

Rodrigo's Roundelay: *Hernandez v. Texas* and the Interest-Convergence Dilemma

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INTRODUCTION: IN WHICH RODRIGO AND THE PROFESSOR MEET BEFORE THE PROFESSOR'S PARTY AND DISCUSS CELEBRATORY JURISPRUDENCE

I was staring glumly at the single birthday card propped up at the edge of my office desk and pondering my own mortality when I heard a brisk knock at the door.

“Professor, it’s me, Rodrigo.¹ Have you got a minute?”

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¹ See Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992), introducing my interlocutor and alter ego, Rodrigo. The son of an African American serviceman and an Italian mother, Rodrigo was born in the United States but raised in Italy, where his father was assigned to a U.S. outpost. Rodrigo graduated from high school at the base school, then attended an Italian university and law school on government scholarships, graduating second in his class. When the reader meets him, he has returned to the United States to investigate graduate law (LL.M.) programs. At the suggestion of his half-sister, famed U.S. civil rights lawyer Geneva Crenshaw, see DERRICK BELL, AND WE ARE NOT SAVED 7 (1987), he seeks out “the professor” for career advice. Despite their age difference, the two become good friends, discussing affirmative action and the decline of the West (Delgado, *Rodrigo's Chronicle*, *supra*); law and economics (Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993)); love (Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387 (1993)); legal rules (Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993)); the critique of normativity (Richard Delgado, *Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 STAN. L. REV. 1581 (1993)); relations between men and women (Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639 (1993)); enlightenment political theory (Richard Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721 (1994)); black crime (Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994)); narrative jurisprudence (Richard Delgado, *Rodrigo's Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence*, 68 S. CAL. L. REV. 545 (1995) (final chronicle in first cycle and final chapter of RICHARD DELGADO, THE RODRIGO CHRONICLES (1995)); the rule of law (Richard Delgado, *Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379 (1994)); affirmative action (Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995)); clinical theory (Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61 (1996)); legal formalism (Richard Delgado, *Rodrigo's Twelfth Chronicle: Legal Formalism*, 95 MICH. L. REV. 1105 (1997)); the problem of desperately poor border settlements (Richard Delgado, *Rodrigo's Thirteenth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667 (1997)); interracial

The door opened to reveal the lanky figure of my smiling young friend. “I come bearing gifts,” he said, picking up a large flat package, wrapped in red ribbon, which he deposited on the floor outside my door. “This is from Giannina and me.”²

I jumped up and shook his hand warmly, “What a pleasant surprise! I didn’t know you were in town. Come in.” Motioning toward my office couch, I said, “Have a seat. What brings you to these parts?”

“Giannina and I were at a conference in Houston. But our ticket allowed us to stop here for a couple of days on the way back. The two women swore me to secrecy. That’s why you didn’t hear about it.”

“I’m delighted to see you. But if this has something to do with my birthday, I hope you know I hate celebrations.”³

“Don’t worry. Just a few friends, nothing fancy. Giannina is over at your place right now, getting things ready with Teresa.⁴ They sent me to pick you up and make sure you didn’t arrive before they finished. Open your present.”

I warily untied the ribbon, dug through the tissue paper, and picked up the contents. “Hey, what a great shirt!”

“It’s just like that Mexican one of mine that you admired last time.⁵ We had some extras from our trip and decided that this was just the one for you. Does it fit?”

I unfolded the brightly colored shirt with geometric designs and held it out in front of me. “Looks like it’s just my size. Maybe I’ll wear it to the party.”

“We’ve got lots of time. They told me to entertain you for an hour or so. What’s that you’re working on?” Rodrigo pointed to the twelve-inch stack of papers on my desk in front of me.

indifference (Richard Delgado, *Rodrigo’s Remonstrance: Love and Despair in an Age of Indifference—Should Humans Have Standing?*, 88 GEO. L.J. 263 (2000)); Latino civil rights (Richard Delgado, *Rodrigo and Revisionism: Relearning the Lessons of History*, 99 NW. U. L. REV. 805 (2005); and many other topics over the next few years. During this period, the brash, talented Rodrigo earns his LL.M. degree and embarks on his first teaching position. The professor meets Rodrigo’s friend and soul mate, Giannina, and her mother, Teresa; he also learns that Rodrigo’s father’s family immigrated to America via the Caribbean. His father, Lorenzo, looks black and identifies as such, but speaks perfect Spanish.

² See Delgado, *Rodrigo’s Third Chronicle*, *supra* note 1, at 402 (introducing Giannina, Rodrigo’s life companion and soul mate. A published poet and playwright, Giannina recently enrolled in a law school in Rodrigo’s city).

³ Like Rodrigo, the Professor is a fictional character based loosely on a composite of many persons this author has known. He is a man of color in the late stages of his legal teaching career and the veteran of many civil rights struggles.

⁴ See Delgado, *Rodrigo’s Remonstrance*, *supra* note 1, at 266 (introducing Teresa, Giannina’s widowed mother, with whom the professor, a dignified, elderly gent, was immediately smitten).

⁵ See Delgado, *Relearning*, *supra* note 1, at 807 (recounting story of Rodrigo’s new shirt).

"The dreariest task imaginable—making an index for the next edition of my casebook. My publisher gave me the option of sending it out to a professional, but I decided to do it myself. Now I wish I hadn't."

Rodrigo looked sympathetic. "Anything I can do to help?"

"Not really. It's a one-person job. But tell me about your conference. Was it the one about that Latino⁶ case? I know you've been exploring your Latino roots lately. I got a flyer in the mail last month and thought I saw you on the list of speakers."

"That's the very one. Timed to coincide with the fiftieth anniversary of *Hernandez v. Texas*,⁷ it drew some prominent law professors, historians, social scientists, and a large and receptive audience."⁸

In response to my blank expression, Rodrigo went on: "*Hernandez* was the first Supreme Court decision to hold that Latinos—specifically Mexican Americans—may sue for violations of their civil rights. It came down only two weeks before *Brown*.⁹ In fact, it is sometimes called the Latino *Brown v. Board of Education* because it bears so many similarities to that more famous case."

"Right. I knew I recognized it. And I see why you went. You've been interested in Latino civil rights lately."

"I have," Rodrigo acknowledged. "My dad's family immigrated to the United States through the Caribbean, and most of them still speak perfect Spanish. I grew up around that culture. Plus, my mom is Italian, so I have latinicity and romance languages all around me. As you know, I look more black than Latino. Though when we first met some years ago¹⁰ we talked mainly about African American issues, I also feel strongly connected to my Latino roots."

"And you've been traveling in Latin America a lot and wearing Mexican and Guatemalan clothes. Not to mention learning to play the guitar, as I discovered last time."¹¹

"Right. I do love the many facets of Latino culture. But I've also become interested in Latino civil rights."

⁶ The term "Latino" is a broad one, encompassing a diverse collection of ethnic, cultural, and linguistic differences. Its unitary sense in this Article is not meant to diminish or ignore the significant differences that exist within the community. Rather, this Article uses the term partly for convenience and partly because the dominant legal and political culture of the United States has subscribed to an uncomplicated and undifferentiated view of Latinos as a single group. In using the umbrella term, this Article addresses the jurisprudence in its own terms, but without endorsing the blanket generalization.

⁷ 347 U.S. 475 (1954).

⁸ See University of Houston Law Center and Arts Publico Press Sponsor Conference on *Hernandez v. Texas*, <http://www.law.uh.edu/hernandez50/homepage.html> (last visited Oct. 27, 2005) (describing a conference commemorating a civil rights milestone); see also Symposium, *Commemorating the 50th Anniversary of Hernandez v. Texas*, 25 UCLA CHICANO-LATINO L. REV. 1 (2005) (containing some of the conference papers).

⁹ *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

¹⁰ Delgado, *Relearning*, *supra* note 1, at 806.

¹¹ *Id.* (discussing Rodrigo's new-found talent at playing the guitar).

“As might we all,” I said. “Latinos are now the largest ethnic minority in the United States—”¹²

“And in some ways the worst off,” Rodrigo interjected, “with a high poverty rate and incidence of workplace injuries and accidents, in addition to having the highest school drop-out rate of any group.¹³ A United Nations study showed that if it considered all Latinos in the United States as a separate country, that country would rank thirty-fifth in the world on a combined index of social well-being; blacks would rank thirty-first.”¹⁴

“Plus, I think you told me recently that Latinos are even more segregated in schools than blacks are.”¹⁵

“Your memory is good, Professor.”

“I don’t know about that,” I said. “But the group can use all the help it can get. Now tell me more about that conference. Did you give a paper?”

“I did. An early draft. It created quite a stir.”

Noticing a telltale glint in Rodrigo’s eye, I took the bait, “Do I detect a new thesis coming on?”

“You do,” Rodrigo said, leaning forward on the couch and looking up animatedly. “If you have a minute, I could run it past you. Can I buy you a cup of coffee somewhere?”

“Sure, after working on that index all afternoon, I could use a break. We could go to that new coffee shop down the block. I’m parked right across the street from there. After we’re finished, I can give you a ride home.”

When he nodded in agreement, I closed down my computer, put a bookmark in the oppressive manuscript, and turned my answering machine to “on.”

Minutes later, we were at the counter of the Italian-style coffee shop, ordering our beverages. “I’d like a double espresso, Italian roast, if you have it,” said Rodrigo.

“A decaf latte for me,” I said. Then, to Rodrigo: “Doctor’s orders.”

The waiter took our order and said he’d bring our coffees to us when they were ready. He looked a little like one of my students. I wondered idly if he might be Latino.

¹² Lynette Clemetson, *Hispanic Population is Rising Swiftly, Census Bureau Says*, N.Y. TIMES, June 16, 2003, at A22. The term “Latino/a” refers to U.S. residents who trace their origins to a Spanish-speaking, especially Latin American, country. See *infra* notes 36–53 and accompanying text (describing Latinos).

¹³ See *infra* notes 36–53 and accompanying text.

¹⁴ Cass R. Sunstein, *Well-Being and the State*, 107 HARV. L. REV. 1303, 1321 (1994); see also UNITED NATIONS, HUMAN DEVELOPMENT REPORT 2001, at 15, 141–42 (demonstrating that this disparity has grown even wider).

¹⁵ See Richard Delgado, *Locating Latinos in the Field of Civil Rights: Assessing the Neoliberal Case for Radical Exclusion*, 83 TEX. L. REV. 489, 504 n.91 (2004) [hereinafter Delgado, *Locating Latinos*].

After we settled ourselves at a small clean table by the window, I asked, "Now, what's this new thesis of yours?"

I. IN WHICH RODRIGO EXPLAINS HIS DISCONTENT WITH
CELEBRATORY JURISPRUDENCE AND OUTLINES HIS
INTEREST-CONVERGENCE HYPOTHESIS

"It started," he began, "when one of the speakers praised Earl Warren for his role in writing the opinion in *Hernandez*.¹⁶ He said that Warren was the only justice who understood Latinos because of his previous service as attorney general and Governor of California. During the comment session afterward, I asked the speaker if he had not succumbed to a style of history that emphasizes great men, wars, and generals at the expense of common people, unions, and activism. I pointed out that Warren had a poor record with respect to Asian civil rights¹⁷ and that many other forces besides one justice's forceful personality may have contributed to *Hernandez*."

"How did the audience take your question?"

"They were taken aback. Warren is a civil rights icon. Later, when they heard my own thesis, they were even less happy."

We paused as the waiter arrived with our drinks. "Sugar, cream, and powdered chocolate are over there, if you want them," he pointed out. "Refills are free this week."

Sipping my latte, I said, "Mmmm. This may be decaf, but it's as good as the real thing. How's your espresso?"

"Almost as good as we had on our last trip to Mexico. Now, where were we?"

"You were explaining your quarrel with celebratory jurisprudence. What got you to thinking about that?"

A. *In Which Rodrigo Explains His Quarrel with
Celebratory Jurisprudence*

"Oh, I was mulling over why I felt so differently about two types of celebration. I was actually thinking about your party. Why, I wondered,

¹⁶ See Kevin Johnson, *Hernandez v. Texas: Legacies of Justice and Injustice*, 25 UCLA CHICANO-LATINO L. REV. 153, 159, 169–70, 175–78 (2005) [hereinafter Johnson, *Legacies*].

¹⁷ See, e.g., Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73 (1998); see also Edward R. Long, *Earl Warren and the Politics of Anti-Communism*, 1981 PAC. HIST. REV. 51, 54–70 (1981) (calling attention to Warren's fierce anti-communism and efforts to combat domestic subversives while serving as governor of California) [hereinafter Long, *Earl Warren*]; G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* 42–43, 56, 67, 113–14, 119–20 (1982) (showing how Warren, as Attorney General and later Governor of California, was a staunch anti-communist who backed loyalty oaths for state employees).

was it okay to celebrate a friend's birthday, but not to lavish attention on a single Supreme Court decision?"

"Randall Kennedy once wrote an article on that subject," I noted. "Entitled *Race Relations Law and the Tradition of Celebration*, it takes issue with a kind of triumphalist view of civil rights history."¹⁸

"I know," Rodrigo said. "It's a fine article. And in some ways it captured my feeling about the hosannas that marked the conference, with speakers lavishing praise on Earl Warren and the *Hernandez* opinion, as though they solved all of our problems at once."

"So, how did you explain your discontent to your audience?"

"During the question period, I explained it one way. Then, when I gave my own talk a little later, I elaborated a bit more."

"What did you say the first time around?"

"Oh, I just pointed out that ordinary Latino people don't celebrate *Hernandez v. Texas*. While everyone loves a party, few regard *Hernandez* in the mythic terms in which some Latino academics do. Indeed, it seems likely that most of them have never even heard of it. Others are active skeptics."

