

Silencing Talk About Race: Why Arizona's Prohibition of Ethnic Studies Violates Equality

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I see a big difference because from the ethnic studies classes you're getting both perspectives of the history. In the regular studies like English or social studies, you're just getting the one perspective that's in the book. In the MAS you're getting what's in the book but you're also getting background information on how other places contributed to it.¹

Ignorance is strength.²
– George Orwell

Introduction

Multiethnic, racial, or ethnic studies were one of the mechanisms developed by schools as a remedy in school desegregation cases in the 1970s,

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1. MAS participant, Cambium Audit Report, Curriculum Audit of the Mexican American Studies Department Tucson Unified School District, May 2, 2011, at 33, available as Exhibit C to Plaintiffs' Third Amended Complaint [hereinafter "Cambium Report"]. The Arizona Superintendent of Education commissioned the Cambium Report as part of his investigation into the Mexican American Studies program at Tucson High School.

2. GEORGE ORWELL, 1984 4 (Plume 2003). In Orwell's 1984, "ignorance is strength" is one of three slogans adhered to by the governing party. The other two are "war is peace" and "freedom is slavery." The slogans reflect the society's approach to language, "newspeak," which reinterprets terms to mean their exact opposite.

when the United States Supreme Court stymied other mechanisms for stimulating racial and ethnic diversity in public schools.³ The Court ruled that states could not fashion interdistrict or multi-district remedies unless all of the districts involved had been found to violate the Equal Protection Clause.⁴ Thus, inner city school districts, abandoned in substantial numbers by white families and left with majority minority racial populations, could not attempt to desegregate by reaching out to suburban white populations. School districts found to be guilty of violating students' Equal Protection rights, instead, could pursue alternative, resource-driven measures that could take race into account in curriculum, student assignment, and teacher training. Ethnic or racial studies are an example of this type of measure.

Race conscious courses came into being at the height of the Civil Rights era. At the heart of *Brown v. Board of Education*'s mandate that "separate educational facilities are inherently unequal"⁵ was recognition that racially segregated education functioned to perpetuate inequality of the races with the superiority of the white race the predominant and established norm. Racially segregated public education represented enforcement and continued entrenchment of the norm by educating generations of children to absorb, accept, and extend the norm. The norm of white supremacy was embedded throughout the pre-*Brown* school curriculum, and reflected in literature, historiography, mathematics, and sciences as well as pedagogical methodology, in ways that scholars are still analyzing. White supremacy rested on a particular telling of history; a particular construction of the United States and U.S. society, which implicitly and explicitly called for "ignorance" about facts or truths in the country's history that challenged the norm. This kind of ignorance masquerades as strength in the world of George Orwell's *1984*, where historical facts or narratives are easily and painlessly changed to suit the moment's political necessities. *Brown* opened the door to truth-telling about slavery, race, and segregation in school classrooms. School districts turned to ethnic studies programs, designed to recognize the contributions of the "inferior" races or ethnic groups and tell a more complete truth about U.S. history and U.S. society than had been accepted pre-*Brown*.

3. *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*).

4. *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*).

5. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

Ethnic studies, or “culturally relevant pedagogy,” have proved successful at bridging educational gaps between minority students and their white cohorts.⁶ Black and Hispanic eighth-grade students are significantly behind their white peers in mathematics; are substantially overrepresented among students with learning disabilities; and have double the dropout rates than white students.⁷ However, a recent Stanford study concluded that the ethnic studies program in use in some San Francisco high schools increased student attendance significantly, student grade point average by 1.4 grade points, and the number of credits earned.⁸

Despite their success with student populations, ethnic programs have proved controversial because of their focus on race. In 2010, the state of Arizona enacted a statute prohibiting such programs.⁹ Subsequently, the state superintendent of education ordered the dismantling of the Tucson Unified School District No. 1’s Mexican-American Studies (“MAS”) ethnic or “race related” program because it violated the statute.¹⁰ Arizona justified its actions on the grounds that the programs promoted racial hatred.¹¹ The state superintendent of education contended that the MAS program constituted racist or hate speech. A coalition of teachers, parents and students challenged the statute and the order dismantling the MAS program on the grounds that they violated the First Amendment and Equal Protection Clause of the federal Constitution. Although the litigation has been successful in part, the MAS program ceased to exist.¹² The success of the

6. Thomas Dee & Emily Penner, *The Causal Effects of Cultural Relevance: Evidence from an Ethnic Studies Curriculum* (Nat’l Bureau of Econ. Research, Working Paper No. 21865, 2016).

7. NAT’L CTR. FOR EDUC. STATISTICS, 2015 NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS (2017); See SUSAN AUD ET AL., NAT’L CTR. FOR EDUC. STATISTICS, NCES 2010-013, STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS (2010); MARIE C. STETSER & ROBERT STILLWELL, NAT’L CTR. FOR EDUC. STATISTICS, NCES 2014-391, PUBLIC HIGH SCHOOL FOUR-YEAR ON-TIME GRADUATION RATES AND EVENT DROPOUT RATES: SCHOOL YEARS 2010-11 AND 2011-12 (2010).

8. Dee & Penner, *supra* note 6, at 3.

9. ARIZ. REV. STAT. ANN. §§ 15-112 (2011).

10. ARIZ. REV. STAT. ANN. §§ 15-112 (2011); see *infra* Section 5, at notes 125–153. See also Richard Delgado, *Precious Knowledge: State Bans on Ethnic Studies, Book Traffickers (Librotraficantes), and a New Type of Race Trial*, 91 N.C. L. REV. 1513, 1523 (2013); Lupe S. Salinas, *Arizona’s Desire to Eliminate Ethnic Studies Programs: A Time to Take the “Pill” and to Engage Latino Students in Critical Education About Their History*, 14 HARV. LATINO L. REV. 301, 311 (2011).

11. *Id.*

12. See *Acosta v. Huppenthal*, 2013 WL 871892 (D. Ariz. Mar. 8, 2013), *aff’d* in part, *rev’d* in part, and remanded for trial, *Arce v. Douglas*, 793 F.3d 968 (9th Cir. 2015). The case went to trial in July 2017. The district court issued a decision on August 22, 2017, while this article was in production. The court issued a judgment as to liability for the plaintiffs on the grounds that the

effort to dismantle the MAS program raises questions about the extent to which these kinds of programs continue to be a viable mechanism for broadening their students' awareness and perspective of history, race, ethnicity, and self-identity, and a part of the Fourteenth Amendment's essential guarantee of equality, beyond a narrower role as a desegregation remedy.

Particularly in states with significant minority ethnic populations, like Arizona, Texas, and California, ethnic studies programs are a way of debunking stereotypes, enhancing critical learning skills, improving understanding among different ethnic groups, and promoting greater national unity. Developments in Equal Protection law, however, adopting a more tolerant view of when public educational institutions may prohibit the use of race or ethnicity as the defining characteristic of a program may encourage states to prohibit or limit this type of program. While there may be no constitutional command to offer such programs, courts should rigorously scrutinize their statutory prohibition. There are few, if any, legitimate reasons to prohibit ethnic studies programs in public schools.

This Article examines the development and function of ethnic studies, their role as a desegregation remedy and in crafting a more accurate and informed view of history. This Article contends that ethnic studies are a vibrant and vital educational tool to explore and challenge established historical and cultural orthodoxies that adversely affect formation of individual and group identity, and encourage and develop critical thinking about race and ethnicity in student populations. The Article explains how the Court's intolerance for the use of race conscious measures, even as desegregation remedies, renders ethnic studies programs a race conscious method available to public school districts to enhance student diversity and promote multiracial understanding and acceptance. Paradoxically, the Court's tolerance for state-initiated bans on race conscious measures reflects its adherence to color blindness or race neutrality as a positive constitutional value. The Court's approach frames as neutral initiatives that treat all races or ethnicities alike, regardless of their impact on minority races or of the overt or covert amount of racism in the community that produced the initiatives. In this framing, neutrality functions to hide or protect racism and allows courts to avoid identifying whether the political initiative furthers equality between the races or continues to subordinate one race or ethnicity.

statute and the enforcement action against the MAS program were motivated by invidious racial animus. Memorandum of Decision, *Gonzalez v. Douglas*, No. CV 10-623 TUC AWT, D. Ariz. Aug. 22, 2017. The court did not decide the question of remedies for the constitutional violation, however, and parties were invited to file remedy briefs with the court. *Id.* Where practical, some of the citations in the piece were changed to reflect the district court's opinion.

This Article contends that state efforts to prohibit ethnic studies programs are constitutionally infirm and should engage strict scrutiny under the Equal Protection Clause because they classify and prohibit curricular content and offerings on the basis of race or ethnicity to silence and subordinate non-majority racial and ethnic groups. Statutes like Arizona's, on their face, promote the majority racial and ethnic group and silence others.

I. The Development of Cultural/Ethnic/Multiethnic Studies: A Race Conscious History

That history and knowledge of culture is colored by the historian's or narrator's perspective and methodology is a principle accepted in historiography.¹³ Ethnic studies are designed to enrich our understanding of historical and other narratives by acknowledging and increasing the perspectives that are presented to primary and secondary students to include a racial or multiracial perspective. History is an evolving, continually revisited and rewritten narrative, and the use of ethnic studies is not dependent on a particular historical view or period. That ethnic studies became prevalent during the Civil Rights Era, in the wake of *Brown v. Board of Education*, does not render them irrelevant today. On the contrary, the need for ethnic studies programs and classes remains in a world order that not only relieves the states and federal government from addressing stark disparities in the impact of governmental measures on minority groups, but sharply limits their ability to undertake them.¹⁴

Ethnic studies programs present subject matter through a particular ethnic or racial perspective. They plainly identify, acknowledge, and explore race and ethnicity. This is what makes the programs race conscious. They are designed to acknowledge and celebrate the contributions of marginalized or subordinated groups, such as Native Americans, African-Americans, women, Latina/os, the Japanese, the Chinese, and others, to the dominant national narrative that traditionally has ignored or minimized how race, ethnicity and gender function in society. Ethnic studies may be used across disciplines to teach a variety of subject matter areas. Although designed

13. KEITH JENKINS, *RE-THINKING HISTORY* (Routledge 1991). *See generally* E.H. CARR, *WHAT IS HISTORY?* (Knopf 1963); DAVID LOWENTHAL, *THE PAST IS A FOREIGN COUNTRY* (Cambridge Univ. Press 1985); HAYDEN WHITE, *TROPICS OF DISCOURSE* (Johns Hopkins Univ. Press 1978). *But see* GEOFFREY R. ELTON, *THE PRACTICE OF HISTORY* (Fontana 1969).

14. *See, e.g.*, *Schuette v. Coal. to Def. Affirmative Action*, 134 S. Ct. 1623 (2014), *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013), and *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).

from a particular ethnic or racial perspective, ethnic studies enrich the educational experience of students from all racial or ethnic backgrounds.

In one sense, however, ethnic studies are not race conscious measures. Although race and ethnicity are used to make decisions about curriculum and pedagogy, race, and ethnicity are not used to make decisions about individual students. As long as they are offered to all students, without regard to the student's own individual racial or ethnic identity, ethnic studies programs do not violate or challenge the equality principle. When they are offered to both white and nonwhite students, ethnic studies programs do not distribute burdens or benefits on the basis of individual racial or ethnic classifications. Instead, these programs facilitate "exposure to widely diverse people, cultures, ideas, and viewpoints; and create opportunity for all students, not just students of a particular race or ethnicity."¹⁵ Ethnic studies programs can enhance individual students' sense of identity, generate greater understanding of ethnic groups, and generate greater individual awareness of the commonality, not just the differences, in human beings.¹⁶

Ethnic studies programs were developed in the latter part of the twentieth century as part of the national effort to desegregate public education in the United States, and to acknowledge and counterbalance the dominance of a "white" or "Euro-centric" perspective across a wide-range of disciplines. Ethnic studies developed both in the context of higher education and secondary education. In higher education, they emerged as departments or majors in African-American studies,¹⁷ Asian studies,¹⁸ and Latina/o studies.¹⁹ Higher education developed race or ethnic studies in

15. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

16. CHRISTINE E. SLEETER, NAT'L EDUC. ASS'N, *THE ACADEMIC AND SOCIAL VALUE OF ETHNIC STUDIES: A RESEARCH REVIEW* vii–viii (2011).

17. *See, e.g.*, The Dep't of African American Studies at Syracuse Univ., <http://aas.syr.edu>; African American Studies at Penn State, <http://afam.la.psu.edu>; Dep't of African American Studies at Northwestern Univ., <http://www.afam.northwestern.edu>; African & African Diaspora Studies at Tulane Univ., <http://tulane.edu/liberal-arts/african-and-african-diaspora-studies/>; Duke African & African American Studies, <http://aaas.duke.edu>; Dep't of African American Studies at Yale Univ., <http://afamstudies.yale.edu>; African-American Studies at Columbia Univ. Graduate Sch. of Arts and Sciences, <https://gsas.columbia.edu/degree-programs/admissions>.

