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Richard Delgado

*University of Alabama - School of Law*, [rdelgado@law.ua.edu](mailto:rdelgado@law.ua.edu)

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## BOOK REVIEW

### Rodrigo's Bookbag: Brimelow, Bork, Herrnstein, Murray, and D'Souza— Recent Conservative Thought and the End of Equality

Richard Delgado\*

ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER. By Peter Brimelow. New York: Random House. 1995. 384 pp. \$14.00.

SLOUCHING TOWARD GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE. By Robert H. Bork. New York: Regan Books. 1996. 400 pp. \$25.00.

THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE. By Richard J. Herrnstein and Charles Murray. New York: Free Press. 1994. 845 pp. \$30.00.

THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY. By Dinesh D'Souza. New York: Free Press. 1995. 724 pp. \$30.00.

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\* Jean N. Lindsley Professor of Law, University of Colorado Law School.

Rodrigo, his wife Giannina, and their straight man, "the Professor," meet in the latter's city, where the young people have gone for a wedding. After discussing a recent incident at Rodrigo's law school in which interlopers defaced the lockers of four students of color, the protagonists discuss changes and contractions in the social ideal of equality. Using as a springboard four recent books by conservative authors urging cutbacks in welfare, affirmative action, and immigration, Rodrigo puts forward the thesis that our national commitment to equality is inherently unstable in light of our embrace of principles of economic liberty. Not only are the two values on a collision course, they are internally inconsistent, Rodrigo argues, in light of the other. Without strenuous efforts to renew it, equality contracts—with biological theories of racial inferiority the final brutal fiction society fastens on to justify a deeply divided status quo.

# INTRODUCTION: RODRIGO TRACKS ME DOWN AT A BOOK STORE AND TELLS ME ABOUT AN INCIDENT AT HIS SCHOOL

I looked up from signing the flyleaf of my book when a familiar, smiling youth reached out to shake my hand.

"Rodrigo!<sup>1</sup> What on earth are you doing here?" I exclaimed.

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1. The son of an African-American serviceman and Italian mother, Rodrigo was born in the United States but raised in Italy when his father was assigned to a United States military base there. Rodrigo graduated from the base's high school, then attended an Italian university and law school on government scholarships. When the reader meets him, he has returned to the United States to investigate graduate law (LL.M.) programs. At the suggestion of his sister, veteran American civil rights lawyer Geneva Crenshaw (a character created in DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987)), he seeks out "the professor" for advice. Despite their age difference, the two become good friends, discussing many contemporary issues over the years. See generally Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) (discussing affirmative action and the decline of the West); Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993) (exploring law and economics); Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CAL. L. REV. 387 (1993) (contemplating love) [hereinafter Delgado, *Redemptive Tragedy*]; Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133 (1993) (discussing legal rules and racism) [hereinafter Delgado, *Neutrality and Stasis*]; Richard Delgado, *Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 STAN. L. REV. 1581 (1993) (critiquing normativity); Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639 (1993) (exploring relations between men and women of color) [hereinafter, Delgado, *Dilemma of Social Reform*]; Richard Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. REV. 721 (1994) (discussing enlightenment political theory); Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994) (considering black crime); Richard Delgado, *Rodrigo's Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence*, 68 S. CAL. L. REV. 545 (1995) (exploring narrative jurisprudence; the final chronicle in first cycle and final chapter of RICHARD DELGADO, *THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE* (1995)); Richard Delgado, *Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379 (1994) (discussing discrimination and the rule of law) [hereinafter Delgado, *Legal Instrumentalism*]; Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995) (debating affirmative action) [hereinafter Delgado, *Merit and Affirmative Action*]; Richard Delgado, *Rodrigo's Eleventh*

"Giannina and I drove down for a wedding.<sup>2</sup> I read about your tour and decided to track you down."<sup>3</sup>

"What a wonderful surprise! But where's Giannina?"

"At the rehearsal. She has a small part to play in the event tomorrow." Rodrigo craned his head sideways. "New book, I see."

"I asked the publisher to mail you a copy. I hope you like it. You're in it, actually."

"Oh?" Rodrigo looked up quizzically. "I think you're in Giannina's new play, too, although she hasn't let me see it yet. Hey, any chance you could join us for dinner?"

"I'd love to. Business is slowing down. I was supposed to sit here until five o'clock, but I'm sure I could leave a little early. When will Giannina be free?"

Rodrigo looked at his watch. "In about twenty minutes. We agreed to meet at a little place around the corner. If you have time, I'd love to get your opinion about an incident at my school."<sup>4</sup>

"No problem," I said, catching the store owner's attention and gesturing that I was taking off. "I have nothing scheduled until tomorrow morning."

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*Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61 (1996) (considering clinical theory and practice); Richard Delgado, *Rodrigo's Twelfth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667 (1997) (addressing the problem of disparately poor border settlements) [hereinafter Delgado, *The Problem of the Shanty*]; Richard Delgado, *Rodrigo's Thirteenth Chronicle: Legal Formalism and Law's Discontents*, 95 MICH. L. REV. 1105 (1997) (contemplating formalism) [hereinafter Delgado, *Legal Formalism*]; Richard Delgado, *Rodrigo's Fourteenth Chronicle: American Apocalypse*, 32 HARV. C.R.-C.L. L. REV. 275 (1997) (chronicling the recent right-wing surge) [hereinafter, Delgado, *American Apocalypse*]; Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997) (discussing racial mixture and assimilation) [hereinafter Delgado, *Black-White Binary*]; Richard Delgado, *Conflict As Pathology: An Essay for Trina Grillo*, 81 MINN. L. REV. 1391 (1997) (reflecting on alternative dispute resolution in an unnumbered tribute to the late Professor Grillo).

During this period, the brash, talented Rodrigo earns his LL.M. degree and embarks on his first teaching position. The professor meets Rodrigo's wife and soulmate, Giannina, and learns that Rodrigo's family immigrated to America via the Caribbean. His father, Lorenzo, looks black and identifies as such, but speaks perfect Spanish.

2. In Delgado, *Redemptive Tragedy*, *supra* note 1, and Delgado, *Dilemma of Social Reform*, *supra* note 1, I introduced Giannina, Rodrigo's life companion and soulmate. A published poet and playwright, Giannina recently enrolled in law school. See Delgado, *Legal Formalism*, *supra* note 1, at 1108.

3. Like Giannina and Rodrigo, the professor is an imaginary character and not to be confused with any person, living or dead. As I have created him, the professor is a civil rights scholar of color in the late stages of his career.

4. Rodrigo has been teaching law at a school in the Midwest since earning his LL.M. degree. See Delgado, *Legal Instrumentalism*, *supra* note 1, at 380-82 (reflecting on the job market); Delgado, *Merit and Affirmative Action*, *supra* note 1, at 1711-13 (recounting Rodrigo's experiences as a newly hired professor).

As we set out along the crowded sidewalk in front of the black-owned bookstore where I had spent the afternoon, I asked Rodrigo, "What happened at your school?"

"It's really quite appalling," Rodrigo replied. "Someone defaced the lockers of some students of color, including my own research assistant's.<sup>5</sup> I know this kind of thing happens all the time, but what's unusual is that this time the perpetrators got caught. One of them had a qualm of conscience after a town meeting called by the dean. He came forward and named his confederates."

"Sounds like a happy ending," I said. "Was any punishment imposed?"

"The hearing's next week. Three of them confessed and said they're sorry. I doubt they'll get more than a reprimand and some sort of community service. But the fourth—an undergraduate—is an interesting case. He refused to apologize, saying that he stands by his statements. He's citing *The Bell Curve* and Robert Bork's new book."

"Now I've heard everything," I said. "A defense of truth! This new crop of conservatives is getting brazen. Dinesh D'Souza, for example, observes that it's now acceptable to say things—about the genetic inferiority of blacks, for example—that were unthinkable a few years ago."<sup>6</sup>

"This must be the place," Rodrigo said, stopping to scan a menu posted on the window. "It's Ethiopian. Our friend says it's good and moderately priced."

"Sounds fine to me," I said. "Do they provide forks and knives, or will we be eating with our hands?"

"Looks like you have your choice," Rodrigo replied, peering through the glass.

We stepped inside. "Two for dinner?" the waiter asked. "Three," Rodrigo replied. "One will be joining us later."

Minutes later we were seated in a comfortable side booth in the homey restaurant. "I'll keep an eye out for Giannina," I said, indicating that I could see the door. "So, what do you think will happen to your unrepentant defacer?"

"It's anyone's guess," Rodrigo replied. "He's being represented by one of those conservative legal foundations.<sup>7</sup> They plan to make a test case out

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5. For a description of other such incidents in law schools and universities, see generally RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT* (1997).

6. See D'Souza, pp. 9-18 (describing the phenomena of "white backlash" and "liberal despair").

7. On the role of conservative think tanks and foundations in the race, IQ, and eugenics movements, see JEAN STEFANCIC & RICHARD DELGADO, *NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA* 33-44 (1996) (arguing that racial pseudo-science, like that popularized in *The Bell Curve*, can only be carried out with funding from elite conservative organizations).

of it, arguing that if the student had written 'Malcolm Lives' or 'Workers of the World, Unite,' nothing would have happened. And they're prepared to argue that what the four did write on the lockers—'Special Admit' and 'One Standard Deviation'—either was true or fell within the range of fair comment."<sup>8</sup>

"What do you know about the unrepentant one?"

