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**Precious Knowledge: State Bans on Ethnic
Studies, Book Traffickers (Librotraficantes),
and a New Type of Race Trial**

Richard Delgado

91 NORTH CAROLINA LAW REVIEW 1513 (2013)

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*PRECIOUS KNOWLEDGE: STATE BANS ON ETHNIC STUDIES, BOOK TRAFFICKERS (LIBROTRAFICANTES), AND A NEW TYPE OF RACE TRIAL**

RICHARD DELGADO**

The rapid growth of populations of color, particularly relatively young groups like Latinos, has generated an increasing number of conflicts over schools and schooling. One such controversy erupted in Tucson, Arizona, over a successful Mexican American Studies program in the public schools. The controversy featured accusations that the program was un-American and biased, while defenders countered that it greatly boosted attendance, graduation rates, and aspiration level for hundreds of Latino schoolchildren, many from poor immigrant families. Prior to the program's inception, drop-out rates for this group were nearly fifty percent; the program elevated the graduation rate to nearly ninety. Taught by energetic young teachers, many of them graduates of university-level ethnic studies programs, the course of instruction emphasized Latino history and culture, including works by well-known authors. When the Arizona authorities banned the program under a new law prohibiting the teaching of ethnically divisive material and removed the offending textbooks to an offsite book depository in front of shocked schoolchildren, the local Latino community exploded in indignation. A Texas community-college professor organized a caravan of librotraficantes (book traffickers) that carried trunkfuls of "wet books" all the way from Houston to Tucson, where the drivers gave them away to schoolchildren and interested bystanders.

Teachers who were fired or transferred brought a number of actions challenging the legislation and book ban. Taking as its title an award-winning documentary film, this Article analyzes a number of issues likely to come to the fore in the years ahead, including the right of minority groups to study material essential to understanding their own background, history, and identity—in short, a new type of race trial.

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INTRODUCTION: MEXICAN AMERICAN STUDIES IN
TUCSON, ARIZONA

During hard times, society tends to increase resistance toward immigrants and those it perceives as outsiders.¹ Our times are no different. In the current economic downturn,² America has seen an increase in border

1. See generally ARIZONA FIRESTORM: GLOBAL IMMIGRATION REALITIES, NATIONAL MEDIA, AND PROVINCIAL POLITICS (Otto Santa Ana & Celeste González de Bustamante eds., 2012) [hereinafter ARIZONA FIRESTORM] (discussing the background and nature of anti-immigrant movements); IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed., 1997) (describing a host of anti-immigrant measures and sentiment that materialize during hard times).

2. See, e.g., Adam Davidson, *Can Anyone Really Create Jobs?*, N.Y. TIMES, Nov. 6, 2011, (Magazine), at 12 (describing the economic downturn and prospects for remedying it).

enforcement,³ state and local laws designed to make life difficult for undocumented entrants,⁴ and even private vigilantism and “beaner hopping” by young males looking for an outlet for boredom or free-floating aggression.⁵

Arizona has witnessed all three types of behavior.⁶ Maricopa County Sheriff Joe Arpaio and other law officials have carried out heavy-handed policing, including sweeps aimed at Latinos, documented or otherwise.⁷ Armed vigilantes patrol the desert in search of small knots of border-crossers trying to make their way to a friendly city.⁸ And Latinos in the state, legally or otherwise, suffer a tide of invective and laws aimed at their culture, language, supposed lack of patriotism, and living habits.⁹

Although earlier nativist behavior took aim at adults, a new wave targets schoolchildren. Arizona first enacted an English-only law, one of

3. See, e.g., Julia Preston, *Tweak in Rule to Ease a Path to Green Card*, N.Y. TIMES, Jan. 7, 2012, at A1 (describing the high rate of deportation during the early years of the Obama administration).

4. See, e.g., RICHARD DELGADO, JUAN F. PEREA & JEAN STEFANCIC, *LATINOS AND THE LAW: CASES AND MATERIALS* 477–80 (2008) (describing state measures aimed at making life hard for the foreign-born).

5. See *id.*; Cara Buckley, *Teenagers' Violent Sport Led to Killing on Long Island, Officials Say*, N.Y. TIMES, Nov. 20, 2009, at A26 (detailing the “hate crime” of randomly attacking Hispanic men for “sport,” the assailants referring to their victims as “beaners,” a reference to the staple Hispanic dish of rice and beans”).

6. See JEFF BIGGERS, *STATE OUT OF THE UNION: ARIZONA AND THE FINAL SHOWDOWN OVER THE AMERICAN DREAM* 1–9 (2012) (discussing how the state “had conjured a massive following of supporters” on behalf of anti-immigrant measures); Editorial, *Migrants' Freedom Ride*, N.Y. TIMES, July 29, 2012, (Sunday Review), at 10 (describing Arizona as the “national capital of anti-immigrant laws and oppressive policing”).

7. See, e.g., Michael Muskal, *Civil Trial Begins for Arizona's Sheriff Joseph Arpaio*, L.A. TIMES (July 19, 2012), <http://articles.latimes.com/2012/jul/19/nation/la-na-nn-arizona-sheriff-joe-arpaio-racial-profiling-trial-20120719> (describing the sheriff's trial for civil rights violations); see also BIGGERS, *supra* note 6, at 110–11 (discussing Arpaio's motivations); Editorial, *supra* note 6, at 10 (describing the sheriff's “long history of racial profiling and discriminatory policing”).

8. See BIGGERS, *supra* note 6, at 91 (discussing the role of armed posses in enforcing border vigilance in Arizona); DELGADO, PEREA & STEFANCIC, *supra* note 4, at 468 (describing conditions posing “high risk of death or, at least, extreme discomfort” in the desert); Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT'L L. & POL'Y 121, 123–24, 133–44, 146–47, 149–50 (2001) (discussing same).

9. See, e.g., Gerald P. López, *Don't We Like Them Illegal?*, 45 U.C. DAVIS L. REV. 1711, 1798–99 (2012) (discussing recent successful ballot initiatives including one prohibiting undocumented immigrants from receiving state or local benefits, another making ones charged with certain felonies ineligible for bail, and a third barring undocumented students from receiving in-state tuition or financial aid and describing successful legislation that included a law penalizing human smuggling and another requiring businesses to participate in the federal E-Verify program and punishing knowing employment of the undocumented); see also BIGGERS, *supra* note 6, at 112 (discussing ethnic profiling in the state); *infra* notes 10–12 and accompanying text (discussing similar legislation). For regular discussions of anti-immigrant propaganda and rhetoric, see THREE SONORANS, <http://threesonorans.com/> (last visited May 8, 2013) (formerly the online supplement of the newspaper *Tucson Citizen*).

the nation's harshest.¹⁰ When the state's supreme court struck it down, the legislature enacted another.¹¹ A few years later, the legislature passed a wide-ranging law penalizing many activities that immigrants engaged in, including renting an apartment, obtaining a driver's license, working, or seeking shelter in a church or from friends.¹²

The Supreme Court struck most of the new legislation down, as well.¹³ Before the court decision, however, Arizona enacted a companion statute ("H.B. 2281") aimed at eliminating Mexican American Studies ("MAS") programs in the state's public schools, many of whose student bodies were over half Latino, most of them of Mexican origin.¹⁴

Events unfolding in Arizona thus exemplify a type of race trial that is apt to require increasing attention in coming years. The growth of the Latino population has already sparked litigation over immigration, language rights, and workplace discrimination.¹⁵ But Latinos are a

10. See *Ruiz v. Hull*, 957 P.2d 984, 994–96 (Ariz. 1998) (comparing Arizona's former English-only constitutional amendment to English-only laws in other jurisdictions). English-only (sometimes called Official English) laws, as their name suggests, prescribe the use of English in certain settings, such as governmental activities.

11. See *id.* at 996–1003 (invalidating Arizona's former English-only statute); DELGADO, PEREA & STEFANCIC, *supra* note 4, at 240–50 (reproducing and discussing the opinion and subsequent legislation).

12. See Act of April 23, 2010, ch. 113, 2010 Ariz. Sess. Laws 450, *invalidated in part by Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012); Editorial, *supra* note 6 (describing "saturation patrols" and overt profiling of Latino-looking people). On Arizona's long history of discrimination against Latinos and of racially polarized voting, see *Gonzalez v. Arizona*, 624 F.3d 1162, 1194 (9th Cir. 2010), *aff'd in part, rev'd in part*, 677 F.3d 383 (2012). For additional discussion, see BIGGERS, *supra* note 6, at 178 (comparing the statute's breadth and pervasiveness to those of old-time southern systems of segregation), and Celeste Gonzalez de Bustamante, *A Chronology of Exclusion in Arizona and the United States, 1880–2011*, in ARIZONA FIRESTORM, *supra* note 1, at 43–46 (detailing earlier measures that sought to restrict immigration in the state).

13. See *Arizona v. United States*, 132 S. Ct. at 2510–11.

14. See Act of May 11, 2010, ch. 311, 2010 Ariz. Sess. Laws 2091, 2091–92 (codified at ARIZ. REV. STAT. ANN. § 15-112 (Supp. 2012)). Much of Arizona, including Tucson, maintained racially segregated schools until recently. See, e.g., *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131, 1134, 1144 (9th Cir. 2011) (discussing this history and ordering oversight of desegregation in the district); Michael Winerip, *Written a Book? Racial Lens Used to Cull Curriculum in Arizona*, N.Y. TIMES, Mar. 19, 2012, at A8 (describing events leading up to enactment of the new law); Cindy Casares, *Bad Education: In Arizona, Only the Courts Can Save Ethnic Studies Programs in Public Schools*, AM. PROSPECT (Jan. 9, 2012), <http://prospect.org/article/bad-education> (same). For a discussion of the 1970s-era Tucson desegregation case and its subsequent enforcement, see Recent Case, *Ninth Circuit Requires Continued Federal Oversight over School District*, 125 HARV. L. REV. 1530, 1530–31 (2012). For discussion of earlier attempts by Arizona legislatures to enact an anti-MAS bill, see Preston C. Green, III et al., *An Analysis of the Constitutionality of Arizona's Ethnic Studies Law*, 39 RUTGERS L. REC. 86, 87–89 (2012), http://lawrecord.com/files/39_Rutgers_L_Rec_86.pdf, and Lupe S. Salinas, *Arizona's Desires to Eliminate Ethnic Studies Programs*, 14 HARV. LATINO L. REV. 301, 305–06 (2011) (noting that the Tucson program dated back to 1998). On the make-up of the state's schools, see *infra* note 40.

15. See generally DELGADO, PEREA & STEFANCIC, *supra* note 4, at 206–302, 406–540, 634–97 (discussing litigation in these and a host of related areas).

relatively young group,¹⁶ so that a new area of contention is coming to the fore over the right to cultural identity and education.¹⁷

Latino education has always stirred controversy. Early disputes centered on whether Latino school segregation was actionable under U.S. civil rights laws.¹⁸ Later, Latino parents and schoolchildren sued for exclusion from schools,¹⁹ inadequate funding,²⁰ and bilingual instruction or education at least carried out in a language that the students could understand.²¹

With these issues settled, largely in the group's favor,²² a new issue—the right to learn one's own history and culture—is beginning to require attention. This issue is playing out now in connection with an ambitious and highly successful MAS program in the Tucson schools, where the Latino community is waging a battle to preserve the program in the face of

16. As of 2009, the median age of Latinos in the United States was twenty-seven; that of Americans at large was 36.8. *Hispanic Heritage Month 2010*, U.S. CENSUS BUREAU (July 15, 2010), http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb10-ff17.html.

17. See Kristi L. Bowman, *Pursuing Educational Opportunities for Latino/a Students*, 88 N.C. L. REV. 911, 948–68 (2010) (discussing this new area of contention). On education as a judicially cognizable value, see generally Martha Minow, “A Proper Objective”: *Constitutional Commitment and Educational Opportunity After Bolling v. Sharpe and Parents Involved in Community Schools*, 55 HOW. L.J. 575 (2012). On a role for conscious reflection in countering prejudicial habits, see generally Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013). On how easy it is for the judiciary to miss an opportunity to do justice in an unfamiliar area, see, for example, Gabriel J. Chin et al., *The Lost Brown v. Board of Education for Asian Pacific Americans*, 91 N.C. L. REV. 1658, 1658–61 (2013).

18. See DELGADO, PEREA & STEFANCIC, *supra* note 4, at 342–60 (describing the campaign for school desegregation and applicable landmark civil rights cases); PHILIPPA STRUM, *MENDEZ V. WESTMINSTER: SCHOOL DESEGREGATION AND MEXICAN-AMERICAN RIGHTS passim* (2010) (tracing this campaign through the vehicle of a landmark decision).

19. See *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (invalidating state law prohibiting undocumented children from attending public schools); MICHAEL A. OLIVAS, *NO UNDOCUMENTED CHILD LEFT BEHIND: PLYLER V. DOE AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN* 7–33 (2012) (discussing the history of this case).

20. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 4–6 (1973) (upholding Texas scheme of school financing based on local property taxes). *But see Serrano v. Priest*, 487 P.2d 1241, 1244 (Cal. 1971) (equalizing state funding for poor school districts).

21. See *Lau v. Nichols*, 414 U.S. 563, 569 (1974) (holding that federal law requires public-school instruction in a language that foreign-born students could understand); DELGADO, PEREA & STEFANCIC, *supra* note 4, at 250–69 (discussing English-only issues and bilingual education); Rachel F. Moran, *The Politics of Discretion: Federal Intervention in Bilingual Education*, 76 CALIF. L. REV. 1249, 1250 (1988) (discussing issues on both sides of the controversy and concluding that it reduces to a question of discretion).

22. See *supra* notes 19–21 and accompanying text (discussing cases in which the Latino forces succeeded in enlarging rights for the community's schoolchildren).

Anglo legislators and public officials who see it as a threat to American values and national unity.²³

Close consideration of the Tucson controversy is warranted for a number of reasons. First, as will be seen, the stakes are high.²⁴ In addition, the relative youth of Latinos means that many more such controversies are likely to arise, and not only in Arizona. Moreover, the issues implicate citizenship rights and participation in public life in ways that few other controversies do, at least so starkly.²⁵

These matters are of interest to the civil rights community for a second reason having to do with the structure of civil rights thought itself. Attending to them will require that this community, which until now has concerned itself largely with the problems of African Americans and, to a lesser extent, Native Americans, broaden its focus beyond the familiar black-white binary paradigm of race.²⁶ Legal scholarship has long recognized this need, beginning with a foundational article by Juan Perea.²⁷ Today, most scholars realize, at least abstractly, that the U.S. racial scene contains more than one group and that the problems of nonblack groups

23. See *infra* Part II; see also Anna Ochoa O'Leary et al., *Assault on Ethnic Studies*, in *ARIZONA FIRESTORM*, *supra* note 1, at 97, 103–10 (discussing program in light of provisions of H.B. 2281, the anti-MAS measure).