"Like Derrick Bell and Girardeau Spann among African Americans?" I asked.¹⁹

"Exactly," Rodrigo said enthusiastically. "And this skepticism is no recent development. Early Chicano folk literature, for example, includes *corridos*, *cuentos*, and *carpas*²⁰ that tell of brutal Texas Rangers who gunned down innocent Mexican Americans, and of crooked lawyers, judges, and county land surveyors who stole ancestral lands guaranteed under the Treaty of Guadalupe-Hidalgo.²¹ The legal system appears in the oral literature as a trap for the unwary and a source of unfairness, arrests, hassling, land theft, deportation, and other disasters—best avoided if at all possible."

"And how did your audience react?"

"Skeptically," Rodrigo replied. "They suggested that things might be different nowadays."

"And are they?"

¹⁸ 86 COLUM. L. REV. 1622 (1986).

¹⁹ See, e.g., THE DERRICK BELL READER (Richard Delgado & Jean Stefancic eds., forthcoming 2005) (collecting examples of Bell's skeptical, material-determinist view of black legal history); GIRARDEAU A. SPANN, RACE AGAINST THE COURT (1993) (articulating a similar view).

²⁰ "Sagas, stories, and tent theater": traditional story-telling techniques of Chicano oral history.

²¹ For a discussion of this oral literature, see Delgado, *Locating Latinos*, *supra* note 15; AMÉRICO PAREDES, A TEXAS-MEXICAN CANCIONERO xvii–xviii, 30–33 (1976); NICOLÁS KANELLOS, HERENCIA: THE ANTHOLOGY OF HISPANIC LITERATURE OF THE UNITED STATES 5–6, 106–29 (2002); see also Ralph Blumenthal, *New Charges Tarnish Texas Rangers' Image and Reopen Old Wounds*, N.Y. TIMES, Oct. 31, 2004, at A20 (describing the Texas Rangers' history of violence toward Latinos).

"Not really. El Teatro Campesino, for example, seems never to have put on a skit in which a lawyer, court, or judge emerges as a hero, or the Supreme Court as staunch defender of little people.²² As far as I can tell, The Royal Chicano Air Force²³ has never depicted *Hernandez v. Texas* or any other legal decision in glowing terms. The legendary, drug-taking, fast-talking gonzo lawyer Oscar Zeta Acosta . . ."

"The fellow who represented the L.A. Thirteen and Biltmore Hotel defendants in the days after the Sleepy Lagoon murders?" I asked.

"Yes, him.²⁴ He comes in for an occasional admiring mention. Aside from that, veneration for law and lawyers is in short supply."

"Was your audience convinced?"

"Not at all. I asked them to try a thought experiment: Imagine yourself walking into a gathering of ordinary Latino people, at a job site, for example, and announcing, 'My name is _____. I represent the law.' Ask yourself whether your audience would smile and draw closer, or regard you with suspicion and edge closer to the exits."

"Just for the sake of argument," I said, eyeing my cup, which I had nearly drained, "what if the common people are wrong and the academics right? What if *Hernandez v. Texas* deserves greater attention than it has received from mainstream scholars and teachers of constitutional law? What if it really is, in its way, as momentous and farsighted as *Brown v. Board of Education* in framing a theory to protect the Latino community from the ravages of discrimination?"

"Answering that requires that I set out my thesis in further detail," Rodrigo said. "Do you have the time?"

"I do," I replied. "Although I might like a refill. What about you?"

As though reading our minds, the waiter appeared at our tableside to inquire, "Would you gentlemen like refills?" When we nodded, he repeated our order, which we confirmed, and left for the counter, our near-empty cups in hand.

"Good timing," said Rodrigo admiringly. "Anyway, my thesis is that the ordinary people—the Latino restaurant workers, gardeners, janitors, and garment workers who do not sing the praises of *Hernandez* or any other legal decision—are right and the scholars wrong. Their skepticism, founded

²² See Yolanda Broyles-González, *El Teatro Campesino: Theatre in the Chicano Movement*, in JUAN F. PEREA, RICHARD DELGADO, ANGELA P. HARRIS & STEPHANIE M. WILDMAN, *RACE AND RACES: CASES AND MATERIALS FOR A DIVERSE AMERICA* 976, 978 (2000) [hereinafter PEREA ET AL.] (describing the tone and range of subjects of this earthy, bottom-up road show and theatrical company); see also Luis Valdez, *Notes on Chicano Theater*, in LUIS VALDEZ, *EARLY WORKS: ACTOS, BERNABÉ, AND PENSAMIENTO SERPENTINO* (1990) (same).

²³ For a description of this feisty, community-based arts collective and its program of posters, sketches, dance, murals, and guerrilla theater, see Royal Chicano Air Force, *What is the RCAF?*, <http://www.chilipie.com/rcaf/> (last visited Oct. 1, 2005).

²⁴ On Oscar Acosta's life and philosophy of community lawyering, see Oscar "Zeta" Acosta, *Life in the Trenches*, in *THE LATINO/A CONDITION: A CRITICAL READER* 332 (Richard Delgado & Jean Stefancic eds., 1998).

in long experience, is closer to the truth than the praises of the academy. They just don't put forward a five-part argument, with footnotes and examples. What I'd like to do is just that."

"This I'd love to hear," I said, making room on the table for the fresh cups of coffee that the waiter had brought.

B. Offstage Forces: The Supreme Court as Manchurian Candidate

"I wonder, Professor, if you've seen the movie *The Manchurian Candidate*."²⁵

When I shook my head, Rodrigo explained, "In a 1962 movie, remade in 2004, the stepson of a presidential candidate turns out to have been a prisoner of war who underwent interrogation at the hands of Chinese communists. When the young war hero begins acting in a peculiar robot-like fashion, some of his countrymen suspect that he is a potential assassin acting under some outside influence. When he makes a number of decisions that confirm their suspicions, a former member of his platoon, played by Frank Sinatra, takes matters into his own hands. Dimly remembering his own interrogation, Sinatra breaks through the cloud of hypnotic suggestion and, aided by his love interest Janet Leigh, saves the situation."²⁶

"It does sound dimly familiar," I said, smiling. "And I gather you think this has something to do with that decision your colleagues were celebrating?"

"I do," Rodrigo said with conviction. "Some of my reasons parallel Derrick Bell's when he cautioned his readers not to cheer *Brown v. Board of Education* and the rest of the 1960s-era civil rights breakthroughs too loudly, but rather to watch and see whether they delivered on their promises.²⁷ He warned that civil rights gains almost always come as a result of a momentary convergence of interests between white elites and blacks."²⁸

When Rodrigo paused for a sip of his high-octane brew, I continued, "And when that convergence ends, the breakthroughs slip away."

"Right. The victim of administrative foot-dragging, narrow judicial construction, or delay. This happens every time. Blacks are soon back to where they were before the landmark decision, if not worse off."

"And you think that will happen with *Hernandez v. Texas*?"

²⁵ THE MANCHURIAN CANDIDATE (United Artists 1962).

²⁶ *Id.* Film critic Roger Ebert posits that the Sinatra character himself may have been part of the communist plot and Janet Leigh the triggerwoman. Roger Ebert, *The Manchurian Candidate*, CHI. SUN-TIMES: WEEKEND PLUS, Nov. 29, 2002, at 33.

²⁷ See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) [hereinafter Bell, *Interest-Convergence*]; BELL, *supra* note 1.

²⁸ Bell, *Interest-Convergence*, *supra* note 27.

"It might have happened already. Bell's evidence consisted of a careful review of black history and some astute observations on white psychology."

"His thesis received a great boost in a recent book by legal historian Mary Dudziak," I added. "Entitled *Cold War Civil Rights*, it documents Bell's thesis in great detail.²⁹ Secret memo after memo show that elite decision makers, including some on the Supreme Court, engineered a breakthrough for blacks in order to boost America's fortunes in the international arena."³⁰

"Exactly," Rodrigo replied. "We were then in the earlier stages of a prolonged Cold War against the forces of godless, monolithic international Communism . . ."³¹

"Competing for the loyalties of the Third World," I added.

"Yes. Which was largely black, brown, or Asian," Rodrigo continued. "Yet the world press had the nasty habit of splashing across its front pages stories of domestic atrocities like the murder of Emmett Till."³²

"As well as lynchings and Southern sheriffs with cattle prods shocking peaceful civil rights protesters," I added.

"Right," Rodrigo continued. "I think you and I discussed this earlier.³³ Even though our society has been conditioned to believe that *Brown* was a great victory for morality and equal rights, we agreed, as do many, that it was international appearances and not a moral breakthrough that prompted the Supreme Court to decide as it did in *Brown*."³⁴

I paused for a moment and then looked up. "And you think that something similar explains *Hernandez v. Texas*? Is that why you asked if I was familiar with *The Manchurian Candidate*?"

"I do," Rodrigo replied decisively. "If you examine Latino legal history, you see the same interest convergence that explains *Brown v. Board of Education* . . ."

"And that outraged many of Bell's readers," I interjected.

"Agreed," Rodrigo said. "They found his thesis cynical and disillusioning, preferring to think of *Brown* as a great moral breakthrough, not a case of white people doing themselves a favor."³⁵

²⁹ MARY DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 106–51 (2000).

³⁰ *Id.*

³¹ 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, 372 (2002) [hereinafter Delgado, *Explaining the Rise and Fall*].

³² *Id.*

³³ See Delgado, *Relearning*, *supra* note 1. For further discussion of this point, see *infra* notes 106–108, 110–112, 117–119, 161–162, 179–180, 184–193 and accompanying text.

³⁴ Delgado, *Relearning*, *supra* note 1; see also Delgado, *Explaining the Rise and Fall*, *supra* note 31.

³⁵ See, e.g., Alan D. Freeman, *Derrick Bell—Race and Class: The Dilemma of Liberal Reform*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 573 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000).

“But do go on,” I said. “This is fascinating. Has anyone else applied Bell’s material-determinist theory outside the area of black civil rights?”

“Not to my knowledge,” Rodrigo replied. “I ran a short version of my thesis past the audience at the conference. They seemed stunned. But now I’ve done some more research, and I’m even more sure of its truth. The judiciary responded to a similar set of forces in both cases, even if only dimly aware of it at the time.”

“This I’d love to hear,” I said. “Could you use another refill first?”

II. IN WHICH RODRIGO SETS THE STAGE FOR HIS ASTONISHING THESIS

The waiter again seemed to walk out of nowhere. “Can I fill those cups for you, gentlemen?”

“Sure,” Rodrigo said, already happily caffeinated.

“Make sure mine’s decaf,” I said. Then, to Rodrigo, “Can’t have caffeine after noon or I’m up all night. But tell me, how did you structure your talk? Did you begin with a review of the Latino community? I imagine your audience did not know much about it. Even I know little more than the basics.”

A. *Rodrigo Discusses Latinos in the United States*

“I did,” said Rodrigo. “Going back to the early years, when U.S. society first encountered Latinos as the early settlers pushed westward to Texas, then California and the rest of the Southwest. The hardy farmers and ranchers they found there were unlike the Indians the dominant Anglos had fought and conquered. These Mexicans were peaceful. They had advanced agriculture, property and irrigation systems and close, intact families. Even though some of them were familiarly European, they all needed to be displaced to make way for American expansion.”³⁶

“A familiar story,” I said. “But go on.”

“I’m sure it will sound familiar. The Mexicans’ brown skin and indigenous appearance invited racism . . .”

“Indeed,” I interjected, “the term ‘Anglo-Saxon’ seems to have come into common use during this period precisely to justify the take-over of Mexican-owned land. I do know about that from reading Reginald Horsman.”³⁷

“I was just reading his book. It’s a compelling study,” Rodrigo said. “It explains how the United States rationalized a brutally aggressive war with Mexico. U.S. forces marched all the way to Mexico City and dic-

³⁶ See Delgado, *Locating Latinos*, *supra* note 15, at 492–93. Some of the Latinos were mestizo, with Indian forebears and features.

³⁷ REGINALD HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM 208–10 (1981).

tated terms in which that country surrendered nearly one-half of its territory."³⁸

"And after the war, anti-Mexican attitudes justified shady lawyers and corrupt local officials in depriving the Mexicans of ancestral lands in the Southwest guaranteed to them under the Treaty of Guadalupe-Hidalgo.³⁹ Another author I know, Rodolfo Acuña, writes about that,"⁴⁰ I added.

"True. Just around that time," Rodrigo continued, "pseudoscience, which until then had focused almost exclusively on African American defects, shifted to consider Latino genetic inferiority.⁴¹ Prominent eugenicists, such as Madison Grant . . ."

"I remember him," I chimed in.

"Right. After focusing his scholarship on what was wrong with your ancestors, he turned to Latinos, writing that their mixed blood rendered them inferior even to the Southern Europeans and Slavs, who were then immigrating to the United States in large numbers, and put them hardly above blacks."⁴²

"Imagine that," I said dryly.

"U.S. decision makers seem to have gotten the message. During the middle years of the twentieth century, the United States launched two large programs to deport excess Mexicans and Mexican Americans, many of them perfectly legal U.S. citizens of long standing.⁴³ Carried out during times of economic downturn when jobs were scarce, these programs operated in tandem with labor contracting programs . . ."

"Sometimes called Bracero programs, no?" I interjected.

"Exactly. Those programs came into being when the U.S. economy was strong and the agricultural sector needed more, not fewer, Mexican workers.⁴⁴ Things settled down for a time. Then, over the past few decades, immigration reform and the lure of jobs brought millions of new immigrants from Latin America.⁴⁵ By the end of the 1980s, the growing Latino population once again began to cause alarm.⁴⁶ English-Only⁴⁷ and anti-immigration movements sprang up,⁴⁸ while bilingual education and aid to immigrants and exiles came under fire."⁴⁹

³⁸ Delgado, *Locating Latinos*, *supra* note 15, at 493.

³⁹ See PEREA ET AL., *supra* note 22, at 260–99.

