "in the structure and functioning of society," but that did not make them "employment related," and so they would not be considered.[223] The *Rutan* dissent argued that a court should consider interests beyond those in efficient and effective employment.[224]

Subsequent Supreme Court *Pickering* cases have not followed the *Rutan* dissent. In *Waters*, a *Pickering* case decided four years after *Rutan*, the plurality not only limited its analysis to the state's employment interests, but also stated that "[t]he key to First Amendment analysis of government employment decisions" was "[t]he government's interest in achieving its goals as effectively and efficiently as possible,"[225] as commanded by *Pickering* itself. Such interests were the basis for the government's ability to restrict the speech of government employees.[226] Similarly, in *NTEU*, a case decided five years after *Rutan*, the Court only considered the government's interest in efficient and effective employment, and stated that only those interests gave the government the power to restrict employee speech.[227]

Arizona proffered three primary interests that the English-only statute ostensibly was created to advance: (1) "protecting democracy by encouraging 'unity and political stability'"; (2) "encouraging a common language"; and (3) "protecting public confidence."[228] The Ninth Circuit first noted with each of the three concerns that Ari-

223. Rutan v. Republican Party of Ill., 497 U.S. 62, 70 n.4 (1990).

224. *Id.* at 102 n.3 (Scalia, J., dissenting).

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

226. *See id.*

227. *See NTEU*, 513 U.S. at 468 (free speech interests must be outweighed by interference with the actual operation of government); *see also* Hoover v. Morales, 164 F.3d 221, 226 (5th Cir. 1998) ("the only state interest acknowledged by *Pickering* and its progeny, which may outweigh the right of state employees to speak on matters of public concern, is the State's interest, 'as an employer, in promoting the efficiency of the public services it performs through its employees.'").

228. *Yniguez*, 69 F.3d 920, 944 (9th Cir. 1995) (en banc).

zona had not satisfied its burden under *NTEU*. Arizona had produced no evidence to support its claims,[229] but rather relied on "assertion and conjecture"—evidence that the Supreme Court found entirely inadequate in *NTEU*.[230]

After finding that Arizona had no evidence to back up any of its stated interests, the Ninth Circuit went on to reject them as invalid even apart from the fact that they were not employment related at all. The court found that the first two interests, promoting unity and encouraging a common language, were invalid by analogizing to *Meyer v. Nebraska*[231] and *Farrington v. Tokushige*.[232] Both *Meyer* and *Farrington* invalidated restrictions on the teaching and use of foreign languages in schools. Quoting first *Meyer* and then *Epperson v. Arkansas*,[233] the Ninth Circuit noted that the supposed government justifications offered for the language restrictions in *Meyer* mirrored exactly those now pronounced by proponents of English-only statutes: encouraging unity and the learning of English. The Ninth Circuit then pointed out that "despite these worthy goals," the Supreme Court had found such governmental interests to be "arbitrary" and completely "invalid" to justify a restriction on foreign languages.[234]

Many sociolinguists also doubt whether an English-only provision would actually promote unity even if that were a permissible state goal. According to William Eggington, a sociolinguist at Brigham Young University and expert witness for the plaintiffs in the liti-

229. *See id.* at 944–45 (finding that there was no evidence and "no basis in the record to support the proponents' assertion that any of the broad societal interests on which they rely are served by" the provision).

230. *Id.* at 945; *see NTEU*, 513 U.S. at 475–76. The Ninth Circuit hit on a potential problem with English-only statutes passed by ballot initiative, for the very fact that makes them so much easier to pass than a bill in the end may slit the statute's own throat: the Ninth Circuit recognized that the provision was "a ballot initiative and thus was subjected to neither extensive hearings nor considered legislative analysis before passage." *Yniguez*, 69 F.3d at 945. I find this to be a pleasing paradox. Because legislatures have been reluctant to pass restrictive English-only statutes, "U.S. English" has gone out to the states to attempt passage by ballot initiative, where there are no hearings, no findings, and no justifications made for the statute's passage. Consequently, when the statute is challenged in court, the state has no evidence to back up its asserted interests. And *NTEU* requires evidence. *See supra* text accompanying notes 193–204.

