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**Rodrigo's Footnote:
Multi-Group Oppression and a
Theory of Judicial Review**

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INTRODUCTION: IN WHICH RODRIGO WALKS IN ON ME IN THE MIDDLE
OF AN EMBARRASSING OPERATION

Clomp. Clomp. Clomp.

I was trying out my new walker in the privacy of my office and wishing I had left it behind to experiment with once I got home, when a knock on my door stopped me in my tracks. Hopping over to my coat closet, I jammed it inside as best I could and called out, "Just a minute. Who's there?"

The familiar voice from outside gave me quite a start. "It's Rodrigo.¹ I hope I'm not showing up at a bad time."

"Not at all," I said, opening the door and giving my young protégé a warm hug.² "Come in. What a surprise! What brings you to town?"

"A recruiting fair, which just ended. The dean sent me, probably knowing I'd take advantage of the opportunity to spend the rest of the afternoon with you. Did I hear somebody tromping around?" He glanced around my otherwise empty office and looked back at me for an answer.

"It's a little embarrassing," I said. "I was trying out my new walker. My doctor gave it to me a couple of days ago, but I haven't used it very

¹ See Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) [hereinafter *Chronicle*] (introducing Rodrigo, the son of an African American serviceman and an Italian mother). Rodrigo was born in the United States but raised in Italy, where his father served at a U.S. outpost. He is the half-brother of civil rights superlawyer Geneva Crenshaw — a heroine created by Derrick Bell. For a collection of the chronicles of Geneva Crenshaw, see DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987). Rodrigo attended college in Italy after which he earned an Italian law degree, graduating fourth in his class. See *id.* at 1359. He and I met when he sought me out, at his sister's suggestion, during a return trip to the United States to investigate LL.M. programs for foreign students. Both Rodrigo and the narrator, "the Professor," his straight man and mentor, are fictional characters, composites of many people I have known and not to be identified with any one of them. See *infra* note 2 (describing Rodrigo and the Professor).

² See *infra* notes 14-19 and accompanying text (explaining how we came to meet and discussing how our relationship developed over the years). One of my objectives in recounting their story is to give readers a glimpse of the range of interests and topics of conversation among African American and other intellectuals of color. The Professor is black, while Rodrigo is of mixed race. His appearance is indeterminate. With black, curly hair and olive-colored skin, he could be African American, middle eastern, northern African, or Mediterranean/Latino in origin. See *Chronicle*, *supra* note 1, at 1358. For his part, the Professor is an African American of advanced years who teaches civil rights at a large public law school and is the veteran of many civil rights struggles. For a discussion of narrative jurisprudence and more information on my two main characters, see Richard Delgado, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133, 1133-35 (1993) [hereinafter *Stasis*].

much yet. I'm supposed to lean on it until I can walk without limping. I hurt my ankle last week while jogging in the park with Teresa, and it's slow healing."³

"You've always been a great runner," he said, giving me a concerned look. "It must be playing hob with your exercise program."

"I'm a little better every day," I said. "Come on in and have a seat. My walker's over there — just inside that door."

While he extracted the gadget and inspected it with curiosity, I thought how little he had changed since we had first met. Beginning with an interview in my office during a return visit to the States in which he recounted his hopes of becoming a law professor,⁴ we had become fast friends despite the difference in our ages. Over the years, he and I had met many times, sometimes by pre-arrangement, other times by chance at airports or law school conferences, discussing merit and affirmative action,⁵ the decline of the West,⁶ love,⁷ law and economics,⁸ environmental standing,⁹ intersectionality,¹⁰ and many other subjects. I got to meet Giannina,¹¹ a playwright and poet, and the love of his life, and learned about his family roots and how he came to be contemplating a return to the U.S. after spending most of his life in Italy.¹²

We discussed the merits of various types of LL.M. program, as well as his chances of landing a teaching job afterward.¹³ Our meetings had

³ See Richard Delgado, *Rodrigo's Remonstrance: Love and Despair in an Age of Indifference – Should Humans Have Standing?*, 88 GEO. L.J. 263, 268 (2000) [hereinafter *Remonstrance*] (introducing Giannina's mother, Teresa, with whom the Professor, an elderly gent, was immediately smitten).

