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# THE HOLE-IN-THE-WALL GANG VIEW OF LIFE AND AMERICA'S RACIAL FUTURE

*Richard Delgado\**  
*Jean Stefancic\*\**

## INTRODUCTION: HOW TO TURN A NEW LEAF

If ordinary individuals may at times—at least in the movies—resolve to change and thenceforth lead better lives, can an entire society do the same? Recently, a major conference of civil rights scholars and activists addressed this very question, with roughly half of the speakers expressing faith that the United States could and would turn a new leaf and do better by minorities, and the remaining half doubting that it would. Entitled *The Present and Future of Civil Rights Movements: Race and Reform in 21st Century America*, the two-day event hosted by Duke Law School's Center on Law, Race, and Politics featured sessions devoted to such topics as the Roberts Court, the future of affirmative action, voting rights in the new millennium, and the role of immigration in broadening the black-white binary paradigm of race.<sup>1</sup>

A casual attender who wandered in could easily have found herself torn in both directions, first by a speaker doubting that the Roberts Court was likely to champion minority causes any time soon, followed by another arguing that immigration would, after a short period of adjustment, start the country on the road to a multiracial paradise.

We incline toward the former view, foreseeing a turbulent period as the country approaches the year 2044 when, according to projections, minorities will begin to outnumber whites.<sup>2</sup> We also foresee a longer, rather than shorter, period of adjustment when this moment arrives. This Essay explains why.

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1. *The Present and Future of Civil Rights Movements: Race and Reform in 21st Century America*, DUKE L., <https://law.duke.edu/clrp/conference/civilrights/> (last visited Oct. 14, 2016) (describing the conference and the program).

2. SANDRA L. COLBY & JENNIFER M. ORTMAN, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, PROJECTIONS OF THE SIZE AND COMPOSITION OF THE U.S. POPULATION: 2014 TO 2060, at 9 (2015), <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf>.

In *Butch Cassidy and the Sundance Kid*,<sup>3</sup> Butch Cassidy (played by Paul Newman) and the "Sundance Kid" (played by Robert Redford) are members of the notorious Hole-in-the-Wall Gang of outlaws who specialize in robbing banks and trains. Set in 1890s Wyoming, the movie opens when Butch and Sundance return from a short absence to find that the gang has selected a new leader, Harvey Logan, to replace the missing Butch. The two fight it out, with Butch winning through trickery. Upon installing himself as the new chief, Butch steals Harvey's clever idea to rob the Union Pacific train on both its eastward and westward runs, reasoning that the second robbery would take the authorities by surprise because they would be so preoccupied with trying to solve the first that they would not see the second job coming.

After the initial heist goes well, the two friends celebrate by visiting a brothel and later the town's schoolteacher, Etta (played by Katharine Ross), who is Sundance's lover. Perhaps distracted by a surfeit of female companionship, Butch botches the second robbery when he uses too much dynamite to crack open the train's safe, destroying the baggage car and spreading the loot in all directions. While the gang scrambles to gather the bills, a third train arrives with a detachment of lawmen accompanied by the relentless Indian tracker "Lord Baltimore." The ensuing chase across picturesque Western countryside provides the movie's main element of suspense, culminating in a desperate leap by the cornered fugitives off a high cliff into a raging river. They both survive, only to learn that they are marked men: the posse that has been pursuing them is in the employ of Union Pacific head E.H. Harriman—who wants them dead, no matter the cost.

Faced with bleak prospects, Butch persuades Sundance to escape with him to Bolivia, where the banks are flowing with mining wealth—a virtual robber's paradise. Etta, the schoolteacher who has joined them, teaches them Spanish, including necessary phrases of the bank robber's art, such as "Give me all your money." Bolstered by their new linguistic knowledge, they pull off a string of robberies so audacious that the country dubs them *Los Bandidos Yanquis*. While taking a breather between jobs, Butch spots a man who resembles one of Harriman's paid sleuths and decides to go straight. The two obtain jobs as legitimate payroll guards for a Bolivian mining company and consider going into farming after one of their operations goes awry and Butch dispatches a would-be robber—the first time he has killed someone—and is immediately overcome by remorse.

Sensing trouble ahead, Etta returns to the States. Butch and Sundance abandon their vow to go straight and, in search of quick cash, hijack a mule train carrying a payroll. But when they take

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3. (Twentieth Century Fox 1969).

their loot to a small town, a young boy recognizes the mule's brand and notifies the authorities. The Bolivian army soon surrounds the two, who agree that if they succeed in getting out of their jam they will go to Australia and start new lives. The movie ends when their desperate dash for freedom goes poorly, with dozens of Bolivian troops firing round after round into their bodies.

### I. THE FUTURE OF CIVIL RIGHTS IN AMERICA

Butch and Sundance were unsuccessful in changing their lives. Too much stood against them. They knew only one profession—robbery—and the forces aligned against them were both expert (Lord Baltimore), and implacable and well financed (E.H. Harriman). As they say, structural conditions favored the other side.

Will America be able to escape its iniquitous past, which includes the American Indian Wars, slavery, the Mexican-American War, the Chinese Exclusion Act, the Jim Crow laws, lynching, Japanese internment, and other chapters almost too numerous to mention?<sup>4</sup> Will immigration,<sup>5</sup> interest convergence,<sup>6</sup> and the need for multicultural leadership in a globalizing world<sup>7</sup> prompt national self-reflection and change? Or will the United States remain stuck in old practices, with whites on top and others struggling to gain a foothold in a rich, but emotionally cold, society?<sup>8</sup>

In some sense, the future is always open. We choose to act this way or another, to select this destiny rather than that.<sup>9</sup> But as with

4. We have, however, mentioned them. See generally JUAN PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (3d ed. 2015) (describing the civil rights histories and constructions of four groups of color and ethnic whites).

5. See HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* 31–41 (2014) (noting that undocumented immigration grows and shrinks in response to changing economic conditions and needs).

6. See, e.g., Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (positing that civil rights advances generally arrive only when they coincide with the needs of elite whites). See generally TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* (2015) (describing the realities of being black in the United States and arguing that African Americans have no reason to be optimistic when there is no evidence that the white supremacy system will change).

7. See Thomas L. Friedman, Opinion, *Laughing and Crying*, N.Y. TIMES (May 23, 2007), [http://select.nytimes.com/2007/05/23/opinion/23friedman.html?\\_r=1](http://select.nytimes.com/2007/05/23/opinion/23friedman.html?_r=1).

8. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 198–99 (1992) (painting America's likely future as a society stuck in old practices).

9. See PEREA ET AL., *supra* note 4, at 86–97 (reflecting on society's ability to choose its own future); see also HOWARD ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES, 1492–PRESENT* 23–38 (2003) (presenting history as a series of choices, including the one to enslave an entire population); Jennifer Hochschild,

the Hole-in-the-Wall Gang, we often end up the way we do as a result of habits, inertia, and circumstances that incline us, in ways we often barely know, toward one course of action rather than another.<sup>10</sup>

Our thesis is that the country's changing demographic composition will create increasing anxieties and turmoil. Just as Butch and Sundance's return to the gang sparked a fight over leadership, whites will not readily accept second-place status in a diversifying population and economy.<sup>11</sup> We base our contention on evidence from two regions where something like the above-described shift has already taken place—California and the South.<sup>12</sup> Neither region adapted peaceably and cheerfully to the new order. As with Butch and Sundance, who missed the telltale mark on the side of their purloined burro, it is all in knowing where to look.

