Mexican Law Review
New Series
VOLUME VI
Number 2

MEXICAN-AMERICAN STUDIES IN TUCSON, ARIZONA AND THE *ACOSTA V. HUPPENTHAL* DECISION

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Abstract. *This note examines the political context surrounding the banning of the Mexican American Studies program in Tucson, Arizona and the Acosta v. Huppenthal decision, which leaves the ban largely intact. The convergence of economic crisis and partisan politics contributed to the rise in anxiety over the demographic shifts of the state of Arizona, for which Mexican American Studies became a symbolic target for Republicans. Mexican American Studies was declared in violation of a new law passed by the Republican dominated legislature, A.R.S. § 15-112, by Arizona Superintendent John Huppenthal, despite the conclusion by an independent audit he ordered which concluded otherwise. This left leaders within the Mexican American community and civil rights organizations with the conclusion that the ban on Mexican American Studies was politically motivated. This note explores the motivations by individual political actors, such as the current Attorney General of Arizona Tom Horne, and how he rose to power on a platform centered on the ban against Mexican American Studies.*

Key Words: *Mexican American Studies, ethnic politics, Republican Party, partisanship, Tucson, Arizona.*

Resumen. *Esta nota examina el contexto político alrededor del programa de Estudios México-Americanos en Tucson, Arizona y la decisión Acosta v. Huppenthal. La convergencia de la crisis económica y las políticas partidistas contribuyeron al aumento de la ansiedad sobre los cambios demográficos del estado de Arizona, por lo cual el Programa de Estudios México-Americanos se convirtió en un objetivo simbólico de los republicanos. El Programa de Estudios México-Americanos fue declarado violatorio de una nueva ley aprobada por una legislatura dominada por los republicanos, A.R.S. § 15-112, por el superintendente de Arizona John Huppenthal, a pesar de la conclusión de una auditoría independiente que él ordenó y quien concluyó lo contrario. Lo anterior llevó a los*

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líderes de la comunidad México-americana y organizaciones de derechos civiles a concluir que la prohibición del programa de Estudios México Americanos fue por motivos políticos. Esta nota explora las motivaciones de los actores políticos, como el actual fiscal general de Arizona, Tom Horne, y la forma en que llegó al poder en una plataforma centrada en la prohibición de estudios mexicanos.

Palabras clave: *Estudios México-Americanos, políticas étnicas, Partido Republicano, Tucson, Arizona*.

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I. Introduction

The *Acosta v. Huppenthal*[1] decision illustrates the confluence of socio-economic forces and partisan politics in shaping public policy, providing historical context to the banning of the Mexican-American Studies program in Tucson, Arizona. Rooted in political opportunism and a historical proclivity to cultural domination by the majority population in Arizona, A.R.S. § 15-112[2] is part of a long string of political attempts to leverage cultural anxiety for political gain. As a state covered under Section 5 of the Voting Rights Act,[3] designed in large part to address injustices committed against African-Americans in the South, the historical evidence of Arizona's civil rights record is well established and will not be discussed here. It is important, however, that readers are made aware of this historical fact to help them understand the cultural setting that led to the ban on Mexican American Studies in Arizona, as well as why A.R.S. § 15-112 arose when it did. The focus of this paper will center on the contemporary political climate and how that contributed to A.R.S. § 15-112. We then discuss the *Acosta v. Huppenthal* decision, followed by a discussion of the decision's legal implications and its impact on the Mexican-American community.

[1] *See* Acosta v. Huppenthal, CV 10-623-TUC-AWT, 2013 WL 871892, (D. Ariz. Mar. 8, 2013), *judgment entered*, CV 10-623-TUC-AWT, 2013 WL 871948 (D. Ariz. Mar. 8, 2013).

[2] Ariz. Rev. Stat. Ann. § 15-112 (2011).

[3] 42 U.S.C.A. § 1973c (West 2006).