18. *See, e.g.*, Asian Studies at the Florida State Univ., <http://coss.fsu.edu/inaprog/programs/undergraduate/asian>; Dep't of Asian Studies at Williams Coll., <http://asian-studies.williams.edu>; Asian Studies at Tulane Univ., <http://tulane.edu/liberal-arts/asian-studies/courses.cfm>; Loyola Univ. New Orleans, <http://interdisciplinary.loyno.edu/asianstudies>. *See also* The Ass'n for Asian Studies, <https://www.asian-studies.org>.

19. *See, e.g.*, Dep't of American Culture Latina/o Studies at the Univ. of Michigan, <http://www.lsa.umich.edu/latina>; Dep't of Latina/Latino Studies at the Univ. of Illinois at Urbana-Champaign, <http://www.lls.illinois.edu>; Latina and Latino Studies at Northwestern Univ.,

response to student demand and protest. In 1968, students at San Francisco State engaged in a five-month strike that generated the first College of Ethnic Studies in the nation.²⁰ Led by a coalition of student groups including the Black Student Union, Chicano, Latino and Asian-American groups, known as the Third World Liberation Front, and supported by students, faculty, and community activists, the protest is the longest campus strike in United States history. By 1978, 439 colleges in the country offered a total of 8,805 ethnic studies courses.²¹ In higher education, ethnic studies are vibrant but controversial academic disciplines that generate substantial scholarly interest.²²

Ethnic studies programs in public primary or secondary schools are not that common throughout the United States.²³ They were one of many mechanisms adopted by school districts found to have operated racially separate school systems, as part of their desegregation plans designed to remedy the Equal Protection violations.²⁴ They received scholarly attention in the 1990s, in view of the Supreme Court's retrenchment towards race conscious remedies.²⁵ Their use as remedies in Equal Protection litigation continues to be valid, and presumably would not be affected by statutes like Arizona's.²⁶

<http://www.latinostudies.northwestern.edu>; Latina/o Studies at Williams Coll., <http://latino-studies.williams.edu>; and Latino Studies Program at Cornell Univ., <http://latino.cornell.edu>.

20. RODOLFO F. ACUNA, *THE MAKING OF CHICANA/O STUDIES: IN THE TRENCHES OF ACADEME* (Rugters Univ. Press 2011). See Karen Umemoto, "On Strike!" *San Francisco State College Strike, 1968-69: The Role of Asian American Students*, 15 *AMERASIA* 3-41 (1989).

21. *Campus Commemorates 1968 Student-led Strike*, SF STATE NEWS (Sept. 22, 2008), <http://www.sfsu.edu/news/2008/fall/8.html> (citing to a 1981 Educ. Res. Info. Ctr. report).

22. E.g., *Journal of Black Studies*, *Journal of African American Studies*, *African American Review*, *African American Review* (formerly *Black American Literature Forum*); *Journal of Latina/o Psychology*, *Latino Studies*, *Chicano/a – Latino/a Law Review*, *Latino Journal*; *Journal of Asian Studies*, *International Journal of Asian Studies*, *Journal of East Asian Studies*. See COLOR-LINE TO BORDERLANDS: THE MATRIX OF AMERICAN ETHNIC STUDIES 103-12 (Johnnella E. Butler ed., Univ. of Wash. Press 2001).

23. SLEETER, *supra* note 16, at 6-7.

24. The Tucson Unified School District litigation is an example of the first desegregation plan approved by the court, which included an African American Studies Department and instruction in Black Studies.

25. See, e.g., Sonia R. Jarvis, *Brown and the Afrocentric Curriculum*, 101 *YALE L.J.* 1285 (1992).

26. Throughout, the term "race conscious remedies" refers to remedies that courts may order in equal protection litigation; the term "race conscious measures" refers to measures that may be constitutionally prohibited when school districts adopt them voluntarily, like student assignment plans, and measures, like ethnic studies programs, that school districts may adopt voluntarily that do not directly lead to differences in individual treatment.

Their absence may reflect a number of factors. Current national educational policy emphasizes testing and basic competency in core areas. School districts seeking to meet national standards may be deterred from pursuing more specialized or inclusive perspectives. In addition, school districts have been adversely affected by the weakness of the national economy; they have faced cuts to their resources that make it difficult to pursue ethnic studies. Further, although the rise of charter schools could facilitate an ethnic studies pedagogy or curriculum, in practice that has not developed either because of the stress on standards or because charters have opted to identify themselves in other ways, by stressing mathematics and science, for example.²⁷ The absence of ethnic studies, however, may simply reflect the Euro-white centric nature of the American educational system, and adherence to the view that there is a single, objective, neutral, correct historical (or other) narrative.

A significant benefit of ethnic studies programs to all public school students may be to offset the Euro-American bias still predominant in the primary and secondary school curriculum.²⁸ By naming, acknowledging, and celebrating the accomplishments and impact of other, marginalized groups to the dominant narrative in areas such as history, the sciences, literature, and mathematics, ethnic studies programs provide young students who are members of the marginalized group positive role models to emulate and a positive sense of cultural or ethnic identity. These positive outcomes are not based on hatred for others but on the accomplishments of individuals that are part of the group, something that the dominant racial or ethnic group enjoys by virtue of its own position in the social hierarchy. Ethnic studies benefit members of the dominant social group as well because they enrich their own understanding of the complexity of the social order, affording them a fuller, more descriptive and more accurate account of the subject. Although they began in higher education, they have been used as early as pre-kindergarten.

27. In New Orleans, a city whose public education system has become almost all charter, most of the schools have opted to emphasize a subject matter focus, like technology or science, or simply continue a traditional college prep curriculum. A list of New Orleans charter schools is available at <https://lcharterschools.org/about-charter-schools/find-a-charter-school/>. See Danielle Dreilinger, *New Orleans Could Get 5 New Charter Schools, Including Audubon Expansion*, TIMES-PICAYUNE (May 24, 2017) http://www.nola.com/education/index.ssf/2017/05/opsb_charter_rec_ommendations.html. See Andrea Gabor, *The Myth of the New Orleans School Makeover*, N.Y. TIMES (Aug. 22, 2015), <https://www.nytimes.com/2015/08/23/opinion/sunday/the-myth-of-the-new-orleans-school-makeover.html> (criticizing the functioning of the charter school system in New Orleans).

28. See generally ACUNA, *supra* note 20.

At least two types of ethnic studies program are used in primary and secondary education in the United States: programs designed for students of color and programs designed for groups that include white students.²⁹ Both kinds of programs are offered to white students and to students of color. Some programs are integrated into the curriculum and some are offered as stand-alone programs.

The primary benefit of ethnic studies programs may be to eradicate the disparities in achievement and graduation rates between black and Hispanic student populations and their white peers. Research into the effectiveness of ethnic studies programs in primary and secondary schools finds that programs that have been designed specifically for students of color have a positive impact on them, including: high levels of student engagement, improvement in literacy skills, achievement, and attitudes towards learning.³⁰ Programs that are designed for groups that include white students produce higher levels of thinking, particularly for white students.³¹ More recent research shows a causal effect between ethnic studies courses and pedagogy and improvements in academic achievements for at-risk students. The Stanford study of San Francisco public high schools found that ES participation “increased student attendance . . . by 21 percentage points, cumulative ninth-grade GPA by 1.4 grade points, and credits earned by 23 credits.”³² The results led the researchers to conclude, “participation in the course reduced the probability of dropping out in addition to possibly improving the performance of enrolled students.”³³

In institutions of higher learning, critics have claimed that ethnic studies programs are that these programs are not a rigorous enough discipline and produce weak scholarship, that they are divisive and undermine national unity, and that they are of interest only to members of the particular ethnic group.³⁴ Some might suggest that they are irrelevant or unnecessary in a

29. SLEETER, *supra* note 16, at 7–19.

30. *Id.* at 8–16.

31. *Id.* at 16–19.

32. Dee & Penner, *supra* note 6, at 3. The GPA gains were larger for boys than for girls, and were higher in math and science than in English language arts. *See also* SLEETER, *supra* note 16, at 16–19.

33. Dee & Penner, *supra* note 6, at 3.

34. *See* Evelyn Hu-DeHart, *The History, Development and Future of Ethnic Studies*, 75 THE PHI DELTA KAPPAN 50–54 (1993); Evelyn Hu-DeHart, *Ethnic Studies in U.S. Higher Education: The State of the Discipline*, 75 THE PHI DELTA KAPPAN 1, 50–54, Sept. 1993; COLOR-LINE TO BORDERLANDS: THE MATRIX OF AMERICAN ETHNIC STUDIES, *supra* note 22; *Statement on the Value of Ethnic Studies Programs*, MODERN LANGUAGE ASS'N, https://www.mla.org/statement_val_ethnic_studies.

society where race is no longer a barrier to achieving positions of power, Similar criticisms are leveled at ethnic studies programs in primary and secondary schools.³⁵ Although ethnic studies programs continue to be controversial in higher education, current legal doctrine respects the discretion and autonomy of teachers and educational institutions in higher education to make determinations as to which areas of studies they will promote or offer to their students, either under the First or Fourteenth Amendments. Academic faculties in higher education enjoy academic freedom rights, which protect the right to exercise discretion in determining how and what they teach. Universities and colleges similarly enjoy deference even when they are publicly funded, and the power of state legislatures to prescribe or proscribe curricular choices is limited.³⁶

The law applied to secondary education, however, has developed a different understanding of the discretion and autonomy teachers, school districts, and state legislatures enjoy under the First and Fourteenth Amendments. Courts have tended to circumscribe the degree of autonomy and discretion secondary education teachers enjoy, and have recognized, to some extent, the power of the state to inculcate values and proscribe and prescribe curricular choices for public schools.³⁷ When school districts make voluntary curricular choices in which race has some weight, those decisions are analyzed not under the Equal Protection Clause of the Fourteenth Amendment, but under the First Amendment. The First Amendment analysis looks at institutional speech rights, teachers' academic freedom, and students' right to know—all of which receive less protection in the school setting. As a result, the curriculum may fall prey to political processes that leave students of color vulnerable to backlash without ever violating their First Amendment rights. It becomes important, then, to examine the importance of these programs to primary and secondary education academically, and the role that they continue to play in ensuring that public schools not discriminate against students on the basis of race or ethnicity.

Recent Supreme Court opinions suggest that the Court views the United States as a society that has successfully dealt with the problem of race,

35. *Dee & Penner*, *supra* note 6, at 6–7.

36. *Grutter v. Bollinger*, 539 U.S. 306, 324–29 (2003) (“We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”) (citations omitted).

37. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bd. of Edu. v. Pico*, 457 U.S. 853 (1982); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Epperson v. Ark.*, 393 U.S. 97 (1968); *Meyer v. Neb.*, 262 U.S. 390 (1923).

viewed through the prisms of slavery and segregation, the goal at the heart of *Brown v. Board of Education* and its progeny.³⁸ For example, in the area of voting rights, a majority of the U.S. Supreme Court in *Shelby County v. Holder* concluded that continuing to require pre-clearance of certain states chosen by reference to a formula adopted in the Civil Rights era was unconstitutional because it ignored current conditions, which in the view of the Court showed that there is no widespread or flagrant discrimination by the relevant states.

A year later, in 2014, in *Schuette v. Coalition to Defend Affirmative Action*, the Court upheld a state referendum in Michigan that prohibited the use of race, sex, color, ethnicity, or national origin in public employment, public education, or public contracting.³⁹ Yet, it was the University of Michigan, the state's flagship school, which had produced the cases that led the Court to uphold the use of race as one of many factors in achieving the interest of diversity in higher education. Michigan voters, in essence, rejected the Court's earlier holding in *Grutter v. Bollinger*,⁴⁰ and thereafter adopted a state constitutional amendment that banned the University from using race conscious measures in admissions.⁴¹ In *Schuette*, a badly splintered Court upheld the constitutional amendment with no opinion drawing a majority of justices, but a majority rejecting a view of the amendment as a race-based measure that required strict scrutiny.⁴² Rather,

38. See *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612 (2013); M. Isabel Medina, *The Missing and Misplaced History in Shelby County, Alabama v. Holder – Through the Lens of the Louisiana Experience with Jim Crow and Voting Rights in the 1890s*, 33 MISS. C. L. REV. 201 (2014).

39. *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014).

40. *Grutter*, 539 U.S. 306.

41. *Schuette*, 134 S. Ct. at 1629. The Michigan Civil Rights Initiative, or Proposal 2, passed by a fifty-eight percent to forty-two percent margin on November 7, 2006.

42. *Schuette*, 134 S. Ct. at 1636–38 (Justice Kennedy joined by The Chief Justice and Justice Alito, announced the judgment of the Court in a plurality opinion that rejected application of strict scrutiny to the voter initiated ban on race-based preferences, viewing the question of whether to allow race based preferences as properly decided by the electorate rather than the judiciary.). *Id.* at 1638–39 (Roberts, C.J., concurring) (briefly addressing the dissent as “expounding its own policy preferences in favor of taking race into account” and stressing that racial preferences may do more harm than good). *Id.* at 1639–1648 (Scalia, J. & Thomas, J., concurring) (on the grounds that the Michigan voter initiative essentially provided what the text of the Fourteenth Amendment Equal Protection Clause “plainly requires” and solidly rejecting the view “that a facially neutral law may deny equal protection solely because it has a disparate racial impact”). *Id.* at 1648–1651 (Breyer, J., concurring) (on the grounds that the ban applied only to programs whose only justification was to obtain a diverse student body, that while such programs are allowed under the Constitution they are not required and that the ban reflected “decisionmaking through the democratic process” rather than through an “unelected administrative body,” a situation to be distinguished from that in the

the state here was simply exercising its power to determine that educational and other state actors would not be allowed to voluntarily use race-based preferences, even to the extent they were constitutionally valid.