⁴⁰ See RODOLFO ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* 88–90, 96, 134 (5th ed. 2004).

⁴¹ Delgado, *Locating Latinos*, *supra* note 15, at 493–94.

⁴² *Id.*

⁴³ *Id.* at 494.

⁴⁴ See PEREA ET AL., *supra* note 22, at 312–16, 320.

⁴⁵ Delgado, *Locating Latinos*, *supra* note 15, at 501–02.

⁴⁶ See PEREA ET AL., *supra* note 22, at 835–36, 841 (describing the new nativism).

⁴⁷ *Id.* at 541–48, 848–57.

⁴⁸ See JEAN STEFANCIC & RICHARD DELGADO, *NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA* 20–32 (1996).

⁴⁹ *Id.*

“But the immigrants kept coming, if I’m not mistaken, and not just from Mexico,” I said.

“They did. Since the Bureau of the Census resumed counting Latinos—persons of Spanish/Hispanic origin—in 1980, the group has nearly tripled in size from 14 to 38.8 million, making Latinos the largest minority group in the country, slightly ahead of blacks.⁵⁰ Nearly two-thirds of Latinos are Mexican Americans, who are also the fastest-growing subgroup.⁵¹ Then come Central and South Americans, totaling about 13%, then Puerto Ricans and Cubans with 11% and 5%, respectively.”⁵²

“Where do these groups live?” I asked.

“Mexican Americans are concentrated in the Southwest, but are beginning to form substantial settlements in the Midwest, South, and East.⁵³ Large groups of Puerto Ricans live in New York and other large eastern cities, while most Cubans live in Florida.”⁵⁴

“Latinos as a group are severely disadvantaged, I think you said.”

“That’s right. Larger than the population of Canada, the group suffers from poverty and an extraordinary school dropout rate.”⁵⁵ Rodrigo paused and took a sip of espresso.

“Thanks for the overview. I knew some of that, but it was good to hear it all at once. It puts your talk in context. Where did you go from there?”

“Since some members of my audience were legally trained, I discussed the subsequent history of *Hernandez*. Then, I showed how the case was a product of interest convergence, not some sort of moral breakthrough by the Supreme Court. Then, at the end I returned to my theme of celebratory jurisprudence. Each of these subsections made my audience progressively angrier.”

“This I’d love to hear,” I said, smiling. “I’ve stirred a few people up in my day.”

Rodrigo grinned. “Like father, like son. You’ll have to be the judge of whether they were justified in getting mad at me or not. Do you have time for all three topics?”

“Fire away,” I said. “I’m delighted to have an excuse not to work on my index. And I’m sure the women are having a good time catching up with each other. What time are the guests supposed to arrive?”

Rodrigo looked at his watch. “We’ve got about an hour and a half. Although Giannina wanted me to pick up a few things on our way there.”

“There’s a convenience store and a food chain right on our way,” I said.

⁵⁰ Delgado, *Locating Latinos*, *supra* note 15, at 501–02.

⁵¹ *Id.* at 503.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 503–04.

"Then we've got plenty of time. How familiar are you with *Hernandez v. Texas*?"

"Not very. You'd better start with the basics."

B. The Hernandez v. Texas Decision

"The case got started," Rodrigo began, "when Pete Hernandez murdered another Latino after an altercation in Jackson County, Texas, in 1952.⁵⁶ When his lawyer challenged the jury pool for containing no Mexican Americans in a region with a heavy Latino concentration, the trial court rejected the challenge on the ground that Mexican Americans were not a separate racial group apart from whites.⁵⁷ Because Hernandez was not seen as black, the court considered him white. As the jury was composed of white citizens, the court ruled that he would receive a trial by a jury of his peers."⁵⁸

"A familiar trick," I said. "I think I heard that school authorities in the Southwest used to do something similar."

"Right," Rodrigo replied. "They would mix fifty percent Latino and fifty percent black kids in one school and declare it integrated. Then they'd point out that Latinos themselves insisted they were white."⁵⁹

"But I gather the Court in *Hernandez* saw through this shabby strategy?"

"It did. After reviewing evidence of pervasive discrimination against Mexicans in southern Texas, including whites-only bathrooms and signs declaring Mexicans unwelcome in local restaurants, it found that regional prejudice marked Mexicans and Mexican Americans as a separate, stigmatized group.⁶⁰ The Court also found that Jackson County's history of never having had a Mexican on its jury panel bespoke racism.⁶¹ It ordered that Hernandez receive a new trial in front of a jury from which Mexicans had not been systematically excluded."⁶²

"I can see why Chicano legal scholars, at least, regard the case as a breakthrough."

"It is, in a way," Rodrigo conceded. "But the opinion, which appears in the United States Reporter immediately before the better known *Brown v. Board of Education*, is brief, running slightly over six pages, and devoid of the soaring rhetoric and citations to social science that marked the landmark decision. Its analysis and reasoning are also more crabbed."

⁵⁶ *Hernandez v. Texas*, 347 U.S. 475, 476 (1954).

⁵⁷ *Id.* at 477–78.

⁵⁸ See Steven H. Wilson, *Brown over "Other White,"* 21 LAW & HIST. REV. 145, 160–65 (2003); Clare Sheridan, "Another White Race," 21 LAW & HIST. REV. 109 (2003) (both describing litigation leading up to the Supreme Court decision in *Hernandez*).

⁵⁹ Delgado, *Locating Latinos*, *supra* note 15, at 519; see, e.g., Wilson, *supra* note 58.

⁶⁰ *Hernandez*, 347 U.S. at 479–80.

⁶¹ *Id.* at 480–82.

⁶² *Id.*

“How so?”

“*Brown*’s broad language declaring segregation a constitutional evil practically invited future litigants to expand it to a host of other settings, such as school faculty and staff,⁶³ public transportation,⁶⁴ and lunch counters.⁶⁵ In contrast, *Hernandez* is riddled with a number of surprising and seemingly gratuitous qualifications. For one thing, it limits its own scope to regions where Latinos can prove a history of local discrimination, thus requiring that they establish their own racialization every time they sue.⁶⁶ It also relies heavily on the jury-trial guarantee.”

“I see. That makes it problematic to extend beyond that setting,” I observed. “Did the opinion contain any other limitations?”

“It did,” Rodrigo replied. “It turned on the Fourteenth Amendment’s Equal Protection Clause,⁶⁷ a familiar vehicle imported from the black civil rights struggle. In analogizing Latinos to blacks with brown skin, the Court blithely adopted an approach that proved ill-fitted to redress many of the harms this group suffers.”⁶⁸

“Hmm, I’ll definitely want to hear about that,” I said. “But first, why don’t you tell me about *Hernandez*’s subsequent history. I gather the case had much less effect than some of your fellow conferees were willing to admit?”

C. Later Courts’ Treatment of *Hernandez*

“Much less,” Rodrigo said. “Despite the smattering of celebrations marking its anniversary, *Hernandez* exerted relatively little influence on subsequent Supreme Court jurisprudence. The Court itself has cited it a mere thirty-eight times, only a handful of which are for the proposition that Mexican Americans or Latinos are a group that experiences redressable discrimination.”⁶⁹

“I think I might be able to guess some of those cases,” I said. “*White v. Regester*, the voting rights case?”⁷⁰

“Right,” said Rodrigo. “And, of course, *Keyes v. Denver School District No. One*, the Denver school segregation case.”⁷¹

“Of course,” I said. “Along with blacks, Chicanos were one of two groups that brought suit.”

⁶³ *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969).

⁶⁴ *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam).

⁶⁵ *Turner v. City of Memphis*, 369 U.S. 350 (1962).

⁶⁶ *Hernandez*, 347 U.S. at 478 (“Whether such a group exists within a community is a question of fact.”).

⁶⁷ *Id.* at 479 (discussing “discrimination prohibited by the Fourteenth Amendment”).

⁶⁸ See Delgado, *Relearning*, *supra* note 1.

⁶⁹ Number of hits found using LexisNexis U.S. Supreme Court Cases, Lawyers’ Edition Database. Last consulted Oct. 1, 2005.

⁷⁰ 412 U.S. 755, 767 (1973).

⁷¹ 413 U.S. 189, 197 (1973).

"Then there's *Castaneda v. Partida*," Rodrigo continued, "another jury discrimination case.⁷² The only other similar mention of *Hernandez* in Supreme Court jurisprudence came in *Tijerina v. Henry*, in which the Court dismissed an appeal from the District Court of New Mexico."⁷³

"I think I've heard of that case," I said. "Plaintiffs sought to file a class action on behalf of Latinos in that state, charging several types of discrimination.⁷⁴ They described their class as 'Indo-Hispano, also called Mexican, Mexican American and Spanish American . . . mixed Indian and Spanish ancestry and . . . [speakers of] Spanish as a primary or maternal language.'⁷⁵ I was reading the opinion just the other day. The language is so striking that it stayed with me."

"That's the very case," Rodrigo went on. "The lower court declined to certify the complaint, holding that the definition of the class was too vague.⁷⁶ Dissenting from the dismissal of the appeal, Justice William Douglas cited *Hernandez* and stated that in light of the record of discrimination against Latinos in the Southwest, he would have allowed the suit to go forward."⁷⁷

When Rodrigo looked up expectantly, I took the bait and asked, "And those four cases are it?"

"They are. And though they did aid Mexican Americans and Latinos in challenging discrimination, cases like them have been relatively few. *Hernandez* has more commonly been cited for other propositions, and in cases in which blacks and other groups sought relief. These include challenges to the death penalty⁷⁸ and laws forbidding interracial cohabitation.⁷⁹ They also include affirmative action cases, like *Regents of University of California v. Bakke*⁸⁰ and *City of Richmond v. J. A. Croson Company*,⁸¹ cases concerning mainly African Americans, and other cases stemming from black civil rights activism, like *Garner v. Louisiana*,⁸² an early lunch counter case.

"Overall, only a handful of Supreme Court citations to *Hernandez* stand for the proposition that Latino plaintiffs deserve relief from dis-

⁷² 430 U.S. 482, 497 (1977).

⁷³ 398 U.S. 922, 924 (1970).

⁷⁴ *Id.* at 922 (Douglas, J., dissenting from dismissal of appeal).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 924–26.

⁷⁸ See *McClesky v. Kemp*, 481 U.S. 279, 316 n.39 (1987) (citing *Hernandez* in unsuccessful challenge to disproportionate imposition of the death penalty on black defendants).

⁷⁹ See *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) (citing *Hernandez* in successful challenge of a law forbidding "[a]ny negro man and white woman, or any white man and negro woman, who are not married to each other" from living together).

⁸⁰ 438 U.S. 265, 295 (1978) (citing *Hernandez* in case determining limits of affirmative action in higher education admissions).

⁸¹ 488 U.S. 469, 523 (1989) (Scalia, J., concurring) (mentioning *Hernandez* in decision invalidating a minority set-aside).

⁸² 368 U.S. 157, 178 (1961) (Douglas, J., concurring).

crimination. A number of lower court cases distinguish or refuse to follow it, some on the ground that local attitudes are rarely uniform, or that the category is difficult to define or discern.”⁸³

“Ah, the limitation you mentioned clicking in,” I observed.

“And with a vengeance,” Rodrigo agreed. “Others cite it for the proposition that discrimination against a group must be situation-specific and proved each time.⁸⁴ By comparison, the Supreme Court has cited its own decision in *Brown* 176 times.”⁸⁵

“And for a wide variety of propositions, you said earlier.”

“Right. Not just in student desegregation cases, but in ones dealing with school faculty and staff,⁸⁶ courtroom seating,⁸⁷ voting districts,⁸⁸ poll taxes,⁸⁹ employment,⁹⁰ public transportation,⁹¹ city-owned restaurants,⁹² and tax exemptions for charities that discriminate.⁹³ It has also cited *Brown* to condemn public enforcement of private discrimination⁹⁴ and to support its disapproval of discrimination against groups other than blacks, such as Chinese Americans,⁹⁵ illegitimate children,⁹⁶ whites,⁹⁷ and undocumented Mexican schoolchildren.⁹⁸ *Brown* has been the subject of over forty law review symposia this anniversary year alone.”

“And *Hernandez*?” I asked.

“To my knowledge, only one.”⁹⁹

“What about outside the legal realm?” I asked.

⁸³ See, e.g., *United States v. Rodriguez*, 588 F.2d 1003, 1006–08 (5th Cir. 1979); *Hirst v. Gertzen*, 676 F.2d 1252, 1258–60 (9th Cir. 1982); *Johnson v. State*, 288 F. Supp. 655, 657 (M.D. Ala. 1968); *State v. Hobbs*, 282 S.E.2d 258, 267 (W. Va. 1981); Lisette E. Simon, *Hispanics: Not a Cognizable Ethnic Group*, 63 U. CIN. L. REV. 497, 503–04, 510–22 (1994) (citing cases and arguing that the Hispanic/Latino category is vague and unmanageable).

⁸⁴ See, e.g., *Rodriguez*, 588 F.2d at 1007.

⁸⁵ Number of hits found using LexisNexis U.S. Supreme Court Cases, Lawyers’ Edition Database. Last consulted Oct. 1, 2005.

⁸⁶ *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225, 226 (1969).

⁸⁷ *Johnson v. Virginia*, 373 U.S. 61, 62 (1963) (per curiam).

⁸⁸ *Shaw v. Reno*, 509 U.S. 630, 649 (1993); *Reynolds v. Sims*, 377 U.S. 533, 566 (1964); *Gomillion v. Lightfoot*, 364 U.S. 339, 349 (1960) (Whittaker, J., concurring).

⁸⁹ *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966).

⁹⁰ *Colo. Anti-Discrimination Comm’n v. Cont’l Air Lines, Inc.*, 372 U.S. 714, 722 (1963).

⁹¹ *Gayle v. Browder*, 352 U.S. 903, 903 (1956) (per curiam).

