

# CUTTING CLASS: WHY ARIZONA'S ETHNIC STUDIES BAN WON'T BAN ETHNIC STUDIES

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*In 2006, Mexican-American labor activist Dolores Huerta told an assembly of Tucson High School students that “Republicans hate Latinos.” This remark set in motion a prolonged effort by then-Arizona State Superintendent of Public Instruction Tom Horne to rein in perceived racist and politically charged teaching in Tucson Unified School District’s Mexican-American Studies Program. Four years later, the Arizona State Legislature enacted HB 2281, a bill that proponents claimed would give the Superintendent authority to withhold a significant amount of funding from Tucson Unified School District if it refused to stop teaching Mexican-American Studies. This Note will demonstrate that the ethnic studies law is in fact much narrower than its proponents have suggested, so much so that it will not even apply to Tucson’s Mexican-American Studies Program. While the ethnic studies law makes sweeping prohibitions on teaching resentment and ethnic solidarity in the classroom, it simultaneously carves out vast exceptions allowing instruction on history and controversial issues. The end result is a law that will be difficult to enforce: for the Superintendent to determine that any classroom material violates the law, he must first observe how teachers actually present the material in the classroom. Additionally, the Superintendent may not conclude that a course violates the law because a high percentage of enrolled students are a particular race. Although supporters of HB 2281 celebrated the law’s passage as an important step in reining in radical public school courses, HB 2281 in fact leaves Arizona with an ambiguous, difficult to enforce law that will only be successful at removing curriculum decisions from more accountable local school boards and stirring up litigation between schools and the state.*

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### INTRODUCTION

In 2006, Mexican-American labor activist Dolores Huerta told an assembly of Tucson High School students that, “Republicans hate Latinos.”<sup>1</sup> This statement sparked Arizona’s Republican Superintendent of Public Instruction to lobby for an ethnic studies law intended to limit the influence of Tucson Unified School District’s (“TUSD”) La Raza Studies Department (“Department”).<sup>2</sup> In the ensuing years, the Republican-controlled Arizona Legislature considered three bills proposing ethnic studies laws, culminating in 2010’s House Bill 2281 (“HB

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1. Daniel Scarpinato, *Bill Aims to Rid TUSD of Ethnic Studies*, ARIZ. DAILY STAR, June 13, 2009, at A14.

2. The Department originally called itself La Raza Studies, then switched to La Raza/Mexican American Studies, and now goes by Mexican American Studies. Since it is still familiarly known as La Raza Studies, that term is used here.

2281”).<sup>3</sup> The legislators who debated HB 2281 focused exclusively on the Department and its alleged improper teachings; no other ethnic studies programs were discussed.<sup>4</sup> Meanwhile, the TUSD School Board and La Raza Studies Department deny that the plain language of the bill will apply to anything taught in their courses. The Legislature passed HB 2281, now codified at Arizona Revised Statutes section 15-112, nevertheless and it went into effect on the last day of 2010.

The ethnic studies law contains four sections that limit public school curricula.<sup>5</sup> First, no course or class may “promote the overthrow of the United States government.”<sup>6</sup> Second, no course may “promote resentment toward a race or class of people.”<sup>7</sup> Third, no course may be “designed primarily for pupils of a particular ethnic group.”<sup>8</sup> Finally, no course may “advocate ethnic solidarity instead of treatment of pupils as individuals.”<sup>9</sup> Along with these four prohibitions, the law contains important exceptions. The law indicates that it should not be read to restrict or prohibit “the discussion of controversial aspects of history”<sup>10</sup> or “the historical oppression of a particular group of people based on ethnicity, race, or class.”<sup>11</sup>

As written, the law is highly ambiguous. The law’s two exceptions severely limit the scope of its four prohibited activities. It lacks a definition section and uses a phrase, *ethnic solidarity*, that is unique to the Arizona Revised Statutes and the entire U.S. Code.<sup>12</sup> These ambiguities create interpretive problems that have already spawned litigation in Tucson and will likely require resolution in the judicial system.

On December 30, 2010, outgoing Superintendent of Public Instruction Tom Horne issued a finding that TUSD’s La Raza Studies Department had violated the ethnic studies law.<sup>13</sup> Horne determined that, “[i]n view of the long history regarding that program . . . the violations are deeply rooted in the program itself, and . . . [o]nly the elimination of the program will constitute compliance.”<sup>14</sup>

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3. See *infra* Part I.D–E.
  4. See *infra* Part I.E.
  5. See *infra* Part I.E. Public school curricula is normally determined by local school boards. See, e.g., ARIZ. REV. STAT. §§ 15-341, -351 (2011).
  6. ARIZ. REV. STAT. § 15-112(A)(1) (2011).
  7. *Id.* § 15-112(A)(2).
  8. *Id.* § 15-112(A)(3).
  9. *Id.* § 15-112(A)(4).
  10. *Id.* § 15-112(E)(4).
  11. *Id.* § 15-112(F).
  12. See *infra* note 198 and accompanying text.
  13. See *infra* Part I.F.
  14. Memorandum by Tom Horne, Superintendent of Public Instruction, Ariz. Dep’t of Educ., Finding by the State Superintendent of Public Instruction of Violation by Tucson Unified School District Pursuant to A.R.S. § 15-112(B), at 2 (Dec. 30, 2010) [hereinafter Superintendent Horne’s Findings], available at [http://www.tucsonsentinel.com/documents/doc/010311\\_horne\\_tusd\\_finding](http://www.tucsonsentinel.com/documents/doc/010311_horne_tusd_finding). The document is no longer available on the Department of Education’s website since Tom Horne left his post as Superintendent to become Arizona’s Attorney General and new Superintendent John Huppenthal conducted his own inquiry into the program. See Press Release, John

Yet, Horne based his findings solely on the courses' textbooks and characterizations from five teachers who briefly taught La Raza Studies courses.<sup>15</sup> The Superintendent never visited La Raza Studies classes to observe how teachers presented the curriculum materials to students.<sup>16</sup>

Upon taking office, newly elected Superintendent John Huppenthal undertook his own inquiry into La Raza Studies.<sup>17</sup> At the cost of \$110,000, the Superintendent commissioned a private consulting company to audit all La Raza Studies curricula.<sup>18</sup> The audit took place between March 7 and May 2, 2011 and included three phases: 1) collecting curriculum material, class standards, statistics, and other data; 2) visiting classrooms to observe teaching and conducting focus groups with interested parties; and 3) evaluating and triangulating the findings.<sup>19</sup> The audit concluded that no part of La Raza Studies violated section 15-112(A).<sup>20</sup> Despite this conclusion, Superintendent Huppenthal issued his own findings on June 15, 2011, determining that La Raza Studies violated three subsections of the ethnic studies law.<sup>21</sup> Superintendent Huppenthal claimed that the auditors did not have full access to curriculum material and said his contrary findings were based on independent research.<sup>22</sup>

For each subsection of the law that prohibits specific conduct, subsections 15-112(A)(1) through (A)(4), this Note determines that section's best interpretation using the methods of statutory interpretation prescribed by Arizona courts. Next the Note outlines the Superintendent's application of sections (A)(1) through (A)(4) to La Raza Studies. Finally, the Note determines whether Superintendent Horne's and Superintendent Huppenthal's findings are sufficient to withstand judicial review under Arizona's rules regarding review of agency decisions.

This analysis will reveal that the law actually bans no written La Raza Studies curriculum material *per se*. The law's vast exceptions allow even

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Huppenthal, Superintendent of Public Instruction, Ariz. Dep't of Educ., Official Statement on TUSD Violation of A.R.S. § 15-112 (Jan. 4, 2011), *available at* <https://www.azed.gov/pio/Press-Releases/2011/pr01-04-11.pdf>.

15. Superintendent Horne's Findings, *supra* note 14, at 4–9.

16. *See infra* note 101 and accompanying text.

17. Alexis Huicochea, *Huppenthal Sets Own Review of TUSD's Ethnic Studies*, ARIZ. DAILY STAR, Jan. 4, 2011, at A2.

18. Emily Gersema, *Ethnic-Studies Finding Defined*, ARIZ. REPUBLIC, June 17, 2011, at B1.

19. CAMBIUM LEARNING, INC., CURRICULUM AUDIT OF THE MEXICAN AMERICAN STUDIES DEPARTMENT: TUCSON UNIFIED SCHOOL DISTRICT 4 (2011) [hereinafter CAMBIUM AUDIT], *available at* <http://www.abimorales.com/CambiumAudit/CambiumAudit.pdf>.

20. *Id.* at 50.

21. Mary Ann Zehr, *Ethnic-Studies Classes Tense Subject in Tucson*, EDUC. WEEK, July 13, 2011, at 33.

22. Memorandum by John Huppenthal, Superintendent of Public Instruction, Ariz. Dep't of Educ., Superintendent of Public Instruction John Huppenthal Statement of Finding Regarding Tucson Unified School District's Violation of A.R.S. § 15-112 (June 15, 2011) [hereinafter Superintendent Huppenthal's Findings], *available at* [http://www.saveethnicstudies.org/assets/docs/state\\_audit/John\\_Huppenthal\\_Statement\\_of\\_finding.pdf](http://www.saveethnicstudies.org/assets/docs/state_audit/John_Huppenthal_Statement_of_finding.pdf).

controversial topics to be taught in schools as long as they pertain to past events or teachers introduce them to stimulate student thought and not to advocate ethnic solidarity or anything else prohibited by the ethnic studies law.<sup>23</sup> To determine whether a course violates the ethnic studies law, the Superintendent of Public Instruction must inquire into the manner by which curriculum material is presented to students.<sup>24</sup> Furthermore, the law does not broadly prohibit all ethnic studies courses.<sup>25</sup> Rather, it targets courses designed to promote ethnic favoritism, regardless of whether their effect is such ethnic favoritism.<sup>26</sup>

It is doubtful that Superintendent Horne's and Superintendent Huppenthal's cursory findings regarding TUSD's La Raza Studies curriculum could survive judicial review. Both Superintendents arguably failed to correctly interpret and apply section 15-112, and while courts reviewing agency decisions do not second-guess agencies' factual findings, courts do not defer to agencies' incorrect interpretations of law.<sup>27</sup> More strikingly, neither Superintendent found that teachers actually used any curriculum material to promote or advocate something prohibited by the ethnic studies law, effectively reading the words *advocate* and *promote* out of the law.<sup>28</sup> Finally, both Superintendents relied on evidence of the racial makeup of students in La Raza Studies courses to find that the courses violated section 15-112. But the law only prohibits courses based on their designers' intent, or the ideas that teachers promote or advocate in the classroom, not the race of the students who actually enroll in the courses.<sup>29</sup> The Superintendents' shortcomings in interpreting the ethnic studies law reveal much about what factual findings would be necessary to support a determination that a school course violates the law.

While the original impetus behind the ethnic studies law was undoubtedly to prohibit the teachings of La Raza Studies at TUSD, the statute eventually enacted contains contradictory wording that curtails its breadth considerably. Because of the contradictory nature of the statute, it is far from likely that TUSD's La Raza Studies program will be found illegal in its entirety. Furthermore, it will require Arizona's Superintendent to observe actual, in-class instruction of students, rather than merely review course curriculum, in order to find that a course violates the law. Thus, using TUSD's La Raza Studies program as a case study, this Note demonstrates just how little section 15-112 will actually limit public school curriculum in Arizona.

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23. See, e.g., *infra* Part II.C.

24. See *infra* Part II.C.

25. See *infra* Part II.F.

26. See *infra* Part II.F.

27. See *infra* Part II.B.

28. See *infra* Part II.C–E.

29. See *infra* Part II.F.

## I. BRIEF HISTORY OF LA RAZA STUDIES AND HB 2281

### A. *La Raza Studies at TUSD*

In 1998, Tucson Unified School District established the La Raza Studies Department.<sup>30</sup> The School District created the Department to combat high dropout rates among Hispanic students by teaching students about Mexican-American ethnic history and culture as well as social and political issues pertaining to the Mexican-American community.<sup>31</sup> The School District hoped that offering Mexican-American themed courses would inspire Latino students to take more interest in their own academic careers.<sup>32</sup> This in turn would lead to lower dropout rates and higher standardized test scores among Hispanic students.<sup>33</sup> The Department is believed to be the first Mexican-American studies program in a public school anywhere in the nation.<sup>34</sup>

Since the inception of TUSD's La Raza Studies Department, the dropout rate among Hispanic students has decreased markedly.<sup>35</sup> Additionally, Hispanic students who take courses created by the Department tend to score higher on Arizona's state-administered standardized test than Hispanic students who do not participate in such courses.<sup>36</sup> Of the Mexican-American participants who take the courses, 97.5% graduate.<sup>37</sup> Only 44% of Mexican-American students graduate high school nationally.<sup>38</sup> Seventy percent of the Mexican-American participants

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30. See Colleen Sparks, *Students Say Ethnic Classes Give School More Meaning*, ARIZ. DAILY STAR, Nov. 25, 2002, at A1. "La Raza" translates roughly, from Spanish, into "the people," in English. *Id.* The Department is now called simply Mexican American Studies. See *Mexican American Studies*, TUCSON UNIFIED SCH. DISTRICT, <http://www.tusd.k12.az.us/contents/depart/mexicanam/index.asp> (last visited Aug. 9, 2011).

31. Sparks, *supra* note 30. This Note and citations therein variously utilize the terms *Chicano*, *Latino* and *Hispanic*. The term *Chicano* is synonymous with *Mexican American*. These terms are distinguished from the broader term *Latino*, which refers to people who trace their family to Latin America. Likewise, the term *Hispanic* refers to anyone who traces his lineage or culture to the Iberian peninsula.

32. *Id.*; see also *Mexican American Studies Model*, TUCSON UNIFIED SCH. DISTRICT, <http://www.tusd.k12.az.us/contents/depart/mexicanam/model.asp> (last visited Aug. 9, 2011) ("[Mexican American Studies courses] create[] both a Latino academic identity and an enhanced level of academic proficiency. The end result is an elevated state of Latino academic achievement.").

33. *Mexican American Studies Model*, *supra* note 32.

34. Sparks, *supra* note 30, at 41.

35. Augustine F. Romero & Martin Sean Arce, *Culture as a Resource: Critically Compassionate Intellectualism and its Struggle Against Racism, Fascism, and Intellectual Apartheid in Arizona*, 31 HAMLINE J. PUB. L. & POL'Y 179, 189 (2009).

36. George Sanchez, *Horne Out of Touch, Program Backers Say*, ARIZ. DAILY STAR, June 13, 2008, at A1 (noting that TUSD has released nine studies to that effect). The test is called Arizona's Instrument to Measure Standards ("AIMS") and it measures students' reading, writing, and math skills. *Id.*

37. Sean Arce, M. Ed., Dir. of Mexican Am. Studies Dep't, TUSD Mexican American Studies Department: Presentation to the TUSD Governing Board (Sept. 14, 2010) (Powerpoint presentation on file with *Arizona Law Review*).

38. *Id.*

pursue post-secondary education while only 24% of Mexican Americans pursue higher education nationally.<sup>39</sup>

However, it was not the statistical success or failure of the Department, or its cost to Tucson taxpayers, that motivated sponsors and supporters of the ethnic studies law. Rather, the classroom material and general philosophy of the courses provoked then-State Superintendent Tom Horne to suggest legislation to Representative Steve Montenegro, who in turn introduced HB 2281 in an attempt to rein in the Department. Horne's initial inquiry made no mention of the academic integrity of the courses or the Department, only the values they purportedly espoused and promoted.<sup>40</sup> And, Representative Steve Montenegro did not discuss the program's statistical success or failure when he introduced the bill to the House Education Committee.<sup>41</sup> Therefore, the question the legislature considered when crafting this law was whether the Department's curriculum was impermissibly anti-American, racist, or otherwise unfit for teaching in public high schools.

### *B. La Raza Studies Curriculum*

The current stated goal of the La Raza Studies Department is to "bring[] content about Chicanos/Latinos and their cultural groups from the margin to the center of the curriculum."<sup>42</sup> Although the Department's curriculum focuses on Latino history and culture, its creators, current directors, and at least some students insist that the program serves all races and ethnicities.<sup>43</sup> The courses are elective and available to students of any race or ethnicity.<sup>44</sup> Courses include: *American*

39. *Id.*

40. See Editorial, *Horne Meddling in TUSD's Ethnic Studies Efforts*, ARIZ. DAILY STAR, Nov. 19, 2007, at A6; Tom Horne, Opinion, *Horne Takes to Task Raza Studies Teachers*, ARIZ. DAILY STAR (Dec. 5, 2007, 7:44 AM), [http://azstarnet.com/news/opinion/article\\_421ecc35-1ca5-5899-a761-fc20839619df.html](http://azstarnet.com/news/opinion/article_421ecc35-1ca5-5899-a761-fc20839619df.html) ("I do have a philosophical problem with TUSD's Ethnic Studies Program."). Superintendent Horne criticizes the program as creating "ethnic chauvinism," and teaching students to identify primarily with their race or ethnicity, instead of "treat[ing] each other as individuals." Horne, *supra*.

41. See *Hearing on HB 2281 Before H. Ed. Comm.*, 2010 Leg. 49th Sess. 2 (Ariz. 2010) [hereinafter *House Education Committee Debate*], available at [http://azleg.granicus.com/MediaPlayer.php?view\\_id=13&clip\\_id=6760](http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=6760) (statement of Rep. Steve Montenegro).

42. *Mexican American Studies: Curriculum*, TUCSON UNIFIED SCH. DISTRICT, <http://www.tusd.k12.az.us/contents/depart/mexicanam/curriculum.asp> (last visited Aug. 9, 2011).