"He has a minor position on the campus conservative paper that just started up last year.<sup>9</sup> They've been publishing a series of exposés on the black professors at my university, starting with the undergraduate division. It has created quite a stir. Now it looks like it's the law school's turn."

"I'm sorry to hear that," I sympathized.

"As bad as the whole incident has been, it's gotten me thinking about equality," Rodrigo said. "I've been reading those two books the defacer cited in his defense and have just picked up D'Souza's latest." Rodrigo pulled a thick red and black book from his backpack.

"Oh—*The End of Racism*.<sup>10</sup> I'm almost done with that one; the other two I've read. I remember that Bork offers his usual dyspeptic assessment of multiculturalism,<sup>11</sup> affirmative action,<sup>12</sup> and pop culture,<sup>13</sup> all of which he thinks herald the decline of civilization and the West. If you believe Bork, our only hope is to revitalize the culture and ideas that made Europe and the West great—competition, liberty, and respect for the classics.<sup>14</sup> It's unbelievable to me that Bork thinks the West has little to learn from other cultures, especially African ones,<sup>15</sup> which he seems to believe have produced no great music, science, or technology<sup>16</sup>—little except a good recipe or two," I

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8. "One standard deviation" refers to the supposed average difference in intelligence between whites and blacks. See Herrnstein & Murray, p. 276 ("In discussing IQ tests, for example, the black mean is commonly given as 85, the white mean as 100, and the standard deviation as 15.").

9. Conservative groups have poured substantial amounts of money into campus newspapers in an attempt to "bring conservative political thought to college campuses under the thrall of liberalism." STEFANCIC & DELGADO, *supra* note 7, at 110.

10. D'Souza's second book, *The End of Racism*, traces the origin of racism against blacks and other groups of color. D'Souza argues that liberalism—characterized by cultural relativism (the belief that all cultures are equal) and equality of result (the belief that absent prejudice and racism, all groups should be approximately equally successful in most competitions)—constitutes the main barrier to a just society today. For further description of *The End of Racism*, see text accompanying notes 27-38 *infra*.

11. See, e.g., Bork, pp. 226-30, 253-55, 306-07, 311-13 ("Multiculturalism is barbarism, and it is bringing us to a barbarous epoch.").

12. See, e.g., Bork, pp. 77-79, 231-43 (criticizing affirmative action as misguided and dangerous).

13. See, e.g., Bork, pp. 1-3, 23-24, 55, 123-30.

14. See, e.g., Bork, pp. 2-4, 61-65, 311, 336.

15. See, e.g., Bork, pp. 226-30, 306-07, 311-313 ("European-American culture is the best the world has to offer.").

16. See, e.g., Bork, pp. 248, 306-07, 311-13.

concluded, wryly indicating the menu both of us had been scanning with interest.

"It's frightening to think he could have been appointed to the Supreme Court," Rodrigo commented. "He takes every cultural difference as an indication of innate inferiority on the part of non-Western society," Rodrigo continued, gesturing at the diners next to us who were eating with their hands. "He just ignores that practices such as sitting on the floor, eating with one's hands, or praying five times a day may be fully adaptive within some other societies, and that our practices aren't necessarily better merely because they work for us."<sup>17</sup>

"And you've been reading the Herrnstein-Murray book, as well?" I coaxed.

"Rereading it, actually,"<sup>18</sup> Rodrigo replied. "Now that the undergraduate defacer has made an issue out of it, I thought I'd better have another look."

"It's a little subtler than Bork's," I offered. "But no less disparaging of other cultures."

"Indeed," Rodrigo said, raising a hand to let the waiter know we were ready to order. "Beginning with the premise that IQ is the prime determinant of success in a competitive society like ours,<sup>19</sup> Herrnstein and Murray reason that the gap in resources, education, jobs, and lifestyle between the bright and the less bright will only widen as the job market continues to change.<sup>20</sup> With the elimination of many blue collar jobs and the advent of an economy based on technology and information, the haves and the have-nots move further and further apart.<sup>21</sup> Since race and IQ are linked, according to Herrnstein and Murray,<sup>22</sup> we are doomed to live in a society increasingly split along racial lines.<sup>23</sup> They conclude by warning that America will soon have a seething, crime-ridden underclass unable to find meaningful work and speculate that we may have to wall off the inner city in what they call a sort of 'high tech and more lavish version of the Indian reservation.'<sup>24</sup> The implication, though, is that the 'reservation' will be for those, mostly colored peoples, with low IQ. The whole premise is outrageous."

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17. For additional criticism of Bork's analysis, see Thomas E. Baker, *Bob Bork's Amerika*, 44 UCLA L. REV. 1185, 1197-98 (characterizing the book as superficial and amateurish).

18. See Delgado, *Merit and Affirmative Action*, *supra* note 1, at 1744 n.115 (discussing same volume).

19. See, e.g., Herrnstein & Murray, pp. 25, 51-89, 92-105.

20. See, e.g., Herrnstein & Murray, pp. 25, 51-89.

21. See, e.g., Herrnstein & Murray, pp. 51-89.

22. For a criticism of this proposition, see generally Stephen Jay Gould, *Curveball*, THE NEW YORKER, Nov. 28, 1994, at 139 (arguing that Herrnstein and Murray confused well-proven heredity within groups with dubious assertions about hereditary differences between groups).

23. See, e.g., Herrnstein & Murray, pp. 269-315.

24. Herrnstein & Murray, p. 526; see also Herrnstein & Murray, pp. 523-26.

"Unbelievable," I replied. "It reminds me of Peter Brimelow's suggestion that we cordon off the entire Mexican border.<sup>25</sup> Oh, here's our waiter."

Rodrigo ordered a kabob for himself and a savory-sounding lamb dish for Giannina. After some deliberation, I ordered my usual vegetable curry ("Doctor's orders—I'm supposed to cut down on meat"), and the waiter departed.

"And so, you're also reading D'Souza," I continued. "What do you think about his position?"

"I'm nearly finished," Rodrigo replied. "Like Bork, he argues for a color-blind society,<sup>26</sup> but with a twist. Writing that diversity, affirmative action, and multiculturalism are all forms of racism, he urges his readers to refrain from enshrining difference in government programs of any sort.<sup>27</sup> In addition to reasons of principle, D'Souza argues against multiculturalism on practical grounds.<sup>28</sup> Like Bork, he believes that other societies have little to offer the West.<sup>29</sup> According to D'Souza, the best way to integrate nonwhite groups into society is to encourage them to give up their attachment to 'inferior' cultures and fully embrace the Western version as earlier immigrant groups have done."<sup>30</sup>

"That also reminds me of Peter Brimelow," I said. "Maybe they were members of the same study group."

Rodrigo laughed. "It is a little like Brimelow, although D'Souza focuses mainly on American blacks, not on immigrants from Mexico and Latin America. And he differs from Brimelow and the others in that he outlines the case against racism toward blacks—albeit only as a way of challenging preferences in any form.<sup>31</sup> In the early part of his book—you know, where he reviews the history of racism—he expounds some highly dubious premises of his own, such as that African society was backward and savage<sup>32</sup> and that slave traders may have done blacks a favor by forcibly bringing them here.<sup>33</sup> He's generally careful not to impute biological inferiority to Africans and other minority groups, at least conclusively.<sup>34</sup> In that sense, he's a little kinder than the others.<sup>35</sup> But he leaves no doubt that he considers black cul-

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25. See Brimelow, pp. 236-37, 259.

26. See, e.g., D'Souza, pp. ix, 206, 528-37, 551.

27. See, e.g., D'Souza, pp. 23, 206, 290-94.

28. See, e.g., D'Souza, pp. 326-336, 342-60.

29. See, e.g., D'Souza, pp. 118-20, 151-56, 337-86.

30. See, e.g., D'Souza, p. 556.

31. See, e.g., D'Souza, pp. 25-65, 289-336, 551.

32. See, e.g., D'Souza, pp. 51-56. For D'Souza, "[i]t is impossible, even for scholars hostile to the West, to deny the civilization gap." D'Souza, p. 54.

33. See, e.g., D'Souza, pp. 88-91, 102, 112-13.

34. See, e.g., D'Souza, pp. 24, 435-37, 454, 475-76.



ture inferior to the European kind<sup>36</sup> and believes that programs that ignore this inferiority simply perpetuate it in a new kind of racism."<sup>37</sup>

"Oh, there she is!" I said, half-standing and waving to the dark-haired young woman who had entered the restaurant and was looking around. "Giannina—over here."

"Perfect timing," Rodrigo said, giving his wife a warm hug. "I was worried we had ordered too early. How was the rehearsal?"

"Fine. They liked my poem," Giannina replied. Then, giving me a smile and quick peck on the cheek, "How's your tour been going?"

"Great this morning, and then it slowed down just in time for me to spend some time talking to Rodrigo."

"About the controversy at his school, I bet."

"Yep," I replied. "And also about the three books he's been reading, all by conservative authors."

"Oh, Bork, Herrnstein, and, what's the other one?"

"D'Souza," I responded. "Have you read it?"

"No, he's been hogging it ever since we got it last week. He says he needs to read it before the hearing."