⁹² *Turner v. City of Memphis*, 369 U.S. 350, 353 (1962).

⁹³ *Bob Jones Univ. v. United States*, 461 U.S. 574, 593 (1983).

⁹⁴ *Griffin v. Maryland*, 378 U.S. 130, 136 (1964).

⁹⁵ *Guey Heung Lee v. Johnson*, 404 U.S. 1215, 1216 (1971).

⁹⁶ *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 172 (1972).

⁹⁷ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 294 (1978).

⁹⁸ *Plyler v. Doe*, 457 U.S. 202, 222 (1982).

⁹⁹ See Symposium, *supra* note 8. *Hernandez* has commanded relatively little attention from the legal academy at large. See LexisNexis U.S. Law Reviews and Journals, Combined Database (showing that *Hernandez* has been cited 392 times; *Brown*, well over 3000) (last consulted Oct. 6, 2005).

"Recent scholarship has demonstrated that *Brown v. Board of Education*, whatever its doctrinal significance, had relatively little effect beyond the legal spectrum.¹⁰⁰ *Hernandez* appears to have had even less. The Latino community today is as impoverished and marginalized as it was fifty years ago."¹⁰¹

"Why do you think *Hernandez* had so little influence?" I asked.

"Well, for one thing, the case did not come on the heels of a long, carefully orchestrated campaign, like that which led up to *Brown*.¹⁰² Its focus was narrowly procedural, rather than substantive.¹⁰³ Few members of the public were likely to sympathize with a man convicted of murder; Pete Hernandez was not nearly as appealing a plaintiff as little black schoolchildren walking to school in starched dresses."

"Latinos' struggle for equality started later than that of blacks," I chimed in. "It also commanded less public attention, perhaps because *Brown* overturned the sixty-year-old separate but equal doctrine,¹⁰⁴ while *Hernandez* merely extended the jury trial guarantee to a new group. It lacked tension and drama."

"That it did," Rodrigo seconded. "That Texas might resist the Court's mandate and force the President to send in the National Guard to assure Latinos an opportunity to serve on juries was just not in the cards."

"And then there was that peculiar proof requirement that you mentioned.¹⁰⁵ What part did that play?" I asked.

"A large one. Following in *Hernandez's* footsteps is costly. The opinion made Mexican Americans' cognizability a matter of fact requiring proof each time.¹⁰⁶ A lawyer considering filing suit on behalf of a Latino might

¹⁰⁰ See Ebert, *supra* note 26 and accompanying text; Bell, *Interest-Convergence*, *supra* note 27 and accompanying text; MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS (2004) (demonstrating the comparatively small role judicial decisions play in ushering in social change); GERALD N. ROSENBERG, THE HOLLOW HOPE (1991) (same). On current conditions, including poverty and racism, that the black community endures, many years after *Brown*, see ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (expanded and updated Ballantine Books ed. 1995) (1992).

¹⁰¹ See Sunstein, *supra* note 14; Delgado, *Locating Latinos*, *supra* note 15, at 503-04; *Hernandez v. Texas* 347 U.S. 475, 476 (1954); text accompanying notes 14, 54-56.

¹⁰² See PEREA ET AL., *supra* note 22, at 156-61. On how the *Hernandez* decision came about, see A COTTON PICKER FINDS JUSTICE! THE SAGA OF THE *HERNANDEZ* CASE (Ruben Munguia ed., 1954), available at <http://www.law.uh.edu/Hernandez50/saga.pdf>. The decision seems to have been the work of three attorneys, backed by a number of community organizations that were pressing for educational desegregation as their top priority. The decision drew relatively little attention, even in the Latino community. If it was an establishment ploy to buy domestic peace, it failed. See generally IAN F. HANEY LOPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE (2003) (describing outbreak of Brown Power and Latino activism only a short time later).

¹⁰³ For example, it was concerned with the mode of trying a case and the kind of jury available as a matter of right. See *Hernandez*, 347 U.S. at 477-482.

¹⁰⁴ *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 691-92 (1954).

¹⁰⁵ See *supra* note 66 and accompanying text.

¹⁰⁶ *Hernandez v. Texas*, 347 U.S. 475, 478 (1954); see *supra* note 66 and accompanying text.

easily find a skeptical court requiring him to produce costly evidence of local discrimination, especially during a time, such as now, when the ‘community norms’ have turned to colorblind racism and everyone pretends that race and racism do not exist.¹⁰⁷ A pragmatically oriented lawyer might find other avenues and theories more promising.”

When Rodrigo was silent for a moment, I said, “That’s a serious set of hurdles. No wonder the opinion did not change the world overnight.” When Rodrigo was still silent, I added, “But I gather you think there’s more?”

III. IN WHICH RODRIGO EXPLAINS *HERNANDEZ* IN THE FRAMEWORK OF INTEREST-CONVERGENCE

“I do,” Rodrigo said with conviction. “The decision came about because the United States needed to burnish international appearances during a time of Cold War tensions.¹⁰⁸ It also needed to quell rumblings in the Latino community about decorated veterans unable to eat a meal in their local restaurants.¹⁰⁹ But the opinion was especially the result of concern over communist threats in Latin America.”¹¹⁰

I leaned forward in my chair. “What a fascinating thesis! This I want to hear. It parallels, and expands upon, some important writing about the black civil rights movement.¹¹¹ Do go on.”

“Do you recall, Professor, the world political situation that prevailed during the period when *Hernandez* was making its way up to the Supreme Court?” When I nodded, Rodrigo continued. “As you know, the United States had just concluded a prolonged struggle against the original axis of evil and was in the early stages of the Cold War, in which it was competing with the Soviet Union for the loyalties of the Third World.”¹¹²

“Much of which was nonwhite,” I added.

“Right. But as you know, the world press publicized our racial troubles, and the Soviets seized on them to win propaganda victories.¹¹³ Re-

¹⁰⁷ See Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1 (1991) (examining the Supreme Court’s color-blind constitutionalism).

¹⁰⁸ DUDZIAK, *supra* note 29 (describing this period in history). See TOM C. CLARK & PHILIP B. PERLMAN, *PREJUDICE AND PROPERTY: AN HISTORIC BRIEF AGAINST RACIAL COVENANTS* 34 (1948) (book version of amicus brief in *Shelley v. Kramer*, 334 U.S. 1 (1948), calling attention to the way domestic racism embarrassed the United States in the eyes of international critics).

¹⁰⁹ See PEREA ET AL., *supra* note 22, at 315 (describing this and similar accounts).

¹¹⁰ See *infra* notes 114–200 and accompanying text. For incisive analyses of this period, see WALTER LA FEBER, *INEVITABLE REVOLUTIONS: THE UNITED STATES IN CENTRAL AMERICA* (2d ed. 1993); LARS SCHULTZ, *BENEATH THE UNITED STATES: A HISTORY OF U.S. POLICY TOWARD LATIN AMERICA* (1998). For a popular overview of Latino history, including this formative period, see HIMILCE NOVAS, *EVERYTHING YOU NEED TO KNOW ABOUT LATINO HISTORY* (3d ed. 2003).

¹¹¹ See, e.g., Bell, *Interest-Convergence*, *supra* note 27; Delgado, *Explaining the Rise and Fall*, *supra* note 31; see also DUDZIAK, *supra* note 29.

¹¹² Delgado, *Explaining the Rise and Fall*, *supra* note 31, at 372.

¹¹³ *Id.*

cent scholarship demonstrates that the need to fortify international appearances exerted a great deal of backstage pressure for the Supreme Court to decide *Brown v. Board of Education* the way it did.”¹¹⁴

“You’re thinking of the work of Mary Dudziak and, before her, Derrick Bell, I assume?”

“Right. And what I posit is that similar pressures may have underlain *Hernandez v. Texas*. My evidence falls into two groups.”

Just then, a student of mine materialized next to our table. “Hi, Professor.” Then, to my companion: “Excuse me, but are you Rodrigo Crenshaw?”

When Rodrigo nodded yes, the student continued: “We’ve been reading your stuff in our study group. Like it a lot.” He paused for a moment. “Well, sorry to disturb you. Nice to see you, Professor. I’ve been enjoying class.”

With a wave and a smile, the student disappeared. “Nice kid,” Rodrigo said. “Good taste in reading, too.”

“I actually assigned a number of your pieces,” I said. “But I didn’t know they were discussing them in their study group. You must have been a hit.”

“We’ll see if they like my current thesis. My fellow speakers at the conference were certainly skeptical.”

“Do go on. Sorry about that interruption. That’s what I like about students. They’re so spontaneous.”

“Don’t worry. I enjoy the notoriety. Everybody needs a little ego boost now and then. Where were we?”

“You were going to tell me about two kinds of evidence of majoritarian interest convergence in the *Hernandez* litigation.”

A. *Cold War Politics and Brown v. Board of Education*

“Right. Most people believe that *Brown* and *Hernandez* came down when they did because American decision makers had an epiphany. They realized, for the first time, that segregating little black schoolchildren could scar them for life. Derrick Bell¹¹⁵ and Mary Dudziak¹¹⁶ have shown that this was not the only or even the primary reason.”

“Of course not,” I added. “The NAACP had been litigating school desegregation cases for decades, losing each time, or winning, at best, very narrow victories.¹¹⁷ Then, in 1954, the skies opened. The Supreme Court held, for the first time in a school desegregation case, that separate is never equal.”¹¹⁸

¹¹⁴ See *id.*; see also DUDZIAK, *supra* note 29; Bell, *Interest-Convergence*, *supra* note 27.

¹¹⁵ Bell, *Interest-Convergence*, *supra* note 27.

¹¹⁶ DUDZIAK, *supra* note 29.

¹¹⁷ Delgado, *Explaining the Rise and Fall*, *supra* note 31, at 372.

¹¹⁸ *Id.* at 372–73.

“Why just then?” Rodrigo asked. “Derrick Bell was the first to offer an explanation. In his famous article, *Brown v. Board of Education and the Interest-Convergence Dilemma*,¹¹⁹ he posited that *Brown* came down when it did not because the Supreme Court achieved a moral breakthrough, but because the result was necessary to advance the United States’ Cold War objectives.”

“So the interests of minorities and those of white elites coincided, for a short time,” I added.

“Producing a breakthrough for black civil rights. But advancing black interests was only a secondary consideration. *Brown* was also necessary to broadcast to the uncommitted Third World that the United States had their interests at heart.”¹²⁰

“And what Mary Dudziak added was the documentation.”

“Right. She proved what Bell only posited. Producing document after document, memo after memo, international headline after headline, she proved Bell’s hypothesis that U.S. elites, in the State Department and elsewhere, prevailed upon the Justice Department and judiciary to grant blacks a major concession.”¹²¹

“To gain an edge on our Soviet rivals,” I added. “But I think you mentioned a second objective.”

“I did. Elite decision makers were also concerned about potential civil disruption.¹²² Hundreds of thousands of black servicemen and women had just returned from fighting for American democracy and against the forces of evil. They were unlikely to return peaceably to the old regime of shining shoes and ‘no sir,’ ‘yes, sir.’ For the first time in years, the prospect of domestic disruption loomed.¹²³ A major civil rights breakthrough would demonstrate to domestic blacks that things were getting better and that the federal government, at least, had their interests at heart.”

“This part of your thesis ought to have been familiar to your audience,” I said, “at least those who had studied legal history or critical theory. What about your second part?”

B. Documenting Interest-Convergence in *Hernandez v. Texas*

“I think that interest-convergence explains *Hernandez* at least as convincingly as it does *Brown v. Board of Education*. It, too, was a civil rights breakthrough that would broadcast to the world that the United States was serious about improving conditions for minorities. But, in addition, interest-convergence exhibited a second, even more powerful, dimension.”

¹¹⁹ Bell, *Interest-Convergence*, *supra* note 27.

¹²⁰ *Id.*

¹²¹ See *supra* notes 29–30 and accompanying text.

¹²² Delgado, *Explaining the Rise and Fall*, *supra* note 31, at 372.

¹²³ *Id.*

"The specter of Latin American communism, I think you said."

"Yes, and here I think you'll find some of my evidence exciting. To my knowledge, at least, no one else has collected it or shown its relevance to *Hernandez*."

"This I'd love to hear," I said. "It promises to extend and strengthen Bell's already powerful analytical tool, but also to generalize it and show how it explains the zigs and zags of another group's fortunes, not just blacks. But first, can I buy you a little snack? You've been going strong for nearly [I looked at my watch] an hour. I don't want to wear you out. I have a feeling you are planning to perform again at my party."

"How did you know I was going to sing?" Rodrigo asked in surprise. "You read my mind. I did bring my guitar and learned a few new songs, all in Spanish, including '*Cumpleaños Feliz*.'" He laughed at my puzzled look, "That's 'Happy Birthday' in Spanish."

"I've known you for a while," I said. "Reading minds is an old professor's trick. We learn to get inside our students' heads. Not that you're a student—just much younger than I. Anyway, let's go get one of those good looking muffins I saw behind the counter."

We got up and walked over to the counter. The same clerk took our orders and answered my question about the ingredients in a certain muffin that had caught my eye. ("It's half bran, half whole wheat, Professor. Very good for you. I eat one for breakfast every day." I wondered idly how he knew I was a professor.)

We returned to our table. After eating in tacit silence for a few seconds, Rodrigo began:

1. *The Specter of Indigenous Communism*

"Consider what was going on around and just before the time of *Hernandez*. In addition to the events we just mentioned . . ."

"Having to do with the general civil rights situation, you mean?"