43. See Adrian Lorenzi, *'Enlightening': Student Praises THS' Raza Studies Program*, TUCSON CITIZEN, May 28, 2008, at 1B (describing white graduate's praise of the Department's courses); *Mexican American Studies: Curriculum*, *supra* note 42 ("Presenting material from many different perspectives and points of view allows students to more accurately understand the nation's heritage and traditions. The curriculum reduces prejudice, which promotes academic achievement."); Interview with Sean Arce, Director of Mexican American Studies Department, in Tucson, Ariz. (Sept. 15, 2010). Mr. Arce is the current director and a founding member of the Department. See Romero & Arce, *supra* note 35, at n.aal.

44. Interview with Sean Arce, *supra* note 43; see also *Hearing on HB 2281 Before S. Ed. Accountability and Reform Comm.*, 2010 Leg. 49th Sess. 2 (Ariz. 2010),

*History: Mexican American Perspectives; English: Latino Literature; American Government: Social Justice Education Project; Chicano Art; and Chicano Studies (Middle School).*<sup>45</sup> These courses meet their respective state standards,<sup>46</sup> cover issues pertaining to Latino and Mexican-American history and culture, and assign texts written by Latino authors.<sup>47</sup>

Courses offered by TUSD's La Raza Studies Department have relied heavily on two texts in years past, *Pedagogy of the Oppressed* and *Occupied America*.<sup>48</sup> While there is no evidence that these texts continue to be utilized in any La Raza course,<sup>49</sup> the legislature discussed only these two texts during the passage of HB 2281 and they are therefore instructive background to the law's legislative history.

The Department uses Paulo Freire's *Pedagogy of the Oppressed* to guide its teaching style.<sup>50</sup> *Pedagogy of the Oppressed* is Freire's most famous work, inspired by Freire's experience teaching illiterate peasants in rural Brazil to read and write.<sup>51</sup> In *Pedagogy of the Oppressed*, Freire focuses on the dichotomy between the oppressors and the oppressed.<sup>52</sup> In order to effectively teach the peasants, Freire encouraged them to think critically about their living conditions and the social structures around them.<sup>53</sup> He emphasized that the peasants should not blame themselves for their social situation, but instead blame the oppressors who exploited them.<sup>54</sup> He simultaneously rejected the traditional "banking" system

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[hereinafter *Senate Education Committee Debate*], at 2:55:30, available at [http://azleg.granicus.com/MediaPlayer.php?view\\_id=13&clip\\_id=7405](http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=7405) (referring to statements by Sen. Huppenthal who noted that he observed students of all races in a La Raza Studies class he attended).

45. CAMBIUM AUDIT, *supra* note 19, at 116–20; *High School Course Offerings*, TEZCATLIPOCA "REFLEXIONES" (Tucson Unified Sch. Dist. Mexican Am. Studies Dep't, Tucson, Ariz.), Winter 2009, at 1, available at <http://www.tusd.k12.az.us/contents/depart/mexicanam/newsletters.asp>. Tezcatlipoca is the quarterly newsletter of TUSD's Mexican-American Studies Department.

46. *Mexican American Studies: Curriculum*, *supra* note 42.

47. CAMBIUM AUDIT, *supra* note 19, at 116–20 (providing full list of curriculum texts seen in use and on shelves in classrooms of La Raza Studies courses).

48. Interview with Sean Arce, *supra* note 43; see also Tamar Lewin, *Citing Individualism, Arizona Tries to Rein in Ethnic Studies in School*, N.Y. TIMES, May 14, 2010, at A13; Lorenzi, *supra* note 43.

49. CAMBIUM AUDIT, *supra* note 19, at 36–39.

50. See Lewin, *supra* note 48; *Mexican American Studies Model*, *supra* note 32.

51. See generally Richard Shaull, *Foreword to PAULO FREIRE, PEDAGOGY OF THE OPPRESSED* 29–31 (Myra Bergman Ramos trans., 30th Anniversary ed. 2006).

52. See generally Kathleen Weiler, *Paulo Freire: On Hope*, RADICAL TEACHER, No. 67, Spring 2003, at 32.

53. FREIRE, *supra* note 51, at 65–69.

54. *Id.* at 62–65. One of the chief criticisms of the book is that the "oppressors" and the "oppressed" are often alluded to but seldom specifically named. See Gerald Graff, *Teaching Politically without Political Correctness*, RADICAL TEACHER, No. 58, Fall 2000, at 26, 28 ("Nowhere in *The Pedagogy of the Oppressed* does Freire imagine the possibility that students might end up deciding that they are *not* oppressed or that for them authentic liberation is getting a job with IBM, making lots of money, and moving to the suburbs.").

of education.<sup>55</sup> This system, according to Freire, is one where the teacher stands in the front of the classroom and authoritatively “deposits” knowledge into the students.<sup>56</sup> Freire argued that this system encouraged students to fatalistically accept society as it currently exists and discouraged students from thinking critically and creatively.<sup>57</sup> This kind of education, he believed, only furthered social inequality because the oppressed would become complacent in their social strata and fail to resist their oppressors.<sup>58</sup>

As an alternative, Freire proposed an educational system based on student–teacher dialogue and problem solving.<sup>59</sup> This model recognized that both the student and the teacher were holders of knowledge and thus encouraged dialogue between students and teachers.<sup>60</sup> As a result of this dialogue, students would reject a fatalistic view of their surroundings and instead seek to confront social injustice.<sup>61</sup> The students then “feel increasingly challenged and obliged to respond to that challenge . . . and gradually the students come to regard themselves as committed.”<sup>62</sup> Freire therefore regarded his teaching as a method for the oppressed to take greater interest in their own education and ultimately liberate themselves from their oppressors.<sup>63</sup>

Instructors in La Raza Studies courses employ exercises that reflect Freire’s educational philosophy, including his emphasis on the oppressor/oppressed dichotomy.<sup>64</sup> For example, the Department uses exercises called “My History” and “I Am”—that stand in stark contrast to the banking model that Freire vigorously rejected—because they emphasize the students’ contributions to the class.<sup>65</sup> In the “My History” exercise, students answer seemingly simple questions about the history of their own life, their family’s history, their history at high school, and their views about their community, the world, and their future.<sup>66</sup> The questions include: “Why do you believe this?”; “Where did that belief come from?”; “Who does that belief benefit?”; “Who are we?”; “Why do we do these things?”; “What is our identity?”; and “How was our identity constructed?”<sup>67</sup> The goal of these questions is to allow the students to construct their own “counterhistories” by reflecting deeply on their own experiences.<sup>68</sup> Students will then, according to the Department, realize that these counterhistories are legitimate American stories that add to the social, cultural, and

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55. FREIRE, *supra* note 51, at 71–77.

56. *Id.* at 72.

57. *Id.* at 73.

58. *Id.* at 76. Again, the specific oppressors and oppressed remain nameless. *See* Graff, *supra* note 54.

59. FREIRE, *supra* note 51, at 79–80.

60. *Id.*

61. *Id.* at 85.

62. *Id.* at 81.

63. *Id.*

64. The legislature did not hear evidence about this aspect of the courses, but it is important in understanding how La Raza Studies utilizes Freire’s philosophy.

65. Romero & Arce, *supra* note 35, at 194.

66. *Id.* at 194–96.

67. *Id.* at 195.

68. *Id.*

historical fabric of America.<sup>69</sup> This encourages students to greater appreciate and respect their own cultural history.<sup>70</sup>

Likewise, “I Am” poems give students the opportunity to reflect on their own experiences. “I Am” poems use the following structure: (First Stanza) I am . . . (two characteristics about the author) / I wonder . . . / I hear . . . / I want . . . / I am . . . (first line of the poem repeated) / (Second Stanza) I pretend . . . / I feel . . . / I touch . . . / I worry . . . / I cry . . . / I am . . . (first line of the poem repeated) / (Third Stanza) I understand . . . / I say . . . / I dream . . . / I try . . . / I am . . . (first line of the poem repeated).<sup>71</sup> The “I Am” poem can therefore reveal much about the author.<sup>72</sup> The Department encourages teachers to write their own “I Am” poem first and read it to the class.<sup>73</sup> This helps students relate to their teachers on a personal level, thus encouraging them to pursue their education for their teacher’s sake as well as their own.<sup>74</sup> Then, when the students read their own poems, the teacher will in turn invest greater human capital in the students’ education.<sup>75</sup>

Another exercise following the Freireian pedagogical model is the “Four Tables” exercise.<sup>76</sup> In this exercise, students receive a word or phrase related to the Freireian model of education.<sup>77</sup> Students must then define the word or phrase, list words they associate with it, and draw a picture representing it.<sup>78</sup> The words include Hegemony, Subordinate Group, Dominant Group, Colonization, Inequality of Language Theory, Racism, Oppression, Fatalism, Privilege, and Resistance.<sup>79</sup> While finding the definition of the word or phrase is relatively easy, the word association and picture helps students place the word or phrase into the context of their own life experiences.<sup>80</sup> This approach makes students more interested in learning the concepts and more likely to apply the concepts to future problems they encounter in their own lives.<sup>81</sup>

La Raza Studies courses assigned Rodolfo Acuña’s *Occupied America* as a textbook in past years.<sup>82</sup> The book is regarded as a seminal work on Mexican-American history because it was the first to characterize the Mexican-American experience as one of internal colonization.<sup>83</sup> In other words, Acuña asserts that

69. *Id.*

70. *Id.* at 193.

71. *Id.* at 201–02.

72. *Id.* at 199–201.

73. *Id.* at 200.

74. *Id.* at 200–01.

75. *Id.* at 200.

76. *Id.* at 196–97.

77. *Id.*

78. *Id.*

79. *Id.* at 197.

80. *Id.* at 197–98.

81. *Id.*

82. See *Senate Education Committee Debate*, *supra* note 44, at 2:21:00 (statements of Rep. Montenegro); *CAMBIUM AUDIT*, *supra* note 19, at 36–39.

83. ARMANDO NAVARRO, MEXICANO POLITICAL EXPERIENCE IN OCCUPIED ATZLÁN 3 (2005); Kevin R. Johnson & George A. Martínez, *Crossover Dreams: The Roots*

white North Americans have economically colonized Mexican-Americans within the United States, with white Americans owning the land and exploiting Mexican-Americans for labor.<sup>84</sup> The book's title thus refers to the political and social construction of what is known as Atzlán, the land in modern California, Arizona and New Mexico that once belonged to Mexico.<sup>85</sup> Much of *Occupied America* is based on secondary source material, merely collecting and reciting events important to Mexican-American society and politics in the last century.<sup>86</sup> As such, *Occupied America*'s thesis has been criticized as being more theoretical than historical;<sup>87</sup> Acuña merely puts a new spin on already accepted historical facts.

Therefore, while the facts underlying *Occupied America* do not warrant much controversy,<sup>88</sup> some have taken issue with the implications of Acuña's thesis.<sup>89</sup> In particular, Acuña often seeks to identify forces that have oppressed Chicanos throughout history. Yet he is vague as to whom exactly the oppressors are, variously calling them "Anglo-Americans" or "Euroamericans."<sup>90</sup> At first blush, this gives the impression that Acuña is generalizing as to thoughts, actions, and ambitions of all white North Americans. However, a closer reading reveals different motivations for individual actors and distinct groups of white Americans.<sup>91</sup> Thus, Acuña suffers from a tendency to begin his discussions with overly generalized claims and only later acknowledges the more contextualized nature of racial tension between white and Chicano Americans.

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*of LatCrit Theory in Chicana/o Studies Activism and Scholarship*, 53 U. MIAMI L. REV. 1143, 1149 (1999).

84. Mario Trinidad García, Book Review, 43 PAC. HIST. REV. 123, 125 (1974) (reviewing RODOLFO ACUÑA, OCCUPIED AMERICA: THE CHICANO'S STRUGGLE TOWARD LIBERATION (1972); and MATT S. MEIER & FELICIANO RIVERA, THE CHICANOS: A HISTORY OF MEXICAN AMERICANS (1972)).

85. Among the works that refer to the Atzlán is the poem "Going Back" by Victor E "El Vuh," and the essay "The Lost Land: The Chicano Homeland" by John R. Chávez. Superintendent Horne referred to these writings in his finding that La Raza Studies failed to comply with the new law. Superintendent Horne's Findings, *supra* note 14, at 7–8.

86. García, *supra* note 84, at 123–24; Victor C. Dahl, Book Review, 4 W. HIST. Q., 339, 340 (1973) (reviewing RODOLFO ACUÑA, OCCUPIED AMERICA: THE CHICANO'S STRUGGLE TOWARD LIBERATION (1972)).

87. García, *supra* note 84, at 125.

88. J. Joseph Huthmacher, Book Review, 80 THE AM. HIST. REV. 479, 480 (1975) (reviewing RODOLFO ACUÑA, OCCUPIED AMERICA: THE CHICANO'S STRUGGLE TOWARD LIBERATION (1972); RICHARD B. CRAIG, THE BRACERO PROGRAM: INTEREST GROUPS AND FOREIGN POLICY (1971); and ROBERT F. HEIZER & ALAN J. ALMQUIST, THE OTHER CALIFORNIANS: PREJUDICE AND DISCRIMINATION UNDER SPAIN, MEXICO, AND THE UNITED STATES TO 1920 (1971)).

89. *Senate Education Committee Debate*, *supra* note 44, at 2:21:00 (statements of Rep. Montenegro); Dahl, *supra* note 86, at 340.

90. See, e.g., RODOLFO ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS 94–97, 222, 296 (6th ed. 2007); Dahl, *supra* note 86, at 340.

91. See, e.g., ACUÑA, *supra* note 90, at 94–97 (explaining race relations among different classes of whites and Mexicans in 19th-century Arizona).

### C. Controversy Surrounding Guest Speakers

In 2006, labor activist Dolores Huerta gave a speech to students at Tucson High Magnet School during which she asserted, “Republicans hate Latinos.”<sup>92</sup> Horne, believing that students should hear both sides of political issues, arranged for his then-Deputy Superintendent, Margaret Garcia Dugan, to speak at the school.<sup>93</sup> Dugan, like Horne, is a Republican.<sup>94</sup> During her speech, several students stood with their backs to Dugan and their fists in the air.<sup>95</sup> When asked to sit, the students walked out.<sup>96</sup>

Believing that La Raza Studies courses encouraged this behavior, Horne requested information about funding and instructional materials for the courses from Tucson Unified School District.<sup>97</sup> In February and December, 2007, Horne penned editorials in Phoenix’s *Arizona Republic* and Tucson’s *Arizona Daily Star* newspapers criticizing the Department.<sup>98</sup> Horne admitted, however, that the purpose of his inquiry was merely to expose the teaching methods and materials of the Department, at which point the Tucson Unified School Board, and ultimately the Tucson voters, would become responsible for ending or revising the program.<sup>99</sup> Under Arizona law, local school boards possess the power to develop school curriculum, not the State Superintendent.<sup>100</sup>

Members of the Tucson Unified School Board expressed outrage that Horne would even inquire about the Department without first asking for the School

92. Scarpinato, *supra* note 1. Dolores Huerta is an activist who co-founded the United Farm Workers in 1962 with Cesar Chávez. See *Dolores Huerta*, NAT’L WOMEN’S HALL OF FAME, <http://www.greatwomen.org/women-of-the-hall/search-the-hall/details/2/80-Huerta> (last visited Aug. 9, 2011).

93. *House Education Committee Debate*, *supra* note 41, at 1:26:30 (testimony of Superintendent Tom Horne).

94. Scarpinato, *supra* note 1.

95. *House Education Committee Debate*, *supra* note 41, at 1:26:55 (testimony of Superintendent Tom Horne).

96. *Id.*

97. Sanchez, *supra* note 36.

98. Tom Horne, Editorial, *Racist Views Are Poor Use of School Funding*, ARIZ. REPUBLIC, Feb. 3, 2007, at B7 [hereinafter Horne, *Racist Views*]; *Horne Takes to Task Raza Studies Teachers*, *supra* note 40.

99. See Sanchez, *supra* note 36.

100. “Pursuant to the guidelines that the state board of education distributes, the governing board of a school district shall . . . [p]rescribe curricula.” ARIZ. REV. STAT. § 15-701(C)(1) (2011); see also ARIZ. REV. STAT. § 15-341(A)(5) (2011) (“[School district] governing board shall . . . [p]rescribe the curricula.”). The State Board of Education is charged only with

[d]evelop[ing] and maintain[ing] a handbook for use in the schools of this state that provides guidance for the teaching of moral, civic and ethical education. The handbook shall promote existing curriculum frameworks and shall encourage school districts to recognize moral, civic and ethical values within instructional and programmatic educational development programs.

ARIZ. REV. STAT. § 15-203(A)(25) (2011). The State Superintendent’s duties do not include developing school curricula. See *id.* §§ 15-251, -252.

