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AN ANALYSIS OF THE CONSTITUTIONALITY OF ARIZONA'S ETHNIC STUDIES LAW

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Introduction

On May 2011, the Arizona legislature passed a law that has placed significant restrictions on K-12 ethnic studies programs. The law prohibits any public school district or charter school from conducting classes that, *inter alia*, are designed primarily for a specific ethnic group.¹ School districts or charter schools that violate the law can lose up to ten percent of their state funding.² Former Arizona state superintendent of public instruction Tom Horne championed the passage of this legislation after an incident involving a state department of education official at a Tucson public school.³ As discussed in Section I of this paper, present superintendent John Huppenthal found that the Mexican American Studies (“MAS”) program violated the state’s ethnic studies law. A state administrative law judge affirmed Huppenthal’s determination, authorizing the state’s power to withhold ten percent of its funding to the Tucson Unified School District (“TUSD”) until the MAS program came into compliance with state law.⁴ Students and teachers are challenging the constitutionality of the statute in federal district court and seek the issuance of a preliminary injunction.⁵

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¹ ARIZ. REV. STAT. § 15-112(A)(1-4) (2011).

² *Id.* § 15-112(B).

³ *Arizona Bill Targets Classes Promoting Ethnic Resentment*, Education Reporter: The Newspaper of Education Rights (June 2010), available at <http://www.eagleforum.org/educate/2010/june10/AZ-bill.html>.

⁴ In the Matter of Hearing of an Appeal by Tucson Unified School District No. 1, No. 11F-002-ADE (Ariz. A.L.J., Dec. 27, 2011), available at http://www.tucsonsentinel.com/documents/doc/122711_tusd_mas_doc/.

⁵ *Costa v. Huppenthal*, No. CV10-623TUCAWT (D.C. Ariz., Nov. 16, 2011), available at <http://www.courthousenews.com/2011/12/22/plaintiffs%20filing%20mexican%20studies%20tusd.pdf>.

Arizona's ethnic studies law is significant because of this country's ever-changing racial demographics. The U.S. Census anticipates that current minorities will become the majority in the United States by 2042.⁶ By the year 2050, according to projections, 30% of the population will be Hispanic and 15% will be African American.⁷ The non-Hispanic white population is projected to drop from 66% in 2008 to 46% in 2040.⁸ Other state legislatures may respond to this demographic change by passing laws similar to Arizona's ethnic studies statute. It is also highly likely that teachers and students will challenge these laws in court. Several law review articles have ably called into question whether Arizona's ethnic studies law would have actually banned the ethnic studies program,⁹ or whether it is wise as a policy matter.¹⁰ This article examines the constitutionality of Arizona's ethnic studies law. Section I provides an overview of the controversy. Section II identifies and analyzes the possible constitutional challenges.

Section I: Overview of Arizona Ethnic Law Controversy

In 1974, African-American and Mexican-American parents sued the Tucson school district arguing that it had committed intentional discrimination on the basis of race and national origin.¹¹ In 1978, a federal district court ruled that the school district had acted with discriminatory intent in violation of the Constitution.¹² The TUSD entered into a settlement agreement and committed itself to taking several steps to eliminate its segregation. One step included the creation of the MAS program in 1998.¹³

Tom Horne became concerned about the MAS program in 2006 when he was state superintendent of public instruction. After learning that a speaker had told the student body of Tucson Magnet School that "Republicans hate Latinos," Horne asked a deputy, who was a Latina, to address the students.¹⁴ The deputy appealed to the students "to think for themselves and avoid stereotypes."¹⁵ According to Horne, a small number of students in the MAS Program "treated her rudely" and "defiantly walked out" after the principal asked them to behave.¹⁶

On June 11, 2007, Horne wrote an open letter to the citizens of Tucson claiming that the ethnic studies program should be terminated. In this letter, Horne asserted that the students did not learn this rude behavior from home but from the ethnic studies teachers.¹⁷ Horne also opined that

⁶ Press Release, U.S. Census Bureau News, *An Older and More Diverse Nation by Midcentury* (Aug. 14, 2008), <http://www.census.gov/newsroom/releases/archives/population/cb08-123.html>

⁷ Brief of Amici Curiae the Council of Great City Schools *et al.* 2, *Parents Involved in Community Sch. v. Seattle Indep. Sch. Dist.* No. 1, 551 U.S. 701 (2007) (Nos. 05-908, 05-915).

⁸ *Id.*

⁹ See Generally Nicholas B. Lundholm, Note: *Cutting Class: Why Arizona's Ethnic Studies Ban Won't Ban Ethnic Studies*, 53 ARIZ. L. REV. 1041 (2011).

¹⁰ See Generally 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 (2011).

¹¹ See *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131, 1134 (9th Cir. 2011).

¹² *Id.*

¹³ *Fisher v. U.S.*, 549 F. Supp. 2d 1132, 1161 n.31 (D. Ariz. 2008).

¹⁴ *Arizona Bill Targets Classes Promoting Ethnic Resentment*, Education Reporter: The Newspaper of Education Rights (June 2010), available at <http://www.eagleforum.org/educate/2010/june10/AZ-bill.html>.

¹⁵ Tom Horne, *An Open Letter to the Citizens of Tucson* 1 (June 11, 2007), available at www.scribd.com/doc/32001977/An-Open-Letter-to-the-citizens-of-Tucson.

¹⁶ *Id.* at 1-2.

¹⁷ *Id.* at 2.

“the evidence is overwhelming that ethnic studies in the Tucson Unified School District teaches a kind of destructive ethnic chauvinism that the citizens of Tucson should no longer tolerate.”¹⁸ For instance, one of the textbooks used in the program, *Occupied in America*, took “the Mexican side of the battle at the Alamo.”¹⁹ Horne criticized another textbook, *The Mexican American Heritage*, for “gloating over the difficulty we are having in controlling the border” between the United States and Mexico.²⁰

Horne was also disparaging of the Movimiento Estudiantil Chicano de Aztlán (“MEChA”), the TUSD’s extracurricular, an organization related to the ethnic studies program and “founded on the principles of self-determination for the liberation” of Chicanos.²¹ Horne quoted a passage from the MEChA Constitution which states: “Aztlán belongs to those who plant the seeds, water the fields, and gather the crops and not to the foreign Europeans. We do not recognize capricious frontiers on the bronze continent.”²² Further, Horne cited a series of investigative reports by the *Arizona Republic* on the ethnic studies program. One of the series’ sources, a Latino teacher who was a former employee of the TUSD, claimed that the teachers in the program: (1) were “vehemently opposed to the United States and its power,” and (2) taught students “not to trust the system.”²³ This former teacher claimed in his own column that the “TUSD administration intimidated him by removing him from his class, and calling him a ‘racist,’ even though he himself is Hispanic.”²⁴ Horne closed his letter by calling for an elimination of ethnic studies which would save Tucson’s citizens \$2 million per year.²⁵

In 2008, state senator Russell Pearce proposed an amendment to a state homeland security bill, Senate Bill 1108.²⁶ The Bill would have prohibited public schools from including in their curricula any classes or school-sponsored activities “that promote, assert as truth or feature as an exclusive focus any political, religious, ideological or cultural beliefs or values that denigrate, disparage or overtly encourage dissent from the values of American democracy and western civilization, including democracy, capitalism, pluralism and religious toleration.”²⁷ This bill would not have prohibited the inclusion of “diverse political, religious, ideological or cultural beliefs or values if the course...as a whole [did] not denigrate...the values of American democracy and western civilization.”²⁸ The bill authorized the superintendent of public instruction to “withhold a proportionate share of state monies from any public school.”²⁹ Furthermore, the bill also would have required public universities and community colleges to ban organizations on campus that were based wholly or in part of race-based criteria.³⁰ This measure failed to pass.³¹

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 3.

