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Reflections on Reform Litigation: Strategic Intervention in Arizona's Ethnic Studies Ban, 47 J. Marshall L. Rev. 1181 (2014)

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REFLECTIONS ON REFORM LITIGATION: STRATEGIC INTERVENTION IN ARIZONA'S ETHNIC STUDIES BAN

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I. INTRODUCTION: LESSONS FROM DERRICK BELL

As Derrick Bell often warned, it is unwise to rely on litigation alone for relief from racial oppression.¹ Although Bell was writing about African Americans, his observation would seem to hold equally true for Latinos, who suffer many of the same indignities as blacks² and place the same boundless faith in courts as an avenue of redress.³ Histories of the NAACP have confirmed Bell's observation, showing that even when legal relief did arrive for blacks, it did so only as a product of meticulous planning with

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¹ See, e.g., DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (Basic Books 1987) (noting how the quest for justice is uncertain and slow); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (noting that law reform litigation often suffers from an inherent conflict of interest between the litigator and the client); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (noting that breakthroughs for minority rights generally arrive only in response to a temporary convergence of majoritarian interests and those of minorities and that without such a convergence, business tends to proceed as usual).

² Immigration searches and dragnets, mass deportations, a high rate of school dropout, low representation in high-level jobs, and little access to health insurance, family wealth, or other forms of social capital, to name a few. See, e.g., *A Statistical Portrait of U.S. Hispanics*, Pew Hispanic Research. Ctr., (Feb. 13, 2013), available at http://www.pewhispanic.org/2013/02/15/hispanic-population-trends/ph_13-01-23_ss_hispanics/ (discussing the general condition of this demographic group).

³ See George Martinez, *The Legal Construction of Race: Mexican Americans and Whiteness*, 2 HARV. LATINO L. REV. 321, 338-39 (1997) (arguing that this faith is often misplaced).

careful attention to timing, choice of judge, cause of action, and jurisdiction – and then only when majoritarian self-interest opened the door for it.⁴

A new edition of Gerald Rosenberg's *The Hollow Hope: Can Courts Bring About Social Change?* showed that these generalizations also held true for the successful campaign for gay rights.⁵ Additionally, in previous scholarship, I showed how right-wing think tanks and foundations changed America's social agenda by careful planning, strategic deployment of resources, and proceeding in a carefully orchestrated fashion in campaigns lasting, in many cases, several decades.⁶ Social change, then, for most groups, tends to arrive following a broad-based campaign, including mass mobilization, scholarship, endorsement by media celebrities, and litigation by top lawyers enjoying institutional support and proceeding, step-by-step, in a highly strategic manner.

To the extent that these generalizations are correct (and I believe they are), reformers ignore them at their peril. As I write, an important legal issue affecting Latino schoolchildren is playing out in Arizona, with national implications, some of which came under discussion at a panel at the 2013 annual Conference on Latino-Critical Studies.

After discussing a lawsuit, *Arce v. Huppenthal*,⁷ growing out of that controversy, I review, in Part II, the role of a number of amicus briefs by organizations that entered the proceedings after two court rulings against the Latino position. Then, in Part III, I draw lessons from the Arizona litigation, including selection of the attorney, choice of court, timing, vehicle, institutional backing, and attention to the repercussions of a broad or narrow judgment. What emerges here is a cautionary tale. Although the case may yet have a happy ending, many of the early choices appear now to weigh against it. I offer these observations in the hope that future reform litigation on behalf of Latino schoolchildren will proceed in

⁴ See Mark Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925-1950* (2005) (describing the NAACP's legal strategy against segregated education).

⁵ GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (U. of Chicago Press, 2d ed. 2008).

⁶ See JEAN STEFANCIC & RICHARD DELGADO, *NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA* (Temple U. Press 1996) (describing how conservative forces rolled back affirmative action, welfare, and consumer protection, selected conservative judges, trained a generation of law students sympathetic to their views, and established a cadre of researchers, journalists, and speakers reinforcing conservative viewpoints on such matters as tax reform, entitlements, and welfare).

