

# COMMUNITY DREAMS AND NIGHTMARES: ARIZONA, ETHNIC STUDIES, AND THE CONTINUED RELEVANCE OF DERRICK BELL’S INTEREST-CONVERGENCE THESIS

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*In 2010, the Arizona State Legislature drew national attention to issues of ethnicity, pedagogy, and censorship in public schools by passing House Bill 2281. As interpreted by Arizona officials, this law made the curriculum of the Mexican American Studies Department in Tucson public schools illegal. The ongoing conflict between supporters and opponents of the Department in public discourse—and in state and federal courts—raises important questions about the ways that majority and minority cultures interact in United States educational institutions. This Note uses Arizona’s ethnic studies ban to suggest that Derrick Bell’s interest-convergence thesis and Lani Guinier’s related theory of interest-divergence continue to be useful tools in assessing the dynamics between powerful and marginalized groups. The Note sets the facts of the ethnic studies controversy against recent criticism of Professor Bell’s work and, in doing so, rebuts the assertion that the interest-convergence thesis has become less relevant to understanding contemporary inter-group conflict in the United States.*

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## INTRODUCTION

Educational programs promoting the histories and narratives of specific racial and ethnic groups have been fraught with controversy—praised as outlets for identity and avenues to achievement by some and criticized as perpetuating racial fragmentation in American society by others. “Ethnic studies includes units of study, courses, or programs that are centered on the knowledge and perspectives of an ethnic or racial group, reflecting narratives and points of view rooted in that group’s lived experiences and intellectual scholarship.”<sup>1</sup> This definition was written by the National Education Association as part of a study “of the research on ethnic studies programs and curricula—specifically the ways in which such programs . . . improve student achievement and narrow achievement gaps—to inform the discourse on this issue.”<sup>2</sup> Framed in relation to other curricula taught in American schools, ethnic studies programs present an alternative to what might otherwise be understood as “Euro-American ethnic studies,” where English literature, history, and social sciences courses espouse the perspectives of a White ethnic majority in the United

<sup>1</sup> CHRISTINE E. SLEETER, *THE ACADEMIC AND SOCIAL VALUE OF ETHNIC STUDIES: A RESEARCH REVIEW* vii (2011).

<sup>2</sup> *Id.* at iii. In the report, the National Education Association is described as “the nation’s largest professional employee organization, representing 3.2 million elementary and secondary teachers, higher education faculty, education support professionals, school administrators, retired educators, and students preparing to become teachers.” *Id.* at ii.

States.<sup>3</sup> Ethnic studies curricula originated at San Francisco State University in 1968 and then spread to other campuses in California, building on the lived experiences of non-white students and pioneering models of pedagogy from authors such as Carter G. Woodson and W. E. B. DuBois.<sup>4</sup> Models employed in ethnic studies programs are also drawn from black independent schools, tribal schools, and language immersion schools.<sup>5</sup> While ethnic studies programs can be found at many universities,<sup>6</sup> at least one study suggests that it is uncommon for high school students to have been exposed to similar courses.<sup>7</sup> Where they have been successfully created in schools throughout the country, however, ethnic studies programs have been shown to alter both traditional and non-quantifiable qualities among students in middle school through university settings. For example, adolescent students who are encouraged to develop pride in their racial and/or ethnic identities show higher levels of academic achievement.<sup>8</sup>

These qualities frame ethnic studies as an issue near the center of the emotionally-charged and culturally-divisive question of how schools and society ought to engage with racial, ethnic, and cultural differences within student populations. The presumed success or failure of landmark decisions such as *Brown v. Board of Education*<sup>9</sup> has sparked intense and long-running academic debates about how students from differing backgrounds are brought together and how they are kept apart, including the foundations for the theoretical

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<sup>3</sup> See Rosalee A. Clawson, *Poor People, Black Faces: The Portrayal of Poverty in Economics Textbooks*, 32 J. BLACK AM. STUD. 352, 358 (2002) (noting the pervasiveness of academic literature replicating the dominant White perspective).

<sup>4</sup> See SLEETER, *supra* note 1, at 5 (describing the origins of ethnic studies).

<sup>5</sup> *Id.* (claiming this lineage).

<sup>6</sup> See Johnella E. Butler, *Ethnic Studies as a Matrix for the Humanities, the Social Sciences, and the Common Good*, in COLOR-LINE TO BORDERLANDS: THE MATRIX OF AMERICAN ETHNIC STUDIES 31 (Johnella E. Butler ed., 2001) (describing the structure of ethnic studies departments in several American universities); Robin Shulman, Letter to the Editor, *Columbia's Ethnic Studies Protest Isn't Over*, N.Y. TIMES, Apr. 19, 1996, at A28 ("There are 700 universities in this country with ethnic studies programs . . .").

<sup>7</sup> Sylvia Hurtado et al., *Students' Precollege Preparation for Participation in a Diverse Democracy*, 43 RES. HIGHER EDUC. 163, 172 (2002) (using descriptive statistics to argue that the percentage of high school students exposed to ethnic studies is very low).

<sup>8</sup> See Inna Altschul, Daphna Oyserman & Deborah Bybee, *Racial-Ethnic Identity in Mid-Adolescence: Content and Change as Predictors of Academic Achievement*, 77 CHILD DEV. 1155, 1162-66 (2006) (describing findings of a study linking strong racial-ethnic identity with improved grades and increased effort in school among Black and Latino students).

<sup>9</sup> 347 U.S. 483 (1954).

framework used in this Note.<sup>10</sup> For example, on the one hand, “neighborhood schooling,” which results in grouping and separation of children by economic status and is often accompanied by racial and economic homogeneity, has recently been vociferously defended by advocates as an essential right.<sup>11</sup> On the other hand, when parents of students of color and students themselves *choose* to be set apart, especially within schools, the reaction is very different. Critics argue that educational programs that place emphasis on the lives and histories of minority populations in the United States effectively fragment American culture, perpetuating racism by furthering the socially constructed differences between ethnicities and races.<sup>12</sup>

Criticisms of ethnic studies gained popular traction and legal teeth in 2010, when the Arizona state legislature introduced House Bill 2281 (“H.B. 2281”).<sup>13</sup> H.B. 2281—passed and codified as § 15-112 in the Arizona Code—bans any courses in the state of Arizona which:

“Promote the overthrow of the United States Government;  
 Promote resentment toward a race or class of people;  
 Are designed primarily for pupils of a particular ethnic group;  
 Advocate ethnic solidarity instead of the treatment of pupils as individuals.”<sup>14</sup>

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<sup>10</sup> See, e.g., Richard Thompson Ford, *Brown’s Ghost*, 117 HARV. L. REV. 1305, 1307 (2004) (arguing that ethnic studies, bilingual education, and programs designed for LGBT youth each undermine *Brown’s* aims of integration).

<sup>11</sup> See Stephanie McCrummen, *In N.C., A New Battle on School Integration*, WASH. POST, Jan. 12, 2011, at A01 (describing efforts by the Wake County School Board in Raleigh, North Carolina to promote “neighborhood schools,” thereby lessening school integration, as school integration opponents’ way of “say[ing] no to social engineers”); Arne Duncan, U.S. Sec’y of Educ., Letter to the Editor, *Maintaining Racial Diversity in Schools*, WASH. POST, Jan. 13, 2011 (describing “steps to reverse long-standing policy to promote racial diversity in . . . schools” by opponents of busing in Wake County, North Carolina); see also Stacy Teicher Khadaroo, *Busing to End in Wake County, N.C. Goodbye, School Diversity?*, CHRISTIAN SCIENCE MONITOR (Mar. 24, 2010), <http://www.csmonitor.com/USA/Education/2010/0324/Busing-to-end-in-Wake-County-N.C.-Goodbye-school-diversity> (“Parents and residents who spoke in favor [of stepping away from policies promoting integration] . . . said busing for the purpose of economic diversity poses an unfair burden on families, in terms of costs to the district and in time that children could spend on learning rather than being transported.”).

<sup>12</sup> See, e.g., ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 95 (1987) (blaming ethnic studies, among other things, for continued societal fractures along racial and ethnic lines); Arthur Schlesinger, Jr., *When Ethnic Studies Are Un-American*, WALL ST. J., Apr. 23, 1990, at A14 (describing ethnic studies as “un-American” in how they balkanize educational institutions).

<sup>13</sup> 2010 Ariz. Sess. Laws 311.

<sup>14</sup> ARIZ. REV. STAT. ANN. § 15-112 (2010). The law passed in the Arizona House in March 2010. It passed in the Arizona Senate in April of that year and was signed into law by Governor Jan Brewer on May 12, 2010. Nicole Santa Cruz, *Ariz. Ethnic Studies Ban OKd as Law*, L.A. TIMES, May 12, 2010, at AA.2.

While some observers argued that the statute would create little real impact on the Arizona schools because administrators would face difficulties in identifying violations under the statute's language,<sup>15</sup> Tucson's Mexican American Studies Department was quickly found to be impermissible under the law, proving that the initial predictions of little impact were incorrect.<sup>16</sup> In response to an order that would have withdrawn ten percent of Tucson Unified School District's monthly state aid, had the district not acted, the district's governing board voted to dismantle its Mexican American Studies Department.<sup>17</sup>

The law has drawn additional national and international attention due to the decision to remove selected books from Arizona public school classrooms. The books at issue assert that "Latino minorities have been and continue to be oppressed by a Caucasian majority," according to Superintendent of Public Instruction John Huppenthal.<sup>18</sup> In late 2010, a group of students, parents, and Mexican American studies instructors filed a federal suit in the District of Arizona challenging H.B. 2281 on the grounds that it violates the Equal Protection Clause, infringes on their First Amendment right to free speech, and violates due process.<sup>19</sup> The controversy surrounding ethnic studies in Arizona and the passage of H.B. 2281, coupled with continuing federal litigation on the Act, has resulted in an unsustainable tension between passionate advocates and families who want the Mexican American Studies Department reinstated and those who see it as a divisive force in Tucson's schools.<sup>20</sup>

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<sup>15</sup> See generally Nicholas B. Lundholm, *Cutting Class: Why Arizona's Ethnic Studies Ban Won't Ban Ethnic Studies*, 53 ARIZ. L. REV. 1041, 1041 (2011) (arguing that "the ethnic studies law is in fact much narrower than its proponents have suggested" and that the law does not, in fact, apply to Tucson's Mexican American Studies Program).

<sup>16</sup> Stephen Ceasar, *Ethnic Studies Classes Ruled Illegal*, L.A. TIMES, Dec. 28, 2011, at AA.2.

<sup>17</sup> Alexis Huicochea, *TUSD Board Shuts Down Mex. American Studies*, ARIZ. DAILY STAR, Jan. 11, 2012, at A.1, available at [http://azstarnet.com/news/local/education/precollegiate/tusd-board-shuts-down-mex-american-studies/article\\_89674600-5584-58a8-9a0f-4020113900f9.html](http://azstarnet.com/news/local/education/precollegiate/tusd-board-shuts-down-mex-american-studies/article_89674600-5584-58a8-9a0f-4020113900f9.html).

<sup>18</sup> Nina Golgowski, *Shakespeare Work Axed in Arizona Schools as Law Bans 'Ethnic Studies'*, DAILY MAIL ONLINE (Jan. 17, 2012, 7:21 AM), <http://www.dailymail.co.uk/news/article-2087667/Shakespeares-The-Tempest-banned-Arizona-schools-law-bans-ethnic-studies.html>. The qualification for books that can be banned resulted in the removal of a motley collection, including Rudolfo Acuña, *Occupied America: A History of Chicanos*, Paulo Friere, *Pedagogy of the Oppressed*, and Arturo Rosales, *Chicano!: The History of the Mexican Civil Rights Movement*. *Id.*

<sup>19</sup> Complaint at 4, *Acosta v. Huppenthal*, No. 4:10-cv-00623-TUC-AWT, 2013 WL 871948 (D. Ariz. Mar. 8, 2013).

<sup>20</sup> Full treatment of the constitutional challenges raised in *Acosta* is beyond the scope of this Note. I leave that analysis to future work on the subject.

This Note explores how Arizona's ethnic studies ban—and subsequent legal challenges to its legitimacy—can be explained in terms of Derrick Bell's groundbreaking framework for theorizing the relationship between race and the law—the “interest-convergence thesis”<sup>21</sup>—and Lani Guinier's follow-on conception of “interest-divergence” between groups.<sup>22</sup> Professor Bell's theory posits that the interests of minorities can typically only be advanced by formal legal institutions—particularly courts—when they coincide with the interests of the majority. Professor Guinier argues that the reverse is also true: When the interests of majorities and minorities are less aligned, minorities are unlikely to succeed in advancing their agendas. This Note adds to the current literature both on ethnic studies in Arizona and on the interest-convergence thesis by using the historical details of the ethnic studies ban to answer recent academic criticism of Bell's theory.<sup>23</sup> In doing so, this Note demonstrates that the events in Arizona present a unique opportunity to test the efficacy of Bell's work against the backdrop of contemporary events and ultimately proves the continued importance and applicability of Bell's work.