Many scholars are in the practice of making civil rights forecasts based on extrapolation from a favorite mechanism or theme that explains ethnic relations in those terms—such as social contact,<sup>13</sup> nativism,<sup>14</sup> interest

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*Looking Ahead: Racial Trends in the United States*, 134 DAEDALUS 70, 79–81 (2005) (discussing possible racial futures).

10. See PEREA ET AL., *supra* note 4, at 86–97; HOWARD ZINN, *supra* note 9, at 23–38; Hochschild, *supra* note 9, at 79–81. The South, for example, did not have to opt for a system of plantation farming centered on a few labor-intensive crops like cotton that virtually required slavery. Like New England or London, the region could have developed factories, seafaring, fishing, or a host of other economies and modes of social organization. By the same token, Butch might have chosen a different line of work or circle of friends. Before migrating to Bolivia, he might have learned Spanish better, which would have enabled him to select among different professional options once he arrived.

11. See *infra* notes 29–39 and accompanying text.

12. See *infra* Parts II and III (describing developments in these regions).

13. Viz., the idea that frequent contact with persons of different backgrounds will, over time and under the right conditions, diminish racism and suspicion. See, e.g., GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 254–55 (Doubleday Anchor Books 1958) (1954). Persons who embrace this perspective often believe that travel and immigration will enable people to feel more comfortable with each other. Boosters of this theory may forecast a rosy racial future as immigration and an increasingly diverse population enable the citizenry to feel at home with people of many different backgrounds. *But see* ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 26–28 (2001) (noting that we are becoming a society of loners); Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-First Century*, 30 SCANDINAVIAN POL. STUD. 137, 149 (2007) (observing that introducing diversity into a community can cause its members to “hunker down”).

14. See Juan F. Perea, *Introduction to IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 1, 1–6 (Juan F. Perea ed., 1997) (noting that nativism and fear of outsiders increase during times of economic downturn). Those who hold to this theory would likely forecast a troubled racial future for the United States as our mature economy flattens and offers fewer and fewer opportunities for citizens to prosper equally.

convergence,<sup>15</sup> a flat world,<sup>16</sup> or a competition-aggression model.<sup>17</sup> While these approaches can be helpful, in our opinion nothing beats actual experience. Studying events in California and the South can hold a mirror to America's racial future, for in those regions that future has already arrived. One need not ponder whether Lord Baltimore will miss this or that footprint in a grassy meadow. All one needs to know is that Harriman has both a large bank account and a great deal of determination. It is also helpful to realize that those in power, like Harvey, rarely relinquish leadership without a fight.

This Essay proceeds as follows. We first examine recent events in California that suggest what course America's racial future is likely to take.<sup>18</sup> We then examine nativism against Latinos in the South for clues into what an explosive increase in Latino numbers is likely to mean for race relations in the country at large.<sup>19</sup> The outlook that emerges is guarded. We foresee neocolonial responses in states that resemble California. In others, we foresee a new Southern Strategy in which conservatives will play Latinos against blacks and working-class whites in an effort to retain power despite a changing electorate.<sup>20</sup> Finally, we outline a new theory of judicial review for discrimination that is covert and segmented.<sup>21</sup>

## II. CALIFORNIA AS BELLWEATHER

Recently, we examined developments in one large, populous state—California—as it approached the tipping point we describe

15. See Bell, *supra* note 6, at 523. Interest convergence finds that advances for minorities arrive only (or mainly) when they also benefit elite whites. *Id.* Backers of interest convergence will probably predict a zigzag future course of civil rights, with some minorities' well-being increasing during wartime and national emergencies, but not otherwise. See, e.g., PHILLIP A. KLINKNER & ROGERS M. SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* 317–29 (1999).

16. See THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 9–10 (2005) (noting that increased telecommunications and travel created interconnected economies and cultures).

17. *Viz.*, competition and aggression. See ALLPORT, *supra* note 13, at 222–26 (noting that prejudice is often a function of group competition); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1377–85 (1985).

18. See *infra* Part II.

19. See *infra* Part III.

20. See *infra* notes 57–94 and accompanying text (defining and illustrating the term “Southern Strategy”); see also Julia Preston, *The Truth About Mexican-Americans*, N.Y. REV. BOOKS (Dec. 3, 2015) (book review), <http://www.nybooks.com/articles/2015/12/03/truth-about-mexican-americans/> (noting that nativist movements targeting this group have occurred periodically in U.S. history and that one is peaking right now).

21. That is, discrimination that proceeds in stages so that its full impact does not become apparent at once. See *infra* Part III.

above.<sup>22</sup> California's experience is useful for forecasting the civil rights future of much of the country<sup>23</sup> for a number of reasons. First, the state considers itself a bellwether for trends, styles, and social movements.<sup>24</sup> What appears there is apt to appear on the national stage a little later; it is a veritable laboratory for students of trends.<sup>25</sup> Moreover, the state is representative of much of America. With a mixed economy, a settler-colonial history, a get-rich-quick spirit, and a self-image as a bellwether state,<sup>26</sup> California's story can tell us a good deal about how much of the rest of the country may react as it, too, approaches the abovementioned tipping point.<sup>27</sup> And finally, the state has long contained a large and growing minority population, so that it arrived at this tipping point a few years ago.<sup>28</sup> The rest of the country has a few more decades to go.

We found that California behaved in many respects like South Africa in the final years of apartheid, when whites clung to power in the face of a large and restless black population by means that included repressive laws and referendums.<sup>29</sup> As South Africa did, California restricted avenues by which potential leaders of color could advance and receive an education.<sup>30</sup> South Africa jailed militants, while California embarked on a program of mass

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22. See generally Richard Delgado, *Rodrigo's Portent: California and the Coming Neocolonial Order*, 87 WASH. U. L. REV. 1293 (2010) [hereinafter Delgado, *Rodrigo's Portent*] (discussing emergent neocolonialism in California as a response to the shift in demographic composition); Richard Delgado & Jean Stefancic, *California's Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521 (2000) [hereinafter Delgado & Stefancic, *California's Racial History*] (exploring the history of racial mistreatment of citizens of color in California).

23. For other regions, we need to look to the South as an indicator of what may lie ahead. See *infra* notes 45–70 and accompanying text.

24. See generally KEVIN STARR, CALIFORNIA: A HISTORY (2007) (chronicling the history of the trend-setting state).

25. *Id.*

26. *Id.* (noting how trends and movements often start in California).

27. See COLBY & ORTMAN, *supra* note 2, at 9 (describing the national demographic tipping point that is fast approaching).

28. See Teresa Watanabe, *California is Leading Nation in Diversity*, L.A. TIMES (May 17, 2007), <http://articles.latimes.com/2007/may/17/local/me-census17>.