"Right. In addition to that, writers such as John Steinbeck exposed the dismal condition in which many Mexican Americans lived.¹²⁴ The United States Communist Party began agitating for the rights of Mexican farm and mine workers.¹²⁵ Emma Tenayuca led a pecan shellers' strike and pub-

¹²⁴ See, e.g., JOHN STEINBECK, *TORTILLA FLAT* (1935); WALTON BEAN & JAMES J. RAWLS, *CALIFORNIA: AN INTERPRETIVE HISTORY* 350–53 (4th ed. 1983); JUAN RAMON GARCIA, *OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954* 143 (1980) [hereinafter *OPERATION WETBACK*] (reporting that beginning in 1951, stories and articles played up the misery of Mexican migrant workers); see also CAREY MCWILLIAMS, *NORTH FROM MEXICO* (1947) (providing sympathetic coverage of Mexican American issues and problems).

¹²⁵ BEAN & RAWLS, *supra* note 124, at 338–39; *OPERATION WETBACK*, *supra* note 124, at 196–97; GILBERT G. GONZALEZ, *CHICANO EDUCATION IN THE ERA OF SEGREGATION* 118–27 (1990) (describing how U.S. Latinos organized, beginning in the 1930s, for better labor conditions, and were willing to work with Communists and radicals on strikes).

lished ‘The Mexican Question’ in *The Communist* (1939).¹²⁶ Earlier, Eleanor Roosevelt called attention to the plight of Mexican Americans.¹²⁷ The Latino community was up in arms over stories of decorated veterans returning from World War II or Korea only to be refused service in their local restaurants,¹²⁸ and outraged over two large-scale deportation programs that forcibly repatriated more than a million Mexicans and Mexican Americans, some of them residents of long standing.”¹²⁹

“What you are saying is that Latino unrest, like the black variety, loomed for the first time in a long while.”

“Exactly. But an even more powerful factor was the great concern U.S. elites were beginning to feel about the threat of communist infiltration of Latin America.”

“What evidence do you have for that?” I asked. “This explanation of the civil rights process is new to me.”

“A great deal of evidence,” Rodrigo replied. “I’m finding more every day. And not for just this period. I believe I can show that interest-convergence—the international situation, the needs of the U.S. economy . . .”

“Especially the agricultural sector, I bet,” I interjected.

“Especially there,” Rodrigo agreed. “Plus, the rise and fall of nativism and economic upturns and downturns—all account for the advances and setbacks that this poor group has experienced over the years. But I’m getting ahead of myself.”

I smiled at my young protégé’s eagerness to spell out a new thesis. “You were going to tell me about the fear of Latin American communism and the role it may have played in the *Hernandez* decision.”

“That, plus worry over people’s movements, Indian uprisings and land revolts,” Rodrigo said. “U.S. decision makers saw them all in the same light—part of a worldwide communist conspiracy that could end up in a second front, right on our doorstep.”¹³⁰ After the conference, one Latin American expert told me that during that period he was a paper boy in

¹²⁶ JOHN-MICHAEL RIVERA, *THE EMERGENCE OF MEXICAN AMERICA: RECOVERING STORIES OF MEXICAN PEOPLEHOOD IN U.S. DEMOCRATIC CULTURE* (forthcoming 2005) (manuscript at 201–03, on file with author).

¹²⁷ See NOVAS, *supra* note 110, at 89, 144. *Braceros* (guest workers) received such poor treatment in Texas during the war years that the Mexican government intervened and received an official apology and a promise that the conditions would not recur. *Id.* at 91–94; see also ACUÑA, *supra* note 40, at 267 (discussing the poor conditions for *braceros* and the resulting political tensions between the U.S. and Mexico).

¹²⁸ See *supra* notes 109–110 and accompanying text.

¹²⁹ See RODOLFO ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* 288–89, 353 (5th ed. 2004); ADOLFE A. BERLE, JR., *Race Discrimination and the Good Neighbor Policy*, in *DISCRIMINATION AND NATIONAL WELFARE* 91–92 (R. M. McIver 1949) (“[R]ace discrimination damages the Good Neighbor Policy . . . [and is] the greatest single danger to the foreign relations of the United States.”), *quoted in* GONZALEZ, *supra* note 125, at 118–19.

¹³⁰ See GONZALEZ, *supra* note 125 (reporting that the first Latin American labor unions formed around this time to oppose U.S. exploitation of workers and natural resources).

Los Angeles. The newspaper he delivered carried stories warning about the Red Army massing in Tijuana.”¹³¹

“Bizarre!” I said, “It had enough trouble massing within its own borders, after the huge losses it sustained during World War II.”

“But that’s just the tip of the iceberg. I’m reading government documents and reports right now. No fewer than eighteen commissions and official inquiries examined the threat of Latin American communism.”¹³²

“Joe McCarthy, John Foster Dulles, and George Kennan sounded the alarm, if I recall.”¹³³

“Among others. And with reason, as many viewed the normal state of affairs in Latin America as consisting of a group of military-controlled countries doing the United States’ bidding and suppressing their own people.”

“Was that the same period when Fidel Castro and Che Guevara were becoming active?” I asked.

“It was. They were both young and in their university days.¹³⁴ But they were both beginning to write tracts, give speeches, and come to the attention of Latin American intellectuals.¹³⁵ Guevara, a student of Marxist-Leninist ideology, led a revolt against President Juan Peron of Argentina.¹³⁶ When it failed, he went to Guatemala, where he joined the regime of leftist Arbenz Guzman.¹³⁷ That was in 1953.”

¹³¹ Interview with Joe Thome, Professor of Law, University of Wisconsin, in San Francisco, Cal. (Jan. 8, 2005). Mexican newspapers at this time carried cartoons and editorials highlighting U.S. mistreatment of Mexican Americans and guest workers. OPERATION WETBACK, *supra* note 124, at 169–71.

¹³² *E.g.*, *Communist Aggression in Latin America: 9th Interim Rep. of Hearings Before the Subcomm. on Latin America of the H. Select Comm. on Communist Aggression*, 83d Cong. (1954); Comm. on Foreign Affairs, Select Exec. Sess. Hearings 1951–56, U.S. Foreign Policy and the East-West Conflict, Comm. & Subcomm. Hearings & Briefs, H.R.; *State Department Information Programs—Voice of America: Hearings before the Permanent Subcomm. on Investigations of the S. Comm. on Government Operations*, 83d Cong. (1953); [Review of the World Situation: 1949–50] *Hearings Held in Exec. Sess. Before the S. Comm. on Foreign Relations*, 81st Cong. (1950); *Hearings before the Subcomm. on Immigration & Naturalization of the Comm. on the Judiciary*, S., 83d Cong., 2d Sess. (1953) at 16 (citing fear of subversives entering across border); *see id.* at 56 (inflammatory articles appearing in Mexican newspapers about plight of “the Wetback”); 100 CONG. REC. 2, 2781 (1954) (warning that “100 subversives are daily coming across the Mexican border”).

¹³³ LAFEBER, *supra* note 110, at 110 (describing role of John Foster Dulles); SCHOULTZ, BENEATH, *supra* note 110, at 334 (describing role of Dulles and McCarthy); *id.* at 335 (role of George Kennan); GONZALEZ, *supra* note 125, at 116–17 (role of Nelson A. Rockefeller, who headed the Office of Inter-American Affairs, in countering anti-American sentiment in Latin America and assuring a steady supply of forest and soil products to America).

¹³⁴ *See* NOVAS, *supra* note 110, at 184–87.

¹³⁵ They were also coming to the attention of the U.S. government. *See, e.g.*, SCHOULTZ, *supra* note 110, at 350, 354–57 (describing official concern over Castro’s rising influence); NOVAS, *supra* note 110, at 184–87 (describing the rising star of these two young leaders).

¹³⁶ NOVAS, *supra* note 110, at 186–87.

¹³⁷ *Id.*

“Just a year before *Hernandez* and *Brown*. Didn’t the CIA overthrow Arbenz?”

“It did. He was a liberal, redistributing unused land to the Indians. American-owned fruit companies didn’t like that, so they arranged a coup.”¹³⁸

“What happened to Guevara?”

“He left for Mexico and joined young Fidel Castro, who had been kicked out of Cuba for agitating against the corrupt dictator Batista.¹³⁹ Castro was a young law graduate and a member of the Social Democratic Party. He had launched a daring raid on an army barrack in Santiago, hoping to seize arms and spark a popular uprising.¹⁴⁰ It failed; he was captured and sentenced to fifteen years in prison.”¹⁴¹

“When did this happen?”

“In that same year, 1953. Like Guevara, he was not easily discouraged. While in prison, he wrote *History Will Absolve Me*, a famous revolutionary tract setting out his anti-colonial and nationalist views.¹⁴² Two years later, the government granted him amnesty on the condition that he leave the country.¹⁴³ He returned to Mexico, where he announced, to great fanfare, a new program for Latin American reform and revival.¹⁴⁴

“Violating the terms of his release, he returned to Cuba, where he devoted himself to mobilizing the peasantry against the repressive government.¹⁴⁵ Joined by idealistic students and workers, he drew the support of several foreign countries and was covered favorably in the *New York Times*, which portrayed him as a brave figure.¹⁴⁶ Within a few years, the Batista government could see the handwriting on the wall.”

“But you mentioned, I think, that all of Latin America was in turmoil.”

“Not all, but much of it,” Rodrigo continued. “And close to our doorstep. Nicaragua, for example, had been suffering under the rule of Somoza, a corrupt, murderous military dictator.¹⁴⁷ In 1956, a young poet, Rigoberto Lopez Peres, assassinated the general at a ball. The general’s son then took over.¹⁴⁸ By the early 1960s, the Sandinista National Liberation Front was mobilizing against the tyrannical regime.¹⁴⁹

¹³⁸ *Id.* at 249; SCHOULTZ, *supra* note 110, at 340–44.

¹³⁹ NOVAS, *supra* note 110, at 186–87.

¹⁴⁰ *Id.* at 184.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 185.

¹⁴⁶ *Id.* This favorable attitude quickly shifted. See SCHOULTZ, *supra* note 110, at 361–62 (describing CIA plots on Castro’s life); ACUÑA, *supra* note 40, at 373 (same).

¹⁴⁷ NOVAS, *supra* note 110, at 254–56.

¹⁴⁸ *Id.* at 256; LAFEBER, *supra* note 110, at 131–32.

¹⁴⁹ NOVAS, *supra* note 110, at 255–58.

"In the Dominican Republic, Trujillo, a murderous dictator, always sided with the United States, supplying us with food during World War II and backing our Cold War policies against the Soviet Union.¹⁵⁰ By the mid-1950s . . ."

"Again, the very period you mention," I noted.

"Right. By that very period, he was becoming an embarrassment after kidnapping and murdering a Columbia University professor who had criticized his regime.¹⁵¹ This was too much for the United States Congress, which was furious about the abduction.¹⁵² Oh, and I forgot Honduras, where much of the same was going on. This country with a lagging economy turned revolutionary when banana workers struck in 1954.¹⁵³ This catalyzed a series of events, including agrarian reform in the liberal tradition of Guatemala's Arbenz. For a short time, Honduras maintained friendly relations with Castro's Cuba.¹⁵⁴ This was again too much for the United States, which launched efforts to rein in the new regime. By 1963, the army and American interests had things well in hand."¹⁵⁵

When Rodrigo paused, as though to gather his thoughts, I said, "That's quite a story."

"It is," he continued. "And that's only a sampling. Much more was occurring that the U.S. government found worrisome, including Puerto Rican nationalism."

"From what I remember, the movement was strong during that period," I said.

"It was.¹⁵⁶ A few years earlier, Abizu Campos and other nationalists were charged with conspiring to overthrow the United States government. Members of his Nationalist Party, which advocated complete independence, launched an attack in November, 1950, on Blair House, which Harry Truman was using as the official guest house. The group hoped to assassinate the President.¹⁵⁷ They succeeded in killing one Secret Service agent, but Truman himself escaped.¹⁵⁸

"Then, on March 1, 1954, Puerto Rican nationalists positioned in the visitors' gallery in the House of Representatives opened fire on U.S. legislators, wounding five Congressmen."¹⁵⁹

"Interesting timing," I said. "That was only a few months before *Brown* and *Hernandez*."

¹⁵⁰ *Id.* at 218; SCHOULTZ, BENEATH, *supra* note 110, at 318.

¹⁵¹ NOVAS, *supra* note 110, at 218.

¹⁵² *Id.*

¹⁵³ See LAFEBER, *supra* note 110, at 178–79.

¹⁵⁴ *See id.*

¹⁵⁵ *See id.*

¹⁵⁶ *See id.*

¹⁵⁷ *Id.* at 146.

¹⁵⁸ *Id.*

¹⁵⁹ See LAFEBER, *supra* note 110, at 146.

“Exactly,” Rodrigo confirmed. “It must have made an impression on the members of the Supreme Court.”

“I should think so,” I replied. “Especially since it occurred only a block away. Rodrigo, you’ve made a powerful case, based on Cold War politics, for an interest-convergence understanding of *Hernandez*. Building on the work of Bell and Dudziak, you have shown how fear of Latin American communism could easily have played a part in producing *Hernandez*. But to assemble a fully persuasive case, it seems to me that you still need to do three things. You must show that domestic currents added force to the growing picture you have painted. Then, you must demonstrate that high-ranking government officials knew of the events you have described and reacted in the way you posit. And finally, you must show that individual justices on the Supreme Court heeded those concerns when they crafted the *Hernandez* decision. Can you do all those things?”

“I think I can,” Rodrigo said quietly. “Let me start. This is a project of a lifetime.”

“Or at least a casebook,” I joked.

“At least that,” he replied, smiling. “Remind me to tell you about my plans along those lines sometime.”

“Just don’t get stuck making your own index,” I quipped.

“I’ll trust you on that one,” he replied. “Let me touch briefly on the three areas you mentioned. Then, I have some final thoughts about celebratory jurisprudence.”

“That’s your final task, it seems to me—to offer a materialist, economic-determinist explanation of the resistance your interest-convergence theory sparked.”