24. For example: Are we one America, or a nation of minorities? Should schools try to assimilate newcomers and those who speak other languages, or encourage them to retain connection with their culture while learning what they need to know about life in the United States? What role does pluralism play in democracy? Should the country recognize interest groups, or are they an obstacle to social progress?

25. See *supra* note 24 and accompanying text. On the unreliability of arguments from analogy, see generally Richard Delgado, *Four Reservations on Civil Rights Reasoning by Analogy: The Case of Latinos and Other Nonblack Groups*, 112 COLUM. L. REV. 1883 (2012).

26. See, e.g., Richard Delgado, *Centennial Reflections on the California Law Review's Scholarship on Race: The Structure of Civil Rights Thought*, 100 CALIF. L. REV. 431, 443–62 (2012) (discussing two emerging paradigms of race scholarship); Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CALIF. L. REV. 1213 *passim* (1997) (discussing and criticizing an implicit paradigm of U.S. racial thought).

27. See Perea, *supra* note 26. These issues have also been addressed by other authors. See generally Roy L. Brooks & Kirsten Widner, *In Defense of the Black/White Binary: Reclaiming a Tradition of Civil Rights Scholarship*, 12 BERKELEY J. AFR.-AM. L. & POL'Y 107 (2010) (defending the paradigm as a manifestation of African American tradition and solidarity); Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997) (book review) (describing the paradigm and explaining some of its consequences); Ariela Gross & Alejandro de la Fuente, *Slaves, Free Blacks, and Race in the Legal Regimes of Cuba, Louisiana and Virginia: A Comparison*, 91 N.C. L. REV. 1669, 1733, 1748 (2013) (noting that even the conventional black-white paradigm requires differentiation to understand the different courses that slavery took in various jurisdictions and nations).

may require consideration of issues that are not commensurate with ones that haunt African Americans.²⁸

This broadening of focus is likely to be only the first of many. Criminal procedure, national security, immigration, language, and media-stereotype issues confronting groups other than blacks, such as Muslims and Latinos, are beginning to vie for attention.²⁹ Some of these issues may be reminiscent of struggles that have confronted blacks over the years, but others will differ in significant ways.³⁰ Few African Americans, for example, will suffer discrimination on account of a foreign accent, exotic surname, or appearance that could be perceived as alien.³¹

Realizing, perhaps, that the Tucson controversy is likely to be a harbinger of things to come, conservative think tanks and columnists have been heightening their resistance to ethnic studies classes and departments, even at the university level.³²

28. See, e.g., Delgado, *supra* note 26, at 449–50 (tracing the development and adoption of this broader conception of race).

29. See, e.g., JOHN TEHRANIAN, *WHITEWASHED: AMERICA'S INVISIBLE MIDDLE EASTERN MINORITY* 90–113 (2009) (discussing social construction of Middle Eastern people); Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259, 1261–63, 1268, 1294–1302 (2004) (discussing reactions to the events of September 11, 2001); Kevin R. Johnson & Joanna Cuevas Ingram, *Anatomy of a Modern-Day Lynching: The Relationship Between Hate Crimes Against Latina/os and the Debate over Immigration Reform*, 91 N.C. L. REV. 1613, 1613, 1626 (2013) (noting how disparaging rhetoric against outsider groups can easily spark violence against them).

30. See RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 75–82 (2d ed. 2012) (discussing some of these differences); Richard Delgado, *Derrick Bell's Toolkit: Fit to Dismantle that Famous House?*, 75 N.Y.U. L. REV. 283, 288–302 (2000); Elizabeth Martínez, *Beyond Black/White: The Racisms of Our Time*, SOC. JUST., spring-summer 1993, at 28–30 (discounting the black-white model of understanding racism). See generally Delgado, *supra* note 25 (pointing out that arguments analogizing civil rights treatment of different groups confront a series of obstacles).

31. Relatively few African Americans, for example, will have a surname such as Rodriguez or the copper-colored skin, black hair, high cheekbones, and stocky body type of a Mexican American mestizo with a great deal of Chichimec or Mayan Indian ancestry. To be sure, African Americans will suffer discrimination based on many other features, ascribed or invented, as well as certain unlovely and completely undeserved stereotypes, but these will often differ from those society associates with Muslims, Latinos, and other groups.

32. Ethnic studies has long stirred controversy, particularly among those who do not wish to highlight diversity or difference. See, e.g., RODOLFO F. ACUÑA, *THE MAKING OF CHICANA/O STUDIES: IN THE TRENCHES OF ACADEME passim* (2011) (discussing the history of the discipline and struggle to defend it against conservative criticism); O'Leary et al., *supra* note 23, at 98–101 (same); Rodolfo Acuña, *Mexican American Studies: A Pedagogy Not Sociology*, COUNTERPUNCH (June 15, 2012), <http://www.counterpunch.org/2012/06/15/mexican-american-studies-a-pedagogy-not-sociology/> (same); see also Russell Jacoby, *Dreaming of a World with No Intellectuals*, CHRON. HIGHER EDUC., July 20, 2012, at B11 (reviewing recent books by conservatives who accuse the educational system of abetting subversion); *Arizona's Ban on Ethnic Studies Worries More Than Latinos*, NEW AM. MEDIA (May 17, 2010), <http://newamericamedia.org/2010/05/arizona-ban-on-ethnic-studies-worries->

A close look at the Tucson controversy is thus in order, both for its own sake and for the light it may shed on broader issues of culture and pluralism in American life. Part I of this Article reviews the Tucson controversy, beginning with the anti-ethnic studies statute that sparked it. As will be seen, the backers of the anti-MAS law, called H.B. 2281, stated explicitly that their objective was to “stop la raza”—to set the movement for Latino self-understanding and solidarity back on its heels.³³

Part I then analyzes the public reaction, particularly in the Latino community, to the outlawing of MAS. As will be seen, that response was both spirited and imaginative, including a car caravan carrying copies of the “banned books” all the way from Houston to Tucson.

Part II analyzes the MAS program and curriculum in greater detail, as well as the early litigation growing out of it.

Part III discusses the controversy over ethnic studies in the public schools, focusing on the events occurring in Tucson and identifying three paradoxes of ethnic studies. Early legal arguments in the Tucson case were relatively narrow, centering on whether the law prohibiting MAS is unconstitutionally vague and imprecise and whether it violates the First Amendment of the U.S. Constitution. Anticipating that laws in other states are apt to raise broader issues, the Article identifies three considerations that should enter into any such discussion. These include pedagogical concerns, psychological considerations, and the role of culture in a system of pluralistic governance and education.³⁴ Paradoxical as it might sound, treating cultural diversity with respect is the best way to advance the goal of national unity while providing students, especially young ones of color, with an education that will inspire them to succeed.

more-than-latinos.php (noting that other minority groups fear that the ban may soon extend to them); Heather Mac Donald, *Less Academics, More Narcissism*, CITY J. (July 14, 2011), <http://www.city-journal.org/2011/cjc0714hm.html> (deploring lightweight ethnic studies departments and courses at a major university).

33. See, e.g., BIGGERS, *supra* note 6, at 177–219 (discussing the Tucson school board decision to eliminate the MAS program and banish the textbooks associated with it); Jeff Biggers, *Who's Afraid of "The Tempest"?*, SALON (Jan. 13, 2012), http://www.salon.com/2012/01/13/whos_afraid_of_the_tempest/ (same); Gregory Rodriguez, *Why Arizona Banned Ethnic Studies*, L.A. TIMES (Feb. 20, 2012), <http://articles.latimes.com/2012/feb/20/opinion/la-oe-rodriguez-ethnic-studies-20120220> (noting that one highly placed Arizona educational authority, who based his own educational principles on corporate management strategies, compared the program to Hitler Jugend indoctrination sessions). Another official declared it an exercise in “ethnic chauvinism.” See Julianne Hing, *Chicano Studies Teach “Ethnic Chauvinism,” Says AZ School Chief Tom Horne*, COLORLINES (May 13, 2010, 11:39 AM), http://colorlines.com/archives/2010/05/az_superintendent_tom_horne_chicano_studies_teaches_ethnic_chauvinism_video.html (reviewing a CNN debate between the former state Superintendent of Education and University of Pennsylvania professor Michael Eric Dyson).

34. See *infra* Part III (discussing each of these concerns).

The Article concludes with some thoughts about balancing the right of educational authorities to promote Americanism and national unity while preserving the rights of minorities to learn about the many histories that make up a diverse region and country.

I. THE ARIZONA ANTI-ETHNIC STUDIES STATUTE AND THE TUCSON LITIGATION

A. *The Anti-Ethnic Studies Statute*

As mentioned, the Arizona anti-MAS bill (“H.B. 2281”) came on the heels of several other laws aimed at making things difficult for Latinos, immigrants, or persons who spoke Spanish as their native language.³⁵ The statute prohibits the teaching of classes designed primarily for students from a particular ethnic group,³⁶ designed to increase racial solidarity rather than treatment of persons on an individual basis,³⁷ or aimed at the overthrow of the American government³⁸ or inculcation of racial resentment.³⁹

Although the law does not mention any particular type of ethnic studies, its backers made plain that it aimed to end Latino studies in public schools, particularly the highly successful program in Tucson.⁴⁰ The law allows school districts to teach Native American and Jewish history,

35. See *supra* notes 10–14 and accompanying text. For a discussion of the war-on-immigrants fervor that surrounded the bill’s enactment, see Francis J. Mootz & Leticia M. Saucedo, *The “Ethical” Surplus of the War on Illegal Immigration*, 15 J. GENDER RACE & JUST. 257, 269 (2012).

36. ARIZ. REV. STAT. ANN. § 15-112-A(3) (Supp. 2012) (prohibiting any program of instruction that includes courses “designed primarily for pupils of a particular ethnicity or race”).

37. *Id.* § 15-112-A(4) (prohibiting ones that “[a]dvocate ethnic solidarity instead of the treatment of pupils as individuals”).

38. *Id.* § 15-112-A(1) (prohibiting the promotion of the “overthrow of the United States government”).

39. *Id.* § 15-112-A(2) (forbidding the promotion of “resentment towards a race or class of people”); see also O’Leary et al., *supra* note 23, at 103–10 (analyzing the four provisions and doubting that Tucson’s program contravened any of them).

40. See, e.g., Winerip, *supra* note 14 (noting that in its heyday the program enrolled 1,400 students in the Tucson school district, which is sixty percent Latino); Biggers, *supra* note 33 (noting that underlying both the book ban and termination of the program may have been simple fear); Christine Sleeter, *Ethnic Studies and the Struggle in Tucson*, EDUC. WK. (Feb. 15, 2012), <http://www.edweek.org/ew/articles/2012/02/15/21sleeter.h31.html?tkn=VRMFRGuUcYPvsaR7iQ0tSO0BuBkBdu8hRyIN&cmp=clp-edweek> (noting that the program since its inception served 6,438 students, about ninety percent of them Latino).

including that of the Holocaust.⁴¹ Most school districts have reacted to the law as though it were aimed primarily at MAS, as it indeed seems to be.⁴²

The law penalizes nonconforming school districts by withholding up to ten percent of state funding, which can total millions of dollars.⁴³ It provides for hearings upon receipt of a complaint and prompt notice to an offending district, which then has a short period of time to bring its program into compliance in order to avoid a hefty penalty.⁴⁴

B. *The Reaction in Tucson*

Shortly after the statute entered into force, the state Superintendent of Education, as he indicated he would, declared the Tucson program in violation on several counts.⁴⁵ The city school board acquiesced, ordering the MAS teachers to shift to other subjects or resign.⁴⁶ The same day, office staff entered the classrooms, which were filled with colorful flags, posters, blankets, Aztec calendars, and artwork,⁴⁷ and proceeded to box up the

41. See ARIZ. REV. STAT. ANN. § 15-112-E to -F; BIGGERS, *supra* note 6, at 178 (discussing this statutory selectivity).

42. See Acuña, *supra* note 32 (“[Tucson’s program] began in 1997 in response to a court mandate. . . . While the teachers specialize in different disciplines, they have almost daily interaction with each other and discuss how to . . . teach students. Lessons in the Mexican historical and cultural experience are then applied to the American experience. . . . As of 2010, MAS co-sponsored twelve ‘Annual Institutes for Transformative Education Conferences’ in which prominent educators made presentations for four days to MAS and other teachers . . . [in order to] ke[ep] the mission to teach focused and . . . buil[d] upon this new knowledge.”).

43. ARIZ. REV. STAT. ANN. § 15-112-B; Marc Lacey, *Citing ‘Brainwashing,’ Arizona Declares a Latino Class Illegal*, N.Y. TIMES, Jan. 7, 2011, at A1 (describing penalty); Casares, *supra* note 14 (same).

44. See ARIZ. REV. STAT. ANN. § 15-112-B to -C (providing for a hearing and reduction of funding).

45. See, e.g., Casares, *supra* note 14. These counts included emphasizing ethnic solidarity rather than treatment of everyone as an individual, teaching anti-American values, and catering to members of a particular racial or ethnic group. See Tucson Unified Sch. Dist. No. 1, No. 11F-002-ADE, slip op. at 1 (Ariz. Dep’t of Educ. Dec. 27, 2011), <http://www.azag.gov/issues/TUSD%20Ethnic%20Studies%20Ruling.pdf>.

46. See PRECIOUS KNOWLEDGE (Dos Vatos Productions 2012). The school board first obtained a ruling from a sympathetic administrative law judge that the local program did indeed violate the new statute by promoting ethnic resentment and solidarity and by being designed for members of one ethnic group. See Tucson Unified Sch. Dist. No. 1, slip op. at 1–2.

