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# RODRIGO'S EQUATION: RACE, CAPITALISM, AND THE SEARCH FOR REFORM

*Richard Delgado\**

## INTRODUCTION: IN WHICH I ENCOUNTER MY YOUNG FRIEND IN THE MIDST OF AN AWKWARD OPERATION

I was hopping awkwardly up and down on one foot in an effort to remove my remaining shoe while trying not to drop the pile of notes and law review articles I had brought to read on the plane, acutely aware of the impatient young couple behind me and the glinty-eyed TSA inspector sizing me up nearby. Just then, as though by magic, a familiar voice from behind caused me to start.

"Professor!" the voice said. "Let me help you with those things." I looked up to see the tall, smiling figure of my young protégé and friend.<sup>1</sup>

"Rodrigo!" I exclaimed, slipping the tight shoe off with my finger and fumbling to lower the handle on my new carry-on suitcase.<sup>2</sup> "What a sight for sore eyes! I bet we're going to the same place."

Realizing that I had merely stated the obvious and feeling more than a little foolish, I shook his hand warmly and let him help me ease my belongings onto the conveyor belt. On seeing two men of color, separated by many years of age, enacting a fond greeting, the inspector eyed us even more suspiciously than before, while the couple behind seemed happier, realizing that I was getting help and would not be slowing them down much longer. I motioned them to go ahead of me.

"I haven't seen you in ages," I said, as he deftly slipped his own backpack onto the roller. "Are you travelling alone?" He nodded. I

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1. See Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357, 1357 (1992) (introducing Rodrigo, my young colleague, alter ego, and friend). For details about Rodrigo's origins, interests, and career, see *infra* notes 6-19 and accompanying text.

2. See Delgado, *supra* note 1 (introducing "the Professor," Rodrigo's mentor, interlocutor, and straight man). As I have constructed him, the Professor is a senior man of color teaching law at a school in the state next to the one in which Rodrigo teaches. See *id.* Both characters are entirely fictional composites of many persons I have known and not to be confused with any one person, alive or dead.

looked at him closely. “You’re looking great,” I said. “Not a day older.”

“It must be nearly a year,”<sup>3</sup> he said, unzipping his laptop and placing it on the roller. “You look good, too. I like your suit.”

“Over here, please,” a second uniformed officer said, motioning in my direction. “Raise your hands over your head, Professor.” Wondering how she knew I was a professor, I stepped into the glass semicircular enclosure, spotting my belongings making their way down the conveyor belt outside. While waiting for the scanner to complete its inspection of my innards, I noted that the belt had stopped with my luggage inside the X-ray compartment for what seemed a long time.

The enclosure and the rolling belt disgorged me and my possessions at the same time, and moments later I was sitting on a nearby chair, tying my shoes, with Rodrigo slipping his on beside me. I noticed that his were expensive Italian-made loafers with no shoelaces and recalled that he had always been a sharp dresser.<sup>4</sup>

“You’re better at this than I am,” I said. “I’m still getting used to the routine they put you through these days.”

“The new regulations are a waste of time,” he said. “They haven’t caught a single terrorist in twelve years.<sup>5</sup> But if you’re going to the New Orleans conference, Professor, maybe we can sit together. I’d like to run my latest thesis past you. As luck would have it, it’s about your favorite subject—regulation.” He held up a new-looking book with a gray and black cover. I squinted to see the title but couldn’t make it out.

“I’d love to hear,” I said.<sup>6</sup> To be honest, I was more than a little dubious. Over the years, I had greatly enjoyed hearing Rodrigo’s audacious ideas, many of which had spurred thoughts of my own, beginning with an initial conversation years ago in my office.<sup>7</sup> Fresh from his return from Italy, he had sought me out to discuss his plans for earning an American LL.M. degree in preparation for a career in law teaching.<sup>8</sup> We had discussed race,<sup>9</sup> affirmative action,<sup>10</sup> the

3. See generally Richard Delgado, *Rodrigo’s Reconsideration: Intersectionality and the Future of Critical Race Theory*, 96 IOWA L. REV. 1247 (2011) (marking Rodrigo’s latest appearance). For others, see *infra* notes 6–19 and accompanying text.

4. See Delgado, *supra* note 1, at 1395 n.5; Richard Delgado, *Rodrigo’s Corrido: Race, Postcolonial Theory, and U.S. Civil Rights*, 61 VAND. L. REV. 1691, 1692–93 (2007) (describing Rodrigo’s penchant for stylish clothing).

5. See *Airport Security Without the Hassle*, Editorial, N.Y. TIMES, July 28, 2013, at SR10.

6. Many of our conversations had begun with a discussion of recent books. See, e.g., Richard Delgado, *Rodrigo’s Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133, 1133–35 (1993) (discussing books by Derrick Bell, Gerald Rosenberg, David Savage, and Girardeau Spann).

7. Delgado, *supra* note 1, at 1357–58.

8. *Id.* at 1359.

9. *Id.* at 1361–62.

LSAT,<sup>11</sup> the decline of the West,<sup>12</sup> and many other topics in the course of a wide-ranging conversation. I learned that he had grown up in Italy, the son of an African-American serviceman posted there and an Italian mother, that he had attended the base high school, then gone to an Italian university and law school ("One of the oldest in the world, Professor"), both on government scholarships, and that he had returned to the United States, the country of his birth, on a mission.<sup>13</sup>

We had become friends, discussing love,<sup>14</sup> law and economics,<sup>15</sup> black and white crime,<sup>16</sup> and many other topics<sup>17</sup> over the following years. I had watched with quiet pride as he earned his LL.M., published his dissertation, and secured his first teaching position.<sup>18</sup> Along the way, I met his fiancée, Giannina, and learned about their hopes and plans.<sup>19</sup>

Much as I had found his previous ideas intriguing, I had some misgivings about this one. I was not much interested in regulation and thought it a little dull, at least compared to my own area, which was civil rights. In addition, if he was going to delve into law and

10. *Id.* at 1362–64.

11. *Id.* at 1359–60.

12. *Id.* at 1368–76.

13. Namely, to help his birth country through a difficult period of decline and adjustment. *Id.* at 1376–80.

14. See Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CALIF. L. REV. 387, 392–93 (1993).

15. See Richard Delgado, *Rodrigo's Roadmap: Is the Marketplace Theory for Eradicating Discrimination a Blind Alley?*, 93 NW. U. L. REV. 215, 215–16 (1998).

16. See Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503, 505 (1994).

17. For more on the topics covered in our discussions, see Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183, 1187 (1993) [hereinafter Delgado, *Second Chronicle*] (law and economics), Delgado, *supra* note 6, at 1145 (legal rules), Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform*, 68 N.Y.U. L. REV. 639, 643 (1993) (the plight of black women), Delgado, *supra* note 16, at 507 (racial fears), Richard Delgado, *Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law*, 143 U. PA. L. REV. 379, 388 (1994) (the rule of law), Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1715 (1995) (merit), Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CALIF. L. REV. 61, 67 (1996) (empathy and false empathy), and Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181, 1183 (1997) (interracial mixture).

18. For more on Rodrigo's LL.M. studies and subsequent search for a law teaching job, see Delgado, *supra* note 1, at 1360–61, and Delgado, *supra* note 4, at 1742.

19. See Delgado, *supra* note 14, at 402 (introducing Giannina, Rodrigo's partner and, later, wife, who is a published playwright and poet, a lawyer, and a mother of a three-year-old son, Gus).

economics, with which the regulatory field seemed saturated,<sup>20</sup> I would soon find myself in over my head.

"I didn't know you were interested in regulation," I said.

"I haven't been, until now," he replied. "Then I read this book,<sup>21</sup> some writing by an Israeli law professor,<sup>22</sup> and a second book on immigration reform<sup>23</sup> and realized they all shared a common structure. And now I can't stop thinking about them. Although I started out interested in regulation of large systems like immigration law and Wall Street, I soon found myself thinking about the broader relation of capitalism and law."

"Now *that* sounds interesting," I said. "Let's try and see if we can sit together."

### I. IN WHICH RODRIGO BEGINS TO EXPLAIN HIS AUDACIOUS THESIS

After comparing boarding passes, we trudged to the distant gate down the long concourse crowded with people, exchanging news of our families. I learned that Giannina, who had been practicing law at a women's rights project, was interviewing for law teaching positions and that their child, Gus, who was three, was already learning to read.<sup>24</sup> Before I knew it, we were at our gate and standing in line, which was just starting to move. As we handed the agent our boarding passes, I could see she was mentally counting our bags and personal articles. Airport formalism, I thought, hoping that she wouldn't count my thick sheaf of papers as a third carry-on item and force me to check something.

"Do you need me to put these in my suitcase?" I asked her. "I was hoping to talk with my friend, anyway."

She smiled and told me not to bother, which I found gratifying all out of proportion to the trouble it saved me.

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20. See generally Howard Gensler, *Law and Economics: A Topical Bibliography*, 26 INT'L J. LEGAL INFO. 184 (1998) (listing major and representative works in the area of law and economics and a sample of current research).

21. STEVEN A. RAMIREZ, *LAWLESS CAPITALISM: THE SUBPRIME CRISIS AND THE CASE FOR AN ECONOMIC RULE OF LAW* (2013).

22. See generally Katya Assaf, *Capitalism Against Freedom*, N.Y.U. REV. L. & SOC. CHANGE (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2243513](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243513) (examining the influence of capitalist ideology on American legal thought and identifying a tendency to favor materialist and individualist values, such as the freedom to do what one wants in pursuit of pecuniary gain, over nonmaterialist ones, including a clean environment, the humane treatment of animals, and social equality).

23. See generally KEVIN R. JOHNSON & BERNARD TRUJILLO, *IMMIGRATION LAW AND THE US-MEXICO BORDER: SI SE PUEDE* (2011).

24. See Richard Delgado, *White Interests and Civil Rights Realism: Rodrigo's Bittersweet Epiphany*, 101 MICH. L. REV. 1201, 1216 (2003) [hereinafter Delgado, *Epiphany*]; Richard Delgado, *Rodrigo's Homily: Storytelling, Elite Self-Interest, and Legal Change*, 87 OR. L. REV. 1259, 1279–88 (2008) (introducing Rodrigo's family).

When we reached our seats on the plane, they turned out to be only two rows apart. By unspoken agreement, we each asked our seatmates if they minded switching so that we could sit together. Mine, a teenager who was listening to music on a headset, unplugged, smiled, and said "sure." He crossed the aisle, keeping time to music only he could hear. A second piece of good news, I thought—a small private act of rebellion against the overregulation of life. If this was one of the issues Rodrigo was going to discuss, maybe the long trip wouldn't be so dreary, after all. As the reader has probably guessed, I hate unnecessary regulation and wish that life could be simpler and freer.

Minutes later, our seat belts buckled and carry-on luggage stowed overhead, Rodrigo looked up with an eager expression and said, "Professor, you know how many of our colleagues hold great hopes for social reform through law?"

"I do. You and I discussed this once or twice in connection with civil rights.<sup>25</sup> And since then, a host of books have come out on the same subject."<sup>26</sup>

"They have, and I have one of them with me right here." Rodrigo held up the gray and black book I had spotted earlier, so I could see it. This time I could read the title: *Lawless Capitalism*, by Steven Ramirez.<sup>27</sup>

"Hah," I said, taking it from him and turning it over. "That very one is on my reading list. I'm interested in what he says about the financial crisis, because, among other things, many poor people lost their homes due to it.<sup>28</sup> I gather he argues for greater regulation?"

