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Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law Review Essay

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REVIEW ESSAY

Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law

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FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM. By Derrick Bell. New York: Basic Books. 1992. xiv + 222 pp. $20.00.

THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? By Gerald N. Rosenberg. Chicago: University of Chicago Press. 1991. xii + 425 pp. $29.95.

TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT. By David G. Savage. New York: John Wiley & Sons. 1992. 473 pp. $22.95.

RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA. By Girardeau A. Spann. New York: New York University Press. Forthcoming 1993 (manuscript on file with the *Stanford Law Review*). 256 pp. $40.00.

INTRODUCTION: IN WHICH RODRIGO AND I COMMISERATE AND CATCH UP WITH DEVELOPMENTS IN EACH OTHER'S LIVES

I was in my office late one afternoon, puzzling over how to incorporate four recent books addressing the role of courts in protecting minority rights into the next edition of my casebook. The first of these books, Derrick Bell's *Faces at the Bottom of the Well*,[1] argues that racism is likely to prove a permanent feature of America's cultural landscape.[2] The "faces" are those of African-Americans whose existence at the bottom of society enables even the poorest whites to gain self-esteem.[3] Written almost entirely in the narra-

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1. DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992).

2. *See also* DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987) [hereinafter BELL, AND WE ARE NOT SAVED]; Derrick Bell, *Foreword, The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985) [hereinafter Bell, *Foreword*].

3. Bell, p. v (frontispiece).

tive mode, *Faces* recounts a series of imaginary tales, each illustrating a lesson about racial justice.[4] Although most of these lessons are bleak and severe, Bell nevertheless exhorts readers to continue the struggle for racial justice.

A second work, Gerald Rosenberg's *The Hollow Hope*,[5] presents a critique of the role of the courts in producing social change. Although sponsored by a conservative foundation, the book purports to be an objective assessment of courts' role and function.[6] Contrasting the view of the United States Supreme Court as dynamic in producing social change with the view that the Court is constrained in its ability to effect reform, Rosenberg concludes that the latter is a more accurate depiction.[7] According to Rosenberg, courts produce little change that was not previously in motion and are less effective in propelling reform than other extralegal forces such as market pressures, technological changes, political action, and legislative reform.[8] Nevertheless, Rosenberg notes that courts are effective in blocking change.[9]

Race Against the Court, by Girardeau Spann,[10] argues that the Court not only is institutionally incapable of protecting minority rights but that it serves to perpetuate majoritarian control.[11] In Spann's view, operational and formal safeguards designed to insulate judicial decisions from political pressure are insufficient to counter the influence of majoritarian socio-political values.[12] Indeed, often "the governing substantive principles of law themselves incorporate majoritarian values in a way that leaves the Court with no choice but to acquiesce in majority desires."[13] Automatically taking minority grievances to the judicial system creates a dependency relationship with an increasingly unresponsive institution.[14] Spann believes that the use of other societal mechanisms, such as mass politics, demonstrations, and state and local governments, would be more effective in producing racial advances than judicial intervention.[15]

The last work, David Savage's *Turning Right*,[16] considers the Supreme Court's role in minority rights from the perspective of a *Los Angeles Times*

4. For example, in the first chapter, Bell illustrates society's preference for symbolic rather than actual breakthroughs for African-Americans by recounting a conversation with a taxi driver. Bell, pp. 15-32.

5. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

6. Rosenberg, p. xi.

7. Rosenberg, pp. 10-30, 35, 157-69, 175-227.

8. Rosenberg, pp. 42-71, 157-69, 175-227, 247-65, 292, 300-03.

9. *See, e.g.*, Rosenberg, pp. 85-102, 107-34 (discussing the possibility that Brown v. Board of Education, 347 U.S. 343 (1954), may have impeded the movement toward school integration).

10. GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA (forthcoming 1993) (manuscript on file with the *Stanford Law Review*).

11. Spann, pp. iv, 31-59, 180-272.

12. Spann, pp. 22, 37-43.

13. Spann, p. 30.

14. Spann, pp. 178-206.

15. Spann, pp. 146-75, 178-206, 219-20.

16. DAVID G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT (1992).

journalist. In a discussion which contains elements of the three above-mentioned theses, Savage focuses on the changes in the Court's composition and ideology which accompanied the emergence of the current conservative majority.[17] The books had quite disparate theses. I was getting nowhere in figuring out how and where to incorporate them in my revision when a familiar lanky figure appeared as though by magic in my doorway.

"Rodrigo!" I exclaimed. "I'm glad to see you. Please come in." I peered at him closely. The usually ebullient Rodrigo stood in my doorway, looking down. "Is something wrong?"

"Well, as a matter of fact, yes. Do you have a minute? I tried phoning first, but you were out."

"Of course," I assured him, gladly pushing the four books aside. A discussion with Rodrigo was always a welcome break from my work. Rodrigo is the younger half-brother of civil rights activist Geneva Crenshaw.[18] Born in the United States, Rodrigo later moved to Italy where his father, an African-American serviceman, was stationed. After graduating from the base high school, Rodrigo received a scholarship from the Italian government which enabled him to study world civilization and law at Bologna. Rodrigo recently returned to the United States to prepare for a career in teaching law and is currently pursuing an LL.M. degree at a law school in the same city where I teach.[19]

Recalling Rodrigo's recent success in winning a national student writing competition with his seminar paper on care and competition and his plans to enter a paper on race in an upcoming contest sponsored by a conservative organization,[20] I began: "The last time we talked, things were going well for you. You had won that writing prize and were hot on the track of a second paper that sounded intriguing. Has school taken a turn for the worse?"

"Well, yes. And in a way, it has to do with the paper that I am working on."

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17. Savage's book deals with the Court's treatment of civil rights, the right to die, flag desecration, the death penalty, and other notable areas. Moreover, Savage's personal interviews with the Justices enable him to give fascinating insights into the Justices' personalities and working styles. The book ends with a description of the Clarence Thomas confirmation hearings, Savage, pp. 423-50, and a look forward at the Court's likely quietist role in social reform.

18. Geneva Crenshaw is a fictional character created by Derrick Bell. For additional background information on Rodrigo, see Richard Delgado, *Rodrigo's Chronicle,* 101 YALE L.J. 1357 (1992) [hereinafter Delgado, *Rodrigo's Chronicle*] (reviewing DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS (1991)); *see also* Richard Delgado, *Rodrigo's Second Chronicle: The Economics of Politics and Race,* 90 MICH. L. REV. (forthcoming 1993) [hereinafter Delgado, *Rodrigo's Second Chronicle*] (reviewing RICHARD EPSTEIN, FORBIDDEN GROUNDS (1992)); Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race,* 81 CAL. L. REV. (forthcoming 1993) [hereinafter Delgado, *Rodrigo's Third Chronicle*] (reviewing ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992)).

19. Rodrigo's foil, "the professor," is also a fictional construct. As I have created him, he is a middle-aged, male professor of color who teaches in a large law school in a major urban area. Neither Rodrigo nor the professor is based on any single person, alive or dead.

20. This is the subject of the "Third Chronicle." *See* Delgado, *Rodrigo's Third Chronicle, supra* note 18.

"I'd like to hear about it. Can I offer you a cup of coffee? I have a new coffeemaker."

"Yes, thanks. Oh—Giannina and I have one of those." Rodrigo examined my new gadget with interest. "We have the smaller version."

As I busied myself measuring the grounds and setting the switches, my visitor inquired: "Does your law school have an annual 'libel show,' Professor?"

"Yes. I think most do. Here, they're called the Follies—a little singing, some bad dancing, and a lot of mockery of the professors.[21] They're a good way for students to let off steam, although the faculty sometimes grumble over the irreverent way they are portrayed."

"We had something similar back in Italy, too. But the one they had at my school this year set a new low. Half the skits were antifemale or antiminority. One made fun of affirmative action; another, of gays and lesbians. A third, perhaps the most tasteless of all, lampooned a gay scholar who had died less than a year earlier of AIDS—even though her one-time lover and young son were in the audience."[22]

"In bad taste, to say the least," I commented. "Did anyone do anything about it?"

"A number of students and several of the faculty complained and signed a petition demanding action. But the administration did nothing. Several faculty members sided with the students who produced the show. They said that, despite the odiousness of some of the ideas expressed, it was free speech."[23]

"Reminds me of the position certain liberal organizations take on the campus hate-speech controversy. They deplore racism and racist remarks but throw up their hands and say there is little we can do because they include speech."[24]

"I know. But that's only the beginning. When the administration refused to take action against those who put on the first production, my group of nearly fifty LL.M. students decided to produce a show of our own. It was a kind of counter-parody. We made fun of the original production, as well

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21. Many law schools appear to have such annual programs.

22. A similar incident happened at Harvard Law School. For a discussion of the controversy surrounding a lampoon issue of *Harvard Law Revue,* see David Margolick, *In Attacking the Work of a Slain Professor Harvard's Elite Themselves Become a Target,* N.Y. TIMES, Apr. 17, 1992, at B16, B16. This controversy concerned the following article: Mary Doe, *He-Manifesto of Post-Mortem Legal Feminism (From the Desk of Mary Doe),* 105 HARV. L. REVUE 13 (1992) (on file with the *Stanford Law Review*) (the issue was subsequently withdrawn).