47. See PRECIOUS KNOWLEDGE, *supra* note 46; see also Neil Genzlinger, *Television*, N.Y. TIMES, May 13, 2012, at 6L (describing the film); Lacey, *supra* note 43 (describing the atmosphere and decorations in one of the classrooms). Directed by Ari Luis Palos, *Precious Knowledge* interviews some of the students, parents, and educational authorities who played parts in the Tucson controversy. See PRECIOUS KNOWLEDGE, *supra* note 46. It shows the students spray painting complex, modernist murals on a wall set aside for this purpose, practicing Mexican dancing while wearing colorful dresses, and delivering poetry and rap rhymes of their own composition. *Id.*

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offending textbooks and other materials, all in front of crying students. These materials were then trucked away to a depository outside of town.⁴⁸

48. See, e.g., Matthew Rothschild, *Banned in Tucson*, PROGRESSIVE (Jan. 19, 2012), http://www.progressive.org/banned_in_tucson.html. Books removed from the classroom included:

Chicano! The History of the Mexican Civil Rights Movement, by Arturo Rosales

Critical Race Theory, by Richard Delgado and Jean Stefancic

500 Years of Chicano History in Pictures, edited by Elizabeth Martinez

Message to Aztlan, by Rodolfo Corky Gonzales

Occupied America: A History of Chicanos, by Rodolfo Acuña

Pedagogy of the Oppressed, by Paulo Freire

Rethinking Columbus: The Next 500 Years, edited by Bill Bigelow and Bob Peterson

Id.; see also BIGGERS, *supra* note 6, at 180–81 (discussing some of the removed books); Fernanda Santos, *Tucson Schools Overhaul a Program to Help Struggling Hispanic Students*, N.Y. TIMES, Sept. 16, 2012, at A23 (mentioning the removal of seven core books). Other books banned because they were no longer part of the curriculum included:

The Anaya Reader, by Rodolfo Anaya

Borderlands, Gloria Anzaldua

The Lone Ranger and Tonto Fistfight in Heaven, by Sherman Alexie

A Place to Stand, and five other books, by Jimmy Santiago Baca

The Fire Next Time, by James Baldwin

Loverboys and So Far from God, by Ana Castillo

Address to the Commonwealth Club of California, by Cesar Chavez

Woman Hollering Creek, by Sandra Cisneros

Drown, by Junot Diaz

Zapata's Disciple, by Martín Espada

Like Water for Chocolate, by Laura Esquivel

Feminism Is for Everybody, by bell hooks

The Magic of Blood, by Dagoberto Gilb

Savage Inequalities, by Jonathan Kozol

Always Running, by Luis Rodriguez

Justice: A Question of Race, by Roberto Rodriguez

By the Lake of Sleeping Children and Nobody's Son, by Luis Alberto Urrea

A People's History of the United States, by Howard Zinn

Rothschild, *supra*. Another author summarized the banning of *Mexican WhiteBoy* and the other texts:

The local Latino community erupted in indignation, picketed the school board, demonstrated outside the schools, and filed a number of lawsuits challenging the statute and its enforcement.⁴⁹ Sympathetic writers, including a number of prominent Anglos,⁵⁰ spoke at teach-ins and wrote

On Jan. 1, after a new state law targeting Mexican-American studies courses that are perceived as antiwhite was upheld, it became illegal to teach “Mexican White Boy” [by Matt de la Peña] in Tucson’s classrooms. State officials cited the book as containing “critical race theory,” a violation under a provision that prohibits lessons “promoting racial resentment.” For those who have read the book, . . . it is hard to figure. . . . [T]he hero’s hope is to become a pitcher on his school’s baseball team. . . . Seven texts were ordered removed from all classrooms “Mexican White Boy” fell into a category of books that could no longer be taught but could be used by students for leisure reading.

Winerip, *supra* note 14. A state spokesman said that

while the Education Department had found the Mexican-American studies program out of compliance with the law, it was the Tucson district’s job to decide how to enforce the ruling. “I think the district said: Let’s be safe and collect this material. We don’t want a teacher from Mexican-American studies to use it in an inappropriate fashion.”

Id. On the shocked response of the students in front of whom the authorities seized and removed the books, see Valerie Cavazos, *Ethnic Studies: TUSD Ordered to Clear Course Books from Classrooms*, KGUN 9 (Jan. 13, 2012), <http://www.kgun9.com/news/local/137335838.html>; see also Proposed Brief of the National Association of Chicana & Chicano Studies, et al. as Amici Curiae Supporting Plaintiffs at 28–31, *Acosta v. Huppenthal*, No. CV-10-623-TUC-AWT, 2013 WL 871892 (D. Ariz. Mar. 8, 2013), available at <http://www.vincerabagolaw.com/wp-content/uploads/2012/03/MAS-BRIEF-FILED.pdf> (attacking the school district’s decision to remove books used in MAS programs). On the emotional response of the students on seeing the books being packed up in front of them, see Stuart Heady, *Why You Should Care About What Is Going On in Tucson*, DAILY KOS (Jan. 24, 2012, 8:27 AM), <http://www.dailykos.com/story/2012/01/24/1057902/-Why-You-Should-Care-About-What-is-Going-on-in-Tucson>.

49. See, e.g., Rodolfo Acuña, *Sisyphus, Chicano Style: Abandonment or Struggle*, COUNTERPUNCH (June 21, 2012), <http://www.counterpunch.org/2012/06/21/sisyphus-chicano-style/> (discussing community responses).

50. See, e.g., BIGGERS, *supra* note 6, at 217–18; Jeff Biggers, *Breaking: The “Madness” of the Tucson Book Ban: Interview with Mexican American Studies Teacher Curtis Acosta on The Tempest*, HUFFINGTON POST (Jan. 17, 2012), http://www.huffingtonpost.com/jeff-biggers/tucson-ethnic-studies-_b_1210393.html; Biggers, *supra* note 33; see also *Arizona School Censorship Protested by ABFFE and Others*, BOOKSELLING THIS WK. (Jan. 30, 2012), <http://news.bookweb.org/news/arizona-school-censorship-protested-abffe-and-others> (discussing the protest of “the banning of books used for the Mexican American Studies program”); *Censorship, Arizona Style*, NAT’L COALITION AGAINST CENSORSHIP (Jan. 17, 2012), <http://ncac.org/Censorship-Arizona-Style> (citing statements of other organizations of scholars); *Joint Statement in Opposition to Censorship in Tucson Unified School District*, INDIAN COUNTRY (Jan. 30, 2012), <http://indiancountrytodaymedianetwork.com/mobile/opinion/joint-statement-in-opposition-to-book-censorship-in-tucson-unified-school-district-94871> (expressing “concern about the removal of books used in the Mexican-American Studies Program in the Tucson Unified School District”); *NCTE Raises Its Voice to Protest Tucson, Arizona, Book Censorship*, NCTE (Jan. 30, 2012), <http://www.ncte.org/press/news/tucson> (noting that the National Council of Teachers of English opposed the removal of seven books from the MAS program in Tucson); *infra* note 58 (citing statements of national library associations and university presses). For

op-ed columns or blog entries in *Salon*,⁵¹ *The Progressive*,⁵² *Academe*,⁵³ and *Huffington Post*⁵⁴ deploring the events in Tucson. The writers particularly criticized the book ban, which prohibited schools from assigning works by prominent authors such as William Shakespeare, Rodolfo Acuña, Sandra Cisneros, Paulo Freire, and Howard Zinn.⁵⁵

A Houston-based community college instructor, Tony Diaz, organized a caravan of “librotraficantes” with trunkfuls of the banned books, bound

discussion of an earlier case of solidarity on the part of a white attorney with clients of color, see Steven Lubet, *Execution in Virginia, 1859: The Trials of Copeland and Green*, 91 N.C. L. REV. 1786, 1796–1801 (2013).

51. See Biggers, *supra* note 33.

52. See Richard Delgado & Jean Stefancic, *How Does It Feel?*, PROGRESSIVE, <http://progressive.org/richard-delgado-jean-stefancic> (last visited May 8, 2013) (discussing authors’ feelings over having two of their books banned).

53. Richard Delgado & Jean Stefancic, *Book Banning in Arizona*, ACADEME BLOG (Jan. 12, 2012), <http://academeblog.org/2012/01/24/book-banning-in-arizona/> (discussing authors’ feelings over having two of their books banned).

54. See Laura Steiner, *Librotraficante Movement to Open Underground Libraries Following Alleged Book Banning*, HUFFINGTON POST (Jan. 22, 2012), http://www.huffingtonpost.com/2012/02/22/librotraficante-underground-libraries_n_1293488.html (discussing the book caravan). For additional information regarding the *librotraficantes* caravan, see BIGGERS, *supra* note 6, at 217; *Librotraficantes & the Underground Library: The Work Continues!*, NEWS FROM SWU (June 11, 2012), <http://news.swunion.org/2012/06/librotraficantes-underground-library.html> (describing the documentary *La Obra de los Traficantes*, on the book caravan and associated activism).

55. See BIGGERS, *supra* note 6, at 180–81 (listing banned books, including *500 Years of Chicano History in Pictures*, edited by Elizabeth Martinez; *Chicano!: The History of the Mexican Civil Rights Movement*, by F. Arturo Rosales; *Pedagogy of the Oppressed*, by Paulo Freire; *Critical Race Theory*, by Jean Stefancic and Richard Delgado; and *The Tempest*, by William Shakespeare); see also *Banned Books List*, ARIZ. ETHNIC STUD. NETWORK, <http://azethnicstudies.com/banned-books> (last visited May 8, 2013) (listing books banned in various degrees). The district apparently banned the books only for use in the MAS program. Teachers could continue to use them in the public college preparatory high school, University High, entrance to which is based on test scores. See, e.g., Salomón Baldenegro, *The Purge of Mexican Americans in Tucson Schools*, ANTIRACISMSDSA (Jan. 16, 2012), <http://antiracismdsa.blogspot.com/2012/01/purge-of-mexican-americans-in-tucson.html>. Students in these other programs and schools will be able to broaden their educational horizons; the ones in the poor schools and formerly enrolled in MAS will not. See George A. Martínez, *Arizona, Immigration, and Latinos: The Epistemology of Whiteness, the Geography of Race, Interest Convergence, and the View from the Perspective of Critical Theory*, 44 ARIZ. ST. L.J. 175, 192–94 (2012) (arguing that Arizona in effect is attempting to exclude dangerous knowledge and create an epistemologically safe space for whites). The Texas educational authorities have received criticism for attempting to do much the same. See, e.g., Gail Collins, *How Texas Inflicts Bad Textbooks on Us*, N.Y. REV. BOOKS, June 21, 2012, at 18 (describing how legislators in Texas have insisted on textbooks that sanitize U.S. history); Rodolfo Acuña, *Criminalizing Thinking: Dumb, Ignorant and Mean-Spirited*, COUNTERPUNCH (July 5, 2012), <http://www.counterpunch.org/2012/07/05/criminalizing-thinking/>; Tony Diaz, *Texas GOP Platform Would Discourage Multiculturalism*, HOUS. CHRON. (July 11, 2012), <http://www.chron.com/opinion/outlook/article/Texas-GOP-platform-would-discourage-3700653.php>.

for Tucson.⁵⁶ Stopping for programs, rallies, teach-ins, and book signings in cities along the way, the procession arrived a week later in Tucson, where volunteers gave away the remaining books from a taco truck commandeered for that purpose.⁵⁷ Various national library organizations and university presses took stands condemning the ban and donated copies of the books for distribution in Arizona.⁵⁸ Some of the same activists who spearheaded the caravan remained in the region for a series of events called Freedom Summer.⁵⁹

Finally, a policy institute at Arizona State University weighed in with a forty-page report documenting the likely impact on the state's financial health if the state did not "deal with the substantial and persistent academic achievement gap between Latino and White students."⁶⁰

56. See Editorial, *Books Without Borders*, N.Y. TIMES, Mar. 16, 2012, at A26. Diaz referred to the contraband volumes as "wetbooks," a play upon the slang term "wetback," referring to a person of Mexican descent. *Id.*

57. *Id.*

58. See, e.g., *Resolution Opposing Restriction of Access to Materials and Open Inquiry on Cultural and Ethnic Studies Programs in Arizona*, OIF BLOG (Jan. 24, 2012, 7:03 AM), <http://www.oif.ala.org/oif/?p=3157>; see also E-mail from NYU Press to author (Feb. 17, 2012) (discussing donating books to travelling caravan) (on file with the North Carolina Law Review); E-mail from People's Library at Occupy Wall St. to author (Feb. 12, 2012) (seeking copies of the banned books for distribution) (on file with the North Carolina Law Review).

59. See Devon Peña, *Tucson Freedom Summer-I*, MEXMIGRATION: HIST. & POL. MEXICAN IMMIGR. (Aug. 2, 2012), <http://mexmigration.blogspot.com/2012/08/tucson-freedom-summer-i.html>.

60. See BILL HART ET AL., MORRISON INST. FOR PUB. POLICY, ARIZ. STATE UNIV., DROPPED?: LATINO EDUCATION AND ARIZONA'S ECONOMIC FUTURE 5, 8 (2012), <http://morrisoninstitute.asu.edu/publications-reports/2012-dropped-latino-education-and-arizonas-economic-future/view> (estimating that the state could save \$31 million annually if it merely reduced the number of Latino high school dropouts by half). Economists have long found strong correlations between educational attainment and economic productivity. See, e.g., ANTHONY P. CARNEVALE ET AL., THE COLLEGE PAYOFF: EDUCATION, OCCUPATIONS, LIFETIME EARNINGS 3–10 (2011), <http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/collegepayoff-complete.pdf>. This holds true for Arizona. See ALLIANCE FOR EXCELLENT EDUC., HIGH COSTS OF A HIGH SCHOOL DROPOUT 5 (2011), <http://www.all4ed.org/files/archive/publications/HighCost.pdf> (noting that if Arizona had graduated all students in 2011, those students would have added over \$3 billion to the state's economy over the course of their lifetimes). Other researchers calculate even larger gains. See Judith Gans, *The Economic Impact of Immigrants in Arizona*, in ARIZONA FIRESTORM, *supra* note 1, at 47, 53–69 (calculating various costs and gains from immigration in the state). As of the time of writing, Tucson was attempting to resurrect the program in a milder form. See Santos, *supra* note 48 ("Instead of classes about historical realities and the everyday experiences of Mexican-Americans, once a hallmark of the department, Ms. Figueroa's program will offer tutoring to Hispanic students who are teetering on the edge of failure. In place of discussions about race and identity, it will recruit mentors from among Hispanic business leaders and college graduates to talk to students.").