⁷ Memorandum Order, *Acosta v. Huppenthal*, (Mar. 8, 2013) (No. CV 10-623-TUC-AWT), 2013 U.S. Dist. LEXIS 37408, available at <https://www.azag.gov/sites/default/files/Acosta%20Dkt%20227.pdf>, rev'd sub nom. *Arce v. Huppenthal* (Apr. 18, 2013) (Nos. 13-15657, 13-15760).

a more strategic manner, drawing lessons from existing knowledge and previous campaigns to bring about social change.⁸

II. *ARCE V. HUPPENTHAL*: PRECIOUS KNOWLEDGE IN ARIZONA

When Arizona enacted HB2281 in 2010,⁹ it quickly became evident that the days of Tucson Unified School District's longstanding and highly successful program of Mexican American Studies (MAS) were numbered. Established years earlier in response to a federal desegregation decree, the program offered courses in Latino history, art, and literature to local high school students, many of whom were children of Latino working class immigrant parents.¹⁰

The program had succeeded beyond its founders' dreams. Taught by dedicated young instructors, many of them graduates of the University of Arizona's ethnic studies department,¹¹ the program had elevated the graduation rate of students from under fifty percent to over ninety, with many going on to college.¹²

When authorities in the state capital learned that the Tucson program, in addition to teaching the anodyne "many contributions" that are the mainstay of innumerable watered-down ethnic studies courses,¹³ was instructing students in social theories pioneered by critical race theorists and historians,¹⁴ authorities in the state

⁸ For discussion of the group's history and struggles, see *LATINOS AND THE LAW: CASES AND MATERIALS* 348 (Richard Delgado, Juan Perea & Jean Stefancic eds., 2008) (discussing *Mendez v. Westminster School Dist.*, 64 F.Supp. 544 (S.D. Cal. 1946)); *id.* at 45 (discussing *Hernandez v. Texas*, 347 U.S. 475 (1954)); *id.* at 525 (discussing *U.S. v. Brignoni-Ponce*, 422 U.S. 873 (1975)); *id.* at 329 (discussing *Plyler v. Doe*, 457 U.S. 202 (1982)); *id.* at 855 (discussing *Lobato v. Taylor*, 71 P.3d 938 (Colo. 2002)); (Richard Delgado, Juan Perea & Jean Stefancic eds., 2007)). See also *THE LATINO/A CONDITION: A CRITICAL READER* (Richard Delgado & Jean Stefancic eds., 2d ed. 2011) (discussing the group's history and struggles).

⁹ Codified as A.R.S. § 15-112 (2010), available at <http://www.azleg.gov/FormatDocument.asp?inDoc=/ars/15/00112.htm&Title=15&DocType=ARS>.

¹⁰ See, e.g., 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, 1513-24 (2013) (discussing the Tucson Unified School District's program of Mexican American Studies).

¹¹ *Id.* at 1513.

¹² Cf. *id.* at 1528 & n.63 (noting enhanced graduation rate and other remarkable achievements).

¹³ E.g., the black scientist who pioneered blood transfusions; the Latina singer of a hit record; fine Indian basket making. See Santa Barbara Community College, American Ethnic Studies, available at <https://www.sbcc.edu/americanethnicstudies/> (describing a program of study that highlights the many contributions of groups of color, with little mention of discrimination, resistance, or histories of struggle).