"He does. It's a good read, although, in my opinion, he stops short of grasping the full nature of his problem. It's been getting good reviews. He's going to speak at our conference. Do you know him?"

"No, although I gather from the back cover that he was a lawyer for high-level federal regulatory agencies<sup>29</sup> and now teaches at Loyola University Law School of Chicago.<sup>30</sup> Do you know him?"

25. See, e.g., Delgado, *Epiphany*, *supra* note 24, at 1210–11, 1217; Richard Delgado, *Rodrigo and Revisionism: Relearning the Lessons of History*, 99 *Nw. U. L. REV.* 805, 809–11, 816 (2005) (discussing recent colorblind jurisprudence that protects white interests and feelings as much as it does those of racial minorities).

26. See, e.g., JOHNSON & TRUJILLO, *supra* note 23, at xi–xii, 242–68; MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY*, at vii–viii (2006); RAMIREZ, *supra* note 21, at 1–2; GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?*, at xiii (2d ed. 2008).

27. See RAMIREZ, *supra* note 21.

28. See *id.* at xiii–xiv, 8, 76–80, 148–56.

29. Namely, the Federal Deposit Insurance Corporation and the Securities Exchange Commission.

30. See Steven Ramirez, *Full-Time Faculty*, *LOY. U. CHI.*, <http://www.luc.edu/law/fulltime/ramirez.shtml> (last visited Nov. 24, 2013).

“Only slightly, but I’m greatly indebted to him since it was his book that got me to thinking about regulation and capitalism. And that, in turn, got me to thinking about cargo cults.”

## II. RODRIGO’S EQUATION: FAITH IN LAW REFORM AS A CARGO CULT

“Cargo cults?” I said, raising my eyebrows in astonishment. “You mean like South Sea islanders who hope for an offering from the gods?”

“Something like that,” he said, blushing slightly. “Let me explain. Prompted by the book, I went around and around and finally concluded that law and capitalism were the same thing. So, the hope of trying to reform the one through the other is vain, practically a category mistake.<sup>31</sup> Since corporate capitalism is law—their relationship is, for all intents and purposes, an equal sign . . . [he took a pen out and drew a notation—“Law=Capitalism”—on a napkin from the seat-back pocket in front of him] since they are opposite sides of the same coin—the hope of regulating the one by means of the other is destined to fail. It’s like hoping that a thing will regulate itself.”<sup>32</sup>

“An audacious theory, Rodrigo,” I said. “I hope you can prove it. I gather you think that it explains some of the resistance to reform that many writers have noted?”<sup>33</sup>

“I do,” he said, raising his voice to be heard above that of the flight attendant, who was instructing the passengers to buckle their safety belts and return their seat backs to the upright position for

31. A category mistake assigns a quality or trait to something that cannot possess it, such as asking how much the color brown weighs or asserting that the Crusades were conducted in the key of C. For more on the consistent bias the Supreme Court exhibits in cases having to do with corporate rights, see Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES (May 4, 2013), [http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html?\\_r=0&adxnnl=1&ref=adamliptak&adxnnlx=1385327356-hwJ3rWmw9y2a0Uvvg+DIHg](http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html?_r=0&adxnnl=1&ref=adamliptak&adxnnlx=1385327356-hwJ3rWmw9y2a0Uvvg+DIHg) (discussing judicial protectiveness in areas ranging from class actions to arbitration to corporate speech and immunities for pharmaceutical manufacturers and human rights abuses abroad).

32. See *infra* notes 33–35 and accompanying text (where Rodrigo develops this equation). I wondered if it held true for non-Western countries, such as Cuba, and made a mental note to ask him sometime. Would socialist economies resist reform as strenuously as our own? And what about African societies governed by customary law? I also thought of many things that regulated themselves, such as the human body, a population of rats, or a well-designed machine. As luck would have it, he addressed many of these issues over the course of our conversation.

33. See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 3 (1987) (noting the difficulty of achieving racial reform through law); KLARMAN, *supra* note 26, at 9–10; ROSENBERG, *supra* note 26, at 70–71. For more on the faith that law reform will arrive as a result of cheerleading, see Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 182–86 (1990).

takeoff. "Hoping to reform capitalism or any major sector of it, such as banking, by means of law and regulations, as Ramirez does,<sup>34</sup> is like hoping that law will reform itself. A second book, on a different subject, makes the same mistake.<sup>35</sup> I've got it in my backpack," he said, pointing at the overhead compartment, which the flight attendant had just slammed shut as part of her last-minute cabin check. "I'll get it down later. My basic idea is that law is not a promising path to reform for any set of rules governing essential, central features of the corporate-capitalist system, because the two—law and capitalism—are the same thing. And asking whether a thing can regulate itself is like asking what color a symphony is or whether the number seven has an enthusiastic personality—they are not the kind of things that can do that."

"That does sound interesting," I said. "Although many of your readers are sure to be scandalized. It reminds me of a famous line by Audre Lorde.<sup>36</sup> But before I decide whether your theory takes off or not [Rodrigo grinned—the plane was just starting to roll down the runway], I need a bit of background. Why don't you tell me about those books first and then explain that metaphor you used just now. What's the second book?"

Rodrigo waited until the whine of engines subsided a little, then said, "It's by Kevin Johnson, a well-known immigration law scholar, and Bernard Trujillo, and it's on reforming that body of law.<sup>37</sup> Why don't I start by outlining the books?<sup>38</sup> Then I'll explain why law can't reform capitalism because they are the same thing.<sup>39</sup> Believing they can is like those cargo cults I mentioned. If I have time, I can share some thoughts on how we may nevertheless escape from our predicament."

34. RAMIREZ, *supra* note 21, at 30–33.

35. JOHNSON & TRUJILLO, *supra* note 23, at 241 (explaining that a new civil rights movement using political and legal tools will bring about immigration reform).

36. "The master's tools will never dismantle the master's house." AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER* 112 (1984). Lorde's lesson for law reformers, then, would be that the very language and inner logic of the law resists reform, especially in the areas that Rodrigo targets—corporate capitalism, immigration, and civil rights. See *infra* Subpart II.A–B. One who sets out to reform one of these areas is apt to find that the area defends itself—the reform efforts are already deemed illegal. See Lawrence Friedman, *The Law and Society Movement*, 38 *STAN. L. REV.* 763, 771 (1986) (noting that legal institutions deal with demands for change by simply altering the terms of the demands—by translating them, in short, to less threatening forms). One cannot speak against the current regime of corporate capitalism or restricted immigration in the current language of the law—or, if one does, one's narrative will strike others as absurd, quixotic, or amusing, a little like trying to create a nonoffensive American word for people of a nonwhite race.

37. See JOHNSON & TRUJILLO, *supra* note 23, at xi–xii.

38. See *infra* Subpart II.A.

39. See *infra* Subpart II.B.



"I'm all ears," I said. "I've always thought that many of our friends held out overly optimistic hopes for reform, especially in my area, civil rights. Maybe your theory will help me put my finger on something I've long suspected."

A. *In Which Rodrigo Discusses Two Recent Books on the Possibility of Law Reform*

"The first step is simple," he began. "If you want to reform something that is resisting your efforts, you need to know what the source of that resistance is."

"And I gather you think you know what it is, at least for those two areas."

"I do," he said, with an insouciance I found charming, at least in the young. "As you'll see, reformers think that they can change the financial system or immigration law—or civil rights, for that matter—through law and regulation. They can't, because these are central structures of capitalism, and law and capitalism are the same thing. Ramirez's book illustrates that mistake.<sup>40</sup> Johnson and Trujillo's, in a different field, does too."<sup>41</sup>

"I can see why you are interested in immigration law," I said. "I remember your brush with it, years ago.<sup>42</sup> But let's hear about those books. Then, you can tell me where they go astray."

1. *Lawless Capitalism, by Steven A. Ramirez*

"Sure," he said, "Let's start with this one. *Lawless Capitalism* draws lessons from the 2008 financial collapse, positing that it resulted from inadequate regulation, corporate greed, and mismanagement."<sup>43</sup> He riffled through the book in search of a passage, and as he did, I commented:

"I can relate to that. My 401(k) plan fell nearly fifty percent. I thought I'd never be able to retire. I hope he came up with some solutions."

"He did. He believes we need to place corporate corruption and shortsightedness at the center of attention.<sup>44</sup> Unless we do that, the country will veer from one crisis to another.<sup>45</sup> Growth will remain

40. RAMIREZ, *supra* note 21, at 11, 13–14.

41. See JOHNSON & TRUJILLO, *supra* note 23, at 241.

42. See Delgado, *supra* note 1, at 1379–80; Delgado, *Second Chronicle*, *supra* note 17, at 1183–86 (describing his deportation and subsequent return following a two-step maneuver).

43. RAMIREZ, *supra* note 21, at xiii, 11.

44. *Id.* at 1–17.

45. See *id.* at 184 (explaining that "those with economic 'might' subverted law and regulation in the years leading up to the financial meltdown of the fall of 2008. They rigged law to loot the American economy with impunity. . . . [N]ew . . . frameworks . . . left elites with the power to impose massive costs upon society . . . while reaping huge paydays . . . . When the collapse came, the government bailed out the reckless, proving the lack of accountability under

slow,<sup>46</sup> inequality high.<sup>47</sup> What's needed, he says, is more effective oversight by expert regulators and private watchdog groups, like Ralph Nader's Public Citizen or Common Cause."<sup>48</sup>

"Who could be against watchdogs?" I said.<sup>49</sup> "We're still not back to where we were before the crash of 2008. One of my colleagues got a job offer at a better school but can't sell his house because it's under water. So many people are in the same predicament that it's dragging down the economy. People without jobs or wishing to move to a different city to look for a better one can't, because their homes are worth less than they paid for them and they cannot sell. Everything is frozen."<sup>50</sup>

"Ramirez mentions that. He says that much of the problem stems from human nature.<sup>51</sup> The financial industry—in fact, corporate business in general—has a problem with what he calls 'animal spirits.'<sup>52</sup> Bankers and financiers benefit when they make risky decisions that pay off.<sup>53</sup> When they don't, they know that the government will step in and bail them out.<sup>54</sup> What he calls 'rigged globalization'<sup>55</sup> increases the temptation to take chances, since other

law," and concluding that things are little different today); *see also* Gretchen Morgenson, *Five Years Later, the Plumbing Is Still Broken*, N.Y. TIMES, Sept. 15, 2013, at BU1 ("Many of the nation's bankers, lawmakers and regulators [believe] that safeguards . . . protect against another cataclysm. The voluminous Dodd-Frank law, with its hundreds of rules and new regulatory regimes, was the centerpiece of these efforts. And yet, for all the new regulations . . . , a crucial vulnerability remains.").

46. RAMIREZ, *supra* note 21, at 22–30.

47. *Id.* at 34–38.

48. *Id.* at 11, 23–33, 47–73.

49. Not Ramirez, certainly. *See id.* at 47 ("Legal infrastructure created the corporation, . . . one of the most economically powerful legal innovations in history. Yet governance issues plague the modern [form of it] . . . . Increasingly, corporations . . . serve the interest of managers instead of shareholders."); *see also id.* at 57–65 (noting the role of weak federal and state regulation in the recent crisis).