II. THE TUCSON PROGRAM: *PRECIOUS KNOWLEDGE* IN THE SCHOOLSA. *The MAS Program in Tucson*

One reason motivating the Latino community's strong reaction to the program's discontinuation is that during the eleven years of its existence, the MAS program was a resounding success.⁶¹ In its heyday, the program attracted hundreds of children, a large percentage of them Latino.⁶² Before MAS's inception, the dropout rate of Latino schoolchildren had been close to fifty percent. For those in the program, the rate was negligible, with many going on to college.⁶³ Students learned about Latino history,

61. Established in 1998 in response to an earlier desegregation decree, *see, e.g.*, Casares, *supra* note 14, the program attracted energetic young teachers, including recent graduates of the University of Arizona's department of ethnic studies. *See, e.g.*, Augustine Romero, Ph.D., DEP'T INSTRUCTION & TCHR. EDUC.: U. S.C., <http://www.ed.sc.edu/latinoconf/romero.asp> (last visited May 8, 2013) (describing the credentials of the former director of the MAS program); *Meet Us: Jose Gonzalez*, SAVEETHNICSTUDIES.ORG, http://saveethnicstudies.org/meet_us.shtml#Jose (last visited May 8, 2013) (outlining the credentials of a MAS instructor). On the litigation leading up to the current impasse, *see infra* notes 75, 78 and accompanying text.

62. On the makeup of the program's students, *see, for example*, CAMBIUM LEARNING, INC., CURRICULUM AUDIT OF THE MEXICAN AMERICAN STUDIES DEPARTMENT 6 (2011), http://www.tucsonweekly.com/images/blogimages/2011/06/16/1308282079-az_masd_audit_final_1_.pdf (reporting that of the students enrolled in the MAS program in a recent year, 90% were Latinos, 5% were white, 2% were Native Americans, 1.5% were black, and 0.5% were Asian American), and Sleeter, *supra* note 40 (providing similar numbers).

63. *See, e.g.*, Winerip, *supra* note 14 (discussing an independent audit that found that "the program . . . was doing a good job" and that "students . . . were more likely to attend college, and . . . the program helped close the achievement gap"). The state ignored the audit, which was carried out by Texas-based Cambium Learning, Inc., at a cost of \$110,000. *See* BIGGERS, *supra* note 6, at 202–05 (noting that the authorities quickly deemed the audit flawed); O'Leary et al., *supra* note 23, at 104 (same); *see also* Julio Cammarota & Augustine Romero, *The Social Justice Education Project: A Critically Compassionate Intellectualism for Chicana/o Students*, in HANDBOOK OF SOCIAL JUSTICE IN EDUCATION 465, 472–73 (William Ayres et al. eds., 2009) (reporting higher test scores and increased graduation rates for students of the Social Justice Education Project); Salinas, *supra* note 14, at 302 (noting that graduates of the program went on to attend college at a rate higher than that of any other ethnic group, including whites, and that the rate for Latinos enrolled in college increased by a factor of 129); Santos, *supra* note 48 (noting that the scores of students in the program on standardized tests improved by an average of forty-five percentage points in reading, fifty-nine in writing, and thirty-three on math). For the audit, which district authorities commissioned to determine what response, if any, was in order to H.B. 2281, *see* CAMBIUM LEARNING, INC., *supra* note 62. A second audit, conducted by the district director of accountability and research, also found "measurable, positive differences in students enrolled in the MAS program." Casares, *supra* note 14; *see* NOLAN L. CABRERA, ET AL., AN EMPIRICAL ANALYSIS OF THE EFFECTS OF MEXICAN AMERICAN STUDIES PARTICIPATION ON STUDENT ACHIEVEMENT WITHIN TUCSON UNIFIED SCHOOL DISTRICT 7 (2012), http://www.coe.arizona.edu/sites/default/files/MAS_report_2012_0.pdf (noting similar positive effects; submitted on June 20, 2012, to Willis D. Hawley, Ph.D., Special Master for the Tucson Unified School District Desegregation Case); TUCSON UNIFIED SCH. DIST.: DEP'T OF ACCOUNTABILITY AND RESEARCH, RE-ANALYSIS OF AIMS OUTCOMES FOR MEXICAN AMERICAN STUDIES (MAS) STUDENTS tabl. 1 (2011), http://saveethnicstudies.org/assets/docs/proven_results/TUSD_Numbers_03-16-2011.pdf.

including the great empires of Mesoamerica.⁶⁴ They learned, as well, about the Mexican-American War and the Treaty of Guadalupe Hidalgo, under which the United States acquired nearly one-half of Mexico's territory.⁶⁵ The students learned about the loss of Mexico's ancestral lands in the Southwest and the role of shady lawyers and land registration officials in accomplishing it.⁶⁶ They learned of the 1960s-era civil rights movement, Chicano Power, the Brown Berets, and leaders such as Martin Luther King, Cesar Chavez, and Rodolfo ("Corky") Gonzalez and his Denver-based Crusade for Justice.⁶⁷

The students also studied Latino literature, including works by writers such as Sandra Cisneros (*The House on Mango Street*)⁶⁸ and Matt de la Peña (*Mexican WhiteBoy*).⁶⁹ Many classes began with the farm-worker hand clap, a group exercise aimed at focusing attention, or with repetition of a phrase, such as the Golden Rule rendered into Spanish or an Aztec or Mayan phrase expressing a similar universalistic sentiment.⁷⁰

Precious Knowledge, an award-winning film by independent director Ari Luis Palos that aired nationally on PBS in summer 2012,⁷¹ covers much of the above ground. The film also includes interviews with several students in the program, their families and teachers, as well as a number of Arizona authorities intent on ending the program.

64. See, e.g., PRECIOUS KNOWLEDGE, *supra* note 46.

65. *Id.* (depicting classes on Mexican and Southwest history covering this topic). Two textbooks in use by the program covered these topics in specific terms. See DELGADO & STEFANCIC, *supra* note 30, at 91; Ronald Takaki, "Occupied" Mexico, in THE LATINO/A CONDITION: A CRITICAL READER 152, 152-56 (Richard Delgado & Jean Stefancic eds., 1998).

66. See *supra* note 48 (identifying the banned books).

67. See *supra* note 48.

68. SANDRA CISNEROS, THE HOUSE ON MANGO STREET (1991) (describing the life of a young Mexican girl searching for a better life but determined to maintain connection with her community).

69. MATT DE LA PEÑA, MEXICAN WHITEBOY (2008) (portraying a fictional, biracial baseball player struggling with his racial identity).

70. E.g., PRECIOUS KNOWLEDGE, *supra* note 46 (depicting opening moments of a class taught by Curtis Acosta featuring group recitation of the Enlach-Ech code, which follows: "you are the other me, tú eres el otro yo"); see also BIGGERS, *supra* note 6, at 180 (describing same). For an explanation of the hand clap, a brief solidarity-building exercise, see Rodolfo F. Acuña, *In Search of a Pedagogy: "Pedagogy and Theatre of the Oppressed"*, THREE SONORANS (June 6, 2012), <http://threesonorans.com/2012/06/06/in-search-of-a-pedagogy-rodolfo-acuna/> ("I always start a meeting with the farm worker handclap in a tribute to University of Arizona Professor Mark Stegeman, the former president of the Tucson Unified School District who as a pretext for eliminating the TUSD's Mexican American Studies Program said that . . . after listening to Mexican Americans use the clap, he knew that Mexican American Studies was a cult."). Acuña explains that he "joined the struggle to Save Ethnic Studies in Arizona because of the stupidity of xenophobes and their intent to destroy all the educational reforms that Mexican Americans have struggled for." *Id.*

71. See PRECIOUS KNOWLEDGE, *supra* note 46.

The documentarians interview Cristal, a young teenager who wants to go to college, but has to help her single mother raise a young sister. Cristal finds the combination of responsibilities at home and at school “hard.”⁷² The film also shows Pricila, whose father had recently been arrested at the Department of Motor Vehicles office, where he had gone to obtain a driver’s license. An undocumented alien, Pricila’s father is now awaiting deportation in a detention center, where Pricila can only visit him behind a glass wall and cannot touch him physically. Alienated at school and troubled by the family’s circumstances, she reports that prior to enrolling in MAS, she had cut many classes during her freshman year and was thinking of dropping out of school.

Gilbert, a serious-looking youth with a remarkable vocabulary, tells the interviewer that prior to finding a home in the ethnic studies program he was severely disenchanted with school. Gilbert felt that the faculty and staff were against him and his ideas, and that school taught him to despise himself. He had begun experimenting with drugs, was tempted by gangs, and was thinking of dropping out. The viewer follows each of these youths and others through several days with energetic young teachers and learns that the youths have caught fire and are eager to learn and turn their lives around.⁷³

The film also shows white teachers who seemingly despise students like these and have given up on them⁷⁴ and State of Arizona education officials who, based on slender acquaintance with it, declare the program a den of Marxism, Leninism, and anti-American attitudes. The film, in short, provides insight into some of the human issues arising from the controversy over MAS in Tucson and elsewhere. It also sets the stage for understanding what is at stake in current litigation.

B. *Litigation: The First Wave*

At least two lawsuits quickly challenged the statute or Tucson’s decision to abide by it.⁷⁵ A third suit charges two of the program’s teachers

72. *Id.*

73. *Id.* Toward the end of the film it emerges that several of the students are bound for top colleges and one, Gilbert, who found MAS studies “so interesting, [he] started getting As” and declared his life in school prior to that period a “dystopia,” appears bound for even higher levels of achievement. *Id.*

74. *Id.* One self-assured young white teacher asserted that the minority students in his school had a poor attitude toward education and were apathetic and “dysfunctional,” apparently by nature. Several Latino teachers watched with incredulous expressions. *Id.*

75. See *Acosta v. Huppenthal*, CV 10-623-TUC-AWT, 2013 WL 871892, at *2 (D. Ariz. Mar. 8, 2013). The suit aimed to set aside various state measures against the Tucson school district, including compliance monitoring of classrooms and prohibiting the use of certain textbooks, curricular materials, and instruction on the subject of MAS, and to declare the Arizona

with defaming a colleague with an Anglo name in an interview with a reporter for *Scholastic Reader*.⁷⁶ Several free-speech organizations appear poised to intervene or file amicus briefs, as do some of the authors of the banned books, asserting a right to reach a willing audience,⁷⁷ while the U.S. Department of Education is pondering an investigation into the circumstances of Tucson's suspension of its MAS program and the possibility that Arizona applied its statute selectively against it.⁷⁸

The early lawsuits pursue relatively narrow, technical claims, such as void for vagueness (the statute is couched in terms so general that a reasonable teacher or school board may not be clear about what conduct is forbidden),⁷⁹ selective enforcement,⁸⁰ and violation of freedom of expression (based on the right to teach a well-recognized school subject

anti-ethnic studies statute unconstitutional. See Rodolfo Acuña, *False Expectations and the Poor: Fear and Failure in Arizona*, COUNTERPUNCH (July 17, 2012), <http://www.counterpunch.org/2012/07/17/fear-and-failure-in-arizona/> (describing current litigation and how it grew out of 1970s-era desegregation activism in Tucson). Litigation also includes a desegregation enforcement lawsuit, *Fisher et al. v. Tucson Unified Sch. Dist.*, 652 F.3d 1131, 1145 (9th Cir. 2011), that was pending in the Ninth Circuit at the time of this writing. On the relation of the two suits, see Press Release, Mexican Am. Legal Def. & Educ. Fund ("MALDEF"), Judge Bars State Intervention in Tucson Desegregation Case: Court Preserves Possible Use of Ethnic Studies as Means to Remedy Ongoing Discrimination in 38-Year Old Case (June 14, 2012), http://www.maldef.org/news/releases/judge_bars_state_intervention_tucson_case/.

76. See *Tea Party Activists Sue Mexican American Studies Educators*, MEXMIGRATION: HIST. & POL. MEXICAN IMMIGR. (June 20, 2012), <http://mexmigration.blogspot.com/2012/06/sean-arce-and-jose-gonzalez-attacked-by.html#!/2012/06/sean-arce-and-jose-gonzalez-attacked-by.html> (describing defamation action brought by a fellow teacher in the MAS program who disagreed with the dissenters and sided with the authorities).

77. See Interview with Robert S. Chang, Exec. Dir. of the Korematsu Ctr. & Professor of Law, Seattle Univ. Sch. of Law, and co-counsel for two plaintiffs in the Arizona litigation, in Seattle, Wash. (July 2, 2012) (transcript on file with author).

78. See BIGGERS, *supra* note 6, at 206 (describing the initiation in April 2012 of "multiple investigations into possible violations of Title VI," including potential civil rights violations implicated in the dismantling of the MAS program); Press Release, Mexican Am. Legal Def. & Educ. Fund ("MALDEF"), *supra* note 75.

79. See Plaintiffs' Motion for Summary Judgment at 7–8, 10–22, *Acosta*, 2013 WL 871892, http://saveethnicstudies.org/assets/docs/litigation/Motion_for_Summary_Judgment_Ct_Doc_No_91_10-18-2011.pdf; Proposed Brief of the National Association of Chicana & Chicano Studies, et al. as Amici Curiae Supporting Plaintiffs, *supra* note 48, at 2, 28–30; BIGGERS, *supra* note 6, at 183 (discussing early challenges, including vagueness and overbreadth); Green et al., *supra* note 14, at 92.

80. See Plaintiffs' Motion for Summary Judgment, *supra* note 79, at 20–22, 33–40; BIGGERS, *supra* note 6, at 183 (recounting vagueness, breadth, and enforcement charges against HB 2281); Green et al., *supra* note 14, at 92 (noting a claim by teachers and students that the statute was "unconstitutionally vague . . . in its application and . . . that [it] violated their equal protection").

without undue interference or censorship).⁸¹ Defenses to the claims alleged in the suits include lack of standing (some of the student plaintiffs have since graduated) and state immunity.⁸²

Broader issues are at stake, however, including society's right to pursue national unity,⁸³ a minority group's right to its own self-understanding, state school boards' interest in tailoring curricula to local needs, and the rights of children and families to an education that will promote psychological health and wholeness.⁸⁴ The following Part turns to some of these broader concerns.

III. THREE PARADOXES OF ETHNIC STUDIES: YOUNG SELVES, CURRICULAR DESIGN, AND THE ROLE OF SELF-UNDERSTANDING IN A PLURALISTIC SYSTEM

A paradox is a proposition that is, upon investigation, "well founded or true" (or that may be so in certain circumstances), but is initially contrary to received wisdom being "seemingly absurd or contradictory."⁸⁵

81. See Plaintiff's Motion for Summary Judgment, *supra* note 79, at 22–24; Proposed Brief of the National Association of Chicana & Chicano Studies, et al. as Amici Curiae Supporting Plaintiffs, *supra* note 48, at 16–28; BIGGERS, *supra* note 6, at 215 (noting a separate lawsuit by a student claiming First Amendment violations when certain texts and materials were removed from the MAS curriculum based on allegedly discriminatory criteria).