“I do have one,” Rodrigo replied. “As you’ll see, interest-convergence explains resistance to the very idea of interest-convergence. How much time do we have?”

I looked at my watch. “About 30 minutes,” I said. “I’m all ears.”

2. *Domestic Concerns and the Threat of Unrest*

“We can move quickly, because some of this is familiar ground. In 1952, Cesar Chavez was organizing and publicizing the plight of Mexican American farm workers in California and the Southwest.¹⁶⁰ The Community Service Organization (“CSO”) was doing the same.¹⁶¹ A charismatic, humble leader with Christian-democratic leanings and a nonviolent philosophy, Chavez won the hearts of American consumers, seventeen million of whom eventually joined his boycott of California grapes and lettuce.¹⁶² His organization succeeded in winning labor contracts, better wages, and

¹⁶⁰ *Id.* at 104. See also GONZALEZ, *supra* note 125, at 119.

¹⁶¹ NOVAS, *supra* note 110, at 104.

¹⁶² *Id.* at 104–05.

safer working conditions for hundreds of thousands of poor, migrant farm workers and was one of the earliest examples of successful coalition formation between outgroups, namely Filipinos and Mexican Americans.”¹⁶³

“While this occurred on the agricultural front, cities such as Denver and Los Angeles saw outbreaks of Chicano activism, as I recall. Wasn't there a large-scale civil disturbance a few years earlier?”

“Yes, the Sleepy Lagoon incident¹⁶⁴—a rigged prosecution of Mexican American youth during a period of moral panic over ‘gangs’—took place in 1942, followed by the Zoot Suit riots the next year,¹⁶⁵ in which U.S. servicemen on leave beat up dozens of Mexican teenagers on the streets of East Los Angeles for wearing distinctive ghetto-style clothes that the servicemen interpreted as defiant and un-American.”

“Ian Haney Lopez covers some of those incidents in a recent book,”¹⁶⁶ I added.

“And a good one, too. But unrest was not confined to California. In the late forties, racism in Texas became so severe that the Mexican government demanded fair treatment for *braceros* in that state.¹⁶⁷ They won an official apology.¹⁶⁸ Several mainstream U.S. organizations, including the Americans for Democratic Action, National Council of Churches of Christ, AFL-CIO, and the National Catholic Welfare Council had expressed concern.¹⁶⁹ And, as we mentioned earlier, Eleanor Roosevelt and writers such as John Steinbeck had been taking up their cause.”¹⁷⁰

When Rodrigo paused and looked up, I took the cue. “Yes, Rodrigo, you've made a strong case that domestic events threatened to blacken the eye of the United States in world opinion. That would have strengthened the hand of the communists. Coming on top of concerns for Latin American people's movements, United States elites could have perceived a two-pronged threat developing: impoverished conditions in Latin American countries supplied a fertile ground for communist agitation, while abusive treatment of domestic Latinos created a tinderbox situation here. Do you have any evidence that they actually saw the situation that way?”

3. *Documentary Evidence*

“I do,” Rodrigo replied. “For example, in May 1950, Assistant Secretary of State Edward Miller announced a new U.S. policy toward Latin America.¹⁷¹ Expressly warning of the danger of communist political ag-

¹⁶³ See PEREA ET AL., *supra* note 22, at 324–26.

¹⁶⁴ ACUÑA, *supra* note 40, at 247–50.

¹⁶⁵ *Id.* at 251–52, 259.

¹⁶⁶ HANEY LOPEZ, *supra* note 102. See Delgado, *Relearning*, *supra* note 1.

¹⁶⁷ ACUÑA, *supra* note 40, at 267–68; NOVAS, *supra* note 110, at 92.

¹⁶⁸ NOVAS, *supra* note 110, at 92.

¹⁶⁹ *Id.*

¹⁷⁰ See *supra* notes 124–126 and accompanying text.

¹⁷¹ See LAFEBER, *supra* note 110, at 95–96.

gression in that region, he promulgated the Miller doctrine, which later served to justify United States interventions in Central America, including the overthrow of the populist Arbenz regime in Guatemala.¹⁷² That same year, George Kennan made containing communism the centerpiece of his own policy toward Latin America. After touring the region and coming away deeply impressed by its poverty and vulnerability to communist influence, he announced a corollary—the Kennan Corollary—to the Monroe Doctrine under which the United States would see any effort to advance socialism in that area as a threat to its interests.¹⁷³

“John Foster Dulles in 1953 warned that

[T]he conditions in Latin America are somewhat comparable to . . . China in the mid-thirties when the Communist movement was getting started . . . if we don’t look out, we will wake up some morning and read in the newspapers that there happened in South America the same kind of thing that happened in China in 1949.¹⁷⁴

He said that the approach would be made through colonies of European émigrés.”¹⁷⁵

“Wasn’t Joe McCarthy raising the same alarm?” I asked.

“He was.”¹⁷⁶ Some of his House Un-American Activities Committee hearings looked into that. Perhaps he drew support from Secretary of State Kellogg who as early as 1927 provided the Senate Foreign Relations Committee, which was then holding hearings about policy toward Nicaragua, with a memo warning of Bolshevik arms and policies in Mexico and Latin America.¹⁷⁷ Or maybe he found confirmation from Milton Eisenhower, who in 1953, in the wake of his own Latin American fact finding tour,¹⁷⁸ wrote of the need to boost economic development in the region or succumb to communism introduced by ‘insidious process of infiltration. Highly disciplined groups of Communists are busy, night and day,’ he said.”¹⁷⁹

“Sounds like me with that infernal index,” I joked.

“Night and day,” Rodrigo replied. “Elites in this country were unceasing in their stridency over Latin America’s revolutionary potential. An

¹⁷² *Id.* at 125–27. Have these concerns subsided? See Ginger Thompson, *Old Foe of U.S. Trying for a Comeback in Nicaragua*, N.Y. TIMES, Apr. 5, 2005, at A5 (reporting that reappearance of popular socialist leader Daniel Ortega in Nicaragua has revived alarms in Washington over “backslide away from democratic principles” in Latin America).

¹⁷³ Tom Wolfe, *The Doctrine that Never Died*, N.Y. TIMES, Jan. 30, 2005, at 17 (Wk. in Rev.).

¹⁷⁴ LAFEBER, *supra* note 110, at 110–11 (internal citation omitted).

¹⁷⁵ SCHOULTZ, *supra* note 110, at 334.

¹⁷⁶ *Id.*; BERNARD SCHWARTZ & STEPHEN LESHER, *INSIDE THE WARREN COURT* 103–21 (1983).

¹⁷⁷ SCHOULTZ, *supra* note 110, at 335.

¹⁷⁸ *Id.* at 335–36.

¹⁷⁹ *Id.* at 336.

influential article by Louis Halle entitled *On a Certain Impatience with Latin America*¹⁸⁰ in *Foreign Affairs* magazine warned of instability in the region. He later provided the Eisenhower administration with justification for overthrowing the Arbenz government in Guatemala.¹⁸¹ For his part, Eisenhower saw Latin America as a row of dominos ready to fall¹⁸² and this country's treatment of domestic Mexicans as a moral and international embarrassment.¹⁸³

"Didn't the United States establish some kind of counter-insurgency school around this time?"

"Yes. I almost forgot. It established the School of the Americas in the Canal Zone to counter insurrections and train Latin American officers in anti-Communist techniques."¹⁸⁴

"Economies of scale, I guess," I pointed out acerbically.

"Right. If you're worried about events in a dozen countries, it makes sense to train all the local tinpot dictators and their torturers, henchmen, and secret police all at once. Oh, I almost forgot. Speaking of centralization, the C.I.A. has apparently received so many queries and Freedom of Information Act requests dealing with its role in the overthrow of Arbenz in Guatemala that it established a website with official documents and memos describing how it infiltrated the country and arranged the coup."¹⁸⁵

"Sobering," I said. "I certainly see how U.S. decisionmakers might easily have decided to produce a breakthrough for domestic minorities . . ."

"Specifically Mexican Americans . . ." Rodrigo chimed in.¹⁸⁶

"Right, exactly at this period. So many Latinos have strong connections to family in the countries from which they immigrated that political movements abroad could easily become movements inside the United States. It would make sense: sending a message to Latinos both here and abroad that the United States had their interests at heart and that it was not necessary to make trouble, organize, read communist propaganda, or make common cause with our enemies."

"And did the Supreme Court pay attention to this message?"

¹⁸⁰ *Id.* at 341–42.

¹⁸¹ *Id.* at 342.

¹⁸² *Id.* at 343.

¹⁸³ See OPERATION WETBACK, *supra* note 124, at 164–65; ELI GINSBERG & DOUGLAS W. BRAY, THE UNEDUCATED 51 (1953) (finding a high correlation between illegal labor supply and rejection rates for military service; Eisenhower initiated the project when serving as president of Columbia University).

¹⁸⁴ LAFEBER, *supra* note 110, at 106, 153–54.

¹⁸⁵ Cent. Intelligence Agency, Guatemala, <http://www.foia.cia.gov/guatemala.asp> (last visited Nov. 21, 2005).

¹⁸⁶ Mexican Americans were the group whose fortunes were before the Court in *Hernandez*. See *supra* notes 9, 56–60 and accompanying text. The government was also concerned, of course, over other types of activism, such as Puerto Rican nationalism and unrest in Cuba, at the same time. See *supra* notes 124–159 and accompanying text.

4. *The Role of the Justices*

“I have suggestive but indirect evidence of that,” Rodrigo said. “The transcript of the oral argument in *Hernandez* has seemingly been lost. No one knows whether the spectre of communism entered into the exchange between the lawyers and the justices. What we know is that at least three justices were intensely aware of Cold War concerns and likely gave them great weight in deciding the two big civil rights cases, *Brown* and *Hernandez*.¹⁸⁷

“William Douglas, for example, wrote about how America’s race discrimination hurt its standing abroad. When he traveled in India in 1950, he recalled how the first question he received at a press conference in New Delhi was, ‘Why does America tolerate the lynching of Negroes?’¹⁸⁸ In his book, *Strange Lands and Friendly People*, published a year later, he recalled the incident and highlighted the importance that color consciousness took on in other countries’ assessments of the United States.¹⁸⁹

“Not long afterward, he returned to Asia for a Himalayan trek. Upon arriving home he repeated his observation that other nations looked at us through the prism of race, specifically mentioning a ‘Mongol prince’ who told him that the Soviet Union would prevail over the United States for the affections of Asia because of its failure to act for social justice.¹⁹⁰ The United States may lead the world in inventions and military power, the prince told him, but the Soviet Union leads in ideas.¹⁹¹

“And while sick during a trip to Panama, he wrote to a friend back home that this impoverished area was ripe for communism.¹⁹² In another letter he described a second Latin America trip where he paid his own way to talk with university students trying to persuade them not to join the Communist Party. He also described his work on behalf of a foundation that brought young Latin American talent to study at U.S. universities like U.C.L.A.”¹⁹³

¹⁸⁷ See *supra* notes 184–186; see *infra* notes 188–200 and accompanying text; see also Michael McGough, *High Court Case Tinged by Foreign Policy*, PITTSBURGH POST-GAZETTE, Mar. 29, 2005, at A7 (reporting that U.S. Supreme Court justices during oral argument struggled with international law concerns in a case of a Mexican convicted of murder and rape).

¹⁸⁸ DUDZIAK, *supra* note 29, at 104.

¹⁸⁹ *Id.* at 104–05.

¹⁹⁰ *Id.* at 105.

¹⁹¹ *Id.*

¹⁹² Letter from William O. Douglas to John Cooper Wiley, Apr. 24, 1953, in THE DOUGLAS LETTERS 292 (Melvin I. Urofsky ed., 1987) (urging that American intellectuals no longer ignore the region and that a “well-worked out program should be designed”).

¹⁹³ Letter from William O. Douglas to Sol Linowitz (Feb. 26, 1968), in THE DOUGLAS LETTERS 294 (Melvin I. Urofsky ed., 1987); see also JAMES F. SIMON, INDEPENDENT JOURNEY: THE LIFE OF WILLIAM F. DOUGLAS 393–95 (1974) (describing Douglas’ work on behalf of the Parvin Foundation to bring Latin American leaders to the United States for exposure to democratic practices).

"Douglas certainly seems to have been aware of the threat of Latin American communism. What about some of the other justices?" I asked.

"At least two shared the concern that America's treatment of its domestic minorities deprived us of political capital in the fight against world communism. Hugo Black worried that foreign enemies could seize on 'ugly facts' to do us harm.¹⁹⁴ Many members of the Court traveled widely during this period and must have come in contact with foreign news coverage of American civil rights abuses and seen how powerful an impact these stories made."¹⁹⁵

"What about Chief Justice Earl Warren? He's the other great liberal who served on the Court during this period. Didn't he write both opinions?"

"Yes, both *Hernandez* and *Brown*. Before joining the Supreme Court, he served as Governor and, before that, attorney general of California."

"What a connection!" I exclaimed. "It brings everything back full circle. That very same Warren must have known of the Zoot Suit riots, Operation Wetback, and other disgraceful measures his state took against the hapless Latinos.¹⁹⁶ Now in higher office, he might have been concerned over how these events would appear on a world stage."

"It's a plausible explanation. We do know from his memoirs and biography that he deeply regretted his earlier role in marshalling sentiment against the Japanese in the early World War II years.¹⁹⁷ He was a principal architect of internment, a policy that sent tens of thousands of California and West Coast Japanese, most of them United States citizens, to distant camps, where they spent the war years behind barbed wire."¹⁹⁸

"Many of them losing homes, businesses, and farms in the process,"¹⁹⁹ I added. "It's one of the most shameful episodes in American history."

"That it is," Rodrigo seconded. "The government finally issued an apology and awarded reparations to those who suffered relocation."²⁰⁰

"Do you suppose Warren also repented his role in encouraging Operation Wetback?"