23. *Compare* Margolick, *supra* note 22, *with* Michele N-K Collison, *Angry Protests over Diversity and Free Speech Mark Contentious Spring Semester at Harvard,* CHRON. HIGHER EDUC., May 6, 1992, at A39, A39-40.

24. *E.g.,* Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?,* 1990 DUKE L.J. 484 (The author, national president of the ACLU, contends that racial insults are protected speech.). For an opposing perspective on this issue, argued on free speech and equal protection grounds, see, for example, Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision,* 85 NW. U. L. REV. 343 (1991); Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus,* 1990 DUKE L.J. 431.

as of a number of law school institutions, practices, and sacred cows. Many of us are from foreign countries, so we chose targets that struck us as funny about the U.S. or legal education here."

"And what happened?"

"There was a huge turn-out—probably as big as for the original event, even though we didn't serve alcohol. The crowd loved it. We satirized the Socratic method, recruiting season, casebooks with unanswerable questions, ultraconservative student organizations, and professors who take seven months to grade bluebooks that we write in three hours."

"Sounds inoffensive enough. How did this get you in trouble?"

"One of our skits poked fun at the law school for currying favor with rich alumni. We called the skit "Blood Money" and acted it out to the music of a popular tune. When word got out, one wealthy and well-known donor rescinded his pledge to give the law school $3 million for a new library. The administration was furious. Several of us got letters formally reprimanding us for conduct inimical to the institution. Others of us were told informally that we had better not count on the school's help in getting teaching jobs."[25]

"No small threat," I acknowledged. "If your program is at all like ours, most of the LL.M.s are there because they want to become academics. What's the point of getting the degree if you can't teach later?"

Rodrigo shrugged and then continued, "I couldn't help be struck by the different treatment of the two programs. The first one was raunchy, mean-spirited, and really pretty amateurish. Ours was much more light-hearted and, if I may say so, literate. Giannina helped with the lyrics—as you may know, she's a published playwright."

"No, I didn't know." Actually, I had not yet met Giannina, Rodrigo's companion, and I was curious to find out more about her.

"So, the words were really funny. Swiftian, even Voltairean, in their deftness. But it made no difference to the administration. We were all reprimanded, and now I'm not sure I'll be able to get a job."

"Rodrigo, don't worry. You're a top graduate of a major law school, and you have already won a national prize for student writing. You'll do fine."

"I hope so," Rodrigo responded, a little uneasily. "But the whole business got me thinking about neutrality and color-blindness in the jurisprudence of race.[26] As you may recall, my second paper—the one I'm writing for that other contest—"

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25. Several recent articles note the importance of mentors in encouraging the advancement of students of color and women. *E.g.*, Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to be a Role Model?*, 89 MICH. L. REV. 1222 (1991); Linda S. Greene, *Tokens, Role Models and Pedagogical Politics: Lamentations of an African-American Female Law Professor*, 6 BERKELEY WOMEN'S L.J. 81 (1991); Lani Guinier, *Of Gentlemen and Role Models*, 6 BERKELEY WOMEN'S L.J. 93 (1991).

26. For a classic treatment of the role of neutrality in constitutional adjudication, see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). For a

"You mean the one sponsored by the conservative organization?" I interjected.

"Yes, that one. I've been struggling with a way to articulate just what's wrong with neutrality. It seems logical to think that a society that sets out scrupulously to treat Blacks and whites alike in every setting—jobs, housing, education, credit, and the like—should have no discrimination. Yet it obviously doesn't work that way."

"Rodrigo, I know you're widely read. But possibly you don't know that a number of us in the Critical Race Theory movement have been saying just that: Mainstream jurisprudence's neutrality is bogus, a mask, a cover.[27] In feminist theory, Catharine MacKinnon has been saying the same thing—that the law's procedural regularity, its emphasis on 'legality,' serves to conceal and legitimate an antiwoman bias.[28] So, your observation, while trenchant, is not particularly novel, although in light of your recent experience I can see why you are preoccupied with it. Would you like me to refer you to some things to read?" I reached for the four books on the corner of my desk and began mentally composing a short additional reading list that would get Rodrigo started. In a moment, I regretted my offer.

"I've read those," Rodrigo replied levelly. "And I've read you, and Bell, and MacKinnon, and Freeman, and many others on this subject. But I want to go further."

I could feel the blood rushing into the tiny capillaries in my face. I should have known better than to patronize Rodrigo. If not two steps ahead of me, he's almost always at my own level.

"What do you mean, 'go further'?" I asked quickly, in part to cover my own gaffe, but also because I very much wanted to hear his thoughts. Perhaps Rodrigo could help me discover a way to incorporate the four books I had been struggling with into my teaching materials.

"Many Critical Race Theorists condemn neutrality and color-blindness as merely maintaining the racial advantage of whites. But, aside from presenting the 'playing field' or 'starting line' analogy, they offer little explanation of *why* this is so."[29]

"The coffee's almost ready. I assume you have some thoughts about this?"

"I do."

"I'd love to hear them. Let me wash out these cups."

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rigorous reexamination of this position, see Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

27. *See, e.g.*, Bell, pp. 2-14, 89-108; DERRICK BELL, RACE, RACISM AND AMERICAN LAW (3d ed. 1992) [hereinafter BELL, RACE, RACISM] (arguing that neutral race-remedies law maintains white supremacy); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Gotanda, *supra* note 26.

28. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1989); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

29. Both of these analogies demonstrate that because of whites' historical advantages, special provisions must be made for minorities, otherwise whites will prevail in most competitions.

I. In Which Rodrigo Explains How Neutral Principles of Constitutional Law Disadvantage Blacks and Other Outsider Groups

When I returned, Rodrigo was leafing through one of the books on my desk.[30]

"I must correct myself," he said. "I haven't read this one. It looks like it's still in manuscript form."

"It is," I confirmed. "The author, Professor Spann, was kind enough to supply me with an advance copy. It's an expansion of his earlier *Michigan Law Review* article."

"*Pure Politics*?"[31] Rodrigo asked. "I read that article. I thought it was brilliant. He urges Black people to abandon their excessive and misplaced reliance on the Supreme Court as an instrument of social progress, and to concentrate instead on 'pure politics'—the employment of mass force and influence through marches and protests, as well as elections and representative government.[32] Is that what his new book is about?"

"That and more."[33]

"And does he explain what it is about the Supreme Court's fascination with neutrality that causes it to hand down one hurtful decision after another?"

"Not in the version of the manuscript that I have."

"That's disappointing," Rodrigo lamented. "None of the good leftist scholars seem to have addressed that question. And the right-wingers," Rodrigo continued, gesturing toward two of the books on my desk,[34] "agree that the courts haven't been able to initiate sweeping social change. But, unlike the folks on the left, they're not upset about that; they think it's the way things should be. In their view, a neutralist, quietist Supreme Court is simply performing its assigned role in our political system."

"So, both sides agree on the effects of 'neutral' jurisprudence. Left and Critical writers view the Supreme Court's failure to do more to benefit people of color with outrage; they consider our system's noble promises of equality a sham.[35] And more conservative judges and writers see the same thing, but celebrate, since, according to them, that's the way courts should behave."[36]

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30. The book was Girardeau Spann's *Race Against the Court.*

31. Girardeau A. Spann, *Pure Politics,* 88 MICH. L. REV. 1971 (1990).

32. *Id.* at 1990-2007, 2012-18, 2022-30.

33. As noted earlier, Spann's work presents a devastating indictment of the Supreme Court's role as articulator of antiracist values and policies. *See* text accompanying notes 10-15 *supra.*

34. The two books were Gerald Rosenberg's *The Hollow Hope* and David Savage's *Turning Right.* In this statement, Rodrigo might be said to mischaracterize these works. Rosenberg is better described as a centrist whose book, though ultimately supportive of the conservative view of the role of the courts and sponsored by a conservative organization, purports to be nonideological. Savage's book is a study of the emergence of a conservative majority on the Supreme Court.

35. *E.g.,* Spann, pp. iv-vi, 30-34, 180-204, 262-78, 293-97.

36. *E.g.,* Savage, pp. 453-58; Rosenberg, pp. 10-21 (describing "Constrained Court" model of judicial function).

Rodrigo nodded. "Exactly."

As I mulled over Rodrigo's observation, I noticed that my coffeemaker had stopped making noise. "Ready for a cup?" I asked, rising from my chair. Rodrigo nodded enthusiastically. I poured two mugfuls of steaming espresso and handed one to Rodrigo. Sitting back down, I urged Rodrigo, "So tell me what you think causes this situation. In a way, it *is* paradoxical, isn't it? I mean, if a legal system sincerely sets out to treat a person of color and a white man exactly the same in every situation that counts, this should in the long-run produce something like rough equality, shouldn't it?"[37]

"But it's impossible to assume away the short-run," Rodrigo countered. "African-Americans and whites live in vastly different circumstances, as we discussed last time.[38] I think the reason for the paradox has to do with the unspoken background against which people make all of these ostensibly neutral decisions."