231. 262 U.S. 390 (1923).

232. 273 U.S. 284 (1927).

233. 393 U.S. 97, 105 (1968) (stating that in *Meyer*, "[t]he State's purpose in enacting the law was to promote civic cohesiveness by encouraging the learning of English").

234. *Yniguez*, 69 F.3d at 945 (citing *Meyer*, 262 U.S. at 403).

gation challenging the statute in Utah, English-only statutes actually beget diversity and hinder assimilation because they (1) "cause division and linguistic balkanization," creating "language enclaves" in which immigrants who feel they are outsiders and are cut off from the majority of the population fail to assimilate and learn the dominant language; (2) "destabilize family structures, as older family members less adept at acquiring a new language must rely on younger family members more amenable to language acquisition"; (3) "tend to encase language minorities in 'second class citizen' status in terms of their political and economic engagement and success"; and (4) "create an 'us vs. them' mentality between English speakers—even those from prior waves of immigration—and non-English speakers."[235]

The Ninth Circuit also was "entirely unmoved" by Arizona's third rationale, that the lack of an English-only statute would "undermine public confidence."[236] The court found instead that the existence of an English-only statute would "undermine [the] confidence" of non-English-speaking citizens in their government.[237] It noted further that prevention of hostile feelings does not justify infringement of constitutional rights.[238]

In summary, none of the defendants in any of the English-only cases thus far[239] has been able to support the purported interests of the government—even those interests not related to efficient and effective employment—with any evidence connecting the means em-

235. Affidavit of William G. Eggington, Ph.D., in Support of Plaintiff's Motion for Preliminary Injunction, Anderson v. Utah, No. 000909680 (Utah 3d Dist. Ct.) ¶ 6–7.

236. *Yniguez*, 69 F.3d at 947.

237. *See id.*

238. *Id.* The Ninth Circuit then again weighed all of the supposed governmental interests against the infringement on free speech and once again found that under any possible version or level of scrutiny of the *Pickering* test, the free speech rights of both the speakers and their recipients outweighed the entirely unsubstantiated governmental interests. *See id.*

239. *See also* Sandoval v. Hagan, 7 F. Supp. 2d 1234 (M.D. Ala. 1998) [hereinafter *Sandoval I*], *aff'd*, Sandoval v. Hagan, 197 F.3d 484 (11th Cir. 1999) [hereinafter *Sandoval II*], *and rev'd sub nom.* Alexander v. Sandoval, 532 U.S. 275 (2001) [hereinafter *Sandoval III*]. The *Sandoval* litigation addressed whether an Alabama English-only policy for driver's license examinations was a violation of Title VI. The State asserted several different interests in its no-translation policy, including (1) the cost of the translations, and (2) public safety on the highways. *See Sandoval I*, 7 F. Supp. 2d at 1298. In a decision ultimately affirmed by the Eleventh Circuit on appeal, the trial court rejected both qualifications as entirely unsupported. *See id.* at 1298–1313. The Supreme Court reversed on the grounds that no private right of action existed under Title VI. *See Sandoval III*, 532 U.S. at 293.

ployed and the ends sought. Defendants have attempted to support the government's stated interests only with assertion and conjecture, which, under *NTEU*, are insufficient to outweigh the free speech interests of both employees and recipients.[240]

IV. CONCLUSION

The Ninth Circuit correctly found that the Arizona English-only amendment violated the free speech rights of government employees. Unfortunately, the majority erred in several points of its analysis. Of particular note was the majority's failure to realize the irrelevancy of traditional First Amendment dichotomies, which left open the criticisms that the restriction was content based and thus constitutional under *Rust*, that the restriction was constitutional because it was content neutral, or that the restriction was subject to a lower level of scrutiny as a "mode of expression." One of the aspects of the Ninth Circuit opinion that has been criticized is the use of the *Pickering* cases to evaluate whether the speech rights of government employees were abridged.[241] But, as demonstrated, the *Yniguez* majority correctly determined that *Pickering*, rather than *Rust*, stated the appropriate analysis. For *Pickering* and its progeny state the only test that recognizes both the breadth and the limits of the government's power as employer to restrict the free speech rights of its employees. *Pickering* and progeny additionally recognize and give appropriate weight to the free speech interests of both the employees and potential recipients, thereby more fully protecting the free flow of information and the purposes behind the First Amendment.