Board's input or attending a Mexican-American studies class.<sup>101</sup> Following the Superintendent's inquiry, TUSD did not cancel any La Raza Studies courses. Nor did Tucson voters elect a School Board willing to terminate the Department.<sup>102</sup> The Governor signed HB 2281 into law on May 11, 2010, and on May 25, the School Board voted by 4–1 in favor of a resolution supporting the Department and denying that it violated newly passed HB 2281.<sup>103</sup>

#### *D. Previous Failed Legislation*

In 2008, State Senator Russell Pearce sponsored legislation that would prohibit public schools from teaching classes 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.”<sup>104</sup> Senator Pearce introduced this language as a strike-everything amendment to a Homeland Security bill, SB 1108.<sup>105</sup> Like the bill that eventually passed in 2010, SB 1108's sponsor hoped this language would force TUSD's La Raza Studies Department to disband.<sup>106</sup> But unlike the bill that eventually passed, SB 1108 also prohibited public schools and universities from allowing organizations “based in whole or in part on race-based criteria” from operating on campus.<sup>107</sup> Senator Pearce stated that he hoped SB 1108 would ban activist groups like Movimiento Estudiantil Chicano de Atzlán (MEChA) from organizing on campuses.<sup>108</sup> Opponents feared that this language would also prohibit organizations like the Black Business Students Association

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101. Ryn Gargulinski & Mary Bustamante, *Government Leaders Debate Raza Studies*, TUCSON CITIZEN, June 13, 2008, available at <http://tucsoncitizen.com/morgue/2008/06/13/88086-government-leaders-debate-raza-studies/>. Students also expressed that they were “frustrate[ed]” that Horne would draw these conclusions without first visiting a class, relying only on “secondhand” experience. Sanchez, *supra* note 36.

102. From 2005 to 2008, the School Board remained unchanged over the course of two elections. In 2009, Mark Stegeman and Miguel Cuevas replaced Joel Ireland and Alex Rodriguez. *Board of Education and the Governing Board*, TUCSON UNIFIED SCH. DISTRICT, 15 (Jan. 5, 2011), <http://www.tusd.k12.az.us/contents/distinfo/Documents/boardmembers.pdf>.

103. *Minutes of Governing Board Special Meeting*, TUCSON UNIFIED SCH. DISTRICT, 2 (May 25, 2010), <http://www.tusd.k12.az.us/contents/govboard/gbminutes10.html>. Only Mark Stegeman voted against the measure. *Id.*

104. SB 1108, 48th Leg., 2d Reg. Sess. (Ariz. 2008).

105. *Id.*

106. Howard Fischer, *Sharply Split Panel Passes Bill on Ariz. School 'Hate Speech'*, ARIZ. DAILY STAR, Apr. 17, 2008, at A1.

107. SB 1108, 48th Leg., 2d Reg. Sess. (Ariz. 2008).

108. Fischer, *supra* note 106. MEChA is a Chicano-rights student movement. *See About Us*, MOVIMIENTO ESTUDIANTIL CHICANO DE AZTLÁN NAT'L WEBSITE, <http://www.nationalmecha.org/about.html> (last visited Oct. 23, 2010).

and Native Americans United.<sup>109</sup> SB 1108 passed through the House Appropriations Committee 9–6 but was held in the House and never enacted.<sup>110</sup>

In 2009, another bill targeting TUSD’s La Raza Studies Department failed in the House. Senator Jonathan Paton sponsored a strike-everything amendment to SB 1069 at the urging of Superintendent Horne.<sup>111</sup> The bill contained language identical to that of HB 2281, which would pass the next year: it would prohibit classes that are “designed primarily for pupils of a particular ethnic group” and that “advocate ethnic solidarity instead of treatment of pupils as individuals.”<sup>112</sup> Additionally, the bill recognized exceptions for “classes for Native American pupils that are required to comply with federal law” and “grouping of pupils according to academic performance.”<sup>113</sup> Like SB 1108 a year earlier, SB 1069 was also held awaiting a vote in the House and never passed.<sup>114</sup>

### *E. HB 2281*

On February 15, 2010, Representative Steven Montenegro introduced HB 2281 to the House Education Committee.<sup>115</sup> The Committee heard testimony from then-Superintendent Horne that La Raza Studies classes promoted racial separatism and told students that they were victims.<sup>116</sup> A former student and a school district lobbyist both testified that the program did not promote racial separatism.<sup>117</sup> The bill passed through the Education Committee unanimously.<sup>118</sup>

Following its passage through the House Education Committee, then-Senator John Huppenthal introduced several amendments to the bill that were approved by the House.<sup>119</sup> The amended bill was recommended to the Senate by a 33–23 vote, with some members of the Education Committee who had earlier supported the bill in committee now reversing their votes because of the amendments.<sup>120</sup> The Senate Education Accountability and Reform Committee also

109. Matthew Benson, *Plan Targets Anti-Western Lessons*, ARIZ. REPUBLIC, Apr. 17, 2008, at B1.

110. SB 1108, 48th Leg., 2d Reg. Sess. (Ariz. 2008); *SB 1108 Bill Status Overview*, ARIZ. STATE LEGISLATURE, <http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/48leg/2r/bills/sb1108o.asp> (last visited Oct. 23, 2010).

111. SB 1069, 49th Leg., 1st Reg. Sess. (Ariz. 2009); Scarpinato, *supra* note 1.

112. SB 1069, 49th Leg., 1st Reg. Sess. (Ariz. 2009). These clauses are also found in HB 2281. *See infra* Part I.E.

113. SB 1069, 49th Leg., 1st Reg. Sess. (Ariz. 2009).

114. *SB 1069 Bill Status Overview*, ARIZ. STATE LEGISLATURE, <http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/49leg/1r/bills/sb1069o.asp> (last visited Oct. 23, 2010) (bill held awaiting House Committee of the Whole).

115. *House Education Committee Debate*, *supra* note 41, at 1:10:00.

116. *Id.* at 1:29:00 (testimony of Superintendent Tom Horne).

117. *Id.* at 1:41:40 (testimony of Tanya Lazano stating that classes are inclusive of all races and ethnicities); *id.* at 1:44:00 (testimony of Sam Polito saying that the district has no problem with a bill prohibiting teachers from teaching hatred).

118. *Id.* at 1:48:15.

119. HB 2281, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (House Engrossed).

120. *Compare House Education Committee Debate*, *supra* note 41, at 1:47:30 (Representatives Eric Meyer, Rae Waters and Nancy Young Wright supporting bill), *with Third Reading of HB 2281 Before House Comm. of the Whole*, ARIZ. STATE LEGISLATURE,

heard testimony from Superintendent Horne and passed the bill by a 4–3 vote.<sup>121</sup> After some minor amendments in the Senate,<sup>122</sup> the bill returned to the House where it passed by a 32–26 vote.<sup>123</sup> As ultimately enacted, the bill reads in its pertinent parts:

§ 15-111. Declaration of policy.

The Legislature finds and declares that public school pupils should be taught to treat and value each other as individuals and not be taught to resent or hate other races or classes of people.

§ 15-112. Prohibited courses and classes; enforcement.

A. A school district or charter school in this state shall not include in its program of instruction any courses or classes that include any of the following:

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.

B. If the State Board of Education or the Superintendent of Public Instruction determines that a school district or charter school is in violation of subsection A . . . [t]he State Board of Education or the Superintendent of Public Instruction may direct the Department of Education to withhold up to ten percent of the monthly apportionment of state aid that would otherwise be due [to] the school district or charter school . . . .

. . . .

E. This section shall not be construed to restrict or prohibit:

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 subsection A.

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49th Leg., 2d Reg. Sess. (Ariz. Mar. 24, 2010), at 44:30, [http://azleg.granicus.com/MediaPlayer.php?view\\_id=13&clip\\_id=7212](http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=7212) (Representatives Meyer, Waters, and Wright voting against bill).

121. *Senate Education Committee Debate, supra* note 44, at 2:51:00.

122. HB 2281, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (Senate Engrossed).

123. *See H. Final Reading of HB 2281*, 49th Leg., 2d Reg. Sess. (Ariz. Apr. 29, 2010), at 00:10:00, [http://azleg.granicus.com/MediaPlayer.php?view\\_id=13&clip\\_id=7709](http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=7709).

4. Courses or classes that include the discussion of controversial aspects of history.

F. 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 . . . .<sup>124</sup>

***F. State Superintendents' Findings Regarding La Raza Studies***

On December 30, 2010, then-State Superintendent of Public Instruction Tom Horne released his findings regarding TUSD's La Raza Studies program.<sup>125</sup> He determined that the program violated section 15-112(A)(3), which prohibits classes that are "designed primarily for pupils of a particular ethnic group."<sup>126</sup> Horne did not explicitly find the program in violation of any other section of the new law, although he suggested that the program may also be in violation of section 15-112(A)(1), (2) and (4).<sup>127</sup> As evidence for his findings, Horne cited a CNN interview with TUSD's Ethnic Studies Department chairman Augustine Romero in which Mr. Romero said the courses helped students "recognize and connect to their indigenous side . . . as well as our Mexican side."<sup>128</sup> Horne also quoted the Department's website which said, "The Mexican American Studies Department has found that its curriculum, because of its inclusiveness and its critical nature, offers Latino students the opportunity to engage in a learning process which transcends the depth of any previous experience."<sup>129</sup>

As further evidence of the program's violation of the new law, Horne paraphrased former TUSD teachers' opinions about the program.<sup>130</sup> The first opinion appeared in a newspaper article written by Doug MacEachern for the *Arizona Republic*. In that article, former TUSD teacher John Ward alleged that "individuals in this [Ethnic Studies] department are vehemently anti-Western culture. They are vehemently opposed to the United States and its power. They are telling students they are victims and that they should be angry and rise up."<sup>131</sup> Ward characterized the department's faculty as "radical social activists who promote an anti-capitalist and anti-Western Civilization ideology."<sup>132</sup> Horne also quoted former teacher Hector Ayala who reported that his students told him that

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124. HB 2281, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

125. Dylan Smith, *Horne: TUSD Ethnic Studies Illegal*, TUCSON SENTINEL, Jan. 3, 2011, available at [http://www.tucsonsentinel.com/local/report/010311\\_ethnic\\_studies](http://www.tucsonsentinel.com/local/report/010311_ethnic_studies).

126. Superintendent Horne's Findings, *supra* note 14, at 2–3.

127. *Id.* at 3. After explaining how the program violated section (A)(3), Horne lists other relevant information saying that this additional information will "satisf[y]" the "three other criteria of the statute." *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 4–6.

131. *Id.* at 4; Doug MacEachern, Editorial, *Ethnic Studies Program at Tucson High School, Part II*, ARIZ. REPUBLIC, Feb. 3, 2008, at V3.

132. Superintendent Horne's Findings, *supra* note 14, at 5.

they learned “not to fall for the white man’s traps” in their La Raza Studies classes.<sup>133</sup>

Horne further paraphrased three unnamed teachers with negative views about the program.<sup>134</sup> Two teachers alleged that students and other faculty called them racists.<sup>135</sup> A third teacher alleged that another teacher instructs students that Republicans hate Latinos.<sup>136</sup>

Finally, Horne objected to the written material taught in the program. He first criticized *Pedagogy of the Oppressed* for teaching students that they are oppressed. As evidence, he pointed to a hearing before the State Senate Judiciary Committee regarding a prior failed ethnic studies bill in which a student claimed she did not know she was oppressed before taking La Raza Studies courses.<sup>137</sup> Horne also emphasized a portion of *Occupied America* where labor activist José Angel Gutiérrez exclaims, “if the gringo doesn’t get out of our way, we will stampede over him . . . [and] kill the gringo.”<sup>138</sup> Horne further objected to other material that refers to modern California, Arizona, and New Mexico as “Atzlán,” land that once belonged to Mexico.<sup>139</sup> He specifically criticized the courses for teaching students that the United States unfairly gained control over Atzlán or that the United States’ current difficulty controlling the border is associated with cultural continuity between Mexico and Atzlán.<sup>140</sup>

On January 1, 2011, John Huppenthal assumed the role of State Superintendent of Public Instruction.<sup>141</sup> Despite Horne’s findings just two days earlier, new Superintendent of Public Instruction, and former State Senator, Huppenthal put enforcement of section 15-112 on hold to make his own findings on the courses’ legality.<sup>142</sup> Superintendent Huppenthal ordered an educational consulting company to perform an audit of the courses to determine, among other things, whether any courses violated the ethnic studies law.<sup>143</sup>

The audit cost the state \$110,000 and took the company almost two months to complete.<sup>144</sup> Auditors reviewed all course curriculum, texts, applicable state standards, and statistics related to La Raza Studies courses.<sup>145</sup> Auditors then

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133. *Id.* at 6.

134. *Id.* at 5–6.

135. *Id.*

136. *Id.*

137. *Id.* at 7. Horne fails to explain under which subsection of Arizona Revised Statutes section 15-112 this teaching would be illegal.

138. *Id.* (quoting ACUÑA, *supra* note 90, at 262).

139. *Id.* at 7–9. Among the works that refer to the Atzlán is the poem “Going Back” by Victor E “El Vhu,” and the essay “The Lost Land: The Chicano Homeland” by John R. Chávez. *Id.*

140. *Id.*

141. Alexis Huicochea, *Huppenthal: TUSD’s Ethnic Studies Program Not In Compliance*, ARIZ. DAILY STAR (June 15, 2011, 9:49 PM), [http://azstarnet.com/news/local/education/article\\_0b22e4f4-97a7-11e0-ae9d-001cc4c002e0.html](http://azstarnet.com/news/local/education/article_0b22e4f4-97a7-11e0-ae9d-001cc4c002e0.html).

142. Huicochea, *supra* note 17.

143. *See* Gersema, *supra* note 18.

144. *Id.*

145. CAMBIUM AUDIT, *supra* note 19, at 13–15.

conducted focus groups consisting of people interested in the future of La Raza Studies, including school district leadership and personnel, La Raza Studies teachers, other local teachers, students who had taken La Raza Studies courses, students who had not taken La Raza Studies courses, parents, and community members.<sup>146</sup> Finally, and most importantly, auditors visited classrooms and observed the type and quality of instruction taking place.<sup>147</sup> Auditors did not warn teachers before these visitations.<sup>148</sup> Each visitation lasted between 20 and 30 minutes.<sup>149</sup> The results of the audit were documented in a 120-page finding that concluded no La Raza Studies course violated any subsection of section 15-112.<sup>150</sup>

On June 15, 2011, Superintendent Huppenthal issued his own three-page finding that concluded the La Raza Studies program violated subsections 15-112(A)(2), (A)(3) and (A)(4).<sup>151</sup> The Superintendent admitted that the auditors found no violation of the law, but found that the lack of documentation prevented the auditors from adequately reviewing the courses' curriculum.<sup>152</sup> The Superintendent, relying on his own independent investigation, stated that La Raza Studies courses promote resentment by "repeatedly referenc[ing] white people as being 'oppressors' and 'oppressing' the Latino people" and "present[ing] only one perspective of historical events, that of the Latino people being persecuted[,] oppressed[,] and subjugated by the 'hegemony'—or white America."<sup>153</sup> The Superintendent found that La Raza Studies courses were designed primarily for students of one ethnicity based on the percentage of Hispanic students enrolled in the courses, references on the course website to improving academics among Latinos, and curriculum that addressed the reader as being Latino.<sup>154</sup> Finally, the Superintendent determined that the courses promoted ethnic solidarity, stating, "curriculum and materials repeatedly emphasize the importance of building Hispanic nationalism and unity in the face of assimilation and oppression."<sup>155</sup>

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146. *Id.* at 15–16.

147. *Id.* at 16–17.

148. *Id.* at 16.

149. *Id.*

150. *Id.* at 50 ("During the curriculum audit period, no observable evidence was present to indicate that any classroom within Tucson Unified School District is in direct violation of the law. . . . In most cases, quite the opposite is true. Consider, if classes promoted resentment or ethnic solidarity, then evidence of an ineffective learning community would exist within each school aligned with the Mexican American Studies Department. That was not the case. Every school and every classroom visited by the auditors affirmed that these learning communities support a climate conducive to student achievement.").

151. Superintendent Huppenthal's Findings, *supra* note 22.

152. *Id.* at 1–2.

153. *Id.* at 2. The Superintendent provided no citation for these findings, although they likely refer to *Pedagogy of the Oppressed* and *Occupied America*. See *supra* Part I.B. Furthermore, the finding provides no evidence that these books are currently assigned to students in any La Raza Studies course. CAMBIUM AUDIT, *supra* note 19, at 36–39.

154. Superintendent Huppenthal's Findings, *supra* note 22, at 2. The audit disagreed that any of these reasons violated subsection (A)(3). CAMBIUM AUDIT, *supra* note 19, at 56–59.

155. Superintendent Huppenthal's Findings, *supra* note 22, at 2. This is contrary to the conclusions of the audit. CAMBIUM AUDIT, *supra* note 19, at 60–63. Huppenthal also

TUSD is appealing this finding, arguing that La Raza Studies courses do not violate section 15-112 as Huppenthal found.<sup>156</sup>

## II. INTERPRETING THE ETHNIC STUDIES LAW AND APPLYING IT TO LA RAZA STUDIES

The ethnic studies law's sponsor plainly stated that the new law would eliminate TUSD's La Raza Studies program.<sup>157</sup> Yet, supporters of TUSD's La Raza Studies Department and its courses have, at various times throughout the legislative process, claimed that the plain language of the bill would have no effect on the program.<sup>158</sup> Thus, any court reviewing a violation of section 15-112, or determining the law's constitutionality, will have to interpret the statute's language to determine its scope.

For each section of the law that prohibits specific conduct, sections 15-112(A)(1) through (A)(4), this Note determines that section's best interpretation using the methods of statutory interpretation prescribed by Arizona courts. Next it outlines Superintendents Horne's and Huppenthal's application of sections (A)(1) through (A)(4) to La Raza Studies. Finally it determines whether either Superintendent's findings are sufficient to withstand judicial review under Arizona's rules regarding review of agency decisions. This three-step analysis reveals that the ethnic studies law is highly ambiguous and will likely require this or any future Superintendent of Public Instruction to make much more detailed factual findings than those made by Superintendent Horne in his December 30, 2010 findings,<sup>159</sup> or Superintendent Huppenthal in his June 15, 2011 findings,<sup>160</sup> in order to withhold state money from a school for violating the ethnic studies law.