"I'm nearly finished," Rodrigo said, guiltily. "I promise I'll let you have it by this weekend. Brimelow, too, if you want it."

"Thanks, but I've already read him, and once was enough. Although they were hailed by conservatives when they first came out, all four books have proved controversial.<sup>38</sup> I kept thinking, 'wait a minute,' after practically every sentence. They're tough going for someone of my persuasion. Hey, are those for us?" Giannina asked, as the waiter put a series of savory-smelling dishes before us. "Lamb kabobs, my favorite!"

After a few minutes in which we ate in silence, Rodrigo looked up. "This whole business—the incident at the law school and the flurry of con-

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35. Compare D'Souza, pp. 435-37, 454, 467-69 (implying that *The Bell Curve* might be right and that biological differences may explain whites' superior IQ scores), with Brimelow, p. 56 (disagreeing with *The Bell Curve*, but noting that current immigration policy would be "far more disastrous" if Herrnstein and Murray were right).

36. See, e.g., D'Souza, pp. 24, 51-54, 484, 527, 556.

37. See, e.g., D'Souza, pp. 23, 290-91, 528, 537.

38. See, e.g., Richard B. Darlington, *On Race and Intelligence: A Commentary on Affirmative Action, The Evolution of Intelligence, The Regression Analyses in The Bell Curve, and Jensen's Two-Level Theory*, 2 PSYCHOL. PUB. POL'Y & L. 635 (1996) (taking issue with the tenets and reasoning of various authors attempting to demonstrate racial differences in intelligence); Garrett Epps, *Slouching Toward Gomorrah: Modern Liberalism and American Decline*, THE NATION, Jan. 27, 1997, at 25; Ronald P. Formisano, *The End of Racism*, 16 J. AM. ETHNIC HIST. 110 (1997) (criticizing D'Souza for overstatement and "slight-of-hand prose"); Gould, *supra* note 22 (criticizing the premises of *The Bell Curve*); Charles Lane, *The Tainted Sources of The Bell Curve*, N.Y. REV. BOOKS, Dec. 1, 1994, at 14.

servative books—has got me thinking about the role of equality in our society.”

“I’m all ears,” I said.

“Me, too,” said Giannina. “But before you start, I hope you don’t mind ushering tomorrow. One of the wedding party came down with the flu.”

Rodrigo took a big draught of his tea, commented good naturedly that that was the least he could do since he couldn’t write poetry, and began:

### I. RODRIGO’S FIRST THEORY: SURPLUS EQUALITY—THE CASE OF AFRICAN AMERICANS

“The basic problem is that we’re stuck with constitutional guarantees of equality that are becoming increasingly inconvenient, even embarrassing. You can already see some aspects of this retrenchment in the courts.”

“I assume you mean all the recent changes in equal protection doctrine,” I interjected. “Like the new, tougher intent requirements,<sup>39</sup> tighter proof of causation,<sup>40</sup> and manipulation of standing<sup>41</sup> and res judicata law,<sup>42</sup> among others<sup>43</sup>—all of which make it harder for blacks and others to sue for discrimination?”

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39. See *Washington v. Davis*, 426 U.S. 229, 239-42 (1976) (holding that courts may not find state action to be in violation of plaintiffs’ equal protection rights solely on a showing that the action had racially discriminatory effects; the plaintiffs need to make an additional showing of a racially discriminatory purpose behind the challenged state action).

40. See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657-58 (1989) (holding that plaintiffs must demonstrate a specific causal link between challenged employment practices and disparate hiring results before a court may find liability under Title VII of the Civil Rights Act of 1964). *Ward’s Cove* was codified in the Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-75 (codified as amended at 42 U.S.C. § 2000e-2(k) (1994)). Cf. *Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986) (holding that, where a government official is merely negligent in causing the injury, no procedure for compensation is required by the Due Process Clause); *Daniels v. Williams*, 474 U.S. 327, 332-33 (1986) (same).

41. See *Allen v. Wright*, 468 U.S. 737, 752-53, 766 (1984) (holding that plaintiffs lacked standing to bring a class action lawsuit against the Internal Revenue Service alleging that the agency’s procedures were not effective in preventing racially discriminatory schools from receiving tax-exempt status).

42. See *Martin v. Wilks*, 490 U.S. 755, 761-62, 769 (1989) (holding that a litigant is not precluded from challenging employment decisions taken under a consent decree formulated in a case in which the litigant was not a party). *Wilks* was extensively modified by Congress. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 108, 105 Stat. at 1076-77 (codified as amended at 42 U.S.C. § 2000e-2(n) (1994)) (providing that litigants may not challenge “an employment practice that implements and is within the scope of a litigated or consent judgment or order” so long as the litigants had actual notice of the judgment or order and a reasonable opportunity to present their objections).

43. See *Miller v. Johnson*, 515 U.S. 900 (1995) (invalidating race-based redistricting); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (applying strict scrutiny review to federal affirmative action program designed to benefit minority contractors); *Missouri v. Jenkins*, 515 U.S. 70 (1995) (erecting practical hurdles for school desegregation efforts); *Shaw v. Reno*, 509 U.S. 630 (1993) (invalidating race-based redistricting).

"Yes, but the phenomenon reaches beyond the courts," Rodrigo said. "Decisions like the ones you mentioned are just the surface manifestations of something deeper."

"Namely?" Giannina asked, leaning forward.

"All the little, incremental cutbacks are only the tip of the iceberg. Conservatives in think tanks and foundations have begun to see the commitment to equality, enshrined in the Declaration of Independence and three constitutional amendments, as an inconvenience, an anachronism, a little bit like the Second Amendment.<sup>44</sup> Meanwhile, our system is in the process of forsaking that commitment."

"Forsaking it altogether?" I exclaimed. "I hope you have some documentation, Rodrigo! For someone like me, who has dedicated his entire life to working for civil rights and racial justice, that's a stunning indictment. If you're right, I might as well pack up and go home."

"I wouldn't go that far," Rodrigo replied. "But we should know what we're fighting against. I don't mean to be dispiriting."

"Forget the dispiriting part. If it's true, it's true, and we'll just have to deal with it. Let's hear your evidence."

"My thesis breaks down into two parts, corresponding to separate mechanisms for attenuating the equality guarantees. The first shows how equality in our system is inherently and necessarily unstable. Without strenuous efforts, it fades over time. The second explains how we are shrinking the very notion of equal citizenship. The two mechanisms correspond, roughly, to blacks on the one hand, and Latinos on the other—although they overlap. Indeed, they work together in an unholy alliance. The latter even constricts equality of opportunity. Are you ready?"

Giannina and I both nodded emphatically. Rearranging his dishes slightly to give himself more room, Rodrigo began:

#### A. *Rodrigo's Theory*

"Have you two heard of the theory of surplus value?" Rodrigo asked.

Giannina and I looked at each other. "Of course," she replied. "Attributed to Karl Marx, it holds, in one version at least, that in any closed system, such as a factory, capitalism is on a collision course with itself.<sup>45</sup> Because

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44. The Second Amendment guarantees the people the right to bear arms and is "[t]o put it mildly . . . not at the forefront of constitutional discussion." Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 639 (1989).

45. For general introductions to the theory of surplus value, see V.I. LENIN, INTRODUCTION TO MARX, ENGELS, MARXISM 43-44, 70-77 (Int'l Pub. ed. 1987); 2 ENCYCLOPEDIA OF ETHICS 766-67 (Lawrence C. Becker & Charlotte B. Becker eds., 1992); Donald F. Gordon, *Value, Labor Theory of*, 16 INT'L ENCY. SOC. SCI. 279-82 (David L. Sills, ed. 1968). For Marx's original version, see 1 KARL MARX, CAPITAL 179-85, 207-30, 312-21, 508-18, 566-68, 591-98, 618-21 (Sam-

the owner of a plant takes out a certain percentage as profit, believing himself entitled to it as a return on his investment, not enough money is paid out in wages for the workers to buy the products they make.<sup>46</sup> On a larger scale, this is true of countries, as well. That's why capitalism inevitably leads to disparities of wealth and, eventually, colonialism. According to Marx and Engels, capitalist societies must take over new countries to serve as markets and sources of raw materials and cheap labor.<sup>47</sup> Otherwise, everything collapses. Of course, capitalism proved more resilient than they thought.<sup>48</sup> Still, Marx's theory—while discredited in some quarters—is widely regarded as one of the four or five most powerful ideas in all social science. It supplied the theoretical rationale for socialism and paved the way for the modern labor movement, as well as other important reforms of the social-welfare state.”<sup>49</sup>

Giannina paused, so I turned to Rodrigo, “What does this have to do with the host of recent books promoting theories of racial inferiority, such as *The Bell Curve*? I gather you think there's some connection.”

“Have you ever considered Marx's theory might have an analog?” Rodrigo asked.

“You mean a theory of some other kind of surplus?”

Before Rodrigo could answer, the waiter interrupted to ask how we were enjoying our meals. I noticed a slight accent in his English. We nodded—“Fine.” As he departed, Giannina quipped, “I think we definitely have a theory of culinary surplus. These portions are huge. I'm afraid I'm going to have to take half of mine home.”

“I can help you finish it later, if you like,” Rodrigo volunteered. Giannina rolled her eyes at the famous appetite of her rail-thin husband, who shrugged and then continued as follows:

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uel Moore & Edward Aveling trans., Frederick Engels ed., 6th ed. 1974) (on theory of surplus value and class struggle); 2 *id.* at 319-50 (same).