50. *Id.* at 110–17.

51. *Id.* at 74.

52. *See id.* at 74–104 (discussing the effect of human psychology on the stability of the financial system).

53. *See, e.g., id.* at 74–75 (noting that investors often fall prey to excessive enthusiasm, fuelling cycles of boom and bust); *see also* Alex Rosenberg, *Free Markets and the Myth of Earned Inequalities*, 3:AM MAG. (Aug. 26, 2013), <http://www.3ammagazine.com/3am/free-markets-and-the-myth-of-earned-inequalities/> (noting that free markets may begin as effective means of organizing a consumer economy but inevitably introduce inequality and graft as successful capitalists use some of their new wealth to cut corners, buy influence, hire lobbyists, procure favorable judicial decisions, and trade insider tips and information, in a self-fuelling cycle; a free market, then, always ends up in market failure, requiring periodic governmental adjustments).

54. RAMIREZ, *supra* note 21, at xiv–xv, 53–55, 86–90, 92–96, 172–82.

55. *Id.* at 9, 105–30 (discussing rigged globalization).

countries are so desperate to do business with Americans that the corporate elite can pretty much call the tune.”<sup>56</sup>

“Mexico would certainly agree,” I said. “We talked about this before.<sup>57</sup> Free trade has proven a disaster for that nation’s economy.<sup>58</sup> Perhaps this is where your other book comes in—the one on immigration.”

“It does!” he exclaimed. “You always spur me to see connections, Professor. That’s why I love talking with you.”

(Hah! How little he knew. I learned much more from him than the other way around. But I waved his compliment aside, and he continued.)

“As you know, free trade under NAFTA devastated Mexico’s economy, especially the farming sector, spurring a great deal of undocumented immigration.<sup>59</sup> In this country, unregulated corporate activity ravaged our economy, increased poverty, and thwarted regulation.<sup>60</sup> And Ramirez’s solution consists of accustoming the corporate elite to more oversight, which he thinks they will accept once they realize that the costs of economic exploitation are so high,<sup>61</sup> much as happened during the New Deal.<sup>62</sup> All this will ‘demonstrate the power of legal infrastructure to perfect capitalism,’ reduce the number and frequency of crises, and provide a foundation for sustainable growth.<sup>63</sup> In particular, he urges greater attention to children and education as sources for future innovation and growth.”<sup>64</sup>

“He sounds like a gallant warrior, if a little caught up in the conventional liberal paradigm.”

“My thought exactly. Most of the regulators are former executives, who grew up in the same circles and with the same

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56. *Id.* at 105.

57. See Richard Delgado & Jean Stefancic, *What if John Calmore Had a Latino/a Sibling?*, 86 N.C. L. REV. 769, 782 & n.95 (2008) (noting the role of the North America Free Trade Agreement (“NAFTA”) in decimating Mexico’s economy); Bill Ong Hing, *Reason over Hysteria*, 12 LOY. J. PUB. INT. L. 275, 287–90 (2011) (noting the same). See generally Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937 (1994) (noting the same).

58. See DAVID BACON, *ILLEGAL PEOPLE: HOW GLOBALIZATION CREATES MIGRATION AND CRIMINALIZES IMMIGRANTS* 61–64 (2008) (discussing the impact of NAFTA on the Mexican economy).

59. See RAMIREZ, *supra* note 21, at 10, 13, 105–06, 131–58 (discussing how globalization lowered wages and produced a “race to the bottom” in many of our trading partners); *id.* at 110–12 (noting that it produced much the same in the United States); *id.* at 116 (noting that it spurred much Mexican immigration); JOHNSON & TRUJILLO, *supra* note 23, at 108–10 (noting the same in connection with NAFTA).

60. RAMIREZ, *supra* note 21, at 106.

61. *Id.* at xviii–8, 127–30, 184–216.

62. *Id.* at 185–95.

63. *Id.* at 16.

64. *Id.* at 24, 119–20, 217–18.

experiences, hopes, plans, and worldviews as the very people and companies they are regulating.<sup>65</sup> You can't solve a problem by means of the very mindset that got you into it in the first place.<sup>66</sup> You need new thinking that starts from a very basic level."

"And I gather you don't think that he provides the necessary new thinking."

"I don't want to be harsh," he said. "Some of his suggestions are intriguing, such as reducing the power of privately held regional banks<sup>67</sup> or splitting monetary and regulatory power<sup>68</sup> so as to increase the regulators' independence and reduce conflicts of interest.<sup>69</sup> His book is a brave effort. It performs an invaluable service, if only by pointing out what is wrong. And he might have some new things to say at the conference."

"But you think that his argument fails, because his basic approach is legal—that is, proceeds by means of laws and regulations."

"I do. In our system, at least, the law comes permeated with such an intensely probusiness bias, inherent in our basic documents and traditions, that the kind of reform that would put the financial system on a different, sounder footing is practically inconceivable. The system doesn't really want reform. All of law bespeaks that orientation. It would be like trying to sing without melody or without notes."

"Or speak Spanish without the inflections," I said.<sup>70</sup> But, resolving to push him a little, I added, "But surely, we could reform things around the edges and, maybe over time, improve the whole system. Think about all the laws enacted in the wake of the banking crisis to improve accountability, increase transparency, or rein in predatory loans."

65. See *id.* at xvi–xvii, 35–36, 40–43, 68–69, 75, 95–99, 195; James E. Hall, *A Back Seat for Safety at the F.A.A.*, N.Y. TIMES (Apr. 26, 2013), <http://www.nytimes.com/2013/04/26/opinion/a-back-seat-for-safety-at-the-faa.html>; see also Rosenberg, *supra* note 53 (noting that corruption, monopolistic practice, and insider favoritism can achieve the same).

66. Attributed to Albert Einstein, the maxim means that to solve a lingering problem, one will often have to consider it in different terms. See Peter Buffet, *The Charitable-Industrial Complex*, N.Y. TIMES, July 17, 2013, at A-15. See generally THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962) (discussing how scientific paradigms succeed and supplant each other).

67. See RAMIREZ, *supra* note 21, at 97.

68. *Id.* at 98, 197–200.

69. See *id.* at 100–04 (urging greater scrutiny of the qualifications of mortgage brokers and breaking up large banks); *id.* at 197–200 (suggesting depoliticizing regulatory agencies); *id.* at 200–02 (proposing closer regulation of professionals); *id.* at 203–12 (loosening controls over civil litigation for financial impropriety).

70. See *supra* note 36 (explaining how the very language of the law and prevailing narratives interfere with discussions of thoroughgoing reform).

“Ramirez discusses a host of them,” he conceded, “including the ones I mentioned before.<sup>71</sup> And they might do a little good, for a while.”

“Until bankers and traders figure out how to circumvent them,” I said. “I suppose that’s where your cargo-cult metaphor comes in.”

“Exactly. Unless you understand the conditions that produce periodic crises, cracking down on a few crooks who circumvent the laws will accomplish very little. The system will go on much as it always has—a house of cards building toward yet another collapse. Even Ramirez notes this risk.<sup>72</sup> Others do, too.”<sup>73</sup>

“Sobering,” I said. “I think I’m going to hide some of my savings under my mattress. But what about that other book? You said it’s about immigration.”

## 2. Immigration Law and the U.S.-Mexico Border, by Kevin R. Johnson and Bernard Trujillo

“It is,” said Rodrigo, springing up and retrieving a white, black, and brown paperback from his backpack in the overhead compartment. “It’s a thoroughgoing examination of immigration law and history with an emphasis on the twists and turns of enforcement policy,<sup>74</sup> especially with respect to Mexico, culminating in recent efforts for reform.”<sup>75</sup>

“One of the authors has advocated open borders, if I recall,” I said.<sup>76</sup> I noticed that one of our fellow passengers, sitting across the

71. See *supra* notes 67–69 and accompanying text.

72. RAMIREZ, *supra* note 21, at xvii, 1, 13–14, 27–28, 108–10.

73. See, e.g., GEORGE PACKER, *THE UNWINDING: AN INNER HISTORY OF THE NEW AMERICA* 115–19 (noting that even at the highest levels of power, “the establishment [is] much bigger than any President,” and mentioning Bill Clinton’s failure to achieve tighter regulation of securities trading). Clinton began with reformist zeal but ended up “enthusiastically presiding over the riotous deregulation of the financial sector.” Chris Lehmann, *Great Perturbations*, NATION, Sept. 30, 2013, at 33, 34–35. He presided over the repeal of several key measures of the 1933 Glass-Steagal law that forbade financial houses from performing both investment and commercial banking, and signed the Commodity Futures Modernization Act of 2000, which eliminated restraints on derivatives trading, among other probusiness measures. *Id.*

74. See JOHNSON & TRUJILLO, *supra* note 23, at 51–60, 73–85, 169–94.

75. *Id.* at 241–68.

76. KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* 131–67 (2007) (positing that a liberalized immigration policy would benefit the United States and other nations alike); Kevin R. Johnson, *Immigration and Civil Rights: Is the “New” Birmingham the Same as the “Old” Birmingham?*, 21 WM. & MARY BILL RTS. J. 367, 388–91 (2012) (pronouncing immigration reform a new civil rights frontier); Kevin R. Johnson, *The End of “Civil Rights” as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1482–85 (2002) (pronouncing the same); Kevin R. Johnson & Bill Ong Hing, *The Immigration Rights Marches of 2006 and the Prospects for a New Civil Rights*

aisle, was looking in our direction as though intrigued by our conversation. He looked Middle Eastern, possibly Iranian. But before I could say anything, the flight attendants arrived with a cart and big smiles.

"Care for a snack, gentlemen?" (Flight attendants always call men of color "gentlemen," I have noticed. I made a mental note to ask Rodrigo about this sometime and wondered if he found it grating, too, a sort of exaggerated politesse.)

We gratefully accepted the small plastic packets, and Rodrigo immediately tore his own open and wolfed downed a handful. "I'm hungry," he said. "Giannina and I barely had time for a quick bite before she had to drive me to the airport. The first leg of my trip was so short they didn't offer us anything to eat. Did you get anything?" I nodded yes, after which he asked, "Where were we?"

"You were saying that the structure of the second book was similar to that of the first, except for their different subject matters."

"Oh, right. Although the subject matter of the two books is different—one about corporate capitalism, the other about immigration—their structure is not. They both begin by outlining a sector that is behaving badly. In the case of the immigration book, it's an administrative system that exhibits so many eccentricities and sudden changes of direction . . ."<sup>77</sup>

"That it certainly has," I said. "Some of my students have been caught up in those shifts. Two of them are Dream Act<sup>78</sup> children, whose parents brought them here at young ages and are undocumented. Now, it's fifteen or twenty years later. One is on the law review and worried about whether she will be able to practice law when she graduates."

The passenger across the aisle from us was looking even more interested now and leaning in our direction a little. I made a mental note to bring him into the conversation later if I had a chance.

"That's so unfair," Rodrigo said. "I had one like that last year."

*Movement*, 42 HARV. C.R.-C.L. L. REV. 99, 99 (2007) (pronouncing the same); George A. Martinez, *Race and Immigration Law: A Paradigm Shift?*, 2000 U. ILL. L. REV. 517, 517 (2000) (pronouncing the same); Jeff Jacoby, *Broaden the Immigration Debate—and Abolish the Quotas*, BOSTON GLOBE (July 8, 2012), <http://www.jeffjacob.com/11965/broaden-the-immigration-debate-and-abolish>.