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found that La Raza Studies courses failed to follow the TUSD Governing Board's procedures for approving curriculum and textbooks. Superintendent Huppenthal's Findings, *supra* note 22, at 2-3. The board is required to implement such policies pursuant to sections 15-341, 15-721 and 15-722. Discussion of these statutory requirements is beyond the scope of this Note; however, it suffices to say that TUSD's failure to comply with these statutes would not be grounds for withholding funds under the ethnic studies law codified at section 15-112.

156. Heather K. Gaines, Notice of Appeal of Determination of Non-Compliance with A.R.S. § 15-112 and Request for Hearing (June 22, 2011), *available at* [http://saveethnicstudies.org/assets/docs/state\\_audit/Notice-of-Appeal-TUSD\\_06-22-2011.pdf](http://saveethnicstudies.org/assets/docs/state_audit/Notice-of-Appeal-TUSD_06-22-2011.pdf).

157. *See, e.g., Senate Education Committee Debate, supra* note 44, at 2:15:10 (statements by Rep. Montenegro saying that he wants what is being taught in La Raza Studies to be prohibited from being taught elsewhere in the state).

158. *See, e.g., House Education Committee Debate, supra* note 41, at 1:41:40 (testimony of former student saying courses promote "nothing but love and respect" and that classes were inclusive of people from all races); *id.* at 1:44:00 (testimony of school district lobbyist Sam Polito saying that his district has "no quarrel with not teaching hatred").

159. *See* Superintendent Horne's Findings, *supra* note 14 and Part I.F.

160. *See* Superintendent Huppenthal's Findings, *supra* note 22 and Part I.F.

### A. State Law Regarding Statutory Interpretation

A court reviewing an appeal of the Superintendent's determination that a class violates section 15-112 must interpret the law in accordance with Arizona rules of statutory interpretation.<sup>161</sup> Under Arizona law, the primary goal of a court interpreting a statute is to ascertain and give effect to the legislature's intent.<sup>162</sup> To do this, a court begins with the statute's plain meaning, avoiding any tools of statutory construction or analysis of legislative history.<sup>163</sup> To ascertain plain meaning, section 1-213 provides that, "[w]ords and phrases shall be construed according to the common and approved use of the language." However, if the plain meaning is ambiguous, the court will then consider the law's legislative history, historical background, spirit, and purpose.<sup>164</sup> If the meaning of a statute is unresolved after analysis of plain meaning and legislative history, courts consider canons of statutory construction.<sup>165</sup> These include comparisons of the challenged statute to other statutes,<sup>166</sup> reading the statute to give every word meaning,<sup>167</sup> and interpreting statutes to be constitutional wherever possible.<sup>168</sup>

### B. Appealing Agency Decisions

The Superintendent of Public Instruction's findings regarding section 15-112 are subject to both administrative review and judicial review.<sup>169</sup> Schools retain the right to challenge the Superintendent's or the State Board of Education's decision that a course violates the ethnic studies law before an administrative law

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161. This is true for federal courts as well as Arizona courts: when interpreting state statutes, a federal court's role is to "interpret the law as would the [state's] Supreme Court." *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 925 (9th Cir. 2004).

162. *Estate of Winn v. Plaza Healthcare, Inc.*, 150 P.3d 236, 238 (Ariz. 2007).

163. *Janson ex rel. Janson v. Christensen*, 808 P.2d 1222, 1223 (Ariz. 1991).

164. *Hayes v. Cont'l Ins. Co.*, 872 P.2d 668, 672 (Ariz. 1994).

165. *Kyle v. Daniels*, 9 P.3d 1043, 1045 (Ariz. 2000) ("When faced with ambiguous statutes we apply our canons of statutory construction, considering background and context in an attempt to discover true legislative intent.")

166. *See State ex rel. Larson v. Farley*, 471 P.2d 731, 734 (Ariz. 1970).

167. *See Simpson v. Simpson*, 229 P.3d 236, 237 (Ariz. Ct. App. 2010).

168. *See Schecter v. Killingsworth*, 380 P.2d 136, 142 (Ariz. 1963) ("Where differing constructions of a statute are possible, it is our duty to construe it in such a manner that it will be constitutional."); *State v. Kaiser*, 65 P.3d 463, 466 (Ariz. Ct. App. 2003) (noting that party challenging statute's constitutionality has the burden of proving statute unconstitutional). Eleven teachers from TUSD filed suit in October, 2010 to block the law from taking effect alleging constitutional violations. Michael Martinez & Thelma Gutierrez, *11 Tucson Teachers Sue Arizona over New 'Anti-Hispanic' Schools Law*, CNN (Oct. 20, 2010), <http://edition.cnn.com/2010/US/10/19/arizona.ethnic.studies.lawsuit/?hpt=T2>. Their suit argues freedom of speech, equal protection, and vagueness claims. *Id.* This Note does not examine the constitutional questions raised by the law on the premise that a court reviewing the law will still endeavor to determine its best possible construction and would only stray from this construction if other methods of statutory construction fail.

169. *See ARIZ. REV. STAT. § 15-112(D)* (2011) ("Actions taken under this section are subject to appeal pursuant to title 41, chapter 6, article 10."); *id.* § 41-1092.08(H) ("A party may appeal a final administrative decision pursuant to title 12, chapter 7, article 6."); *id.* § 12-902(A)(1) ("This article applies to . . . [e]very action to review judicially a final decision of an administrative agency . . .").

judge.<sup>170</sup> At the administrative review hearing, parties may present evidence, hear evidence presented against them, and cross-examine witnesses.<sup>171</sup> At the conclusion of the hearing, the administrative law judge issues a written opinion.<sup>172</sup> The Department of Education, through the State Board of Education or the Superintendent, may then choose to accept, reject, or modify the administrative law judge's decision.<sup>173</sup> If the Department of Education rejects or modifies the administrative law judge's decision, the Department need only issue a written decision explaining why the determination was rejected or modified.<sup>174</sup>

A school unsatisfied with the outcome of the administrative review process may then challenge the action in a state superior court.<sup>175</sup> The superior court must affirm the Department's action "unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion."<sup>176</sup> Cases have clarified that a state agency abuses its discretion when it fails to conduct an adequate investigation into relevant facts.<sup>177</sup>

As illustrated in *Arizona State Liquor Board v. Jacobs*, reviewing courts give great deference to an agency's decision. In *Jacobs*, the Arizona Court of Appeals correctly deferred to the factual findings of a state agency using the abuse of discretion standard of review.<sup>178</sup> Following the State Liquor Board's decision to deny the transfer of a liquor license, the owner of the liquor license appealed to the superior court.<sup>179</sup> The superior court found that the liquor license should have been granted because of the relative lack of alcohol vendors in the area, finding "by overwhelming evidence that the public convenience requires and the best interest

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170. *Id.* § 15-112(D) ("Actions taken under this section are subject to appeal pursuant to title 41, chapter 6, article 10.")

171. *Id.* § 41-1092.07(B), (D).

172. *Id.* § 41-1092.08(A).

173. *Id.* § 41-1092.08(B); *see also* *Smith v. Ariz. Long Term Care Sys.*, 84 P.3d 482, 485 (Ariz. Ct. App. 2004).

174. ARIZ. REV. STAT. § 41-1092.08(B) (2011).

175. *Id.* § 41-1092.08(H) ("[A] party may appeal a final administrative decision pursuant to title 12, chapter 7, article 6 . . ."); *id.* § 12-902(A)(1) ("[T]his article applies to . . . [e]very action to review judicially a final decision of an administrative agency . . .").

176. *Id.* § 12-910(E); *see also* *Callen v. Rogers*, 168 P.3d 907, 910 (Ariz. Ct. App. 2007). The court must also be sure to affirm or deny the agency's decision, not the administrative law judge's decision, which is no longer relevant. *See Smith*, 84 P.3d at 485.

177. *Avila v. Ariz. Dep't of Econ. Sec.*, 772 P.2d 600, 602 (Ariz. Ct. App. 1989); *see also* *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42-44 (1983) (finding arbitrary and capricious standard not met when agency entirely fails to consider an important aspect of decision or if agency decision contradicts evidence before the agency); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (construing the arbitrary and capricious standard of review under the Administrative Procedure Act, the Court said it "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment").

178. 511 P.2d 179, 181 (Ariz. Ct. App. 1973).

179. *Id.*

of the community will be substantially served by the transfer of said license.”<sup>180</sup> On appeal, the Liquor Board argued that the trial court had made the wrong decision about the need for alcohol vendors in the area, producing evidence showing that there were sufficient alcohol vendors in the area.<sup>181</sup> The appellate court found that the mere existence of evidence on the record supporting the Liquor Board’s decision satisfied the arbitrary and capricious standard.<sup>182</sup> The Arizona Court of Appeals reversed the superior court’s ruling, saying that where reasonable minds may draw different conclusions from the evidence, the state agency’s decision will not be overturned.<sup>183</sup>

While a state agency’s decision that is supported by evidence on the record may not be set aside as arbitrary and capricious,<sup>184</sup> the court will reach its own conclusions on questions of law.<sup>185</sup> This difference in deference highlights underlying policy concerns regarding the role of state agencies. On one hand, courts must be wary of second-guessing agencies with expertise in the field that the agency is regulating;<sup>186</sup> however, the legislature did not give agencies the power to “enact a regulation nor make an order that would conflict with the proper interpretation of the statute.”<sup>187</sup>

For example, a state court overturned an agency decision in *Cummins v. Arizona Department of Economic Security* because the State Department of Economic Security erroneously interpreted the law it was charged with enforcing and, in turn, failed to make a required factual investigation. In *Cummins*, the Department of Economic Security decided that Ms. Cummins was not eligible for unemployment benefits and informed her that if she wished to appeal this decision, she would need to file an appeal within 30 days.<sup>188</sup> Ms. Cummins prepared an appeal and put it in the mailbox at 6:30 p.m. of the 30th day, but the post office did not receive the appeal and therefore did not postmark it until the first collection the following morning.<sup>189</sup> The Department of Economic Security said its rules require that the appeal be postmarked by the 30th day.<sup>190</sup> The Department thus declined to hear her appeal.<sup>191</sup> The court, however, noted that the plain meaning of the Department’s rules only requires that appellants put their appeals in the mailbox by the 30th day.<sup>192</sup> The court gave no deference to the agency’s rule about

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180. *Id.*

181. *Id.* at 181–82.

182. *Id.*

183. *Id.* at 182–83.

184. *See Smith v. Ariz. Long Term Care Sys.*, 84 P.3d 482, 485 (Ariz. Ct. App. 2004).

185. *Eshelman v. Blubaum*, 560 P.2d 1283, 1285 (Ariz. Ct. App. 1977).

186. *See Smith*, 84 P.3d at 485.

187. *Sharpe v. Ariz. Health Care Cost Containment Sys.*, 207 P.3d 741, 748 (Ariz. Ct. App. 2009) (quoting *McCarrell v. Lane*, 258 P.2d 988, 989 (Ariz. 1953)).

188. *Cummins v. Ariz. Dep’t of Econ. Sec.*, 893 P.2d 68, 69 (Ariz. Ct. App. 1995).

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 70–71.

postmarking because the agency decision was a novel legal conclusion.<sup>193</sup> The court then remanded to the agency for the factual determinations, which would be entitled to deference, on the merits of Ms. Cummins case.<sup>194</sup> Thus, whether a state agency's decision is premised on factual or legal determinations will change the deference that courts give those agency determinations.

Additionally, Arizona courts will give deference to an agency's interpretation of a statutory scheme that agency is entrusted to administer if the legislature has not spoken definitively on the issue at hand,<sup>195</sup> or if the agency's interpretation has been accepted for a period of time such that the legislature has supposedly acquiesced to that interpretation.<sup>196</sup>

Neither Superintendent Horne nor Superintendent Huppenthal offered an interpretation of the ethnic studies law. Instead they concluded that La Raza Studies violated the ethnic studies law as written.<sup>197</sup> Thus, there is no agency interpretation to which a court would defer and the meaning of the ethnic studies law will be determined by a reviewing court de novo. Both Superintendents did, however, make factual and legal determinations with respect to La Raza Studies; these determinations are discussed below.

### ***C. Do La Raza Studies Courses Advocate Ethnic Solidarity?***

Section 15-112(A)(4) prohibits courses that "advocate ethnic solidarity instead of treatment of pupils as individuals." As explained below, the best interpretation of this section of the law is that it prohibits courses from telling students that they are currently oppressed. Yet, none of La Raza Studies' written curriculum authoritatively tells students that they are currently oppressed. In fact, it is unlikely that any course could be found to violate section (A)(4) based solely on its textbooks; the Superintendent must produce evidence that teachers utilize texts and curriculum materials in a way that authoritatively tells students that they are currently oppressed in order to find any course in violation of section (A)(4).

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193. *Id.* at 69 (citing *Avila v. Ariz. Dep't of Econ. Sec.*, 772 P.2d 600, 602 (Ariz. Ct. App. 1989)).

194. *Id.* at 71.

195. *See Ariz. Water Co. v. Ariz. Dep't of Water Res.*, 91 P.3d 990, 997 (Ariz. 2004) (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). If the legislature expressed an unequivocal intent that the statute be interpreted a specific way, a reviewing court must respect that intent. *Id.*

196. *See Long v. Dick*, 347 P.2d 581, 583-84 (Ariz. 1959).

197. Superintendent Horne's findings do not, for example, explain the phrase "ethnic solidarity," which also remains undefined in the statute itself. His findings do contain a "Philosophy of the Applicable Statute" section, but it is not clear what legal effect this philosophy section has and it is less clear that the legislature agreed with this philosophy. *See Superintendent Horne's Findings*, *supra* note 14, at 1. Likewise, Superintendent Huppenthal's findings offer no guidance on what sort of instruction might violate the law; instead the findings only indicate that course texts contain prohibited language. Superintendent Huppenthal's Findings, *supra* note 22, at 1-2.

*1. Interpretation of Section 15-112(A)(4)*

Section (A)(4)'s prohibition on advocating ethnic solidarity is perhaps the most perplexing section of the law. The phrase *ethnic solidarity* remains undefined in the statute. *Ethnic solidarity* appears nowhere else in the Arizona Revised Statutes, or in the U.S. Code, or in any other state's current statutes.<sup>198</sup> The *Oxford Dictionary* defines *solidarity* as "unity or agreement of feeling or action, especially among individuals with a common interest," or as "mutual support within a group."<sup>199</sup> Therefore, *ethnic solidarity* means either 1) unity or agreement of feeling or action among individuals of the same ethnicity or 2) mutual support within an ethnic group.

To violate section (A)(4), a course must also *advocate* ethnic solidarity.<sup>200</sup> The *Oxford Dictionary* defines *advocate* as "publicly recommend or support." Prior sections of section 15-112 prohibit courses that *promote* certain activities.<sup>201</sup> The *Oxford Dictionary* defines *promote* as "further the progress of (something, especially a cause, venture, or aim); support or actively encourage."<sup>202</sup> Presumably the legislature chose the words *promote* and *advocate* to convey different meanings.<sup>203</sup> The difference between the two words, according to the *Oxford Dictionary*, is that *advocate* requires public support while *promote* does not require support to be public.

In order to clarify section (A)(4), a court must read it in concert with section 15-112(E)(3) and (F). Provisions of a statute "that may seem ambiguous in isolation [are] often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."<sup>204</sup> Section (F) states, "nothing in this section shall be construed to restrict or prohibit the instruction of . . . the historical oppression of a particular group of people based on ethnicity, race, or class."<sup>205</sup> Likewise, section 15-112(E)(3) permits courses "that include the history of any

198. A Westlaw search of the U.S. Code and every state's statutes for the term "ethnic solidarity" revealed only Arizona Revised Statutes section 15-112(A)(4).

199. *Solidarity* *Definition*, OXFORD DICTIONARIES, [http://oxforddictionaries.com/view/entry/m\\_en\\_us1292248?rskey=zwBVsz&result=1#m\\_en\\_us1292248](http://oxforddictionaries.com/view/entry/m_en_us1292248?rskey=zwBVsz&result=1#m_en_us1292248) (last visited Jan. 13, 2011). Courts use dictionary definitions to deduce plain meaning, not as evidence, but as "aides to the memory and understanding of the court." *See* *Nix v. Heddon*, 149 U.S. 304, 307 (1893) (approving use of dictionary definitions).

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

201. Section 15-112(A)(1) prohibits courses that promote the overthrow of the United States government. *Id.* § 15-112(A)(1). Section (A)(2) prohibits courses that promote resentment. *Id.* § 15-112(A)(2).

202. *Promote* *Definition*, OXFORD DICTIONARIES, [http://oxforddictionaries.com/view/entry/m\\_en\\_us1281095#m\\_en\\_us1281095](http://oxforddictionaries.com/view/entry/m_en_us1281095#m_en_us1281095) (last visited Jan. 13, 2011).

203. *See* *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 697–698, 714 (1995) (explaining that each word in a statute is read to have non-superfluous meaning).

204. *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

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

ethnic group . . . unless the course or class violates subsection A.” This implicitly means courses may teach students of one ethnicity about the historical oppression of their ethnic group and that those students may, as a result, feel ethnic solidarity. Thus, anecdotal evidence of students feeling ethnic solidarity after learning about their ethnicity’s history will not be enough to prove that the course violates section (A)(4). The statute does not define *historical*. The *Oxford Dictionary* defines *historical* as “concerning past events.”<sup>206</sup> Conceivably, therefore, anything that has already happened is within the plain meaning of *historical*. If *historical* were to refer to something more distant in time, for example the historical Romans, a time frame that lessons could not cross would have been written into the statute. No time frame exists and a judge would not write such a time frame into the law.<sup>207</sup> Sections (E)(3) and (F) therefore permit teaching on any oppression that has already happened.