To an extent, this view is the result of examining race and racism primarily or only through black/white relationships and slavery, and excluding the accounts of other racialized groups that have been the object of systematic and at times *de jure* exclusion, discrimination, and segregation: American Indians, Mexican Americans and other Hispanics/Latina/os, the Chinese, the Japanese, and other national origins that fit the label “Asian,” and other ethnic groups (for example, persons of Italian, Irish, and German origins were racialized when they first entered the United States in significant numbers⁴³).⁴⁴ This view also ignores stark reminders in daily American life of the continuing legacy of racism towards Native Americans, African Americans, and other ethnic groups throughout the life of the country.

In particular, the Court developed a view of Equal Protection law that values color-blindness or racial blindness to achieve equality. From this perspective, a statute that purports to treat all races the same (i.e., bans use of race) is the equivalent of a statute that does not, on its face, draw a racial classification (uses a factor other than race even though the factor has a disproportionate impact on different racial groups). Neither type of statute is subject to strict scrutiny. This author joins the many who have argued that a rigid constitutional norm requiring formal racial neutrality or blindness in fact perpetuates structural racial inequalities.⁴⁵ From this perspective,

Hunter-Seattle political process cases). *Id.* at 1651–1683 (Sotomayor, J. & Ginsburg, J., dissenting) (reasoning that the voter initiated ban constituted a distortion of governmental processes in a way that burdened a racial minority and thus should be subject to strict scrutiny).

43. See e.g., IAN HANEY LOPEZ, *WHITE BY LAW THE LEGAL CONSTRUCTION OF RACE* (1996).

44. 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); Delgado, *supra* note 10, at 1519–20; Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CALIF. L. REV. 1213 (1997).

45. See e.g., DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* (3D ED. 1992); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1 (1991); Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135 (1996); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Pamela S. Karlan, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111 (1983); Kimberlé

statutes that prohibit ethnic studies, with some exceptions, are not racially neutral, but instead subvert and subordinate the racial identities of individual members of nonmajority groups.

II. The Journey from *Milliken v. Bradley (II)* to *Parents Involved in Community Schools v. Seattle School District No. 1: Ethnic Studies as a Desegregation Remedy*

In *Milliken v. Bradley (Milliken II)*, the Supreme Court upheld use of ethnic studies program as one of the possible remedies that district courts could impose on public school districts found to have intentionally discriminated on the basis of race in the operation of their schools.⁴⁶ The case involved the public school system of Detroit, a school district whose student population was disproportionately black.⁴⁷ Initially the district court had ordered multi-district relief to overcome the effects of “white flight,” but the Supreme Court rejected that as a remedy, reasoning that only districts that had been found guilty of discrimination could be included in a metropolitan, multi-district remedy.⁴⁸ On remand, the desegregation plan formulated by the parties and approved by the district court included a pupil reassignment plan, but also tried to develop the strength of schools within the district to make them more attractive to students by including “compensatory programs” that provided in-service training for teachers and administrators, guidance and counseling programs, and revised testing procedures.

Also among the “compensatory components” proposed by the school board were educational components including remedial reading programs, bilingual education, and multiethnic studies, all designed “to remedy effects of past segregation, to assure a successful desegregative effort, and to minimize the possibility of resegregation.”⁴⁹ With regards to the educational components, the district court ordered that the district institute “a remedial reading and communication skills program,” with the exact contours of the program to be fashioned by the superintendent of the district.⁵⁰ The state opposed any remedy other than a pupil assignment plan.

Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); and too many other scholars to cite here.

46. *Milliken II*, 433 U.S. 267 (1977).

47. On September 27, 1974, 257,396 students were enrolled in Detroit public schools; 71.5% were black; 26.4% were white and 2.1% were other ethnic groups. *Milliken II*, 433 U.S. at 272.

48. *Milliken I*, 418 U.S. 717 (1974).

49. *Milliken II*, 433 U.S. at 274.

50. *Id.* at 275.

In upholding the district court's order, the Supreme Court applied *Swann v. Charlotte-Mecklenburg Board of Education*,⁵¹ which had recognized that to remedy racial discrimination in schools, schools had to be able to consider and use race in fashioning remedies.⁵² Ignoring race would simply perpetuate the status quo: segregated schools. The *Milliken II* Court found that the remedies ordered by the lower court were tailored to cure the unconstitutional condition, which was Detroit's *de jure* segregated school system.⁵³ The Court's opinion in *Milliken II* rested primarily on a defense of remedial programs, not multiethnic programs.⁵⁴ Remedial programs are designed to assist children who have demonstrated deficiencies in reading, writing and mathematics. But much of the reasoning affirming the use of remedial programs provided support for the use of multiethnic or ethnic programs. Thus, the Court quoted, with approval, from a decision stating that "specific educational programs designed to compensate minority group children for unequal educational opportunities resulting from past or present racial and ethnic isolation" were appropriate remedies.⁵⁵

In the post-*Milliken II* years, district courts presided over a substantial number of desegregation cases. The goal of desegregation litigation, as the Court previously stated, was to have public school districts achieve unitary status.⁵⁶ In 1968, in *Green v. County School Board*, the Court held that Virginia's "freedom of choice" plan was not an adequate remedy for operating a dual system of education—one for whites and one for blacks. The "ultimate end to be brought about" as a result of *Brown* was "a unitary, nonracial system" of public education," consistent with "good faith compliance" by school officials "at the earliest practicable date."⁵⁷ The program left it to parents to choose which school to attend; school authorities did not use race in assigning students to school. In this sense, the plan was the perfect race neutral "remedy." After three years in operation, the plan had failed at dismantling the racially segregated public school system and instead had shifted the burden of desegregation from school authorities to parents. Virginia had to "come forward with a plan that promise[d]

51. *Swann v. Charlotte-Mecklenburg Bd. Of Edu.*, 402 U.S. 1 (1971).

52. *Id.* at 25.

53. *Milliken II*, 433 U.S. at 282.

54. *Milliken II*, 433 U.S. at 285–87.

55. *Id.* at 285–86. Justice Powell in his concurring opinion references the multi-ethnic studies program as one of the approved remedies.

56. *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

57. *Green*, 391 U.S. at 436–37.

realistically to work . . . now.”⁵⁸ *Green* implicitly recognized that school authorities had to take race into account in student admissions, in order to undo the decades of racism and segregation. *Green* identified several factors for schools districts and courts to examine: composition of student bodies, faculty, staff, transportation, extracurricular activities, and facilities.⁵⁹

In *Swann v. Charlotte-Mecklenburg Board of Education*, the Court addressed the scope and form of equitable remedies available to school districts found to have intentionally discriminated on the basis of race.⁶⁰ The plan at issue in *Swann* included student assignment plans and school attendance zones to achieve greater racial balance; racially mixed faculties and administrative staffs; and busing to facilitate the changes in attendance zones. Equitable powers, the Court noted, are about “flexibility, rather than rigidity.”⁶¹ The remedial power of the court, however, was limited by the nature of the constitutional violation. Not so restrained, the school district decided:

School authorities are traditionally charged with broad power to formulate and implement educational policy, and might well conclude, for example, that in order to prepare students to live in a pluralistic society, each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court. As with any equity case, the nature of the violation determines the scope of the remedy. In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system.⁶²

School authorities had to eliminate invidious racial distinctions operating throughout the school system. Courts were free to use their equitable powers, moreover, to achieve desegregation of school faculties and student populations, and to use racial ratios (not quotas) to achieve unitary status in cases where a constitutional violation had been established. Courts and school districts, thus, could consider race in student and faculty

58. *Green*, 391 U.S. at 439.

59. *Id.* at 435.

60. *Swann v. Charlotte-Mecklenburg Bd. of Edu.*, 402 U.S. 1 (1971).

61. *Id.* at 15.

62. *Swann*, 402 U.S. at 16.

assignment to dismantle a racially discriminatory system, and establish and maintain a unitary system. School districts could, as a matter of policy, regardless of whether there had been a constitutional violation, decide that “in order to prepare students to live in a pluralistic society, each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole.”⁶³

Milliken I, however, reigned in any effort by states to devise multi-district remedies to thwart the impact of “white flight” (the abandonment of public schools or innercity school districts by white families) and highly segregated neighborhoods and districts. *Milliken II* instructed districts to focus on improvement of schools and the school district itself, rather than on attempts to have racially balanced schools, a goal impossible to attain in a school district with a ninety percent single-race student body population. Notwithstanding the limits on the permissible remedies allowed under *Milliken I*, and the difficulties of establishing that segregated school districts were segregated as a result of intentional conduct by state or local authorities (in states where segregation was not mandated by law), by the 1980s, the efforts to desegregate public schools had resulted in significant gains in racial integration.⁶⁴ Ethnic studies programs fit the *Milliken II* remedy mold: they were race conscious in that they were designed to assist students from ethnic minorities to succeed academically, but they could be offered to all students, with benefits to both white students and students of color.

Increasingly, however, the Court expressed concern over the length of time federal district courts were exercising control over public school districts traditionally controlled by local public authorities and states.⁶⁵ In the 1990s, the Court signaled to school districts and federal courts overseeing desegregation cases that desegregation injunctions were not intended to operate in perpetuity. In *Board of Education v. Dowell*, the Court, in a 5-3 decision (one Justice did not participate), instructed federal district courts

63. *Swann*, 402 U.S. at 16.

64. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 805 (2007) (Breyer, J., dissenting). Between 1968 and 1980, the number of black children attending a school where minority children constituted more than half of the school fell from 77% to 63% in the nation (from 81% to 57% in the South) but then reversed direction by the year 2000, rising from 63% to 72% in the nation (from 57% to 69% in the South). Similarly, between 1968 and 1980, the number of black children attending schools that were more than 90% minority fell from 64% to 33% in the nation (from 78% to 23% in the South), but that too reversed direction, rising by the year 2000 from 33% to 35% in the nation (from 23% to 31% in the South).

65. *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467 (1992); *Bd. of Edu. v. Dowell*, 498 U.S. 237 (1991); *Missouri v. Jenkins*, 495 U.S. 33 (1990); *Pasadena City Bd. of Edu. v. Spangler*, 427 U.S. 424 (1976).

that school districts could be declared to have achieved unitary status when they had complied in good faith with the desegregation decree and when the vestiges of past discrimination had been eliminated to the extent practicable.⁶⁶ In *Freeman v. Pitts*, the Court went further and held that school districts could achieve unitary status incrementally.⁶⁷ And the Court's ruling in *Missouri v. Jenkins* appeared to abandon the primary objective of *Brown v. Board of Education* when it admonished courts to "bear in mind that its end purpose is not only 'to remedy the violation' to the extent practicable, but also 'to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.'"⁶⁸ In *Missouri v. Jenkins*, a 5-4 majority rejected remedies designed to reverse the effect of "white flight," and make innercity public schools more attractive to white and more affluent families through the use of some of the remedies approved in *Milliken II*. That districts were operating single race schools that looked and operated in ways similar to pre-*Brown* days became constitutionally valid.

In the next decades, courts found numerous school districts achieved unitary status, and released them from court supervision.⁶⁹ Some school districts sought to maintain the gains achieved by desegregation remedies, by maintaining some of the race conscious measures adopted to achieve more integrated schools. In other contexts, like the awarding of government contracts and employment, the Court had abandoned distinguishing between invidious racial measures and benign racial measures; both were to be subjected to strict scrutiny when used by government entities.⁷⁰ Thus, affirmative action measures were to be treated as the equivalent of the kind of invidious racism, premised on adherence to white supremacy, that justified the racial segregation declared "inherently unequal" in *Brown*.⁷¹

66. *Dowell*, 489 U.S. at 247-50.

67. *Freeman*, 503 U.S. at 485-92.

68. *Jenkins*, 515 U.S. at 102 (citing *Freeman*, 503 U.S. at 489).

69. The Honorable George B. Daniels and Rachel Pereira, *May It Please the Court Federal Courts and School Desegregation Post-Parents Involved*, 17 U. PA. J. CONST. L. 626 (2015) (reporting on twenty-four motions for unitary status in twenty-three school districts since *Parents Involved*, with the majority of districts prevailing on unitary status and noting their impact, if any, on graduation rates. The Tucson district, discussed in Judge Daniels' piece, had been denied unitary status in part because of its lack of good faith commitment due to the persistent disparities in student achievements). *Id.* at 662.

70. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

71. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

Governmental entities seeking to use race conscious measures would have to establish that the race conscious measures were necessary to accomplish a compelling interest. The contracting cases made clear that remedying specific, identifiable, racial discrimination in a specific area would constitute a compelling interest, but that other goals of race conscious measures, such as maintaining a racially or ethnically diverse workforce, in the absence of invidious intent to discriminate, were not sufficient. Race conscious measures of any kind came under sharp attack with some states adopting outright prohibitions on any use of race in a variety of contexts including admissions to educational institutions.⁷²

To some extent, the modern Court continued to recognize the constitutional validity of diversity and race conscious measures in the context of higher education. Institutions of higher learning could seek to recruit and maintain a diverse student body because they enjoyed substantial discretion in making decisions about their educational mission and admissions.⁷³ In *Grutter v. Bollinger*, the Court noted:

We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy: “The freedom of a university to make its own judgments as to education includes the selection of its student body.” From this premise, Justice Powell reasoned that by claiming “the right to select those students who will contribute the most to the ‘robust exchange of ideas,’” a university “seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission.”⁷⁴

72. California adopted Proposition 209 in 1996, which banned consideration of race or ethnicity in education, employment, and contracting. See Mario L. Barnes et al., *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After Fisher v. University of Texas*, 62 UCLA L. REV. 272 (2015).

73. *Grutter*, 539 U.S. 306 (2003). See *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013) [*Fisher I*]; *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198 (2016).

74. *Grutter*, 539 U.S. at 329. See also *Fisher I*, 133 S. Ct. 2411.

As Rachel Moran has noted, only in higher education has the Court's approach to racial equality "evolved from colorblindness to diversity."⁷⁵ Primary and secondary public school systems do not traditionally exercise much discretion in student admissions. Most public school systems are required to admit all students who are in the system.⁷⁶ But the principle embodied in the recognition that racial and ethnic diversity served a compelling interest for the educational institutions in the *Grutter* and *Gratz* cases, suggesting that the interest would be even more compelling for primary and secondary public educational institutions since they teach students during their most formative years, when their attitudes towards issues of race and ethnicity might be more easily affected by being exposed to a racially and ethnically diverse student body. The *Grutter* court recognized that having a more diverse student body fostered "'cross-racial understanding,' [which] helps to break down racial stereotypes, and enables '[students] to better understand persons of different races.'"⁷⁷ The Court had noted the reports that showed that "the skills needed in today's increasingly global workplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."⁷⁸

In *Parents Involved in Community Schools v. Seattle School District No. 1*,⁷⁹ a plurality of Justices rejected the idea that public schools had a compelling interest in student diversity that justified even minimally race conscious measures.⁸⁰ Justice Kennedy's concurring vote, necessary for a majority on the issue, made clear that in his view achieving student diversity might justify some race conscious measures and that "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue."⁸¹ Four dissenting justices would have recognized

75. Rachel Moran, *Symposium: The School Desegregation Cases and the Uncertain Future of Racial Equality: Rethinking Race, Equality, and Liberty: The Unfulfilled Promise of Parents Involved*, 69 OHIO ST. L.J. 1321, 1342 (2008). The other area where some race consciousness appears to be constitutionally accepted is in the context of districting—as long as race is not the predominant factor; legislatures or other entities engaged in the drawing of political districts may consider race as one of many factors.

76. Charter schools, on the other hand, may exercise discretion in admissions. Public school systems that rely on charter schools that are allowed to exercise discretion in admissions may be more analogous to the institutions of higher education examined in *Grutter v. Bollinger*, *Gratz v. Bollinger*, and *Fisher v. Univ. of Texas at Austin*.

77. *Grutter*, 539 U.S. at 330.

78. *Id.* at 330–31.

79. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

80. *Parents Involved*, 551 U.S. at 783 (Kennedy, J. concurring).

81. *Id.* at 788.

student diversity as a sufficient interest to justify the use of race conscious measures; thus, five justices recognized the constitutional validity of a school district's need to achieve student diversity. However, the specific measures pursued by the school districts before the Court, student transfer and assignment policies that used race in addition to other factors, a different majority of justices concluded, were not narrowly tailored and thus were unconstitutional.

Justice Kennedy's concurrence left some uncertainty as to how public school districts might be allowed to use race or ethnicity in achieving diversity. Too much of the school district's decision-making was "broad and imprecise."⁸² However, Justice Kennedy cautioned, the plurality's conclusion that "the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools . . . is . . . profoundly mistaken."⁸³ School districts could use some race conscious measures. Justice Kennedy's criteria distinguished between race conscious measures that allow or result in the different treatment of individuals, like the student assignment plans at issue in the case, and race conscious measures that do not lead to differences in individual treatment, like decisions about where to build schools and line-drawing for enrollment zones.

In the administration of public schools . . . it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition. If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.

School boards may pursue . . . [diversity] . . . through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells

82. *Parents Involved*, 551 U.S. at 788 (Kennedy, J. concurring).

83. *Id.* at 788–89.

each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.⁸⁴

Very few race conscious measures of the type that school districts were using to maintain integrated or at least racially balanced schools would survive Justice Kennedy's criteria. However, ethnic studies programs seemed precisely to fit the kind of special policy or program identified in Justice Kennedy's concurring opinion in *Parents Involved in Community Schools v. Seattle School District*⁸⁵ as a race conscious measure that school boards could pursue.⁸⁶

Ethnic studies do not lead to decisions about individual students based on their racial or ethnic identity. They do not place burdens or disadvantage students on the basis of a racial or ethnic classification.⁸⁷ In fact, they may be one of few constitutionally valid race conscious mechanisms left available to school districts to proactively promote diversity. Simply acknowledging and identifying a group's racial or ethnic identity does not reduce individual identity to its racial or ethnic component. Instead, acknowledging and celebrating differences is likely to promote better understanding and communication between all students. That truth-telling about race may also lead to discomfort, grief and, perhaps, accountability, does not justify prohibiting the race talk. Instead, it is integral to addressing racism, particularly in a society that has passively accepted as valid racially segregated public (and private) schools.

III. Tucson's Ethnic Studies Program and Desegregation Litigation

The Tucson Unified School District ("TUSD") litigation is typical of desegregation litigation: lengthy, complicated, with frequent involvement by courts.⁸⁸ In 1974, African-American elementary and secondary school students (the *Fisher* plaintiffs) sued the Tucson District for operating racially segregated schools,⁸⁹ and Mexican-American elementary and secondary

84. *Parents Involved*, 551 U.S. at 789 (Kennedy, J. concurring).

85. *Id.* at 701.

86. *Id.* at 789 (Kennedy, J., concurring in part). Justice Kennedy does not refer expressly to ethnic studies programs as an example of a valid race conscious measure.

87. *Id.*

88. Docket, No. 4:74-cv-00090-DCB, D. Ariz. (available on Pacer and on file with author) (120-page docket as of 1/30/2017 with 1986 entries including filings of multiple parties, multiple fee request adjudications, and budget considerations).

89. *Fisher, et al. v. Lohr, et al.*, Civ. 74-90-TUC-WCF, (May 24, 1974 Dist. of Ariz.).

school students (the *Mendoza* plaintiffs) sued the district in another action.⁹⁰ Both cases were granted class action status and consolidated in 1975. The district court approved a desegregation plan in 1978, which was affirmed by the U.S. Court of Appeals for the Ninth Circuit in 1980.⁹¹

In challenging the school district, the *Mendoza* plaintiffs alleged that the district had maintained a tri-ethnic segregated school system; discriminatory tracking; inferior curricula and facilities for minorities; discrimination in the hot lunch program; discrimination in special education program; failure to take into account linguistic differences; and lack of bilingual notices.⁹² Prior to the settlement the claims involving inferior curricula and facilities, discrimination in the lunch program, and lack of bilingual notices were dismissed. The claims involving discriminatory tracking, discrimination in special education programs, and failure to take into account linguistic differences were severed and stayed because of an agreement between the District and the United States to remedy these problems.⁹³

After discovery and trial, the district court found that the school district had “failed to dismantle its former dual school system for Blacks and non-Blacks, and had continued since 1954 to discriminate against Black elementary and junior high school students.”⁹⁴ The court, however, found that the District had not operated a dual school system with respect to Mexican-American students and that the District had not engaged in a system-wide practice of intentional discrimination against Mexican Americans.⁹⁵ The court found that nine schools in the District “suffered current effects of the past intentionally segregative acts of the School District,” and ordered the District to prepare a desegregation plan.⁹⁶ The plan eventually adopted provided for desegregation of the nine schools, immediate integration of three additional schools, required the District to work with parents to determine future school assignment policies, eliminated discrimination in faculty assignments, training, and policies on testing and discipline, and provided for program improvements, progress reports, and oversight.⁹⁷

90. *Mendoza, et al. v. TUSD, et al.*, CIV 74-204 TUC WCF (October 11, 1974 Dist. of Ariz.).

91. *Mendoza v. United States*, 623 F. 2d 1338 (9th Cir. 1980).

92. *Id.* at 1341.

93. *Id.* at 1341–42.

94. *Mendoza*, 623 F.2d at 1341.

95. *Id.* at 1341–42.

96. *Id.*

97. *Mendoza*, 623 F.2d at 1342.

In the 1990s, parents of students at the Tucson High Magnet School sued challenging the adequacy of programs and facilities available to minority students.⁹⁸ When the District requested closure of one of its most successfully integrated high schools located in the center of the city and construction of a new high school in the city's southwest, the court denied permission to close the school, finding that closing the school would substantially increase minority enrollment in some of the District's other predominantly minority schools and eliminate the "District's only ethnically-balanced high school."⁹⁹

The litigation intensified in 2005 when the District sought unitary status and termination of federal oversight over its desegregation plan.¹⁰⁰ The court noted continuing gaps between achievement of the District's minority students and white students and problems experienced by the plaintiff class in securing the assistance of counsel. In order to achieve unitary status, the TUSD had to establish that it had complied to the extent practicable with the desegregation decree since entered, that it had eliminated the vestiges of past illegal discrimination to the extent practicable, that its compliance was in good faith and that it had a good faith commitment to maintaining the TUSD as a nondiscriminatory system.¹⁰¹ The district court's review of the TUSD's petition for unitary status focused primarily on student assignment and student transfer policies as outlined in *Parents Involved*.¹⁰² Although the TUSD schools consisted of schools that were for the most part de facto segregated and majority-minority schools, the district court declared its goal to be to "return the TUSD schools to the state because oversight and control will be more effectively placed in the hands of the public with the political system at its disposal to address any future issues."¹⁰³ Nonetheless, the court determined it was not yet able to declare the TUSD in unitary status but requested further filings by the parties on student assignment policies and post-unitary policies and provisions. Ultimately, the district court found that the TUSD had "failed to act in good faith in its ongoing operation of the District under the Settlement Agreement" and "to monitor, track, review and analyze the ongoing effectiveness of its programmatic changes to achieve desegregation to the extent practicable or 'at least' not exacerbate the racial

98. *Fisher v. Lohr*, 821 F.Supp. 1342 (D. Ariz. 1993) (referring to *Underwood v. Tucson Unified School District*).

99. *Id.* at 1345 (D. Ariz. 1993).

100. *Fisher*, 502 F.Supp. 2d at 1034 (D. Ariz. 2006).

101. *Dowell*, 498 U.S. at 249–50; *Freeman*, 503 U.S. at 491; *Green*, 391 U.S. at 435–38.

102. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

103. *Fisher v. United States*, 2007 U.S. Dist. LEXIS 61679, at *43 (D. Ariz. Aug. 21, 2007).

imbalances that exist in the District.”¹⁰⁴ Notwithstanding its finding of the TUSD’s lack of good faith—which under the *Green/Freeman/Dowell* test should have led the court to deny the petition—and its finding a number of failures in the TUSD’s implementation of the original decree, the court granted the TUSD’s petition for unitary status, on the condition that the TUSD file a Post Unitary Plan for the court’s adoption, on the reasoning that the plan “can be monitored by the public, without the assistance of experts, the judiciary or even counsel.”¹⁰⁵ The court’s order was reversed on appeal in 2011 and the case remanded to the district court to maintain jurisdiction until TUSD demonstrated that it is in good faith compliance with the Post-Unitary Plan over the course of a reasonable period of time.¹⁰⁶

Tucson’s Mexican American Studies curriculum came about as a result of the litigation. The 1980 Settlement Agreement included provisions for an African American Studies Department (“AASD”), housed in the TUSD’s Multicultural Education Department, and provisions for instruction in Black Studies. One of the programs adopted was Black Awareness Education, “to help TUSD staff, students, and the community, gain knowledge and understanding of the Black student’s historical and cultural background from a positive perspective.”¹⁰⁷ In 1976, the TUSD had established a Native American Studies Department. In the 1990s, the AASD was reconceptualized to serve the entire student body.¹⁰⁸ In 1998, the TUSD established a Mexican American/Raza Studies (or Hispanic Studies) and a Pan Asian Studies department.¹⁰⁹ In 2004, the four ethnic departments in the TUSD were brought back together under the Multicultural Education Department “to increase cultural proficiency and to focus efforts on increasing academic achievement for minority students and ‘working to eliminate the over-representation of minority students in drop out,

104. *Fisher v. United States*, 549 F.Supp. 2d 1132, 1134 (D. Ariz. 2008), *rev’d and remanded sub nom.* *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131 (9th Cir. 2011).

105. *Id.* at 1167.

106. *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131 (9th Cir. 2011).

107. *Fisher*, 549 F. Supp. 2d at 1157.

108. *Id.* at 1158–59.