*But see* Stephen Macedo, *The Moral Dilemma of U.S. Immigration Policy: Open Borders Versus Social Justice?*, in DEBATING IMMIGRATION 63, 63–65 (Carol M. Swain ed., 2007) (doubting that comprehensive reform will arrive anytime soon); *Developments in the Law: Immigrant Rights and Immigration Enforcement*, 126 HARV. L. REV. 1565, 1629–32, 1682 (2013) [hereinafter *Developments in the Law*] (doubting the same); Peter H. Schuck, *Immigration Policy: Myths, Realities, and Reforms*, 51 WASHBURN L.J. 189, 200 (2012) (noting that U.S. immigration law is already generous, requiring little liberalization).

77. See JOHNSON & TRUJILLO, *supra* note 23, at 12–24, 28–41, 59–61.

78. See DREAM Act of 2009, S. 729, 111th Cong.

"And because of the plenary power doctrine,<sup>79</sup> measures like that are beyond judicial review,"<sup>80</sup> I added. "I teach those cases in my constitutional law class, and they have always struck my students as utterly irrational."

"The authors discuss that doctrine and show how it led to a vast administrative apparatus accountable only to Congress and not the courts.<sup>81</sup> They note that admissions . . ."<sup>82</sup>

"Including visas, asylum petitions, green cards, and the like, I suppose?"

"Right, and also its opposite, inadmissibility."<sup>83</sup>

"Meaning, I suppose, those with criminal records, terrorist associations, or contagious diseases?"

"Yes, and in past eras, those who were members of the wrong race," Rodrigo added. "Such as Japanese or Chinese. Each area—admission, impediments to it, and reasons for removal<sup>84</sup>—responds almost entirely to the country's changing labor needs and cultural preferences.<sup>85</sup> When not driven by labor demands, the driving forces are wartime fervor or racial animus. The country, you see, took

79. See *Chae Chan Ping v. United States*, 130 U.S. 581, 592–93 (1889) (discussing the basis of the doctrine in a nation's sovereign right to define its citizenry); *Developments in the Law, supra* note 76, at 1584–88 (discussing the doctrine's evolution and current standing); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990) (discussing the doctrine's gradual weakening).

80. *Developments in the Law, supra* note 76, at 1584–85.

81. JOHNSON & TRUJILLO, *supra* note 23, at 43–69, 73–85.

82. *Id.* at 87–104.

83. *Id.* at 106–30.

84. *Id.* at 133–45.

85. See *id.* at 148–69 (explaining the changing demographic of the U.S. immigrant population); see also, e.g., *id.* at 148 ("It is one of the oldest of migration stories: one leaves home and family and moves to a new country in order to work. The labor market of the United States attracts many migrants. The regulation of migrant labor is an important part of American migration history."); *id.* at 150–57 tbls. 8.1, 8.2, 8.3, & 8.4 (summarizing sectors where immigrants find jobs); *id.* at 158–64 (summarizing the regulation of labor migration through immigration laws and regulations). Might it be that federal authorities keep tight control over immigration in part because they alone are responsible for maintaining the integrity of the Social Security system, whose solvency depends on the contributions of immigrants? See Edward Schumacher-Matos, *How Illegal Immigrants Are Helping Social Security*, WASH. POST (Sept. 3, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/02/AR2010090202673.html>. Moreover, very large corporations are in a position to lobby for favorable national legislation, while labor unions and workers are apt to wield influence at the local or state level. Hence, the interest for some states and towns in enacting measures to discourage or facilitate immigration—and the federal government's resistance to this idea.

turns hating Japanese,<sup>86</sup> Chinese,<sup>87</sup> Arabs,<sup>88</sup> Mexicans,<sup>89</sup> Haitians,<sup>90</sup> or even southern and eastern Europeans.”<sup>91</sup>

“I’ve read that sometimes cities and states get into the act. Places like Hazleton, Farmers Branch, and the states of Arizona, Alabama, and Georgia have been enacting laws making things difficult for immigrants, particularly ones from south of the border.”<sup>92</sup>

“Johnson and Trujillo discuss that,” Rodrigo said.<sup>93</sup> “They note that it goes against the idea of federal plenary power and cheer when the federal courts slap the states down.<sup>94</sup> They end with chapters on national security and terrorism<sup>95</sup> and a brief treatment of possibilities for reform.<sup>96</sup> These include liberalizing immigration policy and making America open to anyone who is not a criminal, an invalid, or a security threat.<sup>97</sup> They favor the Dream Act<sup>98</sup>—which would help those students of yours, Professor. They also suggest a guest worker program, driving licenses for unauthorized entrants, and better tracking procedures and coordination among the various enforcement agencies.”<sup>99</sup>

“The book sounds like a good review of immigration law and history . . .”

“Well written, too,” he said, “with lots of useful tables.”

“But what chances do you see of their suggestions taking hold?”

“Practically none,” he replied, “except the ones having to do with stricter enforcement. As with corporate and financial reform, their suggestions merely ask the system to reform itself simply because they can envision a way it could operate better. It’s like a doctor who notices that his patient is sick but only tells him that he can visualize the patient being healthier.”

86. JOHNSON & TRUJILLO, *supra* note 23, at 2, 4.

87. *Id.* at 4, 43–46.

88. *Id.* at 116–17, 217–37.

89. *Id.* at 112–13, 169–93, 229–30.

90. *Id.* at 229–30.

91. *Id.* at 124, 129.

92. *Id.* at 17–18, 22–23, 59, 198–213.

93. *Id.* at 198–213.

94. *Id.* at 198–99, 213; *see also Developments in the Law, supra* note 76, at 1608–29. The federal government does not rule out all private or state-sponsored limits on immigrants’ ability to work or drive a car. *See, e.g., Hoffman Plastics v. Nat’l Labor Relations Bd.*, 535 U.S. 137, 148–49 (2002) (denying back pay to an undocumented immigrant fired for engaging in union activity); *Alexander v. Sandoval*, 532 U.S. 275, 278–79, 293 (2001) (upholding denial of an injunction against an Alabama English-only rule for issuing drivers licenses).

95. *See* JOHNSON & TRUJILLO, *supra* note 23, at 217–37.

96. *See id.* at 241–68.

97. *See id.* at xi, 256–59.

98. *See id.* at 202, 242–44, 256, 275.

99. *See id.* at 236.



“Or asks him to try to be healthier without telling him how to do it.”

“Or explaining how he got sick in the first place.”

“Maybe the patient lives in an unhealthy environment with lead paint in the walls or arsenic in the drinking water,” I said.

“Exactly. A system is unlikely to fix itself without outside intervention of some sort, or maybe a crisis.<sup>100</sup> As you mentioned, all the prevailing narratives and mindsets provide it with an impregnable suit of armor.<sup>101</sup> Oh, look what we have here!”

The airline attendants had arrived at our row with a second cart bearing hot and cold beverages. We placed our orders, coffee (“Cream and lots of sugar, please”) for my highly wired young friend, chamomile tea for me (“I want to be able to get a good night’s sleep tonight”).

“I forgot to ask, Professor, are you speaking tomorrow?”

“Yes, I’m giving the afternoon keynote. But I’m completely ready, so please go on. I’m fascinated by your paradox of regulation—the idea that our legal system cannot reform either corporate activity or immigration, because law contains encoded within its very structure a legal and operating framework that renders legal reform at best a distant hope. A kind of self-protective DNA or immune system, if you will.”

*B. Waiting on the Beach: In Which Rodrigo Likens Legal Reform to a Cargo Cult Activity*

We were silent for a moment as we sipped the beverages the attendant had brought (“Here you are, Professor”) and Rodrigo stirred his trademark four spoonfuls of sugar into his coffee. Then, after a long swallow, he continued, “As we were saying, neither of the two areas of law is likely to reform itself—”

“Or yield to efforts by outsiders, including federal regulators?” I interjected, resolving to push my young friend as much as possible. “Not even at the margins?”

100. I thought of the Civil War, which enabled society to end slavery, or the Great Depression, which prompted some of the changes of the New Deal.

101. For more on the way an empowered sector (like corporate capitalism) resists change, see, for example, BENJAMIN GINSBERG, *THE VALUE OF VIOLENCE* 34–35 (2013) (describing how the creators of bureaucracies surround these institutions with rules and defenses that resist change and attacks from without). Bureaucracies also attract staff who share the institutional mindset, so that defectors and whistleblowers are few in number and have trouble gaining an audience. When anyone challenges such an institution, judges tend to defer to administrative expertise (i.e., these same administrators). Above all, the structure of corporate law does not merely wish to remain the same (i.e., not change), it cannot change because its modes of thought undermine any possibility of reform. *See supra* note 36.

1. *Rodrigo's First Comparison: Race and Civil Rights*

"Not even there," he said with conviction. "As Derrick Bell pointed out with race,<sup>102</sup> the most that will happen is momentary advances—which usually arrive when white self-interest requires them—followed by silent but inevitable retreat. Bell posited this in his famous *Interest Convergence* article,<sup>103</sup> when he hypothesized that *Brown v. Board of Education*<sup>104</sup> arrived not so much in response to earnest black pleading as because white elites needed a breakthrough for blacks right around then to burnish America's international appearances—" <sup>105</sup>

"Which were then sagging, and decision makers needed a breakthrough to show to the uncommitted Third World..." I interjected.

"Much of which was black, brown, or Asian," he added. "To show them that we were superior to godless, materialistic, worldwide communism and that they should side with us in our struggle against the Soviet behemoth. A great triumph for the NAACP, which had been litigating this very issue for decades, getting nowhere or winning, at best, very narrow victories, was just what the doctor—" <sup>106</sup>

"The State Department, actually," I interjected.

"Precisely. Exactly what the State Department ordered.<sup>107</sup> Mary Dudziak years later showed that Bell's hypothesis was correct.<sup>108</sup> She obtained State Department memos and private letters showing that elite decision makers had been imploring the Supreme Court and Department of Justice, which until then had turned a deaf ear to black pleas, to throw their weight behind the black cause and for precisely the reasons Bell identified."<sup>109</sup>

"And the Supreme Court obliged," I said, "yielding a great victory for African Americans."<sup>110</sup>

"Which soon dwindled away in the face of white resistance, narrow judicial interpretation, and administrative foot dragging and

102. See Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

103. See *id.* (positing an interest-convergence approach to interpreting black history).

104. 347 U.S. 483 (1955).

105. Bell, *supra* note 102, at 524.

106. *Id.*

107. See Derrick Bell, *Brown v. Board of Education, Relearning and Learning from Our Racial History*, 66 U. PITT. L. REV. 21, 28 (2004).

108. See Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 64–66 (1988) (showing how American diplomatic objectives shaped domestic civil rights policy).

109. *Id.* at 103. See generally MARY DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND IMAGE OF AMERICAN DEMOCRACY* (2010) (further documenting this relation).

110. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (reversing the doctrine of separate but equal in school assignments).

delay," he added. "Today, more black children attend segregated schools than before *Brown* came down."<sup>111</sup>

"Interest convergence explains many, if not all, of the twists and turns of black fortunes. In his monumental casebook, *Race, Racism, and American Law*,<sup>112</sup> Bell extends his interest-convergence analysis to a host of areas, including housing and educational law, public accommodations, and the criminal justice system."<sup>113</sup>

"So, Professor, the system resists change, and when it arrives, it is short-lived. Because it responds to its own internal logic and agenda, it's easy to assume that the system is changing because of your earnest pleas. It has just discovered that you are a human being with hopes and fears and a life plan of your own. You can easily believe that the reform is real and long lasting, and, now that the legal system has come to its senses, the reform that you have been celebrating will last forever. Bell's casebook, as well as the entire course of civil rights history, shows that this is not true.<sup>114</sup> If you understand the real force behind the zigs and zags of black fortunes—namely, white self-interest—you will see that this is so, and the reason why."

## 2. *Rodrigo's Second Example: Financial and Corporate Reform*

"And you believe that this is true of reform in general, not just in the area of civil rights?"

"I do. Consider financial regulation. The evidence Steve Ramirez puts forward in the first seven chapters of his book as an argument for reform suggests, instead, that it is extremely unlikely to ever arrive—at least the fundamental kind."<sup>115</sup>

"In other words, it proves the opposite of what he posits," I said.

"It does. He reviews capitalism's history going back over a century, showing that it leads to wheedling, corner cutting, and self-dealing so severe that it eventually brings the whole system down.<sup>116</sup> For his part, Derrick Bell notes that the Constitution built in protection of the right of property, including by means of six

111. See GARY ORFIELD, *THE CIVIL RIGHTS PROJECT, REVIVING THE GOAL OF AN INTEGRATED SOCIETY: A 21ST CENTURY CHALLENGE* 3 (Jan. 2009), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/reviving-the-goal-of-an-integrated-society-a-21st-century-challenge/orfield-reviving-the-goal-mlk-2009.pdf>.

112. DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* (6th ed. 2008).

113. See *id.* at 73–147 (Chapter 3, *The Quest for Effective Schools*); *id.* at 425–96 (Chapter 7, *Property Barriers and Fair Housing Laws*); *id.* at 555–93 (Chapter 9, *Public Facilities: Symbols of Subordination*).

114. See generally BELL, *supra* note 112.

115. RAMIREZ, *supra* note 21, at 3–6.

116. See *supra* Subpart II.A.1 and accompanying notes; see also RAMIREZ, *supra* note 21, at 31–35, 65–66; Rosenberg, *supra* note 53 (noting the same tendency).

measures that implicitly or explicitly protected the institution of slavery."<sup>117</sup>

"And others providing for protection of property against taking."<sup>118</sup>

"Not to mention recent Supreme Court rulings affording corporations the right of free speech,"<sup>119</sup> he added. "As well as the long history of poll taxes and other measures that made sure that democracy remained friendly to free enterprise and a system that rewards and honors wealth.<sup>120</sup> A second form of DNA in action."

"So, as with race, when corporate reform finally arrives, it does so to protect the very system it ostensibly seeks to rein in—as Bell and Dudziak showed with racial reform."<sup>121</sup>

"Exactly. Incremental reform of finance and corporate activity merely allows the system to continue its profitable ways.<sup>122</sup> Basic reform never arrives, because it would be unthinkable. In fact, attacking the immune system only makes it stronger."

"By basic reform, I suppose you mean things like a high minimum wage, laws protecting union activity, and a tax code that

117. BELL, *supra* note 112, at 37–40 (discussing the slavery compromises that protected an economic system in which blacks were a form of property).

118. See U.S. CONST. amend. V (prohibiting official taking without just compensation).

119. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 371–72 (2010) (holding that corporate speech is entitled to First Amendment protection); *Kelo v. City of New London*, 545 U.S. 469, 489 (2005) (permitting the taking of private property through condemnation). For more on how the powerful pharmaceutical and tobacco industries have used the First Amendment (ostensibly a cornerstone of populism, dissent, and democracy) to avoid consumer-warning labels on the theory that this would amount to compelled speech, see Tim Wu, *The Right to Evade Regulation, Remain Unaccountable, and Mock Democracy*, NEW REPUBLIC (June 3, 2013), <http://www.newrepublic.com/article/113294/how-corporations-hijacked-first-amendment-evade-regulation> (noting that recent Supreme Court rulings also protect false advertising and that "[f]ew industries these days can resist First Amendment defenses of even the most outrageous conduct" by characterizing it as protected speech), Rosenberg, *supra* note 53 (noting the same), and Ron Lenz et al., *As Tolerance of LGBT People Grows, Anti-Gay Groups Ratchet up Smears*, INTELLIGENCE REP., no. 150, 2013, at 1, 3 (providing examples of appalling forms of speech by organizations).

120. See BELL, *supra* note 112, at 354–65; JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 681–82 (2d ed. 2007).

121. See generally BELL, *supra* note 112; DUDZIAK, *supra* note 109.

122. See DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY* 33–48, 158 (2d ed. 2010) (discussing legitimation in the context of antidiscrimination laws); DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION [FIN DE SIÈCLE]* 190, 236–64 (1997) (discussing how our system of laws and adjudication legitimizes an unfair system); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1051–52 (1977) (discussing the same); Robin West, *Reconsidering Legalism*, 88 MINN. L. REV. 119, 142 & n.80 (2003) (discussing legitimation); Rosenberg, *supra* note 53 (terming the faith in free markets a useful myth).

requires owners of the means of production to share their profits with their workers and customers.”<sup>123</sup>

“I do,” he said. “The rights that the Constitution does vouchsafe are mostly procedural, having to do with the rights of privacy, speech, due process, and an attorney in criminal matters.<sup>124</sup> They are never substantive, such as the right to food, shelter, or a state-paid education.”<sup>125</sup>

“In fact, college education is becoming more and more expensive, with federal support of tuition controls and Pell Grants and other low-cost loans scarcer and scarcer.<sup>126</sup> Upward mobility in our society is considerably lower than it is in other western industrialized nations.<sup>127</sup> Our bias in favor of protecting wealth and the corporate economy may be the reason. I gather that this is what you are saying?”

### 3. *Rodrigo's Third Example: The Immigration System*

“Yes. As we’ve seen, the very narratives and tools with which we reason stand in the way of reform. The immigration system, too, has resisted fundamental reform, since it lies close to the center of the way we conceive our political and economic system.<sup>128</sup> That system deals with the basic makeup of the American state and

123. Measures, like this, that might amount to reform of the present system and place us on a par with European socialist democracies with high standards of living and little poverty or crime.

124. See Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1067–68 (1980).

125. See, e.g., *Maher v. Roe*, 432 U.S. 464, 465–66 (1977) (finding that the Constitution guarantees no right to a State-paid abortion); Charles L. Black, *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1104 (1986).

126. See Kelly Field, *Obama Plans to Tie Student Aid to College Ratings Draws Mixed Reviews*, CHRON. HIGHER EDUC. (Aug. 22, 2013, 10:32 PM), <http://chronicle.com/article/Obama-Proposes-Tying-Federal/141229/>.

127. See Richard Delgado, *The Myth of Upward Mobility*, 68 U. PITT. L. REV. 879, 880 (2007) (book review).

128. See Victor C. Romero, *Our Illegal Founders*, 16 HARV. LATINO L. REV. 147, 150 (2013) (noting that boundaries persist because laws enable and create them; once created, they govern who may cross and live on the other side); see also Matthew J. Lindsay, *Immigration, Sovereignty, and the Constitution of Foreignness*, 45 CONN. L. REV. 743, 810–11 (2013) (noting that immigration case law has constructed immigrants as dangerously foreign: “As wage labor became ascendant . . . and as ‘native’ workers confronted increasingly intense wage competition from recent immigrants, legislators, judges, labor leaders, and social scientists began to doubt both the regenerative power of American economic and political culture and, most importantly, the moral natures of immigrants themselves. . . . The Supreme Court then translated the discourse of indelible foreignness into a potent and durable rationale for immigration exceptionalism . . . to be deployed against invading armies of racially degraded, economically and politically unassimilable foreigners”). For a discussion on the various ways a large empowered sector defends itself and resists change, see generally Friedman, *supra* note 36.

citizenry. As a result, it is largely impervious to anything like basic reform through law. Shot through with capitalist ideas, foundations, images, and aspirations, it lurches from one extreme to another, in one era closing off immigration to practically everyone, in another opening the doors to a favored few."<sup>129</sup>

"And the force propelling the various shifts and changes is the need for labor of particular types?"

"Yes, and not only that—these days, immigration enforcement is a major industry, with large profits for the tech sector, prison builders, and border states interested in adding jobs in the enforcement industry.<sup>130</sup> And at all times, the ebb and flow of enforcement moves in tandem with the needs of powerful sectors for labor.<sup>131</sup> All this is easy to show. It's like shooting fish in a barrel. The Johnson-Trujillo book shows as much.<sup>132</sup> For example, right now, we need computer technicians from India and Korea and a few farm workers from Latin America—"<sup>133</sup>

129. See Romero, *supra* note 128, at 151 (noting that boundaries have always been subject to the vagaries of politics, economics, and perception and cater to the interests of the powerful); see also Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 211–12 (2012) (describing narrative of the good immigrant—who follows the rules and the law—and the bad immigrant—who skirts the rules); Leticia M. Saucedo, *Anglo Views of Mexican Labor: Shaping the Law of Temporary Work Through Masculinities Narratives*, 13 NEV. L.J. 547, 548–49 (2013) (noting that authorities circulate a number of narratives or story lines of Mexican blue-collar entrants, none of them flattering).

130. See Note, *Improving the Carceral Conditions of Federal Immigrant Detainees*, 125 HARV. L. REV. 1476, 1476 (2012) (discussing detainees and the conditions in which they languish); Julia Preston, *Huge Amounts Spent on Immigration, Study Finds: Report on Enforcement Efforts Sets the Stage for Debate on an Overhaul*, N.Y. TIMES, Jan. 8, 2013, at A11.

131. See, e.g., John B. Judis, *Documented Flaws: The Immigration Bill's Disturbing Fine Print, Politics*, NEW REPUBLIC (May 30, 2013), <http://www.newrepublic.com/article/113295/immigration-bill-denies-obamacare-undocumented-workers> (noting that business interests are asserting themselves in connection with a new reform bill and that the Republican party supports it only because it hopes to attract Latino voters, whereas unions support it because they want new members). All of this amounts to "a bias toward the interests of the rich and powerful," *id.*, much as with financial reform. See *supra* Subpart II.A.1; see also Eric A. Posner, *The Institutional Structure of Immigration Law*, 80 U. CHI. L. REV. 289, 305–06 (2013) (noting that the main purpose of the system is to supply willing workers who will assimilate and provide value); Note, *Proposing a Locally Driven Entrepreneur Visa*, 126 HARV. L. REV. 2403, 2410 (2013) (noting that immigrants have a "willingness to create and manage businesses that may generate new opportunities for current residents in the United States").

132. See *supra* note 85.

133. See Romero, *supra* note 128, at 151 (noting the need for entrepreneurs); *id.* at 161–62 (noting the need for farmworkers); *id.* at 166 (noting the need for anyone willing to "work hard"); see also Steve Appel, *Indecision on Federal Immigration Reform Threatens Farm Industry, Jobs at Risk*, SEATTLE

“Who, hopefully, won’t stick around at the end of their contracts,” I added.