Section (A)(4) is further complicated by the phrase “instead of treatment of pupils as individuals.” It is unclear whether this is positive law—curriculum must treat students as individuals—or whether it is only a suggestion of what courses must do in order to not advocate ethnic solidarity. The phrase raises the question: what if a course neither advocates ethnic solidarity nor treats pupils as individuals? Nothing in the law’s text provides an answer to this question.

Section (A)(4) is therefore ambiguous in multiple respects. As a result, a court interpreting the law will look to the legislative history, historical background, spirit, and purpose of the law to understand the legislative intent.<sup>208</sup>

At nearly every hearing, HB 2281’s sponsor, Representative Montenegro, stressed that the intent of the bill was to stop teachers from telling students that they are oppressed.<sup>209</sup> Representative Montenegro also repeatedly mentioned a student who testified before the legislature regarding one of the prior failed ethnic

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206. *Historical Definition*, OXFORD DICTIONARIES, [http://oxforddictionaries.com/view/entry/m\\_en\\_us1255142#m\\_en\\_us1255142](http://oxforddictionaries.com/view/entry/m_en_us1255142#m_en_us1255142) (last visited Jan. 13, 2011).

207. *See* Lewis v. City of Chicago, 130 S. Ct. 2191, 2200 (2010) (“It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think [the legislature] really intended.”); Pub. Citizen v. U.S. Dep’t of Justice, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) (stating that before a court will correct drafters’ supposed errors, “the alleged absurdity [must be] so clear as to be obvious to most anyone”).

208. *See* Hayes v. Cont’l Ins. Co., 872 P.2d 668, 672 (Ariz. 1994).

209. *See, e.g., House Education Committee Debate, supra* note 41, at 1:12:40 (testimony of Representative Montenegro calling the lessons “victimology”); *Senate Education Committee Debate, supra* note 44, at 2:13:30 (same); *Hearing on HB 2281 Before House Comm. of the Whole*, 49th Leg., 2d Reg. Sess. (Ariz. Mar. 18, 2010) [hereinafter *House Committee of the Whole Debate*], at 0:18:50, available at [http://azleg.granicus.com/MediaPlayer.php?view\\_id=13&clip\\_id=7138](http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=7138) (same). As the bill’s sponsor, Representative Montenegro’s opinion is of particular import. Sponsors are often best in touch with the bill’s drafting and intended results and thus best able to speak to its meaning. WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 302–04 (Found. Press 2000) (noting that committee reports and sponsor statements are the most dependable forms of legislative history); *see also* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 526–27 (1982) (using sponsor’s statements to construe scope of Title IX).

studies bills.<sup>210</sup> This student told the legislature that she did not know she was oppressed until she took La Raza Studies courses.<sup>211</sup> Based on this legislative history, the general intent or purpose of the law is to stop teachers from telling students that they are oppressed.<sup>212</sup>

Some legislators specifically signaled that this language would be sufficient to prohibit courses from using *Pedagogy of the Oppressed* and *Occupied America*, and perhaps disband TUSD's La Raza Studies Department altogether.<sup>213</sup> However, the legislative history is ambiguous as to whether the legislature as a whole agreed with this specific intent. While fielding a question about the interpretation of another section of the law, the Chair of the House Education Committee claimed that the Department of Education would be responsible for interpreting how the law applied to various programs, presumably including La Raza Studies.<sup>214</sup> The bill's sponsor, Representative Montenegro, agreed that the Department of Education would determine who violated the law.<sup>215</sup> Because the legislature indicated a willingness to leave questions about the application of the law up to an administrative agency, a reviewing court should not place much weight on individual legislators' specific assertions regarding the law's application. Rather, the law is best analyzed by considering the general intent of the legislature, and not specific intent.

With this information in mind, the best interpretation of *advocating ethnic solidarity* would be telling students of an ethnic group that they are currently oppressed. Telling students of one ethnic group that they are oppressed is tantamount to advocating unity of feeling or action among individuals of the same ethnicity, which is the plain meaning of the law as deduced from the *Oxford Dictionary*. Although telling students that their ethnic group has been *historically*

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210. See, e.g., *Senate Education Committee Debate*, *supra* note 44, at 2:32:25 (statements of Representative Montenegro); *House Committee of the Whole Debate*, *supra* note 209, at 0:18:15 (statements of Representative Montenegro).

211. *House Committee of the Whole Debate*, *supra* note 209, at 0:18:15 (statements of Representative Montenegro).

212. General intent, or purposivism, is the inquiry into a statute's broad goals, accepting consensus as to the law's general theme and avoiding questions about how individual legislators would have interpreted the law. See *ESKRIDGE ET AL.*, *supra* note 209, at 220–21; see also *United Steelworkers v. Weber*, 443 U.S. 193, 254 (1979) (Rehnquist, J., dissenting) (arguing that, although the majority accepted that the general purpose of Title VII was passed to help black workers achieve equal opportunities in the workplace, many Senators felt Title VII merely ensured equal treatment by mandating that workplace decisions be color-blind).

213. See, e.g., *Senate Education Committee Debate*, *supra* note 44, at 2:21:00 (statements by Representative Montenegro regarding *Occupied America*); *id.* at 2:26:00 (statements by Senator Huppenthal regarding *Pedagogy of the Oppressed* and expressing opinion that law would target the whole La Raza Studies program). Specific intent, however, creates a problem of attribution: different legislators may have voted for a bill thinking it meant different things. See *Weber*, 443 U.S. at 254 (Rehnquist, J., dissenting).

214. *House Committee of the Whole Debate*, *supra* note 209, at 0:15:20 (statements of Representative Crandall).

215. *Id.* at 0:08:30 (statements of Representative Montenegro, but referring to section 15-112(B)).

oppressed would be permissible under sections (E)(3) and (F), telling students that they are *currently* oppressed would violate section (A)(4).<sup>216</sup> Furthermore, refraining from telling students that they are oppressed would comport with section (A)(4)'s instruction to treat pupils as individuals. It lets students come to their own conclusions about whether they are currently oppressed, free, or anything in between.

### 2. Application of Section 15-112(A)(4) to La Raza Studies

In Horne's finding that La Raza Studies violated the ethnic studies law, he suggested that section (A)(4) prohibits teaching *Pedagogy of the Oppressed* because the book tells Latino students that they are oppressed.<sup>217</sup> He admitted, however, that he never attended any La Raza classes in person<sup>218</sup> and offered no details on the manner in which teachers instructed students on *Pedagogy* specifically.<sup>219</sup> Horne also suggested that teachers themselves violated section (A)(4). He quoted a former TUSD teacher as saying that "[i]ndividuals in this [ethnic studies department] are . . . telling students that they are victims and that they should be angry and rise up."<sup>220</sup> He quotes another teacher claiming to have overheard a La Raza Studies teacher tell Latino students that they should "go to college so they can gain the power to take back the stolen land and give it back to Mexico."<sup>221</sup>

Superintendent Huppenthal expressly found La Raza Studies in violation of section (A)(4), saying the "[r]eviewed curriculum and materials repeatedly emphasize the importance of building Hispanic nationalism and unity in the face of assimilation and oppression."<sup>222</sup> Huppenthal stated that certain texts utilized in La Raza Studies classes violated both section (A)(2) and (A)(4), including: 1) materials that "repeatedly reference white people as being 'oppressors' and 'oppressing' the Latino people" and 2) materials that "present only one perspective of historical events, that of the Latino people being persecuted[,] oppressed[,] and

216. Early on, legislators expressed concern that the language in section (A)(4) would prohibit teaching about historical matters like the Civil War. *See House Education Committee Debate, supra* note 41, at 1:28:25 (statements by Representative Young Wright). The amendments to the bill codified in section (F) confirm the legislature's understanding that teaching about historical oppression is different than teaching students that they are currently oppressed. *See* ARIZ. REV. STAT. § 15-112(F) (2011).

217. Superintendent Horne's Findings, *supra* note 14, at 2-3, 7 (finding that La Raza Studies violate section (A)(3) but suggesting that the courses may violate other parts of the law as well).

218. *Senate Education Committee Debate, supra* note 44, at 2:54:50 (testimony of Superintendent Horne).

219. Superintendent Horne's Findings, *supra* note 14, at 7-8.

220. *Id.* at 4.

221. *Id.* at 5.

222. Superintendent Huppenthal's Findings, *supra* note 22, at 2. The Superintendent did not provide specific citations for which classes or curriculum materials violated this section.

subjugated by the ‘hegemony’ – or white America.’<sup>223</sup> Like Horne, Superintendent Huppenthal did not base his findings on any actual classroom observation.<sup>224</sup>

Both Superintendents’ conclusions about whether the course material used in La Raza Studies classes violates section (A)(4) would not likely withstand judicial review because they are factual determinations premised on incorrect readings of the ethnic studies law.<sup>225</sup> As illustrated here, only course material that La Raza Studies teachers use to authoritatively tell students that they are oppressed would violate section (A)(4). Without this factual determination, the Superintendents’ finding that certain course material violates section (A)(4) will be susceptible to challenge on appeal for not being supported by any evidence on the record.<sup>226</sup>

For example, *Pedagogy of the Oppressed* suggests that the oppressed must struggle to liberate themselves from their oppressors through education.<sup>227</sup> As *Pedagogy’s* critics point out, the book discounts the idea that members of an oppressed group would ignore the plight of other members of their group and decide that modern society is fair.<sup>228</sup> In the context of La Raza Studies, oppression refers to the experience of Mexican Americans in America. When *Pedagogy* is taught alongside *Occupied America*, with its internal colonization thesis, it implies that Latinos remain oppressed in contemporary America.<sup>229</sup> Additionally, teaching about the Atzlán further reinforces the idea that Latinos must struggle as an ethnic group to free themselves from oppression.<sup>230</sup> Thus, authoritatively instructing Latino students that *Pedagogy of the Oppressed* presents the single, correct way to think about their race would meet the definition of advocating ethnic solidarity. A

223. *Id.*

224. *Id.* (“Our finding is based on the limited [materials in the audit report] and additional materials gathered independently of the conducted classroom observations.”). Although Superintendent Huppenthal did observe one course while serving as a State Senator, see *Senate Education Committee Debate*, *supra* note 44, at 2:24:10, this occurred before HB 2281 became law. While auditors hired by Huppenthal to assess the courses’ legality did observe classrooms, the auditors found no evidence of a violation of (A)(4) or any other section of the law. CAMBIUM AUDIT, *supra* note 19, at 50–63. Since the audit found no violations of the law, Huppenthal did not base his findings on the observations of the audit report.

225. See *Cummins v. Ariz. Dep’t of Econ. Sec.*, 893 P.2d 68, 69 (Ariz. Ct. App. 1995) (stating that Arizona courts review state agency’s interpretations of law de novo); see also *Long v. Dick*, 347 P.2d 581, 583–84 (Ariz. 1959) (explaining that an agency interpretation that has been accepted for a period of time will be afforded deference).

226. See *Avila v. Ariz. Dep’t of Econ. Sec.*, 772 P.2d 600, 602 (Ariz. Ct. App. 1989) (stating that although agency decision supported by substantial evidence will be upheld, an agency abuses its discretion when it fails to inquire into necessary facts).

227. FREIRE, *supra* note 51, at 81–86.

228. Graff, *supra* note 54 (“Nowhere in *The Pedagogy of the Oppressed* does Freire imagine the possibility that students might end up deciding that they are *not* oppressed or that for them authentic liberation is getting a job with IBM, making lots of money, and moving to the suburbs.”).

229. This view is espoused by former TUSD teacher John Ward and is quoted at length in the Superintendent’s findings. Superintendent Horne’s Findings, *supra* note 14, at 3–5; see also MacEachern, *supra* note 131 (quoting Ward).

230. Superintendent Horne’s Findings, *supra* note 14, at 7–9.

factual determination that La Raza Studies teachers did this would be entitled to great deference if challenged in state court.<sup>231</sup>

However, teaching *Pedagogy of the Oppressed* for its theoretical approach would not violate section (A)(4) because such teaching fails to *advocate* under the meaning of (A)(4). That a teacher merely assigns a text does not mean *a priori* that he advocates its message. Doubtlessly many books are assigned each year to stimulate students' independent reasoning without suggesting students merely memorize and accept each of the author's contentions.<sup>232</sup> Likewise, *Pedagogy* is a highly influential work in the fields of education and critical race theory.<sup>233</sup> If La Raza Studies teachers introduce the text to stimulate student thought, they are not necessarily advocating its message. Additionally, the law could have easily banned the book by name, but instead the legislature opted for language prohibiting courses that *advocate* certain ideas rather than courses that *assign* books that advocate certain ideas.<sup>234</sup> Thus, absent a finding that *Pedagogy* is instructed in a way that authoritatively tells students they are oppressed, *Pedagogy* is not prohibited course material under section (A)(4).

*Occupied America* also does not necessarily fall within the scope of section (A)(4). *Occupied America* is essentially a history book,<sup>235</sup> and its contents and message are therefore protected by section (F), which permits teaching on "the historical oppression of a particular group of people based on ethnicity, race or class."<sup>236</sup> Although *Occupied America* is critical of many policies that adversely affect Latinos today,<sup>237</sup> chronicling the rise of such policies and their effect on Latinos of the time is still an exercise in history. Even if Latino students read *Occupied America* and develop feelings of ethnic solidarity or conclude that they remain oppressed today, this would be protected by section (F).<sup>238</sup> Thus, teaching

231. See *Ariz. State Liquor Bd. v. Jacobs*, 511 P.2d 179, 181 (Ariz. Ct. App. 1973) (stating that where reasonable minds may draw different conclusions from the evidence, the state agency's decision will not be overturned).

232. Malcolm X's autobiography, for example, is *not* assigned in African American history courses so that students will reject Dr. Martin Luther King Jr.'s nonviolent approach and internalize Malcolm X's sentiment that "when the law fails to protect Negroes from whites' attack, then those Negroes should use arms, if necessary, to defend themselves." MALCOLM X AS TOLD TO ALEX HALEY, *THE AUTOBIOGRAPHY OF MALCOLM X* 366 (1965).

233. See Abdeljalil Akkari, *Pedagogy of the Oppressed and the Challenge of Multicultural Education*, 32 *INTERCHANGE* 271, 271–75, 284–89 (2001).

234. See *Lewis v. City of Chicago*, 130 S. Ct. 2191, 2200 (2010) ("It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think [the legislature] really intended.").

235. See *supra* notes 88–89 and accompanying text.

236. ARIZ. REV. STAT. § 15-112(F) (2011); see also, e.g., ACUÑA, *supra* note 90, at 331 (decrying California Governor Arnold Schwarzenegger's praise of the minutemen in 2005). Although 2005 certainly is not ancient history, it is still within the meaning of historical. See *supra* notes 204–05 and accompanying text.

237. See, e.g., ACUÑA, *supra* note 90, at 316–17 (discussing English-speaking-only laws in public schools).

238. See *supra* notes 201–03 and accompanying text.

from *Occupied America* is not made illegal by (A)(4) absent a determination that teachers used the text to advocate ethnic solidarity.

A judge reviewing the application of section (A)(4) to La Raza Studies would not likely defer to either Superintendent's findings regarding any course material because the findings effectively misread the law.<sup>239</sup> The Superintendents failed to consider whether the course instructed *Pedagogy of the Oppressed* or *Occupied America* as authoritatively telling students that they are currently oppressed or merely to stimulate student thought.<sup>240</sup> Superintendent Huppenthal specifically ignored contrary evidence gathered by the audit report concluding that, in all observed courses, teachers treated students as individuals and did not advocate ethnic solidarity.<sup>241</sup> By finding TUSD's La Raza Studies in violation of section (A)(4) without any evidence that teachers used a certain textbook or lesson to *advocate* ethnic solidarity, both Superintendents effectively edited the word *advocate* out of the law.<sup>242</sup> This is an erroneous interpretation of law that would not be entitled to deference during judicial review.<sup>243</sup> An Arizona court would likely overturn such an interpretation because section (A)(4) requires evidence of advocating, i.e., evidence about how course texts and materials are taught to students, before state funds can be withheld.

Even though nothing in the courses' texts themselves advocates ethnic solidarity, teachers may still violate section (A)(4) by advocating ethnic solidarity through their classroom instruction. While Superintendent Huppenthal's findings were based solely on course curriculum material,<sup>244</sup> Superintendent Horne suggested that La Raza teachers themselves advocate ethnic solidarity.<sup>245</sup> These statements fall within the meaning of (A)(4) because they tell students of one ethnicity that they are oppressed. Such findings would be entitled to deference on appeal because they are findings of fact, not interpretations of law.<sup>246</sup> If a judge finds that there is any evidence in the record that teachers tell students of one ethnicity that they are oppressed,<sup>247</sup> then those courses would violate section (A)(4). Because Superintendent Horne did not base his findings on classroom

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239. See *Cummins v. Ariz. Dep't of Econ. Sec.*, 893 P.2d 68, 69 (Ariz. Ct. App. 1995) (stating that Arizona courts do not defer to state agency's interpretations of law). In *Cummins*, the Department of Economic Security made a factual determination that appellant did not timely file her appeal, but because the Department misread the law regarding timely appeals, the court did not defer to its factual findings. *Id.* at 69–71.