46. See, e.g., LENIN, *supra* note 45, at 76-77; Gordon, *supra* note 45, at 279, 282. On the way, capitalism has adapted by providing welfare protections. See, e.g., 3 *ENCYCLOPEDIA OF SOCIOLOGY* 1203 (Edgar F. Borgatta & Marie L. Borgatta eds., 1992) (noting that modern capitalism walks a tightrope in an effort to allow capital accumulation while managing its negative effects).

47. On capitalism and expansionism, see text accompanying notes 63-65 *infra*; 2 MARX, *supra* note 45, at 177-98; KARL MARX, CAPITAL, THE COMMUNIST MANIFESTO, AND OTHER WRITINGS 324 (Max Eastman ed., 1932).

48. See Gordon, *supra* note 45, at 279-82.

49. See LENIN, *supra* note 45, at 57, 68-69; John Kenneth Galbraith, *A Message for the Socially Concerned*, TORONTO GLOBE AND MAIL, Jan. 17, 1997, at A-15; see also MARX, *supra* note 47, at 330.

## B. *The Relation of Liberty and Equality in Welfare Capitalism*

"My theory has to do with the relationship between equality and liberty. Everyone knows we have a liberty-based system that, in the economic sphere at least, is committed to freemarket capitalism.<sup>50</sup> Yet we are also committed to equality. The Declaration of Independence holds that all men are created equal.<sup>51</sup> The Constitution requires equal treatment of citizens in voting, political representation, and other areas."<sup>52</sup>

"Yes, and many people recognize that the two values interfere with each other, to some extent,"<sup>53</sup> Giannina interjected.

"True," Rodrigo acknowledged. "But what few realize is that each is *internally* inconsistent, in light of the other. As we mentioned earlier, Marx theorized that capitalism is on a collision course with itself. If he and his followers are right—which is not self-evident—profit cannot maximize itself without contradiction."<sup>54</sup>

"That's the theory of surplus value," I said. "And I gather you think something similar checks promotion of equality?"

"Yes. I call it the theory of surplus equality."

"Surplus equality?" Giannina said, with a skeptical look. "I assume you mean something more than the idea that too much leveling—through taxation for example—is bad for free enterprise?"

"I do," Rodrigo replied evenly. "And that's where the three books we were discussing a minute ago come in. My theory is that our society must rationalize a larger and larger disparity—measured by the difference between equality of results and equality of opportunity. Because we want to believe that our country gives every person an equal chance to succeed, we must justify social stratification on other grounds. We turn to genetics since it al-

50. See, e.g., ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (R.H. Campbell & A.S. Skinner eds., 1976) (providing Smith's theories on division of labor, capital production, and economic growth).

51. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

52. See U.S. CONST. amends. XIV, XV; *Reynolds v. Sims*, 377 U.S. 533, 561-68 (1964) (holding that it is a violation of the Equal Protection Clause to apportion voting districts so that each voter's vote does not count equally); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting the need for strict judicial scrutiny of legislation directed at "discrete and insular" minorities in order to guard against majoritarian oppression).

53. That is, practically every measure aimed at protecting one person's equality (either of opportunity or result, but especially the latter) will interfere with someone else's liberty, and *vice versa*.

54. See text accompanying notes 45-50 *supra* (discussing internal contradictions in capitalism that can only be resolved by restless expansion and the acquisition of new colonies). On the theory that capitalism is doomed to suffer periodic crises, see 1 MARX, *supra* note 45, at 699, 733-39; MARX, *supra* note 47, at 333-34. See also *id.* at 334, 339 (explaining, in question-and-answer format, how principles of socialism are designed to work together).

lows us to explain why whites hold most of the wealth.<sup>55</sup> People can then say that whites deserve to keep their wealth and power. People can claim that—after all—whites are *biologically* superior.”

“Hmmm,” I said. “I think I need to hear more. I read that the U.S. just overtook Great Britain as the most divided society in the Western world.<sup>56</sup> Even Bork noted this.<sup>57</sup> And we’ve certainly seen a great deal of blaming of the poor for their own condition, with tales of welfare abuse, stories of Mexicans crossing the border to have babies, and of course, the books you mentioned.<sup>58</sup> But isn’t this just a more or less inevitable consequence of deregulation and the more laissez-faire economy the public seems to want?”

“I think it’s more basic than that, so that even if the Democrats took over Congress, the situation would be difficult to reverse. Do you remember what we said about pro-rata equality—equality of results?”

“Yes, the notion that economic success and failure should be spread equally among all groups of people—that’s the kind of equality conservatives love to hate,” I said.<sup>59</sup> “They much prefer the other kind, equality of opportunity, since it enables them to rationalize disparities in wealth and lay blame at the doorstep of poor people’s work habits and family structures. But I still don’t see why you think our national commitment to equality is on a collision course with itself. Isn’t the deplorable state of the inner city only contingently, not necessarily, the case? It might right itself if we all worked harder.<sup>60</sup> We could resist what the conservatives are saying. We could create social supports for the poor to decrease disparities in wealth and increase equality.”

55. See STEFANCIC & DELGADO, *supra* note 7, at 33–44 (detailing upsurge in eugenic theories of race and racial inferiority).

56. See Keith Bradsher, *Gap in Wealth in U.S. Called Widest in West*, N.Y. TIMES, Apr. 17, 1995, at A1 (calling disparities in wealth in United States the greatest of any Western industrialized society).

57. See Bork, p. 69.

58. See Bork, pp. 158–71; Brimelow, p. 4 (calling births to immigrant mothers “a minor industry”); Brimelow, p. 149 (calling birthright citizenship a “welfare loophole”); D’Souza, pp. 477–524 (describing the “pathologies” of black culture); Herrnstein & Murray, pp. 522–25 (describing the emergence of the welfare state); STEFANCIC & DELGADO, *supra* note 7, at 82–95 (illustrating the attack on the poor). See generally IMMIGRANTS OUT! NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed., 1996) [hereinafter IMMIGRANTS OUT!] (compilation of articles describing the advent of modern nativism).

59. See, e.g., Bork, pp. 10, 54 (distinguishing between equality of opportunity and equality of results); D’Souza, pp. 160–70, 290–91 (criticizing commentators who advocate using color-conscious mechanisms to achieve equality of results). See also text accompanying notes 70–71 *infra*. On the origins of, and the Framer’s ambivalence over, equality of opportunity, see ROBERT L. HAYMAN, JR. THE SMART CULTURE 27–97 (1998) (describing the debate among Pinckney, Madison, Hamilton, Jefferson, and John Adams over whether the Constitution ought to contain a substantive, or merely procedural, equality guarantee).

60. For example, consider the Clinton administration’s recent call for every church to hire one unemployed person. See Jeannette Keton, *Churches Can’t Help Until Members Do*, DALLAS MORNING NEWS, Mar. 21, 1997, at A29.

"I wish it were so," Rodrigo replied. "But my theory says it's unlikely. Instead, the plight of the indigent will worsen over time, so long as our system is committed to both equality and free-enterprise capitalism. Just as the gap between workers and capital will continue to grow, our commitment to equality for nonwhite groups and the poor will, ironically, assure their continued degradation."

"Our commitment to *equality* will assure their continued degradation?" Giannina replied. "I think you need to spell things out a little more."

C. *How Our National Commitment to Equality Necessitates Increasing Dehumanization of the Poor and, Ultimately, Biological Theories of Inferiority*

"Here's the idea," Rodrigo began. "Our society is supposed to be equal. That is, everyone is supposed to have a decent level of comfort, not too far below what others have.<sup>61</sup> But that cannot happen: Free-market capitalism and the profit motive cause society to become more and more stratified over time.<sup>62</sup> Industrialized nations must colonize;<sup>63</sup> workers cannot purchase what they make, and so on."

"Every system must have winners and losers," I pointed out.

"Do they?" Giannina queried. "Can't all systems, including capitalist ones, try to combat stratification by adopting antitrust laws, welfare and social security programs, and progressive tax rates? Haven't we, in effect, done this?"

"To a degree," Rodrigo conceded. "But the disparity continues to grow, flying in the face of our *other* great national ideal—equality. Looking around us, we see cities full of gangs, deteriorating buildings, crack houses, and schools so demoralized that teachers transfer out as soon as they get enough seniority. How can this happen in a nation that prides itself on providing equality? We can only explain it by blaming the poor. We coin physical or cultural theories of their inferiority,<sup>64</sup> asserting that the poor must

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61. See, e.g., Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (arguing that the Court often seeks to protect citizens from the hazards posed by poverty); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659 (defending his theory that Americans have "constitutional rights to provision for certain basic ingredients of individual welfare, such as food, shelter, health care, and education").

62. See text accompanying notes 43-45 *supra*. See generally KEVIN PHILLIPS, *THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH* (1990) (discussing the "triumph of upper America" during the Reagan administration).

63. For a summary and critique of the leading economic theories of imperialism, see MICHAEL BARRATT BROWN, *THE ECONOMICS OF IMPERIALISM* 305-29 (1974).