82. Proposed Brief of the National Association of Chicana & Chicano Studies, et al. as Amici Curiae Supporting Plaintiffs, *supra* note 48, at 5 (introducing Arizona's "state's rights" defense, according to which it cannot be sued for curricular decisions, since they are tantamount to governmental speech and thus are immune to First Amendment challenges).

83. Some Arizona officials worry that national unity is under attack in programs like MAS. See, e.g., Lacey, *supra* note 43 (recounting criticisms by Arizona authorities that the ethnic studies program was excessively insular and engaged in a Bull Connor-style resegregation of America); Winerip, *supra* note 14 (quoting John Huppenthal, the state Superintendent of Public Instruction, as saying that "[t]his is the eternal battle, the eternal battle of all time, the forces of collectivism against the forces of individuality"); Rodolfo F. Acuña, *Only in Arizona*, MEXMIGRATION: HIST. & POL. MEXICAN MIGRATION (Apr. 14, 2011), <http://mexmigration.blogspot.com/2011/04/guest-blog-rodolfo-acuna-on-tom-horne.html> (discussing the Arizona Attorney General and quoting his declaration that "[t]o divide students by race is racism"); PRECIOUS KNOWLEDGE, *supra* note 46 (interviewing Huppenthal, who accused Tucson's MAS program of engaging in anti-American zealotry).

84. Readers familiar with United States ethnic history will note a parallel between the Arizona legislation and laws passed in the slaveholding South, see generally Amy Reynolds, *The Impact of Walker's Appeal on Northern and Southern Conceptions of Free Speech in the Nineteenth Century*, 9 COMM. L. & POL'Y 73, 86 (2004) (describing laws which forbade teaching blacks to read or write in order to prevent them from communicating incendiary messages like the one in *Walker's Appeal*), and another parallel to Indian schooling during the late nineteenth and early twentieth centuries. See generally MARGARET SZASZ, *EDUCATION AND THE AMERICAN INDIAN* 2, 4, 8–12 (3d ed. 1999) (describing early federal Indian education, much of which was based on a policy of "assimilation" that sought to erase all trace of Indian behavior, thought, and appearance).

85. OXFORD AMERICAN DICTIONARY OF CURRENT ENGLISH 568 (Frank R. Abate ed., 1999).

Paradoxes often arise in the political sphere where a belief by one political ideology stands in stark contrast to the actual effects of the contradictory policy advocated by an opposing camp. Conservatives, for example, believe that lowering tax rates for the wealthy will increase economic investment, productivity, and net wealth in the long run, thus in the end raising government revenue.⁸⁶ This rings untrue to many liberals and advocates of a progressive income tax, and hence, if valid, is an example of a paradox.

By the same token, liberals believe that gun controls will lead to less violent crime, since making weapons less available will reduce the opportunities for using them to commit mayhem.⁸⁷ For the National Rifle Association, this belief is paradoxical, because they hold that armed citizens will be able to defend themselves when confronted by criminals without having to depend on the police, who may not always be on the scene. And fear of an armed response will deter many miscreants from acting criminally at all.⁸⁸ If gun control does in fact limit crime, this dispute serves as a second example of a paradox occurring within this nation's political discourse.

The ethnic studies programs at issue in Arizona and elsewhere also present a series of paradoxes. In these areas, opponents of ethnic studies warn that teaching these subjects in the public schools poses a risk of harm to the schoolchildren themselves, to the ideal of national unity, and to the broader curriculum which is already crowded with courses necessary to equip students for life in a technologically complex society.⁸⁹

Because each of these assertions is superficially plausible, each warrants examination. As we shall see, ethnic studies is beneficial for young students, particularly ones of color. Moreover, this educational program strengthens, not weakens, America's unity. And, paradoxically, it improves scholastic performance across the board, including in traditional subjects such as mathematics and English.

86. This is a common tenet of supply-side economics. See Louis Uchitelle, *A Political Comeback for Supply-Side Doctrine*, N.Y. TIMES, Mar. 26, 2008, at C1 (describing the role of Arthur Laffer in popularizing the economic theory).

87. See, e.g., Paul Krugman, Opinion, *The Conscience of a Liberal: Researchers Republicans Like*, N.Y. TIMES (Mar. 25, 2011), <http://krugman.blogs.nytimes.com/2011/03/25/researchers-republicans-like/> (disputing claims of arms lobby that guns will make society safer).

88. See, e.g., JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS 2-6 (3d ed. 2010) (making the case for gun ownership).

89. See *infra* note 90 and accompanying text (discussing these reasons and objections to them).

A. *The First Paradox: Ethnic Studies and the Individual Learner—
Understanding One's Own Ethnicity*

Opponents of ethnic studies sometimes charge the programs with inculcating a sense of victimization that is harmful to young, developing psyches.⁹⁰ And it is certainly true that the MAS program as carried out in Tucson, for example, taught about many downbeat episodes, including a pretextual war of aggression with Mexico,⁹¹ widespread discrimination in the Southwest,⁹² school segregation,⁹³ vicious Texas Rangers,⁹⁴ and other

90. See, e.g., BIGGERS, *supra* note 6, at 187 (quoting an Arizona official who declared the program “tribal” in nature); *id.* at 193 (proclaiming, allegorically, that “Carthage must be destroyed”); *id.* at 194 (pronouncing the program Marxist, Islamist, or communistic); Mootz & Saucedo, *supra* note 35, at 272–73 (quoting a high-ranking Arizona political figure who accused Mexicans in the state of planning a “reconquista” in which all Latinos in the Southwest would unite in a campaign to return the region to Mexico); PRECIOUS KNOWLEDGE, *supra* note 46 (interviewing Arizona Superintendent of Education who accused Tucson’s MAS program of engaging in anti-American zealotry at the expense of the young). For other accusations by high-ranking officials, see *supra* notes 33, 83; *infra* note 99 (comparing the program to “tribalism”).

91. See PRECIOUS KNOWLEDGE, *supra* note 46 (depicting teaching materials). See generally DELGADO, PEREA & STEFANCIC, *supra* note 4, at 8–15, 421–23 (describing the war with Mexico and the residually strained relationships between the two countries).

92. See PRECIOUS KNOWLEDGE, *supra* note 46. See generally DELGADO, PEREA & STEFANCIC, *supra* note 4, at 360–62, 525–39 (discussing discrimination in public schools and racial profiling in law enforcement). It would appear that, at least in the cases of some government officials in Arizona and other parts of the Southwest, such allegations of discrimination and racism are not entirely unfounded. See STRUM, *supra* note 18, at 44–52, 82–85, 108 (recounting administrators’ efforts to keep Mexican children out of certain public schools because the children were “too dirty,” were presumed to speak only Spanish, and were thought of as generally inferior); NICOLÁS C. VACA, *THE PRESUMED ALLIANCE* 78 (2004) (noting that California and Texas school officials believed that Mexican children suffered from poor hygiene, devalued education, spoke poor English, were intellectually inferior, and required education in separate schools from those reserved for white children); see also *Hate in the Mainstream*, INTELLIGENCE REP., Winter 2012, at 4 (quoting an email written by the Arizona State Senate President in which he proclaimed that “[w]e are much like the Titanic as we inbreed millions of Mexico’s poor, the world’s poor and we watch our country sink”).

93. See PRECIOUS KNOWLEDGE, *supra* note 46. See generally DELGADO, PEREA & STEFANCIC, *supra* note 4, at 41–48, 303–06, 346–59 (discussing cases and history relating to Latinos’ struggle against school segregation); STRUM, *supra* note 18, at 35–53 (describing Mexican American parents’ struggles with school administrators and frustration over their children not being admitted into the nicer, primarily white schools, prompting the parents to sue the school district); VACA, *supra* note 92, at 78–83 (describing the factual backdrop that prompted Mexican American parents to sue a school district in Texas over its segregation policies).

94. See JUAN PEREA ET AL., *RACE AND RACES* 294–96 (2d ed. 2007) (describing American racism toward Mexicans during this era); William D. Carrigan & Clive Webb, *The Lynching of Persons of Mexican Origin or Descent in the United States, 1848 to 1928*, 37 J. SOC. HIST. 411, 416–17 (2003) (describing the Rangers’ systematic abuse of legal authority and estimating the number of Mexicans they killed as possibly rising into the thousands); Richard Delgado, *Rodrigo’s Corrido: Race, Postcolonial Theory, and U.S. Civil Rights*, 60 VAND. L. REV. 1691, 1738–40 (2007) (discussing Mexican American folk ballads in which brave Latino outlaws defend their rights against Texas Rangers and other ruthless white authorities).

features of “history from below.”⁹⁵ Even courses on minority literature frequently recount tales of immigrants and other poor families struggling to survive in an alien land.⁹⁶

One might think that exposure to this side of history would dishearten a sensitive schoolchild of color. She might, one could imagine, conclude that her people were an easily dominated group lacking in spirit or intelligence.⁹⁷

Paradoxically, however, this diverse historical education seems to have the opposite effect on students. The children find the tales edifying, even inspiring, especially historical stories of resistance.⁹⁸ As with Cristal in the film *Precious Knowledge*, such children often become hungry for more details of their history and culture.⁹⁹ Far from being depressed or discouraged, children of color want to learn more.¹⁰⁰ They aspire to become leaders for justice.¹⁰¹ If this requires gaining an even greater body of knowledge, a college degree, and other credentials, these students now see reasons for doing so.¹⁰²

95. “History from below” is a term for historical study that focuses on ordinary workers and activists “who shaped history through small, nearly invisible actions[,] rather than the traditional version emphasizing kings, generals, and wars.” Richard Delgado, *Liberal McCarthyism and the Origins of Critical Race Theory*, 94 IOWA L. REV. 1505, 1538 (2009); see also Sabyasachi Bhattacharya, ‘History from Below,’ SOC. SCIENTIST, Apr. 1983, at 3, 3 (beginning with quotes from Puerto Rican and Mexican historians and describing early practitioners of “what came to be known as ‘history from below’”). For works exemplifying this approach, see generally PATRICIA LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* (1987), and HOWARD ZINN, *PEOPLE’S HISTORY OF THE UNITED STATES* (2003).

96. See *supra* note 69 and accompanying text (describing one such book).

97. See Richard Delgado, *The Law of the Noose*, 44 HARV. C.R.-C.L. L. REV. 298, 309–10 (2007) (describing the different ways in which a young Latina could learn to view her ancestors’ history and the current situation of Spanish-speakers).

98. See O’Leary et al., *supra* note 23, at 110 & nn.104–05 (noting that it is anti-ethnic studies and other discriminatory legislation—not the classes themselves—that lead young students of color to feel inferior). For examples of such tales, see, for example, DELGADO, PEREA & STEFANCIC, *supra* note 4, at 34–41, 302–04.

99. See PRECIOUS KNOWLEDGE, *supra* note 46 (depicting the lives of Pricila, Gilbert, and Cristal). In the documentary, Cristal is heard saying, “I had an opportunity to understand. It made a big difference in my life.” *Id.* Other students make proclamations such as “I am in love with this class,” “it made me feel comfortable,” “I never pulled an all-nighter before,” or “it helped me resist stereotypes of who I am.” *Id.* On the other hand, a state official is heard declaring the program sheer “tribalism” and a reversion to primitive periods when clans took precedence over nations. *Id.* Another accuses the program of preaching collectivism, rather than individual effort, and of being more aligned with the historical interpretations of Marx, Engels, and Che Guevara than with American heroes and figures. *Id.*

100. *Id.*; see *infra* notes 100–17 and accompanying text.

101. See PRECIOUS KNOWLEDGE, *supra* note 46; see also *infra* notes 100–17 and accompanying text (discussing the ability of programs such as MAS to lead to self-development for minority children).

102. See PRECIOUS KNOWLEDGE, *supra* note 46 (describing, through her mother, the changes in Cristal during her short period in the MAS program).

What is more, such students often spread the knowledge gained at school to others, conversing animatedly with parents and friends about writers such as Sandra Cisneros, history as interpreted by Rodolfo Acuña, and the insights of critical race theory.¹⁰³

MAS programs like the one previously offered in the Tucson schools appear to offer the greatest benefit to students belonging to poor, historically oppressed groups, in relation to students whose families are middle class and who are bound for college anyway. Cristal, for example, told the interviewer that it is unlikely that she would have persevered in school without the support of teachers like Mr. Acosta and Mr. Arce.¹⁰⁴ Others recounted how they were alienated from school and would have proceeded with little interest or passion¹⁰⁵ or even soon dropped out.¹⁰⁶

1. Ethnic Studies and a Theory of the Young Self

Why should this be? As I wrote on another occasion, the needs of whites and nonwhites often differ with respect to the type of racial narrative that will make sense to them.¹⁰⁷ In simplest terms, many whites need absolution and relief from guilt. Needing to feel innocent, not personally responsible for the terrible injuries Anglo-American society has visited on blacks, Latinos, and Indians throughout history, many whites cling to the belief that their own comfort and security did not come at the expense of the suffering of populations whose skin colors are black, brown, or red.¹⁰⁸ This narrative will often go roughly as follows:

Early in our history there was slavery, which was of course a terrible thing. But, following the Civil War, slavery was abolished; though blacks initially remained poor and alienated, in response to the

103. *See id.*

104. *Id.* For sources describing the classroom settings and class activities in the MAS program that Cristal attended, see *supra* notes 46–47 and accompanying text.

105. *See* PRECIOUS KNOWLEDGE, *supra* note 46 (recounting the story of Pricila).

106. *Id.* (describing Gilbert).

107. *See* Richard Delgado, *Derrick Bell's Racial Realism: A Comment on White Optimism and Black Despair*, 24 CONN. L. REV. 527, 528–31 (1992) (describing the psychic needs of whites and blacks); *cf.* Arthur Pearl, *Democratic Education as an Alternative to Deficit Thinking*, in THE EVOLUTION OF DEFICIT THINKING: EDUCATIONAL THOUGHT AND PRACTICE 211, 213–16 (Richard R. Valencia ed., 1997) (describing the appeal of this theory to the education establishment).