"In other words," I mused, "are you saying that the various decisionmakers—employers, apartment managers, admissions committees, and so on—strive to decide fairly, but carry around subconscious biases that make it impossible to be truly impartial?[39] Charles Lawrence says something like that; he argues that everyone in American society harbors unconscious racism that manifests itself in a myriad of ways."[40]

"I think Lawrence is right, but the problem is broader than that."

"In what way?" I asked, setting down my mug and leaning forward in my chair.

Rodrigo took a deep gulp of coffee. "In our society, even a decisionmaker with the most pristine racial conscience, one without a trace of prejudice against minorities, would still end up making decisions adverse to candidates of color. It has more to do with the cultural background against which legal criteria are applied than with any sort of overt antiminority conspiracy."

"What do you mean by cultural background? Do you mean our people's exclusion from informal networks, sources of information—that sort of thing?" I had heard this argument before and thought it had some validity.[41]

"That's part of it," Rodrigo replied. "But there's more. Legal and cultural decisions are made against a background of assumptions, interpretations, and implied exceptions, things everyone in our culture understands

37. The concept of the "long-run" incorporates the assumption that sufficient time has passed to allow any differences in initial starting points to disappear. *See* note 29 *supra* and accompanying text.

38. Delgado, *Rodrigo's Third Chronicle, supra* note 18 (discussing HACKER, *supra* note 18, at 93-103, 109-32, 134-78, which describes with stark clarity many of these differences).

39. On unconscious racism, see Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism,* 39 STAN. L. REV. 317 (1987).

40. *Id.* at 339-44 (pointing out the ways in which unconscious racism informs acts which might appear neutral on the surface).

41. *E.g.,* Greene, *supra* note 25; Guinier, *supra* note 25.

but which seldom, if ever, get expressed explicitly."[42]

"And I suppose you are going to say that all those assumptions favor whites?"

"Of course. And they have at least as much efficacy as does law on the books."[43]

"Could you give me an example?" I persisted. "It still seems to me that if every relevant decisionmaker sets out to treat two individuals, A and B, identically even though one is white and the other Black, then we have achieved formal equality. "How," I asked with a wry smile, "can a system like this possibly disadvantage minorities?"

"Take a different kind of promise," Rodrigo said, eyeing my coffee machine. The young wunderkind set a fast pace; I was happy to see he needed fuel from time to time, too.

"Like another cup?"

"In a minute. Let's say that a father promises his son a trip to the ice cream parlor if the child cleans up his room. The child says, 'No matter what?' The father answers, 'Sure.' So the child cleans up his room, but the father never ends up taking him out for the ice cream."

"Hmm," I murmured, turning the hypothetical over in my mind. "I suppose the father had an excuse of some sort?" I recalled with no small measure of guilt times in my own life as a parent when I had done something similar.

"Right. The father says, 'You couldn't have thought that I meant that you had *three whole days* just to clean that little room.' Or, the day after the promise, the local ice cream parlor goes out of business, and the nearest shop is an hour away. Or, the father loses his job. Or, the car develops engine trouble or suffers some other mishap and has to go to the garage, and the only way to get the cone would be for the two to take a $10 cab ride. Or, the child develops a milk allergy. It turns out, then, that the father's promise assumed dozens of conditions, implied exceptions, and unstated excuses. Although the father never spelled these out, he insists the child must have known of them. The same sort of unstated conditions underlie our society's promises of racial equality."

"So, you are saying that just as all the terms of the argument favor the father, mostly white decisionmakers construe the interpretational structure in a manner which inevitably favors whites and disadvantages nonwhites in situations like the ones we've been talking about? And they do this, you're

42. *E.g.*, T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991); Derrick A. Bell, Jr., *Private Clubs and Public Judges: A Nonsubstantive Debate About Symbols*, 59 TEX. L. REV. 733 (1980); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989).

43. Writers in an early Critical movement that originated at the University of Wisconsin in the middle years of the century used the term "law on the books" to designate the system of formal legal rules—a system they regarded as less interesting and often less efficacious than the system of "law in action." *See, e.g.*, David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984).

saying, not because they're biased, consciously or unconsciously, but rather because they're fully acculturated members of society?"

"Exactly!" Rodrigo replied with animation that I didn't think was entirely caused by the high caffeine content of my mocha java beans, obtained from a new supplier. "Imagine an African-American applies for a job on the faculty of an institution like yours. The only other candidate for the position is white. The hiring committee declares its intention to use only scrupulously race-neutral criteria."[44]

"Yet, the white gets the position, right?"

"Yes. Even though the two candidates went to the same law school, got the same grades—you name it—a difference will emerge, and that difference is not part of the formal, written criteria. One turns out to have a more pleasant demeanor than the other. The white strikes the hiring committee as better at 'small talk.' The white has more seniority, more 'solid' job experience, better 'communication skills,' or a stronger recommendation from a better-known professor. It turns out that new 'merit' criteria just happen to favor the white applicant. None of these requirements was mentioned in the formal job description circulated or advertised by the employer."[45]

"Yet everyone knows they're there. The formal, 'on the books' rule—the only one explicitly stated—looks magnificently fair: 'Treat blacks and whites exactly the same.' But the cultural backdrop skews the application of the rule, producing discriminatory results," I summarized. "I bet you think this explains why the LL.M. skit got you into trouble, while those students who put on the main event got off unpunished."

"Exactly," Rodrigo replied. "There turned out to be an implied exception to the rule that satires are acceptable.[46] Free speech reigns unless you poke fun at certain things or cause a wealthy alum to put his checkbook away."

"I'm sure he will reconsider once the fuss dies down. Alums love having their names prominently displayed on buildings, classrooms, and lounges throughout the law school. It reminds them of the good old days."

"Even if the law school is changing—if the composition of the student body and faculty is radically different from the way he remembers?"[47] pressed Rodrigo.

"You may have a point. But in all fairness, I think the original skitsters would have earned retribution, too, if their program caused a rich alum to revoke a donation." I stopped, realizing I was uncomfortably close to taking

44. For the view that few law schools achieve this goal of equal consideration, see BELL, AND WE ARE NOT SAVED, *supra* note 2, at 140-61 (chronicle of the "seventh candidate," dealing with law faculty hiring).

45. *See* Aleinikoff, *supra* note 42 (culture skews perception); Delgado, *Rodrigo's Third Chronicle, supra* note 18; Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia,* 1990 DUKE L.J. 705, 716-21.

46. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (stating general rule that satire directed at a public figure qualifies for First Amendment protection).

47. *See* BELL, AND WE ARE NOT SAVED, *supra* note 2, at 143 (addressing alumni uneasiness with demographic shifts within contemporary law schools).

on the role of apologist for the system. Was I losing my own critical edge? I had a birthday coming up, and this had been on my mind for a while.

Rodrigo shot me an appraising look so I backtracked slightly. "I do agree with you that in this case there is a propensity to apply the 'boys will be boys' excuse, and not the other. The school's reaction does seem more than a little harsh."

"Maybe I'll have my friend Ali write a letter asking him to reconsider—the donor, I mean. Ali's a great conciliator and has a gift for words. Maybe he can remind the wealthy philanthropist that the true test of a great law school lies in its ability to withstand vigorous criticism, and that the LL.M. skit simply confirmed his old school's greatness."

"I'm sure it wouldn't hurt your job chances if you and he were successful," I added.

Rodrigo was silent for a while. Then, returning to his critique of neutrality, he posed another hypothetical: "Maybe this is a way to explain it. Imagine that a lawn treatment chemical turns out to be virulently poisonous. The suburbs disappear. Overnight, white people become a minority who must now deal with Blacks (and other racial minorities) from a position of weakness. A long tradition of Black subculture holds that one may freely disparage and ridicule anyone who is a 'jerk.'[48] The definition of 'jerk' is a person who is naive, slow at sports, bad at repartee, lacking in street smarts.[49] A whole culture of songs, myths, stories, and the like derides people who fit this description. Let's suppose that unflattering concept just happens to be associated, fairly or unfairly, with people who have light skins. Is there any doubt that in the new regime, white people would come out second-best, even if they were just as talented, smart, deserving, and motivated as members of the new majority group?"[50]

"A vivid example, if a little far-fetched," I replied. "Whites would end up second-best even if Blacks set out to treat them fairly, humanely, and even-handedly. The background assumptions would cause them to lose out in the race for jobs, slots in law school classes, and so on, even if all the rules were colorblind."

I flipped the switch on the coffee warmer to "On." "But let's return to the world at hand. Much of the action these days concerns retributive, not

48. Most groups, of course, including the dominant one, use disparaging terms to focus anger, contempt, or dislike on members of other groups. *See* CAROL ROSEN, MAYBE HE'S JUST A JERK (1992); Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 133-49 (1982); Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1282-83 (1992).