64. See D'Souza, pp. 467-68; Herrnstein & Murray, pp. 253-95; STEFANCIC & DELGADO, *supra* note 7, at 33-44.

not want to work or to take advantage of their opportunities.<sup>65</sup> We assign an increasing degree of inferiority to them precisely as our society becomes more and more stratified. 'They do not *deserve* to be equal,' we tell ourselves, 'because they are not really like us. Something is wrong with them.' There must be, precisely because of our commitment to the second great ideal—equality."

"Are you saying the poor are worse off in a system like ours that believes in equality for all?" Giannina asked.

"Yes," said Rodrigo. matter-of-factly, "considerably worse off than they would have been in a system that emphasizes just one or the other value. Capitalism requires an underclass.<sup>66</sup> It requires colonies to exploit.<sup>67</sup> Yet our commitment to equality makes us intensely anxious when this happens. The development of an underclass implies that our ideology may be false, that maybe everyone really doesn't have an equal chance to achieve and rise. But we refuse to confront this possibility, instead labeling those others as inherently inferior, as unable to rise, no matter what. That way we can still pretend to embrace both free markets and equality. Thus, my theory of surplus equality is that more equality inheres in our national principles than can be accommodated at any time. Someone—usually blacks and Latinos—must end up constructed as unequal."

"And by virtue of their makeup," I added, shaking my head sadly.

"Right," Rodrigo replied. "If the group were merely contingently poor and miserable, that would stand as a contradiction to our commitment to equality. We would have deserving, energetic, ambitious, intelligent people—much like us—who were starving and desperate. This we could not have. Our commitment to equality would force us to tax ourselves radically to alleviate their plight, if we could not explain it away by dismissing them as inferior, lazy, undeserving, lascivious, not very intelligent, and so on."<sup>68</sup>

"Which we have done," Giannina added.

"Let me see if I understand you," I said. "You say that equality, in the aspirational sense—equality of result—is the very source of inequality, that the very commitment to it injures minorities because our system is capitalist

65. See D'Souza, pp. 472-524 (describing a supposed culture of poverty within the African American community).

66. See texts accompanying notes 46-50 & 55-61 *supra*.

67. See texts accompanying notes 46-47 & 63-64 *supra*.

68. 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, 1261-75 (1992) (describing the history of derogatory cultural depictions of minorities in America). Compare D'Souza, pp. 487-524 (arguing that insistence on the equality of all cultures—when one is so obviously dysfunctional—calls the struggle for civil rights into disrepute), with REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM* (1981) (arguing that the age-old use of racism as a rationalization for empire is at its most virulent in a system, like ours, that is committed to fairness and equality).



and expansionist, and whites got here first.<sup>69</sup> We cannot mistreat our underclass without finding them innately, biologically inferior, and not like us.<sup>70</sup> So they end up worse off than they would be if we had no such commitment."

"Nations without a commitment to radical egalitarianism have been much kinder to slaves and prisoners of war," Rodrigo pointed out.<sup>71</sup> "Some of the great military societies of the ancient world made far better use of their captives for precisely this reason.<sup>72</sup> They could assign them responsible jobs, such as tutoring the captors' children, because they did not need to deem them innately inferior. Having no commitment to equality, they could cheerfully exploit without having to disparage and demonize.<sup>73</sup> But because free market economics causes inequality to accelerate over time, we are compelled to assign more and more traits of hopeless inferiority to the losers in our midst. Just as early Industrial Revolution era societies required colonies, today's society requires books like *The Bell Curve* that tell us the poor are that way because of *who* they are. We get to hold onto our belief in democracy and sleep well at night, too," Rodrigo concluded.

"And the beauty of it," I added, "is that the Equal Protection Clause remains perfectly intact. We can continue to pay it homage even in the face of deepening social division, poverty, and racial animosity. And the reason is that we tell ourselves equality doesn't mean literally giving everyone the same amount—say, \$30,000 a year. Rather, it means giving that other person what he or she is due."<sup>74</sup>

"Equality of opportunity," Giannina emphasized.

"Precisely," I continued. "We tell ourselves that equality only guarantees that people will receive what they deserve because of their merit, intelligence, energy, and resourcefulness.<sup>75</sup> And then we arrange it so that this quantum decreases over time as distributive inequality increases because of capitalism—because of what is happening on the other side of the value divide."

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69. At least, whites conquered the Americas first, using Western legal thought to legitimate their dominance over the native people. See, e.g., ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 6-8 (1990).

70. That is, we cannot do so without violating our commitment to rough equality and a decent level of comfort and wealth for all.

71. See Delgado, *Merit and Affirmative Action*, *supra* note 1, at 1729-30.

72. See *id.*

73. See *id.*

74. Cf. D'Souza, p. 193 ("[T]he Fourteenth Amendment was not intended to grant and does not grant an unrestricted right to equality.").

75. See Bork, pp. 226-49; D'Souza, pp. 151-68, 528, 533; Herrnstein & Murray, pp. 25, 90-105; see also Richard H. Fallon, Jr., *To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination*, 60 B.U. L. REV. 815 (1980) (discussing the role of merit as a principle of distributive justice).

"Two precisely counterpoised values, each with interlocking internal contradictions," Rodrigo mused.

"And the pair maintained nicely in balance through a system of popular imagery, books, novels, jokes, stories, and other narratives,"<sup>76</sup> Giannina observed. "In a more generous time, the public image of the minority was that of noble warrior, like Martin Luther King, Cesar Chavez, or Malcolm X."<sup>77</sup>

"That was when the pie was expanding," Rodrigo continued. "Now there's not enough to go around, and so elite groups make sure that if anyone suffers, it won't be they. But because our system is geared toward equality, they can't straightforwardly pass laws and measures that hurt the poor and working classes. They have to demonize them first, show they are not deserving of what one might think a person should have in an advanced, affluent society like ours."<sup>78</sup>

"But, Rodrigo," I interjected. "I still can't see how having a social commitment to equality can be anything but good. Suppose you could live in either of two societies. Society A has a commitment to equality. Its constitution contains an equal protection clause. Society B has no such thing. As a person of color, where would you prefer to live?"

"In society B, all other things being equal," Rodrigo replied. "This assumes that both societies are capitalist and have an economic system based on free market principles, as opposed to, say, socialism."<sup>79</sup>

"Okay," Giannina responded. "But even accepting those assumptions, aren't blacks and Mexicans better off in society A because if they are discriminated against, they can go to court, invoke the national values, and gain redress?"

"In theory, yes," Rodrigo replied. "Although Mexicans will have difficulty winning such suits due to something I call the black-white binary. Mexicans in America occupy a sort of never-never land. Not really considered a minority, they are nevertheless subject to discrimination in housing, education, employment, and a host of other areas."<sup>80</sup>

"You're part Latino," I said to Rodrigo. "You once told me that even though you look black and identify as such, your father's family immigrated here via the Caribbean and still speaks perfect Spanish."<sup>81</sup> Assuming you identify with your Latino roots as well, maybe you can give us your thoughts about equality and this group."

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76. See Delgado & Stefancic, *supra* note 68, at 1261-75.

77. See *id.* at 1266-67.

78. See generally HORSMAN, *supra* note 68.

79. See text accompanying notes 45-47 *supra*.

80. See Delgado, *Black-White Binary*, *supra* note 1, at 1184-89; Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571, 573 (1995).

81. See Delgado, *The Problem of the Shanty*, *supra* note 1, at 673.

"I will," Rodrigo promised. "But if I could first return to your point, Giannina, about legal redress, consider the following: A black person comes to court trying to prove discrimination. He has a Ph.D., an M.D., and credentials exceeding those of Bill Cosby's fictional hero of TV fame. This paragon has been denied a position for which he is amply qualified, and a white person was picked instead. What happens?"

"I suppose you are going to say the black superstar loses," Giannina said. "But why? Is the judge biased?"

#### D. *How the Dehumanization Is Effected*

"He or she doesn't have to be, at least in any conscious sense," Rodrigo replied. "And the same goes for the jury, the attorneys, the witnesses, and all the other participants in the event. Each has been raised in our culture, which has ingrained in their psyches a host of images, pictures, and narratives that render the black superstar one-down.<sup>82</sup> Maybe he is good, but too pushy. Maybe he got where he is by affirmative action. Maybe he applied for the position to make trouble—he wanted a lawsuit, not a job.<sup>83</sup> Maybe the white candidate was actually superior, and the black one a spoiled affirmative action baby who can't take disappointment.<sup>84</sup> And where do all these pernicious images come from?" Rodrigo cued, watching us expectantly.

"From the broader society?" I ventured. "From the system of free expression that enables moviemakers, utterers of hate speech, cartoonists, and others to trade at blacks' expense?"<sup>85</sup>

"Yes. And this has been picking up lately, gaining in virulence and incessancy . . ."

"Because of your paradox," Giannina and I both said at the same time, then laughed. I motioned to her continue. She then elaborated, "Because our system produces increasingly greater gaps in wealth and comfort, with folks of color at the bottom, courtesy of racism. Then the theory of surplus equality kicks in. It's like Zeno's paradox, but in reverse.<sup>86</sup> The distribution of

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82. See Delgado & Stefancic, *supra* note 68, at 1261-67, 1275-79, 1284-88.

83. See *id.* at 1267 (giving examples of contemporary images of pushy minorities).

84. Cf. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2418-35 (1989) (presenting five versions of the same event—a minority candidate's rejection for employment).

