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Amendment Legal Realism**

Richard Delgado and Jean Stefancic

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## SOUTHERN DREAMS AND A NEW THEORY OF FIRST AMENDMENT LEGAL REALISM

*Richard Delgado\**

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### ABSTRACT

*When legal realism swept through the law nearly a century ago, spelling the end to what Roscoe Pound called “mechanical jurisprudence,” one enclave that emerged unscathed is the First Amendment, where shopworn rules, hidebound doctrinal boxes, and thought-ending clichés still hold sway. We show how this is so and give examples of a number of areas where change is in order. An examination of federal court cases having to do with hate speech and cross burning, as well as the wave of nativist sentiment that swept the South in the wake of increased Latino immigration, show how an application of legal realism would improve society’s ability to respond more quickly and flexibly to change.*

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\*\* Professor and Clement Research Affiliate, University of Alabama School of Law. We gratefully acknowledge Mark Brandon for offering encouragement and sharing with us his deep knowledge of southern history. Susan Hamill helped us understand Alabama’s constitutional and legal framework. Paul Pruitt and David Durham shined a light on many chapters of regional history and directed us to sources that we might never have found. Steve Bender organized a workshop at Seattle University that yielded many helpful ideas and comments when our Article was in draft form. Eugene Volokh provided numerous observations and criticisms. Any errors of commission, omission, or interpretation are ours alone.

## INTRODUCTION

When legal realism swept through the law over three-quarters of a century ago, scouring away what Roscoe Pound termed “mechanical jurisprudence,”<sup>1</sup> most observers heralded the event as welcome—indeed, past due.<sup>2</sup> Abandoning mechanistic formulas, rote rules, and thought-ending clichés, the new approach invited attention to the roles of power, social influence, countervailing values (balancing), the personal and class interest of judges, argument, rhetoric, culture, history, and politics in shaping legal doctrine. It paved the way for a host of legal movements, including critical legal studies, feminist legal theory, law and economics, and critical race theory, and rendered law more responsive to the needs of a changing society.<sup>3</sup>

Today, most agree that the realist revolution has improved legal process in practically every area. One enclave that has resisted it, however, is the First Amendment, where shopworn rules (no content discrimination), hidebound doctrinal boxes (speech versus action), and threadbare platitudes (the best response to bad speech is more speech) still hold sway.<sup>4</sup> This Article offers examples of this resistance in two areas, explains how an infusion of realism would improve matters, and urges that we begin the process of reform.

An initial set of examples may be familiar to scholars of civil rights or the First Amendment—recent federal court decisions centering on hate speech and cross-burning. Coming down as they did within a short span of time, the cross-

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<sup>1</sup> Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

<sup>2</sup> For an early statement, see Morris R. Cohen, *Justice Holmes and the Nature of Law*, 31 COLUM. L. REV. 353 (1931). For a recent summary, see Brian Leiter, *American Legal Realism*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* (Martin P. Golding & William A. Edmundson eds., 2005).

<sup>3</sup> See, e.g., Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984) (describing some of these developments).

<sup>4</sup> See Richard Delgado, *First Amendment Formalism Is Giving Way to First Amendment Legal Realism*, 29 HARV. C.R.-C.L. L. REV. 169 (1994) [hereinafter Delgado, *Giving Way*]; Richard Delgado, *Toward a Legal Realist View of the First Amendment*, 113 HARV. L. REV. 778 (2000) [hereinafter Delgado, *Realist View*] (reviewing STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (1999)). We are not the only ones to take note of the abovementioned anomaly. See Stanley Fish, *The Harm in Free Speech*, N.Y. TIMES: OPINIONATOR (June 4, 2012, 9:00 PM), <http://opinionator.blogs.nytimes.com/2012/06/04/the-harm-in-free-speech> (reviewing Jeremy Waldron’s book *The Harm in Hate Speech* and quoting Waldron that it is “odd and disturbing that older and cruder models remain dominant in the First Amendment arena”; that this body of law is “indifferent (relatively) to the effects speech freely uttered might have on the fabric of society”; and that “in the American debate, the philosophical arguments about hate speech are knee-jerk, impulsive and thoughtless” (quoting JEREMY WALDRON, *THE HARM IN HATE SPEECH* (2012)); see also JEREMY WALDRON, *THE HARM IN HATE SPEECH* 11 (2012) (same).

burning cases, *R.A.V. v. City of St. Paul*<sup>5</sup> and *Virginia v. Black*,<sup>6</sup> illustrate the evolution of First Amendment thought that this Article endorses. Two decisions having to do with campus hate speech and student conduct codes illustrate the opposite tendency.<sup>7</sup> Decided by federal district courts in rural states with major universities, these decisions show how formalism can impede the development of rules that might otherwise enable institutions to cope with the needs of an increasingly multiracial society.<sup>8</sup>

A second example, discussed in Part II, may be less familiar but nevertheless of interest to those who follow developments in the South. This example concerns not case law but legislation and popular deliberations growing out of the wave of Latino immigration that this region has experienced in recent years.<sup>9</sup> Featuring a host of oppressive laws<sup>10</sup> and public

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<sup>5</sup> 505 U.S. 377 (1992).

<sup>6</sup> 538 U.S. 343 (2003).

<sup>7</sup> See *infra* Part I.A discussing *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989), and *UWM Post, Inc. v. Board of Regents of University of Wisconsin System*, 774 F. Supp. 1163 (E.D. Wis. 1991).

<sup>8</sup> And formalism is a poor practice for that reason. See *infra* Part I.B. Formalism, however, as every parent will realize, is highly useful in turning down a request (“No, I told you: You can’t go to Jennifer’s party. No overnights, as I’ve said many times, until you turn fifteen.”). When we are eager for something to happen, a non-formalist, multifactorial approach is generally much more to our liking. And so it is with speech, especially hate speech. See *infra* Part I.B. As though by instinct, judges often resort to formalism when they are handing down an opinion that they know will disappoint a strong constituency (“Sorry. Our hands are tied.”).

<sup>9</sup> See *infra* Part II.A. On the recent increase of Latino immigration in the South, see RAKESH KOCHHAR, ROBERTO SURO & SONYA TAFOYA, PEW HISPANIC CTR., *THE NEW LATINO SOUTH: THE CONTEXT AND CONSEQUENCES OF RAPID POPULATION GROWTH* (2005), <http://www.pewhispanic.org/files/reports/50.pdf>; and Raymond A. Mohl, *Hispanics and Latinos*, ENCYCLOPEDIA ALA. (Mar. 12, 2007), <http://www.encyclopediaofalabama.org/article/h-1096> (last updated Aug. 29, 2012). In recent years, the growth rate leveled off somewhat because of increased immigration enforcement, a downturn in the U.S. economy, and an improvement in Mexico’s. See Noam Scheiber, *Job Growth for Hispanics is Outpacing Other Groups*, N.Y. TIMES (Mar. 8, 2015), <http://www.nytimes.com/2015/03/09/business/economy/job-growth-for-hispanics-is-outpacing-other-groups.html>. But it is now on the upswing because of an improving U.S. job market, especially in construction. *Id.*

<sup>10</sup> An anti-immigrant (“papers, please”) law in Arizona survived initial scrutiny; Alabama’s was harsher. Mickey Hammon, its sponsor, designed it to “attack[] every aspect of an illegal immigrant’s life” and “make it difficult for them to live here so they will deport themselves.” FELIPE FERNÁNDEZ-ARMESTO, *OUR AMERICA: A HISPANIC HISTORY OF THE UNITED STATES* 327 (2014); *Caught in the Net: Alabama’s Immigration Law Is Proving Too Strict and Too Costly*, ECONOMIST (Jan. 28, 2012), <http://www.economist.com/node/21543541>. The Supreme Court subsequently struck down portions of Arizona’s version on federal preemption grounds in *Arizona v. United States*, 132 S. Ct. 2492 (2012), thereby calling other state laws into question. Alabama’s was modeled after Arizona’s and granted the police the power to demand papers, school officials to ask students about their parents’ immigration status, and made it a crime to give an undocumented person a ride. The harshest in the nation, it “virtually guarantees racial profiling, discrimination and harassment against all Latinos in Alabama.” S. POVERTY L. CTR., *ALABAMA’S SHAME: HB 56 AND THE WAR ON IMMIGRANTS* 3–4 (2012) [hereinafter *ALABAMA’S SHAME*] (noting that its history was “rife with stereotypes, misinformation,

outrage over an influx of Spanish-speaking newcomers looking for work, this rejection, which went far beyond that seen in other parts of the country, is counterintuitive. A conventional understanding of the marketplace of ideas implies that it should not have happened, yet it did.<sup>11</sup>

This negative reception is counterintuitive because a common theory of political speech holds that citizens and legislators deliberate in a variety of forums—legislative chambers, barbershops, town halls, letters to the editor—to determine where a region’s self-interest lies.<sup>12</sup> Yet, when Latinos began immigrating to this region in substantial numbers beginning in the early 1990s, discussion of their role in Southern life was short, angry, and simplistic.<sup>13</sup> Stereotypes and preconceptions foreshortened discussion, taking precedence over the region’s economic self-interest, humanitarian considerations, and vaunted Southern hospitality. As with campus conduct-code cases and one of the two Supreme Court decisions dealing with cross-burning, we theorize that First Amendment formalism explains this discursive failure, one that amounted, paradoxically, to a form of censorship.<sup>14</sup>

This Article continues a vein of scholarship investigating the fortunes of Latinos in national life. An earlier article analyzed a controversy over Mexican-American Studies in public high schools in Arizona.<sup>15</sup> The current Article examines Southern reactions to Latino immigrants and the role of free-speech ideology in shaping those reactions. It also shows how our interpretation of events often has roots in a barely remembered past and develops a theory of meaning to explain how this happens.

A future article shows how events that roiled society a hundred years ago shape contemporary struggles over political ascendancy as two dominant

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incendiary rhetoric and bigotry”). The Senate sponsor told colleagues they needed to “empty the clip” to deal with the immigrants and cited the growth in the Latino population throughout the South as evidence of the increase in the undocumented population. *Id.* at 4. For further treatment of the Alabama law, see Jennifer E. Brooks, “No Juan Crow!”: Documenting the Immigration Debate in Alabama Today, 18 S. CULTURES, Fall 2012, at 49. For discussion of other southern anti-immigrant laws, see *infra* notes 96–103 and accompanying text. On the role of a former Kansas secretary of state in drafting many of them, see George Talbot, *Kris Kobach, The Kansas Lawyer Behind Alabama’s Immigration Law*, AL.COM (Oct. 16, 2011, 9:05 AM), [http://blog.al.com/live/2011/10/kris\\_kobach\\_the\\_kansas\\_lawyer\\_1.html](http://blog.al.com/live/2011/10/kris_kobach_the_kansas_lawyer_1.html).

<sup>11</sup> See *infra* Part II.

<sup>12</sup> On the centrality of popular deliberation in First Amendment theory, see, for example, Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255–57.

<sup>13</sup> See *infra* notes 87–95, 117–18 and accompanying text.

<sup>14</sup> See *infra* notes 124–25, 264–68, 276–79 and accompanying text.

<sup>15</sup> See Richard Delgado, *Precious Knowledge: State Bans on Ethnic Studies, Book Traffickers (Librotraficantes), and a New Type of Race Trial*, 91 N.C. L. REV. 1513 (2013).

political parties, one conservative, the other liberal, vie for control.<sup>16</sup> Each article offers a lesson for lawyers—the need for a developmental approach to equal educational opportunity (in the first), the need to temper First Amendment formalism in political decision-making (this Article), and the role of judicial review in a nation that increasingly contains more than one discrete and insular racial minority (in the third).

Part I of this Article discusses legal realism and its reception in First Amendment scholarship and case law. Part II discusses realism at play in the legislative arena. Part III shows how an expanded conception of the First Amendment can improve analysis in both areas.

As the reader will see, the sections of the Article analyzing hate speech cases and those addressing legislative responses to immigration in the South combine analytically. Each pinpoints a seemingly separate problem owing to First Amendment formalism. But, in the end they emerge as integrated aspects and products of the same deficiency.

#### I. LEGAL REALISM AND THE FIRST AMENDMENT

In August 1921, in a Birmingham, Alabama courtroom, a young attorney named Hugo Black received a choice assignment. A Methodist minister named Edwin Stephenson, who was a friend of Black's law partner, had killed a Catholic priest named James E. Coyle. Coyle had committed the grievous sin of marrying Stephenson's daughter to a middle-aged, dark-skinned Puerto Rican paperhanger named Pedro "Gussman" (probably Guzman) whom she had met at the local Catholic Church years earlier.<sup>17</sup> The daughter, Ruth, was "literarily inclined" and, evidently, high-spirited, having run away from home at least twice.<sup>18</sup> The father, unless he was given to Dickens, was apparently not literarily minded. He once whipped the daughter for staying out past nine thirty and on another occasion punished her for a minor offense by locking her in her room without food and water for three days.<sup>19</sup>

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<sup>16</sup> See Richard Delgado & Jean Stefancic, *Strict Scrutiny and Majoritarian Oppression in an Age of Multi-Group Politics* (2016) (unpublished manuscript) (on file with authors).

<sup>17</sup> See ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 71–72 (2d ed. 1997).

<sup>18</sup> *Id.* at 72.

<sup>19</sup> *Id.*

After learning of the marriage and, even worse, her conversion to Catholicism, Stephenson went to see Coyle, accused him of marrying his daughter “to that nigger,” and shot him to death.<sup>20</sup>

At the time of the trial, Birmingham was a “cesspool of racial and religious hatred.”<sup>21</sup> Most of the jurors, the foreman, and the aggrieved father were members of the Ku Klux Klan, which organized and paid for his defense.<sup>22</sup>

After a sensational trial, featuring Black’s argument that Stephenson was “not normal” (i.e., insane) at the time of the murder, and klieg lights trained on Gussman to accentuate his facial features and skin color,<sup>23</sup> as well as Black’s accusation that the Catholic church had robbed a decent Methodist family of their daughter and that Stephenson had shot Gussman in a fit of understandable rage, the jury acquitted Stephenson by reason of self-defense.<sup>24</sup> As his former law partner put it: “Hugo didn’t have much trouble winning that verdict.” Black’s son agreed, noting that his father “was not beyond exploiting . . . race if that helped his client.” After all, “he was only doing what a lawyer must do.”<sup>25</sup>

The daughter and her father never reconciled, and she died a few years later at the age of thirty.<sup>26</sup> Stephenson became a martyr and hero who travelled the state celebrating his victory.<sup>27</sup>

We recount this story because it contains, in capsule form, many of the elements of this article: Hispanophobia, religious orthodoxy, regional racial paranoia, suspicion of outsiders, and the manner in which community sentiment can influence legal results. It shows how First Amendment absolutism<sup>28</sup> is perfectly compatible with racism and racial antipathy. Hugo Black was one of the Amendment’s staunchest defenders.<sup>29</sup> In his early years,

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<sup>20</sup> *Id.* at 73.

<sup>21</sup> *Id.* at 74; *see also infra* notes 215, 232–38 and accompanying text (noting that southern culture was unwelcoming toward dark-skinned Europeans migrating to the region during the early twentieth century).

<sup>22</sup> *Id.* at 74, 85–86. The father believed that Catholics were theologically wayward and bound for an unfortunate fate. *Id.* at 72–73. The Klan’s views at the time were anti-Catholic and anti-black. *See id.* at 73–74.

<sup>23</sup> *Id.* at 75–82.

<sup>24</sup> *Id.* at 77, 83–85.

<sup>25</sup> *Id.* at 86. This observation is from his biographer, whose views seem similar to those of the son.

<sup>26</sup> *Id.* at 87–88.

<sup>27</sup> *Id.*

<sup>28</sup> Itself a form of legal formalism. *See* Meiklejohn, *supra* note 12, at 248.

<sup>29</sup> NEWMAN, *supra* note 17, at 405, 496, 500–01.

he was also a member of the Ku Klux Klan<sup>30</sup> and showed little hesitation about marshaling social taboos—religious and racial disapproval, Hispanophobia—to secure the acquittal of a murderer.<sup>31</sup>

Although by the time he ascended to the Supreme Court Black had tempered his views,<sup>32</sup> the story of his defense of the Methodist minister shows how easy it is for an empowered actor, steeped in local culture, to manipulate racial antipathies while maintaining an entirely virtuous self-image.<sup>33</sup>

This Article begins the process of showing how this can happen and the role of First Amendment ideology in enabling it. Scholars have pointed out how First Amendment formalism can easily lead to doctrinal anomalies when courts examine cross-burning cases, for example, under precedents having to do with the law of theater marquees.<sup>34</sup> They have also noted that even when this does not happen, formalism limits the range of considerations judges are able to bring to bear on sensitive cases,<sup>35</sup> that the current approach gives insufficient weight to political dissent,<sup>36</sup> and that a reaction to it is beginning to set in.<sup>37</sup> Elsewhere, we noted that our system of freedom of speech is most useful in connection with narrowly bounded disputes—such as trying to determine whether a municipality could raise more money from a sales tax on food than it would forfeit by encouraging residents to shop elsewhere—and less so in connection with efforts to address deeply imbedded evils like sexism or racism.<sup>38</sup>

In short, First Amendment formalism is relatively harmless in addressing controversies that are straightforward, preferably binary, and in which one conclusion will emerge as decidedly superior, after which the controversy is closed.<sup>39</sup> With automobile speed limits, for example, bright-line rules are

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<sup>30</sup> *Id.* at 89–100.

<sup>31</sup> *See supra* notes 22–25 and accompanying text.

<sup>32</sup> *See* NEWMAN, *supra* note 17, at 98.

<sup>33</sup> To wit, as defender of Southern virtue and the mighty First Amendment. Later, Black expressed defensiveness over his role in this case. *Id.*

<sup>34</sup> *See* WALDRON, *supra* note 4 (noting the inadequacy of free-speech ideology in addressing problems of hate speech); Delgado, *Realist View*, *supra* note 4, at 781–95; Fish, *supra* note 4.

<sup>35</sup> Delgado, *Realist View*, *supra* note 4, at 778, 780–81, 786–96.

<sup>36</sup> *Id.* at 779–86.

<sup>37</sup> *Id.*; *see also* Delgado, *Giving Way*, *supra* note 4, at 170–72.

<sup>38</sup> *See* 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, 1258–59 (1992).

<sup>39</sup> *See* Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975) (counseling against a rigid approach to decision-making).

sensible and relatively harmless.<sup>40</sup> Legal realism plays little role in their drafting and even less in their enforcement.<sup>41</sup> But with other cases (campus hate speech codes, Latino immigration, Nazis marching in Skokie), perfunctory analysis can easily overlook important elements, resulting in decisions that fail to advance even the interests at stake in the relevant community.<sup>42</sup> Consider recent decisions that illustrate how this happens and how First Amendment formalism can impede the search for justice.

A. *Federal Hate Speech Cases Decided Under Campus Conduct Codes*

In *Doe v. University of Michigan*<sup>43</sup> and *UWM Post, Inc. v. Board of Regents of the University of Wisconsin System*,<sup>44</sup> two federal district courts considered challenges to university conduct codes that prohibited certain forms of demeaning speech and insult. Although lawyers and law faculty had drafted the provisions in an effort to counteract “a rising tide of racial intolerance and harassment on campus,”<sup>45</sup> both courts had little difficulty finding them overbroad,<sup>46</sup> burdensome,<sup>47</sup> and impermissibly vague.<sup>48</sup> One declared the local school’s code unconstitutional on the ground that most racist insults did not rise to the level of fighting words, apparently the closest analogy the court could think of to the type of speech in question.<sup>49</sup> Other cases, including one at Stanford University, similarly make short shrift of the university’s effort to temper hate speech on campus.<sup>50</sup>

Despite a steady drumbeat of decisions going against them, universities remain convinced of the need to reduce the amount of hate speech that circulates on their campuses. Over 200 have enacted hate-speech codes of one

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<sup>40</sup> See also Delgado & Stefancic, *supra* note 38, at 1258–59.

<sup>41</sup> That is, society gains little from extended discussion of the virtues of a 65 miles-per-hour limit versus one that allows drivers to go 70. Safety, accident rates, and gas consumption are among the few variables requiring consideration.

<sup>42</sup> See *infra* notes 45, 51, 62–65, 107–15 and accompanying text.

<sup>43</sup> 721 F. Supp. 852 (E.D. Mich. 1989).

<sup>44</sup> 774 F. Supp. 1163 (E.D. Wis. 1991).

<sup>45</sup> *Doe*, 721 F. Supp. at 852, 853.

<sup>46</sup> *Id.* at 864.

<sup>47</sup> *UWM Post, Inc.*, 774 F. Supp. at 1181; *Doe*, 721 F. Supp. at 865 (noting that an individual charged with an offense under such a code would need to attend a hearing).

<sup>48</sup> *Doe*, 721 F. Supp. at 866 (citing *Young v. Am. Mini-Theatres*, 427 U.S. 50 (1976), a case dealing with theater marquees and locations).

<sup>49</sup> *UWM Post, Inc.*, 774 F. Supp. at 1169–75.

<sup>50</sup> Azhar Majeed, *Defying the Constitution: The Rise, Persistence, and Prevalence of Campus Speech Codes*, 7 GEO. J.L. & PUB. POL’Y 481, 490 (2009) (Corry v. Leland Stanford Junior Univ., No. 740309 (Cal. App. Dep’t Super. Ct. Feb. 27, 1995)).

form or another, hoping to find the perfect formula.<sup>51</sup> Society at large has also adopted the new norm. Thirty years ago, it was possible to say, “Yes, I know that was hate speech. So what?” Now it is not. Practically no one today says, “That’s hate speech, and I don’t care. Smith is a fine person.” Only in court do you get to say that and to praise Smith’s attorney as a courageous and proud person, like Hugo Black with his Southern client.

As though that incongruity was not enough, current case law in this area is at war with itself. Consider, for example, how one can put together one of the early cross-burning decisions, *R.A.V. v. City of St. Paul*<sup>52</sup> and *Wisconsin v. Mitchell*<sup>53</sup> (the sentence-enhancement case) and get a perfectly constitutional campus hate-speech code. Imagine a college or university that has experienced a wave of hate speech and wants to do something about it. Wary of the abovementioned district court decisions, as well as the cross-burning case, *R.A.V.*,<sup>54</sup> the university enacts an entirely general provision that penalizes insults severe enough to endanger a victim’s ability to study or work on campus.<sup>55</sup> This provision mentions nothing about race or sex but is entirely general.<sup>56</sup> Then, in a different section dealing with sanctions, the university enacts a second measure providing for increased punishment for *any* offense<sup>57</sup> carried out with a racial motivation.<sup>58</sup> Now, combining the two measures, the university will have created a perfectly valid hate speech code. Prohibiting disturbing insults and invective of any kind (as the first measure does) avoids the shoals of favoritism,<sup>59</sup> while drawing strength from the parallel to hostile-workplace law.<sup>60</sup> And the sentence-enhancement provision that appears elsewhere in the code would enable the campus to punish racial insults more

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<sup>51</sup> See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.3.3.4 (3d ed. 2006); JON B. GOULD, SPEAK NO EVIL: THE TRIUMPH OF HATE SPEECH REGULATION 75–122 (2005).

<sup>52</sup> 505 U.S. 377 (1992).

<sup>53</sup> 508 U.S. 476 (1993) (holding that a state’s penalty-enhancement provision does not violate an individual’s First Amendment rights).

<sup>54</sup> *R.A.V.*, 505 U.S. 377; see *infra* notes 68–71 and accompanying text.

<sup>55</sup> Thus establishing the university’s reason (i.e., jurisdiction) for acting in this area.

<sup>56</sup> Thus avoiding the shoals of ethnic favoritism that struck Justice Scalia as insupportable, a form of handicapping one set of combatants (presumably, whites) by saddling them with Marquis de Queensbury rules, but not another (presumably, blacks, who got to strike at will). *R.A.V.*, 505 U.S. at 391–92.