As stated in *Kovacs v. Cooper*, "[t]he right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention."[242] This is the essential flaw of English-only legislation. It denies multilingual governmental employees the right to "reach the minds of willing listeners" who do not speak English. It cuts off *all* opportunity for a ready, willing, and able government employee to give to non-English speakers information and messages from their government. Consequently, English-only statutes infringe on the

240. *See NTEU*, 513 U.S. 454, 468, 475 (1995); *id.* at 483, 485 (O'Connor, J., concurring).

241. *See, e.g.*, Angstreich, *supra* note 20; Robertson, *supra* note 21, at 325–26.

242. 336 U.S. 77, 87 (1949).

rights of both the public employee in giving the message and the non-English-speaking citizen in receiving that message.

Margaret Robertson

Appendix A—Arizona's English-Only Amendment

ARTICLE 28. ENGLISH AS THE OFFICIAL LANGUAGE

§ 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.

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

§ 2. Requiring this state to preserve, protect and enhance English

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

§ 3. Prohibiting this state from using or requiring the use of languages other than English; exceptions

Section 3.

(1) Except as provided in Subsection (2):

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

(b) No entity to which this Article applies shall make or enforce a

law, order, decree or policy which requires the use of a language other than English.

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

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

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

(b) to comply with other federal laws.

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

(d) to protect public health or safety.

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

§ 4. Enforcement; standing

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

Appendix B—Utah's English-Only Statute

Utah Code Annotated 63-13-1.5. Official Language

(1) English is declared to be the official language of Utah.
(2) As the official language of this State, the English language is the sole language of the government, except as otherwise provided in this section.
(3) Except as provided in Subsection (4) all official documents, transactions, proceedings, meetings, or publications issued, conducted, or regulated by, on behalf of, or representing the state and its political subdivisions shall be in English.
(4) Languages other than English may be used when required:
  (a) by the United States Constitution, the Utah State Constitution, federal law, or federal regulation;
  (b) by law enforcement or public health and safety needs;
  (c) by public and higher education systems according to rules made by the State Board of Education and the State Board of Regents to comply with Subsection (5);
  (d) in judicial proceedings, when necessary to insure that justice is served;
  (e) to promote and encourage tourism and economic development, including the hosting of international events such as the Olympics; and
  (f) by libraries to:
    (i) collect and promote foreign language materials; and
    (ii) provide foreign language services and activities.
(5) The State Board of Education and the State Board of Regents shall make rules governing the use of foreign languages in the public and higher education systems that promote the following principles:
  (a) non-English speaking children and adults should become able to read, write, and understand English as quickly as possible;
  (b) foreign language instruction should be encouraged;
  (c) formal and informal programs in English as a Second Language should be initiated, continued, and expanded; and
  (d) public schools should establish communication with non-English speaking parents of children within their systems, using a means designed to maximize understanding when

necessary, while encouraging those parents who do not speak English to become more proficient in English.

(6) Unless exempted by Subsection (4), all state funds appropriated or designated for the printing or translation of materials or the provision of services or information in a language other than English shall be returned to the General Fund.
   (a) Each state agency that has state funds appropriated or designated for the printing or translation of materials or the provision of services or information in a language other than English shall:
      (i) notify the Division of Finance that those monies exist and the amount of those monies; and
      (ii) return those monies to the Division of Finance.
   (b) The Division of Finance shall account for those monies and inform the Legislature of the existence and amount of those monies at the beginning of the Legislature's annual general session.
   (c) The Legislature may appropriate any monies received under this section to the State School Board for use in English as a Second Language programs.