The Note is structured as follows: Part I unifies threads of Professor Derrick Bell's interest-convergence thesis and related works, examining their utility in legal and social analysis. I focus closely on Lani Guinier's writing on “interest-divergence” and the importance of her contribution to the creation of a more comprehensive understanding of the long-term implications of Professor Bell's theoretical perspective. This Part also introduces Justin Driver's recent criticism of Professor Bell's interest-convergence thesis. Part II tracks the path of ethnic studies programs in Arizona, starting with their introduction and establishment in Tucson United School District (TUSD), through increasing animus towards ethnic studies programs among segments of the population, and finally to the passage of H.B. 2281. Part III highlights the importance of interest-convergence and interest-divergence to an understanding of how the Tucson program was created and subsequently dismantled. In Part IV, I use the history of the ethnic studies program and its relationship to interest-convergence and divergence to explain that the ethnic studies ban

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<sup>21</sup> See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522–33 (1980) [hereinafter Bell, *Interest-Convergence*] (laying out original notions of “interest-convergence”).

<sup>22</sup> See Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92, 98–99 (2004) (explaining the basic dynamics of interest-divergence in intergroup relations).

<sup>23</sup> See *infra* notes 51–62 (describing Justin Driver's criticisms of the interest-convergence thesis's application to modern race relations).

helps answer challenges to the interest-convergence theory in contemporary academic work. I conclude by considering the potential for interests to realign based on the shared benefits of ethnic studies, especially in light of new litigation centering on the legitimacy of barring ethnic studies from school curricula.

The controversy over Tucson, Arizona's ethnic studies program and its subsequent ban, as it relates to larger understandings of race and the law, deserves attention for several reasons. In a school district where Mexican American Studies have long been part of the larger public school curricula,<sup>24</sup> the outcome of this controversy could drastically alter the immediate future for a number of students in Tucson schools and have farther reaching implications for curriculum options available to all students in Arizona schools and beyond. Effectively, a major program of study has been not only dismantled, but disallowed. At a more basic level, this Note suggests that contemporary academic works proclaiming that interest-convergence theory is no longer a useful lens for examining relationships between powerful and marginalized groups in the United States—or is dangerous for its tendency to overstate adversarial positions among those groups<sup>25</sup>—are incorrect. Rather, I show that Professor Bell's work remains an important tool for understanding our society.

## I

### THE POWERFUL, THE MARGINALIZED, AND INSTITUTIONAL PROTECTION: DERRICK BELL'S INTEREST-CONVERGENCE THESIS

Professor Bell's writings are a cornerstone of efforts by legal academicians—especially critical race theorists—to theorize the ways in which race interacts with the legal system in the United States. Within the broader canon of those writings, Bell's "controversial and provocative"<sup>26</sup> interest-convergence thesis remains one of the most frequently cited principles guiding the study of race and the law.<sup>27</sup> This

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<sup>24</sup> See *infra* note 63–67 and accompanying text (describing the origins of the Mexican American Studies Department).

<sup>25</sup> See generally, e.g., Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 Nw. U. L. REV. 149 (2011) (arguing that analytical flaws in the interest-convergence thesis and historical changes in race relations in the United States undermine the theoretical efficacy of Bell's work on the subject).

<sup>26</sup> Francis J. Mootz III, *Between Truth and Provocation: Reclaiming Reason in American Legal Scholarship*, 10 YALE J.L. & HUMAN. 605, 629 n.95 (1998) (reviewing DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997)).

<sup>27</sup> See *infra* Part I.B.1 (describing citations to the interest-convergence thesis).

Part lays out the basics of Derrick Bell's interest-convergence thesis and discusses its utilization in legal academia and beyond.

### A. Professor Bell's Theory

The interest-convergence thesis posits that advances achieved by minorities in the United States are defined and determined by their relationship to the interests of dominant cultures.<sup>28</sup> Where the interests of those in power converge with marginalized interests, official policies that support minority agendas will emerge, but absent such convergence, governmental institutions—assumed to be controlled by the majority—will not protect or advance minority interests in meaningful ways.<sup>29</sup> Hence, at least in terms of government policy, non-controlling interests are subject to the whims and the changing priorities of those in power.

Professor Bell's term "interest-convergence" as a means of interpreting racial politics in the United States was first popularized through his article, *Brown v. Board of Education and the Interest-Convergence Dilemma*.<sup>30</sup> While previous works by Professor Bell had articulated similar ideas,<sup>31</sup> his assessment of *Brown* was the work that defined interest-convergence as a theoretical framework for American law.<sup>32</sup> In this article, Professor Bell analyzed the reasoning behind the Supreme Court's landmark decision declaring school segregation in the United States unconstitutional.<sup>33</sup> He concluded that the decision could not adequately be explained by the popularly understood rationale, which hinged on the fundamental unfairness associated with

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<sup>28</sup> See Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME LAW. 5, 6 (1976) ("[T]he most significant political advances for blacks resulted from policies which were intended and had the effect of serving the interests and convenience of whites rather than remedying racial injustices against blacks . . .").

<sup>29</sup> See Bell, *Interest-Convergence*, *supra* note 21, at 523 (noting the interest-convergence thesis's core concept that movements among Black communities directed toward achieving racial equality would be fruitful in the event they were complementary to White interests, but would be ignored by courts where "the remedy sought threatens the superior status of middle and upper class whites").

<sup>30</sup> See generally *id.* For an explanation of Professor Bell's work as situated in the *Brown* literature, see Driver, *supra* note 25, at 161.

<sup>31</sup> See Bell, *supra* note 28; see also Driver, *supra* note 25 at 158 (noting the origin of interest-convergence theory in Professor Bell's earlier work).

<sup>32</sup> See, e.g., Robert S. Chang & Peter Kwan, *When Interests Diverge*, 100 MICH. L. REV. 1532, 1537 (2002) (reviewing ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000)) (describing Bell's work in *Interest-Convergence* as articulating the interest-convergence thesis); Guinier, *supra* note 22 (same).

<sup>33</sup> Bell, *Interest-Convergence*, *supra* note 21, at 518.



separate and patently inferior schools for Black children.<sup>34</sup> Instead, Professor Bell concluded that factors essential to the interests of White elites drove the Court to state an official position in rejection of segregation.<sup>35</sup>

Professor Bell continued to argue for the broader proposition that the interests of Black Americans must be in alignment with those of Whites in order for the interests of Black Americans to succeed until his death in October 2011.<sup>36</sup> As recently as *Brown's* 50th anniversary in 2004, Bell highlighted the continued relevance of the interest-convergence theory, proclaiming that “[i]t is . . . tempting to rationalize the history of self-interest motivation in determining the direction of racial policymaking as an interesting if troubling background, but hardly relevant in today’s more enlightened world. There is, though, little indication that the favoring of white interests over black has changed.”<sup>37</sup> Around the same time, Professor Bell reaffirmed the continued relevance of interest-convergence by applying the theory to the Court’s decision in *Grutter v. Bollinger*, a decision which affirmed the continued legitimacy of affirmative action.<sup>38</sup> In his discussion of *Grutter*, Professor Bell emphasized that interest-convergence had not lost any persuasive explanatory value since *Brown* and that, in fact, the theory was perhaps more important given society’s generally decreased emphasis on race.<sup>39</sup>

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<sup>34</sup> *Id.* at 523–24 (explaining that the Court had maintained the separate but equal doctrine in the face of litigation attacking school segregation for over a century and that “the decision in *Brown* to break with the Court’s long-held position on these issues cannot be understood without some consideration of the decision’s value to whites”).

<sup>35</sup> *Id.* at 524 (arguing that *Brown* was decided for three reasons: (1) to provide credibility to America’s position in the Cold War among “emerging third world peoples”; (2) to quell discontent among Black citizens, domestically; and (3) to support the industrialization of the American South by ending segregation).

<sup>36</sup> See, e.g., DERRICK BELL, *SILENT COVENANTS: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform* (2004) [hereinafter BELL, *SILENT COVENANTS*] (maintaining that the logic behind the interest-convergence thesis remains useful in analyzing contemporary politics); Derrick Bell, *On Celebrating an Election as Racial Progress*, 36 A.B.A. HUM. RTS. MAG., Fall 2009, at 2 (“Barack Obama’s election was a dramatic example of Interest Convergence.”). Derrick Bell passed away on October 6, 2011, and continues to be best known for his fervent advocacy for civil rights. See Fred A. Bernstein, *Derrick Bell, Pioneering Law Professor and Civil Rights Advocate, Dies at 80*, N.Y. TIMES, Oct. 7, 2011, at A18.

<sup>37</sup> BELL, *SILENT COVENANTS*, *supra* note 36, at 58.

<sup>38</sup> Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622, 1624 (2003) (citing *Grutter v. Bollinger*, 539 U.S. 306 (2003), as a “definitive example” of interest-convergence in action).

<sup>39</sup> See *id.* (noting that the institutional importance of diversity, not notions of racial justice, explains the results in the Michigan cases).

## B. *New Frames and New Lenses in Constructing Interest-Convergence and Interest-Divergence*

In the time since Professor Bell originally published his work on the interest-convergence thesis, several new strands of analysis have emerged. These build upon the thesis's application to identity group dynamics in the United States. Works by a number of authors have expanded the number of groups the thesis may apply to while also using the thesis's guiding principles to explain a broader set of inter-group dynamics.

### 1. *Contemporary Expanded Applications of the Interest-Convergence Thesis*

While the interest-convergence thesis was initially proposed as an explanation of the Supreme Court's reasoning in *Brown*,<sup>40</sup> the thesis has since been expanded to frame many other issues. Professor Bell's later work, for example, would use interest-convergence to explain the disconnect between "White interests" and "Black interests" more generally,<sup>41</sup> as well as later developments related to race and American educational institutions.<sup>42</sup> Subsequent authors too have broadened interest-convergence well beyond the original Black-White binary used by Professor Bell, showcasing the power of the theory as it applies to several historically oppressed communities.<sup>43</sup> The broad

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<sup>40</sup> See Bell, *Interest-Convergence*, *supra* note 21, at 519.

<sup>41</sup> See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* 9 (1992) (noting the disconnect between Black interests and White interests due to "racial bonding"—the rhetorical practice of asserting that any developments advancing the interests of non-White people come at a cost to the White community as a whole).

<sup>42</sup> See, e.g., BELL, *SILENT COVENANTS*, *supra* note 36, at 149 (describing how the Supreme Court's decision in *Grutter v. Bollinger* highlighted the continued validity of the interest-convergence thesis as applied to cases concerning race and education); Bell, *supra* note 38, at 1624 (same).

<sup>43</sup> The interest-convergence thesis has been used to explore several identity-based communities in the United States. Richard Delgado, for example, has discussed the theory's applicability to Latinos, positing that the Supreme Court's holding that equal protection applied to Mexican Americans and all other racial groups in *Hernandez v. Texas*, 347 U.S. 476 (1954), functions as a rough analog to *Brown*, with interest-convergence playing a major role in the Court's decision. See Richard Delgado, *Rodrigo's Roundelay: Hernandez v. Texas and the Interest-Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23, 30 (2006) (explaining how Bell's interest-convergence thesis helps explain the Supreme Court's decision in *Hernandez v. Texas*, the analogue to *Brown* for Latinos in American schools). Similarly, Eric Yamamoto and Ashley Obrey have discussed the fight of Japanese American internment victims for redress, positing that their success depended on the convergence of Japanese American demands with political elites' international goals. See Eric K. Yamamoto & Ashley Kai'ao Obrey, *Reframing Redress: A "Social Healing Through Justice" Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5, 41 (2009) ("President Reagan reversed his prior opposition to Japanese American Redress in 1988 when America needed to bolster its stature as a

array of work featuring the interest-convergence thesis highlights its capacity for use beyond its original application. As the thesis has evolved over time, it has grown into a tool which helps to explain unequal power among groups with different identities, with outcomes depending on interest alignment between communities this Note refers to as “dominant” groups and those that are “marginalized.”