II. Context

1. *Economic Crisis and Partisan Opportunism*

The housing market crash and ensuing recession after 2008 significantly damaged the Arizona economy. Largely built on tourism, agriculture, mining, and housing development, Arizona has been a historical magnet for young low-skilled labor. Over sixty percent of Arizonans were not born in Arizona, making it the second lowest rate of native-born residents.[4] The demographic implication of this cannot be understated. The result is a state that has one of the highest cultural generation gaps in the country, where almost half the school population is minority and almost seventy-five percent of the older voting population is white.[5]

Most important, however, is how the state's demographic makeup, combined with its economic crisis, provoked strife among racial and ethnic minorities as a result of partisan politics —and how it spurred growth in the Republican Party. As Governor Jan Brewer's approval ratings sunk, and local politicians sought re-election, Arizona's voting population became anxious not only because of economic loss but also perceived threats to their cultural identity. The push for SB1070, the anti-immigrant law that requires state police to determine the immigration status of anyone arrested or detained based on "reasonable suspicion" that they are not in the country legally, became a popular rallying cry for politicians and Tea Party activists across the state. SB1070 was part of an assault on the Mexican-American community along with other bills designed to decimate programs and services that benefitted the Latino population.

Governor Brewer's rise to power came on the heels of an important Democratic victory by President Obama. As a result of Democratic Governor Janet Napolitano's appointment to head the Department of Homeland Security, Secretary of State Jan Brewer became next in line to replace her. Governor Napolitano's departure was a major loss for Latinos. While she was willing to make concessions to Republican calls to address unauthorized immigration, such as sending the National Guard to assist at the border, she also acted to curb harsher Republican initiatives. In 2008, for example she vetoed a bill, SB 2807, that would have allowed police to share, compile, and track information with other agencies regarding unauthorized immigrants. This bill resembled the now infamous SB1070 that Governor Brewer signed enthusiastically.

With the departure of Governor Napolitano, and worsened recession, the GOP was ripe for making important gains in the legislature and statewide

[4] U.S. Census Bureau, *Lifetime Mobility in the United States: 2010*, AM. CMTY. SURVEY BRIEFS (Nov. 2011), http://www.census.gov/prod/2011pubs/acsbr10-07.pdf.

[5] CNN Election Center, http://www.cnn.com/election/2012/results/state/AZ/president.

office. Prior to 2010, the Democratic deficit in the State Senate was six State Senators and ten State Legislators; after the 2010 election, the Republican Party gained three Senate seats and five in the State Legislature.

2. *Partisan Politics, Political Entrepreneurship and the Impact on Mexican-American Studies*

The rise against Mexican-American Studies in Tucson, Arizona cannot be solely explained by economic strife; likewise, we cannot simply say that it transpired as a result of white resentment or anxiety about the growth in the Latino population. Rather, it was the confluence of these events with a political party willing to exploit each of these issues to their advantage. And individual actors motivated to use these issues in order to rise to power within the party seeking political office. This political entrepreneurship interested in mobilizing institutional responses to the cultural anxiety, from the media, political organizations, such as the Tea Party, and the state party came overwhelmingly from the Republican Party in triggering the legislative response between 2009 and 2011. Ramakrishnan and Gulasekaram find that the greatest predictive value in explaining the rise in anti-immigrant legislation lies not on demographic shifts or even economic crisis, but on the strength of the Republican Party and those within the party willing to capitalize on harsh economic times.[6]

In Tucson, where the public school district is over sixty percent Latino,[7] the Mexican-American community has been subject to asymmetrical power structures dominated by Anglos, resulting in a disproportionate impact on issues ranging from justice[8] to housing.[9] As a result, segregation has long been a fixture of the political landscape in Tucson, where a desegregation plan has been in effect since 1978. However, federal oversight was terminated at the end of 2009, exposing Mexican American Studies to political attack. Mexican American Studies was originally designed to comply with the directives set forth in No Child Left Behind in order to close the Latino "achievement gap" in the schools to improve the graduation rate of Latinos, and increase their low matriculation rates at college.[10]

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[6] Karthick Ramakrishna & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 (1431) Arizona State Law Journal (2013); Santa Clara Univ. Legal Studies Research Paper No. 4-13. Available at SSRN: http://ssrn.com/abstract=2209311/.