⁴ See *Chronicle*, *supra* note 1, at 1359 (describing his career plans).

⁵ See generally Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995) [hereinafter *Merit and Affirmative Action*] (discussing the role of race and merit in college admissions).

⁶ See *Chronicle*, *supra* note 1, at 1367-77.

⁷ See Richard Delgado, *Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 CALIF. L. REV. 387 (1993) [hereinafter *Care, Competition*].

⁸ See Richard Delgado, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 MICH. L. REV. 1183 (1993).

⁹ See *Remonstrance*, *supra* note 3.

¹⁰ See Richard Delgado, *Rodrigo's Reconsideration: Intersectionality and the Future of Critical Race Theory*, 96 IOWA L. REV. 1247 (2011).

¹¹ See *Care, Competition*, *supra* note 7, at 387, 402 (introducing Giannina, Rodrigo's partner, now wife and mother of his young son).

¹² See *Chronicle*, *supra* note 1, at 1365-80 (explaining his hopes to contribute to his country of birth, which he regarded as in a cultural and economic slump).

¹³ See *id.* at 1359-64 (discussing the young man's career prospects).

charged me with new energy and given me many ideas for books and articles of my own.¹⁴ I watched with satisfaction as he completed his LL.M. studies,¹⁵ won a prize for student writing, interviewed for teaching positions,¹⁶ married,¹⁷ and started his first teaching job.¹⁸ I learned about his colleagues, including "Laz," who was about his same age and a member of the Federalist Society.¹⁹

"Quite a contraption," he said, folding it up and putting it back in the closet. "I hope you won't need it much longer."

"Me, too," I said. "It makes me look even older than I am. And Teresa worries that I'll get it caught on one of our throw rugs at home and take a second tumble. But enough about me. Have you and Giannina been well?"

"Yes. She's still working at that nonprofit, while I'm up for my first sabbatical this fall. In fact, I was hoping to run my project past you. I called earlier to let you know I'd try to drop by, but your line was busy."²⁰

"I have all the time in the world," I said. "Now that I can't run, the days seem endless. Have a seat on my couch and tell me about your project."

¹⁴ See, e.g., RICHARD DELGADO, *THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE* (NYU Press 1995) (collecting some of the early chronicles); RICHARD DELGADO, *THE COMING RACE WAR: AND OTHER APOCALYPTIC TALES OF AMERICA AFTER AFFIRMATIVE ACTION AND WELFARE* (NYU Press 1996) (containing chronicles about racial conflict); RICHARD DELGADO, *WHEN EQUALITY ENDS: STORIES ABOUT RACE AND RESISTANCE* (Perseus Press 2000) (discussing resistance to oppression); RICHARD DELGADO, *JUSTICE AT WAR: CIVIL LIBERTIES AND CIVIL RIGHTS DURING TIMES OF CRISIS* (NYU Press 2003) (discussing how politics and economics can shape racial fortunes).

¹⁵ See, e.g., Richard Delgado, *Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 *STAN. L. REV.* 1581, 1582-95 (1993) (recounting some of his adventures in the LL.M. program); *Stasis*, *supra* note 2, at 1133-38 (same).

¹⁶ See *Merit and Affirmative Action*, *supra* note 5, at 1719-21 (describing his fortunes on the job market).

¹⁷ See Richard Delgado, *Rodrigo's Corrido: Race, Postcolonial Theory, and U.S. Civil Rights*, 60 *VAND. L. REV.* 1691, 1692 n.1 (2007) (describing Giannina, Rodrigo's soul mate and life companion); *Care, Competition*, *supra* note 7, at 402 (same).

¹⁸ See *Merit and Affirmative Action*, *supra* note 5, at 1711 (recounting how he accepted a teaching position at a nearby law school).

¹⁹ See *id.* at 1713 (introducing Laz, Rodrigo's best friend on his faculty).

²⁰ An unabashed member of the pre-computer generation, the Professor prefers to use as little technological gadgetry as possible, including the voice mail recorder on his office phone.