108. *See* Delgado, *supra* note 107, at 529–31 (describing the majority race's attitude toward the "progress" of minorities); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2417–18 (1989) (describing the psychic needs of whites and blacks) [hereinafter Delgado, *Storytelling for Oppositionists and Others*]; *see also* Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1125–26 (2012) (discussing white guilt); Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. AND MARY L. REV. 1 *passim* (1990) (same).

efforts of brave civil rights leaders, society began to right racial injustices and prohibit many forms of discrimination. Today, minorities have the same rights and opportunities as anyone else. Everyone has black and Latino friends. Some of the most admired entertainers, athletes, and politicians are black. While a few outright racists may still harbor backward thoughts and attitudes, white racism is largely a thing of the past.¹⁰⁹

For minority children, roughly the opposite situation prevails. Looking around the world, such a child may see her parents and neighbors living in small, run-down houses. The streets may be filled with potholes, the walls covered with graffiti and gang signs. Trash pick-ups are infrequent. Many of the adults with whom she comes into contact work at menial jobs. Few will have attended college.¹¹⁰

By contrast, white people on the other side of town may live in neat homes on clean, orderly streets. Children in these neighborhoods attend good schools, take ballet and piano lessons, play on organized sports teams, and spend the summers at camps or working at high-prestige internships, sometimes overseas.¹¹¹

A minority child from a low-income background could easily conclude that something is wrong with her people and that the whites who enjoy a better standard of living are superior—more intelligent, more energetic, and with a better culture and habits than hers. If we are poor, such a child may reason, it must be our fault.¹¹² For such a child, ethnic

109. For a similar discussion and a comparison with the other side of the story, see Delgado, *Storytelling for Oppositionists and Others*, *supra* note 108, at 2417–18.

110. A 1993 U.N. commission determined that all African Americans, if considered as a separate nation, would rank thirty-first in the world on an index of human flourishing that included longevity, infant mortality, school completion, access to health care, and a few other measures. Latinos in the United States would rank thirty-fifth. American whites, meanwhile, ranked first. UNITED NATIONS, HUMAN DEVELOPMENT REPORT 1993, at 10, 18 (1993); Richard Delgado, *Locating Latinos in the Field of Civil Rights*, 83 TEX. L. REV. 489, 504–05 (2004) (discussing the report). A 2010 report indicates that such disparities, measured in relation to life expectancy, have actually widened during the last few decades. UNITED NATIONS, RETHINKING POVERTY: REPORT ON THE WORLD SOCIAL SITUATION 2010, at 69 (2010). The report listed life expectancy as “a fundamental indicator of both well-being and poverty.” *Id.* It found that the average lifespan in a white community near Washington, D.C., was eighty years, whereas the life expectancy in the nearby, predominantly African American city was sixty-three. *Id.*

111. See generally Richard Delgado, *The Wretched of the Earth*, 2 ALA. C.R.-C.L. L. REV. 1, 1–14 (2012) (describing and analyzing two youths, one raised in an upper-middle class suburb, the other on the wrong side of town).

112. For example, Rodolfo Acuña quoted an essay written by a thirteen-year-old Mexican girl:

To begin with, I am a Mexican. That sentence has a scent of bitterness as it is written. I feel if it weren't for my nationality I would accomplish more. My being a Mexican has brought about my lack of initiative. No matter what I attempt to do, my dark skin always makes me feel that I will fail. Another thing that “gripes” me is that I am such a coward. I

history and literature come as a tonic, for they supply reasons for her community's low estate. Nothing is wrong with her people. Their poverty, lack of cultural capital, and statistically low levels of achievement are the product of years of systematic suppression. With the burden of self-blame lifted, the child can dive into school and, learning with a strong heart, resolve to become knowledgeable and an agent for social change.¹¹³

A Latina child may devour stories about the lives of successful Latino writers, historians, and professors who achieved stature despite humble origins like her own.¹¹⁴ Having before received scant exposure to such

absolutely will not fight for something even if I know I'm right. I do not have the vocabulary that it would take to express myself strongly enough

Acuña, *supra* note 70. Acuña asks, "How could someone who looked at herself in this way learn?" *Id.*; *see also* Delgado, *supra* note 95, at 308–10 (discussing consequences for a Latina child of growing up with little knowledge of her people's history and culture); Roberto G. Gonzales & Leo R. Chavez, "Awakening to a Nightmare": *Abjectivity and Illegality in the Lives of Undocumented 1.5 Generation Latino Immigrants in the United States*, 53 *CURRENT ANTHROPOLOGY* 255, 255–60 (2012) (noting forces that produce depression, anxiety, and dread in the Latino community arising from the high proportion who are undocumented or who have a close family member who is).

113. *See, e.g.*, BIGGERS, *supra* note 6, at 216–77 (discussing a specific example as well as the general mechanism by which this happens); *see also* Delgado, *supra* note 95, at 309–12 (noting how knowledge of racial history can energize a person of color previously ignorant of it and how its lack can produce the opposite effect); Al Fiertes, *Storytelling and Its Transformative Impact in the Philippines*, 29 *CONFLICT RESOL. Q.* 333, 333 (2012) (describing how "storytelling can be an effective tool in transforming the negative energy of trauma into something positive" and noting that "[f]or survivors of armed conflict, for example, including those who go through the cycle of silence in reaction to deep traumatization, the coming out into the open through storytelling is empowering and affirming, enabling them to redefine their sense of identity given their new normalcy"); *id.* at 343 ("We tell stories so that our children and the next generation will know [those] of their parents and the older generation . . . because we want our children to learn about the good deeds that their parents and the older generation did . . . [and] because storytelling is good for health. When you tell stories, you cry, you laugh, you smile, and you get upset. It enables you to release heavy emotions, but these are all parts of the storytelling process. The important thing is that after you tell your stories, you feel relieved and become more relaxed." (internal quotation marks omitted))

114. In the Tucson program, the students could learn about figures like Cesar Chavez (the farm union organizer) and Simón Bolívar (Latin American liberation figure) and read contemporary writers such as Rodolfo Acuña (historian), Sandra Cisneros (novelist), and critical race theorists (legal figures who analyze the role of race and racism in American society). However, many of the books written by and about such figures were subsequently banned from the curriculum under H.B. 2281. *See, e.g.*, Patricia Williams, *Anti-Intellectualism Is Taking Over the U.S.*, *GUARDIAN* (May 18, 2012, 4:32 EDT), <http://www.guardian.co.uk/commentisfree/2012/may/18/anti-intellectualism-us-book-banning> (noting that "[r]ecently, I found out that my work is mentioned in a book [*Critical Race Theory: An Introduction*, by Richard Delgado and Jean Stefancic] that has been banned, in effect, from the schools in Tucson, Arizona" and acknowledging that she is in good company; listing other authors of banned books to include Isabel Allende, Junot Diaz, Jonathan Kozol, Rodolfo Anaya, bell hooks, Sandra Cisneros, James Baldwin, Howard Zinn, Rodolfo Acuña, Ronald Takaki, Jerome Skolnick, Gloria Anzaldúa, Henry Thoreau, and William Shakespeare); *see also* ELAINE

figures, she may adopt them as role models, deciding to be like them when she grows up. If others did it, she may reason, so can I. A conventional history or literature class, dominated by Anglo figures, heroes, generals, writers, and statesmen, may not perform this function for such a child.¹¹⁵

Both reasons—students' fresh understanding of their ethnic group's situation and their discovery of new role models—seem likely to support the remarkable record of programs like MAS in inspiring minority schoolchildren to read, think, complete school, and attend college.¹¹⁶ If one understands the family history and perspective of a minority child, this is not paradoxical at all. Instead, courses like the MAS program emerge as key to personal self-development and the decision to strive for educational success.¹¹⁷

B. The Second Paradox: Ethnic Studies and National Unity

Some opponents of ethnic studies in public schools, including those in Arizona, charge that teaching and reading about the history of ethnic

ROMERO, THE BATTLEGROUND FOR AMERICA'S NARRATIVE, AN ANNOTATED BIBLIOGRAPHY OF 84 BANNED BOOKS IN ARIZONA (2012), available at <http://www.ncte.org/library/NCTEFiles/Press>

/Battleground%20for%20America's%20Narrative.pdf (providing a somewhat more comprehensive list); Rothschild, *supra* note 48 (discussing these and others banned from the schools).

115. Such a class might emphasize, for example, the role of Paul Revere and the Framers, and the writing of Herman Melville and Mark Twain; all useful sources, to be sure, but not easily recognizable as role models for a Latina from East Los Angeles or the Tucson barrio. See CHRISTINE SLEETER, THE ACADEMIC AND SOCIAL VALUE OF ETHNIC STUDIES: A RESEARCH REVIEW, at vii, 4, 5 (2011), <http://www.nea.org/assets/docs/NBI-2010-3-value-of-ethnic-studies.pdf> (noting that a typical course in U.S. history or literature will include a few token "contributions" from each ethnic group, but that "students of color are not only aware of a Euro-American bias in curriculum, but they can describe it in some detail, and view it as contributing to their disengagement" and going on to note that ethnic studies can combat that disengagement).

116. For a discussion of Tucson's "impressive record" in raising students' test scores and the story of a near-dropout who is now on track to become a civil rights attorney, see BIGGERS, *supra* note 6, at 216.

117. See SLEETER, *supra* note 115, at 5 (noting that ethnic studies often increases intellectual engagement, particularly for minorities). What could be the mechanism producing this gain? It might come, in part, from countering "stereotype threat." See Claude Steele, *A Threat in the Air: How Stereotypes Shape Identity and Intellectual Performance*, 56 AM. PSYCHOLOGIST 613, 613 (1997) (defining "stereotype threat" as "the threat that others' judgments or [the person's] own actions will negatively stereotype" him in the relevant academic domain). See generally *id.* (explaining how members of a stigmatized group often perform worse on intellectual tasks when reminded of their group's stereotype in the public mind). Curricula that merely teach, implicitly or explicitly, that whites are smart and successful will also impair the performance of Latino schoolchildren. See Tom Bartlett, *How to Help Kids Fail*, CHRON. HIGHER EDUC. (June 28, 2012, 12:22 PM), <http://chronicle.com/blogs/percolator/how-to-help-kids-fail/29807> ("[C]hildren's ability to perform an activity may be undermined by statements that link success at that activity with membership in a social group.").

groups will reinforce group solidarity at the expense of national unity.¹¹⁸ By dwelling on historical grievances, they warn, students of color may become indignant or even learn to hate America.¹¹⁹ Such critics insist that one of the functions of public education is to teach American values and culture and inculcate a sense of national unity,¹²⁰ and that ethnic studies will make it harder to reach those goals.

Ethnic studies certainly may enable students to develop a more nuanced view of the country in which they live than the one they might have received had they taken only mainstream courses of literature and history emphasizing European-American heroes, myths, and tales.¹²¹ And some students might well feel indignant over loss of lands, wealth, and culture resulting from conquest, connivance, slavery, Jim Crow laws, lynching, or bigotry.¹²² Nevertheless, this may be a necessary price to pay for an informed citizenry and especially vital for a multiracial society such as ours.¹²³ Consider the relation between this type of knowledge and the health of our political system.

118. See, e.g., Lacey, *supra* note 43 (observing that the Arizona authorities criticized the ethnic-studies program for being excessively insular and engaging in Bull-Connor-style resegregation of America); see also *supra* notes 33, 88 (citing other authorities who accused the program of being racist, of being the latter-day equivalent of the Huns, or of secretly plotting a “reconquista”).

119. Lacey, *supra* note 43 (noting that other authorities accused the program of whipping up indignation over long-past events); see also *The Daily Show with Jon Stewart: Tucson Mexican American Studies Ban* (Comedy Central television broadcast Apr. 2, 2012) [hereinafter *The Daily Show*], available at <http://www.thedailyshow.com/watch/mon-april-2-2012/tucson-s-mexican-american-studies-ban> (interviewing a Tucson school board member who tells the interviewer that he agrees with the ban because MAS teachers urged students to reclaim southwestern states through violent uprisings and secured their loyalty by buying them burritos). The school board official also noted that the ban would be applied only to Mexican American studies and not to the black or Native American versions. See *The Daily Show, supra*.

120. See generally Richard Rothstein & Rebecca Jacobsen, *The Goals of Education*, PHI DELTA KAPPAN, Dec. 2006, at 264 (reviewing goals of public education from colonial times to today).

121. See O’Leary et al., *supra* note 23, at 104–06 (disputing that ethnic studies is likely to foment an anti-American attitude and suggesting that at most it will instill a critical perspective). Might some educators hold the view, subconsciously, that the ideal amount of critical perspective is zero? See Delgado, *supra* note 95, at 1509–10 for a description of the theory of surplus educational value, similar to the one Marx described for labor. This corollary holds that ideas, education, and intelligence cannot easily be controlled, and that if you set out to teach a Latino or black schoolchild, for example, just enough to enable him to hold a menial job or work on a farm, the child may use that knowledge to read the label on a bag of fertilizer, including the health warnings. *Id.* Years later, the child may get a lawyer and sue you for chemically induced injury. *Id.* In short, education can easily strengthen the instinct for justice.

122. See, e.g., Delgado, *supra* note 95, at 308–10.

123. See SLEETER, *supra* note 115, at 15–16 (observing that “by seeing the depth and richness of their own American ethnic history and culture, some students who had questioned their identity began to affirm and claim an American identity”); Juan Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 MICH. L. REV. 1123, 1148 (2012)

1. Interest Groups in Pluralistic Politics

The United States is one of the more diverse countries in the world.¹²⁴ The American system of politics recognizes this composition by providing for voting, redistricting, freedom of speech, and dozens of other political measures by which groups with different histories, needs, and attitudes compete to share their message.¹²⁵

(noting that familiarity with the past is key to understanding current inequities, including the subtle racism in recent judicial opinions). Might some whites in Arizona be overreacting to the supposed threat of Latinos and educational programs centered on their culture and history? If one's racial mindset is dichotomous, one could easily fall prey to a syllogism that goes roughly like this: Whites are, by and large, good, smart, virtuous, and all-American. People of color, being not-white, can easily be stupid, lazy, and immoral. If teachers in school teach self-love and cultural appreciation to Latino schoolchildren, they must be anti-white. By the same token, teaching Latino schoolchildren that Anglos oppressed Latinos at certain points in history must be anti-American, because it would mean that the dichotomy was wrong, and it cannot be. See Richard Delgado, *Authoritarianism: A Comment*, 13 RUTGERS RACE & L. REV. 65, 67–78 (2012) (showing how an authoritarian impulse characterized by black-white, dichotomous thinking shadows much of racial discourse).