## 2. *Interest-Divergence*

The logical corollary to Bell’s interest-convergence thesis presents itself as the idea that, as the interests of dominant groups diverge from those of the minority, those dominant groups will be less willing to participate in projects that protect minority interests. The study of “interest-divergence” as an independent phenomenon has been proposed by Professor Lani Guinier, who argued that the positive outcomes of interest-convergence between two groups of unequal power can be undone when changes in the political environment occur such that projects protecting the interests of less powerful groups no longer serve the aims of the powerful.<sup>44</sup> Guinier’s theoretical framework supplements interest-convergence theory as a tool for assessing developments in the dynamics of cooperation and conflict between groups over longer periods of time. Interest-convergence theory best explains individual phenomena resulting from specific circumstances; that is, the theory has been most helpfully applied to single moments such as Bell’s use of *Brown*.<sup>45</sup> When interest-divergence is added into

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democracy . . . this kind of American self-interest in redress lies at the heart of Derrick Bell’s theory of interest-convergence . . .”). Similarly, in a New York Times op-ed, Kenji Yoshino employed the logic of the interest-convergence thesis in encouraging strategies intended to advance the legalization of gay marriage. See Kenji Yoshino, *Marriage Partners*, N.Y. TIMES, June 1, 2008, at A26 (discussing the utility of interest-convergence as a tool for use in advocating for gay marriage in New York State). Finally, other academic work has applied the thesis to controversies surrounding the use of cultural defenses in criminal trials. See, e.g., Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911, 939 (2007) (arguing that cultural defenses are more likely to succeed in criminal cases when the cultural norms underlying a defendant’s defense claim align with the cultural norms of the American majority and the rights of religious minorities); Stephen M. Feldman, *Principle, History, and Power: The Limits of the First Amendment Religion Clauses*, 81 IOWA L. REV. 833, 869 (1996) (reviewing STEVEN SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995) and NAOMI COHEN, *JEWS IN CHRISTIAN AMERICA: THE PURSUIT OF RELIGIOUS EQUALITY* (1992)) (“If we attempt to transfer this interest-convergence thesis to the realm of religion . . . then we can generalize and enhance the thesis, understanding it anew as representing a technique of power.”).

<sup>44</sup> Guinier, *supra* note 22, at 98 (discussing the interest-divergence concept as a further development of Bell’s theory by tracking *Brown*’s historical consequences).

<sup>45</sup> See Bell, *Interest-Convergence*, *supra* note 21, at 524–25 (explaining the Supreme Court’s decision in *Brown* in terms of interest-convergence).

the assessment, issues can be tracked over time.<sup>46</sup> This helps to explain, for example, whether benefits granted to less powerful groups survive certain political changes.

Guinier posits that after the interest-convergence catalyzed by the *Brown* decision, Black students' attempts to enter integrated schools were shaped by a steady *divergence* of interests.<sup>47</sup> Disjointed ethnic and economic interests made it such that the White majority did not feel that they would benefit from integrated schools and made integration increasingly unfeasible.<sup>48</sup> Guinier concludes that, as these interests diverged, the *Brown* decision could have little staying power because, "[b]y defining racism as prejudice and prejudice as creating individual psychological damage, the Court's opinion paved the way for others to reinterpret *Brown* as a case mandating formal equality and nothing more."<sup>49</sup> As a result, even an epochal event, such as the *Brown* decision, could only have as much staying power as continued interest alignment between groups would allow.<sup>50</sup>

### C. *Justin Driver's* Rethinking the Interest-Convergence Thesis

Professor Justin Driver presents the most recent effort to challenge the theoretical underpinnings of the interest-convergence thesis.<sup>51</sup> Driver suggests that "[a]lthough the interest-convergence thesis is cited with great regularity, the articles that refer to the idea almost invariably invoke the idea as a kind of received wisdom. The few scholarly works that criticize the thesis . . . tend to do so in a

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<sup>46</sup> See Guinier, *supra* note 22, at 102–13 (tracking interest-divergence in schools through the period of history following *Brown*).

<sup>47</sup> See *id.* at 98.

<sup>48</sup> See *id.* (noting, given social conditions, the difficult road any legal theory would have faced).

<sup>49</sup> *Id.* at 116.

<sup>50</sup> Other authors have sought to advance Guinier's work by expanding its applications to other groups and providing more empirical examples. Historian Mary Dudziak, for example, traces a similar narrative in her work focusing on how Cold War politics played an essential role in shaping civil rights movements in the United States. MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 14–15 (2000); see also Chang & Kwan, *supra* note 32. Chang and Kwan distill Dudziak's thesis into a statement that sounds very much like Lani Guinier's ideas, positing that "where the judiciary perceives that interests of the white middle and upper class diverge from those of African Americans, they will not be willing to grant racial remedies to African Americans." *Id.* at 1537. Richard Delgado followed on to this argument and the internationalist elements of the interest-convergence thesis's treatment of *Brown*, arguing that the breakdown of the American civil rights movement can be explained by its leaders' failure to endorse the interests of the dominant majority, namely foreign wars, anti-Communism, and the expulsion of radicalism. See Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369, 376–85 (2002).

<sup>51</sup> See generally Driver, *supra* note 25.

fleeting manner.”<sup>52</sup> Driver goes on to argue that, despite the dearth of scholarly criticism, interest-convergence theory suffers from “four principal analytical flaws.”<sup>53</sup>

First, Driver argues that Professor Bell’s theory cleaves society too generally by separating “White” (“majority”) interests from “Black” (“minority”) interests.<sup>54</sup> As a result, the theory ignores “deep intraracial disagreements regarding what constitutes progress and, more broadly, offers an excessively narrow understanding of the term ‘interest.’”<sup>55</sup>

Second, Driver argues that the theory represents the dynamics between majority and minority racial and ethnic groups as they existed when Professor Bell first proposed it, thereby ignoring important progress made in the relationships between racial groups since the theory’s inception.<sup>56</sup> As a result, Driver argues, the theory presumes the existence of the “unvarnished racial prejudice of yesteryear,”<sup>57</sup> which, he argues, has faded considerably in more recent years.<sup>58</sup>

Third, Driver argues that the theory assumes an absence of agency on the part of members of both minority and majority groups, conceiving of minority groups and their allies as simple beneficiaries of favorable circumstances, rather than advocates for their own well-being.<sup>59</sup> According to Driver, the theory fails to recognize the important role of agency among judges handing down egalitarian decisions such as *Brown*.<sup>60</sup>

Fourth, and finally, Driver suggests that the theory is rendered non-refutable by its refusal to acknowledge advancements in racial equality through “racially egalitarian judicial decisions.”<sup>61</sup> Driver argues that while Bell acknowledges some of these decisions, he explains them based on their necessity in maintaining societal stability rather than as advancements in equality.<sup>62</sup>

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<sup>52</sup> *Id.* at 156.

<sup>53</sup> *Id.* at 164.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 164–65.

<sup>56</sup> *Id.* at 165.

<sup>57</sup> *Id.*

<sup>58</sup> *See id.* (arguing that “this contention ignores significant racial advancement”).

<sup>59</sup> *Id.* at 175 (asserting that Bell incorrectly assumes a lack of agency among members of the Black community).

<sup>60</sup> *Id.* at 179 (“This minimization [of the role White judges have played in advancing the interests of Black citizens] at once denies culpability to members of the judiciary who have ratified racism through their decisions and denies credit to members of the judiciary who have rejected racism.”).

<sup>61</sup> *Id.* at 187.

<sup>62</sup> *Id.* at 182.

## II

ARIZONA'S ETHNIC STUDIES CONTROVERSY AND THE  
INTEREST-CONVERGENCE THESIS

No clear environmental factors fully explain why ethnic studies programs in Arizona schools, which enjoyed an arguably strong track record in educating students, would suffer such a decline in support as to warrant a legislative ban. This Part describes the historical background of the Mexican American Studies Department in Tucson, from the time of its creation through its eventual extinction under H.B. 2281.

A. *The Creation of an Ethnic Studies Program in Tucson  
Public Schools*

Ethnic Studies Programs at TUSD were created in an effort to comply with a desegregation order handed down to Tucson schools by Arizona's federal district court in 1978.<sup>63</sup> In *Mendoza v. United States*, the district court found that TUSD had acted with segregative intent and had not met its obligation to rectify the effects of past actions which furthered the segregation.<sup>64</sup> In response to the district court's ruling, TUSD proposed desegregation plans as part of a larger settlement agreement.<sup>65</sup> As remedial measures in compliance with the court's desegregation order, a Native American Studies Department was established in 1976 and an African American Studies Department was created in 1980.<sup>66</sup>

TUSD's Mexican American Studies Department (MASD) was created in July of 1998.<sup>67</sup> The Department was created, at least in part, to assure continued compliance with the desegregation order of 1978.<sup>68</sup> The order required that the district aid in improving educational outcomes of students who had been discriminated against by the district in the past.<sup>69</sup> According to an amicus brief submitted in the

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<sup>63</sup> See *Mendoza v. United States*, 623 F.2d 1338, 1341 (9th Cir. 1980) (describing the procedural history and district court's 1978 order).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1341–42.

<sup>66</sup> See *Fisher v. United States*, 549 F. Supp. 2d 1132, 1161 n.31 (D. Ariz. 2008) (stating the dates of creation of the Native American Studies, Black Studies, Mexican American Studies, and Pan Asian Departments in Tucson public schools).

<sup>67</sup> 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 *HAMLIN J. PUB. L. & POL'Y* 179, 180 (2009) [hereinafter Romero & Arce, *Culture as a Resource*].

<sup>68</sup> See *Mendoza*, 623 F.2d at 1341–42 (describing the procedural history of the segregation case and the district court's June 1978 order).

<sup>69</sup> *Id.*

federal case challenging H.B. 2281, “the Mexican-American Studies program in TUSD was created while TUSD was under the protection of an existing desegregation order . . . and the MAS program was used as one of various efforts undertaken to remedy the violations.”<sup>70</sup>

While the 1978 order served as a backdrop for the initiation of ethnic studies programs in African American Studies and Pan Asian Studies, initiating additional ethnic programs twenty years later required intense advocacy on the part of interested students and parents. Agitation for the development of a Mexican American Studies Department was initiated by members of the community in Tucson because, “[d]espite the issuance of a federal desegregation order in 1978, the social and education[al] condition[s] for Chicano[s] in Tucson Unified School District would change very little.”<sup>71</sup> This dire reality inspired a group, “Communities and Neighborhoods for Mexican American Studies,” which included individuals who had protested segregation in Arizona in the years leading up to the 1978 federal desegregation order, to advocate for the creation of MASD.<sup>72</sup> Grassroots activism among students and parents interested in higher levels of academic achievement among Latino students enrolled in TUSD schools proved “instrumental in the realization of a community dream, the creation of MASD.”<sup>73</sup>

Among the contributions made by MASD in Tucson schools was the implementation of the Critically Compassionate Intellectualism (CCI) model of pedagogy in 2003.<sup>74</sup> The CCI model is intended to help students achieve a “Latino academic identity and an enhanced level of academic proficiency.”<sup>75</sup> In testimony before Congress, one founder of the program noted that “CCI students have matriculated to college at [a] rate that is 129% greater than the national average for Chicana/o students.”<sup>76</sup> Students enrolled in MASD classes also

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<sup>70</sup> Proposed Brief for the National Association of Chicana and Chicano Studies et al. as Amici Curiae Supporting Plaintiffs at 5, *Acosta v. Huppenthal*, No. 4:10-cv-00623-TUC-AWT, 2013 WL 871948 (D. Ariz. Mar. 8, 2013).

<sup>71</sup> Augustine F. Romero & Sean Arce, *Saving the Lives, the Culture and the History of Our Children: Telling the Truth in Arizona's Cultural War*, *REGENERACIÓN*, Winter 2011, at 4, 5 (hereinafter *Saving the Lives*).

<sup>72</sup> See *id.* (describing the composition of community groups supporting the creation of a Mexican American Studies Department).

<sup>73</sup> Romero & Arce, *Culture as a Resource*, *supra* note 67, at 180–81.

<sup>74</sup> See Lupe S. Salinas, *Arizona's Desire to Eliminate Ethnic Studies Programs: A Time to Take the "Pill" and to Engage Latino Students in Critical Education About Their History*, 14 *HARV. LATINO L. REV.* 301, 301–02 (2011).

<sup>75</sup> *Id.* (citing *Mexican American Studies Model*, TUCSON UNIFIED SCHOOL DISTRICT, <http://web.archive.org/web/20120529131304/http://www.tusd.k12.az.us/contents/depart/mexicanam/model.asp> (last visited Aug. 20, 2013) (accessed by searching for Tucson Unified School District in the Internet Archive index)).