²² *Id.* at 1.

²³ *Id.* at 3-4.

²⁴ *Id.* at 4.

²⁵ *Id.* at 5.

²⁶ Committee on Appropriations House of Representatives Amendments to S.B. 1108, *available at* <http://www.azleg.gov/legtext/48leg/2r/adopted/h.1108-se-approp.pdf>.

²⁷ *Id.* at 1.

²⁸ *Id.*

²⁹ *Id.* at 1-2.

³⁰ *Id.* at 2.

³¹ Anna O. O’Leary & Andrea J. Romero, *Chicana/o Students Respond to Arizona’s Anti-Ethnic Studies Bill, SB 1108: Civil Engagement, Ethnic Identity, and Well-Being*, 36 AZTLÁN: A JOURNAL OF CHICANO STUDIES 12 (2011).

In 2009, state senator Jonathan Paton proposed Senate Bill 1069.³² This bill would have prohibited public schools from including any classes that either: (1) “are designed primarily for pupils of a particular ethnic group”; or (2) “advocate ethnic solidarity instead of the treatment of pupils as individuals.”³³ The Bill would have also authorized the superintendent of public instruction to withhold up to ten percent of state aid from any school district deemed to be in violation of the law. This bill also failed to become law.³⁴

In 2010, Arizona legislators made a third attempt to impose a ban ethnic studies. This bill, HB 2281, was successfully passed in May 2010.³⁵ The statute prohibits any school district or charter school from including any courses or classes that:

1. Promote the overthrow of the United States 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.³⁶

The statute also authorizes the state board of education or superintendent of public instruction to withhold up to ten percent of state aid if the charter school or school district fails to comply within sixty days after being notified of a violation.³⁷ However, HB 2281 stated that it is *not* prohibiting the following types of classes:

1. Courses or classes for Native American pupils that are required to comply with federal law.
2. The grouping 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 or class violates [the ethnic studies law].
4. Courses or classes that include the discussion of controversial aspects of history.³⁸

Further, the statute stipulates that it does not “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.”³⁹

On August 3, 2010, Horne wrote a letter to John Carroll, interim superintendent of the TUSD.⁴⁰ In this letter, Horne noted that the school district was still teaching its ethnic studies courses despite the enactment of H.B. 2281. Specifically, Horne was critical of the Mexican

³² Committee on Judiciary Senate Amendments to S.B. 1069, *available at* <http://www.azleg.gov/legtext/49leg/1r/adopted/s.1069jud.doc.htm>.

³³ *Id.*

³⁴ O’Leary & Andrea J. Romero, *supra* note 31, at 9.

³⁵ H.B. 2281, *available at* <http://www.azleg.gov/legtext/49leg/2r/bills/hb2281p.pdf>.

³⁶ ARIZ. REV. STAT. § 15-112(A)(1-4) (2011).

³⁷ *Id.* § 15-112(B).

³⁸ *Id.* § 15-112 (E)(1-4).

³⁹ *Id.* § 15-112 (F).

⁴⁰ Letter from Tom Horne to John Carroll, Aug. 3, 2010, *available at* http://www.edweek.org/media/letter_to_dr_carroll_tusd.pdf.

American Studies/La Raza course.⁴¹ Among other things, Horne cited a teacher's claim that the La Raza program "indoctrinate[s] students...in the belief that there is a war against Latino culture perpetrated by the white capitalist system."⁴² As further proof that the MAS program was in violation of H.B. 2281, Horne cited the director of ethnic studies program's explanation on a television program for the adoption of the word "Raza" (which means "the race" in Spanish) instead of just "Mexican-American Studies":

So that our students could recognize and connect to their indigenous side, just like the word "dine" for the Navajo translates to "the people," like the word "O'odham" for the Tohono O'odham translates to "the people."

The word "Yoeme" for the Yoeme people translates to "the people."⁴³

It was an attempt to connect to our indigenous sides, as well as our Mexican side.

Horne interpreted this quote as an admission that the La Raza course was created for the purpose of advocating ethnic solidarity in violation of the statute.⁴⁴

Horne further mentioned in his letter his intent for it to serve as a formal request to tape the ethnic studies and the MAS program courses in their entirety during the coming semester.⁴⁵ Moreover, he declared his expectation that when H.B. 2281 went into effect on December 31st, the state department of education would withhold ten percent of the TUSD's budget until the district came into compliance with the law.⁴⁶

On December 30th, Horne announced a finding that the TUSD's MAS program, which had by then dropped the "Raza" name, violated § 15-112(B)(3) of the Arizona Revised Statutes because it was primarily designed for students from a particular ethnic group.⁴⁷ In arguing his case, Horne pointed to several pieces of evidence. First, Horne claimed that the "percentage of students in the course that are of Hispanic background greatly exceeds their overall percentage in relevant schools."⁴⁸ Second, Horne cited the chairman of the ethnic studies department's assertion that the course was "an attempt to connect with our indigenous sides, as well as our Mexican side."⁴⁹ Third, Horne argued that the district's website, which claimed that the purpose of the MAS program was to improve the academic performance of Latino students by creating "both a Latino academic identity and an enhanced state of Latino Academic achievement," was even further evidence that the program was designed primarily for Latino students.⁵⁰ Finally, Horne provided both statements from teachers and written materials to support his finding that the MAS program violated the statute.⁵¹ For instance, Horne observed that some of the written materials taught students that Chicanos had

⁴¹ *Id.*

⁴² *Id.* at 2.

⁴³ *Id.* at 3.

⁴⁴ *See id.*

⁴⁵ *See id.*

⁴⁶ *See id.*

⁴⁷ Tom Horne, *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 at <http://www.azag.gov/issues/TUSD%20%20Ethnic%20Studies%20Findings.pdf>.

⁴⁸ *Id.* at 2.

⁴⁹ *Id.* at 3.