[7] Tucson Unified Sch. Dist., http://tusdstats.tusd.k12.az.us/planning/demo_main.asp.

[8] Adalberto Aguirre Jr. & David Baker, *The Execution of Mexican American Prisoners in the Southwest*, 16(4) Social Justice (1989).

[9] James E. Officer, *Barriers to Mexican Integration in Tucson*, 17 (1-2) Kiva 7-16 (Nov.-Dec. 1951).

[10] Agustine F. Romero, *The Hypocrisy of Racism: Arizona's Movement towards State-Sanctioned Apartheid*, 6 (1) Journal of Educational Controversy (Fall 2011-Winter2012), available at http://www.wce.wwu.edu/Resources/CEP/eJournal/v006n001/a013.shtml.

Tom Horne, a Canadian immigrant who was the Superintendent of TUSD, ran for state Attorney General in 2010 on a platform that supported measures to crack down on immigrants and oppose the Patient Protection and Affordable Care Act[11] ("Obamacare"). The Mexican American Studies program provided a useful tool to appeal to the growing concern over immigration and the influence Mexican migration has had on the shifting demographics of the state. Horne's attack on Mexican-American Studies helped him win the seat as Attorney General.

Similarly, John Huppenthal ran to replace Tom Horne on the promise to continue the fight to "stop La Raza" by ending Mexican-American Studies program, as well as bilingual education.[12] By the end of 2010, SB1070 became the model legislation for anti-immigrant politicians across the country, and Mexican-American Studies was declared illegal because it violated state law for "promoting the overthrow of the U.S. government and resentment toward a race or class of people."[13] Despite an independent audit ordered by John Huppenthal which found that "no observable evidence was present to suggest that any classroom within Tucson Unified School District is in direct violation of the law", MAS was declared in violation of the law by Huppenthal.[14] The decision to ban Mexican-American Studies was an immediate source for legal and political recourse for the Latino community, resulting in the Acosta v. Huppenthal lawsuit. In response to the ban on Mexican American Studies, the Arizona American Civil Liberties Union Executive Director, Alessandra Soler Metze said, "Huppenthal is ignoring evidence showing how the program has made great strides in improving student achievement and in building students' confidence, and in doing so is making a mockery of his oath of office. This kind of censorship is even more offensive because it lets politics and bias dictate what should be discussed in the classroom."[15]

III. The *Acosta v. Huppenthal* Decision

In Acosta v. Huppenthal, the United States Circuit Judge Tashima issued a memorandum that overwhelmingly upheld A.R.S. § 15-112, the law prohibit-

[11] *See* 42 USCA § 18001 (2010).

[12] Gregory Rodriguez, *Why Arizona Banned Ethnic Studies: Put Bluntly, the State Acted to Protect the Reputation of the White Majority*, L.A. TIMES, Feb. 20, 2012, http://articles.latimes.com/2012/feb/20/opinion/la-oe-rodriguez-ethnic-studies-20120220.

[13] *See* Acosta v. Huppenthal, CV 10-623-TUC-AWT, 2013 WL 871892, 1 (D. Ariz. Mar. 8, 2013), *judgment entered*, CV 10-623-TUC-AWT, 2013 WL 871948, (D. Ariz. Mar. 8, 2013).

[14] Cambium Learning. National Academic Educational Partnership, Curriculum Audit of the Mexican American Studies Department: Tucson Unified School District (May 2, 2011).