29. Compare Delgado & Stefancic, *California's Racial History*, *supra* note 22, at 1523, 1552–1614 (discussing popular referendums and other measures designed to inhibit the social mobility of minorities and the poor, including the creation of a stratified system of higher education reminiscent of Plato's Republic), and Delgado, *Rodrigo's Portent*, *supra* note 22, at 1304–05 (same), with Richard Delgado, *Law's Violence: Derrick Bell's Next Article*, 75 U. PITT. L. REV. 435, 441–42 & n.46 (2014) (discussing South Africa's system of pass laws).

30. Delgado & Stefancic, *California's Racial History*, *supra* note 22, at 1580–95; see also Delgado, *Rodrigo's Portent*, *supra* note 22, at 1304–05 (discussing Proposition 209, which eliminated affirmative action at the University of California).

incarceration so extreme that it was soon bankrupting the state.<sup>31</sup> California citizens of means set aside pennies for a rainy day, much as the white citizens of South Africa had done only a few decades earlier, anticipating the flood to come.<sup>32</sup>

These features are beginning to appear in the country at large and seem likely to increase as 2044 nears. Economists have warned about the widening wealth and earning gaps,<sup>33</sup> which mirror a similar pattern seen in California as that state's day of reckoning neared.<sup>34</sup> And of course police violence, long sentences, and bulging jails have been making headlines of their own, in that state and elsewhere.<sup>35</sup> For its part, the conservative Supreme Court has been gradually narrowing affirmative action.<sup>36</sup> In the Golden State, power brokers recruited light-skinned minorities with moderate views and agreeable dispositions to serve as middle managers, police chiefs, and mayors of small towns, much as South Africa and other colonial societies did during the heyday of those regimes.<sup>37</sup> Meanwhile, relatively few minorities found employment in

31. See generally JONATHAN SIMON, *MASS INCARCERATION ON TRIAL* (2014) (discussing California's prison crisis). With plenty of diamonds and uranium, South Africa had little difficulty in providing prisons for insurrectionist figures like Bishop Tutu, Nelson Mandela, and their followers. See *Profile: Archbishop Desmond Tutu*, BBC NEWS (July 22, 2010), <http://www.bbc.com/news/world-africa-10725711>.

32. Compare Suzanne Daly, *Race Dominating 'Ho-Hum' Vote in South Africa*, N.Y. TIMES (June 2, 1999), <http://www.nytimes.com/1999/06/02/world/race-dominating-ho-hum-vote-in-south-africa.html?pagewanted=all>, with Delgado & Stefancic, *California's Racial History*, *supra* note 22, at 1554–55 (noting that California's Proposition 13, which lowered property taxes for homeowners and thus put more money in the pockets of the homeowner class, greatly reduced the state's ability to fund public education and social programs for the poor).

33. E.g., THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 237 (Arthur Goldhammer trans., 2014); Josh Harkinson, *America's 100 Richest People Control More Wealth than the Entire Black Population*, MOTHER JONES (Dec. 2, 2015), <http://www.motherjones.com/mojo/2015/12/report-100-people-more-wealth-african-american-population>.

34. See generally Delgado & Stefancic, *California's Racial History*, *supra* note 22 (discussing wealth disparity as a result of racism within California's higher educational institutions).

35. E.g., SIMON, *supra* note 31, at 17–24 (noting the rapid increase in incarceration, long sentences, and punitive prison conditions); Joanna Drowos et al., *Variations in Mortality from Legal Intervention in the United States—1999 to 2013*, 81 PREVENTATIVE MED. 290, 293 (2015) (noting the sharp rise in killings by police).

36. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 725 (2007) (limiting the holding of *Grutter v. Bollinger*, 539 U.S. 306, 327–28 (2003) to institutions of higher education); see also Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1863–64 (2014).

37. See Delgado, *Rodrigo's Portent*, *supra* note 22, at 1325 n.192, 1333 (discussing the role of neocolonial middlemen and California's practice of recruiting them as well).



university teaching, state government, or other sectors that wield serious decision-making power.<sup>38</sup> The same pattern has emerged recently in national politics.<sup>39</sup>

We do not mean to drive a parallel into the ground or to assert that California is typical of the entire country, which consists of many different subcultures rolled into one.<sup>40</sup> The South, in particular, has been oppressing Latino immigrants for a different set of reasons that we discuss in the next section.<sup>41</sup> And of course, less dire scenarios than the ones we found playing out in California are quite possible.<sup>42</sup> But if the reader lives in a region that resembles California and wants to know what the future holds, developments in that state provide clues: elite groups hoarding wealth, deploying police violence, and limiting access to education and government for minorities pressing for a share in society's bounty.<sup>43</sup> Elites may also play minority groups against each other, much as South Africa did (Bantus against Coloureds and Indians), for example by planting the thought that Latino immigrants want to take black jobs or are unwilling to wait their turn.<sup>44</sup>

### III. A NEW SOUTHERN STRATEGY

In California this divide-and-conquer strategy made little headway because minority leaders there quickly realized that coalition politics was the only sure route to political power and that if they did not stand together, the establishment would pick them off

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38. *Id.* at 1313–14 (discussing this low representation and some of the mechanisms responsible for it, including gerrymandering, old-boy networks, and restrictions on racial preferences in higher education).

39. The 2016 presidential campaign at one point featured two conservative Cubans with European features and elite educations and one African American with conservative views. *See, e.g., Who is Running for President?*, N.Y. TIMES, [http://www.nytimes.com/interactive/2016/us/elections/2016-presidential-candidates.html?\\_r=0](http://www.nytimes.com/interactive/2016/us/elections/2016-presidential-candidates.html?_r=0) (last updated July 26, 2016).

40. *See generally* JOEL GARREAU, *THE NINE NATIONS OF NORTH AMERICA* (1981) (suggesting that North America consists of nine nations, each with distinct cultural and economic features); COLIN WOODARD, *AMERICAN NATIONS: A HISTORY OF THE ELEVEN RIVAL REGIONAL CULTURES OF NORTH AMERICA* (2012) (discussing the distinct regional identities present in North America).

41. *See infra* Parts III–IV.

42. *See supra* notes 1–2 and accompanying text (noting the same). For a discussion of America's possible racial futures, see generally Hochschild, *supra* note 9.

43. *See supra* notes 33–39 and accompanying text. For further discussion of California's neocolonial turn and its implications for national politics, see Delgado, *Rodrigo's Portent*, *supra* note 22, at 1303–04 (discussing a rise in vigilante-style private border enforcement activity, as well as English-only initiatives).

44. *See generally* NICHOLAS VACA, *THE PRESUMED ALLIANCE: THE UNSPOKEN CONFLICT BETWEEN LATINOS AND BLACKS AND WHAT IT MEANS FOR AMERICA* (2004) (examining the uneasy relationship between Latinos and blacks in the United States).

one by one.<sup>45</sup> A new version of this strategy, however, will be harder to counter because it is less familiar, proceeds in stages, and is more difficult to recognize at first glance.<sup>46</sup> To see it in its infancy, we need not look to California but a different region—the South—where conservatives have begun deploying a three-step approach to suppressing minority political power, much as Richard Nixon did a few decades earlier, but with a few additional ingredients.<sup>47</sup> Like Butch and Sundance, who tried to remake their lives and improve their fortunes in Latin America, conservatives are trying to improve their lives and fortunes at the expense of the same group (Latinos)—except in reverse—here in the States, rather than in the Latinos' home countries.