¹⁴ Classes featured critical race theory, Latino-critical theory, and theories of internal colonialism. See *Precious Knowledge*, *supra* note 10, at 1535-36 (describing the curriculum).

capital were incensed. When they learned that the program taught about colonialism and conquest in the Southwest, the War with Mexico, the loss of ancestral lands to unscrupulous lawyers and land developers, and the suppression of Latino culture, language, and hopes over the intervening years, they were even more outraged.¹⁵

Egged on by a conservative state superintendent of education, the legislature quickly enacted a statute prohibiting classes that aimed to (1) overthrow the government of the United States, (2) create ethnic resentment, (3) cater to one racial group only, or (4) inculcate ethnic solidarity rather than treatment of students as individuals.¹⁶ Despite two outside audits that cleared the program of any violations, a state administrative law judge ruled to the contrary.¹⁷ Threatened with the loss of state funding, the Tucson school board quickly ordered the program discontinued and removed the offending textbooks from classrooms in front of crying students.¹⁸

The termination of a beloved program prompted an outpouring of community resistance, including an automotive caravan of “*librotraficantes*” (wet-book traffickers) who carried trunks full of the banned books all the way from Houston to Tucson, where the drivers distributed them to bystanders and school-age youth.¹⁹ Many of the books had been donated by library groups, free-speech advocates, publishers, and the authors themselves.²⁰

¹⁵ *Id.* at 1532 n.83 (discussing the reaction of the Superintendent of Public Instruction to learning about the Tucson program).

¹⁶ *See id.* at 1521–22 (discussing H.B. 2281).

¹⁷ *Id.* at 1524 n.46 (discussing the ruling of administrative law judge Lewis D. Kowal). *See also* DA Morales, *ALJ Ruling Against Ethnic Studies in TUSD*, SCRIBD. (Dec. 27, 2011), <http://www.scribd.com/doc/76617576/ALJ-ruling-against-Ethnic-Studies-in-TUSD> (reprinting the opinion of Judge Kowal).

¹⁸ *See Precious Knowledge*, *supra* note 10, at 1524. (listing the seven banned books: WILLIAM SHAKESPEARE, *THE TEMPEST*; RETHINKING COLUMBUS: *THE NEXT 500 YEARS* (Bill Bigelow & Bob Peterson, eds.); PAOLO FREIRE, *PEDAGOGY OF THE OPPRESSED*; RODOLFO ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS*; ARTURO ROSALES, *CHICANO!: THE HISTORY OF THE MEXICAN CIVIL RIGHTS MOVEMENT*; ELIZABETH MARTINEZ, *500 YEARS OF CHICANO HISTORY IN PICTURES*; and RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION*). *See also* *After Becoming National Disgrace, TUSD to Approve Some Chicano Authors But Keeps Rudy Acuna Banned*, *THREE SONORANS: NEWS AND ANALYSIS BLOG* (Sept. 23, 2013), <http://threesonorans.com/2013/09/23/becoming-national-disgrace-tusd-approve-chicano-authors-keeps-rudy-acuna-banned> (stating that a new, watered-down program recently offered in hopes of satisfying federal desegregation mandates would restore some but not all of the banned books). School authorities removed the seven above mentioned books plus many others, as well as colorful posters, Aztec calendars, and artwork.

¹⁹ *Precious Knowledge*, *supra* note 10, at 1526, 1552.

²⁰ *Id.* at 1526.

When several MAS teachers and students, represented by a local attorney, filed suit in federal district court, alleging that the statute was vague, overbroad, and discriminatory, and the termination unconstitutional, Arizona defended its action as a legitimate exercise of its authority over the school curriculum.²¹ The plaintiffs also alleged that prohibiting them from teaching and learning legitimate subjects violated equal protection and the First Amendment's free-speech guarantee.²²

Federal Judge Wallace Tashima ruled for the state of Arizona on every count but one.²³ The plaintiffs appealed to the Ninth Circuit, at which point several public interest groups weighed in with amicus briefs, including the Freedom to Read Foundation, the National Education Association, the Conference of Latino-Critical Studies, the Earl Warren Institute, and four individual authors of the banned books.²⁴

III. THE AUTHORS' AMICUS BRIEF

Prepared by Morrison and Foerster pro bono attorneys, the authors' brief is somewhat representative of the others.²⁵ It asserts the rights of the authors of the banned books to be heard and read.²⁶ It asserts that freedom of expression is a prime value of American society, that book banning has a disreputable history, that the authors of the banned books have a legitimate interest in reaching an audience of willing readers of Mexican American history and literature, and that the students and teachers of the Tucson school district have a vital stake in the exchange of ideas about their own history.²⁷ It maintains that all of these groups have a right to receive conflicting viewpoints and that critical texts offer a framework for understanding differing interpretations of American history.²⁸

The brief notes the chilling effect of a ban on an author's

²¹ See Huppenthal, *supra* note 7, at 28 (noting the state's traditional authority to control the content of a school's curriculum).