[15] ACLU-AZ Press Release. ACLU Demands Audit Records, Says Efforts to Shut Down TUSD Mexican American Studies Program Amount to Censorship 8 (June 16, 2011).

ing certain race-related curricula in school districts and charter schools.[16] The court was explicitly deferential to Arizona, as federal courts must be when examining a state law regulating public school education.[17] In December 2010, then-Superintendent Tom Horne issued a finding that the Mexican American Studies program was in violation of § 15-112(A), which was later supplemented with a second finding from Superintendent Huppenthal, who found that MAS promoted resentment towards white people, advocated for Latino solidarity, and was primarily designed for Latino pupils. A.R.S. § 15-112(A) prohibits courses that: (1) promote the overthrow of the U.S. government; (2) promote resentment towards a particular race or people; (3) are designed primarily for students of a specific ethnic group; or (4) advocate ethnic solidarity rather than treatment of students as individuals.[18] While TUSD administratively appealed the Huppenthal finding, plaintiffs including teachers of the Mexican American Studies program at Tucson Unified School District, the Director of the MAS program, and two students who intend to take MAS classes in the future brought the original action, but because the teachers and director lacked standing, they were dismissed as plaintiffs.[19] A former MAS student and his mother were later added as plaintiffs, and the court assumed the current plaintiffs had standing without deciding the issue.[20] In December 2011, an Administrative law Judge (ALJ) concluded that the MAS program violated § 15-112(A).[21]

In order to determine whether § 15-112 is unconstitutional under the student's right to receive information, the court looked to whether sections of the statute are facially overbroad or vague.[22] A statute is overbroad if "a substantial number of its applications are unconstitutional" balanced with the legitimate applications of the statute.[23] Although the court held that § 15-112 is facially overbroad, § 15-112 (A)(1)-(2) was not found to be facially overbroad, because it would not produce a substantial number of unconstitutional applications.[24] Because the court found that a narrow reading was readily susceptible, it could not read it in a broad enough way to encompass all teaching of histories of oppression or political theories.[25]

Unlike the court's holding concerning § 15-112(A)(1)-(2), it held § 15-112(A)(3) to be unconstitutionally overbroad.[26] § 15-112(A)(3) states: "Are de-

[16] *Id.*

[17] *Id.*

[18] Acosta, 2013 WL at 1.

[19] *Id.*

[20] *Id.* at 11.

[21] *Id.* at 1.

[22] Acosta, 2013 WL at 7.

[23] *Id.*

[24] *Id.* at 9.

[25] *Id.*

[26] *Id.*

signed for pupils of a particular ethnic group."[27] The court found that there is no legitimate purpose being served in this section that is not already served by § 15-112(A)(2); anything that is not already covered is too attenuated from the legitimate purpose of reducing racism in schools in Arizona.[28] The court wrote, "It thus appears that (A)(3) forbids courses designed for a particular ethnic group, even if those courses do not promote resentment of another group, and even if they do not advocate ethnic solidarity, instead of individual treatment."[29] While the section is technically not a ban, it is overbroad for it could create a deterrent effect, effectively chilling the offering and teaching of all ethnic studies courses.[30] There was no evidence to support either an inference that the law could not be enforced without the section or that the law would not have passed but for this subsection, so the court severed the section from the statute as a whole.[31]

The court then found that § 15-112(A)(4) was facially valid because it reflected the stated purpose of the statute as a whole.[32] While "ethnic solidarity" language within this section seems problematic because ethnic solidarity does not itself create racism or divisiveness, it is sufficiently narrowed by the words "advocate" and then "instead of the treatment of pupils as individuals."[33] Those phrases narrow the scope of the section, according to the court, because advocate is a strong verb.[34]

After finding only one of four sections unconstitutionally overbroad, the court found that § 15-112 is not unconstitutionally vague.[35] For vagueness, the court used the *Williams* standard, which is a two-prong test.[36] A statute is vague if it does not give someone of reasonable intelligence fair notice of what is prohibited.[37] Because the statute implicates the First Amendment, it is void if it creates a real and substantial deterrent effect on legitimate expression.[38] There were three phrases which were in controversy here: 1) "to promote"; 2) "advocate ethnic solidarity"; and 3) "designed primarily for."[39] As in the overbroad analysis, the court read the phrases in context of the sentences

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[27] *Id.* at 10; Ariz. Rev. Stat. § 15-112 (A)(3) .