#### A. *Latino Immigration in the South*

The South has long been one of the regions with the lowest percentage of foreign-born people or immigrants.<sup>48</sup> Today, Alabama, for example, stands around three or four percent, close to the bottom among American states.<sup>49</sup> In the United States at large, the percentage of foreign-born people is about thirteen.<sup>50</sup> Thus, when, around 1995, this region experienced a rapid rise in Spanish-speaking immigrants—many of them undocumented—from south of the border, attracted by the mild climate and plentiful opportunities for work on farms, construction sites, restaurants, meat processing plants, and furniture factories, the business community welcomed

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45. See PEREA ET AL., *supra* note 4, at 448–50, 1064–68 (describing solidarity and united action between various groups in California and elsewhere).

46. That is, the entire design is not visible at one time.

47. In particular, Latinos are a new element. See PEW RESEARCH CTR., MODERN IMMIGRATION WAVE BRINGS 59 MILLION TO U.S., DRIVING POPULATION GROWTH AND CHANGE THROUGH 2065, at 68 (2015), [http://www.pewhispanic.org/files/2015/09/2015-09-28\\_modern-immigration-wave\\_REPORT.pdf](http://www.pewhispanic.org/files/2015/09/2015-09-28_modern-immigration-wave_REPORT.pdf). For a definitive study of the original Southern Strategy, see generally REG MURPHY & HAL GULLIVER, THE SOUTHERN STRATEGY (1971). For a discussion of its continuing efficacy, see, for example, Paul Krugman, Opinion, *Empowering the Ugliness*, N.Y. TIMES (Dec. 11, 2015), [http://www.nytimes.com/2015/12/11/opinion/empowering-the-ugliness.html?\\_r=1](http://www.nytimes.com/2015/12/11/opinion/empowering-the-ugliness.html?_r=1).

48. On this low proportion of the foreign-born in the southern states (generally five percent or less), see ELIZABETH M. GRIECO ET AL., U.S. CENSUS BUREAU, U.S. DEPT OF COMMERCE, THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2010, at 4 (2012), <https://www.census.gov/prod/2012pubs/acs-19.pdf>.

49. See, e.g., *Demographic Profile of Hispanics in Alabama, 2014*, PEW RESEARCH CTR., <http://www.pewhispanic.org/states/state/al/> (last visited Oct. 14, 2016).

50. See PEW RESEARCH CTR., *supra* note 47, at 65.

them with open arms, but many others looked on with curiosity mixed with suspicion.<sup>51</sup>

Xenophobia trumped economic self-interest, resulting in the passage of anti-immigrant statutes in every southern state, beginning around 2006, which were so draconian that the conservative federal judiciary struck most of them down.<sup>52</sup> Even so, the negative social attitudes that led to their enactments survived and continue to plague immigrants to this day.<sup>53</sup>

The South is a relatively poor agricultural region, so this response is counterintuitive, since the immigrants were—by and large—law-abiding, hardworking, pious, and willing to perform labor so arduous that few natives wanted to do it.<sup>54</sup> The Latinos

51. On their mixed reception, see, for example, Richard Delgado & Jean Stefancic, *Southern Dreams and a New Theory of First Amendment Legal Realism*, 65 EMORY L.J. 303, 314–19 (2015).

52. See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012) (invalidating most of Alabama's anti-immigrant bill, HB 56, and, by implication, similar copycat laws in other southern states). Alabama's law, which was typical of others in the region, punished practically everything that an undocumented immigrant might want to do—get a job, rent an apartment, get a ride from a friend to church, enroll a child in school, take a state test for a cosmetician's license. See Melissa Keane & Alvaro M. Huerta, *Restrictionist States Rebuked: How Arizona v. United States Reins in States on Immigration*, 3 WAKE FOREST J.L. & POL'Y 249, 249–50, 257–58 (2013).

53. See, e.g., John Sharp, *Alabama Has Seen a Decline in Its Spanish Speaking Population*, AL.COM (Oct. 18, 2015, 8:58 AM), [http://www.al.com/news/mobile/index.ssf/2015/10/why\\_alabama\\_has\\_seen\\_a\\_decline.html](http://www.al.com/news/mobile/index.ssf/2015/10/why_alabama_has_seen_a_decline.html) (noticing that the meanness that found expression in the Alabama anti-immigrant law did not disappear when the courts struck it down but rather has a “continued impact”). Sharp describes a woman who was denied water service in an Alabama town after being told that she needed a state driver's license or state identification to have the water turned on. *Id.* According to a local minister, “There will be people who say, ‘Oh, good, this law was more effective than we thought it was.’” *Id.* Even after Alabama's HB 56 was struck down, local authorities—even in emergency-care hospitals—continued asking Latino-looking people if they could produce documents proving legal status and denying them service if they could not. See Amy Yurkanin, *Anti-Immigrant Law Still Affecting Access to Hospitals*, AL.COM (Oct. 31, 2015, 7:00 AM), [http://www.al.com/news/index.ssf/2015/10/anti-immigrant\\_law\\_still\\_affec.html#incart\\_river](http://www.al.com/news/index.ssf/2015/10/anti-immigrant_law_still_affec.html#incart_river). Private businesses and state offices were doing the same. See, e.g., MARY BAUER, S. POVERTY LAW CTR., ALABAMA'S SHAME: HB 56 AND THE WAR ON IMMIGRANTS 21, 25 (2012), [https://www.splcenter.org/sites/default/files/d6\\_legacy\\_files/downloads/publication/Alabamas\\_Shame.pdf](https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/Alabamas_Shame.pdf). Thus, even though the original, blatantly offensive anti-immigrant statutes are no longer in effect, in the minds of many police chiefs, patrolmen, local officials, and ordinary citizens they live on. These people continue to hold the belief that a Mexican appearance and deferential manner (which they see as evasive) allow them to take action—make an arrest, detain, or call the immigration authorities. See *id.* at 11–12.

54. See John M. MacDonald & Robert J. Sampson, Opinion, *Don't Shut the Golden Door*, N.Y. TIMES (June 19, 2012), <http://www.nytimes.com/2012/06/20/opinion/the-beneficial-impact-of-immigrants.html> (noting that crime has gone down in regions where immigrants have settled in the past two decades); see

consumed relatively few social services, and those they did use were more than made up for by the value of their work and tax contributions.<sup>55</sup> A few towns and cities elsewhere, such as Farmers Branch, Texas, and Hazleton, Pennsylvania, took actions against foreign-born people around this time, but few as harsh as the ones in the South.<sup>56</sup>

Two reasons explain this reaction, both rooted in history, one national, the other regional.