<sup>57</sup> Including defacing property, stealing books from the library, plagiarism, cheating on exams, or ransacking campus vending machines.

<sup>58</sup> That is, to harm or oppress another member of the campus community or franchisor (in the case of the vending machines) on the grounds of race, religion, sex, or other similar trait.

<sup>59</sup> Thus complying with *R.A.V.* See *infra* notes 68–69 and accompanying text.

<sup>60</sup> See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

seriously than, for example, ones targeting less sensitive traits such as habitual tardiness or a mild speech mannerism.<sup>61</sup>

The ability of an institution to accomplish indirectly, in two stages, a result that case law forbids if an institution performed it directly in one, suggests that something is wrong with the premises of the area in question. By failing to advance a coherent set of policy objectives, or even to think them through, formalistically created case law having to do with expressions of racial animosity is at war with itself.

Finally, the current framework of First Amendment formalism can blind legal actors from seeing distinctions that are practically self-evident, such as the difference between up and down. Consider recent debates about the proper place of satire and political cartoons. The history of the genre (satire), beginning with the Roman emperors, through Voltaire, Jonathan Swift, H.L. Mencken, Russell Baker, Art Buchwald, and Arthur Hoppe, shows that the classic satirists drew a careful distinction between satire aimed upward—toward those of greater rank and prestige than the writer—and that aimed downward, for example, toward cripples and the poor.<sup>62</sup> Reserving their slings and arrows for puffed-up kings and nobles who abused power, classical satirists highlighted their foibles, absurdities, and faults, bringing them down to earth.<sup>63</sup> Indeed, one root meaning of “humor” is earthy, bringing low, down to earth.<sup>64</sup> The ancient Roman emperors, realizing their own tendency to indulge in self-importance, employed a fool or servant to march next to them during victory parades whispering, “Thou art but a man.”<sup>65</sup>

These writers were careful not to lambaste the poor, minorities, or other weak groups. A few mocked institutional religions, especially powerful ones like Roman Catholicism or the Church of England, but rarely minority faiths like the Native American Church or Islam.<sup>66</sup> Recent discussions prompted by

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<sup>61</sup> That is, as *Wisconsin v. Mitchell* teaches. 508 U.S. 476 (1993); see *supra* note 53.

<sup>62</sup> See Richard Delgado & Jean Stefancic, *Scorn*, 35 WM. & MARY L. REV. 1061, 1064, 1067–68 (1994); Garry Trudeau, *The Abuse of Satire*, ATLANTIC (Apr. 11, 2015), <http://www.theatlantic.com/international/archive/2015/04/the-abuse-of-satire/390312/>. But see Ross Douthout, *Opinion, Charlie Hebdo's Privilege*, N.Y. TIMES (Apr. 18, 2015), <http://www.nytimes.com/2015/04/19/opinion/sunday/ross-douthat-checking-charlie-hebdos-privilege.html> (noting that the line between satire aimed upward and that aimed downward is not bright and that one's targets, even those of lower position, can sometimes surprise one with deadly fury).

<sup>63</sup> Delgado & Stefancic, *supra* note 62, at 1064, 1067–68.

<sup>64</sup> *Id.* at 1063.

<sup>65</sup> *Id.* at 1091.

<sup>66</sup> E.g., Voltaire, *On the Church of England*, in PHILOSOPHICAL LETTERS: VOLTAIRE 26 (Oskar Piest ed., Ernest Dilworth trans., 1961); see also GILBERT CANNAN, SAMUEL BUTLER: A CRITICAL STUDY 18 (Haskell

newspapers and magazines that have published cartoons lampooning the prophet Mohammed make light of this distinction, treating freedom of expression as a license to ridicule any target that enters an editor's or cartoonist's mind.<sup>67</sup> Although legal under First Amendment formalism, publications that bait minority religions stand on shaky ground ethically and prudentially. But because an outmoded form of legal reasoning finds racial obloquy permissible, some reckless figures do what wiser caution suggests that they should not.

### B. *Cross-Burning Cases*

Two cross-burning cases evidence the kind of progression that we describe and advocate. Decided only eleven years apart, *R.A.V. v. City of St. Paul*<sup>68</sup> and *Virginia v. Black*<sup>69</sup> took quite different approaches to much the same practice.

In *R.A.V.*, the Supreme Court reversed the conviction of a juvenile who had been found guilty of burning a cross in the yard of a black neighbor under a city ordinance that banned the practice when done with the knowledge that it would “arouse[] anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender.”<sup>70</sup> An opinion by Justice Antonin Scalia found St. Paul's statute content-based because it allowed the city to “impose special prohibitions on . . . speakers who express views on disfavored subjects.”<sup>71</sup> Because the ordinance targeted what the Court called fighting words based on white supremacy, it was fatally content based, selective in its application, and hostile to ideas of a type that the city council disapproved.<sup>72</sup> That hostility—and not the juvenile's hostility toward the black family—was what caught Justice Scalia's eye and rendered the law fatally infirm.

Eleven years later, an opinion by Justice Sandra Day O'Connor in *Virginia v. Black* could not have sounded a more different note. In *Black*, three

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House Publishers Ltd. 1970) (1915) (noting that practically all the major satirists poked fun at organized religion).

<sup>67</sup> See, e.g., John Ward Anderson, *Cartoons of Prophet Met with Outrage*, WASH. POST (Jan. 31, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/30/AR2006013001316.html>; Anthony Faiola, *French Muslims Feel Deeply Torn by Viral “I Am Charlie” Slogan*, WASH. POST (Jan. 13, 2015), [https://www.washingtonpost.com/world/europe/they-are-not-charlie/2015/01/13/7c9d6998-9aae-11e4-86a3-1b56f64925f6\\_story.html](https://www.washingtonpost.com/world/europe/they-are-not-charlie/2015/01/13/7c9d6998-9aae-11e4-86a3-1b56f64925f6_story.html).

<sup>68</sup> 505 U.S. 377 (1992).

<sup>69</sup> 538 U.S. 343 (2003).

<sup>70</sup> *R.A.V.*, 505 U.S. at 380.

<sup>71</sup> *Id.* at 391.

<sup>72</sup> *Id.* at 391–92.

defendants, one of them a leader of a Ku Klux Klan rally, were convicted under a very similar statute in the state of Virginia.<sup>73</sup> At the rally, the speakers “talked real bad about the blacks and the Mexicans.”<sup>74</sup> One told the gathering he would like to “take a .30/.30 and just random[ly] shoot the blacks.”<sup>75</sup> Others talked about Bill and Hillary Clinton “and about how their tax money ‘goes to . . . the black people.’”<sup>76</sup> At the conclusion of the speeches, some in the crowd lit fire to a burning cross, which alarmed the neighbors.<sup>77</sup> The local sheriff arrested Barry Black, who admitted to being the head of the rally.<sup>78</sup> Three men who had carried out a similar action a few months earlier on the lawn of a black neighbor had also been arrested in another part of the state.<sup>79</sup> All were charged with burning a cross with the intent to intimidate; they countered that the Virginia statute was unconstitutional under *R.A.V.*<sup>80</sup>

After recounting in detail the histories of the Ku Klux Klan and of cross burning in the South, the Court upheld the convictions. Virginia may outlaw cross burnings “with the intent to intimidate because burning a cross is a particularly virulent form of intimidation.”<sup>81</sup> A general, nonselective “ban on cross burning carried out with the intent to intimidate is fully consistent with . . . the First Amendment.”<sup>82</sup> History, setting, and the feelings of victims and onlookers—legal-realist factors—played a significant part in the ruling.

## II. THE LEGISLATIVE ARENA AND ANTI-IMMIGRANT FEVER IN THE SOUTH

### A. *The Recent Nativist Wave*

Beginning in the early 1990s, the Southern states began experiencing a large influx of Latino immigrants, many of them undocumented.<sup>83</sup> Most were

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<sup>73</sup> The statute prohibited burning a cross with the intent to intimidate another person. *Black*, 538 U.S. at 348.

<sup>74</sup> *Id.* at 349.

<sup>75</sup> *Id.* (alteration in original).

<sup>76</sup> *Id.* (ellipsis in original).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 350.

<sup>80</sup> *Id.* at 348, 350–51.

<sup>81</sup> *Id.* at 363.

<sup>82</sup> *Id.*

<sup>83</sup> See LEO R. CHAVEZ, *THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION* 36–37, 185 (2d ed. 2013); Mary E. Odem & Elaine Lacy, *Introduction to LATINO IMMIGRANTS AND THE TRANSFORMATION OF THE U.S. SOUTH* ix (Mary E. Odem & Elaine Lacy eds., 2009) [hereinafter *TRANSFORMATION*]. Before this time, the Southern states (i.e., Virginia, North Carolina, South Carolina,

young, single men looking for work, but others brought wives and children.<sup>84</sup> Many of the immigrants were drawn to the region because of its mild climate and the many opportunities for finding work in lawn care, meat processing, farming, construction, forestry, and personal services, including maids and nannies.<sup>85</sup> Their hopes were realized; most found jobs readily. Employers liked their positive attitude (“strong work ethic”),<sup>86</sup> exemplary attendance and

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Kentucky, Tennessee, Arkansas, Georgia, Alabama, Mississippi, and Louisiana) had few Latinos, made up mostly of Cubans who fled Castro as well as some Puerto Ricans. *Id.* at x. Small numbers of Mexicans lived in the Mississippi Delta (where they picked cotton) and New Orleans (where they lived middle-class lives). Julie M. Weise, *Mexican Nationalisms, Southern Racisms: Mexicans and Mexican Americans in the U.S. South, 1908–1939*, 60 *AM. Q.* 749, 749–51 (2008); see also Barbara Ellen Smith & Jamie Winders, *New Pasts: Historicizing Immigration, Race, and Place in the South*, S. SPACES (Nov. 4, 2010), [www.southernspaces.org/2010/new-pasts-historicizing-immigration-race-and-place-south](http://www.southernspaces.org/2010/new-pasts-historicizing-immigration-race-and-place-south) (noting that the new immigrants are transforming Southern culture; that North Carolina and Georgia experienced the earliest wave of immigration, with Tennessee (especially Memphis), Kentucky, and Alabama following about five to ten years later). On the geographical distribution of the new settlements, see KOCHHAR ET AL., *supra* note 9, at 1, noting that “Arkansas, Georgia, and North Carolina topped 300 percent [growth] in that decade [1990 to 2000], while Georgia, Tennessee and South Carolina all rose by more than 200 percent.” Alabama was just behind. *Id.* at 2; Mohl, *supra* note 9. Many of the new settlers were undocumented. KOCHHAR ET AL., *supra* note 9, at 14. The growth in the Latino school-age population was even more dramatic. *Id.* at iv.

<sup>84</sup> Odem & Lacy, *supra* note 83, at xiii–xv; Mohl, *supra* note 9. Before this time, few Latinos settled in the region because it was backward industrially and contained many blacks and poor whites who provided a steady pool of low-wage labor. Odem & Lacy, *supra* note 83, at xiii–xiv.

<sup>85</sup> James H. Johnson Jr. & John D. Kasarda, *Hispanic Newcomers to North Carolina*, in TRANSFORMATION, *supra* note 83, at 75; Raymond A. Mohl, *Globalization and Latin American Immigration in Alabama*, in TRANSFORMATION, *supra* note 83, at 54; Odem & Lacy, *supra* note 83, at i–xx (discussing the range of jobs that the immigrants filled—the “pull” factor). Many of the slots were comparatively new, created when poultry and pork processing plants opened. See, e.g., Angela Stuesse & Laura E. Helton, *Low-Wage Legacies, Race, and the Golden Chicken in Mississippi: Where Contemporary Immigration Meets African American Labor History*, S. SPACES (Dec. 31, 2013), <http://southernspaces.org/2013/low-wage-legacies-race-and-golden-chicken-mississippi>. Atlanta required many new construction workers for the Olympic Games, as did New Orleans in the wake of Hurricane Katrina. Odem & Lacy, *supra* note 83, at xvi; Smith & Winders, *supra* note 83. Some new employers expressly recruited foreign-born labor by advertising in Mexican towns. Stuesse & Helton, *supra*.

A “push” factor played a part, as well. Beginning in early 1980s, the World Bank, IMF, and the U.S. government pressured Mexico to carry out neoliberal reform, opening the country to global markets, lowering trade barriers, and reducing subsidies for foodstuffs such as tortillas. These actions debilitated major sectors of the economy, including small farming. Odem & Lacy, *supra* note 83, at xiv–xv. The North American Free Trade Agreement (NAFTA), signed in 1994, accelerated this trend, since Mexican manufacturers lost protection, while small farmers lost out to cheap, mass-produced, subsidized American corn and wheat. The devaluation of the peso administered a further blow, lowering wages and increasing unemployment. *Id.* In Central America, political unrest led to flight as families abandoned villages and neighborhoods in turmoil and sought safety elsewhere. *Id.* at xv.

The largest sending country was Mexico, followed by Puerto Rico, Guatemala, Salvador, Colombia, and the Dominican Republic. *Id.* at xvii, xviii tbl.0.2, xix tbl.0.3. With increased numbers, cycling set in, with villages sending repeat immigrants to the same regions.

<sup>86</sup> Odem & Lacy, *supra* note 83, at xxiv (noting the immigrants’ strong work ethic).

punctuality, and willingness to take on jobs that were arduous, dirty, dangerous, and that offered few chances for advancement.

Despite their popularity with employers, supervisors, and chambers of commerce,<sup>87</sup> public attitudes toward them soured. Editors, small-town newspapers, city councils, and ordinary citizens weighed in against them.<sup>88</sup> The new arrivals were supposedly taking jobs that should have gone to native-born Americans.<sup>89</sup> Moreover, they were said to be consuming social resources

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<sup>87</sup> See Mohl, *supra* note 85, at 60 (noting that business interests in Alabama defended immigration). Farmers warned that tougher immigration enforcement would devastate their sector. As one poultry farmer put it: “If we didn’t have guest workers, who would catch my chickens?” *Id.*; see also Paul Reyes, “It’s Just Not Right”: *The Failures of Alabama’s Self-Deportation Experiment*, MOTHER JONES (Mar. 1, 2012, 7:00 AM), <http://www.motherjones.com/print/160326> (discussing the impact of Alabama’s policy on various businesses and estimating the cost at \$40 million if even 10,000 undocumented workers stopped working: “Anybody that’s promoting illegal-immigration enforcement as a job-creation bill has no clue of the real world,” as a spokesperson for a grower’s association put it, noting that agricultural jobs and construction work are so demanding that very few Americans want to fill them); Challen Stephens, *Alabama Farmers Losing Immigrant Labor*, See *Produce Rotting in the Fields*, AL.COM, (Sept. 26, 2011, 4:05 PM), [http://blog.al.com/breaking/2011/09/alabama\\_farmers\\_losing\\_immigra.html](http://blog.al.com/breaking/2011/09/alabama_farmers_losing_immigra.html). Some city officials noted that the newcomers had opened restaurants and other small businesses, reviving many deteriorated central districts. See Mohl, *supra* note 9.

<sup>88</sup> See generally Elaine Lacy & Mary E. Odem, *Popular Attitudes and Public Policies: Southern Responses to Latino Immigration*, in TRANSFORMATION, *supra* note 83, at 143–64 (noting that the surge of immigration sparked a renaissance of the Klan, which reorganized to confront what it perceived as a new threat to white supremacy; and noting that the events of 9/11, the immigration marches that swept major cities in 2006, and the economic downturn of 2007 played parts, as well). See also Mohl, *supra* note 85, at 57–60, for a discussion of a demonstration in Oneonta by a white supremacist group against the “Mexican invasion”; another featuring complaints that the immigrants were draining resources and taking jobs that should go to whites; and a third featuring the burning of a Mexican flag. In Hoover, Alabama, when Latinos rented moderately priced apartments, white residents threatened to close down a Catholic service center that provided English language classes, family counseling, and other services and prevailed on city government to establish a local Homeland Security and Immigration office to monitor Latinos at day-labor sites. *Id.*

In the nation’s capital, Alabama Senators Jeff Sessions and Richard Shelby advocated tough immigration controls. See *Jeff Sessions on Immigration*, ONTHEISSUES, [www.ontheissues.org/international/jeff\\_sessions\\_immigration.htm](http://www.ontheissues.org/international/jeff_sessions_immigration.htm) (last updated Jan. 2, 2015); *Richard Shelby on Immigration*, ONTHEISSUES, [www.ontheissues.org/international/richard\\_shelby\\_immigration.htm](http://www.ontheissues.org/international/richard_shelby_immigration.htm) (last updated Jan. 7, 2015). Their state counterparts meanwhile cut government services to the undocumented and trained state troopers to enforce federal immigration law, among the first states to do so. Mohl, *supra* note 83, at 58–59. Anti-immigration advocates went to court to limit driver’s license tests in foreign languages. Many cities considered zoning laws to ban large groups sharing a single apartment, while citizens “poured out their complaints about immigration in letters to local newspapers and in town-hall [meetings]” or carried signs saying “Remember the Alamo.” *Id.* at 59.

<sup>89</sup> Lacy & Odem, *supra* note 88, at 144. Lacy and Odem noted that many reasoned that if large numbers of native-born workers are unemployed (which is true in many parts of the country), it must be the Latinos’ fault. *Id.* And if wages are low, it must be their fault as well. *Id.* Wages are, of course, low in the South, but for a variety of reasons—including a lack of infrastructure, over-reliance on low-tech industries and farming, and an anti-union attitude dating back to slavery—that have little to do with Latino immigration. See *infra* notes 188–89 and accompanying text.

and driving up the cost of public schooling and emergency medical services.<sup>90</sup> They were slow to learn English and might be harboring communicable diseases.<sup>91</sup> They were crowding large numbers into small living quarters<sup>92</sup> and, according to some, parking their cars on the front lawn.<sup>93</sup> They could be providing cover for terrorists entering via the border with Mexico.<sup>94</sup> And, above all, they were illegal.<sup>95</sup> Some of the language castigating them was

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<sup>90</sup> Lacy & Odem, *supra* note 88, at 146.

<sup>91</sup> *Id.* at 148–49; see Ian Haney López, *Ebola Fearmongering: The Right's New Dog Whistle*, MOYERS & CO. (Oct. 17, 2014), <http://billmoyers.com/2014/10/17/dog-whistling-ebola/> (noting that disease and the risk of contagion are often imputed to undocumented aliens, especially by Southern politicians).

<sup>92</sup> See LEO R. CHAVEZ, SHADOWED LIVES: UNDOCUMENTED IMMIGRANTS IN AMERICAN SOCIETY 241–43 (3d ed. 2012); ELAINE C. LACY, MEXICAN IMMIGRANTS IN SOUTH CAROLINA: A PROFILE 17–18 (Jan. 2007), [www.sph.sc.edu/cli/pdfs/final\\_final\[1\].pdf](http://www.sph.sc.edu/cli/pdfs/final_final[1].pdf).

<sup>93</sup> On this common complaint, see Sandhya Somashekhar, *Parking on Lawns Faces Ban*, WASH. POST (June 1, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/31/AR2008053100022.html>. See also Alex Kotlowitz, *Our Town*, N.Y. TIMES MAG. (Aug. 5, 2007), <http://www.nytimes.com/2007/08/05/magazine/05Immigration-t.html>.

<sup>94</sup> Lacy & Odem, *supra* note 88, at 144–45 (noting the fear that Middle Eastern terrorists, who also look brown, could sneak in through the border disguised as Latin Americans); PEW RESEARCH CTR., MAPPING THE GLOBAL MUSLIM POPULATION 24 (2009), <http://www.pewforum.org/files/2009/10/Muslimpopulation.pdf>; Dan Cadman, *Have Terrorists Crossed Our Southern Border?*, CTR. IMMIGRATION STUDIES (Oct. 13, 2014), <http://cis.org/cadman/have-terrorists-crossed-our-southern-border>. Unless they remained constantly in hiding, they would be highly conspicuous. The country is Catholic and Spanish-speaking; most Middle Eastern people are not. Most terrorists are well financed and would find entering the United States as tourists or students much cheaper and easier than wading across a river and trekking through a burning desert.

<sup>95</sup> See Jonah Bennett, *Poll: Illegal Immigrants Should Be Deported, Mexico Should Foot the Bill*, DAILY CALLER (July 7, 2014, 5:21 PM), <http://dailycaller.com/2014/07/07/poll-illegals-should-be-deported-mexico-should-foot-the-bill>. This argument (“but they are illegal”) draws force from mental images of serious crimes, like murder or rape. But unauthorized presence in the United States is a mere status offense, not a felony, a victimless crime like leaving a car in a parking spot for longer than the permitted time and punished by removal. In other settings, the South winks at much illegality (“boys will be boys”), including moonshining, hunting out of season, sex between siblings and other close family members, and political corruption. See, e.g., Reid Wilson, *The Most Corrupt States in America*, WASH. POST: GOVBEAT (Jan. 22, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/01/22/the-most-corrupt-states-in-america/>; see also Adam Watts, *A Real Man's Place: Attitudes and Environment at a Southern Deer Camp*, in WHITE MASCULINITY IN THE RECENT SOUTH 86, 86–98 (Trent Watts ed., 2008) (noting the uninhibited freedom some Southern hunters feel to flout social rules, such as rules against hunting while intoxicated); Iris Halpern, *Rape, Incest, and Harper Lee's To Kill a Mockingbird: On Alabama's Legal Construction of Gender and Sexuality in the Context of Racial Subordination*, 18 COLUM. J. GENDER & L. 743 (2009) (noting the frequency of rape and incest—much of it unpunished—in Southern culture and literature); Timothy J. Lockhart, *Moonshine, a Part of Life, Especially in the South*, VIRGINIAN PILOT (Mar. 15, 2010), <http://hamptonroads.com/2010/03/moonshine-part-life-especially-south>. It also tolerates much overt racism. See NoiseCollector, *Racist Democratic Party Logo*, INTERNET ARCHIVE (Jan. 1, 2010), <https://archive.org/details/RacistDemocraticPartyLogo> (depicting a reproduction of the former official seal of the Alabama Democratic Party, with the words “White Supremacy” at the top, a rooster just below, and the words “For the Right” at the bottom); ALLEN TULLOS, ALABAMA GETAWAY: THE POLITICAL IMAGINARY AND THE HEART OF DIXIE 7 (2011) (discussing election ballots containing the same logo).

eerily similar to that which circulated during a period of Southern dreams more than a century earlier.<sup>96</sup>

In response, North Carolina soon passed a wide-ranging anti-immigrant bill.<sup>97</sup> Patterned after an earlier one in Arizona, North Carolina's statute (H.B. 786) allowed law enforcement officers to check the immigration status of anyone they stopped and detain them for up to twenty-four hours.<sup>98</sup> It also made it harder for undocumented immigrants to post bail, required anyone who is undocumented and arrested to pay the cost of their imprisonment,<sup>99</sup> and allowed law enforcement authorities to impound and seize the vehicles of undocumented drivers.<sup>100</sup> Many other Southern states and towns followed suit, some with even harsher measures.<sup>101</sup> Faced with a region that plainly wished

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<sup>96</sup> See *infra* Part I.C; see also Tony Horwitz, Opinion, *Immigration and The Curse of the Black Legend*, N.Y. TIMES, July 6, 2006, at C13 (noting that Arizona Representative J.D. Hayworth, who called for deporting illegal immigrants and eliminating birthright citizenship, described immigration supporters as wimps who were afraid to stand up for America). Talk radio depicted the immigrants as indolent, greedy for benefits, and prone to criminality (all components of the black legend). *Id.*; see also CHAVEZ, *supra* note 83, at 185 (noting that no Southern state passed any version of the Dream Act, which would have allowed children of undocumented immigrants to attend college; many states outside the region did); PHILIP WAYNE POWELL, TREE OF HATE: PROPAGANDA AND PREJUDICES AFFECTING UNITED STATES RELATIONS WITH THE HISPANIC WORLD (2008) (analyzing the effect of the black legend on education, textbooks, religion, and foreign policy). Most state anti-immigrant measures ban driver's licenses for immigrants, provide that they cannot receive organ transplants, penalize employers that hire them, and prohibit them from receiving prenatal care for their children. Some propose to abolish citizenship for "anchor babies." CHAVEZ, *supra* note 83, at 2-4. Alabama State Rep. Mickey Hammon described counties "most heavily hit" by immigration, as though they were victims of a tornado or other natural disaster. Reyes, *supra* note 87. As Alabama's bill (HB 56) was moving through the legislature, he told a newspaper that illegal immigrants cost the state between \$600 and \$800 million annually in benefit costs. When the newspaper fact-checked his figures, they turned out to be grossly exaggerated. *Id.*

Congress weighed in with anti-immigrant measures of its own, including forbidding food stamps, Supplemental Security income, and aid for low-income elderly, the blind, and the disabled. Even legal immigrants may not draw on Medicaid for the first five years; the undocumented cannot obtain any form of federal assistance except short-term disaster relief and emergency medical care. CHAVEZ, *supra* note 83, at 9.