[28] Acosta, 2013 WL at 10.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* at 11.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 13.

[36] *Id.* at 10.

[37] Acosta, 2013 WL at 11, *citing* United States v. Kilbride, 584 F.3d 1240, 1257 (9th Cir. 2009).

[38] Acosta, 2013 WL at 11, *citing* Cal. Teachers Ass'n v. State Bd. Of Educ., 271 F.3d 1141, 1151 (9th Cir. 2001).

[39] Acosta, 2013 WL at 11.

from which they came.[40] In context, while considering the explicit purpose of the statute, the court determined that the phrases were not unconstitutionally vague because they provided fair notice to the parties of what is prohibited.[41]

After deciding on First Amendment issues, the court granted summary judgment *sua sponte* for defendant on the equal protection issue.[42] While not explicitly moving for summary judgment, the plaintiffs argued that the statute violates the equal protection clause because it is discriminatory on its face and was created with discriminatory intent.[43] In terms of the facial challenge, the plaintiffs used *Hunter v. Erickson* (1969) to argue that a statute need not openly target specific ethnic groups to be facially discriminatory.[44] According to plaintiffs, while the statute did not explicitly target Latino populations, it prohibits classes designed for Latino students.[45] The court decided, though, that Hunter did not apply because that statute obstructed minorities from remedying past discrimination and this did not.[46]

The second part of the equal protection claim involved discriminatory intent, which asks whether the law was motivated by a discriminatory purpose.[47] The court used the non-exhaustive list of factors from *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977) to frame the holding,[48] which are: 1) whether the history reveals official actions taken for malicious purposes; 2) whether the events leading up to the decision reveals discriminatory intent; 3) whether there were departures from normal procedural sequence; 4) whether factors normally used by lawmakers would strongly favor a conclusion that contradicts the statute; 5) legislative history.[49] Even though many factors may have shown discriminatory intent, the court held that the record as a whole did not offer sufficient proof.[50] Although it acknowledged that some facts may show discriminatory intent, such as when then-Superintendent Horne attempted to eliminate the MAS program in 2007(before the law was passed) and supported the bill specifically because he wanted to eliminate the MAS program,[51] the bill itself was enacted in response to the MAS

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[40] *Id*. at 12

[41] *Id*.

[42] *Id*. at 13.

[43] *Id*.

[44] *Id*. *citing* Hunter v. Erickson, 393 U.S. 385 (1969) (holding that even without express classifications, a statute can be held to violate the Equal Protections Clause if it creates obstructions to rectify patterns of discrimination).

[45] *Id*.

[46] *Id.*

[47] Acosta, 2013 WL at 14.

[48] *Id*. *citing* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265-268 (1977).

[49] *Id.*

[50] Acosta, 2013 WL at 15.

[51] *Id.*

program.[52] Then-Superintendent Horne also found that two other programs in the state violated the statue, but chose only to target MAS with single-minded focus.[53] Though these facts were acknowledged, the court found that, as a whole, the record does not prove discriminatory intent.[54]

The court also decided issues of substantive due process from the 14th Amendment *sua sponte*.[55] The plaintiffs argued that substantive due process gives the parents the right to make decisions concerning their children, but the court rejected that,[56] because under *Fields v. Palmdale School District* (9th Cir. 2006), the right does not give parents the authority to interfere with decisions made by public schools regarding curriculum.[57] The suspension of the MAS program did not take away the parental rights of the plaintiffs.[58] Because the court found only one section of the law to be unconstitutional, it was unwilling to issue a permanent injunction sought by the plaintiffs, as the court is not required to grant an injunction for every violation of the law.[59]

IV. Implications for Mexican-American Studies

Acosta leaves the bulk of A.R.S. § 15-112 intact and the legal team of Acosta will now need to decide how to move forward, likely leading to an appeal. The impact of the decision will continue to have a ripple effect throughout Arizona's Latino community, as it struggles against periodic waves of statutory attacks on its culture during episodic moments of economic hardship that resonate through the majority population.