### 1. *The National Reason*

The national reason has to do with the revival of the so-called Southern Strategy that former president Richard Nixon and his party used to secure his election in 1968.<sup>57</sup> Borrowing from a maneuver first crafted by southern Dixiecrats in 1948, Republicans played on public fears of civil rights protesters, anti-war demonstrators, and hippies to persuade many working-class whites, especially in the South, to desert the Democratic Party, their longtime home, and join the party of Lincoln.<sup>58</sup> Reinforced by conservative, middle-class whites and captains of industry, the new coalition secured the election of Richard Nixon and maintained Republican strength for many decades.<sup>59</sup>

also Roger Lowenstein, *The Immigration Equation*, N.Y. TIMES MAG. (July 9, 2006), <http://www.nytimes.com/2006/07/09/magazine/09IMM.html?pagewanted=all&r=0> (discussing the work of UC Berkeley labor economist David Card). The principle of complementarity holds, in brief, that a newcomer who obtains work in an undersubscribed sector adds wealth to the local economy while not endangering the job of a longtime resident. *Id.* Some southern cities, such as Charlotte, Atlanta, Memphis, Nashville, and Huntsville, are modern-looking centers of business and economic activity. Still, the region as a whole is heavily dependent on agriculture, timber, mining, and other jobs requiring hands-on labor. See Jillian S. Hishaw, *Mississippi is Burning Georgia's Peaches Because Alabama is No Longer a Sweet Home: A Legislative Analysis of Southern Discomfort Regarding Illegal Immigration*, 58 S.D. L. REV. 30, 40–53 (2013).

55. See MOTOMURA, *supra* note 5, at 166; Lowenstein, *supra* note 54.

56. See Brantley Hargrove, *Farmers Branch Has Spent Five Years and Millions of Dollars Trying to Keep Out Mexicans, Is It Time for a Truce*, DALLAS OBSERVER (June 21, 2012, 4:00 PM), <http://www.dallasobserver.com/news/farmers-branch-has-spent-five-years-and-millions-of-dollars-trying-to-keep-out-mexicans-is-it-time-for-a-truce-6426693>; MacDonald & Sampson, *supra* note 54 (noting that Hazleton, Pennsylvania, “has a recent history of hostility toward immigration”).

57. See Delgado & Stefancic, *supra* note 51, at 341 & n.189.

58. See Mark R. Thompson, *When God Collides with Race and Class: Working-Class America's Shift to Conservatism*, 68 U. PITT. L. REV. 243, 252–53 (2006).

59. On the earlier version of the Southern Strategy, see generally MURPHY & GULLIVER, *supra* note 47. On its current guise, see Steven Cohen, *Donald Trump and the New Southern Strategy*, NEW REPUBLIC (Nov. 9, 2015), <https://newrepublic.com/article/123407/donald-trump-and-new-southern-strategy>; Krugman, *supra* note 47 (noting that in its current incarnation, the tactic relies on “mobilizing . . . resentment” but aims to serve “the interests of a

That strength is waning, however, as the makeup of the population shifts and the percentage of minorities, who usually vote Democratic, grows.<sup>60</sup> Accordingly, GOP operatives are retooling the Nixon tactic into what we call the “New Southern Strategy,” which contains the following elements.<sup>61</sup>

*a. Strict border enforcement.* An initial component of the New Southern Strategy is stringent immigration restriction and border enforcement. Many Latinos, who are here legally, sympathize with the border crossers, most of whom are Latinos as well, and vote with the Democrats.<sup>62</sup> So, keeping out the undocumented or deporting border crossers reduces the number of potential Democratic voters, a matter of great interest to the GOP.

*b. Cutting welfare.* Keeping immigrants out helps pave the way for the second component of the New Southern Strategy, namely cutting welfare benefits, which many Republicans would like to reduce to as near zero as possible. They believe that welfare saps one’s initiative and weakens one’s character.<sup>63</sup> In their view, most welfare recipients are moochers who could work but prefer to stay at home or hang out with their friends.<sup>64</sup> Many conservative Republicans think that blacks participating in the federal food assistance program prefer to drive snazzy cars, eat steak bought with food stamps, play loud music, and have baby after baby to increase the monthly welfare check.<sup>65</sup> It goes without saying that they would like to end this practice. Like E.H. Harriman, many would gladly pay whatever it takes to set things right.

*c. Forcing the idle back to work.* However, conservatives believe they cannot eliminate welfare entirely unless the Mexicans

small, wealthy economic elite, especially through big tax cuts” and “cuts to Social Security and Medicare, an elite priority that has nothing to do with the reasons working-class whites vote Republican”).

60. The current minority breakdown stands at African Americans, thirteen percent; Latinos, seventeen percent; and Asians, five percent. See COLBY & ORTMAN, *supra* note 2, at 9 tbl.2. By 2044, minority numbers are expected to equal or surpass those of whites. See *id.* at 9.

61. See Delgado & Stefancic, *supra* note 51, at 341.

62. See, e.g., Angelo Falcón, Nat’l Inst. For Latino Policy, *Who’s Next? Latinos, the Trump Phenomena and All the Rest of Us*, NEWSTACO (Dec. 2, 2015), <http://www.newstaco.com/2015/12/02/whos-next-latinos-the-trump-phenomena-and-all-the-rest-of-us/>; Marc Fisher, *The GOP’s Identity-Politics Crisis: Holding Race-Card Aces but Loath to Play Them*, WASH. POST (Nov. 29, 2015), [https://www.washingtonpost.com/politics/the-gops-identity-politics-crisis-a-diverse-field-but-an-aversion-to-tout-it/2015/11/29/48c6f040-8fad-11e5-ae1f-af46b7df8483\\_story.html](https://www.washingtonpost.com/politics/the-gops-identity-politics-crisis-a-diverse-field-but-an-aversion-to-tout-it/2015/11/29/48c6f040-8fad-11e5-ae1f-af46b7df8483_story.html).

63. See Paul Buchheit, *The Single Ugliest Myth the Rich Perpetuate About the Poor*, SALON (Dec. 7, 2015, 5:00 AM), [http://www.salon.com/2015/12/07/what\\_rich\\_people\\_get\\_dead\\_wrong\\_about\\_poor\\_people\\_partner/](http://www.salon.com/2015/12/07/what_rich_people_get_dead_wrong_about_poor_people_partner/).

64. See Manny Schewitz, *6 Myths About Welfare Recipients Debunked*, FORWARD PROGRESSIVES (June 2, 2014), <http://www.forwardprogressives.com/6-myths-welfare-recipients-debunked/>.

65. *Id.*

are gone. This is where immigration enforcement enters a second time. In order for unemployed African Americans—many of whom would otherwise face destitution without welfare assistance—to find work, Mexicans have to be chased out of the work force first.<sup>66</sup> The low-level jobs Mexicans have recently held, like picking crops and doing household and yard work for white families, have not been particularly attractive to African Americans because many of these jobs carry overtones of slavery.<sup>67</sup> But for many whites, particularly in the South, the idea of African Americans performing that kind of labor is familiar and attractive—just like the good old days. It reinstates a hierarchy that, in their view, worked well.<sup>68</sup>

These jobs, however, hold no such meaning for the Mexicans whose ancestors were not slaves. They perform these jobs willingly, save their money, and hope to move up sometime, particularly after they learn English.<sup>69</sup> This has caused much friction between two groups who otherwise could be natural allies.<sup>70</sup> But the master plan, of course, has no such alliance in mind.