85. See Delgado & Stefancic, *supra* note 68, at 1284-88 (describing how rights to free expression enable filmmakers, cartoonists and others to disseminate derogatory images of blacks to the public).

86. One of the puzzles attributed to the ancient Greek philosopher Zeno, this particular paradox holds that to traverse any distance, say A to B, one must first cover half the distance. Then, having arrived at the midpoint of the passage, one must again arrive at the midpoint of the remaining distance, and so on. The number of such (increasingly short) minitrips is infinite, hence travel is theoretically impossible. The predicament of the poor of color in a system like ours, based on

goods and wealth becomes so different from what formal equality would dictate that we need to construct the losers as inherently inferior.<sup>87</sup> That way they really aren't equal, cannot legitimately expect a fair share, and should be happy with what they have."

"Dinesh D'Souza says that the institution of slavery did the slaves a favor," I recalled.<sup>88</sup> "A few years ago, it would have been unthinkable to say something like this. Today, hardly anyone bats an eye."<sup>89</sup>

"Not to mention the other books we were talking about, and yet others in the same vein,"<sup>90</sup> Rodrigo added. "Plus an increasing tide of hate speech on campuses and attacks by the right on programs like diversity, affirmative action, political redistricting, and school desegregation."<sup>91</sup>

"Precisely what your theory would predict," I agreed, a little reluctantly.

We were all silent a moment, absorbing the bleak quandary Rodrigo had so remorselessly painted for us. The waiter arrived to clear our dinner plates. "Would you folks like some dessert?"

"I think we'd like to see the menus, right?" Rodrigo answered, raising his eyebrows at Giannina and me. The waiter placed three dessert menus in front of us and began clearing the dishes. "I think I'll have the lemon sorbet," Giannina said.

"The flan for me," Rodrigo added.

"The same," I said. Then, after a short pause, I asked, "You know, Rodrigo, you and I were talking about something similar once before. Do you recall our discussion of free speech and the First Amendment?"<sup>92</sup>

"I do."

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free market capitalism, shares this quality: The more wealth the system creates, the greater the spread in income and resources. The greater this spread, the greater the need to blame the losers for their lot, and so on, indefinitely.

87. The only way we can satisfy equality of opportunity is to characterize the poor as inferior and thus undeserving. See, e.g., Herrnstein & Murray, p. 25 (positing that, in a competitive society, the less talented tend, over time, to congregate at the bottom).

88. See D'Souza, pp. 112-13.

89. See, e.g., DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* (1991) (arguing that affirmative action does not benefit students of color).

90. See, e.g., SEYMOUR W. ITZKOFF, *THE DECLINE OF INTELLIGENCE IN AMERICA: A STRATEGY FOR NATIONAL RENEWAL* (1994) (arguing that the United States is creating a population of permanently poor Third World Americans from the lower end of the intellectual scale); J. PHILIPPE RUSHTON, *RACE, EVOLUTION, AND BEHAVIOR: A LIFE HISTORY PERSPECTIVE* (1995) (arguing that substantial racial differences exist in traits such as intelligence, aggressiveness, and reproductive behavior).

91. See generally STEFANCIC & DELGADO, *supra* note 7 (discussing the conservative revolution); Richard Delgado, *Stark Karst*, 93 Mich. L. Rev. 1460 (1995) (reviewing KENNETH L. KARST, *LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION* (1993), and discussing the growing power of the new right).

92. See Delgado, *Merit and Affirmative Action*, *supra* note 1, at 1715-20.

"We agreed that our system of free expression has a powerfully apologetic, after-the-fact effect.<sup>93</sup> Even though the poor and minorities have little access to it because they cannot afford microphones, TV access, press agents, and so on, First Amendment purists are fond of saying—in the hate-speech debate, for example—that that Amendment must remain unfettered.<sup>94</sup> Supposedly, this will benefit minorities and the poor, even though hate speech is almost entirely directed against them and they are the ones asking for relief. Free speech actually turns out to be of greatest benefit to the powerful and wealthy. Conveniently for them, it contains exceptions—such as copyright, defamation, official secrets, and words of conspiracy—whenever speech threatens the interest of a privileged group.<sup>95</sup> It also perpetuates conflict between, say, skinheads and minority groups, by leaving hate speech protected.<sup>96</sup> Do you think your equality theory taps a similar insight?"

"In a way," Rodrigo replied. "All marketplace mechanisms have the same effect. They enable life's winners to declare the race results fair and just.<sup>97</sup> The winners' ideas must be better than the losers', since they competed and won. If members of other groups are poor and miserable while we are well-clothed, warm, and comfortable, well, that's how it must be in a competitive society."<sup>98</sup>

"All this reminds me of something I have been recently reading about," Giannina remarked. "I assume the two of you have heard of cognitive dissonance."

When we both nodded, she continued, "Although early Marxists thought egalitarian Western institutions, like the U.S. Constitution, would become increasingly criticized as the disparity between the wealthy and the poor worsened over time, this has not necessarily been the case. Jack Balkin pointed out recently that people will resist changing their beliefs in the face of inconsistent evidence, preserving, as long as possible, their 'ontological stake' in the former belief.<sup>99</sup> This is especially so in connection with legal and political principles such as equality of opportunity.<sup>100</sup> Not only is this principle central to a free market economy, it absolves successful individuals of any responsibility for maldistribution of resources. That's why brazen

93. *See id.*; *see also* Delgado & Stefancic, *supra* note 68, at 1286-87.

94. *See, e.g.,* D'SOUZA, *supra* note 89, at 142-51 (deploring campus hate-speech codes). *See also* Delgado & Stefancic, *supra* note 68, at 1286-87.

95. *See* Delgado & Stefancic, *supra* note 68, at 1285-86.

96. I am grateful to Bonnie Kae Grover for this suggestion.

97. *See* Delgado & Stefancic, *supra* note 68, at 1286-87.

98. *See id.*; *see also* Brimelow, pp. 137-55 (attributing poverty among immigrants to their low skill levels).

99. *See* J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105, 146-48 (1993).

100. *See id.*

statements like D'Souza's resonate well: They are part and parcel of a system of collective denial."

"So you're saying we construct the less fortunate as inferior beings rather than face the hard fact that equality and free market liberty are at odds in order to reduce dissonance?" I added.

"Right, and don't forget that not only are equality and free market liberty at odds with each other, they are also inconsistent with themselves, if you take things to their logical conclusion," Rodrigo said.

"And as you pointed out, speech is the main mechanism that holds everything together," Giannina observed. "Your theory requires an increasingly negative social construction of blacks to preserve the fiction that we are both a generous, egalitarian nation and a free market one. Thus, we have books like *The Bell Curve*, movies depicting blacks as criminal, hapless, or lazy, and other similar scripts."<sup>101</sup>

"It's the beauty of the marketplace," Rodrigo seconded. "It all fits together, the fulcrum being, ironically, our national commitment to equality."

The waiter arrived with our desserts.

Again we ate in silence for a few seconds, then I said, "Rodrigo, at first I thought your theory was paradoxical and off-the-wall. But now, I'm half convinced. It explains much of what we've been seeing lately—the renewed ugliness, the spate of new books that label black culture pathological. But earlier you mentioned you had some ideas about other minority groups, such as Chicanos and Puerto Ricans. What does your theory say about them?"

## II. RODRIGO'S SECOND THEORY OF RESURGENT INEQUALITY: DEFINITIONAL CONTRACTION AND SECOND-CLASS CITIZENSHIP—THE CASE OF LATINOS

"Thanks for reminding me, Professor. We recently had a good conversation about Latinos.<sup>102</sup> It seems to me their situation is different from blacks', but in the end, not much better. Regarded by most members of society as a minority group, Latinos until recently were nevertheless held not to fall under the Equal Protection Clause nor to receive the same degree of protection as others under federal civil rights statutes."<sup>103</sup>

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101. See Delgado & Stefancic, *supra* note 68, at 1264-67.

102. See generally Delgado, *Black-White Binary*, *supra* note 1 (discussing the role of Latinos in challenging binary understandings of race).

103. See, e.g., Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 984 (1995) ("There is no meaningful legal protection against discrimination based on the ethnicity of Latinos.").

A. *Rodrigo's First Definitional Mechanism: Deployment of a Black-White Paradigm That Assigns Latinos a Subordinate and Often Invisible Position in the Racial Hierarchy*

"And the reason is that the equality-protecting Amendments were drafted with African Americans in mind," I replied. "Their purpose, like that of the early civil rights statutes, was to prohibit discrimination against former slaves.<sup>104</sup> Only recently have legal protections been extended to nonblack minority groups. Even today, when Latinos sue, say, for school desegregation, everyone is a little surprised. 'Oh, that's right. They are minorities, too,' we have to remind ourselves."

"In that respect, Latinos are better off," Giannina said, "not demonized as intensely as blacks."

"True," Rodrigo replied. "But the problem is that while Latino rates of poverty, infant mortality, unemployment, and school dropout rival those of blacks, most Americans don't think of them as occupying the bottom rung of the racial hierarchy. Latinos are seen as a little above blacks and below whites.<sup>105</sup> The current image is of a slightly lackadaisical people who are content to work at menial jobs, speak their own language, have large families, and attend colorful fiestas."<sup>106</sup>

"And useful," I quipped. "Good gardeners, nannies, and restaurant workers."