The confluence of economic strife, partisan politics, and motivated self-serving politicians willing to mobilize existing institutions against the demographic shifts in Arizona formed a "perfect storm" that put Mexican-American Studies of the crosshairs of the Republican Party. The historical context of Arizona and its relationship with the Mexican-American population, not simply the majority rule of whites, makes these events more likely to occur when economic times fall hard on the majority population.

While other states have similarly large Latino populations, such as Nevada and Colorado, the anti-immigrant movement has had a more difficult time gaining traction there. The electoral results of 2012 demonstrate just how difficult this is even in Arizona, where the Democrats were able to win a majority of the nine Congressional seats after the 2012 election, despite the GOP's

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[52] *Id.*

[53] Acosta, 2013 WL at 15.

[54] *Id.*

[55] *Id.* at 16.

[56] *Id.*

[57] *Id. citing* Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1204 (9th Cir. 2006).

[58] Acosta, 2013 WL at 16.

[59] *Id.*

gains in 2010. This was largely a product of the Independent Redistricting Commission put in place by popular initiative in 2000 to redraw districting lines following the 2010 Census. After an up swell of concern came from the business community worried that the State was gaining a bad reputation for SB1070, causing a slower economic return to normalcy, the state senate voted down five bills proposed by Russell Pearce widely viewed as a further attack on the Latino population. One such bill, S.B. 1611, would make it unlawful to operate a vehicle without proof of legal status and would make it illegal to obtain public housing or any public benefit without proof of being legally present in the country. Another set of bills, S.B. 1308 and S.B. 1309, would amend the state constitution creating a new category of citizenship and would revoke birthright citizenship. The other bills voted down were S.B. 1405, which would have required hospitals to check an individual's legal status and notify law enforcement if they suspected an individual was in the country illegally, and S.B. 1407, which would have required school districts to collect data on the number of students who were illegal immigrants.

Current federal desegregation court orders call for TUSD to establish a curriculum that includes "culturally relevant" material, but the school board has been reluctant to comply for the 2013-2014 academic school year. As the case continues to make it way through the courts, the political momentum against Mexican-American Studies will depend on the socio-economic climate of the state, but A.R.S. § 15-112 is a fixture of Arizona's history that has created anxiety among Latinos of how hostile the state can be towards Mexican-Americans in times of recession.

The 2012 election illustrated that the confluence of factors mentioned above are central to explaining the attack on Mexican-American Studies, but also the difficulty in sustaining that energy. Despite this, President Obama lost in Arizona by a wide margin largely because the anti-immigrant movement has been so effective, unlike in other states, such as Colorado and Nevada. For example, the share of white voters in Arizona voting against President Obama was 12% greater in Arizona than in Colorado and 11% greater in Arizona than in Nevada.[60]

This illustrates that the simmering anxiety within Arizona still has great potential for future politicians willing to take that leap. This continues to be a concern for the Latino community until the Republican Party can find a way to reel back the opportunism of its political base. Although senators John McCain and Jeff Flake have done so in the past, they have also occasionally succumbed to party pressure. Without significant gains by Democrats and increased political participation by Latinos, however, attacks on programs designed to help Latinos will continue to be susceptible to political attack.

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[60] Stephen Nuño, *Why Voting Against Immigration May Not Galvanize the White Vote*, NBCLatino, July 18, 2013, available at http://nbclatino.com/2013/07/18/analysis-why-voting-against-immigration-reform-may-not-galvanize-the-white-vote/.

Recibido: 24 de mayo de 2013.
Aceptado para su publicación: 22 de agosto de 2013.