## 2. *The Second, Regional Reason*

We now come to a second, regional reason that explains why the New Southern Strategy resonated well in the South and largely sprang up there. Antipathy toward Latino settlement in the southern states stems from a set of circumstances dating to a much earlier period, namely the ten years leading up to the Civil War, roughly 1850 to 1860.<sup>71</sup> During that time, the South was highly worried about the future of its economic and class systems, and for good reason.<sup>72</sup> Most of the country's growth was taking place in the North, so that the political balance would soon tip.<sup>73</sup> The writing was on the wall. For the foreseeable future, most new states and cities would be northern or western, and free of slavery.<sup>74</sup>

The South would soon find itself outnumbered by Congress, and even the presidency if a certain young upstart attorney from Illinois

66. Cf. Falcón, *supra* note 62 (noting that racially supremacist forces often pick off one group at a time, with their eye on the next one).

67. See Delgado & Stefancic, *supra* note 51, at 342.

68. *Id.*; see also *Legacy of Slavery Still Fuels Anti-Black Attitudes in the Deep South*, U. ROCHESTER (Sept. 18, 2013), <http://www.rochester.edu/news/show.php?id=7202>.

69. See Julia Preston, *Latino Immigrants' Children Found Grasping English*, N.Y. TIMES (Nov. 30, 2007), [http://www.nytimes.com/2007/11/30/us/30immig.html?\\_r=0](http://www.nytimes.com/2007/11/30/us/30immig.html?_r=0).

70. See generally VACA, *supra* note 44 (examining the uneasy relationship between Latinos and blacks in the United States).

71. See Delgado & Stefancic, *supra* note 51, at 324–34, 334 n.126.

72. See *id.* at 325.

73. See *id.* at 325–26.

74. ROBERT E. MAY, *SOUTHERN DREAM OF A CARIBBEAN EMPIRE, 1854–1861*, at 10–11 (Univ. Press of Fla. 2002) (1973); Delgado & Stefancic, *supra* note 51, at 325–26.

who looked like he might run one day, did just that.<sup>75</sup> Southern slaveholders, politicians, business leaders, and visionaries thus devised an audacious scheme. They would equip private military expeditions to invade and conquer new territories in Latin America and the Caribbean, with a view of creating up to twenty-five new states, which would be pro-slavery and of course under southern control.<sup>76</sup>

Southern editors, writers, poets, and songwriters extolled the bravery of these private commandos.<sup>77</sup> College students dropped out to join the militias that were forming.<sup>78</sup> Bands played as cheering crowds gathered at the docks to send the brave expeditionary forces off.<sup>79</sup> The region was simply aflame with excitement. Everyone was sure that the leisure-loving, indolent Latinos in places like southern Mexico, Nicaragua, and Cuba would welcome American leadership with open arms.<sup>80</sup> Soon, the public thought, our generals would be sitting in the governors' palaces under palm trees issuing edicts and collecting taxes, and of course reinstating slavery, which most of these countries had long since repudiated.<sup>81</sup>

Most of the countries fought back vigorously, proving that they were not so indolent after all.<sup>82</sup> But one expeditionary leader named William Walker, a Tennessee native, led a well-armed contingent of southern youth that succeeded in conquering Nicaragua, which he ruled as president for one year, establishing English as the national language and re-legalizing slavery, before an indignant coalition from the neighboring countries defeated his forces and executed him.<sup>83</sup>

The expeditionary period ended with the onset of the Civil War.<sup>84</sup> But the attitudes that the South formed regarding Latino

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75. MAY, *supra* note 74, at 11–12, 206.

76. ROBERT E. MAY, *MANIFEST DESTINY'S UNDERWORLD* 111 (2002) [hereinafter MAY, *MANIFEST*]; MAY, *supra* note 74, at xi, 10–11.

77. MAY, *MANIFEST*, *supra* note 76, at 65–74; MAY, *supra* note 74, at 4–6.

78. MAY, *MANIFEST*, *supra* note 76, at 77.

79. *Id.* at 74–76.

80. MAY, *supra* note 74, at 4–5; Delgado & Stefancic, *supra* note 51, at 336 n.174.

81. See, e.g., Laura E. Gómez, *Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico*, 25 *CHICANO-LATINO L. REV.* 9, 17 (2005) (noting that Mexico abolished African slavery in 1829).

82. MAY, *supra* note 74, at 84, 94–95, 99, 102–03, 131.

83. AMY S. GREENBERG, *MANIFEST MANHOOD AND THE ANTEBELLUM AMERICAN EMPIRE* 41, 151 (2005); MAY, *MANIFEST*, *supra* note 76, at 263–64; 1 MICHAEL O'BRIEN, *CONJECTURES OF ORDER: INTELLECTUAL LIFE AND THE AMERICAN SOUTH 1810–1860*, at 210 (2004); Ron Soodalter, *William Walker: King of the 19th Century Filibusters*, HISTORYNET (Mar. 4, 2010), <http://www.historynet.com/william-walker-king-of-the-19th-century-filibusters.htm>.

84. MAY, *supra* note 74, at 245–47.

people during this period remained ingrained in southern culture in politics, literature, song, and myth.<sup>85</sup> Southern volunteers, for example, eagerly participated in the Spanish-American War (1898) and a little later the raids against Pancho Villa.<sup>86</sup> A Virginian spearheaded mass deportations of Mexicans during the Depression.<sup>87</sup> In literature, fear of racial mixture between blacks and whites transferred into disgust for mixed-blood Mexican mestizos (another mongrel race according to Senator Thomas Heflin of Alabama).<sup>88</sup> Faulkner's novel *Light in August* describes such a character.<sup>89</sup> An amusement park at the border of the Carolinas on Interstate 95, known up and down the east coast to automobile travelers, features a ninety-seven-foot-high stereotypical Mexican figure, which is somewhat black looking.<sup>90</sup> Examples are legion.

Thus, when by early 2000 substantial numbers of brown-skinned, Spanish-speaking immigrants were in the region looking for work, many Southerners felt outrage.<sup>91</sup> By rights, some Southerners may have thought we should have been there—in their country—running their show, not them here setting up shops and cantinas, playing those damn guitars, striding down the sidewalk, and eyeing our women.

And so it is that some ordinary people in the South dislike seeing so many Mexicans in their towns, even if they are contributing to the economy and keeping out of trouble.<sup>92</sup> This historical backdrop is also why one of the two political parties, which harbors no great love for African Americans, also wants the Mexicans out and has even convinced a few African Americans and working-class whites that they should go along with the plan.<sup>93</sup> But of course the hegemon do not mean well for them and plan to turn to them later when they get through fixing the Mexican problem.

85. *Id.* at 142–48; Delgado & Stefancic, *supra* note 51, at 336–51.

86. See Paul H. Pruitt, *The New-South Soldier: The Prewar Military Career of Walter E. Bare, 1902-1917*, 36 ALA. REV. 18, 21, 29 (1983).

87. FRANCISCO BALDERRAMA & RAYMOND RODRIGUEZ, *DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S*, at 74–76 (rev. ed. 2006); Delgado & Stefancic, *supra* note 51, at 348.

88. CARLOS MUNOZ, JR., *YOUTH, IDENTITY, POWER: THE CHICANO MOVEMENT* 23 (1989).

89. See generally WILLIAM FAULKNER, *LIGHT IN AUGUST* (Modern Library ed., Random House 2002) (1932) (describing Joe Christmas, a character who suffered identity problems stemming from his mixed-race heritage).