²² *Id.* at 6, 9-18 (dismissing the idea that students have a constitutional right to study their favorite curriculum).

²³ See Huppenthal, *supra* note 7 (upholding the entire Arizona statute except the measure prohibiting classes designed for one ethnic group only).

²⁴ See Seattle University School of Law, *Fighting Arizona's Attack on Ethnic Studies* – Maya Arce, et al. v. John Huppenthal, et al., (2014), <http://www.law.seattleu.edu/centers-and-institutes/korematsu-center/arizona-ethnic-studies-case> (discussing several amicus briefs).

²⁵ Brief of Authors Rodolfo Acuna, Bill Bigelow, Richard Delgado, and Jean Stefancic as Amici Curia in Support of Appellants, Arce v. Huppenthal, (Nov. 25, 2013) (Nos. 13-15657, 13-15760), *available at* <http://www.law.seattleu.edu/Documents/korematsu/AZ%20ethnic%20studies%20case/22%20amicus%20-%20Authors.pdf> .

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

work, which can produce self-censorship of future work, as well as possible harm in future employment opportunities.²⁹ The brief also expresses consternation over Arizona's actions, which could easily raise doubts as to the veracity of the material discussed in the books or the legitimacy of the authors.³⁰ The brief is especially scornful of the administrative law judge's focus on the books' tendencies to promote resentment toward a race or class of people – presumably, whites – a tendency that the judge seems to associate with merely discussing the seamy side of American history.³¹ Other briefs elaborated on legal theories that received scant treatment in the lower courts, including freedom of expression and racial animus.³²

IV. LEARNING FROM THE PAST: AN AMICUS SPEAKS TO THE AMICI

Perhaps the appeal will win at the Ninth Circuit and the Supreme Court will decline review. If the Supreme Court does grant certiorari, I am very pessimistic about its chances there.³³ In the meantime, it behooves friends of MAS in Tucson to take a step back and review the case's trajectory strategically, because chances are good that conservative forces on the other side are doing so right now. My book, *No Mercy*, noted how conservative think tanks and foundations changed America's social agenda on a dozen different fronts, ranging from attacks on welfare and affirmative action to race-IQ research.³⁴ The juggernaut continues with attacks on tenure, ethnic studies departments, and liberal scholarship at universities.³⁵

By “strategically,” I mean planning a campaign with the same

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² See, e.g., Brief of the Freedom to Read Foundation, et al., as amici curiae In Support of Plaintiffs-Appellants and Supporting Reversal, *Arce v Huppenthal* (Nov. 25, 2013) (Nos. 13-15657, 13-15760), available at <http://www.law.seattleu.edu/Documents/korematsu/AZ%20ethnic%20studies%20case/17%20Amicus%20-%20Freedom%20to%20Read%20Foundation.pdf> (arguing for Plaintiffs-Appellants and supporting reversal). See also *Fighting Arizona's Attack on Ethnic Studies*, *supra* note 24 (discussing other amicus briefs).

³³ See *infra* note 44 (discussing my reasons for this belief).

³⁴ See *NO MERCY*, *supra* note 6, at 9 (attacks on non-English languages), 20 (on immigration), 33 (funding IQ research), 45 (attacks on affirmative action), 82 (on welfare and the poor), 96 (on tort suits), and 109 (reshaping higher education).