<sup>76</sup> Romero & Arce, *Culture as a Resource*, *supra* note 67, at 181.

acknowledged a dramatic effect on their lives. As one student declared in an interview,

The Project [CCI] helps us because we learned a new way of thinking. . . . [The project] was great, and it helped me feel smarter and know that I could challenge the teachers, and the project gave [me] the idea that I could help my community, and that is what I am going to do with my life.<sup>77</sup>

At the time of MASD's removal from the district, TUSD was the only public school district in America that operated a "full-fledged ethnic studies program" of any kind.<sup>78</sup>

In 2008, the court for the District of Arizona issued a finding that TUSD had achieved a "unitary system," and therefore no longer needed court supervision in implementing the desegregation order.<sup>79</sup> The court reached an odd result in the case, holding that TUSD had failed to meet the standards necessary to achieve unitary status, including failure to provide an equal education to students in minority-identifiable schools and failure to prevent discrimination in hiring, retaining, and firing minority faculty in accordance with the desegregation settlement plan.<sup>80</sup> However, the court concluded that TUSD could achieve unitary status by implementing a "post-unitary plan."<sup>81</sup>

While the order granting unitary status was overturned on appeal,<sup>82</sup> neither decision seems to have affected the status of ethnic studies in TUSD. Participants in the campaign against ethnic studies did not refer to the existence of official desegregation orders or lack

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<sup>77</sup> *Id.* at 214–15.

<sup>78</sup> SLEETER, *supra* note 1, at 7.

<sup>79</sup> *See Fisher v. United States*, 549 F. Supp. 2d 1132, 1168 (D. Ariz. 2008) (granting "the Petition for Unitary Status and Termination of Court Oversight" pending "acceptance by this Court of Defendant's Post-Unitary Plan"). "Unitary system" is a term that was fashioned by the Supreme Court in *Green v. County School Board of New Kent County, Virginia*, as a means by which to assess whether school districts had fully complied with court ordered desegregation decrees in the wake of the *Brown* decision. 391 U.S. 430 (1968). Under *Brown II*, the Supreme Court's order that public schools be desegregated with "all deliberate speed," "[s]chool boards . . . were . . . clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.* at 436–38 (citations omitted). Later cases described the test for determining whether unitary status has been achieved as "whether the [constitutional violator] ha[s] complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable." *Missouri v. Jenkins*, 515 U.S. 70, 89 (1995) (citation omitted).

<sup>80</sup> *Fisher*, 549 F. Supp. 2d at 1132.

<sup>81</sup> *Id.*

<sup>82</sup> *See Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131, 1143–45 (9th Cir. 2011) (remanding the case and ordering that court supervision remain in place until TUSD successfully demonstrated that it had met its burden under the *Green* factors).



thereof as grounds for action on the issue. Instead, the debate and politics behind ending the program are framed the opposite way: The leaders of the campaign against ethnic studies advocated the idea that ethnic studies was promoting separation between ethnic minorities and white students.<sup>83</sup>

### B. *Political Backlash Against TUSD's Mexican American Studies Department*

The motivations behind efforts to remove ethnic studies from Arizona schools were summed up in 2007 by then-Arizona Secretary of Education Tom Horne in an open letter criticizing the Mexican American Studies Department.<sup>84</sup> Following a series of controversial events at Tucson High School,<sup>85</sup> Horne requested that information about funding and instructional materials be provided by the school to the TUSD Department of Education.<sup>86</sup> Acting in his capacity as Superintendent of Public Instruction, Horne followed up in 2007, drafting "An Open Letter to the Citizens of Tucson."<sup>87</sup> In this letter, Horne laid out a nine-point outline of why TUSD's ethnic studies program was not only bad for Tucson's student population, but for "[t]he citizens of Tucson, of all mainstream political ideologies."<sup>88</sup> Horne's

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<sup>83</sup> See *infra* Part IV.A (describing the rhetoric used by public officials in the campaign against ethnic studies).

<sup>84</sup> Tom Horne, *An Open Letter to the Citizens of Tucson* (June 11, 2007), available at <http://nau.edu/uploadedFiles/Academic/CAL/Philosophy/Forms/An%20Open%20Letter%20to%20Citizens%20of%20Tucson.pdf> [hereinafter Horne Letter].

<sup>85</sup> In 2006, labor activist Dolores Huerta visited Tucson High School, part of TUSD, as a guest speaker in the Mexican American Studies Department and stated that "Republicans hate Latinos" during her comments. See Josh Brodesky, *Schools Chief Horne Can't Win this Fight*, ARIZ. DAILY STAR (Dec. 12, 2010), [http://www.azstarnet.com/news/local/article\\_95bbd77d-a8bc-5e48-8721-ca5270bcfb4b.html](http://www.azstarnet.com/news/local/article_95bbd77d-a8bc-5e48-8721-ca5270bcfb4b.html). In response, Latina Republican and then-Deputy Superintendent of Tucson schools Margaret Garcia Dugan, was asked to speak at Tucson High School to offer a balanced (and opposite) perspective. *Id.* During Garcia Dugan's speech, a group of students enrolled in classes through MASD, some of whom had placed tape across their mouths, stood with their fists in the air and later walked out. See *Hearing on H.B. 2281 Before H. Ed. Comm.*, 2010 Leg. 49th Sess. 2 (Ariz. 2010) (statement of Rep. Steve Montenegro), 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).

<sup>86</sup> George B. Sánchez, *Horne Out of Touch, Program Backers Say*, ARIZ. DAILY STAR (June 13, 2008), [http://www.azbilingualed.org/NEWS\\_2008/2008b/horne\\_out\\_of\\_touch.htm](http://www.azbilingualed.org/NEWS_2008/2008b/horne_out_of_touch.htm). In making this request, Horne did not visit any MASD classes. See Illeana Diaz, *AZ Education Boss Visits Tucson, Defends Ethnic Studies Attack*, KGUN9, <http://www.kgun9.com/hottopics/ethnicstudies/124794394.html> (last visited Aug. 20, 2013).

<sup>87</sup> Horne Letter, *supra* note 84, at 1.

<sup>88</sup> *Id.*

purported motivation for writing the letter was to bring the curriculum and motivation behind ethnic studies “out into the open.”<sup>89</sup>

Horne’s efforts to mobilize Tucson voters to elect a school board that would dismantle MASD were unsuccessful—the school board’s composition remained unchanged from 2005 to 2008<sup>90</sup>—but the letter presaged Horne’s larger efforts to advance his claim that TUSD’s ethnic studies program promoted “racist values,” a point that emerged later in court testimony.<sup>91</sup> Collaborating with then-Arizona state senator John Huppenthal, Horne and a coalition of Republican legislators introduced two failed attempts to ban MASD, S.B. 1108<sup>92</sup> and S.B. 1069.<sup>93</sup> Horne would ultimately succeed with a bill—H.B. 2281 was signed into law by Governor Brewer in May of 2010.<sup>94</sup>

In December of 2010, Horne issued findings that TUSD’s Program violated section 15-112(A)(3) of H.B. 2281 because the program was “designed primarily for pupils of a particular ethnic group.”<sup>95</sup> After Horne left his position as Arizona Superintendent of

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<sup>89</sup> *Id.* The nine assertions Horne laid out in his letter were: (1) TUSD’s Ethnic Studies Program would be terminated if people knew what was taking place in the classrooms; (2) the Program’s philosophy threatened the inherent value of the individual and that “it is fundamentally wrong to divide students up according to their racial group and teach them separately;” (3) Horne had personally witnessed the ills of the program; (4) the textbooks used by MASD “teach[ ] a kind of ethnic destructive chauvinism that the citizens of Tucson should no longer tolerate;” (5) M.E.Ch.A., a Mexican American student group that Horne saw on a TUSD librarian’s t-shirt, also promoted ethnic separatism; (6) MASD was “[t]eaching the [w]rong [t]hings [a]bout [l]iterature;” (7) a column in the *Arizona Republic* quoting a former MASD teacher was evidence of the radicalism at MASD; (8) TUSD intimidated its teachers by forcing them to teach anti-American positions; and (9) it was up to Tucson’s voters to elect a school board that would eliminate ethnic studies. *Id.* at 1–3. Horne’s letter closes with a call to political action; he warns voters, “I can use my pulpit to bring out the facts, but only you can bring about change.” *Id.* at 5.

<sup>90</sup> Lundholm, *supra* note 15, at 1053 n.102.

<sup>91</sup> See Alexis Huicochea, *Horne to Court: TUSD Ethnic Studies Program Promoted ‘Racist Values,’* ARIZ. DAILY STAR (Mar. 20, 2012), [http://azstarnet.com/news/local/education/precollegiate/horne-to-court-tusd-ethnic-studies-promoted-racist-values/article\\_54c076b0-7bc5-523d-9ebf-c8213ba341ec.html](http://azstarnet.com/news/local/education/precollegiate/horne-to-court-tusd-ethnic-studies-promoted-racist-values/article_54c076b0-7bc5-523d-9ebf-c8213ba341ec.html) (describing Horne’s testimony in federal court about the nature of MASD).

<sup>92</sup> S. 1108, 48th Leg., 2d Reg. Sess. (Ariz. 2008).

<sup>93</sup> S. 1069, 48th Leg., 2d Reg. Sess. (Ariz. 2008).

<sup>94</sup> See Santa Cruz, *supra* note 14, at AA.2.

<sup>95</sup> Memorandum from Tom Horne, Superintendent of Public Instruction, Ariz. Dep’t of Educ., Finding by State Superintendent of Public Instruction of Violation by Tucson Unified School District Pursuant to A.R.S. § 15-112(B), at 1, 2 (Dec. 30, 2010), available at [http://www.tucsonsentinel.com/documents/doc/010311\\_horne\\_tusd\\_finding](http://www.tucsonsentinel.com/documents/doc/010311_horne_tusd_finding) [hereinafter Horne Findings]. Horne based his findings on statements made by the director of TUSD’s Ethnic Studies Department, statements posted on the district’s website referencing Latino heritage, paraphrased quotes from a disgruntled former teacher who claimed that ethnic studies courses were encouraging students to “rise up” against the United States, and allegations from current TUSD teachers of racist and overtly political instruction by ethnic studies teachers. *Id.* at 4. Horne also raised many of the same concerns he had raised in his

Public Instruction to become the Secretary of Education, his successor, John Huppenthal, would continue the inquiry into MASD.<sup>96</sup> An independent, comprehensive audit of the ethnic studies department at TUSD would find that “no observable evidence was present to indicate that any classroom within [TUSD] is in direct violation of the law.”<sup>97</sup> Instead, “[i]n most cases, quite the opposite is true. . . . Every school and every classroom visited by the auditors affirmed that these learning communities support a climate conducive to student achievement.”<sup>98</sup> In spite of the 120-page discussion of the results of the independent audit, Huppenthal issued a separate three-page finding asserting that MASD courses violated subsections 15-123(A)(2), (A)(3), and (A)(4) of H.B. 2281,<sup>99</sup> by “promot[ing] resentment toward a race . . . of people,” being “designed . . . for pupils of a particular ethnic group,” and “[a]dvocat[ing] ethnic solidarity instead of . . . treat[ing] . . . pupils as individuals.”<sup>100</sup>

TUSD appealed these findings in Arizona state court, citing the Cambium Audit,<sup>101</sup> among other evidence, in arguing that the program did not violate H.B. 2281.<sup>102</sup> In January 2012, Arizona administrative law judge Lewis D. Kowal ruled that TUSD’s Mexican

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“open letter” regarding controversial subject matter used in the Program. See *supra* notes 87–94 and accompanying text.

<sup>96</sup> See Press Release, John Huppenthal, Superintendent of Public Instruction, Ariz. Dep’t of Educ., Official Statement on TUSD Violation of A.R.S. § 15-112, at 1 (Jan. 4, 2011), available at [http://media.azpm.org/master/document/2011/2/7/pdf/pr01-04-11\(2\).pdf](http://media.azpm.org/master/document/2011/2/7/pdf/pr01-04-11(2).pdf) (detailing the issues he saw with respect to MASD).

<sup>97</sup> CAMBIUM LEARNING, INC., CURRICULUM AUDIT OF THE MEXICAN AMERICAN STUDIES DEPARTMENT: TUCSON UNIFIED SCHOOL DISTRICT 50 (2011), available at [http://www.tucsonweekly.com/images/blogimages/2011/06/16/1308282079-az\\_masd\\_audit\\_final\\_1\\_.pdf](http://www.tucsonweekly.com/images/blogimages/2011/06/16/1308282079-az_masd_audit_final_1_.pdf) [hereinafter Cambium Audit].