<sup>97</sup> See Mike Meno, *N.C. Anti-Immigrant Bill Would Lead to Racial Profiling*, ACLU N.C. (Apr. 11, 2013), <http://acluofnorthcarolina.org/blog/anti-immigrant-bill-would-lead-to-racial-profiling.html>. North Carolina had experienced the nation's largest percentage increase (393%) in Latino population during the nineties. Johnson & Kasada, *supra* note 85, at 70, 70-71. Even earlier, Alabama had passed an English-only law. Mohl, *supra* note 85, at 57. The perception was that immigration was "out of control," and legislators warned that "the Spanish are creeping in." *Id.* When a few cities began offering driver's license tests in Spanish, some residents expressed concern that "Birmingham . . . could take on the characteristics of a Miami." *Id.* at 57-58.

<sup>98</sup> Meno, *supra* note 97.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> See, e.g., Mohl, *supra* note 9 (describing Alabama's law, one of the harshest); see also Lacy & Odem, *supra* note 83, at 143, 151-56 (describing new legislation at the state, city and county levels throughout the region); *State and Local Immigration Laws*, ACLU (2015), <https://www.aclu.org/immigrants-rights/state-anti-immigrant-laws>. At the time of its enactment in 2006, Georgia's early anti-immigration law was the harshest:

them to “self deport,”<sup>102</sup> some of the new immigrants decamped for new regions where they could make a fresh start.<sup>103</sup>

### B. Conventional Explanations

Why such a vituperative reaction? No obvious, ordinary non-racial explanation comes to mind. When Asians started arriving in the South in

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denying social benefits, requiring that employers check the status of all new workers and that police check all whom they encountered who looked like they might be immigrants, directing state authorities to cooperate with federal immigration enforcement officers, and prohibiting employers from deducting an illegal’s wage as a business expense. Lacy & Odem, *supra* note 88, at 151. South Carolina passed a similar bill in 2008 that in some respects was even fiercer. It gave standing to anyone to challenge a job of an undocumented immigrant and prohibited them from attending public colleges or universities even if they were qualified and willing to pay tuition. It also penalized anyone who aided one. *Id.* at 152. North Carolina restricted the issuance of driver’s licenses and established a special court designed to speed deportation proceedings. *Id.* Alabama’s “Show Me Your Papers” law, enacted in 2011 soon after a new Republican governor took office, Brooks, *supra* note 10, at 49, predictably led to racial profiling of anyone who looked Latino. It also made Latino parents (whether undocumented or not) hesitant about sending their children to school or reporting crimes to the police. See Lacy & Odem, *supra* note 88, at 143, 152 (noting police enforcement of anti-immigration law has made immigrants fearful to contact the police when they witness or are victims to a crime). Municipal water authorities threatened to discontinue service to patrons with Latino-sounding names unless they could prove that they were in the state legally. Pregnant women feared going to the local hospital to give birth. Many town and city ordinances prohibited the undocumented from renting or buying housing, entering into a contract of any form, or combining with others to share an apartment. Mohl, *supra* note 83, at 51, 53–55; see *Testimony to Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights*, S. POVERTY L. CTR. (Apr. 17, 2012), <https://www.splcenter.org/news/2012/04/17/testimony-senate-judiciary-subcommittee-constitution-civil-rights-and-human-rights> (testimony by Mary Bauer noting that Alabama faced a “humanitarian crisis”); see also Carmen, Vélez, *Puerto Rican Birth Certificate Causes Confusion*, in *ALABAMA’S SHAME*, *supra* note 10, at 23–24 (discussing a Puerto Rican woman who experienced difficulty registering an automobile when the clerk demanded proof of US citizenship).

On the social history of these laws, see CHAVEZ, *supra* note 83, at 1–3, for a discussion on the succession of bills, beginning with Arizona’s, then copycat laws in Georgia, Alabama, Mississippi, South Carolina, and two states outside the South, Utah and Indiana. See also Lacy & Odem, *supra* note 88, at 143, 146–47 (discussing Southern towns that enacted anti-immigrant measures of their own); Reyes, *supra* note 87 (analyzing Alabama’s law and terming it the most draconian). Many of these measures have fared poorly in court. See Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869, 889–90 (2015); Brendan Kirby, *One of Last Vestiges of Guttled Immigration Law, Alabama Pushes Voters for Citizenship Proof*, AL.COM (Dec. 23, 2014, 4:57 AM), [http://www.al.com/news/index.ssf/2014/12/one\\_of\\_last\\_vestiges\\_of\\_guttled.html](http://www.al.com/news/index.ssf/2014/12/one_of_last_vestiges_of_guttled.html); Fernanda Santos, *Court Blocks Arizona Policy of Denying Driver’s Licenses to Some Immigrants*, N.Y. TIMES, (July 7, 2014), <http://www.nytimes.com/2014/07/08/us/08arizona.html>.

<sup>102</sup> See Antonio Alarcón, *Opinion, Do-It-Yourself Deportation*, N.Y. TIMES (Feb. 1, 2012), <http://www.nytimes.com/2012/02/02/opinion/do-it-yourself-deportation.html> (discussing a proposal by presidential candidate Mitt Romney); see also Reyes, *supra* note 87 (describing the “Republican Handshake With Alabama,” which pledges increased enforcement of the immigration laws).

<sup>103</sup> See Reyes, *supra* note 87 (noting that a number took the hint and left); see also Brooks, *supra* note 10, at 52 (same); Paul Harris, *Tensions Rise as Latinos Feel Under Siege in America’s Deep South*, GUARDIAN (Aug. 20, 2011, 7:07 PM), <http://www.theguardian.com/world/2011/aug/21/racist-immigration-law-in-deep-south>. Those who remained burrowed even more deeply into the shadows.

substantial numbers beginning around 1965, they evoked no similar protest.<sup>104</sup> Vietnamese fishermen encountered resistance in Gulf seaports, but only because they posed economic competition with the native fishing community.<sup>105</sup> But the arrival of Latino immigrants that began around 1990 looking for blue-collar jobs sparked a response that is both groundless and counterintuitive.<sup>106</sup> It need not have happened—or when it did, wiser heads should have prevailed. The immigrants represented a supply of willing workers in a region that seemed to greatly need them. They were, on the whole, orderly,<sup>107</sup> non-criminally inclined,<sup>108</sup> pious,<sup>109</sup> and little disposed to use any

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<sup>104</sup> That is, not similar in virulence. See ASIAN AMERICANS IN DIXIE: RACE AND MIGRATION IN THE SOUTH (Khyati Y. Joshi & Jigna Desai eds., 2013) (noting that the number of Asians in the region increased sharply in the aftermath of a 1964 change in the immigration law and that the reaction to their arrival was comparatively mild; in part this happened because Southern society saw them as “model minorities”) For further discussion, see also JAMES LOEWEN, THE MISSISSIPPI CHINESE: BETWEEN BLACK AND WHITE (1988) (describing how acceptance arrived in the course of just one generation).

Southern communities and onlookers drew a sharp distinction between Asians and the new Latinos, who were undocumented. *Id.* at 20; see Jou-Chi Ho, *The Call for and Role of Asian Lawyers in the Deep South*, 12 SEATTLE U. J. SOC. JUSTICE 843, 858–64 (2014) (noting that Chinese immigrants in the South found themselves caught in the middle of the black-white binary paradigm of race and neither white nor black, but in-between, and that many responded by opening small shops catering to the black community). Perhaps the reason for their relatively mild reception was the lingering memory of a period shortly after the Civil War when the region imported Chinese to replace the former black slaves, an arrangement that, for a time, worked perfectly. See ASIAN AMERICANS IN DIXIE, *supra* at 7–9; MATTHEW PRATT GUTERL, AMERICAN MEDITERRANEAN: SOUTHERN SLAVEHOLDERS IN THE AGE OF EMANCIPATION 145–68 (2008). A few years later (during the 1880s), Bengali Muslim peddlers began arriving in New York. In time, a few of them found their way to New Orleans, Charleston, and a few other southern cities, where they sold “exotic” goods from the Orient such as silk garments and shiny trinkets. ASIAN AMERICANS IN DIXIE, *supra*, at 7–9.

<sup>105</sup> E.g., *Vietnamese Fisherman’s Ass’n v. Knights of the Ku Klux Klan*, 518 F. Supp. 993 (S.D. Tex. 1981).

<sup>106</sup> See *supra* notes 87–96 and accompanying text; *infra* notes 107–12, 178–84, 243–45 and accompanying text.

<sup>107</sup> See Robert J. Sampson, *Rethinking Crime and Immigration*, 7 CONTEXTS 28 (2008) [hereinafter *Rethinking Crime*]; Robert J. Sampson, Opinion, *Open Doors Don’t Invite Criminals*, N.Y. TIMES (Mar. 11, 2006) [hereinafter *Open Doors*], <http://www.nytimes.com/2006/03/11/opinion/11sampson.html>.

<sup>108</sup> *Rethinking Crime*, *supra* note 107; Marjorie S. Zatz & Hilary Smith, *Immigration, Crime, and Victimization: Rhetoric and Reality*, 8 ANN. REV. L. & SOC. SCI. 141, 142 (2012) (noting that the crime rate generally drops, especially for violent crime, when immigrants move in; indeed “immigration may be the most important factor explaining the decrease in US violent crime rates in recent years”); Joel Rose, *Does Crime Rate Drop When Immigrants Move In?*, NPR (Mar. 8, 2013, 2:38 PM), <http://www.npr.org/2013/03/08/173642807/does-crime-drop-when-immigrants-move-in>; *Open Doors*, *supra* note 107. “[I]ncreased immigration serves a protective function, revitalizing communities and reducing crime rates for both immigrant and non-immigrants.” Zatz & Smith, *supra*, at 142. It even reduces adolescent violence. *Id.* at 145; see also RUBÉN G. RUMBAUT & WALTER A. EWING, IMMIGRATION POLICY CTR., THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION: INCARCERATION RATES AMONG NATIVE AND FOREIGN-BORN MEN I (2007) (noting the low rate); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599, 605–10 (2015) (noting the same across practically all categories).

but the most urgently needed social services.<sup>110</sup> They were not in competition for most of the jobs that were vacant and available—in labor economics terms, they exhibited a high degree of complementarity with the existing labor force, including African Americans.<sup>111</sup>

In short, they did not pick fights with the locals, make fun of the American flag, displace existing workers, wallow in welfare-fed leisure, commit crimes, or refuse to pay their fair share of taxes.<sup>112</sup> Yet, beginning soon after arrival in the South, the welcome wagon disappeared.

Ignoring plain facts and the evidence of their senses (including the now-booming economy),<sup>113</sup> editors, headline writers, legislators, and ordinary

<sup>109</sup> To wit, devout Catholics. See CHAVEZ, *supra* note 83, at 48–72 (describing a study of recent Latino immigrants in one region).

<sup>110</sup> See *id.* at 124, 126 (pointing out that immigrants on the whole consume considerably less in social services than is commonly thought). Indeed, some studies indicate that the amount that they contribute through their labor and tax payments more than compensates for the social-welfare costs they impose. See Christian Briggs, Note, *The Reasonableness of a Race-Based Suspicion*, 88 S. CAL. L. REV. 379, 396–400 (2015); see also Editorial, *America's Immigration 'Dumping Ground' Contributes to Vibrancy and Growth*, WASH. POST, (Sept. 15, 2015), [https://www.washingtonpost.com/opinions/how-americas-dumping-ground-contributes-to-vibrancy-and-growth/2015/09/15/498de09e-5be4-11e5-b38e-06883aacba64\\_story.html](https://www.washingtonpost.com/opinions/how-americas-dumping-ground-contributes-to-vibrancy-and-growth/2015/09/15/498de09e-5be4-11e5-b38e-06883aacba64_story.html) (noting their gumption and high work rate—“a net positive for the economy”); Eric Pianin, *Study Finds Illegal Immigrants Pay \$11.8B in Taxes*, FISCAL TIMES (Apr. 16, 2015), <http://www.thefiscaltimes.com/2015/04/16/Study-Finds-Illegal-Immigrants-Pay-118B-Taxes>.

<sup>111</sup> See Roger Lowenstein, *The Immigration Equation*, N.Y. TIMES MAG. (July 9, 2006), <http://www.nytimes.com/2006/07/09/magazine/09IMM.html> (discussing the work of UC Berkeley labor economist David Card). The principle of complementarity holds, in brief, that a newcomer who obtains work in an undersubscribed sector adds wealth to the local economy while not endangering the job of a longtime resident. *Id.*; see also Reyes, *supra* note 87 (“There simply aren’t enough people in the United States legally who are willing or able or geographically situated to do the backbreaking work most farms have to offer, a truth that has become increasingly clear as farmers—first in Georgia, . . . and now in Alabama—have scrambled to fill the vacuum left by a labor force that evaporated overnight. Agriculture is a grueling, \$5 billion industry . . . \$3.4 billion comes from poultry; the rest is from farms and nurseries . . . . One of every five jobs in Alabama is connected to agriculture. Most are paid as piecework . . . . And while anti-immigration arguments hang on the idea that if illegal workers were barred from these jobs Americans would eagerly fill them . . . farmers say this doesn’t square with reality. . . . Of the locals . . . hired to replace the workers who fled, most lasted only a couple of hours . . . before they quit.”). In general, the arrival of immigrants to a region does not increase unemployment—instead, it often lowers it. See Lowenstein, *supra*; see also *infra* note 179 (explaining why this is so). Otherwise, regions that are magnets for immigrants, such as New York City, would have very high unemployment rates, which they do not.

<sup>112</sup> See CHAVEZ, *supra* note 83, at 48–72; Lacy & Odem, *supra* note 88, at 147.

<sup>113</sup> Immigration is a prime reason for the region’s boom. See Odem & Lacy, *supra* note 83, at xxi (noting that much of the current Southern economic resurgence results from migrants’ contribution). “Growth and prosperity of the last two decades have depended to a large extent on the recruitment of laborers from Mexico and other countries of Latin America.” *Id.* They represent “a flexible, low cost labor pool that has not only boosted corporate profits but [cut] costs for consumers, fuel[ing] the economic growth and competitiveness of key southern industries such as poultry processing, forestry, textiles, carpets and rugs, construction,

citizens railed against the newcomers, demonized them as criminals and bearers of disease, and urged deporting them as quickly as possible.<sup>114</sup>

This reaction, which included a number of statutes and ordinances so draconian that even a conservative federal court system struck much of them down,<sup>115</sup> begs for an explanation. Derrick Bell's interest convergence formula would not predict such a reception.<sup>116</sup> The explanation, which will require a brief review of the history of the region and the role of cultural meanings as determinants of expression, offers an insight into the workings of the First Amendment and our system of freedom of speech.

We readily admit that social behavior is complex, so that single explanations rarely explain a region's behavior. In fact, a recent essay in *Michigan Law Review* by one of us suggests a slightly different, but related reason for the intensely negative reaction the South exhibited toward the new arrivals—namely, that the region simply dusted off the template it forged in the case of blacks and applied it to the new arrivals.<sup>117</sup> Many Latinos (not all), are

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landscaping, hospitality, and agriculture." *Id.* From its beginnings in the 1990s, "[r]eliance on Latino immigrant labor, both documented and undocumented, is now a structural feature of the southern economy." *Id.* A typical immigrant family would first rent an apartment, then go shopping for a refrigerator, washing machine, and car. See Lacy & Odem, *supra* note 88, at 146–48 (estimating \$1.2 trillion annually for all Latinos by 2012).

<sup>114</sup> On this poor reception, see *supra* notes 9–14, 85–102 and accompanying text.

<sup>115</sup> See, e.g., *Arizona v. United States*, 132 S. Ct. 2492 (2012) (striking down most of Arizona's law as pre-empted and thereby impliedly disapproving many of the others). On the extent and nature of Southern anti-immigrant legislation today, see Haeyoun Park, *Which States Make Life Easier or Harder for Illegal Immigrants*, N.Y. TIMES (Mar. 29, 2015), <http://www.nytimes.com/interactive/2015/03/30/us/laws-affecting-unauthorized-immigrants.html> (listing states that allow or disallow driver's licenses; grant or withhold tuition benefits; permit police to question people about their immigration status; and are challenging programs to give work permits and protections from deportation). See also Julia Preston, *States Are Divided by the Lines They Draw on Immigration*, N.Y. TIMES: POLITICS (Mar. 29, 2015), <http://www.nytimes.com/2015/03/30/us/politics/states-are-divided-by-the-lines-they-draw-on-immigration.html> (discussing the same).

<sup>116</sup> See *supra* notes 85–87 and accompanying text (explaining that the newcomers' reception at first was good). On Bell's hypothesis about the role of self-interest in charting racial progress and retrenchment, see Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

<sup>117</sup> See Richard Delgado & Juan F. Perea, *Racial Templates*, 112 MICH. L. REV. 1133 (2014) (discussing how racial animosity in one era can serve as a blueprint for the same in another). Other contributing factors that may explain the region's hostility toward the wave of Latino immigrants include a general suspicion of outsiders, see TULLOS, *supra* note 95, at 63–64; a low rate of population mobility, *id.*; a punitive attitude toward offenders, *id.* at 2, 65–106; and a fear of interracial sex lingering from the days of slavery and Jim Crow. Edward Ball, *Slavery's Enduring Resonance*, N.Y. TIMES (Mar. 14, 2015), <http://www.nytimes.com/2015/03/15/opinion/sunday/slaverys-enduring-resonance.html> (noting that the South's harsh regime of crowded prisons, long sentences, and punitive attitude toward prisoners, criminal defendants, and ex-convicts is a lingering consequence of slavery and slave patrols); see also TULLOS, *supra* note 95, at 261–62 (noting

dark-skinned, short, barrel-chested, and not at all European-looking and thus might easily strike a xenophobic or racist observer as a new kind of black. But a careful examination of the wave of nativism and its historical precursors suggests intriguing reasons counseling a more skeptical view of the role of free speech formalism than we currently afford it. This is so for three principal reasons: two structural, one historical.

### 1. *An Abbreviated, Clipped Discourse*

The first reason is one mentioned earlier. Southern discourse, in official and unofficial circles alike, failed in connection with the subject of Latino immigration because the First Amendment deemed only certain matters, such as the newcomers' legality, relevant.<sup>118</sup> What is more, speakers felt entitled, under reigning First Amendment law, to say whatever they chose or had heard about Latinos (usually negative) without repercussions.<sup>119</sup>

### 2. *Terms, Meanings, and (Their Origin in) the Past*

The meanings of terms always lie in the past.<sup>120</sup> This is why words like “Mexican,” “illegal,” “dirty,” or “invader” can encode racism lingering from previous times, pre-determining how we think and talk about some of our fellow humans. As Søren Kierkegaard put it, we are doomed to lead life forward but only to understand it in reverse—that is, in retrospect.<sup>121</sup> A realist theory of speech and persuasion would take this insight into account and enable us to counteract it when necessary.

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how “[w]hen contemporary Alabama lapses into throwback scenes from the Heart of Dixie, a few backsliding moments can evoke historical memory” of earlier times when whites maintained ascendancy through casual terror tactics).

<sup>118</sup> For example, “Are they illegal or not?” (If illegal, case closed.) “Do they consume social services?” (If so, case again closed—never mind that they might be contributing more than the net cost of those services.) “Are they dirty?” (I’ve heard they are. Case closed.) See TULLOS, *supra* note 95, at 8–9, 21–64, for a discussion on habits of mind and their thought-ending function. See also TULLOS, *supra* note 95, at 8–9, 20–64.

<sup>119</sup> “May I say vile things about them?” (Yes—it’s not defamation or fighting words or hate speech—case closed). See *supra* notes 43–61 and accompanying text.

<sup>120</sup> See W.E. BURGHARDT DU BOIS, *THE WORLD AND AFRICA* 80 (1947) (“Don’t you understand that the past *is* the present; that without what *was*, nothing *is*?”). It is only in algebra that we get to say, “Let X equal 2 Y.” There, the meaning of a term is whatever we choose to give it at that moment. With ordinary speech, however, meanings attach to words and expressions through a process that extends backward through time.

<sup>121</sup> See Søren Kierkegaard: *Additional Information*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/topic/317503/supplemental-information> (last updated May 29, 2015).

Often, we are unaware of how meanings of terms like the ones above—associations that we have acquired over the years—channel our thinking. But we need to learn to recognize when this happens; it does not take place without effort.<sup>122</sup> In section C, we shall see how an early and little-known period in Southern history may have disposed the South to react negatively to the new arrivals.

### 3. *Hate Speech and Bloodied Chickens*

Because formalist free-speech law tolerates, and may even encourage, hate speech, members of society, including legislators, over time, feel increasingly free to demonize a group. The targets become like chickens with a speck of blood.<sup>123</sup> Policy makers and ordinary citizens feel free to paint the Mexicans as dirty, lazy, and hypersexual because they have heard these things so often they assume that they must be true. They “go without saying”—matters that everybody knows are so and neither need to be repeated nor proven.

As when an officer issues a citation for a speeding violation, formalism enables us to simplify a transaction that we believe should be uncomplicated, even automatic.<sup>124</sup> The First Amendment version of it enables discussion to be brief and predictable, as well. We know that we can say certain things and that our adversaries will not be able to respond in terms other than those we have chosen. We know that the conversation is apt to be short and our cause victorious. “Here come those Mexicans again. We know what to do.” Often these conversations are short because only one or two matters count. And the way we count them is often a function of a stereotype.<sup>125</sup>

### C. *Southern Dreams of Empire in the—Very Deep—South*

To understand why the South responded so vehemently when Latinos began arriving in 1990, one needs to revisit a period about 150 years earlier.<sup>126</sup>

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<sup>122</sup> See Delgado & Stefancic, *supra* note 38, at 1259, 1278–82 (noting that we often perceive the racism of our time only many years later); see also STEVEN W. BENDER, *MEA CULPA: LESSONS ON LAW AND REGRET FROM U.S. HISTORY* 35–58 (2015) (same).

<sup>123</sup> See Richard Delgado & David Yun, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate-Speech Regulation*, 82 CALIF. L. REV. 871 (1994).

<sup>124</sup> That is, we do not want the officer listening to the motorist’s plea that she was in a hurry, that the lighting was good and her reflexes excellent, or that she was distracted and won’t do it again.

<sup>125</sup> See Delgado & Stefancic, *supra* note 38, at 1262–76 (discussing how prevailing stereotypes change over time in step with society’s shifting needs).