³⁵ See Naomi Schaefer Riley, *The Most Persuasive Case for Eliminating Black Studies? Just Read the Dissertations*, *CHRONICLE OF HIGHER EDUC.* (April 30, 2012), available at <http://chronicle.com/blogs/brainstorm/the-most-persuasive-case-for-eliminating-black-studies-just-read-the-dissertations/46346> (urging the elimination of university-level ethnic studies departments).

care that the NAACP Legal Defense and Education Fund exhibited in the campaign leading up to *Brown v. Board of Education*.³⁶ Beginning with skull sessions conducted by Dean William Hamilton Houston for prize seminar students in his Howard Law School class, including Thurgood Marshall and Robert Carter, NAACP attorneys carefully chose their issue (school segregation) – the level (graduate cases first) – their theory (equal funding first, then desegregation) – the jurisdiction, the court, and even the judge in a long campaign leading up to *Brown* that included public education and activism and grassroots organizing.³⁷

Conservative forces aim to replicate that experience today – of course in reverse – in an effort to do away with ethnic studies, with university level departments as the final prize. Well-wishers owe it to our communities to proceed aware of the high stakes in cases such as the one in Tucson and intervene strategically, too. For example, when the plaintiffs filed suit in Tucson, they chose federal rather than state court. That was a major strategic decision. Was it a wise one?³⁸ They rested content with appearing in front of Judge Tashima, even though his record in civil rights cases is uneven.³⁹

They chose a rather conventional set of allegations, including vagueness, equal protection, and the First Amendment, rather than political process challenges.⁴⁰ Were those the best ones available?⁴¹ They chose a local lawyer with good community credentials, but a heavy caseload and little experience in constitutional litigation – rather than a major civil rights institution such as MALDEF or the ACLU.⁴² How sensible was

³⁶ See TUSHNET, *supra* note 4 (describing the strategic legal planning leading up to the historic case).

³⁷ *Id.*

³⁸ For example, they might have decided to file in state court, under state law, where the Arizona Supreme Court's decision would have been final and unreviewable.

³⁹ See, e.g., *Court: It's OK to Fire Woman Who Wouldn't Wear Makeup*, USA TODAY (Dec. 28, 2004), available at http://usatoday30.usatoday.com/money/workplace/2004-12-28-makeup_x.htm ("We have previously held that grooming and appearance standards that apply differently to women and men do not constitute discrimination on the basis of sex," Judge Wallace Tashima wrote for the majority).

⁴⁰ See *Precious Knowledge*, *supra* note 10, at 1541-50 (describing one such argument).

⁴¹ The First Amendment allegation, for example, lent itself to ready dismissal when the trial judge found, predictably, that high school students do not enjoy a First Amendment right to dictate the contents of their curriculum. See *supra* note 22 (dismissing the idea that students have a constitutional right to study their favorite curriculum).

⁴² MALDEF or the ACLU would have brought trained lawyers and researchers with experience in constitutional adjudication to the table. MALDEF Mission Statement, available at <http://www.maldef.org/about/mission/in dex.html>

that? They chose federal court, rather than a state system whose supreme court has handed down favorable civil rights decisions recently and where that court would have been the final arbiter, not the U.S. Supreme Court with its current line-up of judges.⁴³

Were all these decision prudent and carefully considered? If not, we have more work to do, and not just at the endpoints or near-end points of courses of important litigation such as this one.

⁴³ Had they filed alleging violations of Arizona law, including that state's constitution, the Arizona Supreme Court would have had the last word, not the Ninth Circuit or United States Supreme Court. The Arizona Supreme Court has defended minority principles in recent years (*see* *Ruiz v. Hull*, 191 Ariz. 441, 957 P.2d 984 (1998) (striking down Arizona's English-Only statute)), and seems much more attuned to minority interests than does the federal judiciary. *See, e.g.*, *Shelby County v. Holder*, 570 U.S. __ (2013) (declaring the federal Voting Rights Act an insufficient grounds for maintaining supervision over voting practices in several southern states).