I. IN WHICH RODRIGO DESCRIBES HIS SABBATICAL PROJECT

“I’m going to write an article on judicial standards of review in cases of multi-group oppression. I have a new theory that builds on *Carolene Products* and its famous footnote,²¹ but goes further.”

“I wish my own footnotes could go further,” I said, looking down a little ruefully at my own feet, clad in protective, heavy running shoes, not my usual office-going loafers.²² “How did the idea occur to you?”

“Do you remember Laz?”

“Of course,” I said. “Your best buddy on the faculty. How’s he doing?”

“He took a leave of absence to work for the Trump administration.”

“Oh, no,” I said. “How terrible — for you, I mean. I remember that he’s always been conservative, unlike you. Is he happy about his new job?”

“He is,” Rodrigo replied, with a shake of his head. “He was quite defensive when he told me about it. He loves minorities, as you know, being gay, and identifies with civil rights scholars like us. But his

²¹ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 & n.4 (1938).

[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.

And noting in footnote 4 that

[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. (citations omitted).

²² That is, comfortable slip-on loafers — not as stylish as the Italian footwear that my younger companion sported, but, I thought, reasonably good-looking for a man my age.

appointment is with the Antitrust Division. He assured me the work won't be too political or anything I'd disapprove of. I'm going to miss him."

"And I gather your conversation with him got you thinking about standards of judicial review?"

A. *Rodrigo Discusses Latinos, African Americans, and Multi-Stage Oppression*

"It did. We had been talking about Latinos and President Trump's plans to build a wall and deport as many of them as possible.²³ To my surprise, Laz thinks both are bad ideas, an effort to cartelize human labor. But our conversation led me to reflect on multi-group oppression²⁴ and the black-white binary paradigm of race.²⁵ And this, in turn, got me thinking about resistance²⁶ and options for progressive people in an age of Trump."²⁷

"I've been thinking about all those things, too," I said.²⁸ "Let's take them one at a time, starting with multi-group oppression and

²³ See, e.g., Chico Harlan & Jerry Markon, *What It Will Take for President Trump to Deport Millions and Build the Wall*, WASH. POST (Nov. 9, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/11/09/what-it-will-take-for-president-trump-to-deport-millions-and-build-the-wall> (evaluating the prospect for success of these two initiatives).

²⁴ See *infra* Part I-B.

²⁵ See *infra* notes 85-111 and accompanying text. Observant readers will notice that the accompanying passage is the mandatory "map" that outlines the structure of the remainder of this Article.

²⁶ See *infra* Part III.

²⁷ See Laurie Goodstein, *Liberals Fighting for Their Faith: Seeking to Break Right's Grip on Setting Moral Agenda*, N.Y. TIMES, June 11, 2017, at A1 (describing a growing resistance movement); see also Joshua Holland, *Your Guide to the Sprawling New Anti-Trump Resistance Movement*, THE NATION (Feb. 26, 2017), <https://www.thenation.com/article/your-guide-to-the-sprawling-new-anti-trump-resistance-movement>; *infra* notes 141-42 and accompanying text (same).

²⁸ On this very question, I had in mind three pieces by my rapporteurs: Richard Delgado & Jean Stefancic, *Southern Dreams and a New Theory of First Amendment Legal Realism*, 65 EMORY L.J. 303 (2015) [hereinafter *Southern Dreams*] (positing a new approach to First Amendment theory that can accommodate social and political change); Richard Delgado & Jean Stefancic, *The Hole-in-the-Wall Gang View of Life and America's Racial Future*, 51 WAKE FOREST L. REV. 745 (2016) [hereinafter *Hole-in-the-Wall*] (discussing America's future in an era of demographic diversity); and Richard Delgado & Jean Stefancic, *A New Southern Strategy of Multigroup Oppression: A Response to Standard White by Michael Morris*, 7 CALIF. L. REV. ONLINE 49 (2016) [hereinafter *Multigroup Oppression*] (discussing interracial dynamics and manipulation).

standards of review. I gather that the two groups you have in mind are African Americans and Latinos?”