“Exactly. And we don’t want a lot of people from the Middle East, for obvious reasons. If the Equal Protection Clause applied to immigration laws and quotas, the whole system would fall by its own weight.”<sup>134</sup>

“But it doesn’t.<sup>135</sup> As you explained, judges cannot review substantive immigration law.<sup>136</sup> That body of law thus responds to its own set of forces, which at times include overt racism, but in all eras include the need for labor.”<sup>137</sup>

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TIMES (Nov. 4, 2011), [http://seattletimes.com/html/opinion/2016691370\\_guest06appel.html](http://seattletimes.com/html/opinion/2016691370_guest06appel.html); Somini Sengupta, *Engineers See a Path out of Green Card Limbo*, N.Y. TIMES, May 23, 2013, at A1 (noting that tech companies back immigration reform for this reason). When we have little need for a group of immigrants, we want them to remain where they are (i.e., not try to change their location to the United States merely because they would prefer to live here). The term “place” has powerful normative power: If it is not your *place* to say something, the law will deny you standing, and you may not say it. See *Warth v. Seldin*, 422 U.S. 490, 498–99, 502 (1975). And if you commence a lawsuit in the wrong place, the court will dismiss for lack of jurisdiction. See *Pennoyer v. Neff*, 95 U.S. 714, 719–20 (1878). “Place” often carries pejorative overtones (“you are out of place”) ranging from the conferral of birthright citizenship to those born here to the rule that the President must be born in the United States. We find it easy, then, to apply these negative associations to immigrants merely seeking a better life. People should ordinarily stay “in their place,” we think. God created the races, one per continent—why disturb this allocation? See John M. MacDonald & Robert J. Sampson, *Don’t Shut the Golden Door*, N.Y. TIMES, June 20, 2012, at A29 (noting that immigration confers economic benefit on the regions where the new immigrants settle and the crime rate even goes down); see also Richard Delgado, et al., *Setting the Record Straight About Latino Immigrants*, SEATTLE TIMES, May 22, 2011, at A23 (illuminating how immigrants help lower crime rates and bring about economic benefits).

134. See Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A Magic Mirror into the Heart of Darkness*, 73 IND. L.J. 1111, 1114 (1998) (noting that the immigration system, which operates virtually without outside control, supplies a “magic mirror” into what American society really thinks about domestic minorities and would do to them were it not for constitutional restraints). For examples of the current system, see Edwidge Danticat, *Detention is No Holiday*, N.Y. TIMES, Mar. 28, 2012, at A27; *Obama Administration Sets Deportation Record* (Dec. 21, 2012, 5:27 P.M.), <http://www.usatoday.com/story/news/nation/2012/12/21/record-2012-deportations/1785725/>.

135. See Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1–2, 12 (1984).

136. See *supra* note 73, 76.

137. See, e.g., Romero, *supra* note 128, at 149–52 (noting that economic forces explain why most people immigrate and why the receiving country establishes priorities regarding whom it will admit); *supra* notes 79, 85, and accompanying text. To be sure, the immigration authorities sometimes cite “humanitarian” concerns as the basis for granting asylum for immigrants from countries with whom we are having a disagreement. See RICHARD DELGADO, ET AL., *LATINOS AND THE LAW: CASES AND MATERIALS* 83–106, 176 (2012) (discussing

“Especially agribusiness,” he added. “That student I mentioned comes from a family of farm workers who came here when she was a child. The entire family worked in the fields. The government looked the other way because the owners needed their labor. Reform in this area never comes or lasts long, unless it also benefits a key sector of the economy or national security or caters to a currently noisy group of nativists—in which case the change does not amount to reform any more than seven amounts to yellow. It represents the system defending itself and replicating itself, over and over.”

We were both silent for a moment as I absorbed the bleak prospects that Rodrigo’s analysis had raised. I wondered if he believed that areas outside civil rights, the capital markets, and immigration were also impervious to reform and was preparing to ask him, when the passenger on the other side of the aisle politely coughed to attract our attention. “Excuse me, are you two law professors?” he asked. “I couldn’t help hearing your conversation.”

We both nodded, a little warily, at which time our interloper introduced himself in a courtly and self-deprecating fashion. It turned out that he was a senior magistrate and former treasury secretary in a Middle Eastern country that was, as he put it, “in the

federal programs that facilitated Cuban resettlement). Yet, even grants of asylum reinforce American exceptionalism, paint other countries as exotic or cruel, and accelerate a brain drain in the United States’ favor. See, e.g., Anshu Budhrani, *Regardless of My Status, I Am a Human Being: Immigrant Detainees and Recourse to the Alien Tort Statute*, 14 U. PA. J. CONST. L. 781, 782–84 (2012) (providing examples of the inhumane treatment that immigrants receive); Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571, 1574–75, 1585 (2012) (noting that immigration law systematically brands the United States as a high-minded, morally excellent society, while would-be immigrants are of dubious morality and must prove their worth to gain entry); Glenys P. Spence, *Colonial Relics: Unearthing the Lingering Tyranny of Colonial Discourse in U.S.-Caribbean Immigration Law and Policy*, 26 J. CIV. RTS. & ECON. DEV. 127, 128, 135 (2011) (noting that immigration law exhibits roots in colonial mentality and inhumane treatment); Celina Kareiva, *Program Gives Comfort to Local Immigrants amid Violence Abroad*, SEATTLE TIMES, July 24, 2011, at B1. Even the language in which society discusses immigration betrays an aversion to many entrants and their countries of origin. See Kate Aschenbrenner, *Discretionary (In)Justice: The Exercise of Discretion in Claims for Asylum*, 45 U. MICH. J.L. REFORM 595, 625 (2012); Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545, 1548–49, 1569, 1573–74 (2011); Fatima E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 419–20, 424 (2011) (noting that this is true of many immigration judges, as well); Jessica Mayo, *Court-Mandated Story Time: The Victim Narrative in U.S. Asylum Law*, 89 WASH. U. L. REV. 1485, 1502–03, 1505, 1510–12 (2012); Evan Nolan, *Picking Up After the Baby Boomers: Can Immigrants Carry the Load?*, 24 GEO. IMMIGR. L.J. 77, 78–79 (2009); Saucedo, *supra* note 129, at 563 (explaining that immigrants have less of an opportunity to assert workplace rights because of the narrative that immigrants have been given throughout history).



process of modernizing itself.” Trained in England, he was interested in some of the same issues Rodrigo and I had been discussing, namely (as he put it) “how to strike a balance between a free-market economy and protecting human freedom and values.” Rodrigo interjected that this was the very subject that his Israeli friend and he had been corresponding about,<sup>138</sup> and the other fellow—his name turned out to be Rashid—smiled and took down her name. (“I get there often, on business.”)

After a few minutes of amiable talk, Rashid, who was wearing an expensive, tailor-made suit with wide pinstripes and a red silk tie, looked at us meaningfully and said, “perhaps we had better talk about something else.” I saw one of the flight attendants lingering nearby, and immediately realized why.

Rodrigo picked up on our meaning and said, “Let’s talk about doctrine. It’s safer. I bet your system, like ours, protects freedom of speech.” (Out of the corner of my eye, I saw the flight attendant, who was a large male, jump a little at the mention and move away.)

As he disappeared from view, Rashid smiled and said, “Of course. We patterned our constitution after yours, as most emerging nations do. And ours protects freedom of speech in much the same terms as yours.<sup>139</sup> We don’t call it the First Amendment, but Article One. And our case law, though sparse, is very much like yours, too.”

“Well, well,” Rodrigo and I said at the same time. “And I gather you two are curious how First Amendment case law here behaves under my hypothesis,” Rodrigo said.

Rashid said he’d love to hear. I was about to say me too, but was interrupted by a loud voice (probably the eavesdropping male, I thought) ordering everyone on the plane to fasten their seat belts, turn off their computers and cell phones, and put their tray tables up and their seat backs in the vertical position.

“More regulation,” Rashid said with a smile. “But I’m all ears. I read most of your free-speech law in law school, so I’m familiar with it, including all those exceptions and special doctrines that seem to track the interest of some favored group.<sup>140</sup> I gather you think this unruly system only makes sense if you shift focus and look not at doctrine and policy but underlying structures of power, commercial imperatives, and similar forces?”

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138. See generally Assaf, *supra* note 22.

139. See generally, e.g., FRANCES D’SOUZA & KEVIN BOYLE, STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION (Sandra Coliver ed., 1992) (discussing freedom of speech in a comparative perspective); RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH (2006) (discussing the same).

140. See Richard Delgado, *Campus Anti-Racism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 378–86 (1991) (discussing First Amendment exceptions and their tendency to favor an empowered group, such as publishers).

4. *Rodrigo's Fourth Example: The First Amendment and the Role of Favored and Disfavored Speakers.*

We both looked at Rashid with new respect. "I do," Rodrigo said. "Recently, I attended a colloquium by a faculty colleague of mine. She's a labor lawyer who was interested in making sense of opt-in requirements for new union workers.<sup>141</sup> The Supreme Court thinks that forced union membership creates a First Amendment problem—they call it 'forced speech'<sup>142</sup>—if a large portion of a worker's dues go to political activity, such as lobbying.<sup>143</sup> Reasoning that the worker might have no objection to the union's spending his money on ordinary activities, such as policing dangerous conditions on the job site or rest breaks to make sure they are long enough, but could easily object to speeches and other forms of union activity . . ." <sup>144</sup>

"Maybe because the worker is a libertarian," I said. "Someone who prefers to speak for himself."

"Exactly. In some of these settings, the Court sees an opt-out requirement that makes the worker take an affirmative step in order to reduce his union dues as overly burdensome."<sup>145</sup>

"I gather that in situations like that, they want the union to require the worker to check a box or something indicating he wants to opt in," Rashid said. "We have a case like that in my country."

"Right," said Rodrigo. "And my poor colleague was tearing her hair out trying to figure out whether it makes sense, on a principled basis, to make a person opt in or opt out of a system, such as with class actions, where you get to opt out."<sup>146</sup>

"Or opt in," I said, "if, somehow, the lawyer has forgotten to send you a notice."

"Right," said Rodrigo. "But there, the basic tool is opting out—the opposite of the union situation. And she had identified a host of situations, with free speech or association or legal-defense rights, where we protect opting in or opting out."<sup>147</sup>

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141. See Charlotte Garden, *Facilitating Dissent* (2013) (unpublished manuscript) (manuscript at 1) (on file with author) ("When can individuals be compelled to speak, or to subsidize others' speech? What happens when . . . workers seek to opt out of mandatory bar or union dues . . . and when students seek to avoid . . . paying student activity fees that fund groups that espouse conflicting opinions?").

142. *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2289 (2012) (explaining that "compulsory fees constitute a form of compelled speech and association that imposes a 'significant impingement on First Amendment rights'" (citations omitted)).

143. *Id.* at 2294.

144. *Id.* at 2289–90.

145. *Id.* at 2290.

146. See FED. R. CIV. P. 23(c)(2)(B)(v) (providing for opting out of certain types of class actions).

147. See, e.g., *id.*

“Like in *Miranda v. Arizona*,”<sup>148</sup> I said. “There, we make the police tell the suspect that they have the right to remain silent.<sup>149</sup> But they can opt in, so to speak, if they feel like it, so long as they do so knowingly and voluntarily.<sup>150</sup> But the default position is that they must receive a warning—the choice to opt in or out.”<sup>151</sup>

“And your colleague was trying to make sense of all this opting in and out?” I asked.