<sup>126</sup> For accounts of this expeditionary period, see AMY S. GREENBERG, *MANIFEST MANHOOD AND THE ANTEBELLUM AMERICAN EMPIRE* (2005); GUTERL, *supra* note 104; ROBERT E. MAY, *MANIFEST DESTINY’S*

In the decade before the Civil War (1850–1860), the region felt itself beleaguered.<sup>127</sup> Its slave economy was highly profitable, enabling the planter class to build palatial homes and lead lives of leisure. But the North, for the most part, detested slavery and did not want it to spread to new areas. At the same time, the country’s main population growth had been occurring in that region, so that the balance of political power was poised to shift decisively in its favor, spelling disaster for the South and its agrarian way of life.<sup>128</sup> Slavery’s days were numbered, together with the wealth and grand houses that they brought.<sup>129</sup> The writing was on the wall.

This left the South with only two alternatives, secession or expanding the number of slave states. When the North headed off expansion of slavery to

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UNDERWORLD: FILIBUSTERING IN ANTEBELLUM AMERICA (2002) [hereinafter UNDERWORLD]; ROBERT E. MAY, SLAVERY, RACE, AND CONQUEST IN THE TROPICS: LINCOLN, DOUGLAS, AND THE FUTURE OF LATIN AMERICA (2013) [hereinafter SLAVERY, RACE, AND CONQUEST]; ROBERT E. MAY, THE SOUTHERN DREAM OF A CARIBBEAN EMPIRE 1854–1861 (1973) [hereinafter DREAM]. See also Robert E. May, *Young American Males and Filibustering in an Age of Manifest Destiny: The United States Army as Cultural Mirror*, 78 J. AM. HIST. 857, 857–58 (Dec. 1991) [hereinafter *American Males*] (defining “filibuster[s]” as “American adventurers who raised or participated in private military forces who either invaded or planned to invade foreign countries with which the United States was formally at peace”—all in defiance of international and U.S. law, treaties, and presidential decrees); CHARLES H. BROWN, AGENTS OF MANIFEST DESTINY: THE LIVES AND TIMES OF THE FILIBUSTERS 3 (1980) (noting that Aaron Burr and Francisco de Miranda may have been the country’s first filibusters in that both “led military expeditions from the United States against Spanish territories to establish independent states with themselves at the head” and as such “were the prototypes of expeditionaries at midcentury, the heyday of filibusterism, when no year passed without raids being set afoot against Latin-American countries”). On the idea that early expansionists, such as Jefferson, Madison, and Monroe, who fought the French and Spanish throughout the Gulf region in the service of Manifest Destiny, paved the way for the rambunctious filibusters of the midcentury period, see FRANK LAWRENCE OWSLEY, JR. & GENE A. SMITH, FILIBUSTERS AND EXPANSIONISTS: JEFFERSONIAN MANIFEST DESTINY, 1800–1821, at 9–15 (1997). See also BROWN, *supra*, at 458 (noting that earlier expansionism took a different path than the one in the period (1850–1860) we discuss in this Article—namely westward and even northward, casting eyes on Canada).

<sup>127</sup> See DREAM, *supra* note 126, at 3–5, 188–89 (noting that a few years later “Southern leaders . . . demanded evidence that their institutions would be protected in the face of growing northern predominance in the Union. Oregon, admitted into the union in the midst of the Cuba debate, symbolized that predominance, as did the territory of Kansas, which by 1859 was destined to become a free state. Cuban acquisition might have served to reassure the South. . . . The Republicans who quashed Slidell’s efforts were aware of southern anxieties, but were unwilling to pay the price that Caribbean acquisition would have entailed, namely, the strengthening of slave institutions within Buchanan’s failure . . . helped pave the way for Abraham Lincoln’s election in 1860”).

<sup>128</sup> See DREAM, *supra* note 126, at 11, which notes that the South by this time saw the House of Representatives as a lost cause, because population growth was rapid in the North. But each new slave state, even if thinly populated, could provide new votes in the Senate. *Id.* at 10–11.

<sup>129</sup> *Id.*

new territories such as Kansas,<sup>130</sup> Southern politicians and adventurers, in a little-known chapter, cast their eyes on Latin America and the Caribbean, seeing in them a promising source of new land, slaves, votes, and representation, if only they could conquer these areas and add them as new U.S. states.<sup>131</sup> Southern politicians envisioned as many as twenty-five new American states, including Cuba, Nicaragua, and the southern states of Mexico (the northern part having been already conquered).<sup>132</sup> They thus encouraged

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<sup>130</sup> The Kansas-Nebraska Act (1854) “encouraged [S]outherners in their desire to expand slavery” to Cuba and other Spanish-speaking regions. DREAM, *supra* note 126, at 37, 51. But their struggle ended disappointingly. Seven years later, Kansas entered the Union as a free state. *Id.* at 189.

<sup>131</sup> See UNDERWORLD, *supra* note 126, at 111 (“Many Southerners who filibustered . . . did so at least in part as a means of expanding slavery or otherwise advantaging their ‘peculiar institution.’ . . . [I]t was no accident that the majority of leading filibusters hailed from the slave states.”); DREAM, *supra* note 126, at xi (describing the ambition of Southern imperialists “to create abroad a civilization that was under fire at home”). Not only would “a tropical slave empire . . . protect white Southerners from Northern aggression . . . [i]t would offer an escape valve from the limits of continental expansion imposed by the South’s Northern enemies.” *Id.* As one Mississippi senator put it: “I want [the new regions] . . . for the planting or spreading of slavery.” *Id.* at 9. After the fiasco over Kansas, the South wanted expansion to Latin American and the Caribbean to happen rapidly since the possibilities for new slave states in the west seemed slim. *Id.* at 10–11. Indeed, “[t]he essence of the Caribbean movement lay in the hope of its fervent exponents that through tropical expansion the South could maintain a viable political position within the union.” *Id.* at 235; see also BROWN, *supra* note 126, at 459, 462 (noting that the hope for expanding slavery motivated much filibustering, even in the very early period).

This hope persisted even in the period immediately preceding the Civil War, when secession was imminent. Then, secession backers began urging that breaking away would be advantageous for a new reason: It would free the South to pursue an aggressive course in Latin America that “would bring prosperity and greatness.” DREAM, *supra* note 126, at 236. At an Alabama gathering, “James Dowdell said that a seceded South would acquire Central America for slavery, while John Moran predicted that it would occupy the Gulf of Mexico and rule over . . . the adjacent seas.” *Id.* at 238. George Fitzhugh, “possibly the Old South’s most notorious pro-slavery ideologue,” argued in *DeBow’s Review*—published in New Orleans in December of 1858—that acquiring Mexico was a good way of spreading the practice of slavery. UNDERWORLD, *supra* note 126, at 111; see OWSLEY & SMITH, *supra* note 126, at 23–31. Owsley & Smith noted that even earlier, expansion-minded occupants of the White House set their eyes on the Gulf region and its rich ports, such as New Orleans, the “Texas badlands,” *id.* at 32–60, Florida, *id.* at 61–81, and Texas itself, *id.* at 164–80. Amelia Island entered U.S. control that way, as well. *Id.* at 118–40.

<sup>132</sup> See DREAM, *supra* note 126, at 10–11 (“New slave states . . . and new slave-state congressmen, would enable the South to protect the institution of slavery and ‘Southern rights.’”); *id.* at 150 (noting that the Knights of the Golden Circle, see *infra* note 165, aimed to add twenty-five new states, since this would guarantee political parity with the North for the foreseeable future); *id.* at 9 (quoting Mississippi Senator Albert Gallatin Brown: “I want Cuba, and I know that sooner or later we must have it. . . . I want Tamaulipas, Potosi, and one or two other Mexican states; and I want them all for the spread of slavery. Yes, I want those countries for the spread of slavery.”); see also *id.* at 10–11 (noting that Jefferson Davis supported a bill favoring annexing Cuba with this purpose in mind; Governor Wickliffe of Louisiana did so, and parts of Mexico as well; and John Ford of Texas saw getting Mexico (the entire country) as a necessity for Texas and the South for much the same reason).

Some Southerners saw southward expansion as an agricultural imperative, since it would yield new lands with soil not depleted by one-crop farming. *Id.* at 12. Others saw it in psychosexual terms, as an opportunity to regain a manhood damaged by Yankee suppression. GREENBERG, *supra* note 126, at 10.

and funded private and semi-private expeditions—“filibusters”—aimed at taking over some of these lands and establishing American—that is to say, Southern—rule.<sup>133</sup>

These regions, once admitted to the Union, would naturally align with the South in its struggle against northern opponents of slavery such as Abraham Lincoln and Horace Greeley. They would, in short, be just like the new states or territories of California, Utah, Colorado, Arizona, Kansas, and New Mexico—only slave-owning rather than free.<sup>134</sup>

For a crucial ten-year period that is little known today, Manifest Destiny in the South took on a new meaning—expansion southward. While the rest of the country was in the process of marching westward, the South was casting eyes on what remained of Mexico after the U.S.–Mexico War, as well as Central America and the Caribbean. It is almost impossible to describe the degree of fervor that this expeditionary period generated. Journalists touted the fertility of those lands,<sup>135</sup> the bravery of the expeditionaries, and the ignorance, filth,

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<sup>133</sup> See, e.g., DREAM, *supra* note 126, at 3–10. These were called “filibusters” in the language of the day. *Id.* Today we would call them expeditionaries or commando raiders/invasers. The term “filibuster” derives from the Spanish “filibustero” (meaning privateer or pirate), which in turn derives from an earlier Dutch word meaning the same. See *Filibuster*, OXFORD ENGLISH DICTIONARY, <http://public.oed.com/about/free-oed/> (last updated Mar. 2015); see also BROWN, *supra* note 126, at 18 (describing the 1850s as “an exciting period when the self-appointed agents of Manifest Destiny . . . carried on elaborate intrigues to organize their expeditions, resorted to ruses to escape the vigilance of officials . . . landed on foreign soil with only a few armed men to conquer a country, and fought against defending forces, invariably losing . . . only to return to the United States to try again . . . [T]he filibuster movement was a part of larger affairs, the issue of slavery dividing the nation, the rivalry for commercial supremacy with other countries, enforcement of the Monroe Doctrine . . . and the assertion by the United States of . . . its title to ‘national glory, national greatness’”).

<sup>134</sup> DAVID A. CLARY, *EAGLES AND EMPIRE: THE UNITED STATES, MEXICO, AND THE STRUGGLE FOR A CONTINENT* 145, 157, 159, 250, 330, 340–41, 415, 421–26 (2009); DREAM, *supra* note 126, at 8–9. Some also envisioned the new territories as dumping ground for excess slaves, thus reducing the chance of a rebellion. See DREAM, *supra* note 126, at 12. Some of the new territories had only recently entered the United States via the Treaty of Guadalupe Hidalgo, which ended the War with Mexico.

<sup>135</sup> See UNDERWORLD, *supra* note 126, at 2 (stating the news of the Cuban invasion caused a “sensation” and a “frenzy”); DREAM, *supra* note 126, at 6 (describing the Caribbean as a “veritable Garden of Eden”). Texans and transplanted Southerners raved about the beauties of Mexico and Nicaragua. DREAM, *supra* note 126, at 6–7 (“Trees here are all green, ever vegetating, and casting forth their luscious fruits.”). A Kentuckian effused that “Nicaragua’s soil could produce at least three times as much corn as soil in the U.S. and twice the amount of sugar per acre.” *Id.* at 8. A Texan compared the fertility of Nicaragua’s coastal area to that of the Nile Delta. *Id.* And a Tuscaloosa newspaper proclaimed that Haiti was “worth a dozen Nicaraguas.” *Id.*

Backers of Southern expansion included many major newspapers and political figures such as Alexander Stephens, Robert Toombs, John Slidell, and John Winston. *Id.* at 190. Thousands of ordinary citizens turned out for rallies and speeches and gave money and support to the cause, including some who went so far as to advocate taking Brazil. *Id.* at 190–91. At its most fevered pitch in mid-1850s, a majority of Southerners supported expansion. *Id.* at 194; see GREENBERG, *supra* note 126, at 44–45, 54–57 (noting that

and lack of ambition of the populations of the countries they felt destined to conquer and rule.<sup>136</sup> Playwrights extolled the virtues of the brave invaders.<sup>137</sup> Newspaper editors rhapsodized and urged citizens to join up.<sup>138</sup> Magazines did the same.<sup>139</sup> Second-rate poetry extolling the virtues of conquest appeared in newspapers.<sup>140</sup> Photos of prominent expeditionary William Walker looking heroic appeared everywhere.<sup>141</sup> Burlesques, farces, melodramas, books,

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travel narratives of this time, some in magazines like *Harper's* and *Putnam's Monthly*, as well as speeches, drummed up support for occupying Hawaii, as well as much of Mexico). "A fever for Central America . . . infected the country . . . territorial expansion could bring together laborer and merchant, adventurer and farmer, slaveholders" and others. *Id.* at 55. Popular periodicals invoked pride of race and Anglo-Saxon destiny to overrun the entire continent, and featured portraits of pusillanimous Mexicans burdened by suffocating Catholicism. *Id.*

<sup>136</sup> DREAM, *supra* note 126, at 4–6. A Virginia newspaper depicted Mexicans as "the most brutal, the most barbarous, the most ignorant of all the people who claim the right of being civilized—cowardly, treacherous, ferocious half-Indians . . . robbers, murderers, fugitives from justice." Central American countries were "miserable republics . . . peopled by a degraded half race of humanity." *Id.* at 5. An Alabama newspaper predicted that Americans would carry "moral and material well-being to the disintegrating communities and decaying races of Spanish America." *Id.*; see also GREENBERG, *supra* note 126, at 94–95, 103 (noting that Southern travelers and writers depicted Latin Americans as comparable to blacks intellectually and in skin tone, although some were a bit lighter). Others depicted them as barbarous, ignorant, and superstitious, *id.* at 103, or weighed down by their mongrel blood. See UNDERWORLD, *supra* note 126, at 116. Richard Henry Dana found them lazy and thriftless. GREENBERG, *supra* note 126, at 96. Others found them prone to frequent siestas, *id.* at 9, blamed Catholicism for their passive character, *id.* at 98, and advocated invasion to counteract that religion's adverse influence in the region, *id.* at 99.

Some writers date the disparaging attitude to a slightly earlier period, namely the War with Mexico. See CLARY, *supra* note 134, at 185, 207, 267–68. See generally AMY S. GREENBERG, *A WICKED WAR: POLK, CLAY, LINCOLN, AND THE 1846 U.S. INVASION OF MEXICO* (2012). For John Quitman it probably did: As commander of a volunteer brigade during that war, he led troops in the bloody battle of Belen (near Mexico City), and the massacre of young Mexican cadets at Chapultepec. CLARY, *supra* note 134, at 376–77. After Mexico surrendered, he served as first governor of Mexico City. *Id.* at 393. Later, as governor of Mississippi, he subsidized Narciso Lopez (a leading American expeditionary figure) on his failed Cuban invasion, after which the government tried Quitman for violating the neutrality laws. See MICHAEL F. HOLT, *THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR* 602–03 (1999). After two trials of Quitman's co-defendants ended in hung juries, however, the charges against Quitman and all others involved were dropped. *Id.* at 603. Lopez went on to invade Cuba a number of times. See, e.g., UNDERWORLD, *supra* note 126, at 252; see also HOLT, *supra*, at 602–03 (describing the ex-governor's romance with Lopez and, in turn, the South's with Quitman, which may have accounted for the hung juries when federal authorities tried him for violating U.S. neutrality laws and endangering world peace). On Lopez's quixotic career, see BROWN, *supra* note 126, at 39–88.

<sup>137</sup> UNDERWORLD, *supra* note 126, at 65–71.

<sup>138</sup> See *id.* at 68–73.

<sup>139</sup> *Id.* at 68.

<sup>140</sup> *Id.* at 69.

<sup>141</sup> *Id.* at 68, 74.

pamphlets, and book reviews celebrated the exploits or foibles of the adventurers.<sup>142</sup>

Would-be expeditionaries spoke to huge crowds, led torchlight parades,<sup>143</sup> raised large sums of money from wealthy and powerful Southern planters and merchants, and recruited armies of would-be adventurers. Henry Wadsworth Longfellow in 1853 described meeting some college students who were thrilled at the thought of joining Walker.<sup>144</sup> Respectable political figures joined in praise.<sup>145</sup> Well-wishing society figures held balls, serenades, rallies, and welcoming ceremonies in their honor, some with military bands.<sup>146</sup> Citizens swarmed onto docks when they came and went.<sup>147</sup> Crowds waved hats and handkerchiefs; cannons boomed in salute.<sup>148</sup>

The region was simply aflame with excitement over the idea of empire.<sup>149</sup> Some believed that the Almighty himself wanted the South to rule the new areas.<sup>150</sup> The American Geographical Society, which was then espousing

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<sup>142</sup> *Id.* at 71; see also *American Males*, *supra* note 126, at 857 (quoting a local newspaper: “The fever of Filibustering is on our country. Her pulse beats like a hammer at the wrist, and there’s a very high color on her face”). Sympathy for the filibusters ran so high that the U.S. Army experienced difficulty policing and intercepting them on their illegal forays because many U.S. soldiers sided with them, at least privately. *American Males*, *supra* note 126, at 865–68.

<sup>143</sup> UNDERWORLD, *supra* note 126, at 74.

<sup>144</sup> *Id.* at 77. Foreign countries such as England and France fretted, fearing that the expeditionaries might threaten their rule over territories that they considered theirs. BROWN, *supra* note 126, at 460. Some in the U.S. saw the practice (filibustering) as an expression (however lawless) of the Monroe Doctrine. *Id.*

<sup>145</sup> *E.g.*, SLAVERY, RACE, AND CONQUEST, *supra* note 126, at 161–63 (noting that Stephen Douglas increasingly supported Southern expansion as the presidential election approached). “In each city [(e.g., St. Louis)], Douglas’s orations included strong endorsements of . . . territorial expansion southward” (in particular Mexico and Central America), in order to accommodate a growing population. *Id.* at 161–63. He received much support for this idea in the South. *Id.* at 168–71. The South then was indignant over Juan Cortina’s cross-border raids between Mexico and Texas, *id.* at 171–72, which impugned the region’s sense of honor.

<sup>146</sup> UNDERWORLD, *supra* note 126, at 74–75.

<sup>147</sup> *Id.* at 75–76. These would be Gulf Coast port cities such as Mobile and New Orleans, or California docks. See *American Males*, *supra* note 126, at 859.

<sup>148</sup> UNDERWORLD, *supra* note 126, at 75–76.

<sup>149</sup> See *id.* at 66–79 (describing it as big news and a frenzy, and noting the region was aflame with excitement); DREAM, *supra* note 126, at 50–51 (noting strong backing in Georgia and Alabama); ERIC H. WALTHER, WILLIAM LOWNDES YANCEY AND THE COMING OF THE CIVIL WAR 211, 220 (2006) (same). Theaters presented plays celebrating brave conquerors. *American Males*, *supra* note 126, at 859 (noting countless newspaper items, parades, speeches, lectures, bands, stage plays, and other indications of martial spirit and support in the region).

<sup>150</sup> See DREAM, *supra* note 126, at 238 (quoting a Georgia newspaper proclaiming, “This is destiny, and God grant that it may be accomplished without drawing the sword. But it must be accomplished, because Providence designs the spreading out of African slavery into regions congenial and suitable to its prosperity. Such regions are . . . Nicaragua, Honduras, Chihuahua, Tamaulipas in which our omnipotent staples will flourish beneath the plastic hand of black labor. When these golden visions become realities . . . then will the

theories of white superiority, posited that “the U.S. should dominate the other Americas,” and Americans started to believe that inferior races, like the Latin Americans, would and ought to disappear and make way for superior Anglo-Saxons.<sup>151</sup> Even Northerners like Abraham Lincoln, campaigning for public office a few years later (1856), far from the center of action, took note of Southern ambitions for expansion into the tropics.<sup>152</sup> Foreign observers noted the fervor in the region.<sup>153</sup> Strangers meeting serendipitously would often find that they had something in common. For example, passengers on a Mississippi River steamboat discussed filibustering when one passenger, who was interested in the subject, learned the other was on his way to join a filibuster.<sup>154</sup> An editor in Little Rock noted that a friend who had dropped in turned out to be on his way to Cuba, and that they had drunk a toast.<sup>155</sup>

Emboldened by Southern rhetoric depicting the region as a gold mine occupied by simple, indolent brown-skinned people waiting for the arrival of virile Americans,<sup>156</sup> the adventurer William Walker led an expeditionary force

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wisdom and prescience of the founders of our new Government be vindicated—then will the proudest nations of the earth come to woo and worship at the shrine of our imperial confederacy”)

<sup>151</sup> See GREENBERG, *supra* note 126, at 92. The *Southern Quarterly Review* recounted how “an Army officer, of high standing, who accompanied our army in its march through Mexico . . . told us he could not find, in a large hat store in Tampico, a single hat which would go on his head” or that of any other Anglo-Saxon (whose heads, obviously, were larger than those of the Mexicans). *Id.* at 93. Other policymakers deployed an early version of law and economics to justify conquest: The “best use” of the fertile land dictated taking it over and putting it under Anglo (especially Southern) rule. *Id.* at 99–100. A few Southern figures argued against annexation precisely on the ground that the inhabitants of the tropical lands were inferior. John Calhoun, for example, disapproved of southward conquest for the same reason that, earlier, he had opposed the war against Mexico—namely, that we might easily end up with large numbers of Mexicans on our hands. CONG. GLOBE, 30th Cong. 1st Sess. 96–98 (1848); FREDERICK MERK, *MANIFEST DESTINY AND MISSION IN AMERICAN HISTORY: A REINTERPRETATION* 152–53 (1963).

<sup>152</sup> Lincoln naturally disapproved. See *SLAVERY, RACE, AND CONQUEST*, *supra* note 126, at 149 (“If Judge Douglas’ policy upon this question succeeds . . . until all opposition is crushed out, the next thing will be a grab for the territory of poor Mexico, an invasion of the rich lands of South America [ . . . ] each one of which promises additional slave fields.” (first ellipsis in original)).

<sup>153</sup> UNDERWORLD, *supra* note 126, at 78. Even opponents of filibustering admired their courage and determination under adversity. *American Males*, *supra* note 126, at 859–61.

<sup>154</sup> UNDERWORLD, *supra* note 126, at 79.

<sup>155</sup> *Id.*

<sup>156</sup> See DREAM, *supra* note 126, at 4 (noting that Southerners felt it their duty to lift up the inferior, dark-skinned masses of native people living in the tropics, people “incapable of self-rule . . . ‘ignorant, bigoted and miserable’”). It was also their duty to “regenerate” [their] neighbors” who were viewed as cowardly, treacherous greasers “utterly incapable of framing a government and maintaining a nationality.” *Id.*; *Walker in Nicaragua*, VA. SENTINEL, Feb. 3, 1857 (referring to the race of Costa Rican mixed-bloods as not comparable to Anglo-Saxon Americans). Some Southerners envisioned relaxed, neo-colonial lives in the new regions, with the real work being performed by brown-skinned natives as well as by African slaves that they would bring with them to the new lands. See DREAM, *supra* note 126, at 10 (“White men were [deemed] unfit for work in a

that conquered Nicaragua, whereupon he named himself president of that country, ruling for a year before being deposed and executed by indignant Central Americans who turned out to be not so lazy and docile after all.<sup>157</sup> First, however, he re-instituted slavery, which that country had long since abandoned in its laws,<sup>158</sup> and made English the national language.<sup>159</sup> His exploits made him a hero, even in the North,<sup>160</sup> and emboldened many to weigh the advantages of expanding slavery to Central America.<sup>161</sup> A ruthless figure, the “grey-eyed man of destiny” invaded both Mexico and Nicaragua, the latter three times, “burn[ing] towns, confiscat[ing] property, execut[ing] rivals and deserters, and establish[ing] dictatorial rule, with few second

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hot tropical climate; but blacks, because of their African origins . . . could labor effectively with white guidance.”)