49. This concept of a "jerk" is an example of a language game. Conceived by Ludwig Wittgenstein, the notion of a language game focuses attention not on words' core or "essential" meanings or definitions but on their multiple, sometimes overlapping, uses. *See* LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 9-25 (D.F. Pears & B.F. McGuinnes trans., 2d ed., Routledge & Kegan Paul 1974) (1921).

50. For a somewhat different depiction of a racial reversal of fortunes, see BELL, AND WE ARE NOT SAVED, *supra* note 2, at 162-77 ("Chronicle of the Amber Cloud").

distributive justice. White society has already figured out, to its own satisfaction at least, how to go about distributing jobs and other benefits to Blacks—namely, very stintingly.[51] But the attention is now beginning to focus on the remedial aspects of civil rights strategy—on what society should do, in light of its past mistreatment of Blacks.[52] How does your 'cultural background' argument work here, Rodrigo?"

"In much the same way," Rodrigo confidently replied, rising and walking over to my coffeemaker. "May I?"

"Of course. The sugar and creamer are over there."

Rodrigo poured himself a second cup, while I marveled at his youthful constitution. "If you want decaffeinated, I can brew some," I offered.

Rodrigo made a face and returned to his chair, where he began gulping his steaming-hot high-octane. "Implied exceptions arise in this setting, too. Any remedy for past discrimination must not be too costly to whites.[53] So-called 'innocent' whites may not be made to pay the penalty for past injustices.[54] Decrees may not bind whites who are not members of a class before the court.[55] Discrimination is not redressable unless an intent to discriminate can be proven.[56] Harms are not compensable unless tight chains of causation are shown.[57] Standing rules limit who may complain.[58] And so on."

"So, essentially what you're saying is that the dominant culture has somehow managed to take the sting out of any and all available remedies?" I asked.

"Right," Rodrigo responded.

"You know, Rodrigo," I said thoughtfully, "I think you may be onto something. Many of us Critical Race Theorists have written about the way in which the costs of racial remedies always seem to be placed on Blacks—

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51. Derrick Bell's *Faces at the Bottom of the Well* analyzes the societal allocation of benefits to African-Americans. For a description and analysis of the current retrenchment in civil rights, see Savage, pp. 361-420; Linda S. Greene, *Race in the 21st Century: Equality Through Law?*, 64 TUL. L. REV. 1515 (1990).

52. *E.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (minority set-aside held unconstitutional because city failed to show that its plan was narrowly tailored to remedy specific past discrimination that was not redressable through race-neutral means).

53. Derrick Bell has been one of the chief critics of this view. *See, e.g.*, Derrick A. Bell, Jr., Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3 (1979); Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1979); *cf.* Bell, pp. 89-108 (discussing racial realism).

54. For a discussion of the role of innocence, see Delgado, *supra* note 25, at 1224.

55. *See* Martin v. Wilks, 490 U.S. 755, 761-62, 765, 768 (1989), *superseded by statute* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C.A. § 1981 (West Supp. 1992)).

56. *See* Washington v. Davis, 426 U.S. 229, 239-40, 242, 245 (1976); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), *superseded by statute* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C.A. § 1981 (West Supp. 1992)). *But see* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

57. *E.g.*, Davidson v. Cannon, 474 U.S. 344, 347-48 (1986); Daniels v. Williams, 474 U.S. 327, 332-33 (1986); *see* Mark S. Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 292-93, 304-10 (1982).

58. *See* Allen v. Wright, 468 U.S. 737, 751-61, 766 (1984).

the faces at the bottom of the well.[59] Your insight helps explain why this happens."

Rodrigo drained his cup. "Neutral rules rarely detect many breaches of the principle of nondiscrimination,"[60] Rodrigo continued. "And, when breaches are detected, those violations are remedied in as innocuous a way as possible, one that does not significantly disturb the prevailing social order."[61]

"How does partisan politics affect all of this? Do you think it makes much difference whether the conservatives or the liberals are in power?"

"Not much," Rodrigo answered. "Partisan distinctions may be important in other areas, such as economic policy or foreign relations, but they make little difference for minorities. Both liberals and conservatives champion neutrality in antidiscrimination law, as though treating Blacks and whites exactly the same will make discrimination go away. But as we have seen, it won't. We fare no better under one regime than the other. For us, political labels are merely deflections from the issues."[62]

"I'm not sure I'd go that far, Rodrigo," I asserted, "even though I agree that neutrality is flawed. Obviously, rules dictating equal treatment of minorities and whites can't redress longstanding discrimination. But you must admit, such rules are better than the old blatantly racist ones.[63] Perhaps they are way stations to something better. Don't you agree?"

"Maybe," Rodrigo replied somewhat skeptically. "The danger though is in complacency. Since minorities and whites are now definitionally equal under the law, we can tell ourselves that *that* problem is solved. We can even blame the victim.[64] For, if after four decades of scrupulously neutral legal rules, African-Americans and other people of color are still poor, marginalized, and discontent—well, what can be done? 'The problem cannot be our fault,' the argument goes, 'since we've put in place all these wonderful legal rules which mandate equal treatment. If they haven't been able to prosper with such rules in place, then the problem must lie with them. Right? They must be shiftless, or immoral, or not very smart.' "[65]

"I recognize this danger. In fact, I've actually written along somewhat similar lines myself."

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59. *E.g.*, Bell, pp. 101-04; *see also* note 53 *supra.*

60. *See* text accompanying notes 56-57 *supra.*

61. *See* text accompanying notes 54-55 & 59 *supra.*

62. *See* Richard Delgado, *Zero-Based Racial Politics: An Evaluation of Three Best-Case Arguments on Behalf of the Nonwhite Underclass,* 78 GEO. L.J. 1929, 1929-30 (1990).

63. For a description of the old regime of separate but equal schools, whites-only drinking fountains, Jim Crow laws, and of course, slavery, see BELL, RACE, RACISM, *supra* note 27, at 2-63. *See generally* A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS (1978); JENNIFER S. HOCHSCHILD, THE NEW AMERICAN DILEMMA (1984); KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH (1956).

64. *See* Freeman, *supra* note 27, at 1054, 1103; Richard Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?,* 97 YALE L.J. 923, 942-43 (1988) (reviewing DEREK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987)).

65. *See* note 64 *supra*; Delgado, *Rodrigo's Chronicle, supra* note 18, at 1374.

"I know," Rodrigo said with an impatience I found almost charming because of his youth. "And even those of good will, those who don't blame us, end up distracted from the reality of minorities' plight by the rhetoric of neutrality, and are led off into another direction. With formal legal equality, *Brown v. Board of Education*,[66] and the principle of nondiscrimination now in everyone's consciousness, the focus shifts to the courts. Everyone asks whether *Brown* was a justified decision, whether it was principled or not. Everyone talks earnestly about the proper judicial role, about whether courts can or should be in the business of propelling legal change."[67]

Rodrigo gestured toward Gerald Rosenberg's *The Hollow Hope*, one of the books on my desk. "A prime example! Instead of writing about Blacks and their predicament, everyone writes about courts—on law and the appropriate judicial function. We start out writing about racial wrongs, about racial justice. But, we end up writing about ourselves. It's a neat shift."

"Traditional legal scholarship seems much more concerned with procedure, the way one should go about solving a problem—rather than actually solving it.[68] It's probably a universal human tendency."

"Perhaps so," Rodrigo replied. "The problem is how African-Americans, a group that was brought here in chains, can achieve retributive justice. Yet we end up talking about legal principles. We endlessly discuss whether some deviation from perfect formal equality is principled, whether some paltry affirmative action program benefiting a handful of African-Americans can be justified.[69] How can we ever hope to achieve justice when these are what we're calling the burning issues of race. These issues are much more absorbing—not to mention less guilt-inspiring—because they are about *us*."

"Well, Rodrigo, I must admit I find your analysis intriguing, particularly the way you tie your ideas back to neutrality as the source of the trouble. Is this what you are writing about for your seminar paper: the one you plan to submit to the second competition?"

"Yes. I'm thinking of focusing on the dichotomy between equality of opportunity and equality of results. I'm sure the conservative sponsors will appreciate that."

"Bravo," I responded, with a trace of amusement. "Conservatives love equal opportunity as much as they hate equal results. In their view, the first is principled, neutral, and fair, while the second is unprincipled, result-

66. 349 U.S. 294 (1954).

67. *See* Gotanda, *supra* note 26 (discussing color-blindness); Wechsler, *supra* note 26 (discussing neutrality); *see also* RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 147-266 (1992) (urging abandonment of race-conscious laws and programs).

68. For a similar observation, see Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 568-69, 576 (1984). *But see* Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1792-93 (1989) (arguing that, although certainly not the only issue, procedural issues are important to race relations law).

69. For the view that affirmative action programs actually aid middle class Blacks instead of the more needy lower-class Blacks, see STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 71-84, 94, 233 (1991); Delgado, *supra* note 25.

oriented, and wrong.[70] You will definitely get their attention, particularly if you can manage to present a new angle. Have you thought about how you are going to link it up with your insight about neutrality as a sham guarantee?"[71]

"That's the trick," Rodrigo answered, a bit pensively. "I've got a few ideas, though. Can I tell you about them over dinner?"