109. *Id.* at 1161, n.31. In the ethnic studies litigation, the Ninth Circuit, on appeal, found the fact that the MAS program had first been developed in 1998, ten years before Tucson’s Post Unitary Status Plan, meant that it was not designed to remedy past discrimination, at least in the context of the Post Unitary Status Plan. *Arce v. Douglas*, 793 F.3d at 973, 980–81 n.7. This finding led the court to reject an argument that the state’s ethnic studies ban substantially interfered with the desegregation decree, or “the plaintiffs’ ability to seek relief through the PUSP.” In essence, the Ninth Circuit appears to have been telling the Arce plaintiffs to seek relief in the desegregation litigation.

absenteeism, suspension, and expulsion rates.”¹¹⁰ In the context of Hispanic students, the TUSD’s provisions at the time left them substantially underserved, as the court recognized:

In 2004, AASD [African American Studies Department] had twenty-one staff members, Native American Studies had sixteen staff members, Mexican American/Raza Studies had eight staff, and Pan Asian Studies had five staff members. AASD was serving 20 to 30% of the Black student population, which by 2003-04 was approximately 6.7% of the total student body. (D’s Memorandum at 33.) Even with AASD serving approximately 5% of the Hispanic student population, it is unimaginable that the eight-staff Mexican American/RAZA Studies department would be capable of serving the 30,118 Hispanic students. While the Settlement Agreement did not expressly require such service, the annual reports reflect the District’s own undertakings broadened the scope of its obligations to reach all minority students not just African American students.¹¹¹

The TUSD’s student population had changed dramatically in the almost four decades of litigation—Hispanics had become the largest ethnic student group in the TUSD. By 2011, the TUSD enrolled 52,987 students, 60% Hispanic, 24% White/Anglo, 5.6% African American, 3.9% Native American, 2.6% Asian American, and 2.4% multiracial.¹¹²

Accordingly, the Post-Unitary Plan, developed by TUSD in its effort to gain unitary status and adopted in 2009, expanded the Mexican-American Studies (MAS) program.¹¹³ The program primarily consisted of course offerings at the secondary level in American history/Chicano perspectives; American government/social justice education project; English/Latino literature, and Mexican-American studies courses at the middle and elementary school level.

The program also provided for teacher continuing education; student, parent, and community involvement focused on facilitating communication between schools and parents, surveying student population to monitor and adjust the course offerings and monitoring the percentage of students of low

110. *Fisher*, 549 F. Supp. 2d at 1161. (citation omitted).

111. *Id.* (citations omitted).

112. Cambium Report, *supra* note 1, at 5.

113. TUSD Unified School District Post-Unitary Status Plan, Exhibit B to Plaintiffs’ Motion for Summary Judgment, *Acosta v. Huppenthal*, No.2013 U.S. Dist. LEXIS 37408 (D. Ariz. 2013), No. CV 10-623 TUC AWT, filed 10/21/11, D. Ariz., at 31–33.

socioeconomic status engaged in the courses to ensure recruitment, achievement and retention of disadvantaged students; and ensuring equitable representation of Hispanic students, through review, continued development of resources, and other activities to attain equitable representation of Hispanic students in Advanced Placement courses. The plan also provided for continuation of the African American Studies Department.¹¹⁴

TUSD's MAS program offerings were open to all students. At the time of the enactment of the ethnic studies ban, it was part of the Post-Unitary Plan that the Ninth Circuit Court of Appeals subsequently ordered in 2011 be monitored by the district court to determine whether the school district could be declared in unitary status because it had demonstrated good faith compliance with the plan. The district court had appointed a Special Master to develop a Unitary Status Plan in fall 2011, and the Special Master had begun work with the parties on the plan. In the meantime, the district remained subject to the existing Post Unitary Status Plan.¹¹⁵

IV. Arizona's Prohibition of Ethnic Studies: Context Matters¹¹⁶

In 2010, Arizona's legislature enacted its prohibition of ethnic studies, HB 2281,¹¹⁷ in the same legislative session that produced SB 1070, targeting undocumented immigrants and immigration activities, parts of which were struck down on preemption grounds by the Supreme Court in *Arizona v. United States*.¹¹⁸ The bill banning ethnic studies was spearheaded by the state Superintendent of Public Instruction, Thomas C. Horne, who at the time simultaneously was running for the Republican nomination for state attorney general. Mr. Horne publicly declared his target to be the ethnic studies curriculum at Tucson Unified School District.¹¹⁹ In 2007, Mr. Horne had

114. TUSD Unified School District Post-Unitary Status Plan, Exhibit B to Plaintiffs' Motion for Summary Judgment, *Acosta v. Huppenthal*, No.2013 U.S. Dist. LEXIS 37408 (D. Ariz. 2013), No. CV 10-623 TUC AWT, filed 10/21/11, D. Ariz., at 33.

115. The United States' Opposition to the State of Arizona's Motion for Intervention, No. 74-90 TUC DCB (May 24, 2012), at 4.

116. *Grutter*, 539 U.S. at 327 ("Context matters when reviewing race-based governmental action under the Equal Protection Clause.").

117. H.B. 2281, 49th Leg., 2nd Sess. (Az. 2010).

118. *Arizona v. United States*, 132 S. Ct. 2492 (2012).

119. Mary Jo Pitz, *Arizona Bill Targets Ban on Ethnic Studies*, ARIZ. REPUBLIC (May 1, 2010) <http://www.azcentral.com/arizonarepublic/local/articles/2010/05/01/20100501arizona-bill-bans-ethnic-studies.html>. The account of these events is based on the district and appellate court opinions, the full court record, and on testimony introduced at the trial of the case held June 26 through July 21, 2017. The trial transcripts are available at <https://law.seattleu.edu/centers-and-institutes/korematsu-center/litigation/arizona-ethnic-studies-case>.

issued an open letter to the citizens of Tucson that the MAS program should be terminated.¹²⁰ Horne was responding to an incident involving a student walkout to a political speech by Margaret Garcia Dugan, the Deputy Superintendent of Public Education for Arizona.¹²¹ In 2006, Dolores Huerta, an activist with the United Farm Workers, delivered a speech to Tucson High students at a school assembly in which she stated that “Republicans hate Latinos.”¹²² After the talk, students were allowed to ask questions of Ms. Huerta. In response to the Huerta remark, Mr. Horne accompanied his Deputy Superintendent Margaret Dugan to Tucson High, so that Dugan could speak to Tucson High students.¹²³ This time, students were not allowed to ask questions. In response, some students taped their mouths shut, turned their backs, raising their fists, and walked out on the speech.¹²⁴ This incident appears to have provoked Mr. Horne into his efforts, both legislative and administrative, to terminate the Tucson MAS program.¹²⁵ In this endeavor he was joined by fellow Republican state senator John Huppenthal, one of the sponsors of SB1070, and the person elected to follow Mr. Horne as superintendent of education for Arizona. In 2014, Mr. Horne lost his bid for re-election and was investigated for campaign improprieties.

HB 2281 originally prohibited only classes that “are designed primarily for pupils of a particular ethnic group” or that “advocate ethnic solidarity instead of the treatment of pupils as individuals.”¹²⁶ Subsequently, legislators amended the bill to remove these two provisions and instead add two provisions prohibiting classes promoting the overthrow of the U.S. government and promoting resentment towards a race or class of people.¹²⁷ Subsequently, those provisions were reintroduced and enacted into law.¹²⁸

The statute set out as a policy goal the deterrence of racial resentment or hatred. The statute’s declaration of policy stated: “[t]he legislature finds and declares that public school pupils should be taught to treat and value

120. Cambium Report, *supra* note 1, at 11.

121. *Arce v. Douglas*, 793 F.3d 968, 974 (9th Cir. 2015).

122. *Gonzalez v. Douglas*, No. CV 10-623 TUC AWT, Memorandum of Decision, D. Az. August 22, 2017 at 4.

123. *Id.* at 5.

124. *Id.*

125. *Arce*, 793 F.3d at 974–75.

126. H.B. 2281, 49th Leg., 2nd Reg. Sess. (Az. 2010).

127. Defendants’ Ex. 512 and Testimony of Mark Anderson, Tr. (July [sic June] 28, 2017) at 29. Testimony at trial made it clear that these two provisions would not make it easy to eliminate the MAS program so the original provisions were restored.

128. ARIZ. REV. STAT. § 15-112 (A) (2011).

each other as individuals and not be taught to resent or hate other races or classes of people.”¹²⁹ The statutory goal was achieved by prohibiting classes that: “(1) Promote the overthrow of the U.S. government[;] (2) Promote resentment toward a race or class of people[;] (3) Are designed primarily for pupils of a particular ethnic group[;] (4) Advocate ethnic solidarity instead of the treatment of pupils as individuals.”¹³⁰

Exempted from the prohibition were:

- (1) Courses or classes for Native American pupils that are required to comply with federal law;
- (2) The grouping[s] of pupils according to academic performance, including capability in the English language, that may result in a disparate impact by ethnicity;
- (3) Courses or classes that include the history of any ethnic group and that are open to all students, unless the course/class violates subsection A;¹³¹
- (4) Courses or classes that include discussion of controversial aspects of history.¹³²

A special provision addressed study of the Holocaust and genocide:

Nothing in this section shall be construed to restrict or prohibit the instruction of the Holocaust, any other instance of genocide, or the historical oppression of a particular group of people based on ethnicity, race, or class.¹³³

The State Board of Education or Superintendent of Public Instruction determines whether a school district violates the statute. The school district has sixty days to comply. If the school district does not comply the state withholds up to ten percent of monthly apportionment of state aid.

The statute, then, expressly regulated race and ethnicity, which under established constitutional norms, generally would require application of strict scrutiny.¹³⁴ The statute, on its face, exempted certain racial or ethnic

129. ARIZ. REV. STAT. § 15-111 (2011).

130. ARIZ. REV. STAT. § 15-112 (A) (2011).

131. Subsection A contains the prohibited courses including those that teach resentment or hatred and that are designed for “a particular ethnic group.”

132. ARIZ. REV. STAT. § 15-112(E) (2011).

133. *Id.*

134. *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

groups, like certain classes for Native Americans and classes about the Holocaust, thus, on its face the statute treated certain racial or ethnic groups differently than others. The stated policy goal was to deter racial hatred or resentment by teaching students to treat each other as individuals, rather than teaching students “to hate other races or classes of people.” But the statute, read as a whole, made it clear that the kind of classes prohibited by the statute could result in the prohibition of traditional courses, including courses that discussed controversial aspects of history; thus, the provision for the exemptions. Rather than provide for a curriculum to teach students about group stereotyping, the statute prohibited as a general matter courses designed primarily for pupils of a particular ethnic group, something that *Parents Involved* suggested was one of the race conscious measures available to public schools to support school diversity. The statute also prohibited classes that advocate ethnic solidarity instead of the treatment of the pupils as individuals. The statute, however, did not explain why or how prohibiting the advocacy of ethnic solidarity, as opposed to any other kind of group solidarity, something that was long a part of the American political tradition, was harmful or would impair the treatment of pupils as individuals. In this sense, its use of language is reminiscent of “newspeak” in Orwell’s *1984*—group solidarity is treated as being synonymous with elimination of the individual, and ethnic identity is treated as a way to silence the individual rather than as a fundamental part of individual identity.

Teaching students to treat each other as individuals doesn’t foreclose exploration or acknowledgment of group racial or ethnic identity—other provisions in the statute explicitly acknowledged this. For example, the provision exempting instruction of “the historical oppression of a particular group of people based on ethnicity, race, or class,”¹³⁵ is precisely what the MAS program at Tucson appears to have been exploring. In fact, treating individuals as individuals, without acknowledging that their individual identity reflects their membership in a particular racial or ethnic group is significant because society has historically and traditionally rendered that aspect of their identity as the defining and material trait, perpetuates inferiority and subordination of that racial or ethnic group. Thus, the stated policy goal reflected a lack of awareness and sensitivity to the ways in which racial and ethnic identity is part of individual identity.

Moreover, the statute viewed treating individuals as individuals as being what is necessary to eliminate racism. Yet, it is possible to treat individuals as individuals in a racist manner, and it is possible to act in ways

135. ARIZ. REV. STAT. § 15-112 (F) (2011).

that are injurious to individuals who possess a racially or ethnically identifiable trait without engaging in racial hatred or resentment. Much of the reasoning used in the Confederate South rejected the idea of “racial hatred or resentment” and instead considered individual members of a particular race inferior to the dominant race, which in their view justifiably denied them autonomy over their lives. This same kind of thinking, rather than hatred or resentment, was used to justify denying women autonomy and integrity in their lives. The logic reflected in the statute’s purpose was flawed.