<sup>157</sup> DREAM, *supra* note 126, at 77–110, 131 (noting the execution by local authorities occurred after Walker surrendered to the British Royal Navy). The South was bereaved at his death. *Id.* at 132–33. An Arkansas newspaper, for example, saw his downfall as a tragedy—“secession could have been averted if Walker had succeeded because the South would have possessed ‘ample and undisputed outlet for her surplus slave population.’” *Id.* at 133. Alabama probably felt similarly—he had been very popular there. *Id.* at 132.

<sup>158</sup> *E.g.*, GREENBERG, *supra* note 126, at 41, 151 (noting that the expansion of slavery was one of his main goals); UNDERWORLD, *supra* note 126, at 263–64; DREAM, *supra* note 126, at 106, 112; MICHAEL O’BRIEN, 1 CONJECTURES OF ORDER: INTELLECTUAL LIFE AND THE AMERICAN SOUTH, 1810–1860, at 210 (2004).

<sup>159</sup> Ron Soodalter, *William Walker: King of the 19th Century Filibusters*, HISTORYNET (Mar. 4, 2010), <http://www.historynet.com/william-walker-king-of-the-19th-century-filibusters.htm>.

<sup>160</sup> DREAM, *supra* note 126, at 77, 91. After his takeover of the country, many Americans went there to join him and remained as settlers. *Id.* at 91–94, 99. President Pierce, who at first opposed Walker’s foray, changed his mind and recognized him and his new government. *Id.* at 96, 101. During his reign, he was a very popular figure in the South for re-instituting slavery in Nicaragua. *Id.* at 107–09. A Tuskegee newspaper publicized the availability of good free land there. *Id.* at 108. Many other Southern newspapers praised his reign, saying it was beneficial for the country. *Id.* at 109 n.44. Central American forces eventually routed him, and he returned to the U.S. where he was greeted as a war hero. *Id.* at 110–11. He immediately began recruiting for a second round at Nicaragua, giving speeches and raising money. *Id.* He received great support in the South because of his slavery decree. *Id.* at 111–12. Latin American countries despised Walker, however, and eventually secured his removal and execution. *Id.* at 102, 110, 131.

<sup>161</sup> DREAM, *supra* note 126, at 77, 111–12. During one of his publicity tours, he told a Virginia secessionist that “the pure Indian race” of Nicaragua would make good slaves, and that a slave empire encompassing all of Central America would be a boon for that region. *Id.* at 112–13. When a short-lived second expedition to Nicaragua fell short because the U.S. Navy blocked him, citing neutrality laws, the South exploded in indignation over Yankee meddling. *Id.* at 113–15. Southern newspapers sided with him; as did U.S. senators from the region. *Id.* at 114–15. The Southern Commercial Convention passed resolutions backing him and denouncing his interception by Commodore Paulding. *Id.* at 115. Thomas Bowie of Maryland complained that the federal neutrality laws infringed on the South’s right to expand itself and thereby regain its former luster. *Id.* at 125. Thus emboldened, Walker launched the decisive expedition described above. Although successful, it ended one year later in his capture and execution by a coalition of Central American forces unhappy with his rule and the re-establishment of slavery in their midst. *Id.* at 131.

thoughts.”<sup>162</sup> He was extremely popular in the South, even after some of his adventures ended poorly, even tragically.<sup>163</sup>

Another adventurer, a former Southern governor named John Quitman, organized several expeditions to invade Cuba.<sup>164</sup> Others plotted to invade

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<sup>162</sup> *Id.* at 82, 83–101, 102, 103–31. Indeed, he preached that “[t]he white man took the negro from his native wastes, and [taught] him the arts of life, bestowed on him the ineffable blessings of a true religion.” *Id.* at 113. His expeditions were quite popular, even after some ended ignominiously. *See id.* at 132–33 (noting that the South was aghast over one of his many failures, believing him the region’s chief hope for prolonging slavery within the Union).

<sup>163</sup> *See id.* at 132–33 (citing editors of major newspapers, including one in Mobile, a number of prominent judges, a speaker of the Alabama House of Representatives, and many other prominent figures in North Carolina and Texas who supported him “because of his proslavery stand”); *see also* SLAVERY, RACE, AND CONQUEST, *supra* note 126, at 158–59 (noting the several Southern newspapers that took up the cry for new lands to “restore the Union’s lost balance of power” between the North and the South). Many saw Douglas and Walker as emblematic of a new generation of bold leaders who would avoid the “old fogginess” of the abolitionists and lead the region to a “bright destiny”; he remained a hero in the South even after he died. *See generally* BROWN, *supra* note 126, at 244–458 (describing Walker’s rise, defeat, and death).

<sup>164</sup> *E.g.*, DREAM, *supra* note 126, at 46–76 (noting that Quitman’s plan elicited great excitement among Southerners, including Jefferson Davis (Mississippi) and Pierre Soulé (Louisiana)); *see also* SLAVERY, RACE, AND CONQUEST, *supra* note 126, at 134; UNDERWORLD, *supra* note 126, at 255–56 (discussing the plan’s popularity in this region). Quitman found a ready audience for his Cuban ventures, in part because of “southern panic about Cuba’s Africanization.” UNDERWORLD, *supra* note 126, at 255–56. The *Memphis Appeal* published Quitman’s letter asserting that regional self-preservation rode on freeing Cuba from Spanish rule and annexing it. *Id.* at 255–56. A judge of the Arkansas Supreme Court endorsed the application of a friend wishing to join Quitman’s party by terming it an effort to stem a dangerous “English and French policy of Africanization” in Cuba. *Id.* at 256. The Southern Commercial Convention, meeting in Savannah in December 1856, “passed a resolution endorsing slavery’s expansion into Central America,” expanding America’s rule in Nicaragua. *Id.* at 264.

Quitman’s plans for Cuba contemplated proceeding in three steps: (1) invading the island; (2) declaring it “free”; (3) incorporating it into the U.S. “as one or more slave states, thwarting the intentions of Yankees to control Congress.” *Id.* at 256. In his autobiography, Quitman wrote that he considered slavery “beneficial and conservative” and urged advancing “boldly forward in the pursuit of new forms of civilization.” *Id.* at 265.

Quitman abandoned his plans to invade Cuba when federal authorities expressed strong opposition, and he got wind that the Spaniards would put up a stiff fight. *Id.* at 259. He also learned that Spanish plans to free the blacks were less certain than he had heard and did not include a general emancipation. *Id.* Pierre Soulé, however, never gave up his interest in annexing the island republic. *See* BROWN, *supra* note 126, at 124–46 (describing Soulé’s role in drafting the Ostend Manifesto on behalf of the Southern planter class, in hopes of expanding slavery to the Caribbean).

Quitman was something of an equal-opportunity opportunist who had his eye on Mexico too, telling Congress on one occasion that the country was a “waif,” weak after the war with the U.S., and ripe for the plucking (the rest of it, that is). DREAM, *supra* note 126, at 137, 139–41. It was also a destination for runaway slaves, which grated on Southern pride. *Id.* at 137. Juan Cortina’s cross-border raid had likewise inflamed the region’s sense of honor. *Id.* at 143–44. Tehuantepec was frequently mentioned as a target for acquisition. DREAM, *supra* note 126, at 139–40; SLAVERY, RACE, AND CONQUEST, *supra* note 126, at 88, 113, 170; *see also id.* at 243, 263 (noting that this isthmus remained an object of America’s desire well into the future because of its strategic location).

countries ranging from South to Central America, parts of Mexico,<sup>165</sup> and of course the Caribbean.<sup>166</sup> Haiti came in for particular attention because of its earlier revolution in which the island's slaves freed themselves from white rule, setting a frightening precedent for Southern slave-owners.<sup>167</sup> One early expedition even invaded Amelia Island, successfully, as it turned out—the U.S. took command of it forever.<sup>168</sup>

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<sup>165</sup> See DREAM, *supra* note 126, at 83 (describing one such effort spearheaded by the indefatigable William Walker); *id.* at 147 (describing the number of other such raids into Mexico as “staggering”). When, in 1853, the Mexican government refused Walker’s application for colonizing privileges in Sonora, he invaded La Paz (Baja California) and established a beachhead there. *Id.* at 83. Using a ruse (the Mexican flag), he captured the governor and the town and declared Lower California an independent republic with himself as the president. *Id.* at 83–84. Unlike his later Nicaraguan venture, this one ended ignominiously when Mexican forces routed him and forced him to retreat to California, where the United States tried him for violating the neutrality laws. *Id.* at 84. A jury acquitted him; undoubtedly his popularity played a role in getting him off. See *id.* But the South continued to regard Mexico with eyes of desire. *Id.* at 140 (quoting a Southern representative as saying, “It is *manifest destiny* . . . which will ever make a strong, vigorous, and healthful race overrun and crush out a weak and effete one. Our people *will* go South among the Mexicans and Spaniards, and *will* carry with them the love of our civilization and our liberty.”) Presumably, by liberty the speaker meant the liberty to own slaves.

The number of expeditionary raids on Mexico was “staggering,” some aimed at expanding commercial ambitions but others at extending slavery or stopping the flow of runaways seeking freedom. *Id.* at 147–49. The Knights of the Golden Circle had a particular appetite for Mexico. *Id.* at 149; see *infra* note 178. Its leader, George Bickley, a Virginian magazine editor, rhapsodized over “the creation of a great slave empire” with Cuba at its center and “the border states, the South, part of Kansas, Mexico, Central America, part of South America, and the West Indies” radiating outward. DREAM, *supra* note 126, at 149. His main target, though, was Mexico. *Id.*; see also UNDERWORLD, *supra* note 126, at 43 (describing yet another effort at conquering Sonora, by Henry Alexander Crabb, and sixty-eight others from Arizona, by land from Los Angeles in 1857; they were crushed). On Walker’s repeated efforts to subdue that country, see, for example, BROWN, *supra* note 126, at 174–220.

The aforementioned George Bickley was even more persistent. When this well-connected Southern editor became impatient with Sam Houston’s plans, which were merely to take a bit more of northern Mexico, Bickley—an editor and phrenologist who lied about his medical license—schemed to take the entire portion that remained after the U.S.–Mexican War. UNDERWORLD, *supra* note 126, at 44–45. After an initial invasion failed, he gathered his followers for a larger second one. DREAM, *supra* note 126, at 152–53. Following a four-day convention of the Knights of the Golden Circle in Raleigh, North Carolina, he issued a call for volunteers, which appeared in many newspapers in the South and brought a wide response. *Id.* at 153; see UNDERWORLD, *supra* note 126, at 45 (reporting that “[a] Montgomery, Alabama, paper in 1860 observed ‘large numbers’ of Knights ‘passing through this city every day en route for Mexico’”; still others massed and drilled in Baltimore). But with Lincoln’s victory in the presidential election, Bickley turned his attention to secession, and Mexico was spared from a second, much larger invasion. DREAM, *supra* note 126, at 154.

<sup>166</sup> DREAM, *supra* note 126, at 5–7, 163–89.

<sup>167</sup> DREAM, *supra* note 126, at 33. Southerners feared that their slaves might learn of Haiti’s successful and bloody revolution and be tempted to follow their example at home. See GUTERL, *supra* note 104, at 6, 38–39, 40, 44–46, 68; UNDERWORLD, *supra* note 126, at 253.

<sup>168</sup> UNDERWORLD, *supra* note 126, at 8 (discussing the role of expeditionary leader Louis (Luis-Michel Aury)); OWSLEY & SMITH, *supra* note 126, at 118–40 (describing how this island off the coast of Florida entered the U.S. orbit).

Because of poor planning, a long supply chain, and strong resistance from the natives, most of these invasions failed. It would have taken state militias many thousands strong to do the job, but the South soon had more serious troubles on its hands in the form of an upstart Yankee president and, soon, a civil war and a Union army that turned out to be both more effective and rapacious than the Southern saber-rattlers had any reason to expect.

Southern dreams of empire thus came to a halt with the war, in which the region ended up defeated and in ruins.<sup>169</sup> But its dreams did not entirely die, nor did the attitudes and rhetoric that the South deployed during this ten-year period when speakers, editors, writers, politicians, and ordinary people geared up for a push southward into Mexico, the Caribbean, and Central America.<sup>170</sup>

Rather, these ideas hibernated in culturally encoded forms,<sup>171</sup> a little less explicit than the anti-black attitudes that doomed Reconstruction, and more

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<sup>169</sup> With war looming, the South found unexpected help from federal authorities when a few powerful figures in the North began backing Southern expansion. *See* DREAM, *supra* note 126, at 155. Two Whig administrations negotiated for transit rights and a transcontinental railway through Mexico. *Id.* President James Buchanan offered to purchase much of that country, but Mexico refused his offer. *Id.* at 158. After a round of saber-rattling, he proposed to Congress in 1858 that the U.S. assume temporary control of northern Chihuahua and Sonora and establish military posts there. *Id.* at 159. The Senate refused, but Buchanan proceeded with a plan to take Tehuantepec as a protectorate and future territory. *Id.* at 159–60. Congressmen from the North denounced the plan as “a [S]outhern means of bringing slavery to Mexico in order to ‘furnish an increased representation of political power in the United States Senate.’” *Id.* at 159.

A Massachusetts senator accused the president of wishing to “march the Army into Mexico” to further “[S]outhern ‘dreams of empires in which to plant slavery.’” *Id.* at 160–61. Congress was even blunter. *Id.* at 161. A Memphis paper praised Buchanan’s protectorate plan as a “half-way house” to annexation of the entire country. *Id.* at 162. Another newspaper from the same city saw it as “the dawn of brighter, better days for the South,” for it would spell new slave territory for the Union. *Id.* The onset of the “War Between the States” probably saved Mexico from a second mutilation.

<sup>170</sup> *See* DREAM, *supra* note 126, at 162, 162 n.41 (listing Southern newspapers that signed on to the idea); *supra* notes 165, 169 (describing the vast empire that Southern visionaries coveted). Much of the South chafed against Northern resistance to territorial expansion southward as “hemming us in forever.” DREAM, *supra* note 126, at 162.

<sup>171</sup> *See* ELIZABETH FOX-GENOVESE & EUGENE D. GENOVESE, THE MIND OF THE MASTER CLASS: HISTORY AND FAITH IN THE SOUTHERN SLAVEHOLDERS’ WORLDVIEW 1–8 (2005) (noting that the South has often relied on *stories* to pass on culture and memory, and that these have often been oral, not written). The South, as well, is a *stratified* society. *Id.* at 5–6. How logical, then, that the region would see the relaxed Latino immigrants with their dark skins and few years of formal education as ripe for servitude. *See id.*; *see also* Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEX. L. REV. 1053, 1054 (2014) (describing an example of cultural resonance from a much earlier period); Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance after Shelby County*, 102 CALIF. L. REV. 1123, 1173 fig.9 (2014) (showing that anti-Latino attitudes and stereotypes are more common and worse in the South than in other regions); *supra* notes 115–16 and accompanying text (discussing the role of cultural templates).

like the anti-Indian animus that breaks out periodically in our time in states like Wisconsin and Washington where working-class whites unleash vicious anti-Indian slurs and attacks over walleye fishing in lakes, Indian hunting, and even casino construction.<sup>172</sup>

Thus, when thousands of brown-skinned people from Mexico and Central America started to appear in Southern states beginning around the time the North American Free Trade Agreement (NAFTA) went into effect (1994) a few decades ago, attracted by the benign climate and jobs in farm work, construction, furniture factories, and the hospitality industry, the region lashed

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Anti-Latino attitudes may thus have had their roots in earlier times, particularly during the War with Mexico (1846–1848), and gone into temporary hibernation until the expeditionary impulse brought them out in full force a few years later. *See generally* GREENBERG, *supra* note 126 (discussing many examples of U.S. soldiers, especially from the South, who wrote disapprovingly of the Mexicans they were encountering (except, in some cases, of young Mexican women, whom they found pretty and alluring)). Even earlier, some travelers wrote disapprovingly of what they saw in the young country, which had just secured its independence from Spain. *See* JOEL POINSETT, NOTES ON MEXICO 121 (Philadelphia, H. C. Carey & I. Lea 1824). Poinsett, a South Carolinian and special U.S. envoy to Mexico, described the propertyless laboring class there as not having much interest in “the preservation of civil rights.” *Id.*; *see also* Joel Poinsett, *The Mexican Character*, reprinted in THE MEXICO READER: HISTORY, CULTURE, POLITICS 11–14 (Gilbert M. Joseph & Timothy J. Henderson eds., 2002). Poinsett, on a return trip to Mexico to assume his role as U.S. ambassador to that country, found the laboring class even more abject, lackadaisical, and ignorant than before. *See* Poinsett, *supra*, at 121. A later envoy to that country, Waddy Thompson (South Carolina), was equally harsh in his assessment: “That the Indian race of Mexico must recede before us . . . is quite as certain as that that is the destiny of our own Indians.’ Negroes in Mexico Thompson characterized as ‘the same lazy, filthy, and vicious creatures that they inevitably become where they are not held in bondage.’” REGINALD HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLLO-SAXONISM 212 (1981). Thompson found “the general Mexican population . . . ‘lazy, ignorant, and, of course, vicious and dishonest.’” *Id.*

In the South “habits of mind” are many, long-lived, and resistant to change. *See, e.g.*, TULLOS, *supra* note 95, at 8–9, 21–64 (describing a “sez-you” attitude); *supra* notes 116–17 and accompanying text (describing other habitual ways of thinking). To be fair, Southerners were not the only ones who circulated uncomplimentary accounts of Spanish-speaking people. *See* HORSMAN, *supra*, at 208–13 (describing how early contacts between Euro-American settlers in the West and the pious, industrious villagers they found living in that region gave rise to the idea of Anglo-Saxon racial supremacy). The attitude was widespread enough that a term came into use—“doughface”—to describe a Northerner who was sympathetic to the South. *Doughface*, WEBSTER’S UNABRIDGED DICTIONARY (2d ed. 2001); *see* HORSMAN, *supra*, at 208 (quoting James Buchanan, Secretary of State under President Polk: “The Anglo-Saxon blood could never be subdued by anything that claimed Mexican origin”). *See generally* JESSICA ADAMS, WOUNDS OF RETURNING: RACE, MEMORY, AND PROPERTY ON THE POSTSLAVERY PLANTATION 1–20 (2007) (noting that nearly 150 years after slavery’s formal end, its traces remain in tourism, re-enactments, architecture, furniture-making, and cultural practice).

<sup>172</sup> *See* Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., Inc., 759 F. Supp. 1339 (W.D. Wis. 1991); *see also* Richard Blow, *The Great American Whale Hunt*, MOTHER JONES, Sept.-Oct. 1998, <http://www.motherjones.com/politics/1998/09/great-american-whale-hunt>.

out against them, even though tolerating them would seem to have been in its self-interest.<sup>173</sup>

The cultural memory of an earlier period when the South saw brown people as indolent, hypersexual, and feeble-minded<sup>174</sup> lived on and formed the basis for resistance to present-day immigration that is otherwise hard to explain.

When Southerners say, or think, that the South will rise again, they emphatically do not mean Mexico, Cuba, Nicaragua, Guatemala, Honduras, Puerto Rico, Haiti, and the Dominican Republic. And they do not want too many expatriate citizens from those countries making a living, prospering, sending their kids to school, romancing white women, and chattering away in their incomprehensible language in our once-proud region. Why, but for a twist of fate, we might be ruling them today. By rights, we ought to be. *We*, in short,

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<sup>173</sup> See Smith & Winders, *supra* note 83 (describing the forces propelling the immigrants' arrival); *supra* notes 87–110 and accompanying text. On NAFTA, see *supra* note 85 and accompanying text.

<sup>174</sup> See DREAM, *supra* note 126, at 5 (“Central Americans and Caribbean islanders were similarly belittled: ‘The miserable republics of Central America, peopled by a degraded half race of humanity, will yet bow to the rule of the Anglo-American.’ An Alabama newspaper predicted that Americans would carry ‘moral and material well being to the disintegrating communities and decaying races of Spanish America.’ . . . A [S]outhern congressman expressed the same confidence about all the republics of the tropics: ‘With swelling hearts and suppressed impatience they await our coming with joyous shouts of Welcome! Welcome! will they receive us.’”); see also GUTERL, *supra* note 104, at 185 (noting that the memory of expansionary periods still lingers in the South: “The imagination of Southern slaveholders was not constrained by the borders of the Old South, nor was its wanderlust completely destroyed by the Civil War. . . . [A] ceaseless dialectic joined the South to the innumerable islands and encircling landmasses of the American Mediterranean in the aftermath of emancipation.” The old master class is like today’s globe-trotting executives, or like Walmart’s bracero program. GUTERL, *supra* note 104, at 186. It all came down to “[e]fforts to recapture the gang work of black slave labor without the lash. . . . When the federal minimum wage [excluded agricultural workers] in 1938” the same force was at work. *Id.* at 187. The old master class included slaveholders not just in America but the also in the Caribbean—Cuba, Brazil, and elsewhere. *Id.* at 1.

Faulkner’s main character in *Absalom, Absalom!* (Thomas Sutpen) went to the West Indies in search of riches—and to learn how to control and brutalize the occupants. *Id.* at 2–3. When the Civil War left the South in tatters, a privileged class of influential elite Southern intellectuals decamped for Jamaica, Haiti, Brazil, and Cuba. *Id.* at 5. Their world was shrinking. *Id.* at 7, 79–113. Many ex-Confederates sought to recreate that world in expatriate communities in Mexico City, Honduras, Jamaica, Cuba, or Brazil (where they could bring their slaves). *Id.* at 5; see JOHN R. WENNERSTEN, LEAVING AMERICA: THE NEW EXPATRIATE GENERATION 35 (2008) (noting that many of their descendants live there today, observing Southern customs, baking pecan pies on ritual occasions, and singing Southern hymns on Sunday). Wealthy Southerners had long felt an affinity for high society in the Caribbean and Brazil. GUTERL, *supra* note 104, at 28, 31, 33–34. Elites in these regions thought alike; the climate was similar in all these regions; and their attitudes toward slavery and black people were, as well. In some respects it was one integrated region, an “American Mediterranean.” See DAVID I. DURHAM, A SOUTHERN MODERATE IN RADICAL TIMES: HENRY WASHINGTON HILLIARD, 1808–1892, at 162–63 (2008) (noting that “[s]everal thousand Americans had emigrated to Brazil along with thousands of other expatriates who had settled in Mexico and other Latin American countries” and that President Hayes hoped to persuade many of them to return); GUTERL, *supra* note 104, at 79–113 (Ch. 3, “The Promise of Exile”).

ought to be *there*—in the state-house, shaded by palm trees, issuing edicts and collecting taxes—not they, here.<sup>175</sup>

That, in brief, is our thesis: Attitudes formed during this earlier period programmed a sort of dog whistle, as Ian Haney Lopez put it,<sup>176</sup> and sensitized Southern ears to hear, and react to, just this frequency. Countervailing arguments were simply not heard. The South heard that the Latinos were coming. And, with that, they had heard enough.<sup>177</sup>

Indeed, some of these present-day speakers deemed themselves virtuous in advocating harsh treatment for the Latinos. Like the would-be cavaliers and knights of the 1850s who sallied forth in defense of region, home, and ladies' honor, copies of novels by Sir Walter Scott in their backpacks (some even called themselves the Knights of the Golden Circle),<sup>178</sup> some present-day

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<sup>175</sup> See DREAM, *supra* note 126, at 4–5 (explaining that the Southerners expected little resistance since the people in the southern countries “had the common sense to appreciate the benefits [of] American rule”).

<sup>176</sup> See IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 3–5 (2014) (explaining how conservatives use coded language to advance racial appeals).