"Sounds good," I said. "I'm starved. My doctor told me not to go too long between meals."

"I'll pay this time," Rodrigo offered.

"Don't be ridiculous. I owe you. You've helped me figure out how to incorporate those four books into the new edition of my casebook. Plus, I make more money than you."

"An odd definition of neutrality, Professor. Why don't we go Dutch?"

"Okay, okay, if you insist," I conceded.

II. IN WHICH RODRIGO AND I DISCUSS EQUALITY OF OPPORTUNITY VERSUS EQUALITY OF RESULTS

About an hour later, Rodrigo and I found ourselves comfortably ensconced in a plain but comfortable Mexican restaurant in the meat-packing district that my friend Jose Oliveros had introduced me to the last time he was in town. I was struck that Rodrigo, who had been raised in Italy and only been back in the States a short time, knew to order Dos Equis beer with his meal. After the waiter disappeared with our orders, Rodrigo continued our earlier conversation.

"As I mentioned earlier, I'm thinking of using the two types of equality, equality of opportunity and equality of result, as my principal illustration of the problems with neutrality."

"A good choice. Do you intend to argue that they merge, that they constitute a false dichotomy?" I worried that my young friend might have fallen prey to the influence of the deconstruction movement, a movement whose main goal, so far as I could determine, is to show that polar opposites collapse into each other upon close inspection.[72] I hoped Rodrigo was not going to take me on a tour of Continental theory. I didn't feel up to it—at least before we had a bite to eat. Fortunately, my fears proved groundless.

"No, although I suspect one could do that," Rodrigo replied. "I'm thinking of doing something more along the lines of a social and conceptual inquiry."

Relieved, I prodded: "I've always been struck by the way conservatives

70. CARTER, *supra* note 69, at 230-32; SHELBY STEELE, THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA 111-25 (1990) (criticizing result or quota oriented affirmative action programs).

71. *See* notes 35-36, 38-50 *supra* and accompanying text.

72. On the critique of liberalism as incoherent and riddled with contradictions, see, for example, Jamie Boyle, Critical Legal Studies: A Young Person's Guide (1989) (unpublished manuscript, on file with the *Stanford Law Review*).

favor equality of opportunity over the other kind. If they were genuinely committed to neutrality, you would think that equal results would be the logical way to measure the effectiveness of racial programs. Have you a theory for why conservatives—and many liberals, too—have such an aversion to equality of results?"

"I do," Rodrigo declared, pausing for a moment as the waiter set down our drinks. I resolved merely to sip my own Dos Equis until dinner arrived. I could see the outlines of a new subsection of my book forming, and wanted to remain alert. I made a mental note to figure out some way of giving Rodrigo credit. Maybe an effusive footnote would suffice for now. Later, when he got his first teaching position, I'd take him on as co-author, I mused. He certainly had more energy than I did these days, and these revisions were becoming increasingly tedious.

As though reading my mind, Rodrigo offered: "You or I might want to do something with this notion sometime. To my knowledge, no one has really addressed it. It *is* truly amazing, when you think about it, how all the leftists and civil rights activists, like yourself, prefer equality of results, while those of moderate or conservative persuasion prefer equality of opportunity."[73]

"You said you had a theory for this ideological preference?"

"Well, I think it has to do with one's perspective, one's baseline. If you start out from a certain position, a given practice will look neutral. From a different perspective, the same practice will look one-sided, biased, unfair. For example, look at the quota issue. It's no secret that most conservatives dislike quotas for Blacks and other minority groups.[74] Such schemes strike them as radically unfair, because they assure that a certain number of minorities will get jobs. Imposition of a quota seems nonneutral, because whites are treated differently from nonwhites.[75] Without the quotas, that number would, no doubt, be much smaller. But that, in large part, is because in the absence of quotas the job criteria operate to hire artificially low numbers of Black and minority applicants. Genuinely equal treatment will strike some whites as unfair. Apparently, only advantage—a tilted playing field or criteria that favor them—seems neutral and normal. So, with any new arrangement we look to see who benefits, who is advantaged or disadvantaged, and pronounce regimes fair or unfair accordingly."

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73. With equality of opportunity, one never knows if one has achieved complete fairness; with equality of result, one simply notices whether one has achieved one's preselected measure or not.

74. *See, e.g.*, Bruce Fein, *Affirmative Action Fans Who Applaud* Wygant *May Be Misguided*, NAT'L L.J., June 9, 1986, at 13 (calling Wygant v. Jackson Bd. of Educ., 478 U.S. 1014 (1986), a victory for those who favor color-blind jurisprudence); George Will, *Bush's Blunder on Racial Scholarships*, NEWSDAY, Dec. 27, 1990, at 95; *see also* Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1320 (1986) (citing conservatives opposition to quota schemes). Two Supreme Court decisions have struck down minority preference schemes of different types. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

75. *See* THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 37-60 (1984); STEELE, *supra* note 70, at 121-22; Abram, *supra* note 74, at 1319-20.

"I'm still not sure I understand why everyone resists equality of result. Is it merely because such an approach is likely to provide more jobs and benefits to minorities?"

"Well, in part, but the mechanism is a little more complicated. Notice how equality of opportunity is a much more nonformal, multifactorial measure than equality of results.[76] The latter kind of equality is starkly simple. You merely compare the number of minorities and whites at a job site, for example. But with equality of opportunity, many things come into play. This multiplies the opportunity for cultural factors to have an effect."

"By 'cultural factors' you mean the host of background assumptions, interpretations, and implied exceptions that we discussed earlier?"[77]

"Yes. Neutrality works best when it is able to call up and rely on as many of these culturally inscribed routines and understandings as possible. These understandings, 'read' into the culture long ago, now seem objective, unchallengeable, and true.[78] I mean things like the merit principle, the idea that informed consent should insulate a doctor from malpractice liability, or the impression that 'objective' standards for consumer warnings are somehow more fair than subjective standards."[79]

"Women have been pointing out something similar in connection with date rape, urging that consent be examined from a more searching perspective than 'What would most men think in this situation?' "[80]

"And I think it's the same general idea. After we inscribe our ideas of power, authority, and legitimacy into the culture, we then pretend to consult that culture, meekly and humbly, in search of justice—for rules that are fair and neutral. A neat trick if you can get away with it."[81]

Rodrigo paused, since the waiter had arrived with our food. Realizing that our long conversation had made us hungry, in unspoken agreement we ate for a few moments in silence. Rodrigo attacked his *chile relleno* with gusto, while I examined my burrito for anything forbidden by my doctor—a list that seemed to get longer and longer each time I visited her.

After his appetite subsided, Rodrigo continued: "So the nonformal nature of equality of opportunity allows members of an empowered group to call upon and invoke the many culturally established routines, practices, and understandings that benefit them."

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76. *See* Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution,* 1985 WIS. L. REV. 1359, 1367, 1374, 1394 (using "nonformal" to mean embracing a large amount of relevant information).

77. *See* text accompanying notes 38-43 *supra.*

78. For a similar argument, see Richard Delgado, *Shadowboxing: An Essay on Power,* 77 CORNELL L. REV. 813, 817-21 (1992) (legal rules replicate social power, demonstrated through examples of medical informed consent, date rape, and cigarette warnings).

79. *Id.* at 819-21.

80. *Id.*; *see also* Richard Delgado & Jean Stefancic, *Pornography and Harm to Women: "No Empirical Evidence?",* 53 OHIO ST. L.J. 1037 (1992) (using examples of antipornography movement).

81. Delgado, *supra* note 78, at 817-23.

"Could you give me an example?"

"Sure. Take our earlier one of the law school that can only hire one professor.[82] There are two finalists, a Black and a white. The formal job description contains the standard criteria: potential for scholarship, teaching, and public service. The two finalists seem equally qualified in each of those respects. Equality of results would dictate that the Black applicant get the job because of the small number of African-Americans on the faculty. That is, the approach would strive for equality, for proportional representation, or some similar measure. But as we discussed before, under equality of opportunity the white will inevitably get the position. Equality of opportunity only guarantees that both will receive initial consideration. And when both candidates are considered, a myriad of factors, some conscious, some unconscious will come into play: inflection, small talk, background, bearing, social class, and the many imponderables that go into evaluating 'collegiality.'[83] Critical Race Theory argues, and the battle for civil rights demonstrates, that such a regime is exactly the opposite of fair and neutral. Prudent distrust of a decisionmaker who judges persons of a different race suggests that formal, structured rules and strictly confined discretion are the key to just such decisions.[84] But that is the opposite of what we have."

"Or take cases of pay increase and promotion," I suggested. "Formal equality says pay and promote minorities the same as whites doing the same work. But, in practice, this formal rule turns out to have exceptions that are applied in accordance with cultural understandings. The white candidate got a higher test score.[85] So, following the rule of equal treatment would be unfair to the white. The next time, the two candidates have exactly the same test score. Again, the white gets the promotion—this time because he or she had more seniority,[86] or a 'richer' job background, or better references. And so it goes."