<sup>98</sup> *Id.*

<sup>99</sup> See Statement of Finding, John Huppenthal, Superintendent of Public Instruction, Ariz. Dep’t of Educ., Statement of Finding Regarding Tucson Unified School District’s Violation of A.R.S. § 15-112, at 1–2 (June 15, 2011), available at [http://saveethnicstudies.org/assets/docs/state\\_audit/John\\_Huppenthal\\_Statement\\_of\\_finding.pdf](http://saveethnicstudies.org/assets/docs/state_audit/John_Huppenthal_Statement_of_finding.pdf) [hereinafter Huppenthal Findings].

<sup>100</sup> ARIZ. REV. STAT. ANN. §§ 15-112(A)(2)–(A)(4) (2010). Huppenthal’s bases for the determination were similar to Horne’s: (1) MASD courses “reference white people as being ‘oppressors,’” (2) statistics showing a predominant Hispanic enrollment in the classes and language indicating program goals of improving academic performances of Latinos in TUSD, and (3) references to materials that purportedly promoted “Hispanic nationalism and unity in the face of assimilation and oppression.” Huppenthal Findings, *supra* note 99, at 2.

<sup>101</sup> See *supra* notes 97–98 and accompanying text (describing the Cambium Audit).

<sup>102</sup> See Letter from Heather K. Gaines to John Huppenthal, Notice of Appeal of Determination of Non-Compliance with A.R.S. § 15-112 and Request for Hearing 3–5 (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).

American Studies Program violated H.B. 2281.<sup>103</sup> Per that decision, state Superintendent Huppenthal announced that TUSD was required either to drop the program or to face a ten percent cut in state funding.<sup>104</sup> Oddly, only the Mexican American Studies Department was targeted by Horne and Huppenthal as “ethnic programs” operating in violation of H.B. 2281, despite TUSD’s continuing operation of Pan Asian Studies, African American Studies, and Native American Studies classes.<sup>105</sup>

Huppenthal concluded that MASD’s courses violated H.B. 2281,<sup>106</sup> and an Arizona court confirmed those findings.<sup>107</sup> Armed with the court’s finding, Horne assured voters that he would continue to press TUSD to end the program.<sup>108</sup> Despite continued resistance from Tucson school administrators, Horne emphasized his strategy for achieving compliance with the new ethnic studies law, stating: “I’ve never yet seen a school not come to compliance, or school district not come to compliance, when there was a threat to withhold funds. So, I am expecting that to happen here.”<sup>109</sup>

TUSD has since removed the program from its schools. The last standing legal effort to fight H.B. 2281 is a federal suit, which was filed against Tom Horne in 2010, shortly after the law was originally passed.<sup>110</sup> In 2011, the Federal Court for the District of Arizona ruled that only student plaintiffs, not parents or teachers, had standing to raise constitutional challenges to H.B. 2281.<sup>111</sup> The plaintiffs in the

<sup>103</sup> See Cindy Casares, *Bad Education*, THE AMERICAN PROSPECT (Jan. 9, 2012), available at <http://prospect.org/article/bad-education>.

<sup>104</sup> See Stephen Ceasar, *Funding Cut over Ethnic Studies Class: A Mexican American Program in Tucson Has Drawn the Arizona Schools Chief’s Ire*, L.A. TIMES, Jan. 7, 2012, at A.7 (discussing the order and withheld funds).

<sup>105</sup> See Salinas, *supra* note 74, at 305 n.26 (noting the selective enforcement of H.B. 2281 and identifying the singling out of MASD as grounds for the charge of discrimination in the original lawsuit against Tom Horne); see also Luis Carrión, *Ethnic Studies Classes in Legal Limbo*, ARIZ. PUB. MEDIA (Feb. 7, 2011), <http://azpm.org/news/story/2011/2/4/173-tusd-ethnic-studies-classes-deemed-non-compliant/> (discussing TUSD’s continued operation of Pan Asian Studies, African American Studies, and Native American Studies).

<sup>106</sup> Huppenthal Findings, *supra* note 99, at 1.

<sup>107</sup> *Tucson Unified Sch. Dist. No. 1*, Ariz. Admin. Law Judge Decision No. 11F-002-ADE, at 1–2 (Dec. 27, 2011), available at [https://www.azag.gov/sites/default/files/sites/all/docs/TUSD\\_Ethnic\\_Studies\\_Ruling.pdf](https://www.azag.gov/sites/default/files/sites/all/docs/TUSD_Ethnic_Studies_Ruling.pdf).

<sup>108</sup> See *Horne Says He Will Stay Tough on Ethnic Studies*, MYFOXPHOENIX.COM (Jan. 3, 2011), <http://www.myfoxphoenix.com/story/18140386/horne-says-he-will-stay-tough-on-ethnic-studies>.

<sup>109</sup> *Id.*

<sup>110</sup> See Complaint, *Acosta v. Huppenthal*, No. 4:10-cv-00623-TUC-AWT, 2013 WL 871948 (D. Ariz. Mar. 8, 2013). The parties in the suit shifted when Huppenthal took over as State Superintendent.

<sup>111</sup> See Stephen Ceasar, *Judge Refuses to Halt Law Banning Tucson Ethnic Studies Program*, L.A. TIMES NATION NOW BLOG (Jan. 10, 2012, 8:43 PM), <http://latimesblogs.la>

case, *Acosta v. Huppenthal*, filed for a preliminary injunction that would have required Superintendent Huppenthal to cease enforcement activities against the District.<sup>112</sup> Several organizations supporting ethnic studies—especially Mexican American and Chicano Studies—filed amicus briefs in support of the plaintiffs.<sup>113</sup> On March 8, 2013, Judge A. Wallace Tashima issued an order ruling in favor of Huppenthal, finding that the plaintiffs’ concerns about H.B. 2281 “do not meet the high threshold needed to establish a constitutional violation,” and were instead best “left to the State of Arizona and its citizens to address through the democratic process.”<sup>114</sup> The plaintiffs have indicated that they will appeal Judge Tashima’s decision.<sup>115</sup>

### III

#### THE PATH OF ARIZONA’S ETHNIC STUDIES PROGRAMS AS INTEREST-CONVERGENCE AND THE SUBSEQUENT DIVERGENCE

This Part discusses how the history of MASD detailed above reflects a pattern of interest-convergence between majority and minority populations in Arizona at the time of the Department’s creation and how the removal of the Department corresponded with the divergence of those interests. The relationship between interest alignment and the maintenance of MASD in Tucson offers a pointed example of how Professor Bell’s work continues to be relevant to understanding how majority and minority communities interact.

The creation and implementation of TUSD’s Mexican American Studies Department follows Bell’s interest-convergence theory in

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times.com/nationnow/2012/01/judge-refuses-to-halt-law-banning-tucson-ethnic-studies-program.html. United States Circuit Court Judge A. Wallace Tashima in Tucson refused to grant the injunction but permitted the lawsuit to go forward. *Id.* He ruled that the two TUSD students had standing to sue but the teachers did not. *Id.*

<sup>112</sup> See Motion for Preliminary Injunction at 1, *Acosta*, No. 4:10-cv-00623-TUC-AWT, 2013 WL 871948.

<sup>113</sup> In a June 2013 order, Judge Tashima approved the submission of an amicus brief by the National Association of Chicano and Chicana Studies (“NACCS”). See Order at 1, *Acosta*, No. 4:10-cv-00623-TUC-AWT, 2013 WL 871948. Organizations joining the brief included the Association for Asian American Studies, the Hispanic Association of Colleges and Universities, the League of United Latin American Citizens, the Society for Applied Anthropology, and others. See Proposed Brief for the National Association of Chicana and Chicano Studies et al. as Amici Curiae Supporting Plaintiffs at 5, *Acosta*, No. 4:10-cv-00623-TUC-AWT, 2013 WL 871948.

<sup>114</sup> Memorandum Order at 2, *Acosta*, No. 4:10-cv-00623-TUC-AWT, 2013 WL 871948.

<sup>115</sup> See Mari Herreras, *Attorney Martinez to Lead Appeal of Tashima Ruling*, TUCSON WEEKLY (Mar. 17, 2013, 12:33 PM), <http://www.tucsonweekly.com/TheRange/archives/2013/03/17/attorney-martinez-to-lead-appeal-of-tashima-ruling> (discussing plans for the appeal).

three ways.<sup>116</sup> First, the program's implementation stemmed from the emergence of a widely popular, albeit revolutionary, notion in public schooling: The desegregation of educational institutions, catalyzed by *Brown*, made the creation of a remedial curriculum focused on a minority student population more palatable to the general public. Second, creating TUSD's Mexican American Studies Department was a means by which officials could comply with the district court's desegregation order and make progress toward ending supervision of Tucson schools, pursuing a majority interest in controlling school choices without court supervision. Third, where ethnic minorities have been perceived as dissatisfied with conditions in public institutions, ethnic studies programs have served as a means by which majority populations show their commitment to addressing the concerns of minorities, thereby avoiding unrest among minority populations and the public scrutiny that may come with it.

When ethnic studies programs were initially implemented in Tucson public schools, educational efforts related to minority populations were, given *Brown* and its follow-on, largely operating in the context of a larger desegregation effort. Districts like Tucson could, decades later, pursue a similar goal by promoting an equal playing field in education.<sup>117</sup> This normative setting arguably carried through to the time that ethnic studies were created. Given the small size of the program—only three percent of TUSD's student population of over 55,000 were enrolled in MASD classes at the time it was removed

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<sup>116</sup> A related argument appears in Jeremiah Chin, Comment, *What a Load of Hope: The Post-Racial Mixtape*, 48 CAL. W. L. REV. 369 (2012). Chin's Comment argues that "the post-racial project exploits the language of historical antiracist efforts to negate experiences with discrimination while continuing a hostile environment for racial groups . . . in the United States." *Id.* at 370. Chin supports this point using recent Supreme Court decisions, punitive immigration laws in Arizona, and the ethnic studies ban. *Id.* at 370–71. In discussing ethnic studies, Chin suggests that the issue illustrates "an interest convergence view of history . . . . [T]he language of [H.B. 2281] gives the Superintendent of Public Instruction the power to target and eliminate any teachings about United States history that could be interpreted as resentment towards [those] who have dominated . . . United States history." *Id.* at 390. I approach a related discussion but diverge from Chin in two distinct ways: I focus more specifically on the historical events surrounding the ethnic studies ban and, the first scholar to do so, I use recent events to answer contemporary criticisms of the interest-convergence thesis. Other authors have discussed interest-convergence and what it may mean in the context of Arizona's struggles with anti-migrant legislation, focusing primarily on the importance of international implications. See, e.g., George A. Martínez, *Arizona, Immigration, and Latinos: The Epistemology of Whiteness, the Geography of Race, Interest Convergence, and the View from the Perspective of Critical Theory*, 44 ARIZ. ST. L.J. 175, 196 (2012) (suggesting that scholars should investigate official concerns about international perception when examining federal protections of the rights of marginalized groups).

<sup>117</sup> See *supra* notes 68–73 (describing the desegregation order in effect in Tucson public schools and associated litigation).

from the district<sup>118</sup>—and the concurrent lack of attention from Arizona’s education officials, it was possible to persuade one school district to create the program. The changes to curriculum were limited to the creation of a single program, in a single district, which targeted a large percentage of the specific school’s population. The preexisting African American, Native American, and Pan-Asian Studies programs also likely made the creation of MASD even less controversial at its outset.

As previously mentioned, an element of the original desegregation order, which was at least partially responsible for the formation of ethnic studies at TUSD, called for efforts to create equity in educating minority students in Tucson schools.<sup>119</sup> At the time that MASD was created, federal courts were still monitoring Tucson’s compliance with the 1978 settlement agreement.<sup>120</sup>

The continued monitoring of the settlement agreement provided a clear rationale for changing the curriculum to improve educational outcomes for Latino students, who lagged behind their white peers in several achievement metrics.<sup>121</sup> As a result, creating an ethnic studies program could be justified to majority actors as a means to escape external scrutiny of TUSD’s treatment of non-white students, thereby furthering majority interests by creating autonomy for local government. TUSD’s post-unitary status plan, drafted as a requirement imposed by the district court’s decision to grant unitary status to TUSD (the grant of unitary status was overturned on appeal by the Ninth Circuit), suggests that representatives of the school district used the intent behind MASD and positive outcomes tied to the program to relieve themselves of court supervision. Specifically, the District promised it would improve “Diversity Leadership” through “collaboration with . . . the African American Studies and Mexican American Studies Departments [in designing, implementing, and assessing] effective methodologies that contribute to greater academic equity, especially for African American and Hispanic Students.”<sup>122</sup>

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<sup>118</sup> See Santa Cruz, *supra* note 14, at AA.2 (noting the small number of students in MASD classes).