124. See *2010 Census Shows America's Diversity*, U.S. CENSUS BUREAU (Mar. 24, 2011), <http://www.census.gov/2010census/news/releases/operations/cb11-cn125.html>. Our population contains several large ethnic groups, including whites, Latinos, African Americans, Asian Americans, and Native Americans, plus numerous immigrants from around the world. See *id.*

125. On the central role of pluralism in U.S. political thought, see, for example, WILL KYMLICKA, *THE GLOBAL DIFFUSION OF MULTICULTURALISM* 18–19 (2007) (“[A] multicultural state . . . repudiate[s] the older idea that the state is a possession of a single national group. Instead, the state must be seen as belonging equally to all citizens. . . . [A] multicultural state repudiates those nation-building policies that assimilate or exclude members of minority or non-dominant groups. . . . The state accepts an obligation to accord the history, language and culture of non-dominant groups the same recognition and accommodation that is accorded to the dominant group . . . [and] acknowledges the historic injustice that was done to minority/nondominant groups by these older policies of assimilation and exclusion.”). For related discussions, see JOHN DEWEY, *DEMOCRACY AND EDUCATION* 82–84, 341–45 (Dover Publications, Inc. 2009) (1916) (discussing the development of social awareness and understanding cultivated at school and the role of education in fostering self-development as a bulwark against despotic government), AMY GUTMAN, *DEMOCRATIC EDUCATION* 32–33, 54, 72, 230 (rev. ed. 1999) [hereinafter GUTMAN, *DEMOCRATIC EDUCATION*] (noting the role of education in inculcating social values including loyalty to society at large), and AMY GUTMAN, *IDENTITY IN DEMOCRACY* 2, 13–15, 193 (2004) (noting that identity groups benefit democracy, in part because they often challenge injustice). On the role of pluralism in education, see, for example, Katharyne Mitchell, *Educating the National Citizen in Neoliberal Times: From the Multicultural Self to the Strategic Cosmopolitan*, 28 TRANSACTIONS INST. BRIT. GEOGRAPHERS 387, 392 (2003) (noting that through creating school subjects the state creates the “‘well-schooled subject’ . . . willing to work for national unity within this philosophical framework”), and Martha C. Nussbaum, *Teaching Patriotism: Love and Critical Freedom*, 79 CHI. L. REV. 213, 216 (2012) (noting that the state often prefers to “inspire strong emotions with itself as the object,” but cautioning of “the danger of burdening minority conscience by enforced homogeneity”). Compare *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 597–98 (1950) (implying that the state may promote patriotism in public schools by requiring the Pledge of Allegiance), with *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1963) (stating that if our Constitution offers any “fixed star,” it is that the state may not compel orthodoxy in expression). In early England, oppressive laws made it a crime to criticize the King or the

Put simply, we are not all situated identically. Workers often want better working conditions, such as a higher salary and a safer workplace.¹²⁶ Managers and owners of the means of production want workers who are tractable and willing to put up with salaries consisting of less than a fractional share of the market value of the workplace's product.¹²⁷ Women often want better programs for reproductive health and access to jobs formerly blocked by the glass ceiling.¹²⁸ African Americans want better quality social services, greater access to jobs, and less racial profiling.¹²⁹ Latinos want more reasonable immigration laws, especially ones that respect linguistic differences.¹³⁰

Groups that suffered past wrongs want redress and opportunities, such as affirmative action, to achieve the upward mobility that they might have achieved in the absence of discrimination.¹³¹ The American political system recognizes the reality of such groups, provides means for them to adjudicate and resolve their differences, and considers the resulting complex outcomes a strength of our system of pluralistic governance.¹³²

2. Social and Inter-Group Interests: Charles Taylor's Theory of Recognition

Not only do groups have interests that often differ from those of their neighbors, they have ones arising out of social interaction. One of those interests, which political scientist Charles Taylor calls recognition, is the

government. *See* 14 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 723 (London, T.C. Hansard 1813) ("If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it.").

126. *See generally, e.g.*, KENNETH G. DAU-SCHMIDT ET AL., LABOR LAW IN THE CONTEMPORARY WORKPLACE (2009) (discussing a range of workplace issues, including relations among workers, unions, and management).

127. *See, e.g.*, 1 KARL MARX, CAPITAL 270–79 (Ben Fowkes trans., Vintage Books 1st ed. 1977) (1867) (setting out labor theory of surplus value that arises when companies realize that they cannot pay out in the form of wages enough money to enable the workers to purchase their products).

128. *See generally, e.g.*, MARY JOE FRUG ET AL., WOMEN AND THE LAW: CASES AND MATERIALS (2004) (discussing topics including women in the workplace and regulation of reproductive decisions and technologies).

129. *See generally* DERRICK BELL, RACE, RACISM, AND THE LAW (Vicki Been et al. eds., 6th ed. 2008) (analyzing a host of problems confronting this group).

130. *See* DELGADO, PEREA & STEFANCIC, *supra* note 4, at 206–303 (discussing these and other issues facing this group).

131. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (approving carefully tailored affirmative action at public universities).

132. *See* GUTMAN, DEMOCRATIC EDUCATION, *supra* note 125, at 22–28 (tracing this principle to the Greeks and the early nation-states).

right to have others recognize you as you are or, at any rate, as you wish to be taken and seen.¹³³

Refusal to recognize another for what she is becomes a recognition harm and a serious type of depreciation.¹³⁴ Not only is it especially stinging, it interferes with the log-rolling and express consideration of points of view different from one's own that are the hallmarks of our political system.¹³⁵

For example, forcing gays in the military to hide their sexual orientation is an affront irrespective of whether particular gay service members suffer the loss of a promotion or other tangible opportunity.¹³⁶ Declaring a Latino or Middle Eastern person, who is obviously not black, a non-minority—a type of white—is a similar form of non-recognition and an affront to her personhood.¹³⁷ It also makes it likely that others will not take such a person's rights seriously. An interest group composed of her and others like her is a cipher—no different from the majority group, just unluckier.¹³⁸

What about self-recognition? Although Taylor wrote mainly with interpersonal recognition in mind, interfering with another person's ability to learn about her own culture and history would seem as serious a harm as

133. See Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25, 25 (Amy Gutman ed., 1994). In discussing recognition, Taylor notes that

our identity is partly shaped by recognition or its absence, often by the misrecognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.

Id.

134. See *id.*

135. See *id.*; see also AXEL HONNETH, *THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS* 122–39 (Joel Anderson trans., 1995) (discussing various modes of recognition, including love, respect, and solidarity, and noting that its denial can generate social struggles).

136. See, e.g., KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 69–70 (2006).

137. See, e.g., TEHRANIAN, *supra* note 29, at 37–38 (discussing how racial classification systems have often labeled individuals from the Middle East as “white”). The U.S. Census currently does this with Latinos and Middle Eastern people, forcing them to choose a category other than the one many believe true to their identity. See Kenneth Prewitt, *Racial Classification in America: Where Do We Go from Here?*, *DAEDELUS*, Winter 2005, at 5, 5–17 (tracing shifts in census policy regarding racial categories and noting recurring disputes over groups such as Latinos, Middle Eastern people, and biracials).

138. Failure to understand other people is inefficient, as well, impairing the effective operation of corporations and the military. See *Grutter v. Bollinger*, 539 U.S. 306, 330–31 (2003).

the variety with which he was concerned.¹³⁹ Interest group politics require that citizens understand their own self-interest. But a Latino or black deprived of the opportunity to know her own history lacks the tools for asserting that self-interest vigorously or knowledgeably. Ignorant of how her group has been treated and its fortunes altered by fair or unfair means, that individual will be unable to function in interest group politics because she will not be familiar with her own interests. Ignorant of who she, her family, and her community are, how could she serve as a spokesperson for them or even understand their role in American life?

One might say that she does not know, or recognize, herself. Lacking that knowledge, her participation in pluralistic interest group politics will be very shallow at best.¹⁴⁰

3. Judicial Recognition of this Interest

The United States Supreme Court on a few occasions has addressed interests somewhat similar to the focus of this Article. Although these cases did not turn on curricular controversies¹⁴¹ or the right to ethnic knowledge, they do concern the right to participate, without unfair interference, in democratic log-rolling.

In *Romer v. Evans*,¹⁴² the U.S. Supreme Court considered a Colorado referendum, Amendment 2, that prohibited any arm of the state from enacting a measure declaring gays and lesbians a protected class.¹⁴³ Colorado's highest court ruled against the statute after declaring that it

139. My own extension of Charles Taylor's principle: Impairment of self-recognition is the injury *B* suffers when *A* interferes with *B*'s ability to recognize herself, that is, to know whom she is. Taylor wrote of the injury when *A* refuses to recognize *B*—who does know whom she is—in those terms. See Taylor, *supra* note 133, at 25–26.

140. A number of political theorists speak of such a connection. See, e.g., Janice McLaughlin et al., *Introduction: Why Contesting Recognition?*, in *CONTESTING RECOGNITION: CULTURE, IDENTITY AND CITIZENSHIP* 1, 3 (Janice McLaughlin et al. eds., 2011) (“[Q]uestions of equality cannot be separated from the development of a self capable of recognition A good, modern, liberal society . . . is one where growing numbers of its members [receive] both social recognition and the opportunity to develop as autonomous individuals.”) The idea of appearing in public without shame would seem to play a central role in this development. The historically minded reader may recall the many slave-owning states that prohibited slaves from learning to read; the reader interested in family dynamics may recall recent writing showing that children who know their families' history exhibit superior ability to cope with challenges. See Bruce Feiler, *This Life: The Stories that Bind Us Help Children Face Challenges*, N.Y. TIMES, Mar. 17, 2013, at 1L (“I spent the last few years trying to uncover [what makes some families effective], meeting families, scholars and experts ranging from peace negotiators to online game designers to Warren Buffett's bankers. After a while, a surprising theme emerged. The single most important thing you can do for your family may be the simplest of all: develop a strong family narrative.”).

141. One turned on school busing to achieve integration, another on a statewide ban on university-level affirmative action. See *infra* note 164.

142. 517 U.S. 620 (1996).

143. See *id.* at 624.

must pass strict scrutiny, which it failed to do.¹⁴⁴ The Supreme Court affirmed, finding that the Colorado measure did not even pass rational basis scrutiny.¹⁴⁵ Below, the State had argued that the statute merely assured that gays and lesbians did not gain the benefit of special rights.¹⁴⁶

A majority opinion by Justice Kennedy disagreed with the State's argument, finding that Amendment 2 wrongfully deprived this population from engaging in the give and take of political logrolling that lies at the heart of the American political system. Any measure that disqualified "a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence."¹⁴⁷

A few years later, the Court in *Lawrence v. Texas*¹⁴⁸ invalidated a state anti-sodomy statute but on slightly different grounds.¹⁴⁹ Cases that did turn expressly on political-process reasoning generally have agreed with the Court's analysis in *Romer*. For example, in an earlier decision, *Hunter v. Erickson*,¹⁵⁰ an Ohio city had amended its charter to forbid any measure remedying housing discrimination for blacks unless a majority of the citizens first approved it.¹⁵¹ Such a requirement unconstitutionally burdened minority residents since it imposed a restriction that did not apply to all residents.¹⁵² The amendment thus violated fundamental principles of democratic governance.¹⁵³

More recently, the Ninth Circuit considered a California measure similar to the one in Colorado. In *Perry v. Schwarzenegger*,¹⁵⁴ the California courts overturned Proposition 8, which deprived same-sex couples of the right to marry.¹⁵⁵ After a long trial and appeal, a federal district court judge invalidated the measure, ruling that it deprives same-sex couples of the "fundamental right" to marry¹⁵⁶ and violates the Equal Protection Clause by excluding them from an honored status permitted

144. *See id.* at 625.

145. *See id.* at 635.

146. *See id.* at 637.

147. *Id.*

148. 539 U.S. 558 (2003).

149. *See id.* at 578. Political participation was not at stake in *Lawrence*, since criminalizing one form of sex has only an indirect impact on political expression. Instead the Court found the statute infirm because "[t]he liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their dignity as free persons." *Id.* at 558.

150. 399 U.S. 385 (1969).

151. *See id.* at 386.

152. *See id.* at 390-91.

153. *See id.* at 393.

154. 704 F. Supp. 2d 921 (N.D. Cal. 2010).

155. *See id.* at 928.

156. *See id.* at 991.

different-sex partners.¹⁵⁷ The court also noted how stereotypes “inhibit political compromise with other groups”¹⁵⁸ and interfere with “the give and take of the legislative process.”¹⁵⁹ The Ninth Circuit agreed, ruling that the California measure stripped a minority group of an existing right without a legitimate reason relating to a state interest.¹⁶⁰ Indeed, California’s action raised the inference that Proposition 8’s rationale was simple disapproval of gays and lesbians as a class and a desire to exclude them from the polity.¹⁶¹

Each of these cases suggests that state laws that forbid educational authorities from teaching historical and cultural material pertaining to a single group’s history and accomplishments stand on unfirm ground. As mentioned, these prohibitions will fall heavily on young schoolchildren, casting a shadow on their educational futures. The prohibitions will interfere with the students’ acquisition of self-knowledge and their ability to understand and act on their own behalf and that of their interest group.¹⁶² The prohibitions send the symbolic message that, like gays and lesbians, the students’ group is inferior and that its values, history, goals, aims, and hopes lie outside what right-thinking people consider to be American.¹⁶³ And like the cases having to do with sexual minorities, the restrictions concern the ability of young children to develop the tools to vote, run for election, and otherwise participate knowledgeably in national life.¹⁶⁴ As

157. *Id.* at 991–96.

158. *Id.* at 937 (quoting political scientist Gary Segura).

159. *Id.*

160. *See Perry v. Brown*, 671 F.3d 1052, 1076–81, 1086 (9th Cir. 2012), *cert. granted sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012).

161. *See id.* at 1081–82.

162. That is, the prohibition will fall heavily on Latinos both as individuals and as a group. If students learn that they are not worthy individuals, they may not finish school or may set aside schoolwork in place of something that makes them feel good about themselves. And if the group contains many members who feel this way, it is apt to be ineffectual in asserting its interests in the political sphere.

163. *See supra* Parts I–II (discussing the assault on MAS in Arizona and the premises on which it proceeds).