<sup>177</sup> Viz, having heard that the people from Latin America were simple, indolent, lustful, and none too clean in their personal habits. See *supra* notes 172–77 and accompanying text.

<sup>178</sup> Many of the Southern men and youth who joined the expeditionary movements were romantic idealists who had read and thrilled to writers such as Sir Walter Scott and imagined themselves defending homeland, womanhood, and honor. See, e.g., FOX-GENOVESE & GENOVESE, *supra* note 171, at 1–8, 136–37, 777–78; UNDERWORLD, *supra* note 126, at xii (noting that these adventurers “epitomized the romantic spirit of an age”); *id.* at 82–85, 104–05 (noting that romanticism inspired many of them, who found foreign expeditions attractive because they promised spontaneity, travel to exotic locales, human virtue, instinct, and heroism; many “gravitated to knightly imagery in their writings and attire”); *American Males*, *supra* note 126, at 863. See generally BERTRAM WYATT-BROWN, *SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH* (1982) (describing how Southern men adopted an ancient code—chivalry—that claimed honor, dreaded shame, and was quick to respond to insults and perceived threats to self-esteem and reputation). In our era, this mindset took the form of controversies over women’s rights to choose—and also states’ rights, freedom to own guns, and “touchiness over virility.” *Id.* at xix, 35. Formerly, it included dueling and desperate military attacks against great odds. *Id.* at 35–36. The attitude had roots in the British Isles. *Id.* at 37. In addition to duels and other forms of male behavior, it included the frequent taking of oaths. *Id.* at 55. The early travel writers and journal-keepers, especially those from the South, saw little of honorable behavior in Latin America and Latin Americans; instead, they saw the opposite—sloth, hedonism, and reveling in simple pleasures. See *supra* notes 151–71 and accompanying text; see also DREAM, *supra* note 126, at 149–51 (describing the Knights of the Golden Circle, which envisioned a slave empire that included Cuba, Mexico, Central America, and the West Indies); *American Males*, *supra* note 126, at 865; *The Knights of the Golden Circle*, N.Y. TIMES (Aug. 30, 1861), <http://www.nytimes.com/1861/08/30/news/the-knights-of-the-golden-circle.html> (describing the organization’s aims as “nothing less than to raise an army of 16,000 men for the conquest of Mexico, and the establishment . . . of a strongly organized monarchy, resting on a basis of slave institutions,” beginning with a march through Guanajuato on the way “to . . . permanent subjugation of the country”). They hoped to attract many members from Kentucky and to recruit more once in Mexico. *Id.* Many prominent figures in the South were members, including, possibly, Jefferson Davis. See DREAM, *supra* note 126, at 151 (noting, however, that

advocates of immigration restriction convinced themselves that they were doing so *in defense of blacks*. Immigrants take black jobs, they reasoned (incorrectly). Blacks' lot in life is hard enough. We must keep the Latinos out. They just lower wages for everybody, particularly those at the bottom of the social hierarchy.<sup>179</sup>

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these rumors about Jefferson Davis were probably fabricated). They counted large chapters in Texas, Maryland, and Georgia. *Id.*

Perhaps one reason for the organization's wide appeal is that the South is easily the country's most English region, where Anglophilia and the English example run high, with a strong streak of honor, which includes dueling, bare-knuckle boxing, and similar manly displays. See FOX-GENOVESE & GENOVESE, *supra* note 171, at 1–8; GREENBERG, *supra* note 126, at 10, 139, 271; WYATT-BROWN, *supra* at 166–67, 349–61; see also FOX-GENOVESE & GENOVESE, *supra* note 171, at 6–7 (noting that Zora Neale Hurston called the region “the purest English section of the United States,” and describing the influence of Shakespeare and the King James Bible in the speech of all classes).

The emphasis on honor and martial virtues ran highest among white laborers who felt left behind by industrialization. GREENBERG, *supra* note 126, at 14. Many saw in expansionism a way to punish Central Americans for their effeminacy and justified penetration there in psychosexual terms. *Id.* at 21–23. Mexican men were lazy and unable to satisfy their women's sexual needs; only virile Americans could do that. *Id.* at 21–23, 88–134. Southern men, by contrast, valued masculinity and would respond to insults with force. *Id.* at 139. The *Southern Literary Messenger*, for example, was enthralled with the expeditionaries as manly men and touted that quality as the key to the South's preservation. *Id.* at 273. “Allusions to gallantry, chivalry, and knighthood pepper contemporary descriptions” of the Southern adventurers and their deeds. UNDERWORLD, *supra* note 126, at 104; see FOX-GENOVESE & GENOVESE, *supra* note 171, at 329–64 (noting the region's fascination with medieval tales, Ivanhoe, jousting, honor, and handsome dressing); *American Males*, *supra* note 126, at 863. During the 1850s “[t]ournaments thrived at Alabama's state fairs,” as well as in North Carolina and Maryland. FOX-GENOVESE & GENOVESE, *supra* note 171, at 357. After Appomattox, the tournament burst forth anew as a means of coping with defeat, this time with a touch of nostalgia. *Id.*

Why might the South have developed this romantic character? Perhaps a society whose economy depended on brutal exploitation and infliction of pain on fellow human beings needed to recast its history (i.e., denial). A small farmer in New England or a merchant in New York need not be romantic in the conduct of his life or business; indeed, it might be an obstacle to success. Romanticism developed in the South, as it did in medieval society, to justify hierarchy, with different classes of people (knights, nobles, servants) performing their allotted roles, with those on top experiencing few qualms over the arrangement.

<sup>179</sup> The reality, of course, is quite different. See *infra* notes 179–83 and accompanying text (explaining how an influx of Latino immigrants in a region generally leaves native low-wage earners, including blacks, better off). The region increases its general wealth as a result of the immigrants' labor and spending. See, e.g., Odem & Lacy, *supra* note 83, at xxi (noting that in the South, “growth and prosperity of the last two decades have depended to a large extent on the recruitment of laborers from Mexico and other countries of Latin America”). They represent “a flexible, low-cost labor pool that has not only boosted corporate profits but . . . [lowered] costs for consumers . . . [by] fuel[ing] economic growth and competitiveness of key [S]outhern industries such as poultry processing, forestry, textiles, carpets and rugs, construction, landscaping, hospitality, and agriculture.” *Id.* Beginning in the 1990s, “Reliance on Latino immigrant labor, both documented and undocumented, is now a structural feature of the southern economy.” *Id.*

Their labor thus increases opportunities for everyone, including blacks, most of whom are high school graduates and, unlike the immigrants, speak native English, can interact with the public, do basic math, and know their way around the region. The new opportunities created by immigrant labor include, for example: crew chief for a gardening company, shift manager in a fast food restaurant staffed by Latino busboys and kitchen workers, electrician in a construction crew with immigrants serving as handymen and carpenters, line

This form of reasoning ignores a simple truism: There is no such thing as a black job (“The immigrants take black jobs”). Indeed, regions experiencing immigration show a *rise* in wealth, jobs, and economic well-being.<sup>180</sup> Crime

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chief in a poultry processing plant, and supervisor of a cleaning crew. See Mohl, *supra* note 85, at 60–61 (noting that the availability of expert, inexpensive labor may have enabled some marginal industries in the South to survive).

Many economists reject the argument that immigration hurts black employment prospects or well-being. *Id.* at 61. Instead, when the Latinos arrive, the former workers in low-level jobs (who may have been either black or white) move up, often securing better jobs supervising the new Latino workers or in entirely new jobs created when the economy improves. See Lowenstein, *supra* note 111; Joel Rose, *I-95 A ‘Trap’ for Migrant Fruit Pickers*, NPR (Sept. 4, 2010), [www.npr.org/templates/story/story.php?storyId=129580744](http://www.npr.org/templates/story/story.php?storyId=129580744). University of Delaware professor Mark Miller stated that “African-Americans have largely moved on to jobs with better pay and working conditions.” *Id.* In many cases, these have been jobs that the original workers, after a job switch, found more acceptable and prefer. See Mohl, *supra* note 85, at 62 (“American workers in the Black Belt rejected low-pay, low-skill, low-status jobs lacking opportunity for upward mobility.”). The Black Belt area had been losing population, but immigration arrested the decline. *Id.* In relatively short order, Latinos came to hold almost all the unskilled jobs in forestry, poultry farming, and carpet manufacture. *Id.*; see also Johnson, Jr. & Kasada, *supra* note 85, at 70, 70–73 (noting that employers recruited Latinos including advertising abroad in Spanish). The demand for their labor remained strong even during the economic downturn of 2001. *Id.* at 71–73. Latinos were willing to work in sectors where Americans hesitated or turned the jobs down “because of the working conditions or the wages or both.” *Id.* at 73; Reyes, *supra* note 87 (same).

Female immigrants found jobs as maids, janitors, food processors, sales clerks, or dry cleaning assistants; males, as laborers. Johnson, Jr. & Kasada, *supra* note 85, at 74. Few were in white-collar jobs. *Id.* Many became self-employed, opening small businesses at a higher rate than the national average. *Id.* at 74–75. They provided a net benefit, costing the state about \$1360 per person for essential services, but adding the value of their labor and their contribution via tax payments, to the tune of a surplus of about \$13,000 per person. *Id.* at 85–86.

Another little-known benefit is their contribution to national health. Americans eat twice as much chicken as they did in 1980. Angela C. Stuesse, *Race, Migration, and Labor Control: Neoliberal Challenges to Organizing Mississippi’s Poultry Workers*, in TRANSFORMATION, *supra* note 83, at 91–92. The low cost of poultry processing enabled this change to occur and to keep the cost of healthier eating down. *Id.* Mississippi is the poorest state and the one with the largest number of poultry processing plants. *Id.* at 92. The state would be even poorer, with a higher unemployment rate, without immigrant workers. See *id.* Busloads of Latinos began arriving in that state in the mid-nineties, attracted by advertisements in Mexico and elsewhere about plentiful jobs, and word-of-mouth among the sending villages. *Id.* at 92; see also Stuesse & Helson, *supra* note 85.

<sup>180</sup> See Lowenstein, *supra* note 111 (referencing an interview with David Card); Scheiber, *supra* note 9.

[T]he recovery will begin attracting more workers from Latin America . . . .

But even this is not necessarily a bad thing . . . . Recent research suggests that, over time, an influx of low-skill immigrants allows many native-born workers to perform more sophisticated tasks for better pay. ‘More construction workers generates the need for more supervisors, more managers to coordinate them, [and] more contractors to give them work,’ said Giovanni Peri, an economics professor at the University of California, Davis.

Scheiber, *supra* note 9; see also Giovanni Peri & Chad Sparber, *Task Specialization, Comparative Advantages, and the Effects of Immigration on Wages* (Nat’l Bureau of Econ. Research, Working Paper No. 13389, 2007).

and unemployment drop.<sup>181</sup> There are new jobs for everyone, including crew chiefs for the sectors now filling up with Latino workers.<sup>182</sup> The new arrivals struggle with English. The crew chief, however, needs to speak that language to converse with the higher ups, order materials, and talk with outside authorities—and could be either black or white, or even third-generation Latino.<sup>183</sup> These jobs are a net gain for everyone, as are the purchasing power and tax receipts that the new settlers represent.<sup>184</sup> As the *New York Times* recently reported, the new workers contributed \$100 billion to the Social Security system, warding off collapse, but will never receive a cent.<sup>185</sup> At the state and local level, they contributed \$11 billion in 2010 alone.<sup>186</sup>

Finally, inveighing against the immigrants is simply bad politics for progressive people, including those who dedicate their lives to the black cause. The Republican Party, especially in the South, currently desires to cut welfare payments to blacks,<sup>187</sup> in part in order to lower taxes for all, but also because some Southern opinion-makers want blacks once again filling low-level jobs like tilling the soil, shining shoes, or working as domestics in white households. This situation feels familiar, comfortable, and right to many in the South who would like to re-establish it as soon as feasible.<sup>188</sup> Moreover, they detest the idea of anyone (but blacks particularly) idling away their time at home, not working but taking advantage of governmental largesse.

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<sup>181</sup> See *Open Doors*, *supra* note 107.

<sup>182</sup> See Odem & Lacy, *supra* note 83, at ix (describing the range of jobs the immigrants take and small businesses they set up); *supra* notes 109–10 (explaining complementarity).

<sup>183</sup> That is, anyone who speaks native English, can do basic math, make change, and interact smoothly with the public—e.g., a crew chief, counter clerk, office assistant, or shift manager in a warehouse, plant, farm, or store.

<sup>184</sup> On the contribution immigrants make to U.S. tax coffers, see Nicholas Kristof, Opinion, *Immigration Enriches You and Me*, N.Y. TIMES (Nov. 21, 2014), <http://www.nytimes.com/2014/11/23/opinion/sunday/nicholas-kristof-immigration-enriches-you-and-m.html>.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> See Delgado & Stefancic, *supra* note 16 (discussing this new form of an old strategy, which includes cutting taxes, redistricting, reducing welfare payments, and appealing to white voters).

<sup>188</sup> That is, it reminds them of slavery and Jim Crow, which many remember in a positive light. See, e.g., GONE WITH THE WIND (Metro-Goldwyn-Mayer 1936); JUDGE PRIEST (Fox Film Co. 1934) (directed by John Ford); see also Mike Cason, *Senate Committee Delays Vote on Bill to Require Welfare Recipients to Perform Community Service*, AL.COM (Jan. 22, 2014, 9:57 AM), [http://blog.al.com/wire/2014/01/senate\\_committee\\_delays\\_vote\\_o.html](http://blog.al.com/wire/2014/01/senate_committee_delays_vote_o.html) (discussing a bill prompted by Alabama state senator who “drove through a neighborhood marred with graffiti and trash where many of the residents sat idly on porches”); Roberto A. Ferdman, *Missouri Republicans Are Trying to Ban Food Stamp Recipients from Buying Steak and Seafood*, WASH. POST: WONKBLOG (Apr. 3, 2015), <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/04/03/missouri-republicans-are-trying-to-ban-food-stamp-recipients-from-buying-steak-and-seafood/>.

For this new Southern strategy<sup>189</sup> to succeed, there must be a substantial pool of unfilled jobs as hotel maids, janitors, gardeners, agricultural fieldworkers, and assembly-line poultry processors, so that unemployed African Americans, once welfare disappears, will have some jobs to go to. But if these slots are filled by eager Latino workers happy to have them as a means of escape from desperate conditions back in their homeland, the African Americans will have nowhere to go once the welfare payments end. This state of affairs gives many Republicans in the South pause. Not only does it interfere with their plans for blacks, it does not even seem normal. The Latinos, in effect, like the work too much.<sup>190</sup>

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<sup>189</sup> See LOPEZ, *supra* note 176, at 1, 13–34, 216–17 (discussing an earlier version of the “Southern Strategy” that originated during the Nixon Era and survives in some quarters even today); Delgado & Stefancic, *supra* note 16. With fewer immigrants than the bustling cities of the Northeast and West, the South has clung to vestiges of an old ideology of white supremacy. LOPEZ, *supra* note 176, at 217. Earlier, one could hear echoes of this ideology in George Wallace’s speeches. Just before celebrating segregation today, tomorrow, and forever in his 1963 gubernatorial inaugural address, he praised “this Cradle of the Confederacy, this very Heart of the Great Anglo-Saxon Southland.” *Id.* at 217 (citing DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS* 11 (1995)); Alabama Department of Archives & History, *George Wallace 1963 Inaugural Address*, YOUTUBE (Feb. 26, 2015), [https://www.youtube.com/watch?v=\\_RC0EjsUbdU](https://www.youtube.com/watch?v=_RC0EjsUbdU).

As governor, Wallace appealed to Anglo-Saxon solidarity as a means of marginalizing southern and eastern Europeans and appealing to white Southerners of northern European ancestry. See LOPEZ, *supra* note 176, at 216–17. As he moved onto a national stage, he quickly learned that this broad-brush policy was untenable and shifted his disdain to blacks. See *id.* To show that he had abandoned his earlier position, he toured with Poles and other ethnic groups and featured them prominently on his stages and speaker platforms. *Id.*

<sup>190</sup> Blacks may also dislike Latinos, but for a different reason. Unfamiliar with the African American struggle for freedom in the United States, some Latinos look on them with contempt. See Stuesse, *supra* note 179, at 102–03. When they saw a black worker working slowly or spitting on the line, they failed to understand that this may have been an act of resistance. *Id.* at 103. Interpreting it as a sign of laziness or poor upbringing, they develop an unfavorable attitude toward black workers. *Id.* at 102–03. The supervisors encourage this attitude, since it divides workers who might otherwise coalesce in solidarity. *Id.*; see also Stuesse & Helson, *supra* note 85 (“[Mississippi’s poultry processing] has creatively relied upon exploitable classes of workers to increase profits; established a hierarchy of work in the plants; relegated workers of color in each generation to the worst available jobs; and strategically wielded workers’ racial, gender, and other identity categories to limit their collective bargaining power.”). What the Latino or Latina worker may not know is that, for blacks, gaining access to jobs in the poultry-processing plant was a major victory stemming from 1960s-era activism. See Stuesse, *supra* note 179, at 93. What the black worker may not know is that their own victory came about because plant managers wanted to replace the white line workers, who had been clamoring for better conditions, with blacks, who they believed would be more tractable and grateful for the opportunity to perform work that was more attractive than hard, outdoor labor. Stuesse & Helson, *supra* note 85. Both groups, then, were to some extent strike-breakers or scabs; management manipulated them to secure an obedient, highly motivated labor force at the lowest possible rate. See *id.*

In the South, work is supposed to be hard and sweaty, something that one endures, not enjoys.<sup>191</sup> The region has very little infrastructure, for the simple reason that with slavery, one did not need it.<sup>192</sup> Infrastructure—roads, steam engines, railroads, machines that lifted, moved, and processed things—was unnecessary. One had slave labor, which was cheaper. And the dominant crops were labor intensive and did not lend themselves to a great deal of mechanization. For this reason, the South today offers relatively little work in high-tech industries, but much in mining, forestry, poultry and other forms of meat processing, and furniture manufacturing, all of which require hands-on labor but few machines, computers, and robots.<sup>193</sup> And of course, unionization is unthinkable. Workers are supposed to keep their minds on their work, not on possibilities for collective action and better conditions.<sup>194</sup>

Because many of the jobs that the South needs to fill are unattractive to African Americans—because those jobs are associated with slavery<sup>195</sup>—blacks are reluctant to fill them unless they are faced with destitution, which may easily happen if conservative Southern legislators eliminate social welfare, which, as mentioned, some would like to do.

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<sup>191</sup> See *supra* notes 189–90 and accompanying text; *infra* notes 191–97 and accompanying text (explaining this attitude and how it avoids the need to invest in infrastructure—roads, railroads, schools, machines, power grids, and the like—that would make work light). The region resists unionization for the same reason.

<sup>192</sup> See GUTERL, *supra* note 104, at 181–82 (noting that after slavery ended, the South hit upon convict labor for this reason); see also TULLOS, *supra* note 95, at 10. Prior to the Civil War, the South routinely blocked national infrastructure projects (such as canals and highways) designed to allow non-slave industries in the North and West to move goods and products to factories and markets more easily, realizing that this would have harmed the relative position of their slave-based economy. See TULLOS, *supra* note 95, at 3–5; Imara Jones, *10 Things You Should Know About Slavery and Won't Learn at 'Django,'* COLORLINES (Jan. 9, 2013), [http://colorlines.com/archives/2013/01/10\\_things\\_django\\_wont\\_tell\\_you\\_about\\_slavery.html](http://colorlines.com/archives/2013/01/10_things_django_wont_tell_you_about_slavery.html) (positing that the South's historically low tax rates and underfunded schools stem from the same impulse). New England towns, for example, offered public schooling very early in their history; the South not until many years later. See ROBERT FRANCIS SEYBOLT, *THE PUBLIC SCHOOLS OF COLONIAL BOSTON 1635–1775*, at 1 (1935); TULLOS, *supra* note 95, at 3–5. Alabama's constitution provides that the state's children have no right to public education. TULLOS, *supra* note 95, at 4. The state's high-school dropout rate is near 40%, and support for health care, cultural institutions, and social services, is low. TULLOS, *supra* note 95, at 4, 9. The region is belatedly making efforts to modernize, especially in a few large cities like Atlanta, Memphis, and Huntsville. TULLOS, *supra* note 95, at 2–3, 14–15.

<sup>193</sup> See generally Odem & Lacy, *supra* note 83 (discussing the dominant industries in the region, including automobile assembly). A few cities, like Huntsville, are exceptions to this generalization. See WAYNE FLYNT, *ALABAMA IN THE TWENTIETH CENTURY 154–65* (2004); TULLOS, *supra* note 95, at 119 (noting the region's dependence, even today, on a few extractive industries).

<sup>194</sup> E.g., FLYNT, *supra* note 193, at 139–41, 148, 151 (noting that unionization failed in a number of industries, suppressing wages, population growth, and economic development).

<sup>195</sup> Many of them are based on stereotypes. See HARVEY H. JACKSON III, *INSIDE ALABAMA: A PERSONAL HISTORY OF MY STATE 104–05* (2004).

The Latinos, however, stood in the way of the master plan, hence the prompt legislative response and absence of much countering discussion. First Amendment formalism facilitated this because it encourages a habit of mind that routinely disposes of vital issues by means of stereotypes, snap judgments, and cursory analysis. (“Oh, yes. Mexicans. I know about them.”)<sup>196</sup> And it makes harsh results appear tolerable by facilitating a climate (hate speech) in which a group whose fortunes are at stake deserve little better.<sup>197</sup>

*D. Persistence of the Anti-Latino Attitude During the Intervening Years*

In short, the attitudes the South acquired toward Caribbean, Mexican, and Central American people during the expeditionary period (1850–1860) strongly influenced how Southern people responded to the wave of Latino immigrants who began arriving in the early 1990s. Why do we consider that it is those same early attitudes that have been at work and not entirely new ones? The answer is that those attitudes cropped up in the intervening years regularly in the thought, politics, literature, and popular culture of the region. As will be seen, between 1860 and today, many in the South have disliked brown-skinned people more or less continuously, even though they had relatively little direct contact with them.<sup>198</sup>

At times, this attitude broke out into direct action. In the 1890s, for example, Southern boys thrilled to exploits in the Spanish–American War in much the same manner in which the region embraced conquest in the tropics a half-century earlier. Imbued with many of the same ideas and stereotypes of Spanish-speaking people, Southern youth eagerly seized opportunities to wear uniforms and swords in defense of region, womanhood, and honor, even though the South’s fortunes were not directly at stake in that conflict.<sup>199</sup>

A few years later, in 1916, Pancho Villa was stirring up trouble on both sides of the Mexican border, much as Juan Cortina had done fifty-some years before.<sup>200</sup> Like a human body that recognizes a foreign host, Southern men

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<sup>196</sup> See TULLOS, *supra* note 95, at 26–29 (discussing habits of mind and snap judgments in the South and Alabama in particular); *supra* notes 41–42, 117–24 and accompanying text.

<sup>197</sup> See *supra* notes 122–24, 171–75 and accompanying text.

<sup>198</sup> In a forthcoming article, we discuss this period and its implications for present-day politics. Delgado & Stefancic, *supra* note 16.

<sup>199</sup> See Paul M. Pruitt, Jr., *New-South Soldier: The Prewar Military Career of Walter E. Bare, 1902–1917*, 36 ALA. REV. 18, 21 (1983).