⁵⁰ *Id.*

⁵¹ *See id.* at 4-10.

been displaced from their homeland in the southwest region of the United States.⁵² Additionally, the materials asserted that “half of Mexico was ripped off by trickery and violence.”⁵³ Horne concluded that the TUSD had sixty days to eliminate its MAS program courses to avoid the withholding of ten percent of its budget.⁵⁴

John Huppenthal, then acting state superintendent of instruction, issued a statement of finding on June 15, 2011 that the MAS program violated § 15-112.⁵⁵ Citing an audit commissioned by the state department of education, Huppenthal concluded that the program violated three components of the state’s law: (1) it promoted resentment toward a particular race or class; (2) it was designed primarily for a particular racial group; and (3) it advocated ethnic solidarity instead of treating students as individuals.⁵⁶ He gave the TUSD sixty days to bring the MAS program into compliance or lose ten percent of state funds.⁵⁷ However, the audit released the next day contradicted Huppenthal’s assertions, finding that the statute did not violate the ethnic studies law.⁵⁸ Specifically, the audit found no observable evidence that the department: (1) promoted the overthrow of the government;⁵⁹ (2) promoted resentment toward a particular race or class;⁶⁰ or (3) advocated ethnic solidarity, rather than treating students as individuals.⁶¹ With respect to the question of whether the department’s curriculum was designed for a particular ethnic group, the audit did find a statement in the department’s flowchart stating that its model of “Critically Compassionate Intellectualism” was focused on “Latino Students.”⁶² However, the audit concluded that the “majority of the evidence demonstrates that the Mexican American Studies Department’s instruction is NOT designed primarily for pupils of a particular ethnic group.”⁶³

On June 22, the TUSD sent a notice of appeal of the determination of non-compliance and a request for a hearing with the state department of education.⁶⁴ The notice argued, *inter alia*, that the Mexican American Studies Program courses did not promote resentment toward a particular race or class.⁶⁵ The appeal further asserted that general claims that class materials referring to white people as “oppressors” did not establish a violation of the statute because there was no evidence that these materials were used in a specific class.⁶⁶

The notice of appeal also argued against Superintendent Huppenthal’s claim that the MAS

⁵² See *id.* at 8.

⁵³ See *id.* at 9.

⁵⁴ See *id.* at 10.

⁵⁵ *Superintendent of Public Instruction John Huppenthal Statement of Finding Regarding Tucson Unified School District’s Violation of A.R.S. §15-112*, available at

http://saveethnicstudies.org/assets/docs/state_audit/John_Huppenthal_Statement_of_finding.pdf.

⁵⁶ See *id.* at 1-2.

⁵⁷ See *id.* at 3.

⁵⁸ Cambium Learning, *Curriculum Audit of the Mexican American Studies Department, Tucson Unified School District (May 2, 2011)*, available at http://www.saveethnicstudies.org/assets/docs/state_audit/Cambium_Audit.pdf.

⁵⁹ See *id.* at 51-53.

⁶⁰ See *id.* at 55.

⁶¹ See *id.* at 63.

⁶² *Id.* at 59.

⁶³ *Id.*

⁶⁴ *Tucson Unified School District No. 1 Notice of Appeal of Determination of Non-Compliance with A.R.S. §15-112 and Request for Hearing (June 22, 2011)*, available at http://www.saveethnicstudies.org/assets/docs/state_audit/Notice-of-Appeal-TUSD_06-22-2011.pdf

⁶⁵ See *id.* at 4.

⁶⁶ *Id.*

program courses were designed for a specific ethnic group.⁶⁷ The appeal asserted that all students were encouraged to enroll in these courses and take advantage of their rigorous curricula, which emphasized cultural awareness and fostered critical thinking.⁶⁸ The appeal also pointed out that the Notice of Violation's comparison of enrollment in the MAS program courses with district-wide Hispanic employment was flawed because "many of the schools in which Mexican American Studies classes are offered have a higher Hispanic enrollment than the district average."⁶⁹ Instead, the more suitable comparison would be between the "Hispanic enrollment at a particular school and [the] Hispanic enrollment in that school's Mexican American Studies classes."⁷⁰ Furthermore, the Notice of Appeal rejected the superintendent's claim that the MAS courses emphasized ethnic solidarity, arguing that the findings failed to include any specific references to ways in which the classes violated this provision.⁷¹ The state-commissioned audit contradicted this claim as well.⁷²

Finally, the Notice of Appeal claimed that the Arizona ethnic studies law was unconstitutionally vague; specifically that Section 15-112 was vague on its face because it "gives not guidance as to how a district must structure its curriculum to ensure it is not perceived as 'promot[ing] resentment toward a race or a class of people' while trying to teach students about important historical events that involve systematic oppression of one race or class of people by another."⁷³ For example, the appeal explained, "studying the history of slavery in the United States may engender feelings of resentment among some students, even though it is not an intended result of the curriculum."⁷⁴ The Notice also claimed that § 15-112 was unconstitutionally vague as applied to the TUSD because the superintendent failed to identify any class in which violations of the statute occurred.⁷⁵ Therefore, it was impossible "to determine what acts would result in compliance."⁷⁶

On November 14, 2011, students and teachers filed a motion for a preliminary injunction to enjoin Superintendent Huppenthal from enforcing the ethnic studies statute. The plaintiffs claimed that the statute was unconstitutionally vague both on its face and in its application and alleged that the statute violated their equal protection, free speech, and due process rights.⁷⁷ On December 27, 2011, state administrative law judge Lewis D. Kowal held that the MAS program violated § 15-112,⁷⁸ finding that there was no way to use some of the materials in the MAS program "without being in violation of the law."⁷⁹ Kowal also concluded that the "MAS program has classes or courses designed for Latinos as a group that promotes racial resentment against 'Whites,' and advocates ethnic solidarity of Latinos."⁸⁰

While Kowal found that the ethnic studies statute "permits the historical (objective) instruction of oppression that may, as a natural but unintended consequence, result in racial

⁶⁷ *See id.*

⁶⁸ *See id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 4-5.

⁷¹ *See id.*

⁷² *See id.*

⁷³ *Id.* at 6.

⁷⁴ *Id.*

⁷⁵ *See id.*

⁷⁶ *Id.*

⁷⁷ *Costa, supra* note 5.

⁷⁸ *In the Matter of Hearing of an Appeal, supra* note 4.

⁷⁹ *Id.* at 34.

⁸⁰ *Id.*

resentment or ethnic solidarity,” he also observed that “teaching oppression objectively is quite different than actively presenting material in a biased, politically, and emotionally charged manner, which is what occurred in MAS classes.”⁸¹ Although “framed as being a constitutional challenge to the statute as applied,” Kowal characterized the TUSD’s constitutional vagueness claim as a facial challenge.⁸² Moreover, in holding that that Huppenthal could withhold ten percent of state funds until the MAS program came into compliance,⁸³ Kowal noted that because no court had declared the ethnic studies statute as unconstitutional, “the law must be given effect by this Tribunal.”⁸⁴

Section II: An Analysis of the Constitutionality of Arizona’s Ethnic Studies Law

The Arizona ethnic studies law and others like it face many legal challenges. Central to the legal debate over the Arizona law is the question of “who controls the school’s curriculum and to what extent.”⁸⁵ This question not only concerns the proper amount of discretion public school officials enjoy in limiting the “exposure of their students to certain curricular material” but also involves the “proper role of the courts in superintending that exercise of discretion.”⁸⁶ Making curricular decisions is no easy task given the various interests of students, parents, teachers, and government officials. The Arizona law and the Tucson teachers’ lawsuit illustrate the tension between the “constitutional structures that protect identified individual rights” on the one hand and the “institutional mechanisms that have developed for educating American children” on the other, including the “social, political, and academic goals of those who control the schools.”⁸⁷ This section will survey the applicable legal principles for claims that parents, students, and teachers may raise in light of the Arizona law.