"Also good overseers for the workers who occupy the real bottom rung, namely, African Americans," added Giannina. "Not too dark. Not too threatening. Obedient and hardworking. The radical inequality your theory predicts for blacks offers opportunities for Latinos who are willing to fit in and accept their role."

"Some Latinos seem happy to do so," Rodrigo pointed out. "Some are conservatives and members of the Republican Party.<sup>107</sup> Many adopt American ways, learn the language well, change their names.<sup>108</sup> When economic problems arise, some have even been known to join in scapegoating recent

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104. See *Regents of the Univ. of Cal. v. Bakke*, 434 U.S. 265, 291 (1978).

105. See Delgado, *American Apocalypse*, *supra* note 1, at 293-99 (describing the role of Latinos in current and future racial tensions in America); cf. Brimelow, pp. 64, 124 (employing the black-white paradigm of race and race relations while recognizing that blacks will eventually be displaced by Hispanics as the largest minority group in America).

106. See Delgado & Stefancic, *supra* note 68, at 1273-75 (describing popular stereotypes of Latinos).

107. See, e.g., LINDA CHAVEZ, *OUT OF THE BARRIO: TOWARD A NEW POLITICS OF HISPANIC ASSIMILATION* (1991) (opposing affirmative action and advocating Hispanic assimilation into American culture and society).

108. See, e.g., RICHARD RODRIGUEZ, *HUNGER OF MEMORY: THE EDUCATION OF RICHARD RODRIGUEZ—AN AUTOBIOGRAPHY* 3-7, 26-28 (1982) (opposing bilingual education and discussing changing his own name from Ricardo to Richard).

immigrants—something that is easier to do than face up to what Marxists and Neomarxists consider the inevitably cyclical nature of capitalism.”<sup>109</sup>

“That’s true,” I conceded. “And unlike the vast majority of blacks, many Hispanics have the option to fit in. With light skins and European features, they can pass as white. Others who cannot nevertheless strive to assimilate. Uninterested in civil rights or confrontation, they rely on ingratiation. They try to be suave—or, at least, nonthreatening.”

Giannina snorted. “I’m glad Rodrigo’s not that way. Not that you lack charm, but it wouldn’t be you. And I have the feeling that even those who try to assimilate pay a price.”

“That they do,” Rodrigo replied. “Assimilation is a double-edged sword. For blacks, society’s on-the-book values at least open the door for some small number who meet the formal criteria of merit and excellence.<sup>110</sup> I’m not saying this is an easy task. But every now and then one slips through. But with Latinos, by being polite and quiet, the best one can hope to do is to huddle a little below whites and above blacks.<sup>111</sup> And if you don’t play along, you can be discriminated against virtually without recourse.<sup>112</sup> Even formal equality isn’t available.”

“Except on the most minimal basis,” I interjected.

“What you lawyers call minimal scrutiny,” Giannina replied. “The kind that rarely results in courts’ striking down state action.”<sup>113</sup>

“Since our system is both capitalistic and committed to formal equality,” Rodrigo continued, “the misery of the Latino community must prove something is wrong with them. And because only blacks were enslaved, and because civil rights law presupposes a black-white paradigm, the public has few qualms about treating Latinos badly. One can tell an anti-Mexican joke, laugh at a cartoon of a sleeping character dozing under a sombrero in the shade of a cactus, much more freely than at one of a black eating a watermelon.<sup>114</sup> Our very commitment to equality—which admits that, as a nation,

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109. See Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Non-citizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139, 1162-68 (describing the scapegoating of immigrants).

110. See Stephen L. Carter, *The Best Black, and Other Tales*, 1 RECONSTRUCTION 6, 6-8 (1990) (describing author’s success at meeting society’s various criteria of academic excellence yet criticizing society’s tendency to label him as the “best black” rather than the “best qualified”).

111. See Delgado, *American Apocalypse*, *supra* note 1, at 293-94 (analogizing the place of Latinos in American society to that of “coloreds” in apartheid-era South Africa).

112. See generally RODOLFO ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* (3d ed. 1988) (tracing history of conquest, racism, and other outrages that whites visited on Chicanos).

113. See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-2, at 1439-46 (2d ed. 1988) (discussing rationality review in the equal protection context).

114. Cf. Delgado & Stefancic, *supra* note 68, at 1273-75 (describing popular stereotypes of Latinos).



we made only one historic mistake—assures that Mexicans and other Latino-Americans are given short shrift.”

After a short pause for the waiter to clear our plates and offer refills of coffee, I continued, “To summarize, then, Rodrigo, you are saying that a mechanism similar to the one you identified for blacks—namely, the black-white binary—operates to suppress Latinos. Different, yet not afforded full legal protection or vigilant support from liberals, Latinos are consigned to an intermediate status as overseers and clerks. There’s not enough equality to go around, so we give them half. Is that your theory?”

“Yes,” Rodrigo said, “but don’t forget the huge pressures toward conformity and assimilation that afflict the group. Society communicates to them in a myriad of ways that if they behave, they can fit in.”

*B. Rodrigo’s Second Definitional Mechanism: Inequality of Immigration*

“The other author we mentioned earlier, Peter Brimelow, certainly thinks so,” I added. “He’s willing to tolerate older immigrant groups, especially those who try to fit in. But the newer arrivals from Latin America are trouble.<sup>115</sup> They bring inferior cultural mores, including a propensity to go on welfare and commit crimes, poor health and hygiene, disregard for hard work and education, and a backward attachment to their language.<sup>116</sup> He’s especially unhappy that immigrants from Latin America qualify for affirmative action at the expense of white males, like his son.<sup>117</sup> In his view, backward people who do not share our traditions and refuse to assimilate get ahead at the expense of real Americans—persons of Northern European descent who work hard, save money, have small families, and live within their means.”<sup>118</sup>

“According to Brimelow, Latino immigrants drain the infrastructure, contributing less in taxes and services than what they consume in health, education, and welfare costs,”<sup>119</sup> Giannina said. “America’s core is white. Immigration threatens this, harming even blacks.”<sup>120</sup>

“Rodrigo, I gather you think all of this is part of the general contraction of equality you outlined earlier in connection with blacks?” I asked.

“I do,” Rodrigo replied. “Brimelow and others are contracting what I call equality of immigration. In 1965, Congress abolished the old, racist na-

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115. See Brimelow, p. 74 (describing how the recent rise in the Hispanic American population has led some Americans to feel that Hispanics “somehow started sprouting out of the earth like spring corn”).

116. See Brimelow, pp. 108, 146 (recounting a propensity to go on welfare); 182-86 (citing as sources of crime); 35, 186-87 (citing as sources of disease); 267 (calling them “weird aliens with dubious habits”); 272-73 (admonishing them for refusing to assimilate).

117. See Brimelow, pp. 11, 29, 66, 218.

118. See Brimelow, pp. 56, 184.

119. See Brimelow, pp. 9, 151-55, 216-17.

120. See Brimelow, pp. 58-59, 62-65, 173-75.

tional-origins immigration system that favored persons from Northern and Western Europe in favor of a more egalitarian policy.<sup>121</sup> Brimelow would like to go back to a system like the old one.<sup>122</sup> Citizens from Africa and Latin America would be less desirable than ones from Europe and would find it more difficult to immigrate."

"They would be, in effect, less human," Giannina said. "At least in the eyes of U.S. immigration law."

Rodrigo added, "Brimelow's proposals include increased vigilance at the border and within the United States.<sup>123</sup> Americans would have to show identification badges.<sup>124</sup> Those who could not prove they were here legally would be denied social services and might even be deported."<sup>125</sup>

"Some of this is already happening," I pointed out. "Referenda in California and other states, bills in Congress . . ."<sup>126</sup>

"All placing the onus on the foreign looking and sounding to prove they're bona fide," Rodrigo said. "Inequality of immigration has consequences even for those, like Hispanics in New Mexico, whose families have been here for 300 years."

"A little odd coming from conservatives, who tout equality of opportunity," Giannina mused.

### C. *Rodrigo's Third Definitional Mechanism: Inequality of Birthright Citizenship*

Giannina and I were silent for a moment. Then Rodrigo sipped his coffee, looked up and said, "But Brimelow and his crowd would also narrow equality in a third way. He proposes abolishing birthright citizenship so that the children of both legal and illegal aliens would no longer qualify automatically."<sup>127</sup>

"Would no longer be citizens?" Giannina replied. "I don't really remember that part of the book."

"Well," Rodrigo replied, "he and others like him supported a resolution in California and a bill introduced in Congress that would have denied citizenship to children of aliens."<sup>128</sup>

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121. For a review of immigration history, see generally IMMIGRANTS OUT!, *supra* note 58.

122. See Brimelow, pp. 258-63.

123. See Brimelow, pp. 237, 259-61.

124. See Brimelow, p. 260.

125. See Brimelow, p. 260.

126. See Delgado, *American Apocalypse*, *supra* note 1, at 293.

127. See, e.g., Brimelow, p. 265 (asserting that birthright citizenship "must be ended, by amending the Constitution if necessary").