<sup>119</sup> See *supra* note 66 and accompanying text (describing the desegregation order’s role in the creation of ethnic studies programs at TUSD).

<sup>120</sup> See *Mendoza v. United States*, 623 F.2d 1338, 1343 (9th Cir. 1980) (describing the history of the district court’s monitoring of Tucson’s compliance with the 1978 settlement).

<sup>121</sup> See Salinas, *supra* note 74, at 305 (“Arizona’s Latino students are in a precarious educational crisis. For various reasons, Latino students have historically experienced educational difficulties.”).

<sup>122</sup> See Plaintiff’s Motion for Summary Judgment Ex. B at 24–25, 2009 Tucson Unified School District Post-Unitary Status Plan, *Acosta v. Huppenthal*, No. 4:10-cv-00623-TUC-AWT, 2013 WL 871948 (D. Ariz. Mar. 8, 2013).

Finally, TUSD's implementation of an ethnic studies program can be understood as a response to increasingly fervent political activity among a growing minority population. Concessions in the TUSD curriculum were seen as preferable to alternatives that would have involved much larger structural changes—such as a broader recognition of the achievement gap between white and non-white students in Tucson schools. Literature examining the role of ethnic studies in racial dynamics has drawn upon interest-convergence theory as an explanatory factor for the appearance of these programs. One example of this relationship is the creation of Asian American ethnic studies programs, which coincided with social movements advocating for reparations for internment that occurred during World War II.<sup>123</sup> During this period, as agitation for political equality for Asian Americans in California institutions fomented a politically unstable environment, universities in the area were willing to create spaces where students could access culturally-driven alternative pedagogy in institutional settings that were less threatening to established hierarchies.<sup>124</sup>

In a similar discussion, Pedro Noguera examines the racial integration of Berkeley High School, discussing the implementation of ethnic studies courses as a means of “appease[ment]” for activist students and parents.<sup>125</sup> In this instance, Noguera argues that the implementation of ethnic studies programs was in the interests of white school administrators as they were able simply to add to the school's curriculum “[r]ather than address[ ] . . . clear examples of racial bias and differential treatment.”<sup>126</sup> Noguera's historical account of the difficulties of integration indicates how, in some cases, ethnic studies programs came into being as straightforward concessions that permitted school administrators to demonstrate a commitment to addressing volatile racial issues without necessarily delving into more complex solutions to race-related problems at an institutional level. While this may not be true of the origination of all ethnic studies plans, Noguera's account appears to mirror elements of MASD's emergence in Tucson schools.

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<sup>123</sup> See, e.g., Yamamoto & Obrey, *supra* note 43, at 12 (describing political unrest related to ethnic studies in California).

<sup>124</sup> *Id.* at 16–17; see also Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1266–68 (1993) (describing group dynamics in creating critical ethnic scholarship).

<sup>125</sup> See Pedro A. Noguera, *Ties that Bind, Forces that Divide: Berkeley High School and the Challenge of Integration*, 29 U.S.F. L. REV. 719, 732–33 (1995) (discussing the rationale behind the implementation of ethnic studies programs at Berkeley High School).

<sup>126</sup> *Id.* at 732.



As noted above, MASD's creation was at least in part a reaction to political protests on the part of parents, students, and political activists familiar with the political struggles associated with achieving equity at TUSD.<sup>127</sup> In an effort to avoid political damage due to negative publicity surrounding the protests for greater academic equity between Latino and white students and to avoid making larger institutional reforms that might have been seen as adverse to white students' interests, TUSD made a relatively small concession by adding the Mexican American Studies Department to its curriculum.

While interest-convergence was readily apparent with the initial implementation of TUSD's ethnic studies programs, the end of ethnic studies in Tucson indicates that interest-divergence has played a similarly influential role. Decreased external pressures and the assertion by Arizona politicians of a disconnect between their own interests and the interests of those invested in continuing the ethnic studies program produced an environment hostile to the MASD.<sup>128</sup> Thus, divergent interests have divided the aims of the politically powerful and of the marginalized communities. The marginalized communities have limited protections, insofar as courts may be unwilling to intervene to protect the interests of proponents of ethnic studies who lack political power.<sup>129</sup>

As a point of departure, the movement for school desegregation—the background norm critical to the advancement of ethnic studies in Tucson and around the country<sup>130</sup>—has lost momentum in recent history.<sup>131</sup> The problem *Brown* set out to remedy—segregation in public schools—remains pervasive in the United States; in fact, segregation along racial lines within the nation's public schools has

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<sup>127</sup> See *supra* notes 71–73 and accompanying text (recounting the importance of grass-roots activism in the creation of MASD).

<sup>128</sup> See *infra* Part IV.A (describing the rhetoric used by public officials in the campaign against ethnic studies).

<sup>129</sup> Professor Barry Friedman has explored the relationship between popular opinion and judicial outcomes at length, arguing that the Supreme Court's decisions have roughly coincided with the public's feelings on most issues. See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009); see also Guinier, *supra* note 22, at 116 (discussing tendencies by courts after *Brown* to limit the equal protection clause following divergence of mainstream societal interests along racial lines).

<sup>130</sup> See *supra* Part II.A (describing the development of ethnic studies programs).

<sup>131</sup> See *supra* note 11 and accompanying text (describing examples of dismantling historical desegregation efforts in North Carolina). See generally GARY ORFIELD ET AL., *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996) (describing the rollback of integration efforts beginning in the 1990s).

increased in recent years.<sup>132</sup> At the same time, public outcry with regard to desegregation has become less visible<sup>133</sup> and school districts have deemphasized the goal of racial and ethnic integration.<sup>134</sup> Furthermore, courts are less willing to challenge school segregation.<sup>135</sup> This confluence of events has resulted in concentrations of students of one race in certain school districts under the guise of parental “school choice”<sup>136</sup> and has left limited legal recourse for students and parents who feel that they have been negatively affected by racially homogeneous schools.

In a similar way, H.B. 2281 has been likened to what sociologists Michael Omi and Howard Winant refer to as a “racial project,” which is “simultaneously an interpretation, representation, or explanation of racial dynamics, and an effort to reorganize and redistribute resources along particular racial lines.”<sup>137</sup> From this point of view, H.B. 2281 “inhibit[s] students from seeing, acting on, analyzing, [or] experiencing race” and “attempts to forestall . . . any political action that would disrupt the status quo of inequality” through its attempts to halt a curriculum of “ethnic solidarity.”<sup>138</sup> As a result, proponents of the ethnic studies ban operated under the notion that predominantly White voters in Arizona<sup>139</sup> would be receptive to the suggestion that MASD worked against their interests because the program highlights historical racial inequalities and encourages students to fight those inequalities.

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<sup>132</sup> See generally Taunya Lovell Banks, *Brown at 50: Reconstructing Brown's Promise*, 44 WASHBURN L.J. 31 (2004) (arguing that American schools are facing a serious threat of resegregation).

<sup>133</sup> See GARY ORFIELD, *SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION* 3 (2001), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/schools-more-separate-consequences-of-a-decade-of-resegregation/orfield-schools-more-separate-2001.pdf> (discussing decreased public support for desegregation efforts in schools over the course of the 1990s).

<sup>134</sup> See Banks, *supra* note 132, at 62 (noting the failure of desegregation efforts among school districts).

<sup>135</sup> See *id.* at 47–58 (describing decreasing willingness among courts to fight school segregation).

<sup>136</sup> See *supra* note 11 and accompanying text (describing an instance of increased segregation through school choice).

<sup>137</sup> Sandra K. Soto & Miranda Joseph, *Neoliberalism and the Battle over Ethnic Studies in Arizona*, THOUGHT & ACTION, Fall 2010, at 50–51 (quoting MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S*, at 56 (1994)).

<sup>138</sup> *Id.* at 53.

<sup>139</sup> See *Arizona Voter Statistics*, WILLIAM C. VELASQUEZ INST., [http://www.wcvi.org/latino\\_voter\\_research/latino\\_voter\\_statistics/az\\_lv.html](http://www.wcvi.org/latino_voter_research/latino_voter_statistics/az_lv.html) (last visited Aug. 20, 2013) (estimating that White voters comprised 87.97% of registered voters in Arizona during the 2010 elections).

I do not mean to suggest that the ethnic studies controversy in Arizona has been without any pushback from majority political communities in the United States. Indeed, the sheer amount of press coverage that H.B. 2281 received, and the subsequent legal challenges to the law, are an indication of some level of disagreement within the majority about whether the ban was desirable.<sup>140</sup> However, concerted national<sup>141</sup> and international<sup>142</sup> outrage and consequent backpedaling on the part of opponents of ethnic studies were only readily apparent when more broadly identifiable rights came under attack as a result of the law. The most obvious example of this external scrutiny was the effort to remove certain texts associated with the Mexican American Studies Department from Tucson schools.<sup>143</sup> Articles highlighting the book ban consistently noted Shakespeare's *The Tempest* as among books at risk of being removed from classrooms.<sup>144</sup> In response to the influx of negative publicity surrounding the enforcement of the ethnic studies ban, Arizona school officials issued a press release titled "Reports of TUSD Book Ban Completely False and Misleading," assuring that the books in question were not being "banned" but rather "moved into the district storage facility" and that "[e]very one of the books [listed as texts used in MASD courses] is still available to students through several school libraries."<sup>145</sup> A spokesman for Arizona's Department of Education also emphasized that "[t]he superintendent [John Huppenthal] is a huge believer against [sic]

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<sup>140</sup> Compare *supra* notes 103–105 (citing media coverage criticizing the ethnic studies ban) with *In Defense of Arizona's Ethnic Studies Law*, FOX NEWS (May 14, 2010), <http://www.foxnews.com/story/0,2933,592863,00.html> (providing a transcript of an interview with Tom Horne, defending the merits of H.B. 2281).

<sup>141</sup> See, e.g., Rheana Murray, *Ethnic Book Ban in Arizona School District Includes All Books About Mexican-American History, Even Shakespeare's 'The Tempest'*, N.Y. DAILY NEWS (Jan. 16, 2012, 4:09 PM), <http://www.nydailynews.com/news/national/ethnic-studies-book-ban-arizona-include-shakespeare-tempest-article-1.1007105> (describing Arizona's "banned book" list).

<sup>142</sup> See, e.g., Robert Cintlí Rodríguez, *Arizona's 'Banned' Mexican American Books*, GUARDIAN (Jan. 18, 2012, 1:07 PM) <http://www.guardian.co.uk/commentisfree/cifamerica/2012/jan/18/arizona-banned-mexican-american-books> (describing the book ban from a British perspective).

<sup>143</sup> See *supra* note 18 and accompanying text (discussing the book ban and the subsequent media response).

<sup>144</sup> See, e.g., Jeff Biggers, *Who's Afraid of the "The Tempest"?*, SALON.COM (Jan. 13, 2012), [http://www.salon.com/2012/01/13/whos\\_afraid\\_of\\_the\\_tempest/](http://www.salon.com/2012/01/13/whos_afraid_of_the_tempest/) (highlighting *The Tempest* among other texts removed from Tucson schools).

<sup>145</sup> Press Release, Tucson Unified School District, Reports of TUSD Book Ban Completely False and Misleading (Jan. 17, 2012), available at <http://www.tusd1.org/contents/news/press1112/01-17-12.html>.

ensorship.”<sup>146</sup> This adverse reaction to the abridgment of free access to subversive reading material indicates a shift in the engagement of otherwise uninterested parties when the risks associated with H.B. 2281 became cognizable assaults on rights valued by majority culture.<sup>147</sup> As proponents of the ban reframed the issue and it faded from the media, large-scale opposition to H.B. 2281 faded with it.

Thus, in the end, Tom Horne’s campaign against Mexican American Studies proved successful. Given faltering legal momentum for preserving desegregation as a goal in public education, it should be unsurprising that advocates were not able to successfully preserve MASD as it came under attack from H.B. 2281.

#### IV

#### THE ETHNIC STUDIES BAN AND CRITICISMS OF THE INTEREST-CONVERGENCE THESIS

This Part presents Arizona’s ethnic studies ban as an answer to recent criticisms of the interest-convergence thesis and its follow-on works, highlighting the limits of those criticisms and showcasing the Arizona ethnic studies ban as an illustration of the continued importance of Derrick Bell’s work.