"In each case," Rodrigo interjected, "society manages to avoid the strict-equality rule. And the reason is the same: Some unstated cultural understanding or premise comes into play. So, the more empowered person whose predecessors were in a position to dictate the cultural terms for these transactions invariably comes out ahead."[87]

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82. *See* note 44 *supra* and accompanying text.

83. For an explanation of how these factors can be manipulated into evidence justifying a "pool is so small" defense, see Richard Delgado, *Mindset and Metaphor,* 103 HARV. L. REV. 1872, 1876 (1990).

84. For a discussion of the role of distrust in legal theory, see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1978); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law,* 79 YALE L.J. 1205, 1209 (1970).

85. On bias in standardized tests, see TOWARDS A DIVERSIFIED LEGAL PROFESSION: AN INQUIRY INTO THE LAW SCHOOL ADMISSION TEST, GRADE INFLATION, AND CURRENT ADMISSIONS POLICIES (David H. White ed., 1981); Leslie G. Espinoza, *The LSAT: Narrative and Bias,* 1 AM. U. J. GENDER & L. (forthcoming 1993).

86. *See* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 571-72, 575, 577 (1984) (discussing seniority as an implied component of job-desert).

87. Delgado, *supra* note 78, at 817-21. For a somewhat different argument based on structural considerations, see Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change,* 9 LAW & SOC'Y REV. 95, 123-25 (1974).

"So, equality of opportunity really just amounts to affirmative action for whites," I interjected. "It builds in a background of unstated assumptions that confer a consistent advantage in all the competitions that matter. If society were serious about equality, it would abolish this way of doing things and opt for equality of results. But this is something our culture will never do."

"No," Rodrigo added quietly. "It has defined equal opportunity, the approach which permits its members to win, as legal, principled, and just.[88] If one were to devise a system that would, first, produce racially discrepant results, and, second, enable those who manage and benefit from the system to sleep well at night, it would look very much like the present one."[89]

"A serious charge, Rodrigo," I cautioned. "Not every member of the majority group merits that indictment. Some well-wishers and sympathizers want us to succeed. When you go out on the hiring market, you will see that. Perhaps even now, you have found a professor or two of majority race who has adopted and encouraged you, recognized your talent, gone out of his or her way on your behalf."

"Perhaps," Rodrigo conceded. "But not even they fully understand the personal impact of racism.[90] Most sympathetic whites view our current civil rights laws and regulations as adequate. The only thing missing, they believe, is the will to enforce them consistently."

"Isn't there something to that?" I prodded. "Or, what if we simply retooled the current rules to exclude the type of favoritism you mentioned?[91] Then, would you view the system as fair?"

"I'm skeptical," responded Rodrigo. "Such 'retooling' would entail the majority group's agreement to relinquish its advantages. They would have to agree to abide by quite complex rules, nothing as simple as: 'Treat Blacks And Whites the Same.' But, even if they did agree, rules alone cannot remedy racism."

"And why is that?"

"Because of the nature of racism itself. It's a little hard to explain. I'm working on this part of my thesis right now. Would you mind listening and giving me some feedback?"

"I'd be pleased to. I'm certain I'll benefit from discussing it at least as much as you will. Unfortunately, all I've been doing lately is cutting up case reports and reading and summarizing books. Never write a casebook, Rodrigo. It saps your energy and creativity like nothing else."

Since we had finished our dinner, Rodrigo suggested: "Maybe we could

88. *See* Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law,* 101 HARV. L. REV. 1331 (1988) (describing the legitimation function of the law of race remedies); Freeman, *supra* note 27 (same).

89. Delgado, *supra* note 64, at 924, 929-47.

90. For a discussion of the disparity in the quantity of racism that persons of different ethnicities perceive, see Delgado & Stefancic, *supra* note 48, at 1282-84.

91. *See* notes 42-45 *supra* and accompanying text.

talk about it over dessert? I've heard that there's a wonderful bistro not far from here."

"Good idea. Here comes the waiter." I gestured that we would like to pay our bill, and moments later we were walking down the deserted side-street, past warehouses and giant tractor-trailers full (I imagined) of sides of beef.

As we walked, Rodrigo began.

III. IN WHICH RODRIGO EXPLAINS RACISM'S REFRACTORY NATURE IN THE FACE OF LEGAL REGULATION

"We both observed earlier that many recent authors have pointed out that the current laws don't seem able to make much of a dent in minority poverty and despair. Rosenberg, as you recall, says as much.[92] Savage, too, points out how the Court is moving steadily away from any suggestion of social activism.[93] And Spann and Bell seize on these observations to make their pungent points about the pervasiveness of racism.[94] And they're not the only ones."[95]

"True, although many conservatives don't find that particularly troubling; for them, judicial quietism is almost an article of faith. Our friends on the left are outraged, however. Gerry Spann's book all but accuses the Court of betraying African-Americans' legitimate hopes for decisions that can eliminate the barriers to Black achievement and empowerment."[96]

"So, both the left and the right agree that the legal system does little to redress Black misery."

"I'm afraid so. Now, you said you're working on an explanation for this sorry state of affairs. Is this in addition to your earlier comments about neutrality's role in concealing and increasing white privilege?"[97]

"Yes. I think that there is something about racism that makes it peculiarly difficult to dismantle through any system of antidiscrimination laws. Racism would exist even if the dominant group treated minorities and whites similarly in all settings. Even if society recognized and canceled out the myriad cultural interpretations and background factors that now give whites an edge and render equal treatment a hollow illusion, I think racism would still remain."

"Rodrigo, I've been accused of undue pessimism about the prospects for racial reform. But it sounds like I soon will have an ally—namely, you! Please explain your theory about the persistence of racism."

"Facially neutral laws cannot redress most racism, because of the cultural background against which such laws operate. But even if we could

92. *See* text accompanying notes 5-9 *supra.*
93. *See* text accompanying notes 16-17 *supra.*
94. *See* text accompanying notes 1-4, 10-15 *supra.*
95. *See, e.g.,* HACKER, *supra* note 18, at 3.
96. *See, e.g.,* Spann, pp. iv-vi, 30-34, 180-204, 269-78, 293-97.
97. *See* text accompanying notes 30-71 *supra.*

somehow control for this, formally neutral rules would still fail to redress racism because of certain structural features of the phenomenon itself."

A. *Rodrigo's First Structural Reason for Racism's Persistence: Its Vertical Character*

"Rodrigo, slow down a little. My old legs are having trouble keeping up with you." As Rodrigo's speech became more animated, he had been picking up his pace as we walked to the bistro where we planned to have coffee and dessert. I was grateful when Rodrigo slowed.

"Let me start this way. You and others have written about racism's historical character. Everyone knows that Blacks were brought here in slave ships. The practice of chattel slavery remained in effect for over two centuries, then was replaced by a system of Jim Crow laws and social practices that continues to this very day. So, racism's roots cannot easily be ignored.[98] Neutral rules cannot do justice to the thickly embedded historical nature of American prejudice. We act today on a set stage. But the rules ignore this. They tell the actor not to favor the white over the Black. The only thing the rules take into account is what happens right now. If the actor—say a school board commissioner—can truthfully say, 'I acted as I did for no racial animus,' that is the end of the inquiry.[99] This is obviously not sufficient."

"Why not?"

"Let me try to give you an example." Rodrigo squinted into the late afternoon dusk that enveloped the sidewalk. "Imagine a school board needs to establish an attendance boundary. All of the children who live on one side of the boundary will go to one school; the ones who live on the other side, to another one."

"And you would predict that the board will choose a boundary that maintains segregated housing patterns, with the practical effect of maintaining segregated schools?"[100]

"No. This school board truly wants to do the right thing. Recognizing that some boards have drawn attendance lines reflecting ethnic neighborhoods, this board has no desire to follow suit. Besides, it knows that if it does, the ACLU might bring suit against it. So, instead they choose an ex-

98. *See* note 50 *supra*; *see also* PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991) (arguing that racial issues must be interpreted in light of the historical and personal experiences of the oppressed); Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990) (same).

99. *See* note 56 *supra* and accompanying text.

100. For a general discussion of housing discrimination, see BELL, RACE, RACISM, *supra* note 27, at 685-805; Boris I. Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387 (1962); Rodney A. Smolla, *Integration Maintenance: The Unconstitutionality of Benign Programs That Discourage Black Entry to Prevent White Flight*, 1981 DUKE L.J. 891; *see also* City of Memphis v. Greene, 451 U.S. 100 (1987). *But see* Reitman v. Mulken, 387 U.S. 369 (1967) (affirming California Supreme Court's holding that statute allowing discrimination in the sale of real property violates the Fourteenth Amendment).

isting freeway as the dividing line, reasoning that such a boundary will make the children's walk safer and their walk shorter."

"What the board ignores," I continued, following the logic of Rodrigo's hypothetical, "is that many years ago the government probably placed the freeway in that location precisely because minority people lived there. In the past, governments frequently placed freeways, dump sites, power substations, and other such undesirable things in minority neighborhoods.[101] If the school board today selects the freeway as the boundary, it gives effect to a past discriminatory practice. It may do this entirely innocently. Indeed, it may have a laudable motive, one nobody could quarrel with, of making children's walk to school as safe as possible."[102]

"Exactly."