128. See Brimelow, p. 265. For the text of the unsuccessful congressional bill, see H.R.J. 396, 103d Cong. (1994). See also RICHARD DELGADO, *THE COMING RACE WAR? AND OTHER APOCALYPTIC TALES OF AMERICA AFTER AFFIRMATIVE ACTION AND WELFARE* 149-51 (1996).

"Wouldn't that require a constitutional amendment?" I asked.

"It would," Giannina added, "because the Fourteenth Amendment guarantees citizenship to anyone born here. So it would require amending the Fourteenth Amendment for the first time in its history."<sup>129</sup>

"Yet Brimelow and others propose we do just that," Rodrigo continued. "The very Amendment that guarantees equal treatment would no longer apply to a large group of people simply because of their parents' status at the time they were born."

"The carrot and the stick," Giannina said. "If they assimilate, Latinos can fit in. They can even naturalize, if they do it in a hurry. And that, in turn, requires that they assimilate. It's a closed circle. Yet if they don't crack it, they'll find that the Constitution affords them no equal protection. And if they live outside the United States and want to immigrate here, they had better forget it. Equality of immigration is on its way out."

"Sobering," I said. "No wonder Chicano activists are concerned."

We were silent for a moment. Then Rodrigo looked at his watch. "How much time do we have?"

"We need to be there in about twenty minutes," Giannina replied, looking at her watch. "But it's only a short walk."

"We're due at an alumni reception," Rodrigo explained. "Unfortunately, Giannina often ends up doing double duty. Not only is she the class rep at her school, but she attends so many official functions at mine, she's sometimes mistaken as a faculty member."

"It wouldn't surprise me if she is one sometime soon," I said.

"Enough of that," Giannina replied with a smile. "I've a long way to go. And besides, I'm looking forward to my job next summer at a women's law clinic. You two can knock yourselves out trying to reform the legal academy. Now, where were we?"

"How our society relegates Mexicans and other Latinos to a low rung. The mechanism is similar to the one Rodrigo explained with blacks and, in a way, just as pernicious," I said. "Latinos, especially recent immigrants, end up unprotected by civil rights law and pressured to assimilate. Advocates like Brimelow urge redefining equality so that they are not even included in the concept. Was there any more?"

#### D. *Rodrigo's Fourth Mechanism: Inequality of Language*

"Well, yes," Rodrigo said. "I call the final mechanism inequality of language. The Official English movement is sending messages, both symbolic

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(referring to the various measures against birthright citizenship); Richard Delgado, *Citizenship*, in IMMIGRANTS OUT!, *supra* note 58, at 319 (describing the California and congressional resolutions).

129. See Delgado, *supra* note 128, at 319.

and real, to minority groups that their language is unofficial, devalued, even illegal in certain settings.<sup>130</sup> In certain states, you must speak English to vote, get a job, or take a civil service examination."<sup>131</sup>

"Juan Perea describes one case where such laws contributed to a person's death," Giannina noted. "He called it 'Death by English.'"<sup>132</sup>

"Very appropriate. Like the other measures, English-only laws contract the circle of who is afforded full citizenship rights. If you are white, English speaking, and your ancestors came from the right region of the world, all the equality amendments and civil rights statutes apply to you."

"The person who needs them least," I observed sardonically.

"And if you're of a different hue or origin or prefer to speak a different language, you can't insist on equal treatment. You can only be as obsequious as possible and try to convince the surrounding society you're worthy of their company. Defy assimilation, hold on to your language, and you'll have few defenders. All the laws will be arrayed against you."

"How do you suppose the English Only people rationalize that?" Giannina mused. "Some of them are college professors."

"I actually saw one of their ads just the other day," Rodrigo said. "It claimed that the president of the U.S. branch of English Only is a Hispanic."<sup>133</sup>

"Really?" Giannina asked. "He's actually a Hispanic?"

"I think so," Rodrigo replied. "It showed his picture, and he has a Latino name. The ad argued that forcing immigrants to learn English would further equality of opportunity."

"It sounds strange," I said. "But in a warped way it makes sense. If your only reference point is English speaking ability, then forcing those who speak another language to conform to English-only laws will look like equality to you. You take persons who are outside that circle and move them inside. There, everyone's equal. Nice and neat. Outside, they're not full persons. Inside, they are. So you're really doing them a tremendous favor."

"One of the students whose locker was defaced at my school was a Chicano," Rodrigo mused. "The uproar from the student body was not nearly as loud as it was on behalf of the blacks."

"What do you think will happen?" I asked.

"The ones who apologized will be treated lightly," Rodrigo guessed, "even though their actions were clearly deliberate and hurtful. Two of them

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130. See STEFANCIC & DELGADO, *supra* note 7, at 9-19 (describing the Official English campaign); cf. Brimelow, pp. 88-89, 219, 273 (attacking bilingualism).

131. See Perea, *supra* note 103, at 986-88.

132. *Id.* at 965.

133. See *Why a Hispanic Heads an Organization Called U.S. English*, HEMISPHERES, Sept. 1994, at 42.

apologized only because they were caught. As for the one who refuses to apologize, I don't know. The school has no formal hate speech code."<sup>134</sup>

"So what is he being charged with?" Giannina asked.

"Violation of the honor code, which contains a general clause prohibiting behavior that interferes with the ability of other students to enjoy the benefits of their education. The defense is charging that the clause is void for vagueness and that punishing the student would violate his First Amendment rights."<sup>135</sup>

"Sounds like a battle royal coming up," I commented. "In addition to a theory of surplus equality, I think we need one to explain surplus righteousness. These conservative litigation centers always seem to wind up on the wrong side, defending Nazis, cross burners, and utterers of hate speech."<sup>136</sup>

"Speaking of ending up on the wrong side," Giannina said, gesturing for the waiter to bring the check, "Rodrigo and I need to think about moving on. He agreed to give a few remarks to open the dean's reception. For my part, I promised I'd get him there on time."

While waiting for the check, I asked, "Do you two know about the *científicos* movement in Mexican history?"

"You mean in the late nineteenth and early twentieth century?" Giannina asked.

"Yes," I said. "Even revolutionary Mexico was not free of supremacist impulses. Around the time eugenic theories were first being formulated here, a group of Mexican intellectuals and politicians calling themselves *los científicos* coined the theory that indigenous people were inferior and doomed to poverty."<sup>137</sup> Their theory rationalized the large inequalities in wealth and landholding that were developing in that country in the wake of industrialization."<sup>138</sup>

"Depressing, isn't it?" asked Giannina. "The more things change, the more they stay the same."

The waiter arrived with the check, which Giannina quickly intercepted—"you paid last time," she said to me. As she filled out the credit card slip, I

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134. Cf. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2321 (1989) (arguing for both tort and criminal sanctions in response to racist speech). See generally Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 1994 WIS. L. REV. 1425 (using comparative jurisprudence to suggest improvements in American hate-speech regulation).

135. See Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 531-39 (suggesting that many types of campus hate-speech regulation may be unconstitutional).

136. See STEFANCIC & DELGADO, *supra* note 7, at 27, 40, 47-52, 100, 128-31 (describing the role of conservative think tanks and litigation centers).

137. See RODNEY D. ANDERSON, *OUTCASTS IN THEIR OWN LAND: MEXICAN INDUSTRIAL WORKERS, 1906-1911*, at 34-37, 243-46 (1976).

138. See *id.* at 34-37.

noticed that the waiter, a light-skinned, lanky man with high cheekbones, could be either African—probably Ethiopian—or Latino. I wondered if he had overheard any of our conversation, and if so, what he had thought. Perhaps he had been a university professor or other professional back in his homeland. If so, what would he think of Rodrigo's bleak theory about the socioeconomic hierarchy in the United States? Perhaps he had immigrated to escape political repression and willingly endured his current economic privation as the price of physical security. I reflected on Rodrigo's paradox, in which equality, like the profit motive, is on a collision course with itself. Racial conditions in America were certainly worse than I remembered for some time. Would they deteriorate even further? Rodrigo's theory implied so—indeed, his friend Lazlo Kowalsky had recently warned of a coming race war.<sup>139</sup> What role would my talented young multiracial friends—indeed critical race theorists in general—play in warding that off, assuming it were even possible?

Just then, the waiter reappeared and took away the signed voucher. "Thank you folks and have a good evening," he said in the lightly accented English I had noticed earlier.

"Thank you," we said in unison.

As we waited for a taxi on the curb, Giannina said, "We hope we'll see you again soon."

"Let's make a point of it," I agreed. "Are you going to the Michigan conference?"

"We are," Rodrigo said, as two cabs pulled over to pick us up. "I'll give you a call."

"Let's get together then," I said. "I want to talk to you about law and economics."

"I'm game," Rodrigo said, as Giannina nodded as well. "Maybe Laz will join us."<sup>140</sup> He'll be there, and as you know, it's his stock in trade."

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139. See Delgado, *American Apocalypse*, *supra* note 1, at 282-92 (detailing Kowalsky's theory of an impending race war).

140. Lazlo Kowalsky, Rodrigo's best friend on his school's faculty, is a conservative and sponsor of the local Federalist Society. Poles apart politically, the two young friends nevertheless share the same love of ideas and respect for basic human values. One year senior to Rodrigo, Laz befriended Rodrigo and helped him adjust to his new profession. See Delgado, *Merit and Affirmative Action*, *supra* note 1, at 1713, 1740-47 (introducing Lazlo Kowalsky).