“Yes, and getting nowhere. She could see various ways of drawing lines, but the next case that she ran across would falsify her intuition and require a different rule.”

“And I bet you thought of a way around her dilemma,” I said.

“I did,” Rodrigo said, leaning forward with a look of anticipation.

“I have one, too,” Rashid said. “Only I bet it’s the same as yours, young man. Let’s hear.”

Drawing a deep breath and sneaking a quick look out the window to see how far we had descended and how much time he had left, Rodrigo began.

### III. IN WHICH RODRIGO EXPLAINS WHY REGULATION CANNOT REFORM CORE ELEMENTS OF THE CURRENT SYSTEM

#### A. *First Amendment Legal Realism*

“I assume you two have heard of First Amendment legal realism?”<sup>152</sup>

When we both nodded, Rodrigo said, “To make sense of freedom-of-speech law, including my colleague’s opting in or opting out requirements, you have to take account of favored and disfavored speakers.”

“You mean it has to do with the speakers, not the speech?” I asked. I was reminded of a famous line by Yeats about telling the dancer from the dance,<sup>153</sup> but I decided to wait and hear Rodrigo out, since I thought I could tell where he was going.

148. 384 U.S. 436 (1966).

149. *Id.* at 467–68 (requiring that the police notify suspects of the right to remain silent before interrogating them).

150. *Id.* at 475–76.

151. That is, to remain silent or to “opt in” by speaking to the police.

152. See, e.g., Richard Delgado, *Toward a Legal Realist View of the First Amendment*, 113 HARV. L. REV. 778, 778 (2000) (reviewing STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (1999)) (discussing a legal-realist view of that Amendment that is beginning to supplant a categorical approach that decides cases by reference to a series of formulaic questions, for example: Is this speech or action? Does the regulation target content or mere time, place, and manner? Is the speaker a public figure?).

153. I was thinking of William Butler Yeats. See W.B. Yeats, *Among School Children*, in *The Collected Poems of W.B. Yeats* 215–17 (1996) (“O body swayed to music, O brightening glance, How can we know the dancer from the dance?”).

“Sure. In one era, children are disfavored speakers.<sup>154</sup> In another, they are favored.<sup>155</sup> The same is true for communists. In one period, they are banned from everything.<sup>156</sup> Today, we treat them almost sympathetically.<sup>157</sup> We may think they are misguided, but we don't jail or deport them for their beliefs.<sup>158</sup> The *Garcetti v. Ceballos*<sup>159</sup> case disfavors governmental speech,<sup>160</sup> which in another era received protection.<sup>161</sup> Not long ago, we boasted of how our system allowed professors and others to speak freely.<sup>162</sup> Yet when University of Colorado recently fired Ward Churchill for siding with our ideological enemies in an obscure essay, few came to his defense.”<sup>163</sup>

“And the courts refused to reinstate him,”<sup>164</sup> I added. “If he had been one of those neoconservatives attacking Obama's health insurance program and a university fired him for saying so, everyone would have been indignant, and the courts would have ordered him reinstated.”

“And so it goes. Muslim speech is now in disfavor . . .”

154. See *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 514–15 (Stewart, J., concurring) (noting that students and the young have not generally received an unlimited right to speak); see also, e.g., JOHN MIRK, *MIRK'S FESTIVAL: A COLLECTION OF HOMILIES* (1450) (noting the ancient adage, “Children should be seen and not heard”).

155. See *Tinker*, 393 U.S. at 506 (upholding the right of schoolchildren to wear black arm bands protesting the Vietnam War on the ground that they do not shed their rights at the schoolhouse gate).

156. See *Dennis v. United States*, 341 U.S. 494, 516–17 (1959) (affirming the conviction of speakers who advocated socialist reforms).

157. See *Am. Arab Anti-Discrimination Comm. v. Meese*, 714 F. Supp. 1060, 1083–84 (C.D. Cal. 1989) (declaring an immigration statute unconstitutionally overbroad because it allows deportation of individuals merely because they advocate for communism), *rev'd on other grounds*, 970 F.2d 501 (9th Cir. 1991) (reversing for ripeness issues).

158. See *id.*

159. 547 U.S. 410 (2006).

160. *Id.* at 424 (holding that the First Amendment does not protect a public employee from discipline stemming from job-related speech).

161. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574–75 (1968) (upholding the right of public school teachers to speak out about political issues); Peter Van Buren, *Free Speech for Government Employees*, *NATION* (Nov. 28, 2011), <http://www.thenation.com/article/164813/free-speech-government-employees#axzz2dUTAEaO4> (arguing the same).

162. See, e.g., AM. ASS'N OF UNIV. PROFESSORS, 1940 STATEMENT ON PRINCIPLES OF ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS 1 (1970), available at <http://www.aaup.org/file/principles-academic-freedom-tenure.pdf> (declaring that it is settled that faculty may address controversial topics freely).

163. See Dan Frosch, *Professor's Dismissal Upheld by Colorado Supreme Court*, *N.Y. TIMES*, Sept. 10, 2012, at A12.

164. See *id.*; see also *Churchill v. Univ. of Colo. at Boulder*, 285 P.3d 986, 1011–12 (Colo. 2012), *cert. denied*, 133 S. Ct. 1724 (2013).

"Is it ever," our neighbor said, drawing himself up with indignation. "Just the other day, a prominent Muslim scholar I know was denied permission to speak here at a university that had invited him.<sup>165</sup> The authorities intercepted him at the U.S. airport where he landed, interviewed him for several hours, and sent him home.<sup>166</sup> I'm the former treasury secretary of my country, which has long been in the U.S. ambit, and even I sometimes have to undergo intrusive screening when I come to see my son who attends college here. You saw how that flight attendant was watching us a little while ago."

"Yes," Rodrigo said, looking at him sympathetically. "And just a few years ago, Edward Said and Albert Memmi were the hot new scholars.<sup>167</sup> Everybody was reading their work."

"An American citizen named Al Awlaki made broadcasts to the Muslim world depicting the United States in unflattering terms,"<sup>168</sup> I pointed out. "Our mighty system of free speech didn't protect him."<sup>169</sup>

"Right," said Rodrigo. "We sent a drone and killed him.<sup>170</sup> And then there are whistleblowers. The ones we like, we call heroes and protect them against retaliation.<sup>171</sup> The ones we don't like, we call leakers.<sup>172</sup> If what they divulge is a government secret or merely makes the government look bad, we call them traitors and charge

165. See Tiffani B. Figueroa, Note, "*All Muslims Are Like That*": How Islamophobia is Diminishing Americans' Right to Receive Information, 41 HOFSTRA L. REV. 467, 467-68 (2012) (discussing the case of a prominent Muslim scholar from South Africa).

166. *Id.*

167. See generally, e.g., EDWARD SAID, *ORIENTALISM* (Penguin Books, 1977) (describing the subtle, but persistent Eurocentric prejudice against Arab-Islamic people and their culture); ALBERT MEMMI, *THE COLONIZER AND THE COLONIZED* (Howard Greenfeld trans., 1965) (exploring the psychological effects of colonization).

168. See Hakim Almasmari et al., *Drone Kills Top Al Qaeda Figure*, WALL ST. J. (Oct. 1, 2011), <http://online.wsj.com/article/SB10001424052970204138204576602301252340820.html>.

169. *See id.*

170. *See id.*

171. See, e.g., Pete Hamill, *The Life and Death of an Idealist*, N.Y. TIMES (Dec. 13, 1981) <http://www.nytimes.com/1981/12/13/books/the-life-and-death-of-an-idealist.html> (reviewing HOWARD KOHN, *WHO KILLED KAREN SILKWOOD* (1981)) (discussing the life of Karen Silkwood, who brought safety violations in the nuclear power industry to public attention).

172. See Andrew Aylward, *Manning is Acquitted of Aiding the Enemy*, WALL ST. J. (July 30, 2013), <http://online.wsj.com/news/articles/SB10001424127887323854904578637681374754140> (discussing the fate of Private Bradley Manning, who leaked secrets about events in the war in Afghanistan); Steven Lee Myers, *Snowden's Lawyer Comes with High Profile and Kremlin Ties*, N.Y. TIMES, July 28, 2013, at A13 (discussing the case of Edward Snowden, the security analyst who leaked details of NSA surveillance).

them with crimes.<sup>173</sup> So, you see, Professor, the solution to the riddle that was giving my young colleague such a headache was simple. All you need to figure out is whether, at a given period, trade unionists, communists, critical legal theorists, Muslims, anti-American propagandists, consumers who form a class, or people who disclose official secrets to a journalist are in favor or disfavor. The courts then manufacture a reason.”

“And that’s why your colleague could not find one. She was looking for a principle that made sense of all the cases having to do with opting into or out of a speech-producing system such as membership in a labor union or being interrogated at a police station.”

“She was looking for a rule that would explain all the cases. But her search led her to more and more complicated formulas. It reminded me of those pre-Copernican astronomers with their ellipses and eccentric paths.<sup>174</sup> Their system grew more and more complicated every time they discovered a new planet.<sup>175</sup> Once they accepted that the sun, not the earth, was at the center of the solar system, it all made sense.<sup>176</sup> No more contrived ellipses and other courses.”<sup>177</sup>

“Our late friend, Derrick Bell, noted much the same thing with minority speech.<sup>178</sup> Early in the civil rights movement of the sixties, courts protected the speech and assembly rights of protesters,” I noted.<sup>179</sup>

“You mean the early sit-ins at lunch counters and Martin Luther King’s marches,” Rodrigo said. “I’ve read those cases, too. When the demonstrators were arrested, higher courts usually exonerated them.”<sup>180</sup>

“Those early protests were sympathetic,” I said. “They were polite, mannerly, and often religious in nature.<sup>181</sup> The marchers

173. See *supra* text accompanying note 172; see also Adam Waytz, et al., *The Whistle-Blower’s Quandary*, N.Y. TIMES, Aug. 4, 2013, at SR12 (discussing why some people report unethical corporate or governmental behavior while others do not).

174. See Sheila Rabin, *Nicolaus Copernicus*, STAN. ENCYCLOPEDIA PHIL. (Aug. 16, 2010), <http://plato.stanford.edu/entries/copernicus/#2.1>.

175. See Albert Van Helden, *Ptolemaic System*, GALILEO PROJECT (1995), [http://galileo.rice.edu/sci/theories/ptolemaic\\_system.html](http://galileo.rice.edu/sci/theories/ptolemaic_system.html).

176. See Rabin, *supra* note 174.

177. See THOMAS S. KUHN, *THE COPERNICAN REVOLUTION* 180 (1957). See generally KUHN, *supra* note 66 (describing how scientific paradigms succeed and replace one another).

178. See BELL, *supra* note 112, at 595–681 (discussing the parameters of minority speech in racial protests).

179. See *id.* at 596–600, 604–05.

180. See, e.g., *Cox v. Louisiana*, 379 U.S. 536, 540, 552 (1965) (reversing the conviction of a civil rights protester who engaged in a peaceful protest).