240. Student exercises like the "I Am" poems and Four Tables, see *supra* notes 71, 76 and accompanying text, suggest that *Pedagogy* is used primarily to stimulate thought, although this alone is far from conclusive.

241. *CAMBIUM AUDIT*, *supra* note 19, at 50, 60–63.

242. See *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 697–98, 714 (1995) (reading each word in a statute to have non-superfluous meaning).

243. See *Cummins*, 893 P.2d at 69.

244. See Superintendent Huppenthal's Findings, *supra* note 22, at 2.

245. See *supra* notes 216–17 and accompanying text.

246. See *Ariz. State Liquor Bd. v. Jacobs*, 511 P.2d 179, 181 (Ariz. Ct. App. 1973).

247. In reviewing factual determinations of an agency, courts decide only whether the administrative decision was illegal, arbitrary, capricious, or involved an abuse of discretion. *Smith v. Ariz. Long Term Care Sys.*, 84 P.3d 482, 486 (Ariz. Ct. App. 2004).

observation—and the auditors who did observe La Raza Studies classrooms specifically found that the classes did not advocate ethnic solidarity—a judge is likely to conclude that the Superintendents' findings were not adequately factually supported and are therefore arbitrary and capricious.<sup>248</sup>

***D. Do La Raza Studies Courses Promote Resentment Based on Race?***

Section 15-112(A)(2) prohibits courses that “promote resentment toward a race or class of people.” Because the ethnic studies law gives teachers wide latitude to instruct about history, the resentment denoted in section (A)(2) must refer only to present-day resentment and not resentment towards historical injury at the hands of a race or class of people. As explained below, a court reviewing this section as applied to La Raza Studies would likely require more detailed findings from the Superintendent of Public Instruction to determine whether the courses promote resentment under the meaning of section (A)(2).

*1. Interpretation of Section 15-112(A)(2)*

The *Oxford Dictionary* defines resentment as “bitter indignation at having been treated unfairly.”<sup>249</sup> Alternatively, resentment means, “a feeling of indignant displeasure or persistent ill will at something regarded as a wrong, insult, or injury.”<sup>250</sup>

However, as with section 15-112(A)(4), section (A)(2) must be read in conjunction with its exception, section 15-112(F),<sup>251</sup> which states, “nothing in this section shall be construed to restrict or prohibit the instruction of . . . the historical oppression of a particular group of people based on ethnicity, race, or class.” Additionally, section 15-112(E)(3) permits courses “that include the history of any ethnic group . . . unless the course or class violates subsection A.” Thus, *resentment* as it is employed in section (A)(2) cannot mean “bitter indignation at having been treated unfairly” because this refers to historical oppression and is permitted by section (F). Instead, *resentment* must mean “indignant displeasure or persistent ill will at something [presently] regarded as a wrong, insult, or injury.” Therefore, if a public school curriculum that promotes or promoted the indignant displeasure at currently being treated unfairly by white Americans, upper class Americans, or any other race or class of people, the curriculum would violate section 15-112(A)(2).

The legislative history portrays a slightly different meaning of section (A)(2). During the debates over the bill, some legislators espoused the view that learning exclusively and repeatedly about a historical ethnic group's oppressive behavior fosters resentment, under the meaning of section (A)(2). Before both the

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248. See *Cummins*, 893 P.2d at 69.

249. *Resentment Definition*, OXFORD DICTIONARIES, [http://oxforddictionaries.com/view/entry/m\\_en\\_us1284440#m\\_en\\_us1284440](http://oxforddictionaries.com/view/entry/m_en_us1284440#m_en_us1284440) (last visited Nov. 21, 2010).

250. *Resentment Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/resentment> (last visited Nov. 21, 2010).

251. *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (provision ambiguous in isolation must be read in context of entire statute).

House and the Senate Education Committee, Representative Montenegro told his fellow legislators that courses that continually rail against the “white man’s evils” exacerbate race relations.<sup>252</sup> Other legislators repeated the viewpoint that the bill did not prevent students from learning about historical oppression, but did prevent teachers from presenting an unbalanced and solely negative picture of white America.<sup>253</sup> During the Senate Education Accountability and Reform Committee hearing, for example, then-Senator Huppenthal said that during a La Raza Studies class he visited, the teacher called Benjamin Franklin a racist.<sup>254</sup> Senator Huppenthal said that Benjamin Franklin was a leader in the abolitionist movement and that teachers should not be allowed to characterize him as a racist without mentioning this role.<sup>255</sup> For these legislators, therefore, focusing repeatedly on past oppression at the hands of white Americans is enough to promote resentment towards a race or class of persons, as prohibited by section (A)(2).

The meaning of section (A)(2) found in the legislative history defies the plain meaning of the law. Discussing Benjamin Franklin’s views on race amounts to a discussion of the historical oppression of African Americans, something permitted by the plain language of section (F). Even if such a discussion promoted indignant displeasure regarding the founding father’s oppression of African Americans, the oppression is historical so its teaching is permitted. The legislative history cannot alter the plain meaning of section (A)(2).<sup>256</sup> Thus, a school violates

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252. *Senate Education Committee Debate, supra* note 44, at 2:13:40 (statement by Representative Montenegro saying that teaching students about the “white man’s evils” creates an us versus them mentality); *see also House Education Committee Debate, supra* note 41, at 1:12:20 (statement of Representative Montenegro saying that these classes exacerbate race relations).

253. *See, e.g., Senate Education Committee Debate, supra* note 44, at 3:05:20. Senator Braswell said that if you put someone in front of a captive audience for 60 minutes with a product to sell, they’ll sell it. Senator Braswell concluded that courses should not be allowed to dwell on the negative aspects of our history without mentioning the noble aspects. Both Senator Braswell and then-Senator Huppenthal’s statements are not as persuasive as Representative Montenegro’s statements because they are not the bill’s sponsors and have not likely studied it as intimately as a drafter or sponsor. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 262–63 & n.15 (1994) (refusing to consider statements of supporting, non-sponsor Senators). Thus, it should come as no surprise that their interpretations of the law are at odds with the law’s plain meaning. *See ESKRIDGE ET AL.*, *supra* note 209, at 303–04 (sponsors’ statements more trusted form of legislative history than non-sponsors’ statements).

254. *Senate Education Committee Debate, supra* note 44, at 2:24:10 (statement of Senator Huppenthal).

255. *Id.* (saying it is “completely inappropriate” to “trash our founding fathers” in such a way). Senator Huppenthal does not elaborate on the context of the teacher’s comments. In fact, the question “was Benjamin Franklin a racist?” evokes a more complex answer than Huppenthal recognizes at the hearing. Franklin owned slaves for much of his life and ran advertisements in his newspaper for their sale—only later in his life did he become an abolitionist. *See Introduction to Benjamin Franklin Petitions Congress*, THE CTR. FOR LEGISLATIVE ARCHIVES: U.S. NAT’L ARCHIVES, <http://www.archives.gov/legislative/features/franklin/> (last visited Aug. 9, 2011).

256. “If a statute’s language is clear and unambiguous, [Arizona courts] will give it effect without resorting to other rules of statutory interpretation.” *State v. Reynolds*, 823

section (A)(2) if it promotes or promoted the indignant displeasure at *currently* being treated unfairly by any race or class of people.

### 2. Application of Section 15-112(A)(2) to La Raza Studies

Horne did not make any specific factual findings with regard to section (A)(2), although he did suggest that material used in La Raza Studies courses would violate this section. According to Horne, one example of La Raza Studies promoting resentment is a passage in *Occupied America* where labor activist José Angel Gutiérrez threatens, “We are going to move to do away with the injustices to the Chicano and if the ‘gringo’ doesn’t get out of our way, we will stampe over him.”<sup>257</sup> Gutiérrez later called upon a conference of Chicanos to “kill the gringos.”<sup>258</sup> Horne also suggests that the book *Courageous Conversations About Race: A Field Guide for Achieving Equity in School* promotes resentment,<sup>259</sup> although there is no indication that this book is ever assigned in any La Raza Studies class.<sup>260</sup>

Superintendent Huppenthal found La Raza Studies in violation of section (A)(2) based on “materials [that] repeatedly reference white people as being ‘oppressors’ and ‘oppressing’ the Latino people,” and “materials [that] present only one perspective of historical events, that of the Latino people being persecuted, oppressed, and subjugated by the ‘hegemony’—or white America.”<sup>261</sup> Huppenthal gives no citations specifying which texts violate section (A)(2) and does not indicate which courses utilize these texts.<sup>262</sup> Huppenthal is likely referencing *Pedagogy of the Oppressed* and *Occupied America*, as these were the only texts discussed during the legislative sessions leading up to the passage of the law, at which Huppenthal was present in his capacity as a State Senator.<sup>263</sup>

La Raza Studies’ written curriculum material does not by itself violate section (A)(2). First, *Occupied America* does not suggest that its readers must resent today’s white Americans as a race for any past or present injustices felt by Latinos. Though the book heavily criticizes actions and political decisions of white

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P.2d 681, 682 (Ariz. 1992); see also *Hayes v. Cont’l Ins. Co.*, 872 P.2d 668, 672 (Ariz. 1994).

257. Superintendent Horne’s Findings, *supra* note 14, at 7 (referring to ACUÑA, *supra* note 90, at 262).

258. ACUÑA, *supra* note 90, at 262.

259. Superintendent Horne’s Findings, *supra* note 14, at 9 (referring to GLENN E. SINGLETON & CURTIS LINTON, *COURAGEOUS CONVERSATIONS ABOUT RACE: A FIELD GUIDE FOR ACHIEVING EQUITY IN SCHOOL* (2006)).

260. Superintendent Horne lists the book only as a material for the class, not as a textbook or an assigned reading. *Id.* at 9. Indeed, *Courageous Conversations* is a book written primarily for educators. See Gloria Ladson-Billings, *Foreword* to *COURAGEOUS CONVERSATIONS ABOUT RACE: A FIELD GUIDE FOR ACHIEVING EQUITY IN SCHOOL*, at x–xi (2006).

261. Superintendent Huppenthal’s Findings, *supra* note 22, at 2.

262. *Id.* This is significant because the Cambium Audit deemed some texts it found in La Raza Studies classrooms controversial, but indicated that their current use in the classroom is unknown. CAMBIUM AUDIT, *supra* note 19, at 34–38.

263. See generally *Senate Education Committee Debate*, *supra* note 44.

Americans, both living and dead, it nowhere suggests that readers simply resent white Americans as an entire race. Take, for example, the book's discussion of the Mexican-American War. While deriding the political decisions of President James Polk and General Zachary Taylor,<sup>264</sup> and the racist sentiments of select common white Americans,<sup>265</sup> the book also describes how General Ulysses Grant and then-Congressman Abraham Lincoln, both white, opposed the war as an unwarranted war of aggression.<sup>266</sup> The book also states that California is the leader in anti-immigration legislation because "any fringe group with money can propose outlandish schemes that do not necessarily represent the initial views of the majority, whose votes are nevertheless tapped through well-funded propaganda."<sup>267</sup> This suggests that readers resent certain movements and actors for anti-Latino legislation, not all white Americans. Therefore, *Occupied America* does not by itself promote resentment towards a race or class of people.<sup>268</sup> Rather, it instructs on the historical oppression of an ethnic group within the meaning of the exception in section (F).

As for José Angel Gutiérrez's quotation that Horne highlighted as an example of promoting racial resentment,<sup>269</sup> there is no indication that the author of *Occupied America*, much less any members of the La Raza Studies Department, espoused these views. In fact, the audit report explicitly concluded that quotations from the book deemed to be controversial, like Gutiérrez's speech, had been taken out of context.<sup>270</sup> *Occupied America* identified Gutiérrez as an important figure in the Chicano rights movement and introduced a quote from his speech. But immediately following this quote, the book introduces the fact that Hispanic congressman Henry González called for a grand jury investigation into Gutiérrez's political organization as a result of the speech.<sup>271</sup> Certainly, the Superintendent may not impute the views of one activist on an author who writes about him, much less the teacher who assigns a book quoting the activist. Assigning the portion of *Occupied America* with this quote therefore merely instructs on the historical oppression of an ethnic group within the meaning of the exception in section (F).

Likewise, *Pedagogy of the Oppressed* does not necessarily promote resentment.<sup>272</sup> *Pedagogy* specifically rejects the notion that the oppressed should

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264. ACUÑA, *supra* note 90, at 42–48.

265. *Id.* at 46–47.

266. *Id.* at 43.

267. *Id.* at 323.

268. The audit team specifically reviewed *Occupied America* and found it to be an unbiased, factual textbook that "provides a comprehensive, in-depth analysis of the major historical experiences of Chicanos that invokes critical thinking and intellectual discussion." CAMBIUM AUDIT, *supra* note 19, at 39.

269. Superintendent Horne's Findings, *supra* note 14, at 7 (referring to ACUÑA, *supra* note 90, at 262).

270. CAMBIUM AUDIT, *supra* note 19, at 39.

271. *Id.* (referring to ACUÑA, *supra* note 90, at 262).

272. The audit team concluded that nothing about La Raza Studies courses, including *Pedagogy of the Oppressed*, promoted resentment. CAMBIUM AUDIT, *supra* note 19, at 43, 50. The audit team did, however, question whether *Pedagogy* was age-appropriate reading for a high-school class. *Id.* at 36–37. The audit indicated that this source was

turn to violence against their oppressors, as this would simply reverse the tables and would not eliminate oppression in society.<sup>273</sup> *Pedagogy* further asserts that by eliminating oppression, the oppressed would restore humanity both for themselves and for the former oppressors.<sup>274</sup> Thus, Freire rejects resentment of the world's oppressors as an adequate response to oppression because resentment dehumanizes the oppressors and therefore fails to address the existence of oppression.<sup>275</sup>

Neither Huppenthal's findings nor former Superintendent Horne's suggestion that La Raza Studies violates section (A)(2) identified any texts that instruct students that they are *currently* oppressed. Thus, the courses' texts cannot be said to promote resentment within the meaning of section (A)(2).<sup>276</sup>

Both Huppenthal and Horne interpreted section (A)(2) to be violated by curriculum material discussing historical oppression.<sup>277</sup> This is an interpretation of law that a state court may review *de novo*.<sup>278</sup> Contrary to the Superintendents' conclusions, a court would find that the Superintendent must produce evidence that courses instruct students that they are currently oppressed, since this is the best interpretation of promoting resentment. As neither Superintendent has specified any La Raza Studies curriculum material that instructs students that they are currently oppressed, neither finding is supported by sufficient evidence.<sup>279</sup>

Although nothing in the courses' texts promotes resentment toward a present race or class of people, La Raza Studies teachers might themselves promote resentment toward a race or class of people. Anecdotal evidence exists that both supports and refutes this claim. In his findings on TUSD's La Raza Studies Department, Superintendent Horne quoted a former TUSD teacher who said that students call teachers racist if they question the veracity of information they learn in their La Raza Studies classes.<sup>280</sup> This could suggest that even if the

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intended for college students and educators based on its readability and complexity. *Id.* at 36.

273. FREIRE, *supra* note 51, at 57–59.

274. *Id.* at 56.

275. *Id.*

276. This conclusion is further supported by the audit report, which found that no curriculum or class instruction promoted resentment. CAMBIUM AUDIT, *supra* note 19, at 43.

277. See, e.g., Superintendent Huppenthal's Findings, *supra* note 22, at 2 (“[M]aterials present only one perspective of *historical* events, that of the Latino people being persecuted oppressed and subjugated by the ‘hegemony’—or white America.” (emphasis added)).

278. See *Cummins v. Ariz. Dep’t of Econ. Sec.*, 893 P.2d 68, 69 (Ariz. Ct. App. 1995) (overturning state agency’s decision because it did not correctly interpret the law regarding unemployment appeals and therefore did not undertake in the correct factual inquiry).

279. Superintendent Huppenthal only found that curriculum materials promoted resentment; he made no finding regarding teachers’ classroom conduct. See Superintendent Huppenthal’s Findings, *supra* note 22, at 2. Superintendent Horne’s findings contain additional evidence of section (A)(2) violations not based solely on curriculum materials, which are discussed below.

280. See Superintendent Horne’s Findings, *supra* note 14, at 4–6. Additionally, Horne offered evidence that students refused to take orders from a substitute teacher and

curriculum's text does not expressly promote resentment toward white Americans, teachers promote resentment toward present day white Americans.

Defenders of the program deny that this takes place. A former white student of the program wrote an op-ed for the *Tucson Citizen* stating, "Contrary to the assumptions of Horne, Arizona's Superintendent of Public Instruction, I have experienced only love and respect as a white student in La Raza Studies."<sup>281</sup> Another student's "I Am" poem submission for a La Raza Studies course reveals his takeaway from the course. The student states, "we call it the land of the free / or is this hell, every breath that we breathe / land of pain suffering, greed and m[i]sery . . . we can't be color on color / and be self-destructive / we got to see each other as / friends and be self-productive."<sup>282</sup> The student here is both acknowledging the existence of racial oppression and rejecting the notion that the proper response to such oppression is simply to resent white Americans.