A. A State’s Right to Control Curriculum

Foundational to any discussion about the legal implications of the ethnic studies law is the principle that state and local governments have the right to control public school curriculum. Schools are tasked with instilling both content knowledge and social values to the nation’s youth.⁸⁸ The Supreme Court has recognized that a state has an undisputed right to establish the curriculum of its public schools.⁸⁹ In public schools, curriculum is adopted either by state law or through local communities and school boards.⁹⁰ Because state and local authorities are primarily responsible for public education in the United States, courts generally do not intervene in educational issues unless important constitutional rights are clearly implicated.⁹¹ Recognizing the importance of local control over educational decisions and acknowledging that they may lack expertise in educational matters,

⁸¹ *Id.* at 35.

⁸² *Id.*

⁸³ *See id.*

⁸⁴ *Id.* at 36.

⁸⁵ *Mercer v. Michigan State Bd. of Educ.*, 379 F.Supp. 580, 585 (E.D. Mich. 1974).

⁸⁶ *Seyfried v. Walton*, 668 F.2d 214, 217 (3d Cir. 1981) (Rosenn, C.J., concurring).

⁸⁷ Howard O. Hunter, *Curriculum, Pedagogy, and the Constitutional Rights of Teachers in Secondary Schools*, 25 WM. & MARY L. REV. 1, 3 (1983) (discussing the inherent conflict in the educational system between protecting free speech and inquiry, training students for occupational pursuits, and promoting selected social and cultural goals).

⁸⁸ *See Pico v. Bd. of Educ.*, 638 F.2d 404, 432 (2d Cir. 1980) (Newman, J., concurring), cert. granted, 454 U.S. 891 (1981).

⁸⁹ *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968).

⁹⁰ *See Mercer*, 379 F.Supp. at 585.

⁹¹ *See, e.g., Epperson*, 393 U.S. at 104 (1968); Donald F. Uerling, *Academic Freedom in K-12 Education*, 79 NEB. L. REV. 956, 958 (2000).

judges generally defer to local school authorities in matters of curricular decision-making.⁹² Thus, most curriculum debates are resolved in the political branches.⁹³ However, courts have decided a number of key curriculum disputes such as the legality of courses teaching intelligent design,⁹⁴ human sexuality,⁹⁵ and religious studies.⁹⁶ A public school's control over its curriculum is limited only by the constitutional restraints that govern all governmental entities, such as the Establishment Clause.⁹⁷

Although many educational decisions reflect the social, political, and moral principles of state and local authorities, “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”⁹⁸ Thus, courts will not “tolerate laws that cast a pall of orthodoxy over the classroom.”⁹⁹ The limits of state and local curricular decision-making and the proper legal analysis for challenges to curricular decisions, however, are less clear.¹⁰⁰ In addition to state and local school authorities, many parents, students, and teachers have attempted to influence curricular decisions through a host of legal challenges. However, in spite of these challenges courts have generally upheld state and local curricular decisions.

B. Parental Rights

Parental challenges to public school curriculum are common, particularly with respect to controversial issues such as sex education and religion, and courts have recognized that parents have a constitutional right to control their children's upbringing. However, courts have refused to recognize the right of parents to direct how public schools teach their children.¹⁰¹

A line of Supreme Court cases dating back to the 1920s protects the rights of parents to direct the education of their children.¹⁰² The Court recognized that the Fourteenth Amendment's Due Process Clause protects the right of parents to supervise the education and upbringing of their children¹⁰³ and to decide whether to send their children to a private or public school.¹⁰⁴ The

⁹² Mary Katherine Hackney, Comment, *Is This Apple for Teacher an Apple from Eve? Reanalyzing the Intelligent Design Debate from a Curricular Perspective*, 85 N.C. L. REV. 349, 365 (2006).

⁹³ See *Epperson*, 393 U.S. at 104 (“By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems which do not directly and sharply implicate basic constitutional violations.”).

⁹⁴ See, e.g., *Kitzmiller v. Dover Area School Dist.*, 400 F.2d 707, 735 (M.D. Pa. 2005) (holding that teaching intelligent design in public school biology courses violates the Establishment Clause of the First Amendment).

⁹⁵ See Peter J. Jenkins, *Morality and Public School Speech: Balancing the Rights of Students, Parents, and Communities*, 2008 B.Y.U.L. REV. 593, 602-13 (2008) (discussing legal disputes involving human sexuality in school curricula).

⁹⁶ See *McCullum v. Bd. of Educ.*, 333 U.S. 203, 211-12 (1948) (holding that the use of public school property for religious instruction and the close cooperation between school authorities and religious teachers violated the Establishment Clause).

⁹⁷ Jenkins, *supra* note 95, at 594.

⁹⁸ *Epperson*, 393 U.S. at 104 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

⁹⁹ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

¹⁰⁰ See Uerling, *supra* note 91, at 958-59; *Epperson*, 393 U.S. at 107; Hunter, *supra* note 87, at 4.

¹⁰¹ See, e.g., *Fields v. Palmdale*, 447 F.3d 1187, 1190 (8th Cir. 2006); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005).

¹⁰² See William G. Ross, *The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177 (2000).

¹⁰³ See *Meyer v. Nebraska*, 262 U.S. 390, 402-03 (1923).

¹⁰⁴ See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535-36 (1925).

Fourteenth Amendment, however, does not give parents the unfettered right to “veto” curriculum decisions of public school boards.¹⁰⁵

In *Meyer v. Nebraska*,¹⁰⁶ the Court held that a state law that prohibited teaching foreign languages to any child who had not passed the eighth grade violated parents’ and teachers’ Fourteenth Amendment liberty interests.¹⁰⁷ The Court concluded that foreign language statutes, aimed at protecting “American ideals,” exceed a state’s police power.¹⁰⁸ The factual background of *Meyer* is in many ways analogous to the Arizona situation. Nebraska adopted the law during a high immigrant influx.¹⁰⁹ The law’s purpose was aimed at integrating ethnic minority groups and preventing the emergence of a multi-lingual society.¹¹⁰ The Court concluded that the law’s legislative purpose, to promote assimilation and civic development, did not justify interfering with the liberty interest of the teacher to contract with parents to teach their children.¹¹¹

In *Pierce v. Society of Sisters*,¹¹² the Court held that a state’s police power does not permit the state to require students to “accept instruction from public school teachers only.”¹¹³ The Court struck down an Oregon law that required parents to send their children to the public school in the district where the children resided.¹¹⁴ The Court based its decision on the *Meyer* doctrine that a state may not unreasonably interfere with the “liberty of parents and guardians to direct the upbringing and education of children under their control,” absent some reasonable relation to an important state interest.¹¹⁵

While *Meyer* and *Pierce* protect a parent’s right in directing the education of their children, these cases do not give parents the right to participate in curricular decisions outside of the normal political process.¹¹⁶ The First Circuit, for example, has held that a parent’s constitutional right to raise their children does not include the right to restrict what a public school may teach its students.¹¹⁷ The court noted that even if the school’s teachings contradict a parent’s religious beliefs, that teaching does not violate a parent’s free exercise of religion under the First Amendment.¹¹⁸ Similarly, the Eighth Circuit has held that parents do not have a substantive due process right to “control through the federal courts the information that public schools make available to their

¹⁰⁵ See Jenkins, *supra* note 95, at 593.