"I'm looking into that. It stands to reason that he would. The operation was similar to internment, but larger. And there was even less justification for it because it did not take place during wartime."

¹⁹⁴ DUDZIAK, *supra* note 29, at 106–07.

¹⁹⁵ *Id.* at 106.

¹⁹⁶ See ACUÑA, *supra* note 40, at 250–53, 276, 288–89, 352–53 (describing the Zoot Suit riots during Warren's governorship and later mass deportations of Latinos during periods of economic downturn and xenophobia); PEREA ET AL., *supra* note 22, at 317, 320 (describing Operation Wetback); OPERATION WETBACK, *supra* note 124, at 157 (indicating that Warren did, indeed, know of the "wetback problem" and was a proponent of strong measures).

¹⁹⁷ Cho, *supra* note 17; SIMON, *supra* note 193.

¹⁹⁸ Cho, *supra* note 17, at 75; see RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 390–98 (1989).

¹⁹⁹ TAKAKI, *supra* note 198, at 392–94.

²⁰⁰ PEREA ET AL., *supra* note 22, at 411–12.

"I was just reading that the earlier of those two mass-deportation programs was the subject of a class action filed by some of the survivors,"²⁰¹ I said.

"I noticed that, too," Rodrigo replied. "It'll be interesting to see if the case gets anywhere. But speaking of Warren, he spoke or wrote on at least two occasions about how the war against communism was a war of ideas and how the judiciary could play an important role in that battle.²⁰² Just before *Hernandez* came down, he wrote a speech he would later deliver to the judges of the Fourth Circuit Court of Appeals. It expressed his belief that the world looked to the United States as a model of justice, not might, and that our conception of justice was what separated us from other political systems."²⁰³

"In a speech he delivered later that same year to the American Bar Association, he again underlined how our system was on trial abroad and how adhering to the Constitution and Bill of Rights would make us more secure than would an entire stockpile of hydrogen bombs.²⁰⁴ And earlier, as attorney general of California, he waged war furiously against communists and subversives."²⁰⁵

"What about Hernandez's lawyers?" I asked. "Were they attuned to Cold War concerns?"

"Unless that missing transcript turns up, we'll never know," Rodrigo replied. "We do know that, during their trip to Washington, they took the opportunity to meet with the national staffs of several progressive organizations to call their attention to the problems of Latinos in the Southwest.²⁰⁶ Some of these organizations, such as the American Friends Service Committee and AFL-CIO, were quite sympathetic to indigenous movements and even socialism."

"So Cold War concerns were probably on the minds of *Hernandez's* lawyers?"

"It's a reasonable suspicion."²⁰⁷

"Fascinating," I commented. "You've really done your research. It certainly sounds like some of the justices had international appearances in mind when they handed down *Hernandez* and *Brown*. But I'm anxious to hear your thoughts on celebratory jurisprudence. You've put together an intriguing case for expanding Derrick Bell's interest convergence the-

²⁰¹ Delgado, *Locating Latinos*, *supra* note 15, at 494.

²⁰² DUDZIAK, *supra* note 29, at 105-06.

²⁰³ *Id.* at 106.

²⁰⁴ *Id.*

²⁰⁵ Long, *supra* note 17.

²⁰⁶ Gustavo C. Garcia, *An Informal Report to the People, in A COTTON PICKER FINDS JUSTICE! THE SAGA OF THE HERNANDEZ CASE*, *supra* note 102. Garcia was Peter Hernandez's lawyer.

²⁰⁷ For a recent decision indicating awareness of international opinion and law, see *Roper v. Simmons*, 543 U.S. 551 (2005).

ory to Latinos. I'm curious why you thought your audience reacted negatively toward it. Are you ready to move on to this next topic?"

IV. IN WHICH RODRIGO PUTS FORWARD FIVE REASONS TO AVOID CELEBRATORY JURISPRUDENCE

"I am," Rodrigo said. "I don't want to be too harsh. When I first gave the paper, I had not developed my thesis as fully as I've done today. Some people in the audience may simply have wanted more documentation."

"But I think you said that others were outright hostile. They thought your rather downbeat take on that landmark decision was inappropriate on a celebratory occasion, or perhaps took away from the gallantry of the lawyers who argued it before the Supreme Court."

"Some did resist the entire idea of looking at the case from an interest-convergence perspective," Rodrigo conceded. "Why that happened is an interesting story. It can't have been the novelty of the claim, for everyone in the room—at the speaker's table, at any rate—was familiar with Derrick Bell's version of it."

"As applied to blacks, you mean."

"Right. His *Harvard* article²⁰⁸ is a classic of critical race theory. Everyone reads it. It's in all the critical race readers and casebooks. Even our students know about it."

"So why do you think you encountered such resistance in applying that same theory to Latinos?"

"For two or three reasons," Rodrigo continued. "First, everyone likes a celebration. In a little less than an hour, we celebrate your birthday. Nothing is wrong with that."

"But you think celebrating historical events and civil rights milestones are different?"

"I do. Celebration stills our critical instincts. Recall how, early in our history, Frederick Douglass said in a famous address that he could not join in celebrating the Declaration of Independence,²⁰⁹ and how, more recently, Thurgood Marshall declined to join in the 1987 celebrations marking the Bicentennial of the U.S. Constitution.²¹⁰ Those documents mean something different to the sons and daughters of former slaves from their meaning to white people."

"At the beginning of our talk, you mentioned that, by and large, the Latino people do not celebrate the law.²¹¹ Is that part of the great divide you mean?"

²⁰⁸ Bell, *Interest-Convergence*, *supra* note 27.

²⁰⁹ PEREA ET AL., *supra* note 22, at 106–07 (reprinting Douglass's speech declining to celebrate the Fourth of July).

²¹⁰ Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1989).

²¹¹ See *supra* notes 22–24 and accompanying text.

“It is, in a way. But affirmative reasons, not just culture or habit, counsel that we avoid excessive celebration. They fall into a number of categories and include interest-convergence itself.”

“I’d love to hear them. I’ve always had my doubts about all of those conferences and symposia marking the tenth, twentieth, thirtieth, fortieth, and now the fiftieth anniversaries of *Brown*. Maybe you can help give shape to my intuitive reluctance to join in with these celebrations.”

“I’ll try. My reasons fall into three categories: analytical, historical, and psychological. Which would you like to hear first?”

“All of them, in whichever order you see fit. All of this interests me very much.”

A. *Rodrigo’s First Reason—The Gulf Between the People and Their Elites*

“My first reason for rejecting celebratory jurisprudence is simply that I side with the people and their experience. As we mentioned before, if the ordinary Latino people distrust law and lawyers, and academic elites extol them, the ordinary people are apt to be right. Their experience with the law is likely to be direct and immediate; that of the Latino academicians, abstract and theoretical. In these matters, the combined wisdom of thousands of people over many years is likely to be more valuable than that of a few critical scholars who derive most of their learning from texts and articles.”

“That’s not the most persuasive reason in the world,” I observed. “I hope you have more arrows in your quiver than that.”

B. *Rodrigo’s Second Reason—Celebratory Jurisprudence’s Lulling Effect*

“I do. Another reason is psychological and has to do with how celebratory jurisprudence disables you from seeing your actual condition. This may not be accidental, for it benefits the establishment. Recall how fondly Southern whites remember the old days when the darkies would sing their spirituals in the evening, and the sweet notes would waft through the dusk to the veranda, where the Southern family was enjoying after-dinner drinks.”

“So you are saying that when Latinos—or any other group—celebrate a civil rights advance, this benefits the majority?”

After a short pause, Rodrigo said with determination, “Yes, I do. It implies that the disempowered group is satisfied and will demand no more. It is the first step to complacency, toward making peace with the group that has been keeping you down.”

“Toward being satisfied with your condition, in other words,” I added.

“Exactly. Which leads to my third reason.”

C. *Rodrigo's Third Reason—The Plastic Steering Wheel*

“Please go on.”

“My third reason has to do with stilling the critical faculties of the oppressed group. Professor, you're a little older than I. But do you know how parents on a long car trip will sometimes give their child in the back seat a plastic steering wheel?”

“You mean so they can pretend they are steering the car?”

“Yes. The child thinks she is in control, and so tolerates the long trip. At the end, the parent comes and takes the steering wheel away.”

“So your point, Rodrigo, is that triumphalism encourages the oppressed group to believe, mistakenly, that it has been in charge all along, when this may not be so. As with *Brown v. Board of Education* and *Hernandez v. Texas*, a landmark decision may have been the product of forces far beyond the group's agency.²¹² If you examine those forces, you may find that they are simply cases of white society quietly doing itself a favor. Is that your point?”

“It is. And those minorities who sing and dance in the streets after a great breakthrough victory can easily forget what happened the last time, when the great victory melted away as soon as the celebrations died down.”²¹³

“You lose your critical judgment, in other words,” I summarized. “That sounds like a sensible caution. What other reasons do you have?”

D. *Rodrigo's Fourth Reason—The Rise of the Broker Class*

“This one also has to do with the role of minority elites, in particular the conflicted role of Latino academics and community leaders.”

“Do you mean the rise of the broker class about which Rodolfo Acuña writes?”²¹⁴

“Precisely. Professor, have you heard of Pocahontas and La Malinche?”

“Of course, although I know a little more about the Indian maiden who went over to the colonials' side and married one of their leaders than I do about La Malinche. I'm not sure I see what they have in common.”

“Let me explain. Pocahontas, the favorite daughter of Chief Powhatan, saved Captain John Smith's life after he ventured into Rappahannock territory and was about to be executed for a number of alleged crimes.²¹⁵ The Captain apparently made an impression on Pocahontas, because she later

²¹² See *supra* notes 27–35, 104–201 and accompanying text. This is not to diminish the gallantry of the lawyers who litigated *Brown* and *Hernandez*. It is merely to point out the factors that might explain why these breakthroughs happened when they did.

²¹³ See RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 5, 24 (2001) (on critique of triumphalist jurisprudence).

²¹⁴ ACUÑA, *supra* note 40, at 357–58.

²¹⁵ PEREA ET AL., *supra* note 22, at 867–68.

intervened a number of times to extend economic aid and political advice to Smith and his colonial buddies. Later, a different Captain encountered Pocahontas and seized her as a hostage, had her instructed in Christianity, and used her services in negotiating peace between her father's people and those of her new fiancée, John Rolfe, an early pioneer in tobacco cultivation in Virginia. Now Rebecca Rolfe, Pocahontas gave birth to a son, Thomas Rolfe. A year later she went to England with her husband and child, where she met the Queen and, unexpectedly, her former lover John Smith. She died in England in 1617, just as she was planning to return to Virginia."²¹⁶

"An intriguing story. What about La Malinche?" I asked.

"In one common version of her story, La Malinche was an Aztec noblewoman who was presented to Cortes when he landed in Veracruz in 1519.²¹⁷ She later served him as translator and lover and advised him on military tactics and the local terrain. She lives in myth and fiction as the creator of a new race—mestizos—as she played a role in starting the practice of racial mixture and intermarriage between the Spanish invaders and local Indian women. Some also see her as a whore who slept with the enemy for personal gain."²¹⁸

"I think I see what the two figures have in common."

"They both aided the very forces that were oppressing their people. They gave them cultural secrets that the white colonials used to exterminate their brothers and sisters; and in the case of Pocahontas, to wipe them out almost entirely."

"A serious indictment," I said. "And you think that minority elites today are in danger of falling into the same trap?"

"I do. Rodolfo Acuña, the great Chicano historian, describes how college-educated Latinos are being co-opted to act as middlemen between the Anglo power elite and their people. The new brokers serve in government or in business. In the business world, they occupy jobs as diversity directors, human resources personnel, or marketing directors."

"Charged with helping a corporation figure out how to pitch a product . . ."

"Such as cigarettes, beer, credit cards, or trendy, expensive clothes," Rodrigo continued, "to the Latino or black community."²¹⁹ Some of them take on the function of political adviser, helping to assure that the minority community knows who to vote for or understands the importance of funneling their reformist fervor into legitimate channels."

²¹⁶ *Id.*

²¹⁷ *Id.* at 870.

²¹⁸ *Id.*

²¹⁹ ACUÑA, *supra* note 40, at 358; *see also* RODOLFO ACUÑA, OCCUPIED AMERICA 384–427 (2d ed. 1981) (devoting expanded treatment to the same topic). While such behaviors do not characterize all professional-class Latino, it is important to note the phenomenon at work.

"Voting, for example, or polite petitions, not rowdy street demonstrations," I added.

"Exactly. These brokers use cultural information, as Pocahontas and La Malinche did, to help whites administer death. Or, if that's too uncharitable, profits." Rodrigo looked up as though to judge my reaction. "Do you think I'm being too harsh?"

"No, not at all," I said. "We blacks have plenty of examples on our own side, plenty of brothers and sisters willing to make common cause with the enemy, trash affirmative action, preach self-empowerment, and so on. And you think this may have had something to do with the resistance you encountered to your revisionist reinterpretation of *Hernandez* as an interest convergence case?"

"I do," Rodrigo replied. "But this requires a little background."

1. Mid-Twenty-First Century Economics and the White Middle Class Squeeze

"Go ahead. I find this fascinating, if mildly paranoid."

"Paranoid?" Rodrigo grinned and shot me an appraising look. "Remember what Huey Newton once said: 'It's not paranoia if they're really out to get you.'"²²⁰

I grinned back. "I don't mean to be critical. I like the originality of your thesis and find it intriguing how you are beginning to look for internal class differences among the Latino group. I've always thought that critical race theory lacked a class analysis. But I don't mean to sidetrack you. Please continue."

"To see whether my thesis holds water, consider some economic projections that most writers see for America in the years ahead." Rodrigo looked up to see if I wanted to hear more. When I nodded encouragingly, he continued. "The baby boomers are starting to retire, which will place great stress on Social Security and other retirement systems."²²¹

"Such as Medicare," I added. "And maybe private and state pension systems, too."