"In other words," I recapped, "neutrality employs a sort of 'freeze-frame' approach, looking only at present factors, when redressing racism requires a longer view."

Rodrigo smiled, "Without that longer view, one misses things, takes action that seems innocuous but that actually hurts minority people. There's a second feature that works in a similar way. Do you think we have time to discuss it?"

I checked the numbers on the street. "If you can explain it in the course of two blocks. Otherwise, we'll have to continue inside."

"I'll try my best."

B. *Rodrigo's Second Reason: Racism's Concerted, or Horizontal, Aspect*

As I had hoped, my ploy caused Rodrigo to slow down. My legs had begun to complain a second time.

"The other feature is that white-over-Black domination is a concerted system. Racism derives its efficacy from its insidiousness.[103] Many whites don't realize this. They equate racism with isolated, shocking acts such as lynchings or burning crosses. Most white folks, even ones of good will, perceive much less racism in the world than there actually is.[104] In part, that is because they see fewer acts of out-and-out racism than minorities do.[105] But it is also because they analogize racism to other misfortunes that beset everyone, regardless of race, like having a flat tire or being cursed by another driver whom one has inadvertently cut off."[106]

"I've noticed that tendency in the controversy over hate speech and uni-

101. *See* Luke W. Cole, *Remedies for Environmental Racism: A View From the Field*, 90 MICH. L. REV. 1991, 1992 (1992).

102. I am grateful to Pierre Schlag for this example and observation.

103. Delgado & Stefancic, *supra* note 48, at 1282-83; *see also* Davis, *supra* note 48, at 1560-64 (describing racism in the context of the New York court system); Delgado, *supra* note 24, at 383-86 (discussing the pervasive nature of racism, particularly racist speech).

104. Richard Delgado, *Critical Legal Studies and the Realities of Race—Does the Fundamental Contradiction Have a Corollary?*, 23 HARV. C.R.-C.L. L. REV. 407 (1988); Delgado & Stefancic, *supra* note 48, at 1282.

105. Delgado & Stefancic, *supra* note 48, at 1282-83.

106. *See, e.g.*, Marjorie Heins, *Banning Words: A Comment on "Words That Wound"*, 18

versity conduct codes," I said. "Many whites fail to realize how often the victim of one insult is the victim of another, similar one. They analogize it to being called a 'fool lady driver,' something that might happen every six months or year, and which rarely threatens an important feature of one's identity.[107] By contrast, persons of color get almost daily reminders of how different they are. Even my friend Professor Oliveros, a light-skinned Hispanic, reports something similar. He says probably half the people he meets ask him where he is from, what kind of name he has, or how he learned to speak English so well."

"The problem involves what you called the 'freeze-frame' approach, Professor. Law focuses on micro-transactions, looking for something outrageous in a single remark. Not finding anything, it denies the existence of the underlying racism. And if you do confine your attention to the here and now in this way, there's not that much difference between 'Back to Africa' and 'Stay in your lane.' Campus racism, so unremitting that young minority undergraduates sometimes drop out of college, ends up analogized to a football cheer: 'Boo, Cal.'"

"I know academics who have presented similar arguments," I commented.[108]

"This concerted quality of racism enhances its malevolent efficacy, making it an ever-present force even for those of us with high professional status and wealth. It's as though criminal law were to lack any remedy for conspiracy, monopoly, and other offenses of collusion or aggregation, and, instead, dealt with the underlying evils on a case by case basis."

"Or like trying to identify and avoid poisons by examining their atomic structure when it's the behavior of the molecule that gives strychnine its deadly character," I added. "It just doesn't show up at that level."

Stopping at the entrance to the bistro, Rodrigo asked, "Is this the place?"

IV. SUMMARY: IN WHICH RODRIGO WAXES APOCALYPTIC, EXPLAINING HOW EVERYTHING WORKS TOGETHER TO MAINTAIN RACISM'S MALEVOLENT EFFICACY

Entering the dimly lit café and looking around, I observed, "Luckily for us, it's not very crowded. Have you been here before?"

"No, but Giannina and I have talked about coming here. I've heard they give free refills, which is great for someone on a student budget. Some of the other LL.M.s come here, even though it's a long ride."

As we settled down at an empty table, I returned to our earlier discussion: "Your professor urged you to try to solve the 'problems of your peo-

HARV. C.R.-C.L. L. REV. 585 (1983) (arguing that racist speech that does not constitute harassment is as protected as other kinds of speech); Strossen, *supra* note 24, at 489-94 (same).

107. *E.g.*, Delgado, *supra* note 24, at 383-86; Delgado & Stefancic, *supra* note 48, at 1277-78.

108. Heins, *supra* note 106, at 591 (employing the slippery-slope argument); Strossen, *supra* note 24, at 537-39.

ple,' as he put it.[109] Instead, you seem ready to conclude that those problems are insoluble. Neutral principles of antidiscrimination law cannot redress racism.[110] By defining Blacks and whites as equals, neutrality allows society to blame Blacks for their predicament.[111] And, if I've understood the last part of your thesis, racism's nature makes it peculiarly resistant to solution through laws like our own.[112] What a bleak vision for someone so young! For a battered old crusader like me, taking that stance is understandable. I think people give me sympathy for being so downbeat, want to rush in, comfort me, and say, 'No, it's not so.' But, for you, what's the point of struggle, what's the point of your working so hard to become a professor and scholar of civil rights, if you have so little hope of things ever getting better?"

"I didn't say that things would never get better, Professor. I merely observed that the law would not make them better. Any neutrality-based legal rule will look depressingly ineffectual to a Black or person of color who lives in this society. By the same token, any practice that the majority group perceives as favoring minorities to promote racial justice will appear unprincipled and wrong."

"Like affirmative action?"[113]

"Yes. Our society has been based on racial privilege since its inception.[114] Formal equality today serves the same purpose as the formal inequality of earlier years. It's a little bit like putting a car into neutral once you reach a downhill stretch. It just picks up speed; you don't even need to press the accelerator any more. The difference between society and the car is that most people don't even notice it's going downhill. So, society has trouble seeing the racism in a freeway boundary.[115] Civil rights law has devolved into a system of 'nots'—'Thou shalt not this,' and 'Thou shalt not that'—all centered around the relatively few cases society is prepared to denounce as unquestionable breaches of the principle of neutral treatment."

"Like hiring a white high school dropout over a Black Ph.D. and Nobel Prize laureate."

"Something like that. Members of society are safe, so long as they avoid those decisions. Nothing in the law requires anyone to do more, to lend a helping hand, to try to help Blacks find jobs, befriend them, speak to them, make eye contact with them, help them fix a flat when they are stranded on the highway, help them feel like full persons. The law just says, 'Don't set quotas. Don't discriminate.' How can a system like that change anything?"

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109. Delgado, *Rodrigo's Third Chronicle*, *supra* note 18.

110. *See* notes 30-61 *supra* and accompanying text.

111. *See* notes 63-65 *supra* and accompanying text.

112. *See* notes 82-108 *supra* and accompanying text.

113. *See, e.g.*, notes 74-75 *supra*.

114. *See* BELL, AND WE ARE NOT SAVED, *supra* note 2, at 26-42 (imagining the debate over slavery at the Constitutional Convention); BELL, RACE, RACISM, *supra* note 27, at 2-63 (providing an overview of the history of racism against African-Americans); note 63 *supra*.

115. *See* notes 99-102 *supra* and accompanying text.

"It seems the only positive duties are concerned with capitalism—paying taxes, registering for the draft, and so on," I observed sardonically.

The waiter arrived, briefly interrupting our conversation to take our order. I was glad for the break. Rodrigo ordered a strawberry torte and espresso. Mindful of my doctor's orders and the late hour, I asked for a lemon biscuit and decaffeinated coffee.

As the waiter disappeared, Rodrigo continued: "The negative character of antidiscrimination laws, along with their inability to deal with the concerted and culturally rooted quality of racism, mean that neutral law can't do much. Moreover, neutrality precludes white folks from seeing how their own system advantages them, indeed enables their more aggressive elements to blame minorities for their plight."

The waiter served our coffee. "Given the nature and prevalence of the cultural background, conservatives and moderates adore neutral rules of a nonformal character, like those providing for equality of opportunity. Actually, nothing is intrinsically wrong with neutral rules." I looked up with surprise. "They could be written and applied from minorities' perspective, in which case they would do a great deal to redress racism.[116] But the rules that minorities would enact, and which would strike them as fair, would appear one-sided and biased to whites. And whites will use their social power to label such rules unconstitutional, unprincipled, bad."

"So, do you mean to say that neutrality always fails to redress racism in practice? If it is applied against a background of minority cultural assumptions, it is not politically feasible; if it is applied in the current manner, against a background of white cultural premises, it fails to achieve retributive justice for minorities and may even makes matters worse."