164. A handful of education cases turn on political-process concerns, although none of them stem from a curricular controversy. *See generally* *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (invalidating a statewide initiative, enacted in response to a Seattle school board’s decision to order busing to expand racial integration, that would have barred busing anywhere in the state for the purpose of achieving racial balance and deprived school boards of discretion over that single issue); *Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary v. Regents of Univ. of Mich.*, 701 F.3d 466, 470, 474 (6th Cir. 2012) (striking down a statewide affirmative-action ban that placed a special burden on supporters of race-conscious admissions policies by denying them the ability to lobby for their point of view and noting that “a fair political process is nowhere more important than in education,” and that “such a comparative structural burden undermines the Equal Protection Clause’s guarantee that all citizens ought to have equal access to the tools of political

such, this approach offers a stronger basis for safeguarding the interests of minority schoolchildren discussed in this Article than do older cases turning on equal protection or the right to receive or decline education.¹⁶⁵

Considering that Arizona, in the period immediately prior to enactment of H.B. 2281, enacted a series of other measures—including an English-only law and a wide-ranging anti-immigration measure—the inference becomes inescapable that authorities in the state aimed to curtail the ability of the growing Latino population to participate in the public life and politics of a large state.¹⁶⁶

4. The State's Interest in Regulating Its Own Curricula

Courts generally defer to state educational authorities in matters of curricula.¹⁶⁷ Thus, if one state prefers to teach state history rather than the history of a surrounding three-state region, or Latin rather than Italian, courts ordinarily will not intervene. But the state's power over curricular choice is not unlimited. States may not forbid the teaching of foreign

change”), *cert. granted*, 133 S. Ct. 1633 (2013); *see also* Adam Liptak, *Supreme Court Takes New Case on Affirmative Action, from Michigan*, N.Y. TIMES, Mar. 26, 2013, at A14 (reporting that the Supreme Court will review the decision in *Coalition to Defend Affirmative Action*).

165. *See infra* Part III.B.4 and accompanying notes (discussing *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, and a number of other older cases). Although it is possible that a modern court might render a decision based on these more conventional lines of authority, equal protection has been falling into disfavor, *see* Delgado, *supra* note 26, at 452–55 (tracing its decline in an era of “pluralism anxiety”), in favor of hybrid approaches that combine liberty and equality concerns and seek to advance broad political solidarity and unity. *See, e.g.*, Bertrall L. Ross II, *The Representative Equality Principle: Disaggregating the Equal Protection Intent Standard*, 81 FORDHAM L. REV. 175, 175–76 (2012) (noting the resurgence of “representation-reinforcing judicial review” that aims to advance political participation of minorities); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground for Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1357–58 (2011); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748–49 (2011). Moreover, research shows that courts are reluctant to employ analogical reasoning to broaden the rights of minorities. *See* Delgado, *supra* note 25, at 1895–98. For this reason, the political-process avenue this Article explores seems more promising than these other approaches. In addition, it captures a central intuition: state governments should not consign minority groups to ignorance about their own history.

166. *See* Mootz & Saucedo, *supra* note 35, at 263 (noting the virulently anti-Mexican tone of Arizona's rhetoric during the period preceding enactment of H.B. 2281).

167. *See, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42–43 (1973) (expressing disinclination to substitute judgment for that of state authorities in the field of education); MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 900–38 (4th ed. 2002); Green et al., *supra* note 14, at 93–94; Sheerin N. S. Haubenreich, *Parental Rights in Myspace: Reconceptualizing the State's Parens Patriae Role in the Digital Age*, 31 HAST. COMM. & ENT. L.J. 223, 231 (2009) (noting that courts will generally defer to educational authorities in matters of curriculum); *see also* Proposed Brief of the National Association of Chicana & Chicano Studies, et al. as Amici Curiae Supporting Plaintiffs, *supra* note 48, at 6 (noting that Arizona argued, absurdly, that it had the power to prohibit a “Ku Klux Klan curriculum,” and could, therefore, also prohibit one that taught MAS).

languages¹⁶⁸ or deny parents and children the option of attending a private school.¹⁶⁹ School authorities may not deprive children of due process or First Amendment rights without good reason.¹⁷⁰

Does Arizona have a good reason for enacting its anti-MAS statute? A skeptical court could fail to find one. Arizona's broad statute included a prohibition against teaching the overthrow of the U.S. government, suggesting that the state's reasons were grossly exaggerated.¹⁷¹

Would a more neutral statute, less rife with anti-Latino sentiment and racism, withstand constitutional scrutiny? After the Ninth Circuit invalidated a harsh English-only law in *Ruiz v. Hull*,¹⁷² Arizona passed a milder statute, which has stood up, at least for the time being.¹⁷³ And of course another state is free to pass a narrower, less-draconian law with fewer overtones of nativism and xenophobia.¹⁷⁴

168. See *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (holding that a state law that prohibited the teaching of foreign languages to any youth below the eighth grade violated the parents' and teachers' Fourteenth Amendment liberty interests).

169. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) (ruling that states may not require students to attend only public schools); see also *Edwards v. Aguillard*, 482 U.S. 578, 608 (1987) ("[T]he First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma." (quoting *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968)) (internal quotation marks omitted)); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1027 & n.5 (9th Cir. 1998) (citing earlier authorities for the proposition that a school board cannot remove books from a school library if it does so "in a narrowly partisan or political manner").

170. See, e.g., *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 514 (1969) (upholding right of students to wear armbands to protest the Vietnam War); Kathryn A. Kuhlenberg, *The Uncertainties of Educating a Preschooler with Special Needs: Who Makes the Important Determinations? And, Who Should?*, 10 SEATTLE J. SOC. JUST. 585, 589 (2011) (noting the recurring tension between the rights of parents and children, on one hand, and the state, on the other hand, in matters of curricular choice).

171. See O'Leary et al., *supra* note 23, at 104–05. An independent audit of the MAS program found no materials that urged revolution, overthrow of the government, or violent insurrection. See *id.* at 104.

172. See *Ruiz v. Hull*, 957 P.2d 984, 1002–03 (Ariz. 1998).

173. See Eric Pfeiffer, *Arizona Makes English Official*, WASH. TIMES, Nov. 8, 2006, at A12.

174. The state's authority over the content of schooling is as ancient as John Locke, who saw citizenship as the product of a social contract with the state that was binding on all citizens so long as the state ruled with legitimacy and consent. See Lynn A. Staehli, *Citizenship and the Problem of Community*, 27 POL. GEOGRAPHY 5, 9 (2008). Citizens in such a state would share a commonality achieved, in part, through schooling. See *id.* at 10. But the state's authority is limited. Excessive controls and demands for conformity can backfire and "send a message to immigrants that change is not welcome, that their contributions are not valuable, and that the immigration contract . . . demands change on only one side." Patti T. Lenard, *Can Multiculturalism Build Trust?*, in MANAGING ETHNIC DIVERSITY: MEANINGS AND PRACTICES FROM AN INTERNATIONAL PERSPECTIVE 11, 24 (2011).

5. Balancing the Concerns

A prime element in deciding the constitutionality of any statute like Arizona's would be the extent to which it appeared an attempt to consolidate power in a white majority that felt itself beleaguered by a growing minority population. In that case, a prohibition will begin to look like the measures federal courts struck down in *Erickson*, *Romer*, and *Schwarzenegger*—measures aimed at excluding a group from political participation.¹⁷⁵

Most curricular decisions do not rise to this level—teaching algebra rather than geometry in ninth grade does not, nor does a decision to offer physical education three times a week instead of five. But, as mentioned, cultural self-knowledge for Latinos (indeed, for any group) is a prerequisite to political self-knowledge and functioning.¹⁷⁶ Courts are apt, therefore, to scrutinize outright bans on programs that might impart it with considerable skepticism.

C. *The Third Paradox: The Consequences of Ethnic Studies for the General Curriculum*

One final reason school officials may cite in favor of bans like the one in Arizona is that teaching a host of ethnic studies courses, including history and literature, crowds the curriculum. Other subjects are more important. Frill courses like ethnic studies must give way to nuts-and-bolts courses essential to a child's ability to get and hold a job, such as basic math, technical writing, and consumer education.¹⁷⁷

Plausible though it may appear on its face, this objection encounters a serious obstacle when one examines the interaction of ethnic studies and educational achievement. For Latino schoolchildren, and perhaps others as well, turn out to achieve *more* in other classes when they are at the same time taking MAS courses.¹⁷⁸ The greater relevance and sense of urgency that the latter classes imbue translate to higher grades in classes, like math and science, that would appear to have little to do with, say, the novels of Sandra Cisneros.¹⁷⁹

175. See *supra* notes 141–61 and accompanying text.

176. See *supra* notes 137–40 and accompanying text.

177. For a discussion of the trend toward education for specific employment needs and opportunities, see, for example, Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the Job Market*, 59 J. LEGAL. EDUC. 598, 611–14 (2010).

178. See, e.g., Sleeter, *supra* note 40 (citing studies from different regions).

179. See SLEETER, *supra* note 115, at vii (noting that “research on two math/science curricula . . . found a positive impact on student achievement and attitudes toward learning” from taking ethnic studies classes); Sleeter, *supra* note 40.

The reader who has come this far will quickly realize why this is so. Latino schoolchildren in MAS classes develop a thirst for knowledge and an eagerness to learn that translate into improved performance in all of their classes. Cultural self-knowledge inspires and energizes these children, enabling them to see the relevance of studying, reading, and learning about their world.¹⁸⁰ Before enrolling in MAS classes, Latino students in the Tucson schools had a fifty percent likelihood of dropping out before graduation. Once in the program, their graduation rate soared to nearly ninety percent, with many going on to attend college and expressing an interest in careers in writing, medicine, law, or politics.¹⁸¹

Thus, for these schoolchildren, taking courses like the ones under discussion does not detract from performance in more mainstream classes such as English, science, or math. The situation is not win-lose, rather the new classes strengthen performance across the board. This result is paradoxical only until one examines the actual results for students in the program and reflects on the reasons why those results may be accruing.¹⁸²

180. See SLEETER, *supra* note 115, at viii (“In short, there is considerable research evidence that well-designed and well-taught ethnic studies curricula have positive academic and social outcomes for students. . . . [B]oth students of color and White students have been found to benefit from ethnic studies.”).

181. See, e.g., *id.*; Sleeter, *supra* note 40; PRECIOUS KNOWLEDGE, *supra* note 46; see also ERNESTO B. VIGIL, *THE CRUSADE FOR JUSTICE* 160–61 (1999) (describing a poorly funded community school in Denver, Escuela Tlatelolco, at which even mediocre students were allowed to graduate and even those who transferred later to the public schools continued to do well).

182. See TAYLOR ET AL., *supra* note 133, at 65. Enlarging and changing the curriculum is therefore essential not so much in the name of a broader culture for everyone as in order to give due recognition to the hitherto excluded. The background premise of these demands is that recognition forges identity, particularly in its Fanonist application: dominant groups tend to entrench their hegemony by inculcating an image of inferiority in the subjugated. The struggle for freedom and equality must therefore pass through a revision of these images. Multicultural curricula are meant to help in this process of revision. *Id.*; see also Sleeter, *supra* note 40 (“Then why was the Mexican-American studies program in Tucson terminated? . . . I believe the core issue is fear of the knowledge Mexican-American students find precious and empowering. . . . [W]ell-designed programs (like Tucson’s), taught by well-prepared teachers who believe in their students, connect students’ ethnic identity with academic learning and a sense of purpose that takes racism into account.”). Such programs also take “the concerns of students seriously and treat[] them as intellectuals.” Sleeter, *supra* note 40. *But see* Amy Gutman, *Preface*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION*, *supra* note 133, at ix, x–xi (observing that Professor Anthony Appiah takes issue with this position, on the ground that “the identification of people as members of a particular gender, race, ethnicity, nationality, or sexuality . . . ‘come[s] with notions of how [such] a proper person . . . behaves’”). The politics of recognition thus may “tie[] individuals too tightly to scripts over which they have too little . . . control.” *Id.* at xi; see also Wendy Brown, *Wounded Attachments*, 21 *POL. THEORY* 390, 402–03 (1993) (noting that an emphasis on identity can lead to “wounded attachments” and an exaggerated sense of victimization).

CONCLUSION

The growth of school-age populations of color, especially Latinos, can create conflicts in the minds of state and local educational authorities uncomfortable with diversity and difference. Many of the newcomers find school alienating and drop out, representing a large loss to the economy and cultural vitality of the regions where they will live and work. Experience shows that programs of ethnic history and literature can energize and inspire such students, encouraging them to remain in school, graduate, and attend college.

Detractors of these programs accuse them of fomenting resentment and anti-American attitudes. Recent struggles over a popular MAS program in Tucson, Arizona, have brought these conflicts into sharp relief. Under a new law seemingly aimed squarely at this program and ones like it, Tucson school authorities summarily disbanded the city's program, collecting and sending books and materials to a distant depository in a manner that raised eyebrows among publishers, librarians, authors, and supporters of free expression across the country and caused dismay and consternation in the local Latino community. A book caravan, composed of members calling themselves *librotraficantes*, brought national attention to the fate of a list of banned book that included William Shakespeare's *The Tempest* and Paulo Freire's *Pedagogy of the Oppressed*. At least three lawsuits challenged different aspects of the crackdown, marking the arrival of a new form of race trial turning on access to information, culture, self-knowledge, and the past.¹⁸³

To identify and clarify some of the interests at stake, this Article examined three paradoxes—developmental, pedagogical, and political—that lie at the heart of the disagreement over ethnic studies in public schools. By analyzing the role of cultural knowledge in the development of young children and in the operation of a vital, pluralist democracy, one can begin to resolve these paradoxes and discern the outlines of a reasoned approach to minority schooling and inclusion.

183. As this Article went to press, two separate trial courts issued somewhat inconsistent rulings regarding the Tucson MAS program. *See Acosta v. Huppenthal*, CV 10-623-TUC-AWT, 2013 WL 871892 (D. Ariz. Mar. 8, 2013) (granting plaintiffs' motion for summary judgment that parts of the anti-MAS statute are unconstitutional but granting Arizona's motion to dismiss a number of the plaintiff's other challenges, including that the statute violated the First Amendment, equal protection, and substantive due process); *Fisher v. Lohr*, CV 74-00 TUC DCB (D. Ariz. Feb. 6, 2013) (ordering the district to continue desegregation measures, including offering culturally relevant courses for black and Latino students as a strategy to improve student achievement). Many of these issues seem bound for appeal to the Ninth Circuit, if not higher.

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