Moreover, the statute reflected internal inconsistencies that rendered it irrational. For example, the prohibitions against classes that “promote resentment toward a race or class of people” and “advocate ethnic solidarity” were directly in contradiction with the exception provided for classes studying the “Holocaust . . . genocide . . . or the historical oppression of a particular group of people based on ethnicity, race, or class.”¹³⁶ The most glaring exemption missing from the Arizona statute was an exemption for slavery, segregation and Jim Crow, and African-American studies, something that had been part of the original desegregation agreement in the Tucson desegregation litigation. That the Arizona legislature opted to specifically include the Holocaust—initiated and implemented by Nazi Germany primarily in Europe—but omitted any reference to slavery and segregation in the United States, plainly evinces a willingness to ignore or acknowledge U.S.-based racial or ethnic oppression. The statute also expressed a preference for classes about certain ethnic or racial groups, but silenced others.¹³⁷ Even some of the preferred groups, like Native Americans, are preferred in a way that denies them autonomy and self-identification, outside of the narrow confines of tribal reservations: Classes for Native Americans are allowed if they “are required to comply with federal law.”¹³⁸

The statutory language also created external inconsistencies. The state’s overall educational goals were to educate students to develop and exercise critical thinking skills and achieve comprehensive subject matter mastery.¹³⁹ Given the uncontroverted evidence that all students tended to improve performance when participating in classes “designed primarily for pupils of a particular ethnic group,” the statutory language strongly

136. ARIZ. REV. STAT. § 15-112 (2011).

137. *Id.*

138. *Id.*

139. *See e.g.*, ARIZONA GOVERNOR, OFFICE OF EDUCATION, <https://education.azgovernor.gov/edu/strategic-goals> (last visited Sep. 28, 2017).

suggested that the stated justifications were pretextual in nature, and that the state legislature intended to silence narratives that reflected a different racial or ethnic perspective.

Assuming for the moment that students could be taught to see the world as made up of individuals whose merits must be assessed acontextually—without reference to traits that have historically been assigned value like race, color, national origin, or ethnicity—the methodology adopted by Arizona to accomplish this goal was not only unlikely to accomplish the goal, but was actually designed to frustrate it. Celebrating the accomplishments or uniqueness of a particular ethnic heritage does not automatically generate hatred; ethnic studies and race consciousness in the curriculum enhances and promotes unity by valuing various aspects of identity, including one’s racial or ethnic identity.¹⁴⁰

Facially, the statute and the legislative record make clear that it was not neutral with regards to race or ethnicity: It used race and ethnicity as the defining characteristics to bring a course or academic program within its reach. Yet, it provided exemptions for certain racial or ethnic groups. Plainly, the statute raised First Amendment concerns because it banned certain types of speech, curriculum, and education, but its targeting of ethnic solidarity and ethnic group identity raised serious Equal Protection concerns as well, so as to justify the application of strict scrutiny. Particularly because First Amendment law has evolved in ways that substantially reduce the level of protection available to students and teachers and increases the level of deference courts give to administrative or state choices over curriculum, Equal Protection doctrine should continue to protect students of different races and ethnicities from being targeted or discriminated against through curricular choices that result from political processes born out of animus rather than legitimate educational decision-making.

V. The Arizona Statute as Applied

Arizona’s actions made clear its intended target. Still serving as State Superintendent, Horne applied the statute promptly to sanction only the MAS program at Tucson Unified School District No. 1. Mr. Horne issued findings on December 30, 2010 (one day before the statute went into effect and his last day in office as superintendent) that the TUSD was in violation

140. See Delgado, *supra* note 10, at 1543–46 (discussing political scientist Charles Taylor’s theory of recognition and the “right to have others recognize you as you are or, at any rate as you wish to be taken and seen”).

of A.R.S. § 15-112,¹⁴¹ notwithstanding that it was at the time part of the Post Unitary Status Plan, which had been approved by the court in the desegregation litigation.

In his findings, Mr. Horne stated that he drafted HB 2281 with the TUSD MAS program in mind because, in his view, the MAS program was in violation of all of the provisions in § 15-112(A), and thus that only elimination of the program would cure the violation.¹⁴² The findings gave the TUSD sixty days to eliminate the courses and notified it that failure to do so would subject it to having ten percent of its budget withheld, as provided for in the statute.¹⁴³ Shortly thereafter, Mr. Horne was elected Attorney General of the state. As attorney general, he represented the state in the litigation until 2014, when he lost reelection.

Mr. Horne's successor, John Huppenthal, proved similarly antagonistic toward the TUSD MAS program. While serving in the Arizona legislature, Mr. Huppenthal had worked actively to enact HB 2281. He had restored provisions that had been removed from the bill while before the legislature, in particular the provisions granting the superintendent authorization to enforce the bill and the provisions prohibiting classes designed for pupils of a particular ethnic group and that advocated ethnic solidarity.¹⁴⁴ Further, Mr. Huppenthal had campaigned for the office of state superintendent on stopping the MAS program, what he referred to as "la Raza" claiming that the program taught students "hate" or "racist" speech.¹⁴⁵ Mr. Huppenthal also moved the effective date of the bill to after the election for state superintendent.¹⁴⁶ Perhaps aware that the actions of Mr. Horne were open to challenge, he retained an out-of-state educational consultant to conduct an audit of the Mexican American Studies Department of the TUSD.¹⁴⁷ The audit aimed to determine whether the MAS program was designed to improve student achievement; whether the program had actually improved

141. Finding by the State Superintendent of Public Instruction of Violation by Tucson Unified School District Pursuant to A.R.S. § 15-112(B), Dec. 30, 2010, available as Exhibit B to Plaintiffs' Third Amended Complaint, *Acosta v. Huppenthal* (No. CV 10-623 TUC AWT) [hereinafter Findings]. See *Arce v. Douglas*, 793 F.3d at 968, 975 (9th Cir. 2015).

142. Findings, *supra* note 141; *Arce*, 793 F. 3d at 975.

143. Findings, *supra* note 141.

144. Testimony of Mark Anderson, Trial Transcript at 38, *Gonzalez v. Douglas* (No. 4:10cv 00623 AWT). Mr. Anderson, a former Arizona state legislator, worked for Mr. Horne from 2009 to 2010 as a lobbyist, including HB 2281, the bill that became 15-112.

145. Testimony of Mark Anderson, *supra* note 144, at 72–73.

146. *Id.* at 136.

147. *Gonzalez v. Douglas*, No. CV 10-623 TUC AWT, Memorandum of Decision, D. Az. Aug. 22, 2017 at 16.

student achievement; and whether the program was in compliance with A.R.S. §15-112.¹⁴⁸

According to the Cambium Report, most students participating in the MAS program were Hispanic. The report noted that 1,343 middle and high school students participating in MAS classes, of which 90.32% were Hispanic, 5.20% White/Anglo, 1.49% African American, 2.09% Native American, .45% Asian American, and .45% multiracial. The report found evidence of “questionable commentary and inappropriate student text” apparently consisting of references to SB 1070, the State Superintendent, and HB 2281, but did not find those materials currently in use.¹⁴⁹ The report also found some books on the MAS Reading Lists to be questionable, either because of “questionable” content or because designed for an adult reader.¹⁵⁰ Books determined to be of questionable content by the audit included Richard Delgado’s and Jean Stefancic’s *Critical Race Theory: An Introduction*, H. Zinn’s *A People’s History of the United States*, J. Loewen’s *Lies My Teacher Told Me: Everything Your American History Teacher Got Wrong*, Jonathan Kozol’s *Savage Inequalities*, Sandra Cisneros’ *Woman Hollering Creek*, William Shakespeare’s *The Tempest*, James Baldwin’s *The Fire Next Time*, and Laura Esquivel’s *Like Water for Chocolate*.¹⁵¹ Notwithstanding, the audit report ultimately concluded that “based upon observations, the auditors saw no evidence of previous questionable MASD materials, nor any damaging language that could incite resentment in children.”¹⁵² The report found that the program had been successful at improving student achievement.¹⁵³ The report noted:

It is apparent that students enrolled in MASD courses in high school graduate . . . at a rate of 5% more than their counterparts in 2005, and at the most, a rate of 11% more in 2010. Students who complete a MASD course during their senior year of high school are more likely to graduate than compared to non-MASD counterparts. ¹⁵⁴

148. Cambium Report, *supra* note 1, at 4.

149. *Gonzalez v. Douglas*, No. CV 10-623 TUC AWT, Memorandum of Decision, D. Az. Aug. 22, 2017 at 18–20.

150. *Id.*

151. Delgado, *supra* note 10, at n.48 (with a longer list of banned books).

152. Cambium Report, *supra* note 1, at 38; *see Gonzalez v. Douglas*, No. CV 10-623 TUC AWT, Memorandum of Decision, D. Az., Aug. 22, 2017, at 18–20.

153. Cambium Report, *supra* note 1, at 43–47.

154. Cambium Report, *supra* note 1, at 47.

The audit concluded, “no observable evidence was present to indicate that any classroom within TUSD is in direct violation of the law.”¹⁵⁵ Moreover, the report stated, “MASD courses promote a culture of excellence and support and an environment conducive to learning.”¹⁵⁶

Notwithstanding the conclusions of the audit, Mr. Huppenthal rejected its findings and directed his staff to conduct their own investigation.¹⁵⁷ Subsequently, Huppenthal declared the program in violation of subsections (A)(2), (A)(3), and (A)(4) of the statute in June 2011.¹⁵⁸ Mr. Huppenthal found that the Arizona Department of Education had been given incomplete curriculum materials by MAS; that the program promoted resentment towards a race or class of people due to references to white people as being “oppressors”; and, particularly troubling to Mr. Huppenthal, that ninety percent of MAS participants were Hispanic, a disproportionate representation given the population demographics of the student population as a whole.¹⁵⁹ Mr. Huppenthal’s findings ordered TUSD to bring the program into compliance with the statute, but did not require elimination of the program.¹⁶⁰ TUSD was again given sixty days prior to withholding of ten percent of its budget.¹⁶¹

The school board administratively appealed in June 2011.¹⁶² The administrative law judge affirmed the state superintendent in December 2011. On January 16, 2012, Huppenthal withheld ten percent of TUSD’s funds as of the date of his initial finding of a violation and required TUSD to remove all MAS instructional materials by February 29, 2012.¹⁶³ The TUSD Governing Board suspended the MAS program on January 10, 2012, notwithstanding its inclusion in the *Fisher* Post Unitary Status Plan, and the fact that the district had been denied unitary status for its failure to

155. Cambium Report, *supra* note 1, at 50.

156. Cambium Report, *supra* note 1, at 50.

157. *Arce v. Douglas*, 793 F.3d at 968, 975 (9th Cir. 2015).

158. Superintendent of Public Instruction John Huppenthal Statement of Finding Regarding Tucson Unified School District’s Violation of A.R.S. §15-112, available as Exhibit D to Plaintiffs’ Third Amended Complaint, *Acosta v. Huppenthal* (2013) [hereinafter Huppenthal Statement of Finding] (No. CV 10-623 TUC AWT) (Huppenthal found the program to “promote resentment toward a race or class of people,” to be “designed primarily for pupils of a particular ethnic group,” and to “advocate ethnic solidarity instead of the treatment of pupils as individuals.”).

159. *Id.*

160. Huppenthal Statement of Finding, *supra* note 158.

161. *Gonzalez v. Douglas*, No. CV 10-623 TUC AWT, Memorandum of Decision, D. Az. Aug. 22, 2017 at 23.

162. *Id.* at 22–23.

163. *Arce v. Douglas*, 793 F.3d at 968, 975 (9th Cir. 2015).

demonstrate good faith compliance with the desegregation decree.¹⁶⁴ The TUSD notified the *Fisher* court that the MAS program had been suspended, and in February 2012, the *Mendoza* plaintiffs responded and requested reinstatement of MAS.¹⁶⁵ The court denied the motion to reinstate MAS but stated that the status of the MAS program would be addressed in the Unitary Status Plan (“USP”).¹⁶⁶ The Special Master had indicated in a memorandum issued in February that the curricular program envisioned in the USP would include culturally relevant courses.¹⁶⁷ The *Mendoza* plaintiffs moved the court to reconsider reinstatement of MAS courses in March and the court again denied the motion.¹⁶⁸ The Special Master’s March 28 2012 Memorandum declared the intention to develop a culturally relevant curriculum.¹⁶⁹

Teachers in the MAS program, students, and the Director of the MAS program, Sean Arce, filed suit in federal court shortly after enactment of HB 2281, on October 18, 2010, and the complaint subsequently was amended to include an as-applied challenge on the basis of the Superintendent’s enforcement action.¹⁷⁰

In May 2012, while defending the ban on ethnic studies, Attorney General Horne moved to intervene in the desegregation case, “to ensure that the Special Master’s proposed curricular revisions for in-depth ethnic studies courses in the Unitary Status Plan do not violate state law.”¹⁷¹ The district court denied intervention by the State of Arizona but granted it leave to appear as *amicus curiae*.¹⁷² Over the course of the next few years, the parties

164. *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131, 1141-43 (9th Cir. 2011).

165. Motion for Special Master to Take Action and Response to Notice to Court Concerning Suspension of Mexican American Studies Courses by Plaintiffs Edward A. Contreras, Maria Mendoza, The United States’ Opposition to the State of Arizona’s Motion for Intervention, No. 74-90 TUC DCB (May 24, 2012), at 7.

166. Order of February 29, 2012, Case No. 4:74-cv-00204-DCB, D. Ariz.

167. Memorandum by Special Master of February 23, 2012, No. 4:74-cv-00090 TUC DCB (Feb. 29, 2012).

168. Motion for Reconsideration re 1360 Order on Motion for Miscellaneous Relief by Maria Mendoza, No. 4:74-cv-00090 TUC DCB (Mar. 14, 2012); Order denying 1364 Motion for Reconsideration, No. 4:74-cv-00090 TUC DCB (Apr. 3, 2012).