90. Shirley O'Brien Smith, *South Carolina's South of the Border: Old-fashioned Americana*, USA TODAY, [http://usatoday30.usatoday.com/travel/destinations/2006-11-20-south-of-the-border-sc\\_x.htm](http://usatoday30.usatoday.com/travel/destinations/2006-11-20-south-of-the-border-sc_x.htm) (last updated Nov. 20, 2006).

91. Ben Stocking, *How One Mississippi Community Copes with Influx of Hispanic Students*, HECHINGER REP. (July 6, 2016), <http://hechingerreport.org/one-mississippi-community-cope-influx-hispanic-students/>.

92. See *supra* note 54 and accompanying text.

93. See *supra* notes 66–70 and accompanying text.



Much as the Bolivian army kept an eye on the two American desperadoes, biding its time, conservative power brokers plan to turn to African Americans after they finish taking care of Mexicans.

As the nation approaches a tipping point in the mid-twenty-first century, much of the country, and certainly the South, will see yet another manifestation of historical animosity toward minority groups, beginning with Latino immigrants—and perhaps continuing with Muslims—whose removal will mark the first step in a renewed Southern Strategy.<sup>94</sup>

### 3. *A Role for Working-Class Whites*

The New Southern Strategy contemplates roles not only for Latinos and African Americans but working-class whites as well. To avoid defections and garner every possible white vote, conservatives will tell blue-collar whites that minorities and liberals are their despicable enemies, and that African Americans and Mexicans prefer to live idle lives, surviving on federal largesse, while hardworking whites are toiling at low-paid jobs in a factory or store to put food on their families' tables.<sup>95</sup> This tactic is working: working-class whites are among the strongest supporters of regressive social measures like the ones we have been describing.<sup>96</sup>

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94. See *id.* On the building wave of animosity toward immigrants in general, see, for example, Eduardo Porter, *For Immigrants, America Is Still More Welcoming than Europe*, N.Y. TIMES (Dec. 8, 2015), <http://www.nytimes.com/2015/12/09/business/international/for-immigrants-america-is-still-more-welcoming-than-europe.html> (noting that “the United States has some of the most hostile policies toward an immigrant population found in the developed world”). On the recent wave directed at Muslims, see, for example, Falcón, *supra* note 62; Alan Rappeport, *Republicans Split on Donald Trump’s Plan to Ban Muslims, Poll Finds*, N.Y. TIMES (Dec. 10, 2015, at 5:00 PM), <http://www.nytimes.com/politics/first-draft/2015/12/10/poll-finds-republican-support-for-donald-trumps-ban-on-muslims-coming-to-u-s/>.

95. This old strategy dates to colonial days when pro-slavery forces gave poor whites and indentured servants certain perquisites in order to head off their alignment with blacks against the elite whites, who oppressed them both. See HERBERT APTHEKER, *NEGRO SLAVE REVOLTS IN THE UNITED STATES, 1526–1860*, at 13–15 (1939); PEREA ET AL., *supra* note 4, at 123–24. To be sure, current conservative leaders also tell their working-class brothers and sisters that liberals are godless and un-American.

96. Viz., welfare restriction, aggressive policing, and immigration control. See, e.g., E.J. Dionne, Jr., Opinion, *Class War Comes to the GOP*, WASH. POST (Dec. 6, 2015), [https://www.washingtonpost.com/opinions/class-war-comes-to-the-gop/2015/12/06/d62afe64-9ace-11e5-8917653b65c809eb\\_story.html?utm\\_term=.27155fb385ed](https://www.washingtonpost.com/opinions/class-war-comes-to-the-gop/2015/12/06/d62afe64-9ace-11e5-8917653b65c809eb_story.html?utm_term=.27155fb385ed) (observing that the GOP’s courtship of disenchanted working-class whites is succeeding); E.J. Dionne, Jr., Opinion, *Understanding What Makes Trump’s Supporters So Angry*, WASH. POST (Nov. 29, 2015), [https://www.washingtonpost.com/opinions/understanding-what-makes-the-right-so-angry/2015/11/29/14a303a2-951c-11e5-b5e4-279b4501e8a6\\_story.html?utm\\_term=.c2a64d9e5f4d](https://www.washingtonpost.com/opinions/understanding-what-makes-the-right-so-angry/2015/11/29/14a303a2-951c-11e5-b5e4-279b4501e8a6_story.html?utm_term=.c2a64d9e5f4d) (noting this same courtship).

In summary, the experience of two regions suggests what may lie ahead. California's experience predicts a broad rise of neocolonial strategies, including co-optation and efforts aimed at controlling education and the production of knowledge.<sup>97</sup> Events in the South predict the spread of a three-stage strategy, similar to Nixon's brainchild but more carefully crafted. This Southern Strategy contemplates oppressing first Latinos and then blacks, all the while currying favor with blue-collar whites. Our predictions are not merely speculative—all these currents are beginning to appear in national politics.<sup>98</sup> If we do not miss our guess, America's future will look, by turns, Californian and southern. Traditional strategies that conservative leaders formerly deployed to remain in power, such as voting manipulation, will recede because better ones will be available. Consider gerrymandering as merely one example.

#### IV. VOTER MANIPULATION: THE NEW SOUTHERN STRATEGY REPLACES GERRYMANDERING

Just as Butch and Sundance abandoned train robberies when, shall we say, certain structural conditions changed, conservatives will cease relying on certain favorite tactics once the above-mentioned strategies, better suited to our time, begin operating.<sup>99</sup> Gerrymandering, for example, will no longer be feasible or attractive.<sup>100</sup> Until now, conservatives who controlled the state house in a red state could redraw voting districts every ten years with minority-voting dilution in mind.<sup>101</sup> "Packing," in which the majority party draws lines so as to concentrate as many black voters as possible into a single district—thus guaranteeing that the

97. Delgado & Stefancic, *California's Racial History*, *supra* note 22, at 1613.

98. George Packer, *Head of the Class: How Donald Trump Is Winning Over the White Working Class*, *NEW YORKER* (May 16, 2016), <http://www.newyorker.com/magazine/2016/05/16/how-donald-trump-appeals-to-the-white-working-class>.

99. *Viz.*, California-style neocolonialism and three-stage Southern Strategy revivalism. *See supra* note 22 and accompanying text.

100. Gerrymandering is the term for deliberately drawing a voting district to achieve political gain. *Gerrymandering: Politics*, *ENCYCLOPEDIA BRITANNICA*, <http://www.britannica.com/topic/gerrymandering> (last visited Oct. 14, 2016); Sam Wang, Opinion, *Let Math Save Our Democracy*, *N.Y. TIMES* (Dec. 5, 2015), <http://www.nytimes.com/2015/12/06/opinion/sunday/let-math-save-our-democracy.html> (describing "packing" and proposing a simple test for detecting it); *see also* Max Ehrenfreund, *What Obama Still Doesn't Get About American Politics*, *WASH. POST* (Feb. 11, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/02/11/the-problem-with-how-obama-thinks-about-american-politics/> (noting that gerrymandering and polarized attitudes go together—neither causes the other).