<sup>200</sup> *Id.* at 29. For discussion of Juan Cortina’s border raids, see SLAVERY, RACE, AND CONQUEST, *supra* note 126, at 171–73; see also *supra* notes 145, 164 (discussing those raids).

were quick to react to the intrusion, even though it occurred many hundreds of miles away. Heeding a national call, Southern volunteers, most from Alabama, quickly formed a unit to confront the Mexican menace. Screaming “I wanta to get ‘er Greaser!,” they set off with high spirits.<sup>201</sup> But the long march took its toll. Spirits lagged, especially when many came down with stomach disorders along the way. Ill prepared for the cold, they found the Arizona winter a hardship. The unit returned home in early March, not having fought, but only having heard Mexican soldiers two miles away from their encampment firing shots as they executed prisoners and enemies.<sup>202</sup>

Around this time, the United States and Germany were in the midst of pre-war hostilities, with increasingly bellicose messages and acts presaging the U.S. entry into the ongoing conflict. In hopes of securing an ally, the German foreign minister sent a message—the “Zimmermann telegram”—to Mexico offering a deal. In return for financial aid and an opportunity to regain much of the territory that country had lost in its war with the United States (1846–1848), Mexico would join with Germany in its struggle with the U.S.<sup>203</sup> When the offer became known, the American public exploded in indignation.<sup>204</sup> Mexico of course turned it down, but the reaction of Southern newspapers was even more vehement than that of those in other regions, with a quality of outraged disbelief (“How dare they?”).<sup>205</sup>

Dislike of Latin America and Latin Americans, especially Mexicans, ran rampant as well in films and theater productions of the period. By the early 1900s, silent movies were an affordable form of entertainment and a gathering point for American popular culture, particularly in small Southern towns.<sup>206</sup> Because they lacked sound, early films featured easily grasped characters and

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<sup>201</sup> Pruitt, *supra* note 199, at 32.

<sup>202</sup> *Id.* at 30–35.

<sup>203</sup> See THOMAS BOGHARDT, *THE ZIMMERMANN TELEGRAM: INTELLIGENCE, DIPLOMACY, AND AMERICA'S ENTRY INTO WORLD WAR I* 217–18 (2012). See generally, BARBARA W. TUCHMAN, *THE ZIMMERMANN TELEGRAM* (1966) (discussing the historical events surrounding the Zimmermann telegram in detail).

<sup>204</sup> See David Alsobrook, *A Call to Arms for African Americans During the Age of Jim Crow: Black Alabamians' Response to the U.S. Declaration of War in 1917*, in *THE GREAT WAR IN THE HEART OF DIXIE: ALABAMA DURING WORLD WAR I* 82–83 (Martin T. Olliff ed., 2008) (noting that sensational press coverage whipped up a white public); Lamar W. Bridges, *The Zimmermann Telegram: Reaction of Southern, Southwestern Newspapers*, 46 *JOURNALISM Q.* 81, 81–83 (1969).

<sup>205</sup> Alsobrook, *supra* note 204, at 82.

<sup>206</sup> Between 1896 and 1930, movie theaters had opened in small towns across the country, featuring inexpensive entertainment in downtown locations. See *Mapping Moviegoing in North Carolina*, *DOCSOUTH*, <http://docsouth.unc.edu/gtts/index.html> (last visited Oct. 22, 2015). In North Carolina, for example, 200 communities boasted over 1,300 such theaters showing the silent films of that era. *Id.*

plots and sharply drawn lines between good and evil.<sup>207</sup> Tricky, shoot-you-in-the-back Mexicans dueling with upright American cowboys were a staple of this fare. Movies such as *The Virginian*<sup>208</sup> and *The Greaser's Gauntlet*<sup>209</sup> reminded Southerners of their yearning for revenge and their disdain for those whose skin was brown. Mexico's tumultuous revolution (1910–1920) inspired a new generation of movies with plots turning on bandit-desperadoes, like Pancho Villa, and raiders wearing sombreros and ammunition belts crossing their chests.<sup>210</sup>

Caricatures of Mexicans lingered. After World War II, the new interstate highway system made it easier for families to take long automobile trips. Southern travelers were happy to spend the night and purchase knickknacks at roadside attractions such as South of the Border, which featured curios, signs, and billboards depicting a stereotypical-looking Mexican.<sup>211</sup> It is worth noting

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<sup>207</sup> See Delgado & Stefancic, *supra* note 38, at 1275 (discussing the image of the greaser, exemplified in director D.W. Griffith's *The Greaser's Gauntlet*, and the *Bandido*, a desperado-type malefactor born of Mexico's revolutionary period (1910–1920)). For example, the silent film *Barbarous Mexico*, based on the book by John Kenneth Turner, depicted a country ruled by a tyrannical president, Porfirio Diaz, who enslaved workers and political dissidents alike. BARBAROUS MEXICO (America's Feature Film Co. 1913).

<sup>208</sup> Based on a best-selling novel and the stage production of the book, the popular 1914 film featured a villain named Trampas ("tricky" in Spanish) dressed in Mexican garb, who aims to frustrate the noble main character (the nameless Virginian), who is chivalric and a reader of Sir Walter Scott. THE VIRGINIAN (Paramount Pictures 1929). The author, Owen Wister, born in Philadelphia to a South Carolinian mother who greatly influenced him during his formative years, wrote the novel in Charleston drawing on Southern ideals of chivalry and knighthood. See *Owen Wister: An Inventory of the Owen Wister Photograph Collection at the Texas State Archives, 1893, undated*, TEX. ST. LIBR. & ARCHIVES, <http://www.lib.utexas.edu/taro/tslac/90020/tsl-90020.html> (last visited Oct. 22, 2015). The novel sold nearly 200,000 copies in its first year, and over two million in the first century. *Id.* It also spawned five movies and a TV series (1960s). John D. Nesbitt, *Owen Wister: Inventor of the Good-guy Cowboy*, WYOHISTORY.ORG, <http://www.wyohistory.org/encyclopedia/owen-wister#sthash.BJRF9InY.dpuf> (last visited Oct. 22, 2015).

<sup>209</sup> See Delgado & Stefancic, *supra* note 38, at 1275.

<sup>210</sup> William Randolph Hearst, who bore a grudge against Mexico, played a large part in stirring up anti-Mexican sentiment, producing *Patria*, a fifteen part serial depicting Mexicans unfavorably. See JUAN J. ALONSO, BADMEN, BANDITS, AND FOLK HEROES: THE AMBIVALENCE OF MEXICAN AMERICAN IDENTITY IN LITERATURE AND FILM 48, 51–52 (2009). See generally CHRIS FRAZER, BANDIT NATION: A HISTORY OF OUTLAWS AND CULTURAL STRUGGLE IN MEXICO, 1810–1920 (2006) (discussing postcolonial Mexican narratives of Mexican Bandits, including Pancho Villa).

<sup>211</sup> Located on I-95, a major north-south interstate linking Florida and Delaware, South of the Border features a ninety-seven-foot high stereotypical Mexican figure, somewhat black-looking. See Samantha Allen, *The South's Billboard Holy War*, DAILY BEAST (Jan. 14, 2015, 5:45 AM), <http://www.thedailybeast.com/articles/2015/01/14/the-south-s-billboard-holy-war.html>; see also SOUTH OF THE BORDER, <http://www.thesouthoftheborder.com/> (last visited Sept. 9, 2015). The establishment sells food, amusement rides, curios and knickknacks to passing motorists attracted by signs and billboards for a hundred miles in either direction. See SOUTH OF THE BORDER, *supra*.

that unfavorable impressions of Latinos in the South have not greatly abated.<sup>212</sup> The retiring consul general of Mexico, who has lived in the region for nearly thirty-five years, observed that when he arrived in 1978, cultural images of Mexico were deplorable, but that they had made “some advances in casting off certain stereotypes.”<sup>213</sup>

In literature a prominent school of Southern writers based at Vanderbilt University celebrated traditional farm life including occasional disparaging references to blacks and a few to Latinos.<sup>214</sup> The Southern Agrarian movement, which sprang up in the 1920s, included writers such as John Crowe Ransom, William Tate, and Robert Penn Warren (*Remember the Alamo*<sup>215</sup>), who believed that Southern agricultural society was morally and philosophically superior to the Northern industrial kind.<sup>216</sup> They associated plantation farming with refinement, and industrialism with crass manners and outlook. These well-born writers and their latter-day descendants embrace an implicit psychosexual scheme according to which traditional family farming represented virtue (the ego and superego), while rootless minorities and swarthy immigrants, working in factories, represented base, lower functions (the id), including an uninhibited outlook and gangster-like traits.<sup>217</sup> William

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<sup>212</sup> See Saeed Ahmed, *Chains of Diplomacy Broken: Retirement Will Allow Latino Advocate a More Active Role in Confronting State's Immigration Issues*, ATLANTA J. CONST., Feb. 15, 2001, at D1 (noting that the retiring consul general of Mexico, who had lived in Atlanta since 1978, described popular images of the group as highly unfavorable (“lazy and shiftless”) but as having improved in recent years).

<sup>213</sup> *Id.*

<sup>214</sup> E.g., THOMAS A. UNDERWOOD, ALLEN TATE: ORPHAN OF THE SOUTH 291 (2000) (mentioning that Tate, a prominent member of the Southern Agrarian school, deplored miscegenation and refused to meet black poet Langston Hughes). Donald Davidson, a prominent member of the school, was an avowed racist. E.g., Paul V. Murphy, *Donald Davidson*, TENN. ENCYCLOPEDIA HIST. & CULTURE, <http://tennesseencyclopedia.net/entry.php?rec=357> (last updated Jan. 1, 2010); see FREDRICK B. PIKE, THE UNITED STATES AND LATIN AMERICA: MYTHS AND STEREOTYPES OF CIVILIZATION AND NATURE 193–99 (1992) (noting how the Southern Agrarians and their allies in the American “Arielist” school looked down on everyday Latin Americans, particularly the mestizos, as backward and coarse—but admired and fawned over the dignified, cultured hidalgos of the educated upper class whom they regarded as persons of refinement, like themselves).

<sup>215</sup> See generally ROBERT PENN WARREN, REMEMBER THE ALAMO! (1958) (extolling the bravery of the defenders of that fort against a cruel, overwhelming force of Mexicans). Warren’s *The Legacy of the Civil War* describes the lingering legacy of that conflict in Southerners’ bloodstream and bones. ROBERT PENN WARREN, THE LEGACY OF THE CIVIL WAR: MEDITATIONS ON THE CENTENNIAL 13–15 (1961); see David W. Blight, *The Civil War Isn’t Over*, ATLANTIC (Apr. 8, 2015), <http://www.theatlantic.com/politics/archive/2015/04/the-civil-war-isnt-over/389847/>.

<sup>216</sup> See Louis D. Rubin, Jr., *Introduction* to I’LL TAKE MY STAND: THE SOUTH AND THE AGRARIAN TRADITION vii–viii (1962).

<sup>217</sup> See, e.g., *Interview with Stephen Clay McGehee of Southern Agrarians*, AMERIKA (Aug. 15, 2011), <http://www.amerika.org/politics/interview-with-stephen-clay-mcgehee-of-southern-agrarian/> (equating Southern Agrarianism with spirituality, family life, meaning, stability, God, and culture; industrialism and urban life,

Faulkner, who was not a member of this group, had a decidedly ambivalent attitude toward both Mexicans and Haitians.<sup>218</sup> While not every Southern Agrarian writer exhibited a white supremacist outlook, others did, keeping the attitude alive, even if in embryonic form, ready for the next outbreak.<sup>219</sup>

Unsurprisingly, numerous anti-Latino initiatives during these intervening years were led by Southerners. For example, during Depression-era hearings on immigration, Alabama Senator J. Thomas Heflin proposed stringent restrictions on Mexican immigrants on the ground that most of them were of mixed blood (“a mongrel race”) and of unsuitable stock.<sup>220</sup> Even earlier, an Alabama congressman had warned against a national immigration policy that would enable Slavs, Mongolians, and Iberians (Spanish) to settle in the

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with gangsterism and an out-of-control id). “Southern Agrarianism has multiple layers,” including a spiritual layer, chivalry, civility, and daily manners such as ‘yes, sir’ and ‘no ma’am.’” *Id.* McGehee publishes the *Southern Agrarian* and *Confederate Colonel* blogs and is an advocate of home schooling, vegetable farming, cultural secession, and the Southern way of life. *Id.* He also opposes universal suffrage. See generally Stephen Clay McGehee, *A Matter of Suffrage*, CONFEDERATE COLONEL (Jul. 16, 2011), <http://www.confederatecolonel.com/2011/07/a-matter-of-suffrage/> (discussing that the problem with American politics is rooted in the people who vote). On the touchiness of Southern culture in matters of virility, see WYATT-BROWN, *supra* note, 178, at xix, 49 (writing that “honor was a state of grace linking mind, body, blood, hand, voice, head, eyes, and even genitalia” and noting that a steady gaze was a sign of honor—but, in a slave, was a sign of impudence).

<sup>218</sup> See *supra* note 174 and accompanying text (discussing William Faulkner’s novel *Absalom, Absalom!*). See generally WILLIAM FAULKNER, *LIGHT IN AUGUST* (Vintage Books 1990) (1932) (describing a character, Joe Christmas, suffering identity confusion over his possible mixed black-Mexican blood). Christmas, a wanderer, also bewildered many of the other characters in the novel, residents of an imaginary Mississippi county (Yoknapatawpha), who were accustomed to conceptualizing race through the lens of a black–white binary paradigm. *Id.* The astute reader who has come this far will recognize a striking resemblance between the events in Faulkner’s novel and those leading up to a trial in which a young Hugo Black participated, see *supra* notes 17–27 and accompanying text.

<sup>219</sup> See *Interview with Stephen Clay McGehee*, *supra* note 217. Indeed, many in the South made a virtue of their own cultural narrowness. See, e.g., *id.* (discussing the notion of cultural secession); see also Susan B. Riley, *The Hazards of Periodical Publishing in the South During the Nineteenth Century*, 21 TENN. HIST. Q. 365, 365, 373 (1962) (noting that nineteenth century “Southern magazines . . . (like *DeBow’s Review*, the *Southern Literary Messenger*, and the *Southern Review* of Charleston) . . . are an index to the culture of the times” in that they aimed to “sustain the credit of the South in the Republic of Letters . . . and to defend Southern civilization in the intellectual forum”). The *Southern Illustrated News*, for example, in 1862 “reminded its readers that Yankee writers before the ‘separation’ were in the habit of taunting the South” and that buying and consuming Southern literature would be more congenial to their tastes. *Id.* at 374. Exhortations such as these were only partly successful; the readership of Southern journals remained small. *Id.* at 376.

<sup>220</sup> See CARLOS MUÑOZ, JR., *YOUTH, IDENTITY, POWER: THE CHICANO MOVEMENT* 23 (1989) (quoting testimony by Senator Heflin stating, “Mexicans were a danger to American society because they were a ‘mixed breed,’ ‘low type,’ and ‘docile’ people”). In recent years, Southern senators and members of Congress such as Jeff Sessions have been at the forefront of immigration restriction. See Senator Jeff Sessions, *Immigration Handbook for the New Republican Majority: A Memo for Republican Members from Sen. Jeff Sessions*, JEFF SESSIONS: U.S. SENATOR ALA. (Jan. 2015), [http://www.sessions.senate.gov/public/\\_cache/files/67ae7163-6616-4023-a5c4-534c53e6fc26/immigration-primer-for-the-114th-congress.pdf](http://www.sessions.senate.gov/public/_cache/files/67ae7163-6616-4023-a5c4-534c53e6fc26/immigration-primer-for-the-114th-congress.pdf).

South.<sup>221</sup> “We do not want South American civilization in the Southern States. In place of that, we want the Teutonic, and Celtic, and white civilization of the North.”<sup>222</sup>

During the Hoover administration, William Doak, a Virginian and Secretary of Labor, spearheaded a Depression-era wave of mass deportations of Latino-looking people (1929–1939).<sup>223</sup> Virginia was one of the Southern states that, according to historian Robert May, dreamed of empire.<sup>224</sup> Doak disliked Mexicans, believed they were troublemakers, and that the country would be better off without them.<sup>225</sup> When Congress, a few years later, enacted several New Deal measures aimed at improving conditions for American workers, it excluded agricultural and domestic laborers from the new minimum wage provisions.<sup>226</sup> A lingering memory of white ascendancy, black slavery, and efforts at conquest in the tropics made the exclusion seem right and natural, particularly in the eyes of Southern congressmen.<sup>227</sup>

A second, even larger roundup, Operation Wetback (1954) proceeded under the direction of General Joseph Swing, reputedly a long-time Mexico-hater who once rode with General Pershing in pursuit of Pancho Villa.<sup>228</sup> This congressionally-mandated program, which oversaw a vast round-up and

<sup>221</sup> See Rowland T. Berthoff, *Southern Attitudes Toward Immigration, 1865–1914*, 17 J. S. HIST. 328, 352 (1951).

<sup>222</sup> 40 CONG. REC. 530, 554 (1905) (testimony of Rep. Oscar W. Underwood).

<sup>223</sup> See, e.g., Gilbert Paul Carrasco, *Latinos in the United States: Invitation and Exile*, in IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 190–200 (Juan F. Perea ed., 1997).

<sup>224</sup> E.g., DREAMS, *supra* note 126, at 4–5, 44–45, 112, 148–49 (noting participation of Virginia editors, military figures, and politicians in the dream of Southern conquest).

<sup>225</sup> See FRANCISCO BALDERRAMA & RAYMOND RODRIGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S 74–76* (rev. ed. 2006) (Doak accused them of fomenting labor unrest and activism and requested 245 new agents from President Eisenhower in order to seize and deport one-half million of them).

<sup>226</sup> See Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 96 (2011) (discussing several pieces of New Deal legislation that used categorical exclusions of agricultural and domestic laborers as a means to keep African Americans from receiving statutory benefits and protections, such as minimum wage).

<sup>227</sup> GUTERL, *supra* note 104, at 183–88; see also *supra* note 172 and accompanying text (discussing the role of agricultural ambitions in the two periods).

<sup>228</sup> See RONALD L. MIZE & ALICIA C.S. SWORDS, *CONSUMING MEXICAN LABOR: FROM THE BRACERO PROGRAM TO NAFTA 34–35* (2011); ARMANDO NAVARRO, *THE IMMIGRATION CRISIS: NATIVISM, ARMED VIGILANTISM, AND THE RISE OF A COUNTERVAILING MOVEMENT 84–85* (2009); see also Carrasco, *supra* note 223, at 197 (discussing Operation Wetback and the role of General Swing). See generally JUAN RAMON GARCÍA, *OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954* (1980) (same).

deportation of Mexican-looking people, aimed to reduce welfare costs during a time of high unemployment. The program originated in the course of an exchange between Senator J. William Fulbright, a former segregationist and Democrat from Arkansas who signed the Southern Manifesto, and President Dwight Eisenhower, and was very popular among longtime residents in the South and Southwest.<sup>229</sup>

Even when the federal government was welcoming Mexican workers, the South was turning a cold shoulder. Two wartime “bracero” programs (1917–1922, 1942–1964) brought large numbers of Mexican laborers to work, mainly in farming, thus freeing Americans to perform military service.<sup>230</sup> In Arkansas and Mississippi they were so unpopular and received such poor treatment that the government of Mexico registered official concern.<sup>231</sup>

A few years earlier (circa 1905), policymakers in the South had been casting about for means of increasing the supply of laborers for the region. Realizing that the number of immigrants who made their homes in the thinly populated region was very low,<sup>232</sup> and that African Americans did not want to work in agriculture or forestry,<sup>233</sup> some Southern states turned to recruiting “white citizens of the United States, citizens of Ireland, Scotland, Switzerland and France, and all other foreigners of Saxon origin.”<sup>234</sup> Their efforts did not meet with much success, although some states succeeded in attracting moderate numbers of Italians, Poles, and other “desirable immigrants”<sup>235</sup> by means of advertising, setting up immigration and development offices and

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<sup>229</sup> The region at the time had been experiencing even higher employment than the country at large, which was in the midst of an economic downturn. See GARCIA, *supra* note 228, at 13–15. On the program’s origins and the role of William Fulbright, see John Dillin, *How Eisenhower Solved Illegal Border Crossings from Mexico*, CHRISTIAN SCI. MONITOR (July 6, 2006), <http://www.csmonitor.com/2006/0706/p09s01-coop.html>. Fulbright later moderated his views on civil rights and opposed the war in Vietnam. David Lauter & Burt A. Folkart, *William Fulbright, Critic of Cold War Policy, Dead at 89*, L.A. TIMES (Feb. 10, 1995), [http://articles.latimes.com/1995-02-10/news/mn-30368\\_1\\_james-william-fulbright](http://articles.latimes.com/1995-02-10/news/mn-30368_1_james-william-fulbright).

<sup>230</sup> See JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 333–36 (3d ed. 2015).

<sup>231</sup> See Kristin Dutcher Mann, *Bracero Program*, ENCYCLOPEDIA OF ARK. HIST. & CULTURE, <http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=5548> (last updated Dec. 10, 2014).

<sup>232</sup> See Walter L. Fleming, *Immigration to the Southern States*, 20 POL. SCI. Q. 276, 278 (1905) (noting that Alabama had only thirty-five persons to the square mile, Florida nine, and Arkansas twenty-four).

<sup>233</sup> *Id.* at 279 (noting that black workers were a lost cause; increasing their wages simply encouraged them to work three days a week instead of five).

<sup>234</sup> *Id.* at 282.

<sup>235</sup> *Id.* at 282–84.

societies, and offering inducements of various kinds—including free land.<sup>236</sup> Although the nation was in the middle of a large wave of immigration, Southern officials—foreshadowing what was to happen ninety years later—made plain that the region did not welcome transplants from southern or eastern Europe, particularly ones from southern Italy, who were dark, and presumably immigrants from Spain as well.<sup>237</sup> And it did not want ones of a liberal or collectivist bent.<sup>238</sup>

The personal writings of John Tanton, the architect behind Official English and FAIR (Federation for American Immigration Reform), an organization devoted to immigration restriction, date from a slightly later period but are redolent of language common in Southern-dream literature from the 1850s.<sup>239</sup> A 2009 report by Southern Poverty Law Center examined Tanton's correspondence, highlighting connections between his immigration-reduction efforts and white supremacist, neo-Nazi, and eugenicist thought, especially in the South.<sup>240</sup> He maintained contacts and correspondence with at least one prominent white-supremacist professor in the South,<sup>241</sup> had close ties with anti-immigration figures, and was a long-time advocate of the English-only movement, much of which aimed at ridding the United States of Spanish speakers.<sup>242</sup>

In short, the anti-Latino attitudes, ambitions, and rhetoric that sprang up in the South with the campaign for southward empire (1850–1860) hibernated over the subsequent years, occasionally breaking out into the open. The current nativist posture of the South turns out to be rooted in previous thought and

<sup>236</sup> *Id.* at 284–86.

<sup>237</sup> *Id.* at 290–96. Recall what happened to the dark-skinned Puerto Rican son-in-law of Hugo Black's client around this time. See *supra* notes 17–33 and accompanying text.

<sup>238</sup> Fleming, *supra* note 232, at 294–96 (noting that the region was especially wary of those who might organize in a labor organization or union).

<sup>239</sup> See Robert M. Press, *English-Only Drive Mirrors Deeper Miami Unrest*, CHRISTIAN SCI. MONITOR (Oct. 20, 1980), <http://www.csmonitor.com/1980/1020/102034.html>; see, e.g., Heidi Beirich, *The Tanton Files: Fair Founder's Racism Revealed*, S. POVERTY L. CTR. (Sept. 19, 2008), <http://www.splcenter.org/blog/2008/09/19/tanton-fair-founder-racism/> (namely, Latinos and other minorities as of poor moral character and a threat to American values).

<sup>240</sup> *Id.*; see also Heidi Beirich, *John Tanton's Private Papers Expose More Than 20 Years of Hate: Nativist Leader's Racist Past Exposed*, S. POVERTY L. CTR. (Nov. 30, 2008), <https://www.splcenter.org/fighting-hate/intelligence-report/2008/john-tanton%E2%80%99s-private-papers-expose-more-20-years-hate>; Beirich, *supra* note 239. He and Senator Jeff Sessions allegedly maintain close organizational connections. See Mahwish Khan, *Background Briefing: Senator Jeff Sessions*, AM. VOICE (July 7, 2009), [http://americasvoice.org/research/background\\_briefing\\_senator\\_jeff\\_sessions\\_r-al/](http://americasvoice.org/research/background_briefing_senator_jeff_sessions_r-al/).