¹⁰⁶ *Meyer*, 262 U.S. at 400.

¹⁰⁷ *Id.* (“Imparting knowledge in a foreign language is not inherently immoral or inimical to the public welfare, and not a legitimate subject for prohibitory legislation.”).

¹⁰⁸ *Id.* at 402. (The Court noted that the intent of the statute was “to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters,” a purpose the Court found “easy to appreciate” but overstepping the state’s police power).

¹⁰⁹ See Hunter, *supra* note 87, at 5.

¹¹⁰ See *id.*

¹¹¹ *Meyer*, 262 U.S. at 403.

¹¹² *Pierce*, 268 U.S. at 534.

¹¹³ *Id.* at 535. The Court went on to explain that children are not “mere creatures of the State” and that parents “have the right, coupled with the high duty, to recognize and prepare” [their children] for additional obligations.” *Id.*

¹¹⁴ *Id.* at 530.

¹¹⁵ *Id.* at 534-35.

¹¹⁶ *Meyer*, 262 U.S. at 400; *Pierce*, 268 U.S. at 535.

¹¹⁷ See *Brown v. Hot, Sexy and Safer Productions*, 68 F.3d 525, 534 (1st Cir. 1995).

¹¹⁸ See *id.* at 539. The *Brown* decision and similar decisions are quite controversial in that they protect schools deciding to include teaching about sex or homosexuality in spite of parental objections based on the First Amendment. See, e.g., *Parker v. Hurley*, 474 F. Supp. 2d 261, 263 (D. Mass. 2007).

children” and further noted that school boards, and not the courts, must make curricular decisions.¹¹⁹

While parents have a right to control the upbringing of their children, including the right to decide whether to send their children to a public school or to a private school, courts have refused to extend the substantive due process analysis of *Meyer* and *Pierce* to include a parental right to control curricular decisions.¹²⁰ Thus, courts generally give school districts considerable freedom to shape their curriculums even though parents may disagree with those decisions.¹²¹

C. Student Rights

Another important issue is whether students may challenge curricular decisions. Such challenges are often brought on First Amendment grounds. While the starting point for students’ First Amendment rights in school is *Tinker v. Des Moines Independent School District* and its progeny, the *Tinker* “substantial disruption” test does not provide an adequate framework for student challenges to curricular decisions.¹²² Some courts have suggested that students have a First Amendment right to challenge “overly narrow or ideological curriculum-related decisions” that interfere with students’ “freedom to hear.”¹²³ These challenges highlight the tension between the rights of students to learn in the marketplace of ideas and the responsibility of school officials to select appropriate content and teaching methods and inculcating basic moral values.¹²⁴ In deciding such First Amendment challenges, courts will consider whether the school official’s regulation of curriculum content was reasonably related to a legitimate pedagogical concern.¹²⁵

Most student challenges to curricular decisions have involved the removal of controversial books from the school library.¹²⁶ For example, in *Board of Education v. Pico*, a plurality of the Supreme Court held that a local school board could not remove controversial books from its library shelves merely because the Board members disliked material contained in the books.¹²⁷ The Court concluded that the Board’s action violated a student’s right of access to ideas under the First Amendment.¹²⁸ However, the Court limited its decision to school cases involving optional reading books in a school library and refused to enter the “difficult terrain” of a school board’s “discretion to prescribe the curricula” of the school.¹²⁹

¹¹⁹ See *Fields v. Palmdale*, 447 F.3d 1187, 1190 (8th Cir. 2006).

¹²⁰ See *Ross*, *supra* note 102, at 185; *Fields*, 447 F.3d at 1190 (“[T]he Constitution does not afford parents a substantive due process or privacy right to control through the federal courts the information that public schools make available to their children.”).

¹²¹ See *Mercer*, 379 F.Supp. at 586 (E.D. Mich. 1974) (noting that public school “authorities must choose which portions of the world’s knowledge will be included in the curriculum’s programs and courses, and which portions will be left for grasping from other sources, such as the family, peers or other institutions”).

¹²² See *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 513-514 (1969) (holding that the First Amendment protects student speech in the classroom to the extent that it does not “material and substantially disrupt the work and discipline of the school”); See also *Bethel Sch. Dist. v. Fraser*, 474 U.S. 814 (1985); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 262 (1988).

¹²³ *Seyfried*, 668 F.2d at 219 (Rosenn, C.J., concurring); *Zykan v. Warsaw Cmty. Sch. Corp.*, 631 F.2d 1300, 1304 (7th Cir. 1980).

¹²⁴ *Seyfried*, 668 F.2d at 219.

¹²⁵ See, e.g., *Borger v. Bisciglia*, 888 F.Supp. 97, 100 (E.D. Wis. 1995).

¹²⁶ *Seyfried*, 668 F.2d at 219 n.4.

¹²⁷ *Bd. of Educ., Island Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982).

¹²⁸ *Id.* at 868.

¹²⁹ *Id.* at 861.

Students in the TUSD might argue that because the decision to dissolve the MAS program was based in part on controversial textbooks, the case is analogous to library book cases and should be governed by *Pico*. However, a recent First Circuit case, *Griswold v. Driscoll*, demonstrates that courts are unwilling to apply “the *Pico* plurality’s notion of non-interference with school libraries as a constitutional basis for limiting the discretion of state authorities to set curriculum.”¹³⁰ In contrast to library cases like *Pico*, courts generally hold that students do not have a First Amendment right to challenge classroom curricular decisions unless certain constitutional concerns are clearly implicated, such as issues involving the Establishment Clause.¹³¹ In fact, the Supreme Court has “clearly established school administration control over school-sponsored student expression.”¹³² So strong is the discretion that courts grant to school officials to make sound curricular decisions that the Seventh Circuit has held that student challenges to curricular decisions must “cross a relatively high threshold before entering upon the field of a constitutional claim suitable for federal court litigation.”¹³³

However, some courts have considered students’ First Amendment rights through the rubric of censorship in the classroom. In *Borger v. Bisceglia*, a school district refused to allow high school students to view the film “Schindler’s List” as part of the school’s curriculum due to the its “R” rating.¹³⁴ A district policy limited the use of rated commercial films in the classroom to those rated “PG-13,” “PG,” and “G.”¹³⁵ One student challenged the district’s policy, claiming it violated his rights under the First and Fourteenth Amendment.¹³⁶ The court dismissed the claim on summary judgment finding that “the law does not support Borger’s First Amendment claim.”¹³⁷

Noting the “abundant discretion” that courts give to school officials in constructing curriculum, the court considered whether the district’s decision bore a reasonable relationship to a legitimate pedagogical concern.¹³⁸ Importantly, the court determined that this was “not a case in which the plaintiff alleges that school officials acted pursuant to political . . . beliefs.”¹³⁹ Instead, the student argued the district’s reliance on the MPAA rating system in order to exclude a movie from the curriculum was not reasonably related to the legitimate pedagogical concern of preventing students from viewing movies with violence, nudity, and harsh language.¹⁴⁰ The court disagreed and found the district’s reliance on the MPAA ratings was a reasonable way of determining which films were likely to contain inappropriate material for high school students. The court premised this

¹³⁰ *Griswold v. Driscoll*, 616 F.3d 53, 59 (1st Cir. 2010) (rejecting argument that a state board of education’s curriculum guide was library material that the school was censoring in violation of the First Amendment and instead concluding that the board’s deletion of certain materials from the guide did not violate students’ or teachers’ free speech rights because the guide was curricular in nature and thus government speech).