(7) Nothing in this section affects the ability of government employees, private businesses, non-profit organizations, or private individuals to exercise their rights under:
   (a) the First Amendment of the United States Constitution; and
   (b) Utah Constitution, Article 1, Sections 1 and 15.

(8) If any provision of this section, or the application of any such provision to any person or circumstance, is held invalid, the remainder of this act shall be given effect without the invalid provision or application.

Appendix C—Alaska's English-Only Statute

Article 4. Official Language.

Sec. 44.12.300. Findings and purpose. The people of the State of Alaska find that English is the common unifying language of the State of Alaska and the United States of America, and declare a compelling interest in promoting, preserving and strengthening its use.

Sec. 44.12.310. Official language. The English language is the official language of the State of Alaska.

Sec. 44.12.320. Scope. The English language is the language to be used by all public agencies in all government functions and actions. The English language shall be used in the preparation of all official public documents and records, including all documents officially compiled, published or recorded by the government.

Sec. 44.12.330. Applicability. AS 44.12.300–44.12.390 apply to the legislative and executive branches of the State of Alaska and all political subdivisions, including all departments, agencies, divisions and instrumentalities of the State, the University of Alaska, all public authorities and corporations, all local governments and departments, agencies, divisions, and instrumentalities of local governments, and all government officers and employees.

Sec. 44.12.340. Exceptions.

(a) The government, as defined in AS 44.12.330, may use a language other than English when necessary for the following purposes:
  (1) to communicate health and safety information or when an emergency requires the use of a language other than English;
  (2) to teach another language to students proficient in English;
  (3) to teach English to students of limited English proficiency;
  (4) to promote international relations, trade, commerce, tourism or sporting events;
  (5) to protect the constitutional and legal rights of criminal defendants;

(6) to serve the needs of the judicial system in civil and criminal cases in compliance with court rules and orders;
(7) to investigate criminal activity and protect the rights of crime victims;
(8) to the extent necessary to comply with federal law, including the Native American Languages Act;
(9) to attend or observe religious ceremonies;
(10) to use non-English terms of art, names, phrases, or expressions included as part of communications otherwise in English; and
(11) to communicate orally with constituents by elected public officials and their staffs, if the public official or staff member is already proficient in a language other than English.

(b) An individual may provide testimony or make a statement to the government in a language other than English, if the individual is not an officer or employee of the government, and if the testimony or statement is translated into English and included in the records of the government.

Sec. 44.12.350. Public accountability. All costs related to the preparation, translation, printing, or recording of documents, records, brochures, pamphlets, flyers, or other material in languages other than English shall be defined as a separate line item in the budget of every governmental agency, department, or office.

Sec. 44.12.360. Non-denial of employment or services.

(a) No governmental entity shall require knowledge of a language other than English as a condition of employment unless the requirements of the position fall within one of the exceptions provided for in AS 44.12.340, and facility in another language is a bona fide job qualification required to fulfill a function included within one of the exceptions.

(b) No person may be denied services, assistance, benefits, or facilities, directly or indirectly provided by the government, because that person communicates only in English.

Sec. 44.12.370. Private sector excluded. AS 44.12.300–44.12.390 shall not be construed in any way that infringes upon the rights of persons to use languages other than English in activities or functions conducted solely in the private sector, and the gov-

ernment may not restrict the use of language other than English in such private activities or functions.

Sec. 44.12.380. Private cause of action authorized. Any person may bring suit against any governmental entity to enforce the provisions of AS 44.12.300–44.12.390.

Sec. 44.12.390. Severability. The provisions of AS 44.12.300–44.12.390 are independent and severable, and if any provision of AS 44.12.300–44.12.390, or the applicability of any provision to any person or circumstance, shall be held to be invalid by a court of competent jurisdiction, the remainder of AS 44.12.300–44.12.390 shall not be affected and shall be given effect to the fullest extent practicable.