"Exactly. As recently as a few years ago, twelve workers were contributing to support a single retiree on Social Security, and roughly the same was true of those other plans. Now, the ratio is about three to one, and in a few years it will be two to one."²²²

²²⁰ Attributed to Newton, the Black Panther Party's defense secretary, the expression has entered national discourse. See Richard Delgado, *Rodrigo's Fourteenth Chronicle: American Apocalypse*, 32 HARV. C.R.-C.L. L. REV. 275, 289 (1997); see also Robert Lipsyte, *Backtalk: The Vanity of Human Wishes, Once Again on Display*, N.Y. TIMES, Jan. 16, 2000, at § 8, 13.

²²¹ On the impending shortfall in Social Security inputs vis-à-vis outputs, see Editorial, *The Risks in Personal Accounts*, WASH. POST, Feb. 20, 2005, at B6.

²²² *Id.*

“Middle-class families are having fewer children,” I added. “The birth rate is dropping, particularly among whites and the middle class.”²²³

“So, where are the new workers going to come from?” Rodrigo asked. “Latin American immigration is one source. Latino immigrant workers labor long hours in hard jobs. Their morale is high; they are delighted to have a source of income. Many of the men work two, or even three, full-time jobs.²²⁴ By and large, they pay their taxes, do not complain, and stay out of trouble.”²²⁵

“The perfect laborers to prop up the Social Security system,” I said.²²⁶

“Exactly. And consider all those baby-boomer retirees who will be going into nursing homes. Who is going to take care of them—cook their meals, clean their rooms, empty their bed pans?”

“Latinos?” I asked.

“Who else? The perfect group—as they are for dozens of other service-sector jobs—gardening, cooking, serving coffee, cleaning hotel rooms, custodial work . . .”

“And don’t forget nannies,” I said. “A friend of Teresa’s and mine just hired a nanny and housekeeper from Guatemala. They are very happy. They say they don’t know whether Maria is a legal immigrant or not, and they don’t want to know.”

“Pressured two-earner Anglo families have to work harder than ever these days to earn the same salaries that they earned before. Companies cut their benefits and health care packages every year. Both parents have to work. Who gets to take care of little Junior and clean up the apartment every week when the two yuppies arrive, exhausted, at the weekend and don’t have the energy or inclination to fix up their own place?”

“Latinos?”

“Sure,” Rodrigo replied. “The perfect solution.”

“I think I see where you are going with this,” I said. “The demand for Latino labor is explosive and across-the-board. Latinos are going to experience great demand for child care, old age homes, maintenance work, and hundreds of service-sector jobs. And the new middlemen will sell them. Or if that’s too harsh, mediate the terms on which they introduce themselves into American society and the work force.”

“And that includes law professors, do you think?”

²²³ See BEN J. WATTENBERG, *THE BIRTH DEARTH* (1987).

²²⁴ See Delgado, *Relearning*, *supra* note 1.

²²⁵ The proportion of Latinos in U.S. prisons, for example, is about 15%, only slightly higher than their proportion in the population at large, and notably low for a relatively young group that endures a high degree of police suspicion and surveillance. See Richard Delgado & Jean Stefancic, Editorial, *Let’s Welcome Latinos to Pittsburgh; The Region Would Benefit from Concrete Steps to Bring More Working-Class Latino Immigrants Here*, *Say Richard Delgado and Jean Stefancic*, PITTSBURGH POST GAZETTE, Sept. 18, 2005, at K2.

²²⁶ See Eduardo Porter, *Illegal Immigrants are Bolstering Social Security with Billions*, N.Y. TIMES, Apr. 5, 2005, at A1.

"They may not manage the work crews or supervise the gardeners," Rodrigo said, "but many of them will gain tenure by writing about immigration, bilingualism, citizenship, racial history, and other topics integral to the whole process. They will explain the two groups to each other. They will serve as cultural intermediaries, interpreting Latinos to the Anglos and the Anglos to their Latino countrymen and women."

"And so that explains your chilly reception at the conference. Your audience of middle-class Latino law professors and professionals did not want to be reminded of the role of profits and Anglo self-interest undergirding civil rights advances and retreats."

"It hits too close to home," Rodrigo replied. "They would rather think that they are bringing the blessings of liberty to a benighted and impoverished group."

"That there is no downside," I added.

"Much less that they might bear a resemblance to Pocahontas or La Malinche, supplying information and aid that the overlords will use to oppress their own people."

"Yikes," I added. The weight of what Rodrigo had been saying hit me with full force. I shuddered involuntarily for a second and then said something about how we all legitimate an unfair system, merely by agreeing to teach in institutions that have terrible records on matters of race.

"You can even convince yourself that identity politics and diversity are good for capitalism, and that by preaching a cheerful, optimistic view of racial history you are helping everybody stay on the right track," Rodrigo concluded.

E. Optimism and Pessimism: The Half-Full/Half-Empty Syndrome

"And I gather that you disagree with this feel-good philosophy," I said. "But, for the sake of argument, what's wrong with looking on the bright side? After all, things are improving for minorities, are they not? Thirty years ago, we were being lynched and beaten. You don't hear about that any more. Isn't that progress?"

Rodrigo measured his words. "I'm the last one to deny progress, although I think it's not what it's cracked up to be. We do move ahead, from time to time, and on this measure or that. More sociology PhDs. A few more Latino plumbers and trade unionists. But the gap between whites and blacks stays the same, year after year. They keep advancing, too, and we bring up the rear. Only the rear moves ahead just as the head of the column marches forward."

"Sounds like the proverbial half-full, half-empty phenomenon," I said, determined to push my young protégé as hard as I could. "Isn't that, in the end, the difference?"

Rodrigo hesitated. "No. I think it's more than that. Hope and pessimism instead play wholly different roles for minorities and whites."

“And that accounts for your treatment at the conference?”

“I’ll let you decide,” said Rodrigo. “Here’s my thought. For minorities—ordinary people, not the elites—hope is not the way to emotional wholeness. For whites, it is. They need, above all, guilt-assuagement, the sense that they are not responsible, or that if they are, at least things are getting better for blacks and Latinos.²²⁷ If they are, it should follow that in time, people of color will be on a par with whites. Nothing special need be done. Whites can go about their business.”

“They can put all that messy stuff of race out of mind,” I added. “*Bra-cero* programs. Lynching. Slave ships. Chinese Exclusion Acts. Japanese internment. Indian extermination. Gay-bashing. Don’t ask, don’t tell programs. They think that society is improving, every day becoming more liberal, fairer, more just and more inclusive than the last. If America is not yet perfect with regard to racial matters, it is still the fairest, most just nation in the world. Why else would all those immigrants be flooding across our borders?”

“Exactly. So, for whites, the tonic is optimism and faith in progress. But had you considered what it is for minorities, Professor?”

“Let me guess. No, I can’t. Why don’t you continue? I’m curious where this leads.”

“For minorities,” Rodrigo began, “it’s realism. What they need is knowledge of their own histories—of the terrible tale of stolen lands, butchered ancestors, raped grandmothers, Jim Crow laws, and biased employment doctrines and tests that excluded them from society’s bounty and are now responsible for their low estate.²²⁸

“They need to realize that their high rates of incarceration, poverty, and despair are not entirely their fault. That the social pathology one sees in minority communities is not the product of some intrinsic defect but of racism, oppression, and outright plunder. What others would see as hanging onto the past . . .”

“Refusing to let bygones be bygones,” I added.

“Exactly. That way lies psychic healing. That way lies health, and the willingness to forge ahead even though one’s current situation may be unpromising.”²²⁹

“And so that explains the downbeat, satirical, laugh-in-spite-of-it attitude toward what we can only call racial villainy that you described earlier. Chicanos’ refusal to sign on to celebrations, but instead to relish street theatre, *corridos*, *cuentos*, and folktales that celebrate resistance against injustice, the choice to hang onto and almost revel in the brutalities that the community had to put up with, helps them to survive.”²³⁰ I looked at Rod-

²²⁷ See Richard Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L.J. 923, 928–41 (1988).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ See *supra* notes 21–24 and accompanying text.

rigo with new admiration. "Now I see how your thesis holds together. The psychological, the historical, and the analytical. Derrick Bell would be proud. At least I am, and I'm of his generation."

"Thanks, Professor. Your praise means a lot to me. Among other things, it encourages me to press ahead and look for more evidence of interest convergence in the *Hernandez* case. I still need a piece or two of the puzzle. These things are hard to track down. They are buried in archives, memoirs and in headlines in hard-to-find newspapers of the period. Sometimes my eyes glaze over."

"You should continue," I encouraged. "I think you're onto something. If interest-convergence worked for *Brown v. Board of Education*, I see no reason why it can't work for *Hernandez*."

"And maybe for all of Latino history. Remember how Derrick Bell extended his *Harvard* interest-convergence article and its analysis to the full sweep of black history."²³¹

"In his casebook and later articles," I said. "I use that casebook in my class. It's a powerful tool."

"I see no reason why I can't apply the same sort of material-determinist analysis to help understand the twists and turns of Latino legal history."

"I agree," I said. "For example, I can see you looking at labor and immigration law and at such things as the *bracero* program, which waxed and waned as American agribusiness's needs shifted and changed."

"I'll see what I can do," Rodrigo replied. "Maybe I'll send you a draft of the introduction. An article, too. I'll incorporate notes from this conversation. You'll see your imprint."

"I don't know about that," I said. "As usual, I've learned ten times more from our conversations than you have. But I'll be glad to look at what you come up with."

CONCLUSION: RODRIGO'S PRESCRIPTION—WHAT THE LATINO COMMUNITY NEEDS

"Speaking of coming up with something," Rodrigo said with a start. "I was supposed to produce you . . .," he looked at his watch, "five minutes ago."

"My goodness," I said. "Time does pass quickly when you're having fun. You haven't told me about your quarrel with equal protection jurisprudence. That may have to wait for another time."

"Afraid so," Rodrigo said, fishing in his pocket for some change to leave as a tip. "We used their table for a long time. I hope we haven't worn out our welcome."

²³¹ See DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* (5th ed. 2004).

“No chance of that,” said the friendly waiter who materialized at our table to bus the cups and plates. “You gentlemen are in a hurry. I’ll clean up. Just make sure to come back.” Then, after a smile, “*Regresen pronto.*”²³²

“We will,” I said with a start. “How long did you say you were in town for, Rodrigo?”

“Two days.”

“Well, maybe we’ll be able to meet again after the party for a second round. This time, maybe Giannini and Teresa can join us. I know Teresa would be fascinated by your thoughts on equal protection. She’s an avid social reformer, as you know.”

As we made our way out of the restaurant and walked the short block to the parking lot, Rodrigo asked, “Professor, have you seen the movie *The Pianist*²³³ or read the book?”

“I haven’t. It’s on our list. Teresa and I want to see it soon. Why do you ask?”

“Because, in a way, the movie reminds me of some of the things we have talked about today and serves as both a summary and a warning.”

“How so?”

“In it, the Jews whom the Nazis have herded into the Warsaw ghetto are worried and apprehensive about their fate. Why have they been rounded up and made to leave their homes and friends? Why do Nazi guards and watchtowers surround the one area in their old city in which they are permitted to live? What is the meaning of the checkpoints and humiliating interrogations that they must endure from brusque, unsmiling German soldiers? Why can they not leave and travel freely?

“What does the future hold for them? Lacking knowledge about what lies ahead, they speculate. Are they being prepared for extermination? Will the Nazis come to their senses and release them? Will life return to normal? If they are being prepared for the death camps, desperate measures would be in order. They should steal or improvise weapons and make a break for freedom.

“Optimists in their group, however, offer a more reassuring interpretation: the inmates represent such a valuable source of skilled labor that the Nazis would surely be loath to forfeit it.

“The Jews desperately need to know what the future holds. Then, one day, a genius among them figures it out. The trains heading past the ghetto, bearing passengers from a similar enclave further down the line, return a few days later empty. That can mean only one thing. The Nazis are holding them for their own trip to the death camps.

“After absorbing the implications of that chilling information, the Jews begin gathering their resources for a futile, but gallant, escape attempt.”

²³² “Come back soon.”

²³³ *THE PIANIST* (Focus Features 2003).

Rodrigo was silent for a moment as we walked along the darkening street. "And the conclusion you draw from this allegory for Latinos is . . . ?" I asked.

"It is that in a much less desperate situation, Latino people—the common, working-class people, I mean—need clear-eyed vision from their leaders. Celebrations that overlook unpromising realities do little to advance their cause. We academics owe our brothers and sisters, who suffer in refugee camps and labor in the country's sweatshops, farm fields, kitchens, and hotels, the same sort of service the black community received from Thurgood Marshall, William Hastie, Derrick Bell, and the other gallant warriors who brought suit on behalf of the sons and daughters of former slaves. We do not discharge that duty when we cheer victories that bring little fruit, when we rest satisfied with forms of legal redress that do little to combat the discrimination that our community endures, and pretend that medicine aimed at remedying one form of a disease is equally suitable for another."

"Surely you don't mean to compare the plight of the two groups, do you?" I asked.

"No, not at all. I just mean that optimism can blind us to the cruel realities of our situations. *The Pianist* reminded me that Latinos can learn from the horrible atrocities of the past as we move forward, pursuing civil rights."

"Here's the car," I said. "That's a powerful metaphor. I hope your readers don't take it the wrong way. As for me, I can't wait to hear round two of this conversation. I guess I've got to go through this infernal birthday party you've cooked up first. If that's the price of admission, it will be well worth it."

"We'll see. I'm sure I've gotten as much out of this conversation as you, Professor. You always push me and help me clarify my thoughts."

"You're too kind," I said. "I can't wait to see that article."