<sup>241</sup> Beirich, *supra* note 239.

<sup>242</sup> *Id.*

practice, in particular dreams of empire stemming back to a period just before the Civil War and bound up with it.

We are not, of course, asserting a single cause. Movements often trace themselves to many antecedent currents and circumstances. Southern distaste for recent Latino immigration undoubtedly reflects anti-Catholic sentiment and even Islamophobia. The South has always been an intensely religious region—the “Bible belt”—but its religiosity has been confined to a small number of forms, particularly a few intense variants of evangelical Protestantism.<sup>243</sup>

But many slaves were Muslim and literate, both of which posed serious challenges to the Southern order.<sup>244</sup> When the South learned that the Haitians and Dominicans practiced Santeria, voodoo, and even Islam, they must have been equally horrified. And their disdain knew no bounds when they realized that practically all of Latin America, including the very countries that they coveted as new states or territories—namely Mexico, Honduras, and Nicaragua—were deeply Catholic. Travel literature, soldiers’ letters, and other accounts show that many travelers, soldiers, and expeditionaries connected Latin Americans’ supposed laziness, docility, and lack of initiative with their religion.<sup>245</sup>

The racial attitudes that the South formed during slavery, then, combined with religious righteousness and fervor in a fashion that justified and naturalized hierarchy, dominion, and control. When Southern patriarchs set their eyes on conquering Latin America in the years leading up to the Civil War, their motivation must have been both benign and complex—to cure the region’s residents of their mistaken ways, and to persuade them to embrace the right ones—namely slavery and Christianity in that order.

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<sup>243</sup> E.g., WAYNE FLYNT, ALABAMA IN THE TWENTIETH CENTURY 443–84 (2004) (“What Would Jesus Do?”).

<sup>244</sup> See SYLVIANE A. DIOUF, SERVANTS OF ALLAH: AFRICAN MUSLIMS ENSLAVED IN THE AMERICAS 161 (2013) (“In the eyes of the slaveholders, the Muslims’ literacy was dangerous because it represented a threat to the whites’ intellectual domination and a refutation of the widely held belief that Africans were inherently inferior and incapable of intellectual pursuits.”); PEREA ET AL., *supra* note 230, at 98; OMAR IBN SAID, A MUSLIM AMERICAN SLAVE: THE LIFE OF OMAR IBN SAID (Ala Alryes ed., 2011).

<sup>245</sup> See GREENBERG, *supra* note 126, at 21, 55, 98–99, 111, 126, 267; see also 1 RUFUS B. SAGE, HIS LETTERS AND PAPERS, 1836–1847, at 82–87 (LeRoy R. Hafen & Ann W. Hafen eds., 1956); David J. Weber, *Editor’s Introduction [II]*, in FOREIGNERS IN THEIR NATIVE LAND: HISTORICAL ROOTS OF THE MEXICAN AMERICANS 59–60 (David J. Weber ed., 1973) (Editor’s introduction to Part II: Yankee Infiltration and the Hardening of Stereotypes); Raymund A. Paredes, *The Mexican Image in American Travel Literature, 1831–1869*, 52 N.M. HIST. REV. 5, 5–29 (1977) (discussing numerous narratives in detail).

One hundred-plus years later, when hapless Latino workers descended on the region looking for work in the area's farms, hotels, construction sites, and meat-packing plants, they must have evoked, then, a double dose of bigotry. Most were Catholic. And they were failed confederates in slavery, reminders of an inglorious past—when the region, almost, but not quite, saved itself through conquest of lands even further south.<sup>246</sup> The region rejected Latino newcomers because they were out of place in more ways than one. Southern agents, by rights, should have been *there*—in their countries, governing them, not the other way around—not *they*, the sweaty proletariat, *here*.<sup>247</sup>

Their natural role was to play the obedient subject<sup>248</sup>—not free people striding along the sidewalk, singing, eyeing the local women, speaking their inscrutable language, and eating their exotic, spicy food.<sup>249</sup> The South reacted strongly against the new arrivals for a host of reasons—the black legend;<sup>250</sup>

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<sup>246</sup> See UNDERWORLD, *supra* note 126, at 112–14 (noting that Southerners hoped that by championing expansion and “manifest destiny,” they could assure “white American racial superiority over Hispanic peoples”); *supra* notes 125–68 and accompanying text. Patrick Henry’s grandson called on expeditionaries to spread freedom in Latin America for the same reasons. UNDERWORLD, *supra* note 126, at 114. The earlier period’s racial subtext was clear and unambiguous: They “appropriated manifest destiny’s racialist codes,” reasoning that their efforts “would rescue invaded peoples from stagnation, . . . Catholicism, and barbarism” and introduce them to “modern civilization.” *Id.* at 115. Many saw the peoples as “greasers” and “mongrels” (mestizos of mixed blood) in need of a “good thrashing.” *Id.* at 116; see also Walker in Nicaragua, *supra* note 156. The resemblance to today’s rhetoric is hard to avoid. Filibustering was a primarily Southern crusade. UNDERWORLD, *supra* note 126, at 252.

<sup>247</sup> See UNDERWORLD, *supra* note 126, at 265 (noting that the white man with his trusty slave at his side would displace “a useless ‘mixed race’” and provide the “supply of constant and reliable labor” needed to produce agricultural products). Black slaves could discover (in the tropics) their “natural climate,” find the work agreeable, and gain “the ineffable blessings of a true religion.” *Id.* In short, whites should conquer and displace Latinos, paving the way for black slavery—not the other way around. See *id.* at 265–66.

<sup>248</sup> “‘Lower’ races simply did not have the right of self-determination.” DREAM, *supra* note 126, at 6. Fortunately most of them in Latin America and the Caribbean “had the common sense to appreciate the benefits [of] American rule.” *Id.* at 5.

<sup>249</sup> Many Southerners felt uneasy over the habits and cultural preference of the new arrivals, which were different from those of a tradition-bound region of settled residents and churchgoers with long roots. See Odem & Lacey, *supra* note 83, at xxii; Harris, *supra* note 103. The newcomers quickly improvised soccer fields and cheered their teams loudly in Spanish. See Odem & Lacey, *supra* note 83, at xxii. They opened tortilla shops and stalls, and taco stands, attended Catholic churches, and established Mexican restaurants and cantinas. *Id.* at xxii–xxiii; Harris, *supra* note 83. Walmart and other big-box stores began catering to them and offering consumer items geared toward their preferences. Odem & Lacey, *supra* note 83, at xxii–xxiii. Patrons began sharing the aisles with Mexican-looking families picking out items that they needed at home. See *id.* at xxiii. The stores began making public announcements in Spanish. *Id.* at xxii–xxiii.

<sup>250</sup> See Horwitz, *supra* note 96 (employing the concept of the “black legend,” the idea that the Spanish colonizers were cruel and despotic). The English, by contrast, were supposedly kind and enlightened. See also *id.* By the end of the Revolutionary War, “Spain held claim to roughly half of today’s continental United States” and Spanish ships had reached as far as Alaska. *Id.* “The new [Anglo] nation craved Spanish land.” *Id.* Consequently, “As American settlers pushed out from the 13 colonies . . . Americans found a handy weapon in

sexual competition from Latin lovers;<sup>251</sup> Anglophilia;<sup>252</sup> Southern honor;<sup>253</sup> fear of falling—wanting currently undesirable jobs (such as ones in a chicken-processing plant) open and unfilled, just in case we need them one day;<sup>254</sup> and simple unfamiliarity—they fall outside the black-white binary paradigm that the region has come to rely on to make sense of race.<sup>255</sup> And, finally, some in the South still nurse a sense of grievance over the War of Northern Aggression and are prone to lay the blame for the region's ills on any outside force that is handy.<sup>256</sup> But the one we have named and described is, in our view, the main one and the most parsimonious.<sup>257</sup> And it is important for a second reason: It

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a set of centuries-old beliefs known as the 'black legend,' according to which Spanish conquistadores were "uniquely barbarous" and prone to "org[ies] of greed, slaughter and papist depravity, the Inquisition writ large." *Id.*

<sup>251</sup> See Delgado & Stefancic, *supra* note 38, at 1273; Richard Delgado, *Rodrigo's Corrido: Race, Postcolonial Theory, and U.S. Civil Rights*, 60 VAND. L. REV. 1691, 1722–23 (2007) (noting the stereotype of the romantic Latino male).

<sup>252</sup> The South is the most English region. See FOX-GENOVESE & GENOVESE, *supra* note 171, at 1–8 (noting that the region echoes England in its social organization (small villages), means of transmitting culture and knowledge (via sermons, stories and tales), and devotion to farming); see also O'BRIEN, *supra* note 158, at 46 (noting that many of the region's upper-class youth travelled to England for education and culture). See generally BRITAIN AND THE AMERICAN SOUTH: FROM COLONIALISM TO ROCK AND ROLL (Joseph P. Ward ed., 2003) (showing the strong cultural ties between the two regions).

<sup>253</sup> E.g., GREENBERG, *supra* note 126, at 10 ("Southern gentlemen upheld dueling as a key expression of their own culture of honor."); see also *supra* note 178 and accompanying text.

<sup>254</sup> See John Judis, Opinion, *Phantom Menace: The Psychology Behind America's Immigration Hysteria*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Feb. 13, 2008), <http://carnegieendowment.org/2008/02/13/phantom-menace-psychology-behind-america-s-immigration-hysteria>.

<sup>255</sup> CHAVEZ, *supra* note 83, at 126–27; Smith & Winders, *supra* note 83 (noting that teachers, policymakers, and ordinary citizens struggled to understand where Latinos fit into a region accustomed to seeing race in binary terms—black and white—and that some African-American leaders rejected their advances and declined solidarity for this reason).

<sup>256</sup> On the region's sense of grievance, see Alan Blinder, *150 Years Later, Wrestling with a Revised View of Sherman's March*, N.Y. TIMES, Nov. 15, 2014, at A9; Phillip Tutor, *America's Confederate Legacy, 150 Years Later*, ANNISTON STAR (Apr. 9, 2015, 5:52 PM), [http://www.annistonstar.com/opinion/philip-tutor-america-s-confederate-legacy-years-later/article\\_229a2cd2-df0b-11e4-8810](http://www.annistonstar.com/opinion/philip-tutor-america-s-confederate-legacy-years-later/article_229a2cd2-df0b-11e4-8810). On the region's tendency to displace hostility toward immigrants, see WILLIAM WARREN ROGERS ET AL., ALABAMA: THE HISTORY OF A DEEP SOUTH STATE 430–31 (1994) (noting that even early waves of white-looking European immigrants stirred suspicion because of their foreign ways, language, and Catholicism). The Klan, including young Hugo Black, rallied against them. See *supra* notes 17–27 and accompanying text. Lamar Alexander, a Republican from Tennessee, proclaimed that English "is part of our blood, our national language." Horwitz, *supra* note 96 (discussing one of his early trials); see also Michael Hill, *In Defense of Our Blood*, LEAGUE S., [www.leagueofthesouth.com/in-defense-of-our-blood/](http://www.leagueofthesouth.com/in-defense-of-our-blood/) (last visited Oct. 22, 2015) (emphasizing the region's Anglo-Celtic roots and fierce determination to preserve its culture against "[m]illions of Hispanics, Mestizos really, [who] are reclaiming land for themselves and their progeny. How is this different, say, from any other aggressive migration in history?").

<sup>257</sup> The idea of a lingering cultural memory dating from the expeditionary period (1850–1860) is parsimonious—simple and convincing—because it can explain periodic outbreaks of anti-Latino sentiment during the intervening 130 years. It can also explain their rueful quality ("by rights we should be ruling them")

explains the vital need for a modification of First Amendment law and reasoning.

### III. LAW REFORM: NOTES TOWARD A RESTATEMENT OF THE FIRST AMENDMENT

First Amendment formalism failed Latinos in 1990–2015 and, indeed, worsened their plight for two reasons. As has been seen, it reinforced a habit of mind in which a decision-maker (often a legislator, but sometimes a judge) stops his analysis upon encountering a single factor weighing in favor of the desired result. (“They are illegal.”<sup>258</sup> “We must get rid of them.” “They bear disease; we must get rid of them.” And so forth.) When history assures that most speakers will deploy only a single reason—even an unconscious one—for deeming a result the only possible one, the ensuing conversation is apt to be perfunctory. Social scientists know this as “confirmation bias,” but Ian Haney Lopez more recently called the dynamic by a new name, “dog whistle politics.”<sup>259</sup>

Second, formalistic First Amendment analysis offers the group whose fortunes are under consideration little recourse when speakers demonize them.

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and the rapidity by which they arise, as though brought forth by prompt recall or the reaction of a human body to a stimulus to which the body’s immune system has received a previous exposure (such as chicken pox). *See, e.g.,* Blight, *supra* note 215 (explaining that cultural memory can linger for a long time, especially in the South, where conflict over slavery “ended with . . . results that echo down to the present day” and “left a profound and haunting pall on . . . society and culture for generations to come”). Veterans’ organizations, reenactments, and memorials kept memory alive—as, of course, did Klan violence, unpunished acts of revenge, and resistance to Yankee rule. *See also* TULLOS, *supra* note 95, at 26–29 (describing how “habits of judgment” operate to encode core traditions, beliefs, and patterns of behavior). Stories and anecdotes, handed down among friends and family over generations, make certain matters of common knowledge unassailable, part of the common culture. *See id.* at 30–64 (giving the example of football, “sweet” dresses, reluctance to eat with a black family or roommate, mandatory heterosexual pairing up, dietary preferences for rich food and resulting weight gain, “knee jerk” patriotism, fundamentalist religion, and other beliefs typical of white middle class Southern culture); *see also id.* at 63–64 (discussing an anti-outsider disposition (“We defend our rites”). For a vivid example, see Igor Volsky, *How Ted Cruz is Keeping Jesse Helms’ Legacy Alive*, THINKPROGRESS (Sept. 12, 2013, 12:27 PM), <http://thinkprogress.org/politics/2013/09/12/2609951/ted-cruz-keeping-jesse-helms-legacy-alive/> (echoing the nineteenth century view of American naturalists who found Latin Americans to be volatile and quarrelsome and quoting Jesse Helms, who once said that “[a]ll Latins are volatile people”); *see also* PIKE, *supra* note 214, at 61–62 (1992).

<sup>258</sup> Thus conjuring up images of gangsters with Tommy guns, face masks, and low-slung black cars. *See supra* notes 94–95, 107–10.

<sup>259</sup> *See supra* note 176; *see also* Patrick Healy & Maggie Haberman, *95,000 Words, Many of Them Ominous, From Donald Trump’s Tongue*, N.Y. TIMES (Dec. 5, 2015), <http://www.nytimes.com/2015/12/06/us/politics/95000-words-many-of-them-ominous-from-donald-trumps-tongue.html> (noting use of emotional appeals in presidential race to vilify groups and tap insecurities of an audience).

Hate speech may, technically, still be legal.<sup>260</sup> But because our system subscribes to national norms (the American Creed) of fairness and equal respect, actions that relegate entire populations to lives of misery require justification.<sup>261</sup> The easiest way to provide that justification is to circulate the idea that the group deserves this form of treatment. They have it coming—they are dirty, stupid, volatile, uncivilized, with designs on our daughters, refuse to learn English, commit a large amount of crime, and want to revel in free public services, including welfare, public education, hospital treatment, and income support when they do not feel like working. They pay no taxes, crowd many to an apartment, and are noisy and messy thus impairing property values.<sup>262</sup>

A short, popular term for this form of depiction is “hate speech.” Although most legal scholars use the term more narrowly, it captures an important feature of the current controversy over Latino immigration and settlement in the South. Namely, the Southerners who support the cruelest treatment of the new entrants are those who think—usually with very little first-person evidence—that they are, in fact, dirty, criminal, lazy, won’t learn English, and so on, and have little hesitation about saying so. The important point is that they would hesitate to say so about practically anyone else—members of minority religions, foreign exchange students, or German workers at American automobile plants. But because they have heard that the First Amendment allows them to say anything they want, they do. And the reason that it feels just and natural to speak that way is that at some point in their lives someone—a teacher, friend, family member, or tourist—“said something bad” about the Mexicans. Moreover, the poor impression they acquired from this handful of encounters, or media stereotypes, has long historical roots dating back to a period when Mexicans and Central Americans represented the salvation of the region’s slave empire and way of life.

This is why a more nuanced view of deliberation and free speech needs to arrive soon. A multiracial, multicultural, more densely populated nation needs a more flexible free-speech regime and set of rules. Our disputes concern more than parking spaces; they often have to do with the basic rules, such as immigration, by which we live together.<sup>263</sup>

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<sup>260</sup> See *supra* Part I.

<sup>261</sup> See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1374, 1383.

<sup>262</sup> See *supra* notes 89–96 (discussing these stereotypes).

<sup>263</sup> See Tribe, *supra* note 39, at 310 (noting that decision-making processes should be chosen with an eye to the subject matter at hand and the amount of consensus that society has arrived at with respect to it).

Speech that disadvantages a discrete and insular minority calls for more careful scrutiny than speech that does not.<sup>264</sup> Words of this kind can demoralize a victim, so that he or she falls silent, seeming to give assent to a racist remark or statement.<sup>265</sup> It diminishes the credibility of the one who is its target, particularly if it paints him or her as stupid or dishonest.<sup>266</sup> And it gives tacit permission to those who overhear the remarks to do the same, to pass them on to others.<sup>267</sup> Often such group-disparaging speech arrives via coded language, with roots in a long-forgotten past.<sup>268</sup> People are rarely, if ever, admonished for repeating the stock story, but very often punished for speaking against one.

This is particularly so because, as mentioned, formalism focuses attention on a narrow slice of time, usually the here-and-now—even though key meanings and associations generally originate well in the past.<sup>269</sup> If these meanings contain unflattering images of certain speakers, then policy discussions need not be very long, because who would want to listen to a tedious argument from or about people who are not on our intellectual or cultural level?

In fact, we hazard that First Amendment formalism and racism connect and reinforce each other on a final, fourth level of individual psychology and personality development.<sup>270</sup>

Consider that racism is a kind of formalism, since it divides up the world into a small number of categories of person, with important differences supposedly separating them. These differences are not biological; instead, most scientists now believe that race is purely a social construction.<sup>271</sup> The main tool of that construction is, of course, speech—the way we talk about a group and

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<sup>264</sup> *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

<sup>265</sup> See Richard Delgado, *Campus Anti-Racism Rules: Constitutional Narratives in Collision*, 85 *NW. U. L. REV.* 343, 385 (1991).

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> See generally LÓPEZ, *supra* note 176 (explaining how conservatives use coded language to advance racial appeals).

<sup>269</sup> See *supra* notes 120–22 and accompanying text.

<sup>270</sup> See Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 *N.Y.U. L. REV.* 425 (2014) (positing a similar analysis in the context of court opinions).

<sup>271</sup> See, e.g., MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1990S*, at 64–65 (2d ed. 1994).

agree that they are this way or that.<sup>272</sup> Could this be why, for some, First Amendment formalism and the urge to classify racially—that is, racism—align and why one encounters, often, a shrill, even dogmatic quality to discourse condemning reasonable rules limiting hate speech?<sup>273</sup> What writers such as Theodor Adorno<sup>274</sup> and Bruno Bettelheim<sup>275</sup> describe as an authoritarian syndrome and constellation of personality traits is often on full display in both areas.<sup>276</sup>

For all these reasons, people in a region, such as the South, may not react to the better argument, even to one that explains what is in their own best interest, such as a policy of welcoming immigrants. The very terms by which we converse take on meanings from the past, so that we “know” (or think we know) how we feel about a group.<sup>277</sup>

When some listeners in the South appear to be ignoring their agricultural best interest, might they not be, on one level, still hoping to conquer Nicaragua?<sup>278</sup> Formalist—that is to say, conventional—First Amendment law narrows the range of issues and facts that a political or legal dialogue will consider. It can easily operate as *a regime of censorship*—ironic, since the marketplace of ideas imagines itself wide-open and receptive even to ideas that we hate.<sup>279</sup>

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<sup>272</sup> See generally Delgado & Stefancic, *supra* note 38 (explaining how the current system of free speech not only provides inadequate protection for minority groups, but allows minority groups to be further oppressed).

<sup>273</sup> See RICHARD DELGADO & JEAN STEFANCIC, UNDERSTANDING WORDS THAT WOUND 34–36, 203–12 (2004).

<sup>274</sup> See generally T.W. ADORNO ET AL., THE AUTHORITARIAN PERSONALITY (1950) (arguing that authoritarian syndrome is the result of nine personality traits developed through personal experiences and the social environment of the time).

<sup>275</sup> See generally BRUNO BETTELHEIM & MORRIS JANOWITZ, DYNAMICS OF PREJUDICE (1950) (discussing a research study of war veterans to determine the psychological and sociological factors behind racial and ethnic prejudice, and concluding that intolerance goes beyond the conditions of any specific year or world political constellation).

<sup>276</sup> That is, desiring bright lines, despising dirt and disorder, insisting on orthodoxy and obedience to lawful authority.

<sup>277</sup> See CHAVEZ, *supra* note 83, at 23–47 (describing how associations established at an earlier time may color a present response to a new person, such as a Latino).

<sup>278</sup> As William Walker once did. See *supra* notes 156–62 and accompanying text.

<sup>279</sup> That is, it excludes from consideration anything that does not conform to a pre-existing template. See George Yancy & Charles Mills, Opinion, *Lost in Rawlsland*, N.Y. TIMES (Nov. 22, 2014), <http://opinionator.blogs.nytimes.com/2014/11/16/lost-in-rawlsland/> (discussing a conversation with Dr. Mills in which Dr. Mills notes that members of a majority culture or race have “a vested group interest . . . in self-deception,” and giving as an example such a group’s firm belief that they, not minorities, are the group most likely to experience discrimination).

*In summary*, then, the Southern wave of nativism that broke out in the 1990s is rooted in history. But the way we think about the First Amendment and free-speech ideology deepened the region's predicament and made matters much worse than they would have been had free-speech law not suffered the tight grip of legal formalism.

As we have seen, this happened in four ways: (1) Formalism encouraged speakers to consider only a small number of ingredients of a balancing equation that should have been much more complex. (2) Earlier, it enabled hate speakers to demonize Latinos so that they and their defenders enjoyed little credibility in the public arena. (3) It obscured how past associations entered into current meanings. And (4) It encouraged the development of dogmatic, authoritarian personality types who promptly asserted control over the tenor and nature of the debate to the exclusion of wiser, more temperate views.

#### CONCLUSION

Formalist First Amendment jurisprudence, then, is not merely a case of treating in simplistic fashion matters that should be approached in their full complexity. It obscures the role of history in structuring argument and the way in which background meanings and associations influence and foreshorten contemporary discourse. It is a political strategy to enable law to side with the currently empowered and to feel virtuous at the same time. A formalist First Amendment facilitates coded speech whose meaning everyone in an audience immediately grasps. In the contemporary South, it enabled words and phrases like illegal, broke the law, steal our benefits and take our jobs to make more headway than they deserved.

To escape their sway, we explored in detail how forces calibrated one "dog whistle" centuries ago and how First Amendment formalism concealed how this happened, enabling legislators and ordinary citizens averse to immigration to control discourse, harm weak groups, and obscure self-interest in a relatively poor and rural region. In courthouses, formalism enables judges to make short work of cases that ought to be hard. With the hope that explaining how the First Amendment has the potential to combine with regressive politics, and in the hope of starting the process of reform, we have written this Article.