"Much worse," Rodrigo nodded. "Whites simultaneously get to blame the victim, feel relieved of any responsibility for the victim's plight,[117] and congratulate themselves on their fair-mindedness. It's no surprise that under the present legal regime of neutrality, the gap between whites and Blacks in life expectancy, income, total wealth, educational attainment, infant mortality, and virtually every other indicator of social well-being has remained roughly the same.[118] Of course, there has been *some* improvement. After all, only a few generations ago Blacks were formally enslaved.[119] But the economic, social, and political gap between whites and Blacks manages to remain almost identical decade after decade."[120]

"This harsh reality pains and embarrasses white liberals, most of whom don't understand why this disparity continues. But, I think it's fair to say

116. *See* text accompanying notes 30-71 *supra*; *see also* Freeman, *supra* note 27, at 1052-57 (contrasting "victim" versus "perpetrator" perspective for redressing racial wrongs, and deploring that the law almost invariably selects the latter viewpoint).

117. *See* notes 64-67 *supra* and accompanying text.

118. *See, e.g.*, HACKER, *supra* note 18, at 94-103, 109-78; Delgado, *supra* note 64, at 930-32.

119. Delgado, *supra* note 64, at 935-36, 938.

120. *See, e.g.*, HACKER, *supra* note 18, at 94-103, 109-78; Delgado, *supra* note 64, at 931-32.

that it no longer seems to bother the conservatives.[121] They embrace the idea that the courts cannot and should not function as a mechanism for propelling social change. As we've seen, for them social reform is purely a legislative function.[122] Or better yet, from us, they expect bootstrapping efforts, economic development, getting a job, tending to our families, and so on."[123]

"I've been reading some of those books, too," Rodrigo said. "But I think the conservatives overlook something when they maintain that the courts have no efficacy, and that they can and should do little in the area of civil rights."

The waiter brought our desserts. Hungry again from our brisk walk and animated discussion, I immediately attacked my lemon biscuit. Looking up, I challenged Rodrigo: "I'll bite. What are they overlooking?"

"Very funny," he replied. "What conservatives overlook is that our system of cautious, incremental, negatively-phrased, neutral civil rights laws is in fact quite efficacious."

"It is?" I questioned incredulously, nearly spilling my decaffeinated cappuccino. "In what way?"

"The system works very well. It is just that its successes serve a different goal. For example, Gerald Rosenberg's book is full of tables, charts, regression equations, and historical analyses, all demonstrating that Supreme Court decisions have not brought about changes, for women's or minorities' rights, that were not already underway.[124] He shows that *Roe v. Wade*[125] did not increase access to abortion[126] and reveals that *Brown v. Board of Education*[127] did not enlarge the numbers of Black schoolchildren attending desegregated schools.[128] But Rosenberg mistakenly concludes that the civil rights laws have no effect."

"I suppose you are going to say that their effect is too subtle to measure, that it lies in a symbolic dimension that will take years to make itself felt?"[129]

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121. The reasons for the existence of the gap are the subject of much debate. *See* HACKER, *supra* note 18, at 14, 20-21, 31, 202, 216-18 (gap due in large part to white attitudes and actions). *But see* SOWELL, *supra* note 75, at 16-17, 21-29 (citing successes of other racial and ethnic groups with histories of oppression, and arguing that the gap is not necessarily a product of racism); STEELE, *supra* note 70, at 14-17 (stressing personal responsibility for status).

122. *See* notes 35-36 *supra* and accompanying text.

123. *See* ROY BROOKS, RETHINKING THE AMERICAN RACE PROBLEM 131-73 (1991) (offering solutions to society's social ills).

124. Rosenberg, pp. 42-54, 175-201 (comparing pre- and post-*Roe* figures and trends).

125. 410 U.S. 113 (1973).

126. Rosenberg, p. 180, tbl. 6.1 (number of abortions performed both before and after legalization); Rosenberg, p. 190, tbl. 6.2 (percentage of hospitals providing abortions); Rosenberg, p. 197, tbl. 6.4 (total number of abortion providers); Rosenberg, p. 201 (concluding that *Roe v. Wade* had little effect on the availability of abortions in United States).

127. 349 U.S. 294 (1954).

128. Rosenberg, pp. 42-54 (making similar case for school desegregation and concluding that *Brown v. Board of Education* had little effect).

129. On the symbolic dimension of civil rights litigation and activism, see Bell, *supra* note 42, at 733-40.

"No, not at all," Rodrigo replied. "Rather, civil rights laws efficiently and smoothly replicate social reality, particularly Black-white power relations. They are a little like the thermostat in your home or office. They assure that there is just the right amount of racism. Too much would be destabilizing—the victims would rebel. Too little would forfeit important pecuniary and psychic advantages.[130] So, the existing system of race-remedies law does, in fact, grant minorities an occasional victory, an occasional *Brown v. Board of Education*.[131] Every now and then, a bigot who burns a cross or beats a Black youth will be convicted. Particularly in areas where concessions are not too costly, like voting rights,[132] or media licensing,[133] the courts will grant us an occasional breakthrough."

"One of the authors we mentioned, David Savage, points out in his book, *Turning Right*, that the Rehnquist Court, even in a period of civil rights retrenchment, has granted Blacks victories in occasional cases."[134]

"I believe that you and others in the Critical Race Theory movement have a term for this?" Rodrigo prompted.

"Contradiction-closing cases."[135]

"That's it," Rodrigo replied. "I used to think that this notion verged on tautology. But now I think there might be something to it. What else explains such decisions as *Metro Broadcasting, Inc. v. FCC*[136] or *United States v. Fordice*[137] in an era in which the Court methodically has been eviscerating civil rights protection for minorities and women by imposing new burdens of proof, narrowing standing to sue for class-based relief and requiring tight claims of causation?"[138]

"Under your theory, then," I reviewed, motioning the waiter to bring the check, "courts are doing their job. Many of us just misconceive what that job is. Civil rights proponents still believe that the courts want to stamp out racial unfairness, that the optimal amount of racism in society is zero. But it's not. It's a properly low level, maintained by means of neutral rules that reach little conduct of significance, administered and interpreted by judges whose experiences ill equip them to understand the nature of the problem and who dispense 'victories' as parsimoniously as possible. Is that your thesis?"

"Yes, and I think it operates at the level of cultural assumptions, which is, after all, its beauty. There is no conscious conspiracy. Liberal whites are often as blithely ignorant of the workings of the system, as needlessly indig-

130. For a similar argument, see Delgado, *supra* note 64, at 923-24.

131. 349 U.S. 294 (1954).

132. *See* United States v. Fordice, 112 S. Ct. 2727 (1992).

133. *See* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

134. Savage, pp. 334-39, 346. *See generally* Savage, pp. 305-49 (chapter 9, entitled "The Liberals' Last Surprise").

135. A contradiction-closing case is a legal decision that has the effect of closing the gap between our ideal of how law, or society, ought to be, and how it actually is.

136. 497 U.S. 547 (1990).

137. 112 S. Ct. 2727 (1992).

138. *See* notes 52-57 *supra* and accompanying text.

nant as the most rock-ribbed conservative extolling the virtues of our system of individual achievement, where every person rises or falls on her merits."

"Spann is indignant, too."

"Like others on the left, he began by believing—or at least hoping—that the system means what it says when it issues those golden promises of equality. That's why he's so indignant, expressing such a sense of betrayal.[139] It's a little like the law of gravity. Rosenberg says civil rights law has failed because the position of women and minorities has not improved much as a result of constitutional adjudication.[140] But that's like arguing that the law of gravity has failed because not everything has fallen. In fact, gravity holds everything neatly in balance, the sun, the moon, the stars, and the planets. In that respect it is quite successful, as is our civil rights system."

"So law works," I said, slowly grasping the enormity of what Rodrigo had just articulated. "But it operates to preserve racial advantage, to maintain the status quo."

"Like the law of gravity," Rodrigo repeated, draining the last drop of espresso from his cup.

CONCLUSION

We soon parted. After watching my hyperkinetic young friend stride along the sidewalk in the direction of his law school thirty blocks away, I began my slow walk back to my apartment and yet another session with my casebook. As I walked, I reflected on our conversation. If culture determines our interpretation of legal texts and rules, and if racism is woven so deeply into our cultural fabric that we can hardly notice it, then how can civil rights laws ever operate to eradicate racism in our culture? What did Rodrigo mean when he said there might be cause for hope, but not through law? Perhaps he meant that cultural change might occur, possibly through some form of direct action, and that would make legal change possible. I cursed my fate as a casebook writer for having removed me, if only temporarily, from some of the drama being played out on the pages of the law reviews. I resolved to get together again with Rodrigo soon. I wanted to hear how his second essay fared in the competition he had mentioned. But even more importantly, I wanted to know whether he saw any way out of the cultural trap whose gloomy outlines he had so remorselessly sketched for my benefit.

139. *See generally* notes 13-15 *supra* and accompanying text (discussing Spann's disenchantment with courts and view that minorities should seek different avenues for the redress of racial wrongs).

140. Rosenberg, pp. 10-21 (explaining Court's inability to bring about social change, and labeling this the "Constrained Court" view).