Only Superintendent Horne's findings suggest that teachers promote resentment; Huppenthal's finding that La Raza Studies violates section (A)(2) seems to be based only on textual material.<sup>283</sup> If a state court were to hear an appeal of Superintendent Horne's findings that La Raza Studies violated section (A)(2) the court would not likely defer to the Superintendent. While Horne's factual findings are not subject to judicial second-guessing, even though the Superintendent and La Raza Studies' supporters disagree about whether the classes actually breed resentment,<sup>284</sup> Horne made an interpretation of law that a state court may review *de novo*.<sup>285</sup> Superintendent Horne relied on anecdotal evidence that students took the class and felt resentment towards a particular race. But this evidence is not sufficient to show that the class *promoted* those feelings of resentment. As discussed above, the course must instruct students that they are currently oppressed. Any anecdotal evidence of students who learn about the historical oppression and conclude that they should resent a particular race is unpersuasive because courses that teach about historical oppression only are

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were rude to a guest speaker, his Deputy Superintendent Margaret Garcia Dugan, because she was a Republican. *Id.* However, neither of these other instances was racially motivated, because both the substitute teacher and the speaker are Latino. *Id.* This could be evidence that the program has a liberal bias, another one of Horne's disagreements with the program. *Id.* at 5–6. As long as this alleged liberal bias does not amount to promoting resentment, advocating overthrowing the U.S. government, or other conduct prohibited by section 15-112, this evidence is of no moment.

281. Lorenzi, *supra* note 43.

282. Romero & Arce, *supra* note 35, at 204–05.

283. See Superintendent Huppenthal's Findings, *supra* note 22, at 1 (noting that the violation was based on reviewed curriculum materials and not classroom observation).

284. See *Ariz. State Liquor Bd. v. Jacobs*, 511 P.2d 179, 182–83 (Ariz. Ct. App. 1973) (holding that although both opponents and proponents offered evidence regarding whether a liquor license should be transferred, a state court will defer to the state agency's factual determination and will not re-weigh the evidence for or against that decision).

285. See *Cummins v. Ariz. Dep't of Econ. Sec.*, 893 P.2d 68, 69 (Ariz. Ct. App. 1995) (overturning state agency's decision because it did not correctly interpret the law regarding unemployment appeals and therefore did not undertake in the correct factual inquiry).

expressly protected by section (F).<sup>286</sup> Since Superintendent Horne relied only on anecdotal evidence of students feeling resentment, and texts that instructed students about past oppression, his findings do not constitute substantial evidence necessary to uphold an agency's finding of fact.<sup>287</sup> Thus, to find a school in violation of section (A)(2), the Superintendent must undertake a more detailed inquiry to determine what teachers actually promote in the classroom and not how students feel once they leave the class.

### *E. Do La Raza Studies Courses Promote the Overthrow of the Government?*

Arizona Revised Statutes section 15-112(A)(1) prohibits schools from "promot[ing] the overthrow of the U.S. government." As outlined below, the plain meaning of the word *overthrow* encompasses both violent and non-violent overthrowing of the government. Despite this broad meaning, nothing in La Raza Studies courses' curriculum itself promotes the overthrow of the government. Although it is possible that individual La Raza Studies teachers could violate section (A)(1), classroom observation would likely be necessary to find any La Raza Studies course in violation of this section.

#### *1. Interpretation of Section 15-112(A)(1)*

The *Oxford Dictionary* defines *overthrow* as a noun meaning "a removal from power; a defeat or downfall (e.g., plotting the overthrow of the government)."<sup>288</sup> As a verb, it means, "[to] put an end to (something), typically by the use of force or violence."<sup>289</sup> In plainer terms, the *Cambridge Advanced English Learners Dictionary* defines *overthrow* as "when someone or something is removed from power using force."<sup>290</sup> Some ambiguity therefore exists in the word *overthrow*: does the word necessarily implicate the use of force or violence?

Courts occasionally look to unrelated laws to ascertain the meaning of a word on the premise that the legislature accepts the meaning of a word as utilized in an older statute when it writes the word into new statutes.<sup>291</sup> Besides its appearance in section 15-112(A)(1), the word *overthrow* appears four times in the Arizona Revised Statutes.<sup>292</sup> Each time, the word *overthrow* is modified by the term violence and/or force. For example, section 16-806 curtails the state's recognition of the Communist party or any party "the object of which is to overthrow by force or violence the government of the United States . . . ."<sup>293</sup> However, in section 15-112(A)(1), the word *overthrow* is not modified by a term

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286. *Id.*

287. *See* Avila v. Ariz. Dep't of Econ. Sec., 772 P.2d 600, 602 (Ariz. Ct. App. 1989).

288. *Overthrow* *Definition*, OXFORD DICTIONARIES, [http://oxforddictionaries.com/view/entry/m\\_en\\_us1274687#m\\_en\\_us1274687](http://oxforddictionaries.com/view/entry/m_en_us1274687#m_en_us1274687) (last visited Nov. 21, 2010).

289. *Id.*

290. *Overthrow (noun) Definition*, CAMBRIDGE DICTIONARIES ONLINE, [http://dictionary.cambridge.org/dictionary/british/overthrow\\_3](http://dictionary.cambridge.org/dictionary/british/overthrow_3) (last visited Nov. 21, 2010).

291. *See* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 88-92 (1991).

292. ARIZ. REV. STAT. §§ 16-805, 16-806, 26-1094, 38-231 (2011).

293. *Id.* § 16-806.

like violence or force. This may suggest that the legislature intended a broader meaning of *overthrow* than that of its previous laws.<sup>294</sup> Or, it could be a mere drafting error, although courts require the drafting error to produce an “absurd” result before courts will revise a law’s plain meaning.<sup>295</sup> In the context of the rest of the law, it is not absurd to believe that the legislature hoped to prohibit non-violent overthrow of the government in addition to violent overthrow. Thus, section (A)(1)’s plain meaning encompasses both a violent and a non-violent overthrow of the U.S. government.

During its passage, Horne presented *Pedagogy of the Oppressed* to the House Education Committee as evidence that La Raza courses promoted the overthrow of the U.S. government.<sup>296</sup> Horne’s complaint with the book was that its author was an “open communist” and that the sources in *Pedagogy* are Marx, Engel, and Lenin.<sup>297</sup> Horne also mentioned the idea of the Atzlán at this hearing.<sup>298</sup> He said he was upset to find a librarian in a Tucson high school wearing a t-shirt supporting MEChA, which Horne says is a group that claims “North America is a land for the bronze people.”<sup>299</sup> Horne presented this evidence to the legislature as examples of promoting either nonviolent or violent overthrow of the U.S. government.

Despite hearing this evidence, multiple legislators on the House Education Committee expressed doubt that an early version of the law would apply to La Raza Studies as Horne and Representative Montenegro hoped they would.<sup>300</sup> At this point, the bill only contained prohibitions against promoting the overthrow of the U.S. government and promoting resentment towards a race or class of people.<sup>301</sup> One likely explanation for the additional amendments was to make

294. This argument is similar to one embraced by the Supreme Court in *West Virginia University Hospitals*, 499 U.S. at 97–102. There, the Court analyzed a toxic substances law to divine the meaning of “reasonable attorney’s fee” under 42 U.S.C. § 1988, a statute that had nothing to do with toxic substances. *Id.* at 88–92. This approach is not without controversy, *see id.* at 103 (Stevens, J., dissenting), because it is unrealistic to expect legislators to know the precise language of all corners of the law at once. Indeed, the previously cited examples of the Arizona code, *see supra* notes 291–92, come from different Titles and were enacted in 1961 and 1989. It is unlikely that the legislators who passed this law in 2010 familiarized themselves with these older uses of *overthrow*.

295. *See Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) (stating that absurd-result cannon must be limited to cases where “the alleged absurdity is so clear as to be obvious to most anyone”).

296. *House Education Committee Debate*, *supra* note 41, at 1:29:00 (testimony of Superintendent Horne).

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.* at 1:48:20. Representatives Barto, Court, Waters, and Crandall all questioned whether the law, if passed, would actually apply to the program. Yet all representatives voted in favor of the bill.

301. HB 2281, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *available at* <http://www.azleg.gov/FormatDocument.asp?inDoc=%2Flegtext%2F49leg%2F2r%2Fadoption%2Fh.2281-se-ed.doc.htm> (after Committee on Education struck everything amendment passed). The prohibitions against promoting ethnic solidarity and designing courses

certain the law would actually apply to the TUSD's La Raza Studies program. Indeed, the only other reference to *Pedagogy* appeared in the context of the courses' alleged violations of (A)(4).<sup>302</sup> Never again did the legislators take the position that teaching about *Pedagogy* or Atzlán was an example of promoting the overthrow of the U.S. government. Thus, it cannot be said with certainty that the legislature specifically intended to ban teaching about *Pedagogy* or Atzlán;<sup>303</sup> the legislature merely invoked the general intent to ban courses that promote the overthrow of the U.S. government while leaving the determination of what materials promote the overthrow of the government to the Superintendent.<sup>304</sup>

### 2. Application of Section 15-112(A)(1) to La Raza Studies

Superintendent Huppenthal did not find that La Raza Studies violates section (A)(1).<sup>305</sup> Superintendent Horne did suggest in his findings after the bill's passage that La Raza Studies courses promoted the overthrow of the U.S. government but gave no specific examples to this effect.<sup>306</sup> His statements before the Arizona Legislature show his belief that teaching students about Atzlán and assigning *Pedagogy of the Oppressed* are sufficient to establish violations of section (A)(1).<sup>307</sup>

As with each other section of the ethnic studies law, section (A)(1) prohibits nothing in La Raza Studies' curriculum itself. The closest the course comes to promoting a violent overthrow of the U.S. government is a passage in *Occupied America* where labor activist José Angel Gutiérrez threatens, "We are going to move to do away with the injustices to the Chicano and if the 'gringo' doesn't get out of our way, we will stampede over him."<sup>308</sup> However, there is no

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primarily for pupils of a particular ethnic group were introduced in a later amendment. HB 2281, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (as passed to the House), available at [http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/49leg/2r/bills/hb2281h.htm&Session\\_ID=93](http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/49leg/2r/bills/hb2281h.htm&Session_ID=93).

302. *Senate Education Committee Debate, supra* note 44, at 2:26:00 (statement of Senator Huppenthal accusing *Pedagogy of the Oppressed* of encouraging an us-versus-them mentality).

303. Specific intent is problematic where different legislators may have voted for a bill thinking it meant different things. *See United Steelworkers v. Weber*, 443 U.S. 193, 254 (1979) (Rehnquist, J., dissenting). Here, it is not possible to tell how many legislators believed section (A)(1) would prohibit teaching *Pedagogy* in Arizona schools. Some legislators thought *Pedagogy* would be prohibited (e.g., Representative Montenegro) and some thought it wouldn't (e.g., Representative Crandall).

304. General intent accepts consensus as to the law's general theme, thus avoiding questions about how individual legislators would have interpreted the law. *See ESKRIDGE ET AL., supra* note 209, at 220–21; *see also United Steelworkers*, 443 U.S. at 254 (Rehnquist, J., dissenting); *House Committee of the Whole Debate, supra* note 209, at 0:08:30 (statement of Representative Montenegro conceding that the Department of Education would determine what material violated ethnic studies law).

305. *See Superintendent Huppenthal's Findings, supra* note 22.

306. Superintendent Horne's Findings, *supra* note 14, at 2.

307. *House Education Committee Debate, supra* note 41, at 1:29:00 (testimony of Superintendent Horne).

308. *Senate Education Committee Debate, supra* note 44, at 2:21:00 (statements of Representative Montenegro referring to ACUÑA, *supra* note 90, at 262). This passage is

indication that the author of *Occupied America*, much less any members of the Department, espoused these views. Gutiérrez's words are not automatically imputed to those who write about him or those who read his speeches. If La Raza teachers introduce Gutiérrez's speech to stimulate student thought, they are not necessarily promoting its message.

*Pedagogy of the Oppressed* could be read as encouraging a gradual or non-violent overthrow of capitalist regimes in favor of a more egalitarian form of government.<sup>309</sup> Additionally, the courses assign texts mentioning the idea of the Atzlán, the regions in the modern United States once controlled by Mexico.<sup>310</sup> This material implicitly suggests, though never explicitly states, that students might someday recognize Atzlán and not the United States as their homeland even though they now reside within U.S. borders. But as with Gutiérrez's statements in *Occupied America*, La Raza Studies teachers may present this material without promoting its message.

Thus, as with the other sections of the law, a more detailed examination of the day-to-day teachings in La Raza Studies will be necessary to determine whether the courses promote the overthrow of the U.S. government. Any agency finding that La Raza Studies violated section (A)(1), would need to be supported by factual findings that the courses promoted the overthrow of the United States government, not merely that some material assigned in La Raza courses could be interpreted as promoting the overthrow of the government.

#### ***F. Are La Raza Studies Courses Designed Primarily for One Ethnic Group?***

Section 15-112(A)(3) prohibits courses that are "designed primarily for pupils of a particular ethnic group." When read in conjunction with other sections of the ethnic studies law and the Arizona Revised Statutes, the best interpretation of section (A)(3) is that it only prohibits courses whose designers intended to privilege students of a specific ethnic group over other students. Furthermore, a reviewing court would conclude that the Superintendent must make a detailed inquiry into the creation of La Raza Studies, and not merely look at the races of students who enroll in La Raza Studies courses, to determine if the program violates section (A)(3).

##### *1. Interpretation of Section 15-112(A)(3)*

The *Oxford Dictionary* defines *design* as "do or plan (something) with a specific purpose or intention in mind."<sup>311</sup> This section, therefore, refers only to the intent of the course's creators. Section (A)(3) should also be read in concert with

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also referred to in Superintendent Horne's findings. Superintendent Horne's Findings, *supra* note 14, at 7.

309. FREIRE, *supra* note 51, at 55–59, 66–69 (discussing the nature of a political revolution based on liberation of the oppressed through education).

310. See *supra* note 85 and accompanying text.

311. *Design* Definition, OXFORD DICTIONARIES, [http://oxforddictionaries.com/view/entry/m\\_en\\_us1239718#m\\_en\\_us1239718](http://oxforddictionaries.com/view/entry/m_en_us1239718#m_en_us1239718) (last visited Nov. 21, 2010).

section 15-112(E)(2),<sup>312</sup> which allows “the grouping of pupils according to academic performance, including the capability in English language, that may result in disparate impact by ethnicity.” This section, while not directly applicable to ethnic studies courses, suggests that ethnic studies courses that end up with a majority of enrolled students from a particular ethnic group would not trigger the prohibitions codified in (A)(3). This would represent only a disparate impact or effect, and not necessarily the intent of the course’s creators.

Although it is possible to read section (A)(3) as a blanket prohibition on all ethnic studies courses, the legislature did not intend this result. Pre-enactment legislative history is commonly regarded as the second most authoritative source of legislative history behind only committee reports.<sup>313</sup> An earlier failed ethnic studies bill, SB 1108, did attempt to ban all ethnic studies courses.<sup>314</sup> This bill failed to garner enough support to pass, likely because of its breadth,<sup>315</sup> suggesting that the later bill that did pass, HB 2281, did not sweep so broadly. Additionally, during a hearing before the House Committee of the Whole on HB 2281, Representative Shapira questioned Representative Montenegro, the bill’s sponsor, about the intended breadth of section (A)(3).<sup>316</sup> Shapira asked if (A)(3) would prohibit any course that taught about the history of a particular race or ethnic group.<sup>317</sup> Representative Montenegro responded that the intent of (A)(3) is only to curtail curriculum that singles out an ethnicity and teaches them only about their own ethnicity.<sup>318</sup> Representative Montenegro also remarked that it would be up to the Superintendent of Public Instruction to examine the intent of the designers of any course alleged to violate (A)(3).<sup>319</sup> Therefore, an interpretation of (A)(3) that would prohibit all ethnic studies classes is not likely what the legislature intended.

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312. See *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (stating that provision ambiguous in isolation must be read in context of entire statute).

313. See CHRISTIAN E. MAMMEN, *USING LEGISLATIVE HISTORY IN AMERICAN STATUTORY INTERPRETATION* 64–67 (2002); see also *United States v. X-Citement Video*, 513 U.S. 64, 74–75 (1994) (evaluating rejected drafts of law).

314. SB 1108, 48th Leg., 2d Reg. Sess. (Ariz. 2008). Regarding this earlier bill, House Representative Kavanagh suggested it “basically says, ‘You’re here. Adopt American values.’ If you want a different culture, then fine, go back to that culture.” Benson, *supra* note 109 (quoting Representative Kavanagh).

315. See *supra* notes 104–10 and accompanying text.

316. *House Committee of the Whole Debate*, *supra* note 209, at 0:10:15 (statements of Representative Shapira).

317. *Id.*

318. *Id.* As the bill’s sponsor, Representative Montenegro’s statements are particularly important. See *supra* note 209. In contrast, Superintendent Horne did suggest that this language might ban all ethnic studies courses. See *House Education Committee Debate*, *supra* note 41 at 1:32:30; Horne, *Racist Views*, *supra* note 98 (regarding ethnic studies as a fad). While Horne is not a legislator, he did play a role in writing the language of HB 2281. Superintendent Horne’s Findings, *supra* note 14, at 1. Thus, his interpretation of the bill’s meaning is somewhat useful, but certainly less persuasive than Representative Montenegro’s interpretation. See *supra* note 209 (stating that sponsors’ statements are more persuasive legislative history than non-sponsors’ statements).

319. *House Committee of the Whole Debate*, *supra* note 209, at 0:10:15.

Additionally, section 15-112(A)(3) must be read in light of section 15-351,<sup>320</sup> which delegates to local school boards the authority to design curriculum. This section specifically mandates that local school boards “take into consideration the ethnic composition of the local community”<sup>321</sup> when designing the curriculum. Since repeal by implication is strongly disfavored,<sup>322</sup> a reviewing court would assume that section 15-112(A)(3) does not disavow the mandate that local schools consider the ethnic composition of their students when designing curriculum. To violate section 15-112(A)(3), therefore, the creator of the curriculum must intend that a course be primarily for a particular ethnic group in such a way that goes beyond, or cuts against the more general consideration of the school’s existing ethnic makeup. Perhaps this would include creating courses primarily for a particular ethnic group that in some way privileges that ethnic group over other ethnic groups.