Proponents of the interest-convergence thesis tend to understand it as “a reasonable ‘reading of history.’”<sup>148</sup> Professor Stephen Feldman argues that Justin Driver altogether misses the point in his interest-convergence critique.<sup>149</sup> Specifically, Feldman argues that “interest convergence is not a universal maxim, but . . . a historical pattern that appears repeatedly through American history,” and that Driver’s article “not only mischaracterized the interest-convergence thesis, but also Bell’s entire career.”<sup>150</sup> Feldman’s use of citations from the beginnings of Professor Bell’s career through Bell’s last publications prior to his death suggests an understanding of Bell’s academic career in context, over time, and through significant changes in public opinion. By Feldman’s logic, Driver, one of Bell’s prominent critics,

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<sup>146</sup> Emily Gersema, *Tucson District Denies Ban of Mexican-American Books*, AZCENTRAL.COM (Jan. 17, 2012), <http://www.azcentral.com/news/articles/2012/01/17/20120117-tucson-district-denies-ban-mexican-american-books.html>.

<sup>147</sup> See HERBERT N. FOERSTEL, *BANNED IN THE U.S.A.: A REFERENCE GUIDE TO BOOK CENSORSHIP IN SCHOOLS AND PUBLIC LIBRARIES* xv–xvii (2002) (describing the historical expansion of opposition to censorship in public libraries and schools).

<sup>148</sup> Stephen M. Feldman, *Do the Right Thing: Understanding the Interest-Convergence Thesis*, 106 N.W. U. L. REV. COLLOQUY 248, 249 (2012) (quoting DERRICK A. BELL, *RACE, RACISM AND AMERICAN LAW* § 1.12, at 39 (2d ed. 1980)).

<sup>149</sup> See *id.* at 252–58 (discussing Driver’s “erroneous characterization of [Bell’s] thesis”).

<sup>150</sup> *Id.* at 259–60.

misses the mark entirely in his understanding of how the interest-convergence thesis functions as a tool for analyzing society.<sup>151</sup>

Nonetheless, as discussed below, even when the interest-convergence thesis is read on Driver's terms and the interest-convergence thesis is framed as a predictive device, Driver's four primary criticisms of the theory do not effectively undermine its lasting explanatory power. The ethnic studies controversy in Arizona presents an opportunity to reexamine the interest-convergence thesis, to test it against Driver's arguments, and to consider the theory in light of contemporary developments. While I believe that authors in Feldman's tradition offer more accurate and faithful interpretations of Professor Bell's work, I focus in this Note on Driver due to his (self-proclaimed) efforts as the first author to attempt to systematically criticize the interest-convergence thesis.<sup>152</sup> I suggest that Driver's arguments are unconvincing, thereby pointing to the continued validity and relevance of Bell's interest-convergence theory. The following Subparts address each of Driver's criticisms in turn.

#### A. *Intraracial Disagreement over "Interests"*

Intragroup conflict in Arizona's ethnic studies controversy undoubtedly exists, but the debate in Arizona has produced reactions to a single issue that manifested themselves as a differences significant enough to pit two communities against one another. On the one side were predominantly Latino students, families, and allies who support ethnic studies in TUSD; on the other side, predominantly White school officials, political officials, and community members, who do not support the program. Beyond this, as Driver recognizes in his article,<sup>153</sup> the interest-convergence theory has been successfully applied to communities that are not linked by a common ethnic or racial characteristic, such as gays, immigrants, criminal defendants,

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<sup>151</sup> See *id.* at 249 ("[Driver] overlooks that Bell's career divides into three intellectual stages. By blurring these stages, Driver confuses separate concepts that Bell articulated at distinct points in his intellectual development. . . . Driver's initial misunderstanding of interest convergence leads him to argue erroneously that Bell's thesis suffers from. . . four analytical flaws.").

<sup>152</sup> See Driver, *supra* note 25, at 156 ("Given the [interest-convergence] theory's prominence within the legal academy and beyond, it is surprising that virtually no sustained scholarly attention has been dedicated to examining the interest-convergence thesis . . . . This Article initiates a critical discussion of the interest-convergence thesis—a discussion that is long overdue.").

<sup>153</sup> See Driver, *supra* note 25, at 153–54 (describing the various groups that have been analyzed using interest-convergence theory, including the Black community, Latinos, and gays).

and religious groups.<sup>154</sup> Thus, it is clear that an analysis of the ethnic studies controversy using interest-convergence theory would be no less powerful if we were to categorize the groups as “supporters of ethnic studies” and “opponents of ethnic studies,” where those categories have been divided roughly along ethnic lines. This categorization would still capture the identity-driven, powerful-versus-historically-marginalized dynamic that Bell’s thesis illustrates. Interestingly, even when limited to ascribed interests based on racial categories, non-Whites have vocally aligned with Latino advocates in defending ethnic studies, expressing fears that their interests may be compromised if movements like that embodied in H.B. 2281 are allowed to take root in Arizona.<sup>155</sup>

It is also worth noting that while Driver’s analysis of the interest-convergence thesis relies heavily on criticism of a binary split imposed on society from the academic/advocate perspective, where “Blacks” align their interests with or against “Whites,” he fails to fully treat the ways in which the acts of a White majority may polarize an issue. For example, Tom Horne’s rhetoric demonizing ethnic studies relied upon the idea that the program’s pedagogy necessarily taught about the dangers of racial and ethnic oppression by a White majority in Arizona.<sup>156</sup> This reality demonstrates how the binary conception of interests so opposed by Driver is not simply conjured up by academics as an unnecessarily caustic way of understanding race relations in the United States, but also is strategically manipulated by political actors.

### B. *Progress in Ending Racism*

Driver’s assertion that the United States has made dramatic strides in race relations is largely uncontested. However, his belief that Bell’s theory of interest convergence “suggests that the racial status of [groups] over the course of United States history is notable more for continuity than for change” suffers from serious flaws.<sup>157</sup> Indeed, Feldman notes that Professor Bell’s work recognized and

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<sup>154</sup> See *supra* note 43 and accompanying text (describing applications of the interest-convergence thesis to these groups).

<sup>155</sup> See, e.g., Tremaine Jasper, *HB 2281 Is a Lesson for African Americans in Arizona — We Need to STAY Informed about the Legislative Process*, PHXSOU.COM, <http://www.phxsoul.com/blackweblogs/2010/05/hb-2281-is-a-lesson-for-african-americans-in-arizona-we-need-to-stay-informed-about-the-legislative-.html> (last visited Aug. 20, 2013) (voicing fears that Black culture and history will be suppressed in schools after the ethnic studies ban).

<sup>156</sup> See Horne Letter, *supra* note 84, at 2 (attributing students’ rudeness and defiance of authority to their “Raza” teachers).

<sup>157</sup> Driver, *supra* note 25, at 156–57.

applauded changes in race relations throughout his career.<sup>158</sup> Still, evidence from Arizona, especially as it appears in the ethnic studies debate, lends some legitimacy to Bell's pessimism with regard to progress in eradicating racism.

The desegregation orders associated with ethnic studies programs in Arizona provide powerful evidence indicating the amount of progress on racism (at least in Arizona public schools) America has made since Professor Bell penned his first articles on interest convergence. The 1978 Arizona order was issued only two years prior to Bell's seminal work on interest convergence (in which Bell examined the forces that made the *Brown* decision possible and expressed doubts regarding how effective American schools could be in enforcing the decision).<sup>159</sup> Bell's recognition of the courts' failure to effectuate desegregation seems to have played out in Arizona, where, as recently as 2011, a court recognized that TUSD had not achieved unitary status due to its failure to "demonstrate[ ] good faith and eliminate[ ] the vestiges of past discrimination to the extent practicable."<sup>160</sup> In coming to this conclusion, the *Fisher v. Tucson Unified School District* decision points to TUSD's failure to satisfy the test for unitary status, both by failing to eliminate the vestiges of segregation, and by failing to show a good faith effort in complying with the desegregation order.<sup>161</sup> The court explained that the vestiges of segregation were still apparent in Tucson, citing the concentration of Hispanic faculty in specific schools, the District's failure to address the "overrepresentation of minority students in drop out, absenteeism, suspension, and expulsion rates,"<sup>162</sup> and the district court's conclusion that the District had "in some cases . . . 'exacerbated the inequities'" of segregation.<sup>163</sup> Even where the District had implemented policies ostensibly intended to comply with the original order, the court found that the district had "'fail[ed] to monitor, track, review and analyze the effectiveness' of its programs."<sup>164</sup> The Ninth Circuit's acknowledgement of the need for continued progress on a thirty-year-old

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<sup>158</sup> See Feldman, *supra* note 148, at 255 ("As late as 1987, Bell asserted that '[t]angible progress [toward racial justice] has been made.'" (quoting DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 5 (1987))).

<sup>159</sup> See Bell, *Interest-Convergence*, *supra* note 21, at 530–31 ("[T]he remedies set forth in the major school cases following *Brown* . . . have not in themselves guaranteed black children better schooling than they received in the pre-*Brown* era.").

<sup>160</sup> *Fisher v. Tucson Unified Sch. Dist.*, 652 F.3d 1131, 1143 (9th Cir. 2011).

<sup>161</sup> *Id.* at 1138.

<sup>162</sup> *Id.* at 1139 n.17.

<sup>163</sup> *Id.* at 1139 n.16.

<sup>164</sup> *Id.* at 1140 (quoting *Fisher v. United States*, 549 F. Supp. 2d 1132 (D. Ariz. 2008)). Importantly, the court also noted that the District "had not given 'time and attention' to how the African American Studies Department could aid the quality education of minority

desegregation order<sup>165</sup> indicates that, at least so far as Tucson, Arizona, is concerned, there is still a significant amount of progress to be made in achieving the goals set decades ago during the *Brown* era. These issues, especially when considered in combination with the strains of bigotry that run throughout the political assault on ethnic studies,<sup>166</sup> weigh against Driver's suggestion that American progress in ending racism limits Bell's theory.

### C. Agency Among Interested Parties

Professor Bell explicitly acknowledged the importance of agency within the Black community in his writings on interest convergence, arguing that members of the minority community should not sit idly by and wait for periods of interest convergence. Instead, members of the minority community should impress upon Whites the universal benefits of expanding rights for all in order to ensure that goals are met when interest convergence does occur.<sup>167</sup> Tracing the evolution of the ethnic studies fight in Tucson using an interest convergence lens not only requires recognition of the efficacy of actors in creating change in racial dynamics, it shows the ways in which those communities whose interests are most threatened by H.B. 2281 have taken action against it. In *Fisher*, interested parties expanded on the threshold level of convergence which had already occurred to spur the end of school segregation per the *Brown* opinion. They used that convergence to facilitate the creation of ethnic studies as a means to achieve a separate goal in the interest of those in power—namely, fulfilling the requirements necessary to end court monitoring of TUSD's desegregation efforts.<sup>168</sup> Additionally, proponents of MASD have consistently sought out opportunities to “‘forge fortuity’ . . . exert[ing] pressure, through protests and otherwise, [encouraging] whites [to] recognize that ‘the cost [of racial injustice is] too high.’”<sup>169</sup>

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students[ ] and had failed to review program effectiveness in order to ensure quality education for minority students.” *Id.* at 1142.

<sup>165</sup> See *id.* at 1134 (discussing 1970s segregation litigation in Arizona).

<sup>166</sup> See Richard A. Orozco, *It is certainly strange . . . : Attacks on Ethnic Studies and Whiteness as Property*, 26 J. EDUC. POL’Y 819, 820 (2011) (discussing the racially tinged language running through efforts by opponents of ethnic studies, including the Tom Horne Letter and H.B. 2281).

<sup>167</sup> See DERRICK A. BELL, JR., RACE, RACISM, AND AMERICAN LAW § 6.1, at 417 (3d ed. 1992) (lauding protest as among “the self help methods blacks have utilized to gain access to opportunities closed or limited by reason of race”).

<sup>168</sup> See generally *Fisher*, 652 F.3d at 1131.

<sup>169</sup> Feldman, *supra* note 148, at 256 (quoting BELL, SILENT COVENANTS, *supra* note 36, at 190).



Conversely, Tom Horne's political activities showcase a kind of agency that Driver does not consider: agency among individuals and groups that oppose developments leveling the playing field between dominant and marginalized interests. The interests that had previously converged to usher in the creation of MASD, discussed in Part II.A, *supra*, did not diverge through a random materialization of environmental factors. Instead, the campaign that would ultimately be largely responsible for legislation that banned MASD was the result of a volitional effort of a group of influential public officials whose sensibilities were insulted by the program's curriculum. Judges, the actors that are so critical to Driver's criticism of the theory,<sup>170</sup> will also play an essential part in shaping the outcome of the ethnic studies debate.