¹³¹ Nancy Tenney, *The Constitutional Imperative of Reality in Public School Curricula: Untruths About Homosexuality as a Violation of the First Amendment*, 60 BROOK. L. REV. 1599, 1616-17 (1995).

¹³² Kara Lynn Grice, *Striking an Unequal Balance: The Fourth Circuit Holds That Public School Teachers Do Not Have First Amendment Rights to Set Curricula in Boring v. Buncombe County Board of Education*, 77 N.C. L. REV. 1960, 1962-63 (1999) (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1987)).

¹³³ *Borger*, 888 F.Supp. at 99 (quoting *Zykan v. Warsaw Cmty. Sch. Corp.*, 631 F.2d 1300, 1306 (7th Cir. 1980)).

¹³⁴ *Id.* at 98.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 99.

¹³⁸ *Id.* at 99-100 (invoking the test adopted by the Supreme Court in *Hazelwood*, 484 U.S. at 273).

¹³⁹ *Id.* at 100.

¹⁴⁰ *Id.*

holding on the fact that the policy was an exercise of school board discretion which required only “reasonableness.”¹⁴¹

In a similar case, *Krizek v. Board of Education*, a teacher sought to enjoin a school district from terminating her employment contract for showing her students an R-rated film, arguing that the district’s decision violated her rights under the First Amendment.¹⁴² The teacher had shown her students the film “About Last Night,” which contained sexually explicit scenes and vulgar language.¹⁴³

The court noted that public schools have a dual function in society: developing inquisitive minds and transmitting the mores of the community.¹⁴⁴ This dual function requires a balancing of teachers’ First Amendment rights in the classroom with a school’s limitations on teachers’ classroom speech.¹⁴⁵ The court then referred to two types of cases involving teacher speech in the classroom: (1) those involving curricular decisions made by school officials and challenged by teachers; and (2) those where a teacher is disciplined for expression in the classroom.¹⁴⁶ Regarding cases involving curricular decisions, the court noted broad deference is awarded to school administrators in making such decisions.¹⁴⁷

The court found the *Kuhlmeier* standard was the proper test for challenges against school administrators’ regulation of curriculum content.¹⁴⁸ Applying the standard, the court concluded the school could have made a pedagogic determination that the movie was inappropriate for the classroom, given its legitimate concern over the display of vulgarity and sexual scenes.¹⁴⁹ In making this determination, the school legitimately terminated the teacher’s employment for disobeying a school policy without infringing on the teacher’s First Amendment rights.¹⁵⁰

As such, while the Supreme Court vigorously supports the free exchange of ideas in the classroom, public school curriculum bears the imprimatur of the state and, accordingly, the state may reasonably regulate the content of student speech related to the curriculum in the classroom.¹⁵¹ Likewise, courts have refused to recognize the classroom as a public forum during instructional time.¹⁵²

¹⁴¹ *Id.* at 101.

¹⁴² *Krizek v. Bd. of Educ. of Cicero-Stickney Tp. High Sch. Dist. No. 201*, 713 F.Supp. 1131, 1136 (N.D. Ill. 1989).

¹⁴³ *Id.* at 1133.

¹⁴⁴ *Id.* at 1137.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1138 (“[I]n a public school system, where the state pays the costs of the education, it is legitimate for the curriculum of the school district to reflect the value system and collective will of those whose children are being educated.”).

¹⁴⁸ *Id.* at 1139.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 1140.

¹⁵¹ See *Hazelwood*, 484 U.S. at 271-73.

¹⁵² See, e.g., *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993) (concluding that “the classroom is not a public forum”); *Williams v. Vidmar*, 367 F.Supp.2d 1265, 1273 (N.D. Cal. 2005) (taking judicial notice that a “K-12 classroom in a public elementary school is a nonpublic forum”). In some cases, the Supreme Court has recognized a public forum on public school and university campuses. Where a school opens a public forum, it must permit all forms of speech to be exercised equally. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995). However, the Court’s forum analysis has not been applied to school curriculum cases. See *Uerling*, *supra* note 93.

D. Teacher Rights

Much like student speech, teacher speech within the classroom raises constitutional considerations, particularly with regard to the First Amendment. One of the hallmarks of First Amendment protection in academia is the concept of “academic freedom.”¹⁵³ Academic freedom provides teachers with First Amendment protections in the performance of their teaching duties.¹⁵⁴ This “freedom” allow teachers to “influence curriculum content and pedagogical methods.”¹⁵⁵ However, academic freedom is generally applied as a recognized legal concept only in higher education.¹⁵⁶ As a result, teachers in public primary and secondary schools have minimal constitutional protection when making decisions about curriculum.¹⁵⁷

In fact, while courts have recognized that teachers are entitled to certain First Amendment protections in the classroom,¹⁵⁸ courts permit state and local school authorities to widely regulate teacher speech within certain constitutional limits.¹⁵⁹ Teachers are rarely successful in bringing First Amendment claims challenging curricular decisions.¹⁶⁰ While courts have yet to adopt a coherent analysis for First Amendment protections of teacher classroom speech,¹⁶¹ a few key cases provide courts with a framework for deciding teacher challenges to curricular decisions.¹⁶² Courts have recognized the critical role that teachers play in “developing students’ attitude toward government and understanding of the role of citizens in our society,” and by extension acknowledge the importance of teacher speech.¹⁶³ However, courts have consistently held that a teacher’s classroom instruction is public employee speech.¹⁶⁴ Therefore, among other standards, courts have routinely applied the public employee speech doctrine and academic freedom to teacher curricular speech.¹⁶⁵

Even where teachers’ First Amendment concerns are implicated, courts may uphold curricular decisions that are based on legitimate pedagogical concerns.¹⁶⁶ For example, the Seventh Circuit held that a teacher’s claim that a school district’s prohibition on teaching a particular course

¹⁵³ See *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (noting that “civilization will stagnate and die” unless “[t]eachers and students . . . remain free to inquire, to study and to evaluate, to gain new maturity and understanding”).

¹⁵⁴ Justice Frankfurter famously articulated the “four essential freedoms” of the university as the ability to “determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” *Sweezy*, 354 U.S. at 263.