169. Memorandum of March 28, 2012 by Special Master Willis Hawley, No. 4:74-cv-00090 TUC DCB (Apr. 5, 2012).

170. Complaint, *Acosta et al. v. Horne et al.*, No. 10CV00623, 2010 WL 11413395 (D. Ariz. Oct. 18, 2010).

171. State of Arizona’s Motion to Intervene, No. 4:74-cv-00204-DCB (D. Ariz. May 10, 2012).

172. Order denying Motion to Intervene, Case No. 4:74-cv-00204-DCB (D. Ariz. June 14, 2012).

in the desegregation case worked on a Unitary Status Plan with the Special Master. The parties litigated almost everything in the plan, including the question of a culturally relevant curriculum.¹⁷³ That litigation continues.

In March 2013, the district court dismissed the plaintiff teachers and director of MAS in the *Arce* case for lack of standing and decided the remaining claims on summary judgment, despite the fact that neither party had moved for summary judgment.¹⁷⁴ The court upheld the statute under the First Amendment, Equal Protection, and Substantive Due Process grounds but struck down its prohibition of classes or programs that “are designed primarily for pupils of a particular ethnic group” as facially overbroad.¹⁷⁵ The court prefaced its opinion by acknowledging, “the considerable deference that federal courts owe to the State’s authority to regulate public education.”¹⁷⁶ Echoing recent U.S. Supreme Court decisions, the court noted, “they are issues that must be left to the State of Arizona and its citizens to address through the democratic process.”¹⁷⁷

In deciding the First Amendment claims, the court recognized only two possible First Amendment student rights: a right to speak freely on school grounds and a right to receive a broad range of information so that they could freely form their own thoughts.¹⁷⁸ The court concluded, however, that the statute and the District’s enforcement of the statute implicated neither of the rights.¹⁷⁹ To the extent the students’ rights to receive information was impacted, the court reasoned that the statute passed the appropriate standard of scrutiny because it was reasonably related to a legitimate pedagogical interest.¹⁸⁰ Only the provision prohibiting courses designed primarily for pupils of a particular ethnic group, § 15-112(A)(3), the court found to be substantially overbroad, because whatever legitimate interests could be attained through the provision were covered under the first two provisions.¹⁸¹ To the extent it sought to advance additional interests, the provision could

173. See Docket, Fisher, et al. v. Tucson Unified, et al., No. 4:74-cv-00090-DCB.

174. *Acosta v. Huppenthal*, 2013 WL 871892 (D. Ariz. Mar. 8, 2013).

175. *Id.*

176. *Id.*

177. *Id.*

178. *Acosta v. Huppenthal*, 2013 WL 871892 at 4–7.

179. *Id.*

180. *Id.* at 7.

181. *Id.* at 10.

not be sustained because it threatened “to chill the teaching of legitimate and objective ethnic courses.”¹⁸²

In deciding the Equal Protection claim, the court concluded that the Arizona statute did not create a classification on the basis of race or national origin on its face, so as to justify application of strict scrutiny.¹⁸³ In addition, the court concluded, although the legislative history contained red flags that might “spark suspicion” that animus towards an ethnic group motivated the legislature, they were insufficient to establish discriminatory intent.¹⁸⁴ The court discussed the factors relevant to discerning discriminatory intent, but applied them to the record before the court, before discovery and before trial, on summary judgment.¹⁸⁵ Moreover, the court found that the statute did not represent the kind of political process obstruction that would render it invalid under the *Hunter/Seattle* line of cases.¹⁸⁶ Thus, the court concluded that the statute merited only a rational basis scrutiny, and survived challenge under the Equal Protection clause.¹⁸⁷

The state appealed the district court’s determination that the provision in the Arizona statute prohibiting courses that “are designed primarily for pupils of a particular ethnic group” was facially overbroad.¹⁸⁸ The plaintiffs appealed the court’s ruling that the statutory provisions were severable and that the remaining provisions did not violate the First Amendment.¹⁸⁹ In addition, the plaintiffs appealed the court’s grant of summary judgment to the state on the equal protection claims. A number of *amici* filed briefs in support of the plaintiffs in the case, including the authors whose books had been physically removed from the MAS classrooms in the TUSD.¹⁹⁰

182. *Acosta v. Huppenthal*, 2013 WL 871892 at 10.

183. *Id.* at 13.

184. *Id.* at 14.

185. *Id.* (discussing the factors identified by the U.S. Supreme Court as relevant to determining intent in *Village of Arlington Heights v. Metropolitan Development Corp.*, 429 U.S. 252, 265–68 (1977)).

186. *Acosta v. Huppenthal*, 2013 WL 871892 at 13 (referring to *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982); *Hunter v. Erickson*, 393 U.S. 385 (1969)).

187. *Acosta v. Huppenthal*, 2013 WL 871892 at 15.

188. Appellees’ Principal and Response Brief, *Maya Arce v. John Huppenthal*, Nos. 13-15656, 13-15760.

189. Brief of Appellants, *Arce v. Huppenthal*, No. 13-15657, 13-15760, November 18, 2013; Plaintiffs-Appellants/Cross-Appellees’ Response and Reply Brief, *Arce v. Huppenthal*, Nos. 13-15657, 13-15760, June 2, 2014.

190. Brief for Amici Curiae 48 Public School Teachers in Support of Appellants’ Request for Reversal, *Maya Arce v. John Huppenthal*, No. 13-15657, 13-15760; Brief of Amicus Curiae Latina and Latino Critical Legal Theory, Inc., *Arce v. Huppenthal*, No. 13-15657, 13-15760; Brief of Authors Rodolfo Acuna, Bill Bigelow, Richard Delgado, and Jean Stefancic as Amici Curiae, *Arce*

VI. On Appeal in the Ninth Circuit

In 2015, the Ninth Circuit affirmed the lower court's holding that one of the provisions in the statute—the provision that prohibited courses and classes designed for pupils of a particular ethnic group—was unconstitutionally broad but severable from the rest of the statute, and that the other provisions were neither overbroad under the First Amendment or vague in violation of the Due Process Clause.¹⁹¹ The court reversed the district court's summary judgment as to the Equal Protection disparate treatment claim and remanded that claim for trial, precluding disposition of the claim through summary judgment.¹⁹² The court also remanded the First Amendment viewpoint discrimination claim for further proceedings.¹⁹³

The Ninth Circuit agreed with the lower court that the statute did not facially discriminate on the basis of race or ethnicity so as to justify strict scrutiny.¹⁹⁴ Specifically, with regards to the provisions prohibiting classes designed primarily for pupils of a particular ethnic group and advocating ethnic solidarity, the court reasoned that the term “ethnic” in the statute did not refer to ethnic minorities, but to all ethnic backgrounds, including majority ethnic backgrounds.¹⁹⁵ The court rejected consideration of the legislative history in determining the meaning of the term, reasoning that only if the term were ambiguous would consulting the legislative history be appropriate.¹⁹⁶

Although the MAS plan was included as part of the *Fisher/Mendoza* Post Unitary Status Plan approved by the district order in the desegregation

v. Huppenthal, Nos. 13-15657, 13-15760; Brief of Chief Earl Warren Institute on Law and Social Policy, *Arce v. Huppenthal*, Nos. 13-15657, 13-15760; Brief of Freedom to read Foundation, American Library Association, et.al., *Arce v. Huppenthal*, No. 13-15657; Brief of the National Education Association and Arizona Education Association as Amici Curiae in Support of Plaintiffs-Appellants, No. 13-15657, 13-15760. See also Brief Amicus Curiae of Pacific Legal Foundation in Support of Neither Party and In Support of Neither Affirmance nor Reversal, *Arce v. Huppenthal*, No. 13-15657. The oral argument before the U.S. Court of Appeals for the Ninth Circuit is available here http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000006927.

191. *Arce v. Douglas*, 793 F.3d 968 (9th Cir. 2015).

192. *Arce*, 793 F.3d at 976–77. The case went to trial in July 2017. See Roque Planas, *Mexican-American Studies Ban Unlikely to See Trial This Year*, HUFF. POST, (Sept. 29, 2016). Pending before the court is another motion for partial summary judgment filed by the defendants on September 26, 2016, on the First Amendment viewpoint discrimination claim. *Gonzalez v. Douglas*, Case No. 4:10-cv-00623-AWT, Defendants' Motion for Partial Summary Judgment on Plaintiffs' First Amendment Claim.

193. *Arce*, 793 F. 3d at 977.

194. *Id.*

195. *Id.*

196. *Id.* at 977.

litigation, and had come about relatively early in the litigation, the court rejected the argument that Arizona's statute constituted interference with a desegregation remedy and, thus, obstructed the political process in violation of the Equal Protection Clause as interpreted in *Hunter v. Erickson*¹⁹⁷ and *Washington v. Seattle School District No. 1*.¹⁹⁸ The court found the fact that the program had been implemented early in the desegregation case, rather than when the post unitary status plan was ordered, meant that it could not be considered a remedy—a somewhat baffling conclusion. The court dealt with this argument in a footnote, however, perhaps conveying its view as to the viability of this type of argument, which seems at odds with the goals of desegregation cases: a good faith effort to eliminate the vestiges of desegregation to the extent practicable and good faith compliance with court orders,¹⁹⁹ but perhaps reflects the paucity of court opinions that have rested on the “political structure” Equal Protection cases, as well as the Court's *Schuette* decision.²⁰⁰ The court also noted that plaintiffs could continue to seek relief through the desegregation litigation or by appealing to state and local government initiatives, which meant that there was no political process obstruction.²⁰¹

The court, however, agreed with the plaintiffs that the legislative history raised an issue of fact that the state had acted with discriminatory purpose in enacting and enforcing the statute.²⁰² Thus, it remanded the statute back to the district court for trial to determine whether in light of the factors identified by the United States Supreme Court in *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*,²⁰³ the enactment and enforcement of the statute against the MAS programs constituted intentional discrimination against them on the basis of their race or national origin and, thus violated their Equal Protection rights.²⁰⁴ If the kind of claim raised rested on statutes or policies that did not discriminate on the basis of race on their face, but instead had disproportionate impacts on members of a particular race, *Village of Arlington Heights* directed courts to look at certain factors to

197. *Hunter v. Erickson*, 393 U.S. 385 (1969).

198. *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982).

199. *Arce*, 793 F.3d at 981 n.7.

200. *See supra* notes 39–42.

201. *Arce*, 793 F. 3d at 918 n.7.

202. *Arce*, 793 F. 3d at 977–81.

203. *Village of Arlington Heights v. Metropolitan Development Corp.*, 429 U.S. 252, 265–66 (1997).

204. *Arce*, 793 F.3d. at 977–78.

determine whether the statute or policy constituted intentional discrimination.²⁰⁵ In this type of case, the Supreme Court had made clear, challengers of governmental action had to prove discriminatory intent or purpose.²⁰⁶ *Arlington Heights* made it clear that plaintiffs did not have to prove that the discriminatory purpose was the only purpose, “but only that it was a ‘motivating factor,’”²⁰⁷ and directed courts to consider the historical background of the challenged decision, the specific sequence of events leading up to the decision, departures from the normal procedures, and the relevant legislative history.²⁰⁸ The *Arce* court concluded that the statute, although using race and ethnicity as defining characteristics, was the equivalent of a facially neutral statute, and, thus, that the *Arce* plaintiffs would have to prove discriminatory intent in order to prevail on their Equal Protection claim.

Given the legislative history and the factual context in which the Arizona statute was adopted and applied, it would appear likely that the plaintiffs would prevail on remand, by convincing the lower court that the Arizona statute was applied in a discriminatory manner against the Tucson MAS program and that at the heart of the discriminatory treatment was animus towards the MAS program because of its focus on Mexican Americans as an ethnic or racial group.²⁰⁹ If this were actually likely, however, it would be difficult to understand the original ruling finding that as a matter of law, on summary judgment, the plaintiffs could not establish that the targeting of the MAS program by statute raised a genuine issue of material fact as to whether the targeting of the MAS program made possible by the ethnic studies statute violated the Equal Protection clause. Arguably, under this thinking the statutes before the *Brown* court were not facially discriminatory because they too applied to all races. This shows the

205. *Arlington Heights*, 429 U.S. at 266–68 (some factors to be considered in determining discriminatory purpose included impact of official action and whether it bears more heavily on one race than another; historical background of the decision; specific sequence of events leading to the challenged action; defendant’s departures from normal procedures or substantive conclusions; and relevant legislative or administrative history).

206. *Washington v. Davis*, 426 U.S. 229 (1976) (proof of racially discriminatory purpose or intent is necessary for a violation of the Equal Protection Clause; disproportionate impact is relevant as evidence of purpose but may not alone suffice to establish discriminatory intent).

207. *Arce*, 793 F. 3d at 977 (quoting from *Arlington Heights*, 429 U.S. 265–66).

208. *Id.*

209. While this article was in production, the district court decided the case and found that the plaintiffs had established the requisite level of intent: That the Arizona defendants had acted with invidious discriminatory intent towards the Tucson MAS program by enacting and implementing the statute. Order and Opinion, *Gonzalez v. Douglas*, No. CV 10-623 TUC AWT (Aug. 22, 2017).

importance of understanding why, in the view of the courts to engage the question, the statute on its face does not violate the equality principle.