## 2. Application of Section 15-112(A)(3) to La Raza Studies

Horne claimed that the intent of TUSD’s Ethnic Studies Department was to divide students up by race and teach different classes to children of different races.<sup>323</sup> The only section that Horne explicitly determined La Raza Studies to be in violation of was section (A)(3).<sup>324</sup> In his findings regarding La Raza Studies, Superintendent Horne cited an interview with one of the program’s creators, Augustine Romero, in which Mr. Romero states that he and his colleagues created the program as “an attempt to connect to our indigenous side as well as our Mexican side.”<sup>325</sup> The findings note that a higher percentage of Hispanic students take the course as compared to the percentage of Hispanic enrollment in the relative schools.<sup>326</sup> The findings also quote La Raza Studies Department’s stated goal, as found on their website, which is to “bring[] content about Chicanos/Latinos and their cultural groups from the margin to the center of the curriculum.”<sup>327</sup> The website further states that “[Mexican American Studies courses] create[] both a Latino academic identity and an enhanced level of

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320. See *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (explaining that a provision ambiguous in isolation must be read in context of entire statute).

321. ARIZ. REV. STAT. § 15-351(B) (2011).

322. *Morton v. Mancari*, 417 U.S. 535, 549–50 (1974); see also *ESKRIDGE ET AL.*, *supra* note 209, at 489–94. In this case, one tool of statutory interpretation does create tension with another tool of interpretation: the canon that more recently enacted statutes control over earlier ones where there is direct conflict. See *Preiser v. Rodriguez*, 411 U.S. 475, 512–16 (1973) (Brennan, J., dissenting). Here, section 15-112(A)(3) and section 15-351 are not directly in conflict, thus the *Preiser* problem should not change the result.

323. See *House Education Committee Debate*, *supra* note 41, at 1:32:00. In this committee debate, for example, Superintendent Horne commented that when Hispanic students take La Raza Studies courses and African Americans take African-American studies courses, “it looks just like the old South.” *Id.*

324. Superintendent Horne’s Findings, *supra* note 14, at 2–3.

325. *Id.* at 3.

326. *Id.* at 2.

327. *Id.* at 3 (quoting *Mexican American Studies: Curriculum*, *supra* note 42).

academic proficiency. The end result is an elevated state of Latino academic achievement.”<sup>328</sup>

Superintendent Huppenthal also determined that La Raza Studies violated section (A)(3). To support this finding, Huppenthal first relies on the high percentage of Hispanic students enrolled in La Raza Studies courses.<sup>329</sup> Next, Huppenthal indicates that the Department’s website “displays a chart of the Mexican American Studies Model which is stated to be the foundation for their curriculum and is explicitly directed toward Hispanic students.”<sup>330</sup> Huppenthal further states that the curriculum “shows the focus to be academic proficiency and academic identity for Latino students to result in increased academic achievement for Latino students.”<sup>331</sup> Even though Huppenthal admits that the program may benefit students of all races, he concludes that such statements “demonstrate[] [that] the Program and the Department exist[] primarily to serve Latino students.”<sup>332</sup> Finally, Huppenthal states that curriculum material addresses the reader as being Latino.<sup>333</sup> All of this evidence, Huppenthal concludes, proves that La Raza Studies courses are designed primarily for students of a particular ethnicity: Latino.

Conversely, former students say the courses’ goal is to help all races understand and respect each other.<sup>334</sup> The Department claims, “[p]resenting material from many different perspectives and points of view allows students to more accurately understand the nation’s heritage and traditions. The curriculum reduces prejudice, which promotes academic achievement.”<sup>335</sup> The audit concluded that no course violated section (A)(3), indicating that all courses were designed for students of all races.<sup>336</sup> The audit did state that the chart of the Mexican-American Studies Model found on the Department’s website and referred to in Superintendent Huppenthal’s findings was “questionable.”<sup>337</sup> However, the audit concluded that this single chart did not align with any other findings about the courses, and was contradicted by other evidence clarifying that the courses are intended to teach Mexican-American history and culture to all students regardless of race or ethnicity.<sup>338</sup> These facts suggest that the courses were created for all students, although perhaps in consideration of the high percentage of Hispanic

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328. *Id.*

329. Superintendent Huppenthal’s Findings, *supra* note 22, at 2.

330. *Id.* (referring to *Mexican American Studies Model*, *supra* note 32). This is the same evidence of intent that Superintendent Horne cited in his own findings. *See supra* notes 321–22.

331. Superintendent Huppenthal’s Findings, *supra* note 22, at 2.

332. *Id.*

333. *Id.*

334. *House Education Committee Debate*, *supra* note 41, at 1:41:40 (statements of former student Tanya Lazano); Lorenzi, *supra* note 43.

335. *Mexican American Studies: Curriculum*, TUCSON UNIFIED SCH. DISTRICT, <http://www.tusd.k12.az.us/contents/depart/mexicanam/model.asp> (last visited Sept. 28, 2010).

336. CAMBIUM AUDIT, *supra* note 19, at 56.

337. *Id.*

338. *Id.*

students enrolled in Tucson Unified School District schools.<sup>339</sup> This does not mean that the courses were designed primarily for Hispanic students as prohibited by section 15-112(A)(3).<sup>340</sup>

Here, neither Superintendent's findings are sufficient to show that La Raza Studies violate section (A)(3) because both Superintendents failed to consider whether TUSD created its La Raza Studies program in consideration of the school's ethnic makeup, as permitted by section 15-351(B), and not primarily for pupils of a particular ethnic group, as prohibited by section 15-112(A)(3).<sup>341</sup> The impetus for creating the program was to combat high dropout rates among Hispanic students by teaching students about Mexican-American ethnic history and culture as well as social and political issues pertaining to the Mexican-American community.<sup>342</sup> The program's creators viewed TUSD's African American Studies Program as a success that could be duplicated.<sup>343</sup> After TUSD established an African-American Studies Program, the dropout rate among African Americans decreased and graduation rates increased.<sup>344</sup> Yet in 1998, when TUSD's La Raza Studies program was established, African Americans made up only 6.4% of the students in the district, compared to the 42.1% of Hispanic students.<sup>345</sup> Thus, the fact that the school district would create a Hispanic ethnic studies program in a school district with 42.1% Hispanic enrollment to mimic an already-existing African American ethnic studies program where African American enrollment was only 6.4% is merely "tak[ing] into consideration the ethnic composition of the local community"<sup>346</sup> as required under Arizona law.

Furthermore, the mere teaching of history, art, or any other subject from the perspective of Mexican-Americans does not mean that classes are designed primarily for students of one ethnicity. Superintendent Huppenthal determined that

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339. *Enrollment by Ethnicity*, TUCSON UNIFIED SCH. DISTRICT, [http://tusdstats.tusd.k12.az.us/planning/profiles/curr\\_enr/anydate/anyenrlist\\_front.asp](http://tusdstats.tusd.k12.az.us/planning/profiles/curr_enr/anydate/anyenrlist_front.asp) (last visited Aug. 9, 2011). This number refers to enrollment on the first instructional day of the 2010–2011 school year. *Id.* In TUSD's high schools, Hispanic students make up 53.6% of enrollment. *Id.* On the first instructional day of the 1998–1999 school year, the first year of the La Raza Studies program, Hispanic students made up 42.1% of district-wide enrollment and 37.2% of high school enrollment. *Id.*

340. The courses are open to students of all ethnicities, see *supra* note 44 and accompanying text, but the race of the enrolled students is irrelevant because the intent of the courses' creators, not the ethnicities of the students who eventually take the courses, is the only concern implicated by section 15-112(A)(3).

341. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42–44 (1983) (holding that the arbitrary and capricious standard is not met when an agency entirely fails to consider an important aspect of decision or if agency decision contradicts evidence before the agency).

342. Sparks, *supra* note 30.

343. *Id.*

344. *Id.*

345. *School Enrollment by Gender & Ethnicity on Any Day*, TUCSON UNIFIED SCH. DISTRICT, [http://tusdstats.tusd.k12.az.us/planning/profiles/curr\\_enr/anydate/anyenr\\_front.asp](http://tusdstats.tusd.k12.az.us/planning/profiles/curr_enr/anydate/anyenr_front.asp) (last visited Sept. 21, 2011) (enter 1998–1999 School Year, Entire School District, and Instructional Day 1; then Submit).

346. ARIZ. REV. STAT. § 15-351(B) (2011).

because some La Raza Studies texts addressed the reader as being Latino, the existence of these texts alone proves that the courses were designed for pupils of one ethnicity.<sup>347</sup> But as the audit pointed out, just because courses utilize texts primarily written by Mexican-American authors does not mean that these courses are intended for Mexican-American readers.<sup>348</sup> And even if these texts were intended only for Mexican-American readers only, to violate section (A)(3) teachers would need to incorporate these texts into their courses in a way that spoke only to Mexican-American students and not non-Mexican-American students.<sup>349</sup> Superintendent Huppenthal relied on La Raza Studies texts themselves as evidence of a violation of section (A)(3), but this is legally insufficient because (A)(3) requires the Superintendent to ascertain the intent of the courses' creators before funds can be withheld.<sup>350</sup> Thus, Huppenthal's determination failed to consider an important aspect of section (A)(3): whether La Raza Studies courses, which are undoubtedly saturated with Mexican-American perspectives, were designed to serve only Mexican-American students.<sup>351</sup>

Instead of undertaking the required factual inquiry as to whether TUSD created its La Raza Studies program in consideration of the school's ethnic makeup, as permitted by section 15-351(B), or whether the school created La Raza Studies primarily to privilege pupils of a particular ethnic group over others, as prohibited by section 15-112(A)(3), both Horne and Superintendent Huppenthal made factual determinations irrelevant to section (A)(3). Horne and Huppenthal note that a higher percentage of Hispanic students take the course as compared to the percentage of Hispanic enrollment in the relevant schools.<sup>352</sup> But (A)(3) refers only to the intent of the courses' designers, not the students who end up enrolled in the courses.<sup>353</sup> The ethnic makeup of the students who take La Raza courses is of no consequence to section (A)(3).<sup>354</sup>

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347. Superintendent Huppenthal's Findings, *supra* note 22, at 2.

348. CAMBIUM AUDIT, *supra* note 19, at 56.

349. It simply cannot be said that a celebrated book like W.E.B. DuBois's *Souls of Black Folks*, for example, has no value to white readers simply because it addresses African-American readers. See W.E.B. DUBOIS, *SOULS OF BLACK FOLK* 7 (1903) ("Lo! we are diseased and dying, cried the dark hosts; we cannot write, our voting is vain; what need of education, since we must always cook and serve?" (emphasis added)); see also MANNING MARABLE, *LIVING BLACK HISTORY: HOW REIMAGINING THE AFRICAN-AMERICAN PAST CAN REMAKE AMERICA'S RACIAL FUTURE* 94–98 (2006) (describing the book's legacy and influence on African-American scholarship from the time of its release through multiple decades).

350. See *supra* text accompanying notes 312–13.

351. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42–44 (1983) (holding that the arbitrary and capricious standard is not met when agency entirely fails to consider an important aspect of decision or if agency decision contradicts evidence before the agency).

352. Superintendent Horne's Findings, *supra* note 14, at 2; Superintendent Huppenthal's Findings, *supra* note 22, at 2.

353. The students who end up enrolled in the course presents a question of disparate impact, a result that the legislature implicitly authorized. See *supra* note 311 and accompanying text.

354. See *supra* note 311 and accompanying text.

Because both Superintendents likely misread the ethnic studies law, neither made the factual findings necessary to withstand judicial review. Thus, a court would not likely uphold either of the Superintendents' determinations that La Raza Studies violates section (A)(3) of the ethnic studies law because both determinations lack support of substantial evidence.<sup>355</sup> Neither Superintendent found evidence that Hispanic students received different treatment than non-Hispanics in La Raza courses.<sup>356</sup> This amounts to a failure to fully investigate relevant facts, rendering both of the Superintendents' determinations that La Raza Studies violated section (A)(3) arbitrary and capricious.<sup>357</sup>

### CONCLUSION

Arizona's ethnic studies law begins with a broad policy goal and sweeping prohibitions on subjects that may not be taught in public schools. However, the law's effect is drastically limited by its exceptions allowing for the teaching of history and controversial subjects. The tension between the activities prohibited by the law and the law's exceptions create problems for those interpreting the law's plain meaning and applying it to public school courses. These problems will create friction between local school districts, which normally set their own curriculum,<sup>358</sup> and the state's Department of Education. As with the litigation between TUSD and Superintendent Huppenthal,<sup>359</sup> these disputes will likely require litigation to resolve.

The law's contradictory nature would likely have thwarted Superintendent Horne's attempt to shut down the very program that precipitated this ethnic studies law, TUSD's La Raza Studies Department. Superintendent Huppenthal, who ran on a platform of ending La Raza Studies, will be similarly challenged to find evidence sufficient to find the program in violation of the law. Both Superintendents relied on section (A)(3), which prohibits courses designed primarily for students of a particular ethnic group, to find La Raza Studies in violation of the new law.<sup>360</sup> But, both misinterpreted the law by finding only that the ethnic makeup of students in La Raza Studies courses constituted a violation of

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355. See *Sharpe v. Ariz. Health Care Cost Containment Sys.*, 207 P.3d 741, 748 (Ariz. Ct. App. 2009) (stating that agencies may not "make an order that would conflict with the proper interpretation of the statute" (quoting *McCarrell v. Lane*, 258 P.2d 988, 989 (Ariz. 1953)); *Cummins v. Ariz. Dep't of Econ. Sec.*, 893 P.2d 68, 69 (Ariz. Ct. App. 1995) (stating that a court reviews an agency's interpretation of law de novo).

356. Superintendent Horne's Findings, *supra* note 14; Superintendent Huppenthal's Findings, *supra* note 22; see also CAMBIUM AUDIT, *supra* note 19, at 56–59; Lorenzi, *supra* note 43 (white graduate denying that course teaches racism).

357. See *Avila v. Ariz. Dep't of Econ. Sec.*, 772 P.2d 600, 602 (Ariz. Ct. App. 1989).

358. See ARIZ. REV. STAT. §§ 15-341, -351 (2011).

359. See Notice of Appeal of Determination of Non-Compliance with A.R.S. § 15-112 and Request for Hearing, June 22, 2011, available at [http://saveethnicstudies.org/assets/docs/state\\_audit/Notice-of-Appeal-TUSD\\_06-22-2011.pdf](http://saveethnicstudies.org/assets/docs/state_audit/Notice-of-Appeal-TUSD_06-22-2011.pdf).

360. See *supra* Part II.F.

that section.<sup>361</sup> This reading of section (A)(3) will not likely survive judicial review.<sup>362</sup>

Superintendent Huppenthal found, and Horne suggested, that the Department's curriculum violated sections (A)(1), (A)(2) and (A)(4).<sup>363</sup> But none of the texts utilized in any of the courses violate these sections of the law;<sup>364</sup> instead the Superintendent of Public Instruction or his staff will need to make factual findings regarding the manner in which teachers present the curriculum in the classroom in order to find any ethnic studies program in violation of the law.<sup>365</sup> The Superintendent or the State Board of Education must show that teachers have *promoted* or *advocated* something prohibited by the law; referring only to a course's assigned readings will never be legally sufficient to prove a violation of the ethnic studies law. An audit like that commissioned by Superintendent Huppenthal is one viable method by which to discover violations of the ethnic studies law, yet Superintendent Huppenthal ignored the auditors' report and relied on evidence that is insufficient to establish a violation of the law.<sup>366</sup>

Both Superintendents Horne and Huppenthal's difficulty interpreting the new ethnic studies law and presenting evidence sufficient to prove a violation reveal the law's shortcomings. Simply reviewing the texts listed in course curriculum will not suffice to prove that a course violates the ethnic studies law; finding a violation will likely require monitoring of classes or testimony about teachers' conduct. Furthermore, unique terms like *ethnic solidarity* and *promoting resentment* provide little guidance to educators hoping to teach ethnic studies courses. When the Superintendent and a school district advance different interpretations of these terms, the fate of ethnic studies courses will be shifted away from local school districts and into the hands of a judge.

While reining in public school programs that have a destructive effect on Arizona's students is well within the state's prerogative, Arizona is poorly served by a law that at once seeks to limit ethnic studies while purporting to leave untouched the teaching of history and controversial subjects. This ethnic studies law demonstrates that the disciplines of ethnic studies and history are not easily separated. Although the ethnic studies law's sponsors seemed to believe that the law would improve Arizona's schools by banning harmful courses, the law they ultimately enacted is highly ambiguous, hard to enforce, and certain to precipitate

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361. See *supra* Part II.F.

362. See *supra* Part II.F.

363. See *supra* Part II.C–E.

364. See *supra* Part II.C–E.

365. In other words, the ethnic studies law bans no curricular material outright. A much simpler law would have prohibited schools from assigning *Pedagogy of the Oppressed*, for example. Rather, the law only prohibits using books to tell students to believe in something prohibited by sections (A)(1), (A)(2), or (A)(4). See *supra* Part II.C–E.

366. See *supra* Part I.F.

litigation.<sup>367</sup> And perhaps most significantly, the law is unlikely to end TUSD's La Raza Studies Program.

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367. See, e.g., Martinez & Gutierrez, *supra* note 168 (exploring the TUSD teachers' suit challenging the law's constitutionality).