¹⁵⁵ Hunter, *supra* note 87, at 4; see also Uerling, *supra* note 91, at 956.

¹⁵⁶ See Uerling, *supra* note 91, at 956-57; but see *Boring v. Buncombe Cty. Bd. of Ed.*, 136 F.3d 364, 370 (4th Cir. 1998) (suggesting that institutional academic freedom should apply to local schools and school boards in making curriculum decisions).

¹⁵⁷ Hunter, *supra* note 87, at 4.

¹⁵⁸ See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (noting that neither students nor teachers “shed their constitutional rights . . . at the schoolhouse gate”); but see, *Hazelwood*, 484 at 267 (noting that in light of a school’s educational mission, “school officials may impose reasonable restrictions on the speech of . . . teachers”).

¹⁵⁹ Uerling, *supra* note 91, at 959.

¹⁶⁰ *Id.* at 960.

¹⁶¹ Anne Gardner, Note: *Preparing Students for Democratic Participation: Why Teacher Curricular Speech Should Sometimes Be Protected by the First Amendment*, 73 MO. L. REV. 213, 215 (2008); *Kramer v. New York City Bd. of Educ.*, 715 F. Supp. 2d 335 (E.D. N.Y. 2010) (noting that a lack of clarity among the courts regarding the “scope and content of teacher’s free speech rights in the classroom” is evidence in “case law, scholarly literature, and the legal press”).

¹⁶² Grice, *supra* note 132, at 1962-63.

¹⁶³ Uerling, *supra* note 91, at 959.

¹⁶⁴ See *Kramer*, 715 F. Supp. 2d at 357; *Boring v. Buncombe*, 136 F.3d 364, 368 (4th Cir. 1998).

¹⁶⁵ *Gardner*, *supra* note 161, at 215.

¹⁶⁶ See *Hazelwood*, 484 U.S. at 273 (1988) (recognizing that schools have broad discretion in regulating speech as long as the regulations are based on “legitimate pedagogical concerns”).

violated his First and Fourteenth Amendment rights was properly dismissed based on the “principle that an individual teacher has no right to ignore the directives of duly appointed education authorities.”¹⁶⁷ The court noted that the school district clearly demonstrated an “important pedagogical interest in establishing the curriculum.”¹⁶⁸ Courts have consistently applied this rational basis test to curricular decisions.¹⁶⁹ The state of Arizona has the potential to advance a number of legitimate pedagogical purposes, including encouraging respect between students, reducing racial and ethnic tensions, and preventing segregation and isolation of ethnic and racial minorities into ethnocentric courses.

Many courts never reach First Amendment considerations to resolve curricular disputes. In *Boring v. Buncombe County Board of Education*, the Fourth Circuit held a public high school teacher did not have a First Amendment right to participate in determining the school curriculum through the selection and production of a theatrical play.¹⁷⁰ The plaintiff in *Boring*, a high school teacher, assigned her students to perform a theatrical play containing controversial material.¹⁷¹ After receiving complaints from parents, the principal requested that the teacher remove the controversial portions from the play.¹⁷² However, at the close of the school year, the principal requested the district to transfer the teacher to another school.¹⁷³ After the superintendent granted this request, the teacher sued the school on a variety of grounds, including violation of her First Amendment free speech rights.¹⁷⁴ On appeal, the Fourth Circuit concluded that the teacher’s dispute with school officials was an ordinary employment dispute and did not constitute protected speech under the First Amendment.¹⁷⁵ As such, the court noted that the school board did not need to defend its decision with a legitimate pedagogical interest since the teacher’s First Amendment rights were not affected.¹⁷⁶ However, the court also remarked that even if the teacher had a First Amendment right under the circumstances, school officials had articulated a legitimate pedagogical interest because the play was part of the school’s curriculum.¹⁷⁷

The majority in *Boring* also applied the public concern test from *Connick v. Myers*.¹⁷⁸ In *Connick*, the Supreme Court invoked the *Pickering* test¹⁷⁹ and held that “when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of personal interest” then the First Amendment is not implicated because the matter is merely an employment dispute.¹⁸⁰ In a similar case, the Fifth Circuit, applying *Connick*, held that a teacher’s

¹⁶⁷ *Webster v. New Lenox Sch. Dist.*, 917 F.2d 1004, 1008 (7th cir. 1990).

¹⁶⁸ *Id.* (citing *Hazelwood*, 484 U.S. at 273, and *Palmer v. Bd. of Educ.*, 603 F.2d 1271, 1274 (7th Cir. 1979)).

¹⁶⁹ *See, e.g.*, *Parker v. Hurley*, 474 F. Supp. 2d 261, 273-74 (D. Mass. 2007) (noting that the legitimate government interest test “is a paradigm of judicial restraint”).

¹⁷⁰ *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998); *see also* Grice, *supra* note 132 (summarizing *Boring* and discussing its implications).

¹⁷¹ *Boring*, 136 F.3d at 366.

¹⁷² *Id.* at 366.

¹⁷³ *Id.* at 367.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 369. In a concurring opinion, Judge Luttig opined that “the First Amendment does not require school boards to allow individual teachers in the Nation’s elementary and secondary public schools to determine the curriculum for their classrooms consistent with their own personal, political, and other views.” *Id.* at 373 (Luttig concurring).

¹⁷⁶ *Id.* at 370.

¹⁷⁷ *Id.* at 369-70.

¹⁷⁸ *Id.* at 368; *Connick v. Myers*, 461 U.S. 138 (1983).

¹⁷⁹ *See Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (requiring a balancing of a public employer’s interests against its employees’ First Amendment speech rights).

¹⁸⁰ *Connick*, 461 U.S. at 147.

selection of a reading list was not a matter of public concern, and thus, was not protected by the First Amendment.¹⁸¹ The Fifth Circuit noted that while “the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula.”¹⁸² Most courts have adopted the Seventh Circuit’s approach under *Garcetti v. Ceballos*,¹⁸³ where curricular speech is part of a teacher’s employment responsibility and thus the First Amendment does not protect a teacher’s speech that departs from the school system’s adopted curriculum.¹⁸⁴

In addition to First Amendment challenges, teachers may raise due process and equal protection challenges to the Arizona ethnic studies law; specifically the due process claims of vagueness and overbreadth. The Fourteenth Amendment’s Due Process clause requires that statutes provide sufficient notice of a prohibited activity.¹⁸⁵ Under the vagueness doctrine, a statute is void on due process grounds if a prohibition is not clearly defined.¹⁸⁶ Teachers also have a right to know what classroom speech is prohibited in a state statute.¹⁸⁷ Under the vagueness doctrine, regulations must provide people “of ordinary intelligence a reasonable opportunity to know what is prohibited” and “provide explicit standards for those who apply them.”¹⁸⁸ However, the Supreme Court has noted that “when the Government is acting as a patron rather than as a sovereign, the consequences of imprecision are not constitutionally severe.”¹⁸⁹ As such, a vagueness claim brought by the Arizona teachers will likely be unsuccessful.¹⁹⁰

It is also unlikely that a court would find the Arizona law overbroad. A statute is overbroad if it burdens speech protected by the First Amendment such that the burden is substantial when compared to unprotected speech.¹⁹¹ The ethnic studies law, like most curricular decisions in schools, restricts speech only in public secondary education classrooms. Given that classroom speech is not afforded the full protection of the First Amendment, and that courts generally find the unique environment of schools require great deference to school administrators, laws that restrict speech in the classroom will likely withstand facial challenges of vagueness or over-breadth.¹⁹²

Teachers and students in the TUSD could also raise a claim pursuant to the Equal Protection Clause. The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the

¹⁸¹ *Kirkland v. Northside Independent Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989).