VII. Prohibiting Ethnic Studies as Facial Discrimination on the Basis of Race or Ethnicity

Why does the statute's reference to "particular ethnic group" and "ethnic solidarity" not constitute facial discrimination? It is important to understand this because it suggests that the same statute passed without animus and was implemented across the board to apply to all ethnic or racial groups save Native Americans (statutorily exempted to the extent "required to comply with federal law" and in so far as their treatment involved genocide or their historical oppression) and Jews (in so far as the Holocaust is concerned or again their historical oppression) has no constitutional problem under the Equal Protection clause. The state could suppress or prohibit classes designed for a particular ethnic or racial group if it advocates ethnic solidarity. This approach to equality would prohibit school districts from voluntarily attempting one of the few race conscious measures left available to deal with highly racially segregated schools and student populations often lacking in sufficient resources to enrich and adequately supplement their public education. This kind of statutory measure attempts to ensure that the white supremacy principle formally at work in the pre-*Brown* world continues unabated in the twenty-first century. Thus, even the Ninth Circuit's approach leaves one of the few available mechanisms to respond effectively to the lack of actual diversity in public education at risk; one of the tools left available for schools to help their students understand and work with the diversity that is a defining characteristic of the global order and humanity is declared forbidden territory by the Arizona statute.

The Ninth Circuit concluded that because the statute applied to all ethnic backgrounds, not just ethnic minorities, it did not constitute facial discrimination on the basis of race or ethnicity.²¹⁰ The court's thinking appears to reflect a view of race similar to that rejected by the U.S. Supreme Court in cases such as *Loving v. Virginia*, in which the state of Virginia argued that a statute prohibiting interracial marriage did not constitute discrimination on the basis of race because all races were similarly affected.²¹¹ The Ninth Circuit's thinking on the issue took up a paragraph

210. See *supra* Section VI.

211. *Loving v. Virginia*, 388 U.S. 1, 8-9 (1967) ("[W]e reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations.").

but the reasoning underlying its conclusion is not so easily discerned. The modern view of the Equal Protection Clause is that classifications defined by race or ethnicity on the face of the statute are facially discriminatory and thus subject to strict scrutiny. *Schuette* marked a departure from this approach but *Schuette* lacked a majority opinion, instead presenting a badly splintered Court, and involved a ban on affirmative action, not a ban on curricular choices.²¹² Moreover, *Schuette* rests on a challenge based on the “political process” cases, an argument that a majority of voters had acted to make “it more difficult for a traditionally excluded group to work through the existing process to seek beneficial policies.”²¹³

Is the problem that the prohibition was couched in “hate speech” language? The statute prohibits promotion of racial hatred and resentment, so that it evokes the kind of prohibition that might have been directed at KKK groups espousing white supremacy language and hate speech towards racial minorities. Former state superintendent Horne, and former state superintendent Huppenthal in a series of blogs, and in testimony at trial, made it clear that they thought the Tucson MAS program was teaching students to hate whites.²¹⁴

The statute exempts courses that include the history of any ethnic group open to all students, but only to the extent that they don’t promote resentment toward a race, are not designed primarily for pupils of a particular ethnic group (even if open to all students) and again, do not advocate ethnic solidarity. The statute’s attempt to avoid facial unconstitutionality renders it irrational: learning that one’s own history may have accommodated genocide and violent oppression of members of certain racial and ethnic groups may lead to repentance and enlightenment, but it may also lead to resentment and denial. Critical learning and thinking may engage a full gamut of emotions and responses in all racial and ethnic groupings; the Equal Protection clause prohibits constitutionally sheltering the white, Eurocentric racial group at the expense of all others. This is what the Arizona statute attempts to do.

The statute makes solidarity a positive evil when it rests on ethnicity (race). But solidarity is more likely identified as resting on or producing respect for individuals. The Merriam-Webster dictionary defines solidarity as “a feeling of unity between people who have the same interests, goals, etc.; unity (as of a group or class) that produces or is based on community of

212. See *supra* notes 39–45.

213. *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. at 1671 (2014) (Sotomayor, J., dissenting).

214. Order and Opinion, *supra* note 209 at 5–15, 22–25, 29–32.

interests, objectives, and standards.”²¹⁵ Solidarity is a concept often used in religious thinking and practice. For example, Catholic Social Teaching thinks of solidarity as being at one with respecting the individual: “Solidarity is about valuing our fellow human beings and respecting who they are as individuals.”²¹⁶ The statute’s positing of ethnic solidarity (and implicitly classes defined by race or ethnicity) as being in opposition to the individual violates the principle at the heart of equality. Equality is relevant only when there is difference. One can be equal only in comparison to something else. The Arizona statute, read as a whole, is an attack on Equal Protection law and the equality principle.

Statutes that prohibit on their face the use of curricular content or pedagogy that reflects racial or ethnic consciousness, like the Arizona statute prohibiting ethnic studies, merit strict scrutiny because they prohibit formation and exploration of self and group racial or ethnic identity. They assume that the dominant historical narrative is neutral and objective and deny the function of race, ethnicity, and gender in that narrative. They also prohibit challenges to established racial and ethnic orthodoxies, and enshrine those orthodoxies as the only acceptable racial and ethnic perspective through which to explore and study content. They reflect fear that acknowledging cultural and ethnic differences will inevitably lead to ethnic and racial conflict and racism. The motivation behind such a prohibition is likely to be invidious since it seeks to shut down or prevent exploration of one’s ethnic or group identity in the context of a society where that ethnic or racial identity defines them as a practical matter. Such a prohibition flies in the face of the recognition that diversity—racial and ethnic diversity—is valuable and constitutes a compelling state interest in the context of public education as a majority of the Supreme Court recognized in the *Parents Involved in Community Schools v. Seattle School District* opinion.²¹⁷

Conclusion

In a multiethnic, multiracial, multicultural society like the United States, repression of ethnic group identity is unlikely to succeed as a mechanism for creating unity. Increasing exposure to and interaction among diverse ethnic groups may still be the best way to avoid racial or ethnic tension. But in the public school context, integration may no longer be

215. *Solidarity*, MERRIAM WEBSTER (2017).

216. *Seven Themes of Catholic Social Teaching*, United States Conference of Catholic Bishops, www.usccb.org/beliefs-and-teachings/what-we-believe/catholic-social-teaching.cfm.

217. *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

feasible given Supreme Court rulings, and in the Tucson context, public schools are increasingly racially concentrated.²¹⁸ The legislative history of the Arizona statute manifests that creating unity was not the actual goal of the statute; the actual goal of the statute was preservation of the dominant ethnic narrative. The 2016 presidential election reflects this basic conflict between the views that difference, in particular racial ethnic or color difference, must be silenced, and the view that difference, including racial, ethnic or color difference, may be recognized and even celebrated. Repression will only increase existing tension and hostility among ethnic groups, including the majority white Euro-centric group. Repression leads to victimization and alienation; celebration of difference, on the other hand, may facilitate understanding and empowerment. These are old truths, not new or original principles. We ignore them at our peril.

That there is no valid or legitimate reason, grounded in sound educational objectives, to ban ethnic studies programs is in itself stark evidence of such a ban's invidious nature. That empirical research supports their use in accomplishing educational goals, including debunking of racial stereotypes (something key to educating individuals in treating each other like individuals), improving attendance, academic achievement, and graduation rates is even starker proof that the bans are irrational.

Associate Justice Ruth B. Ginsburg recognized the value of celebrating difference in a sex discrimination case: *United States v. Virginia*.²¹⁹ In declaring Virginia's males-only admission policy to its prestigious Virginia Military Institute unconstitutional, Justice Ginsburg stated:

"Inherent differences" are no longer accepted as a ground for race or national origin classifications "Inherent differences between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of members of either sex or for artificial constraints on an individual's opportunity."²²⁰

Humans, like all other species, are individually unique and uniquely individual. Ethnic identity, like any other group-based identity, historically

218. Special Master's Annual Report for 2014-15, No. 4:74-cv-00090-DCB, D. Ariz. March 14, 2016, at 4 ("There are more racially concentrated schools (schools with more than 70% one race) today than in 2011-12.")

219. *United States v. Virginia*, 518 U.S. 515 (1996).

220. *Id.* at 533.

has been used to denigrate, repress, and target; better, instead, to use it as a cause for celebration and as a way to maximize individual opportunity.

One of the most salutary effects of the Arizona experience has been a resurgence of interest in ethnic or culturally relevant studies. Arizona's targeting of the Tucson MAS program drew the attention of documentary filmmakers who produced the award-winning *Precious Knowledge: Arizona's Battle over Ethnic Studies*.²²¹ More important to the future of such programs, scholars and school districts, in particular school districts in California and Texas, two states with significant ethnic populations, reengaged in studying and developing such courses.²²²

Long before Arizona adopted its ethnic studies ban, scholars had come to a consensus as to the importance of ethnic studies to education. Interdisciplinary scholars convened to determine some essential principles distilled from research and experience about education and diversity concluded that national unity would be strengthened by respecting and building upon "the cultural strengths and characteristics that students from diverse groups bring to school."²²³ The essential principles addressed teacher preparation and student learning, among other things. With regards to teacher training, the report provided that programs should educate teachers in "ways in which race, ethnicity, language, and social class interact to influence student behavior."²²⁴ With regards to student learning and relations, the report concluded that "curriculum should help students understand that knowledge is socially constructed," students should learn about "stereotyping and other related biases that have negative effects on racial and ethnic relations," and "about the values shared by virtually all cultural groups (e.g., justice, equality, freedom, peace, compassion, and charity)."²²⁵ Overall, the principles support the ethnic studies or "culturally relevant" courses pedagogy and curriculum.

221. *Precious Knowledge: Arizona's Battle over Ethnic Studies* (Dos Vatos Productions 2011).

222. Cindy Carcamo, *Interest in ethnic studies jump after Arizona ban*, L.A. TIMES (Mar. 23, 2013), <http://articles.latimes.com/2013/mar/23/nation/la-na-ff-tucson-schools-20130324>; J. Weston Phippen, *How One Law Banning Ethnic Studies Led to Its Rise*, ATLANTIC (July 19, 2015), <https://www.theatlantic.com/education/archive/2015/07/how-one-law-banning-ethnic-studies-led-to-rise/398885/>.

223. James A. Banks et al., *Diversity Within Unity: Essential Principles for Teaching and Learning in a Multicultural Society*, Center for Multicultural Education, College of Education, UNIV. of WASH, SEATTLE (2001).

224. *Id.* at 5.

225. *Id.* at 8–9.

Notwithstanding the support among education scholars for culturally relevant education, few school districts in 2010 appeared to have been offering ethnic studies courses. Arizona's ban, however, resulted in renewed vigor in curricular offerings. San Francisco Unified School District, for example, adopted a resolution to support ethnic studies in their schools.²²⁶ Arizona's public schools appear to be committed to offering some culturally relevant courses through the unitary plan process, but the MAS program at Tucson High as it was known prior to the ethnic studies ban, is gone.²²⁷ Perhaps even Arizona may reconsider its position: Its legislature recently rejected a bill that would have expanded its ethnic-studies ban to university and community college courses.²²⁸ But for Arizona, the fact that its students did better with the courses should have sufficed to ensure their continued viability.

In prohibiting ethnic or racial studies, Arizona apportioned a benefit on its current statewide majority race, at the expense of its minority ethnic identities and cultures (ironically in the context of the student population the majority ethnic identity), and placed a special burden on them by denying them the opportunity to access knowledge and understanding critical to the forming of their individual and group identity and to participate fully in their educational experience.

226. Allyson Tintiangco-Cubales et al., *Toward an Ethnic Studies Pedagogy: Implications for K-12 Schools from the Research*, 47 URB. REV. 104 (2014).

227. Ironically, one of the problems identified in the unitary status plan negotiations was a problem hiring teachers to teach culturally relevant courses. In the words of the Special Master: "It appears that the reticence of teachers—which has been fueled by the opposition of the State to the Courses, and, to some, extent, by community controversy—is dissipating." Report and Recommendation of Special Master, No. 4:74-cv-00090-DCB, D. Ariz. (Apr. 20, 2016). The *Mendoza* plaintiffs pushed to have the district found to be in noncompliance over its failure to hire sufficient teachers, but ultimately the district court, on the recommendation of the special master, decided not to.

228. Maria Polletta and Alia Bear Rau, *Arizona Bill to Extend Ethnic-Studies Ban to Universities Dies*, ARIZ. REPUBLIC, (Jan. 17, 2017), <http://www.azcentral.com/story/news/politics/arizona-education/2017/01/18/arizona-bill-extend-ethnic-studies-ban-universities-dies/96694610/>; Maria Polletta, *Divisive or Empowering?: New Arizona Bill Extends Ethnic-Studies Ban to Universities*, ARIZ. REPUBLIC (Jan. 15, 2017), <http://www.azcentral.com/story/news/politics/arizona-education/2017/01/13/divisive-empowering-new-arizona-bill-would-extend-ethnic-studies-ban-universities/96532726/>.