181. BELL, *supra* note 112, at 596–600.

wore suits and white shirts.<sup>182</sup> They linked arms and sang hymns and *We Shall Overcome*.<sup>183</sup> They were nonviolent.”<sup>184</sup>

“So they evoked judicial sympathy. Later, the tone of the civil rights movement changed. Black Power emerged.<sup>185</sup> The Panthers began carrying guns, preaching Black Nationalism, and quoting Mao, Marx, Che, and Engels.”<sup>186</sup>

“Right then, just as your theory would predict, courts began affirming convictions for the very same speakers they had been letting off easily a few years earlier. Early on, they were in favor; later, they were not. Free speech law did not change; the country’s attitude did. So courts found reasons to punish them and hold that their speech was not free after all.<sup>187</sup> It had too much ‘muscle,’ too much of an implied threat. They blocked traffic, talked too loudly, didn’t ask for a permit first or they spoke in the wrong zone or side of the street.”<sup>188</sup>

“So, was your colleague a seeker after hope and reason?” Rashid asked. “One of those—what did you call them?”

“Cargo cultists,” I said.

### B. *When the Ship Does Not Bring in the Cargo*

Rodrigo nodded a little uncertainly, as though expecting resistance, but continued as follows:

“I don’t want to be too harsh. She put her finger on something important. But our friends in immigration law, financial regulation, or the First Amendment, especially those who hold out high hopes for reform—”

“If they can just find the right formula or form of words,” Rashid interjected. “I had a colleague in the Treasury Department who believed in the same thing. He tried to understand the ins and outs of U.S. aid policy toward Third World nations like ours in terms of Keynesian economics. He failed, since U.S. economic policy toward

182. See DANIEL LEVINE, BAYARD RUSTIN AND THE CIVIL RIGHTS MOVEMENT 109 (explaining the organization of early civil rights marches).

183. *Id.* at 146.

184. See BELL, *supra* note 112, at 596–600.

185. See Richard Delgado, *Explaining the Rise and Fall of African American Fortunes-Interest Conversions and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369, 380 (2002) (reviewing MARY DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND IMAGE OF AMERICAN DEMOCRACY* (2000)).

186. *Id.* at 380–81 (discussing the country’s changed mood).

187. See *African Americans Campaign for Voting Rights in Selma, Alabama, USA, 1965*, GLOB. NONVIOLENT ACTION DATABASE (Sept. 28, 2009), <http://nvdatabase.swarthmore.edu/content/african-americans-campaign-voting-rights-selma-alabama-usa-1965>.

188. BELL, *supra* note 112 at 602–11 (giving examples of reasons why protestors were convicted); see also Kate Aschenbrenner, *Beyond “Because I Said So”: Reconciling Civil Retroactivity Analysis in Immigration Cases with a Protective Lenity Principle*, 32 REV. LITIG. 147, 162 (2013) (noting that courts in immigration cases often resolve inconsistencies by reinterpreting precedent).

developing nations changes with every new administration.<sup>189</sup> There is no consistency at the level of principle. But when you look to the underlying interest of the controlling elites, you gain a lot of explanatory power. And can act and plan accordingly. Toward the end of my term in office, we were talking frankly of this approach to calculating our finances.”

Rodrigo's eyes brightened. “Your colleague was like those cargo cultists standing forlornly on the beach, wondering when the tide will bring the next shipment.”<sup>190</sup>

Now it was my turn to look blank. “I thought cargo cults had to do with World War II battles in the Pacific islands, not shipwrecks and cargo strewn on remote beaches. Which is it?”

“Oh, I should have explained myself better,” Rodrigo said. “Anthropologists write about two types of cargo cult.<sup>191</sup> What they have in common is unreasonable faith in something happening that will bring a great boon without knowing what brings it about.”<sup>192</sup>

“The first type,” he continued, “is the islander who notices that an invading army, say, the Americans, has packed up and gone.<sup>193</sup> The army left behind a bounty of junked cars, tins of food, and other items of value to the islanders.<sup>194</sup> Seeing no one around, they help themselves to the leftovers and feel much better.<sup>195</sup> Months go by, and they hear a rumor that the same thing happened to another island 500 miles away.<sup>196</sup> They begin hoping and praying for another visit from the gods, which of course never comes.”<sup>197</sup>

“Because the war is moving in the other direction. So that's the first type. What's the second?” I asked.

“Oh, yes. A down-on-their-luck village in a desolate area learns that a ship has grounded offshore and sunk.<sup>198</sup> Instead of trying to rescue the crew, the villagers rush to retrieve the cargo they know from experience will float in soon.<sup>199</sup> And sure enough it does—furniture, barrels of flour, and other goods from the ship's hold.

189. See, e.g., Douglas M. Gibler & Steven V. Miller, *Comparing the Foreign Aid Policies of Presidents Bush and Obama*, 93 SOC. SCI. Q. 1202, 1202 (2012).

190. See Lamont Lindstrom, *Cargo Cults*, OXFORD BIBLIOGRAPHIES (2013), <http://www.oxfordbibliographies.com/view/document/obo-9780199766567/obo-9780199766567-0108.xml>.

191. See *id.* (discussing the various types of cargo cults); see also Paul Raffaele, *In John They Trust*, SMITHSONIAN (Feb. 2006), <http://www.smithsonianmag.com/people-places/john.html?c=y&page=1>.

192. See Raffaele, *supra* note 191.

193. See *id.*

194. See *id.*

195. See *id.*

196. See *id.*

197. *Id.*

198. See *id.* (discussing the history and spiritual motivations of cargo cultists).

199. See *id.*



This happens rarely, but when it does, it brings the villagers a great boon.”<sup>200</sup>

“So law reformers—some of them, at any rate—are like cargo cultists, hoping for a boon but not knowing what produces one when it does come?”

“Exactly,” he said. “The cargo cultists pray in hopes of propitiating the gods. Since they are unaware of the course of war responsible for their good fortune, they believe that the goods arrive in response to their prayers.<sup>201</sup> They then turn to more and more complex rituals and ceremonies, none of which work. Immigration reformers similarly believe that asking the powers that be—the government—to be a little nicer to desperately poor people wanting to come here will induce them to be that way. With the financial system, our reformist friends believe that asking the gods to be more orderly, more legal, will produce improvements, when this has never worked, at least for long. We should beware of cargo-cult scholarship. Something that did not work yesterday, last month, last year, or the year before last will probably not work again. Some mechanism may be accounting for it, unbeknownst to us.”<sup>202</sup>

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200. See *id.* See generally Tom Clemett, *Shipwrecks Around the Coastal Area of Barry*, HIST. BARRY (2013), <http://www.barrywales.co.uk/tomclemett/shipwrecks.asp> (discussing shipwrecks near Barry, Wales).

201. See Mary D. Fan, *When Deterrence and Death Mitigation Fall Short: Fantasy and Fetishes as Gap-Fillers in Border Regulation*, 42 LAW & SOC'Y REV. 701, 712–13, 717 (2008) (noting the futility of anti-immigration activists who, at great expense, erected a fence along a portion of the U.S. border with Mexico, overlooking the fact that desperate immigrants will simply shift to an unguarded region a few miles away). This type of action, while ineffective at excluding the flood of immigrants, nevertheless enables the protectionist to believe he is “doing something.” *Id.* at 717. But might not scholars who advocate, for example, open borders be enacting fetish ceremonies of their own, complete with heartfelt phrases and invocation of magical thinking? (If only I could get the American public to realize that immigration is the new civil rights issue of our time). Fetish against fetish. See also Adrian Johnston, *Jacques Lacan*, STAN. ENCYCLOPEDIA PHIL. (Apr. 2, 2013), <http://plato.stanford.edu/entries/lacan/> (discussing desire, need, and wish fulfillment in the human ego and personality).

202. See *supra* text accompanying notes 36, 94 (explaining some of the mechanisms that empowered sectors deploy, consciously or unconsciously, to resist change). A few other mechanisms occurred to me, and I jotted them down in order to discuss them with Rodrigo later if the occasion arose. They were (1) American exceptionalism, the belief that “America is best,” and that the only other alternative to the current regime is communism, which is of course unacceptable (look what happened to the Soviet Union); (2) empowered sectors tend to become richer and richer, and they use some of their accumulated wealth to fund political action committees, think tanks, and other organizations devoted to their defense, thus becoming more and more invulnerable over time; and (3) Confirmation bias discourages dissent because the audience has long taken note of the episodes where consumer capitalism “worked.” As luck would have it, we did meet briefly in the conference hotel, where we discussed many of my lingering questions and issues. See *infra* text accompanying note 203.

"Perhaps the islanders should try another way of earning a living," Rashid said. "Maybe stop hoping for a shipwreck but learn to tend a garden or open a furniture factory. Perhaps we should too."

BUMP! The three of us started, realizing that the plane, without our noticing it, had landed. The flight attendant announced that we were at our destination and would be at our gate in a few minutes. She cautioned us to remain seated until the plane came to a full stop at the gate and the pilot announced that we could disembark.

As she cautioned us that our overhead luggage could have shifted during the flight, Rodrigo smiled and said, "It's a metaphor for our times. If you know the mechanism by which something happens, you can sometimes avoid getting hit in the head."

### CONCLUSION

As we retrieved our bags and made our way down the aisle, which was clogged with our fellow passengers, I reflected on what we had said. I shared Rodrigo's belief that reform of civil rights law almost never arrived out of a spasm of conscience on the part of the majority. And after his explanation, I doubted it would arrive in corporate finance or immigration, except, perhaps, in response to widespread protests and demonstrations.<sup>203</sup> I wondered how scholars in those fields would receive his cargo-cult metaphor. I knew from experience that those who most adamantly insist on rationality and morality in the law are the ones most ready to condemn one who posits, as Rodrigo had done, that their favorite proposals are unlikely to go anywhere. I made a note to caution him about this risk sometime, perhaps during a break at the conference. I worried about his career prospects.

I wondered, as well, how he would receive my advice. Earlier he had seemed eager to heed my counsel, and we had established a mentor-protégé relationship that benefited us both. But now, I reflected, he was a tenured professor with a growing reputation. Perhaps I'd better be circumspect, I thought.<sup>204</sup>

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203. In particular, I had noticed that the last few pages of the Johnson-Trujillo book discussed the recent immigration marches and the possibility that a new mass movement might be rising. See JOHNSON & TRUJILLO, *supra* note 23, at 254–66.

204. As it turned out, my concern proved entirely unnecessary. During a brief conversation in a crowded coffee shop in the conference hotel, I learned (1) that he drew a distinction between practices that are central to corporate capitalism, which are essentially beyond the reach of regulatory reform, and minor or peripheral matters, such as term limits for directors or shoe rules for airports, which are not; (2) that he agreed that small reforms can sometimes cascade, producing effects larger than the ones the reformers contemplated, see Richard Delgado, *Liberal McCarthyism and the Origins of Critical Race Theory*, 94 IOWA L. REV. 1505, 1509–10 (2009); and (3) that he thought that capitalism

Just then, a tableau played out in front of us that made me think that circumspection might be unnecessary after all. As we stepped into the main concourse, having negotiated the long, sloping tunnel leading to it, two polite uniformed officials stepped quickly up to Rashid and conducted him by the elbow to a nearby unmarked door. Smiling tightly at us, he said, "See?" as the door closed behind him, shutting him off from our view.

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could theoretically evolve into socialism, as happened in a few countries, but is unlikely to do so in the United States, being so deeply entrenched. He also explained that he saw his theory as just that, a theory, and not a factual assertion, whose main value lay in explaining the past and predicting the future: the closer one's target is to the central mechanism of corporate or state power, the less likely an instrument the law will be to achieve reform.