¹⁸² *Id.* at 800.

¹⁸³ *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (concluding that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline”).

¹⁸⁴ *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477 (7th Cir. 2007) (noting that a “school system does not ‘regulate’ speech as much as it *biases* that speech”).

¹⁸⁵ *See Kramer v. New York City Bd. of Educ.*, 715 F. Supp. 2d 335, 355 (E.D. N.Y. 2010).

¹⁸⁶ *See id.* at 356 (noting that a “punitive enactment is unconstitutionally vague when it (1) does not allow a person of ordinary intelligence a reasonable opportunity to know what is prohibited, or (2) lacks explicit standards”).

¹⁸⁷ *See id.*

¹⁸⁸ *Id.* at 360.

¹⁸⁹ *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 589 (1998).

¹⁹⁰ For a discussion of teachers’ vagueness challenges to a state law regarding curriculum, *see California Teachers Ass’n v. State Bd. of Educ.*, 271 F.3d 1141 (9th Cir. 2001).

¹⁹¹ Uerling, *supra* note 91.

¹⁹² Anna M. Sewell, *Moving Beyond Monkeys: The Expansion and Relocation of the Religious Curriculum Debate*, 114 PENN. ST. L. REV. 1067, 1078 (2010).

equal protection of the laws.”¹⁹³ This provision imposes a restraint on the governmental use of classifications, such as race, to create or enforce a law.

Challenges may be raised to a statute’s constitutionality either on its face or as-applied. Unfortunately for the teachers, a facial challenge to the Arizona law is not likely to succeed. Under Supreme Court precedents, a facial challenge to a statute will fail unless there is no set of circumstances under which the statute is valid.¹⁹⁴ As such, teachers and students in the Tucson School District are more likely to succeed in an as-applied challenge to the Arizona ethnic studies law. Under this type of challenge, the teachers in the MAS program could allege that the state discriminated against them on the basis of their national origin. Discrimination may be found only by establishing unequal treatment of people in similar circumstances.¹⁹⁵ Thus, to prove an equal protection violation, the teachers must show that the state acted with the intent to discriminate against them based upon their membership in that protected class.¹⁹⁶

Teachers and students probably cannot establish a race-based equal protection claim that would warrant strict scrutiny review because there is no evidence of intentional racial discrimination.¹⁹⁷ As such, a court would apply rational basis analysis, which requires the classification to be rationally related to a legitimate purpose.¹⁹⁸ Tom Horne argues that the aim of the law is to prohibit ethnic studies courses that divide students by race and ethnicity.¹⁹⁹ Applying rational basis analysis, a court will consider whether such a purpose is reasonably related to the pedagogical interests of the state.²⁰⁰ State and local education officials have a legitimate state interest in preventing segregation within public schools.²⁰¹ Some commentators and school officials have made the connection between particular ethnic studies courses and segregation.²⁰² A related concern for some school districts is the goal of minimizing racial conflict within the school.²⁰³ Thus, a court will likely uphold the ethnic studies statute in light of Arizona’s pedagogical interest in establishing a curriculum for its public schools and confronting the concerns of racial and ethnic conflict and segregation.²⁰⁴

Similarly, if a challenge is brought alleging that the contents of the curriculum are discriminatory, the state of Arizona will likely prevail because courts grant broad discretion to a state

¹⁹³ U.S. CONST. amend. XIV, § 1.

¹⁹⁴ See *United States v. Salerno*, 481 U.S. 739, 745, (1987) (adopting the no set of circumstances test—a facial challenge to a statute will fail unless there is no constitutional application of that statute), see also *U.S. v. Stevens*, 130 S. Ct. 1577, 1587 (2010).

¹⁹⁵ See, e.g., *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995).

¹⁹⁶ See *Thornton v. City of St. Helens*, 425 F.3d 1158, 166-67 (9th Cir. 2005).

¹⁹⁷ See *id.* at 1167 (“Mere indifference to the effects of a decision on a particular class does not give rise to an equal protection claim.”).

¹⁹⁸ *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

¹⁹⁹ See Horne, *supra* note 15, at 1.

²⁰⁰ See, e.g., *Nordlinger*, 505 U.S. 1 (1992).

²⁰¹ Richard Thompson Ford, *Brown at Fifty: Brown’s Ghost*, 117 HARV. L. REV. 1305, 1306 (2004) (noting that the “halls of the nation’s classrooms are marked by the legacy of Jim Crow segregation and haunted by the ghost of Brown’s promise of integration”).

²⁰² See *id.* (arguing that ethnic studies courses “predictably attract student enrollment that is racially and ethnically exclusive”).

²⁰³ Pedro A. Noguera, *Ties That Bind, Forces That Divide: Berkeley High School and the Challenge of Integration*, 29 U.S.F. L. REV. 719, 720 (1995).

²⁰⁴ See *Webster v. New Lenox Sch. Dist.*, 917 F.2d 1004, 1008 (7th Cir. 1990).

to determine the content of its curriculum.²⁰⁵ Courts have unambiguously held “the Equal Protection Clause will not support a challenge to [a state’s] curriculum even where its contents are allegedly discriminatory.”²⁰⁶

The Arizona ethnic studies statute raises significant constitutional questions. However, courts will likely defer to state school authorities rather than become involved in a public school curriculum policy debate.²⁰⁷ Indeed, while students, parents, and teachers may raise serious constitutional questions to the law, courts will almost certainly conclude that the statute arises in the daily operation of the school system and does not implicate the basic constitutional values necessary for judicial intervention.²⁰⁸

Conclusion

As the demography of this country changes, states may contemplate enacting laws similar to Arizona’s ethnic studies ban. If so, one can only hope that wisdom will prevail. As exemplified by the discussion herein, it is highly debatable whether Arizona’s statute actually prepares students for life in a culturally diverse society. However, as this analysis demonstrates, the Constitution probably provides no barrier to such statutes.

²⁰⁵ See Hunter, *supra* note 87, at 22-33.

²⁰⁶ Cal. Parents for the Equalization of Educ. materials v. Noonan, 600 F. Supp. 2d 1088, 1110 (E.D. Cal. 2009) (noting that an equal protection claim is “squarely foreclose[d]” on the basis discrimination that results in lost educational opportunities); see also Monteiro v. Temple Union High Sch. Dist., 158 F.3d 1022, 1032 (9th Cir. 2000).

²⁰⁷ See, e.g., Cal. Parents, 600 F. Supp. 2d 1088.

²⁰⁸ Epperson, 393 U.S. at 104.