101. Wang, *supra* note 100.

surrounding districts will be majority white and likely to vote Republican—will lose efficacy.<sup>102</sup>

The reason is that Latinos and blacks rarely settle in the same neighborhoods.<sup>103</sup> Because of longstanding animosities and Latino racism,<sup>104</sup> the two groups usually settle in different parts of a city or region. This pattern deprives the two minority groups of the benefit of daily interracial contact,<sup>105</sup> not to mention opportunities to engage in coalition politics. But it does yield one perverse benefit to minority groups: the conservative party will be unable to pack all of them into large, carefully drawn districts every ten years. With growing Latino numbers, conservative operatives will be left with heavy-handed measures like the ones mentioned above: border enforcement, deportation, and divide-and-conquer efforts aimed at obstructing any incipient black-Latino coalition.<sup>106</sup>

#### V. JUDICIAL REVIEW IN AN ERA OF MULTIGROUP RACISM

In order to combat the above-mentioned strategies and the new forms of inequality that they will introduce, civil rights in the next few decades will need to become more complex. Latinos will demand attention to immigration reform and discrimination based on language, accent, last name, and other proxies for race.<sup>107</sup> They will demand reconsideration of decisions like *Hoffman Plastic*<sup>108</sup> that treat undocumented persons in a manner that would be unconstitutional if they were citizens or permanent residents. Blacks will demand civilian control over the police.<sup>109</sup> Both groups will support affirmative action in higher education, antipoverty programs like HeadStart that aid poor families, and public

102. *Id.*

103. By preference, that is. Occasionally, economic necessity trumps preference, resulting in mixed neighborhoods like East Harlem or parts of South-Central Los Angeles, where black and Latino families coexist, sometimes uneasily. See Ehrenfreund, *supra* note 100.

104. See VACA, *supra* note 44, at 8; see also Aura Bogado, “A Matter of Life and Death”: *Confronting Anti-Black Racism Among Latinos*, SALON (May 20, 2014, 3:58 PM), [http://www.salon.com/2014/05/20/a\\_matter\\_of\\_death\\_and\\_death\\_confronting\\_anti\\_black\\_racism\\_among\\_latinos/](http://www.salon.com/2014/05/20/a_matter_of_death_and_death_confronting_anti_black_racism_among_latinos/) (noting a deep vein of anti-black prejudice in the Latino community).

105. See ALLPORT, *supra* note 13, at 17–18.

106. See *supra* notes 44–47 and accompanying text.

107. See generally PEREA ET AL., *supra* note 4, at 279–379 (describing the historical differential racialization of Latinos in the United States).

108. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148–52 (2002).

109. See generally Richard Delgado & Jean Stefancic, *Critical Perspectives on Police, Policing, and Mass Incarceration*, 104 GEO. L.J. 1531 (2016) (emphasizing the benefits associated with civilian-centric approaches to policing).

education reform.<sup>110</sup> Part of the reason for the slightly diverging branches of civil rights law is that the two groups exhibit different histories and formative experiences—for blacks, slavery and Jim Crow laws; for Latinos, the expeditionary conquest.<sup>111</sup> The two groups bear different stigmas and stereotypes—for one, dull and animalistic; for the other, happy-go-lucky and lazy.<sup>112</sup> Remediation will need to proceed with these differences in mind.

But just as Butch and Sundance found that Wyoming and Bolivia, which were superficially very different, shared certain basic features—banks, mule trains, armed guards, and children with highly developed powers of observation, to name a few—blacks, Latinos, and other ethnic groups will encounter a common set of obstacles as society approaches the day of reckoning.<sup>113</sup>

### CONCLUSION

Some of the obstacles discussed in this Essay, such as the New Southern Strategy, will strike every reasonable observer as unfair once they are pointed out<sup>114</sup> and will call for a new, more searching form of judicial review. Judges will need to be alert to three-stage strategies, like the one described above,<sup>115</sup> or control of the content of education, as in California.<sup>116</sup> They may need to recognize an exception to the Plenary Power doctrine<sup>117</sup> when discriminatory immigration enforcement threatens to distort the political processes

110. See PEREA ET AL., *supra* note 4, at 581–610, 660–71, 878–83 (describing the importance of acknowledging the differences between races in the context of affirmative action).

111. See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 62 (2d ed. 1994); PEREA ET AL., *supra* note 4, at 22, 142–63, 279–82.

112. See Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1262, 1264–65, 1273–74 (1992).

113. *Viz.*, 2044. See COLBY & ORTMAN, *supra* note 2, at 9.

114. Notably, here.

115. *Viz.*, the New Southern Strategy. See *supra* Part III (outlining the three stages as (1) strict border enforcement, (2) cutting welfare, and (3) forcing the idle back to work).

116. See *supra* notes 29–30, 38 and accompanying text. See also Richard Delgado, *Precious Knowledge: State Bans on Ethnic Studies, Book Traffickers (Librotraficantes), and a New Type of Race Trial*, 91 N.C. L. REV. 1513, 1521–23 (2013).

117. See *Fong Yue Ting v. United States*, 149 U.S. 698, 713, 731 (1893) (establishing that courts do not, except in the most extreme cases, review substantive immigration policy and rules); *Ekiu v. United States*, 142 U.S. 651, 659–60 (1892); *Chae Chan Ping v. United States*, 130 U.S. 581, 600–03, 609–10 (1889); HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 27, 33–35 (2006). See generally NATSU TAYLOR SAITO, *FROM CHINESE EXCLUSION TO GUANTANAMO BAY: PLENARY POWER AND THE PREROGATIVE STATE* (2006) (noting how the Plenary Power doctrine has operated to shield many immigration measures from judicial review over the ages).

and disadvantage discrete and insular minorities, such as African Americans and Latinos.<sup>118</sup> Judges will need to be especially watchful for majoritarian tactics that discourage minority groups from forming coalitions to advance their interests in the political arena.<sup>119</sup> Some judges and justices may decide to go on siding with E.H. Harriman as they have often done in the past.<sup>120</sup> But more discerning ones may want to take a look at how he became so wealthy, why the train contained so much loot, what he was going to do with it, and how his exercise of power—which even extended to sponsorship of trained vigilantes—usurped legitimate authority and undermined the rule of law.

The two of us are betting that some judges, at least, will take a closer look—and that many legislators, community activists, and much of the public at large will join them. After all, even Butch Cassidy and the Sundance Kid had Etta, the schoolteacher, on their side—at least until it became plain that they were on a collision course with destiny.

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118. See *supra* notes 60–70 and accompanying text (describing how elite operatives have begun to intensify immigration enforcement with the subsequent suppression of black interests in mind); see also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (noting that state action targeting weak and insular minorities may require especially stringent judicial review).

119. See *supra* notes 43–44, 95–96, 100 and accompanying text (describing various guises of the divide-and-conquer strategy).

120. Compare *Vieth v. Jubelirer*, 541 U.S. 267, 305 (2004) (declaring a thinly veiled racial redistricting scheme defensible as legal “political” gerrymandering), with *Lochner v. New York*, 198 U.S. 45, 53 (1905) (upholding liberty of contract under the Due Process Clause in a case pitting workers’ versus employers’ rights).