#### D. *The Role of Courts and the Refutability of the Interest-Convergence Thesis*

One of the most interesting elements of the ethnic studies debate in Arizona is the continuing role that courts have played in finding a resolution to Arizona's ethnic studies controversy. Interested parties have pursued a myriad of challenges to whether TUSD could be barred from continuing to teach ethnic studies, ranging from challenges in Arizona state courts<sup>171</sup> to cases pending in federal court regarding the constitutionality of the ban,<sup>172</sup> to parallel cases where outcomes could *mandate* that something equivalent to MASD courses be offered in order to assure that students have access to culturally relevant courses, in compliance with a desegregation order.<sup>173</sup>

The decision of the state administrative law judge (ALJ) ruling that MASD violated H.B. 2281 offers some insight into the ways courts have shaped Arizona's ethnic studies controversy. In the opinion, the ALJ did not task himself with finding "whether the MAS program has achieved a certain level of academic success," but instead limited his determination to whether the program violated the law "by promoting racial resentment . . . by being designed primarily for one ethnic group . . . or . . . by advocating ethnic solidarity instead of

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<sup>170</sup> Driver, *supra* note 25, at 157 (arguing that Bell "accords insufficient agency to two groups of actors—black citizens and white judges—who have played, and continue to play, significant roles in shaping racial realities").

<sup>171</sup> See *infra* notes 173–191 and accompanying text (discussing the state-level administrative decision concerning MASD's violation of H.B. 2281).

<sup>172</sup> See *supra* notes 110–122 and accompanying text (describing the federal challenge to H.B. 2281).

<sup>173</sup> See Order at 14–17, *Fisher v. United States*, 4:74-cv-00090-DCB (D. Ariz. Feb. 6, 2013) (denying the state of Arizona's request to intervene in the case, despite the possibility that a ruling requiring "culturally relevant courses" created potential conflicts with Arizona's ethnic studies ban).

treating pupils as individuals.”<sup>174</sup> The ALJ offered evidence that MASD did in fact violate the law from the Department’s website,<sup>175</sup> its “pedagogy,”<sup>176</sup> and “classroom materials and observations of teachers.”<sup>177</sup> The ruling also relied on statements by the Department that established goals of improved outcomes among Latino students<sup>178</sup> (in accordance with Tucson’s desegregation order)<sup>179</sup> and an academic article that had been written by the Director of MASD as a graduate student.<sup>180</sup> Despite contrary evidence from the Cambium Audit<sup>181</sup> and opinions of expert witnesses, the ALJ concluded that MASD classes were not engaged in permissible “historical (objective) instruction of oppression that may . . . result in racial resentment or ethnic solidarity,” but instead were “actively presenting material in a biased, political, and emotionally charged manner,” without explaining what distinguished the two in MASD’s case.<sup>182</sup> Ultimately, the opinion’s subjective analysis and willingness to default to the conclusions of majority opponents of MASD seems to accord with expectations of institutional behavior in the face of divergent interests.

In contrast, media outlets announced the possibility that MASD would be resurrected due to an order issued in *Fisher* on February 6, 2013.<sup>183</sup> Judge David Bury’s order adopted the litigants’ proposed “Unitary Status Plan” (USP),<sup>184</sup> which mapped the steps that TUSD

<sup>174</sup> *Tucson Unified Sch. Dist. No. 1*, Ariz. Admin. Law Judge Decision No. 11F-002-ADE, at 1 (Dec. 27, 2011).

<sup>175</sup> *Id.* at 13–14.

<sup>176</sup> *Id.* at 14–16.

<sup>177</sup> *Id.* at 20. The opinion “establish[ed]” that the program was designed for Latinos and promoted racial resentment and ethnic solidarity among Latinos without defining those qualities. *See id.* at 34–35. The ALJ also cited opinions of Tucson School Board members as evidence of MASD’s noncompliance with H.B. 2281. *Id.* at 19 (quoting, among others, District Board Member Hicks, who testified as to his “belief that the MAS program constitutes a form of ‘racial indoctrination’ . . . and [thus] the program must come to an immediate end”).

<sup>178</sup> *Id.* at 13 (citing statements from MASD’s website concerning “a Latino academic identity and an advanced level of academic proficiency” as evidence of preferential academic treatment for Latinos).

<sup>179</sup> *See supra* notes 63–74 and accompanying text (describing the desegregation order).

<sup>180</sup> *Tucson Unified Sch. Dist. No. 1*, Ariz. Admin. Law Judge Decision No. 11F-002-ADE, 14–16 (Dec. 27, 2011) (citing Romero & Arce, *Culture as a Resource*, *supra* note 67, which was written prior to the authors’ time as TUSD employees, as evidence of suspect pedagogical practices in the program).

<sup>181</sup> *See supra* notes 97–102 and accompanying text (introducing the Cambium Audit).

<sup>182</sup> *Id.* at 35.

<sup>183</sup> *See, e.g.*, Griselda Nevarez, *Tucson School District Poised to Reinstate Mexican American Studies*, VOXXI (Feb. 7, 2013), <http://www.voxxi.com/tucson-mexican-american-studies/> (stating that the February order mandated that TUSD “implement culturally relevant courses such as the ones taught in the Mexican American Studies program”).

<sup>184</sup> *See supra* notes 79–82 and accompanying text (describing *Fisher v. Tucson* litigation history).

would take to improve educational equity among ethnic groups, including “improv[ing] the academic achievement and education outcomes of the District’s African American and Latino students” through several means, including “adopting culturally responsive teaching methods that encourage and strengthen their participation and success.”<sup>185</sup> Notably, the order also denied the State of Arizona’s motion to intervene to fight a section of the plan calling for “culturally relevant courses,” based on the State’s presumption that this would result in a mandated reinstatement of MASD in Tucson.<sup>186</sup> After noting various redeeming qualities of MASD and expressing doubts about the rulings that led to its removal from TUSD,<sup>187</sup> Judge Bury ruled that since no courses had been developed by the District to comply with the plan, it was impossible to say whether those courses would comply with H.B. 2281, and intervention by the State to block the USP was therefore untimely.<sup>188</sup>

While the order may have left open the potential for later litigation, it did not “save” the program. Instead, in denying the State’s motion to intervene, the court noted, “MAS courses . . . are not at issue in this case. They have been discontinued. The culturally relevant courses called for in the USP . . . will have to be . . . evaluated to ensure that they align with state curriculum standards before being offered in TUSD.”<sup>189</sup> The court went on to “decline[ ] to address the constitutionality of either the statute, its interpretation, or its implementation to preclude [MASD] courses,” noting that those issues would be decided in *Acosta*.<sup>190</sup> While Judge Bury’s order may suggest some level of convergence around MASD as a means to enforce the 1978 desegregation order, this cannot be equated to the full protection of MASD through a court ruling directly discussing the ban.

Potential rebuttal of the interest-convergence thesis in Arizona’s case—if the thesis is employed as the forward-looking tool Driver suggests—turns on a ruling that would strike down the ethnic studies ban and reinstate ethnic studies in TUSD schools. It appears that no such rebuttal exists thus far in *Acosta*. Judge Tashima’s decision found that only one section of the ethnic studies law raised constitutional

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<sup>185</sup> Order at 12, *Fisher v. United States*, 4:74-cv-00090-DCB (D. Ariz. Feb. 6, 2013).

<sup>186</sup> See *id.* at 12–13 (describing the State’s objections to the USP).

<sup>187</sup> See *id.* at 15–16 (citing, among other evidence of improvement in student achievement due to culturally relevant courses, the USP’s Special Master’s report that the Cambium Audit found that students taking MASD courses were more likely to graduate and pass state achievement tests).

<sup>188</sup> *Id.* at 17 (“[T]he Court finds there is no issue ripe for resolution until the culturally relevant courses are developed.”).

<sup>189</sup> *Id.* at 14.

<sup>190</sup> *Id.* at 16.

concerns and determined that “the public interest does not require the issuance of a permanent injunction.”<sup>191</sup> Judge Tashima’s decision aligns with the expectations of the interest convergence thesis, insofar as it explicitly leaves the fate of a politically vulnerable community—here Mexican Americans—in the hands of a dominant group that has little incentive to protect its interests.

As with any theory, a single federal judge’s actions are not alone sufficient to disprove the continued viability of the interest-convergence theory. However, a thorough study demonstrating multiple cases in which judges act in defiance of majority opinion in the interest of protecting a marginalized group would conceivably “refute” the theory, or at least show that its explanatory value has faded. At present, this project has yet to be undertaken in any systematic fashion.

#### *E. Implications of the Ethnic Studies Controversy Outcome*

The creation and eventual dissolution of ethnic studies programs at TUSD strongly suggest that Professor Bell’s understanding of group dynamics shaped by interest-convergence, along with Lani Guinier’s follow-on discussion of interest-divergence, remains a powerful way of explaining how the interests of marginalized groups succeed and fail. As external pressure in the form of court orders concerned with school desegregation and internal agitation for representation from members of a growing minority in Arizona emerged, the creation of ethnic studies in Tucson schools reflected the goals of dominant political actors who had a stake in pleasing both dominant and minority constituencies. As these external and internal pressures diminished, however, motivation to maintain the programs also tailed off, especially in the face of perceived hostility to dominant groups emanating from the ethnic studies program.<sup>192</sup> The result of this divergence of interests was a willingness to remove ethnic studies from school curricula through legislation and unwillingness of administrative and state courts to protect the marginalized population. What is yet to be seen is how federal courts will respond. The district court’s ruling in the latest round of desegregation litigation, where TUSD has been ordered to implement culturally relevant pedagogy, which the State is free to vet under the ethnic studies ban, will test the tension between the two sides.

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<sup>191</sup> Memorandum Order at 29, *Acosta v. Huppenthal*, No. 4:10-cv-00623-TUC-AWT, 2013 WL 871948 (D. Ariz. Mar. 8, 2013).

<sup>192</sup> See *supra* notes 85–108 and accompanying text (describing events contributing to the ban).

The outcome of the controversy in Arizona may have implications for the ways in which states legislate culture and curricula in their public schools. At present, in places not operating under constraints like Tucson's desegregation order, the ethnic studies ban suggests that states can permissibly prohibit cultural values as a part of public school curricula, even if those values reflect those of large parts of the student body. In Arizona, this may mean the continued denial of accurate (if controversial) historical lessons, such as claims among individuals of Mexican descent to land lost in the Mexican-American War<sup>193</sup> or oppression of Latinos coinciding with Manifest Destiny.<sup>194</sup> Depending on the way the desegregation order and *Acosta* unfold, it may behoove Tucson's Mexican communities to frame ethnic studies in a way that shows its value to all students at TUSD, a strategy which would conform with one of Bell's earliest suggestions: that the interests of minority communities are most viable when they can be shown to complement the interests of those in power.<sup>195</sup> In the meantime, what may have been a source of motivation, inspiration, and pride for Mexican American students in Tucson has been lost.<sup>196</sup>

#### CONCLUSION

This Note has argued that the legal ban on Mexican American Studies in Arizona's public schools presents a novel opportunity to assess the continued utility of Derrick Bell's interest-convergence thesis and Lani Guinier's follow-on ideas about interest-divergence against contemporary academic criticism. Specifically, this Note suggests that group cohesiveness on opposing sides of the issue, continued problems with the vestiges of racial inequality in Tucson schools, the agency of individuals invested in the issue, and the continued absence of empirical opportunities to test the thesis all undermine the framework suggested by Justin Driver for critiquing Bell's work. This Note also suggested that the interest-convergence theory's continued efficacy in explaining racial dynamics in America is important, especially with regard to pedagogy in schools. In Arizona,

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<sup>193</sup> See, e.g., RUDOLFO F. ACUÑA, *OCCUPIED AMERICA* 90 (2002) (describing land grants among Mexicans in the American Southwest lost to Anglo-Americans during "land grabs").

<sup>194</sup> See, e.g., JAMES DIEGO VIGIL, *FROM INDIANS TO CHICANOS* 179 (1998) (highlighting the "roots of inequality" associated with Anglo presence in the Southwest in the 1860s).

<sup>195</sup> See Bell, *Interest-Convergence*, *supra* note 21, at 528 (highlighting the benefits of integrated education to segments of the White population, including poor Whites and policymakers).

<sup>196</sup> See Romero & Arce, *Culture as a Resource*, *supra* note 67, at 206–13 (quoting interviews with students that expressed positive feelings stemming from participation in MASD classes).

through participation in the MASD program, students experienced positive elements of a pedagogical model Bell so presciently recognized wherein they engaged with ideas and texts that highlighted and employed the cultural strengths of their communities.<sup>197</sup> As Arizona's struggle with ethnic studies shows, however, it may be some time before "all will reap the benefits from a concerted effort towards achieving racial equality."<sup>198</sup>

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<sup>197</sup> See Bell, *Interest-Convergence*, *supra* note 21, at 532.

<sup>198</sup> *Id.* at 528.