B. *Multi-Group Oppression and the New Southern Strategy*

“They are,” he said. “As you know, I consider myself part Latino, through my mother’s side of the family. You’re not, although I know that you often go to Mexico on vacation, love the culture, and have managed to pick up a little Spanish.”²⁹

“Anyway,” he continued, “Laz and I had been talking about those new laws that all the Southern states passed, beginning around 2010, making things as hard as possible for Latino immigrants.”³⁰

“We take some of them up in my con law class,” I said. “The Supreme Court invalidated Arizona’s — and by implication all the others — on grounds of federal pre-emption.³¹ But I’ve heard that the social attitudes that led to their enactment seem to have remained unchanged. Small towns and citizens throughout the South still make sure that the Latinos know that they are not welcome there.”³²

“While they were in effect, the laws penalized practically everything an unofficial entrant might want to do, including asking for a job, renting an apartment, or applying for a barber’s license.³³ Some of them even made it a crime to give one a ride. They all made it illegal to accept a public benefit, such as enrolling a child in school or taking him to the emergency ward when he has a high fever. At first, Laz and I could not understand why the region was so set against them.”

“They remind me of the Jim Crow laws of an earlier day,” I said. “Come to think of it, wasn’t the South merely following the pattern laid down during the post-Reconstruction years when the region enacted measures to keep the newly freed slaves in their place?”³⁴

²⁹ See Richard Delgado, *Rodrigo’s Riposte: The Mismatch Theory of Law School Admissions*, 57 SYRACUSE L. REV. 637, 647 (2007) (mentioning the Professor’s affection for Mexico, its people, culture, and food).

³⁰ See, e.g., *Hole-in-the-Wall*, *supra* note 28, at 754-55 (noting that a few northern towns and cities passed similar laws); *Multigroup Oppression*, *supra* note 28, at 88 (same); *Southern Dreams*, *supra* note 28, at 318-19 (discussing the spread of anti-immigrant statutes).

³¹ *Arizona v. United States*, 567 U.S. 387, 400-10 (2012).

³² See *Hole-in-the-Wall*, *supra* note 28, at 754; *Multigroup Oppression*, *supra* note 28, at 87; *Southern Dreams*, *supra* note 28, at 321-22.

³³ See *Hole-in-the-Wall*, *supra* note 28, at 754; *Multigroup Oppression*, *supra* note 28, at 87 & n.41; *Southern Dreams*, *supra* note 28, at 321-22.

³⁴ See Richard Delgado & Juan Perea, *Racial Templates*, 112 MICH. L. REV. 1133, 1146 (2014) (noting how racial templates can guide action far into the future).

"I'm sure cultural memory played a part," he said.³⁵ "But why it's been happening again now required some explanation. After all, when East Indian families began settling there in the 1970s, opening stores and motels, they encountered much less resistance even though many of them were just as dark-looking as the Latinos."³⁶

"Both groups must have given the region a big boost."

"They did," he said. "Through the value of their labor and their tax contributions.³⁷ The economy boomed. The Latinos were especially popular with the farmers."³⁸

"The South is still a largely agricultural society," I interjected. "My grannie still lives there."

"They were boons to the construction, hospitality, and gardening and landscaping industries, too.³⁹ Many of them took jobs that African Americans were uninterested in, like picking crops in the fields or working in white people's houses, jobs that had overtones of slavery."⁴⁰

"That's easy to understand," I said. "But jobs like those would have carried no such associations for the Mexicans and Central Americans."

"Indeed," he said. "They were happy to take them, planning to send some of their money home and move up after they learned a little English and got their green cards.⁴¹ The business community welcomed them, as did most chambers of commerce.⁴² Since they were young, physically fit, and in many cases single, they were

³⁵ See *Hole-in-the-Wall*, *supra* note 28, at 757-60 (showing how cultural memory kept earlier patterns of racial domination alive in the South); *Southern Dreams*, *supra* note 28, at 324-54.

³⁶ See *Southern Dreams*, *supra* note 28, at 319-20 (noting how Asians and, later, Indochinese fishermen from Vietnam and elsewhere encountered relatively little resistance upon arriving in the region).

³⁷ See *Multigroup Oppression*, *supra* note 28, at 88 n.47 (discussing the boost that the immigrants provided to the region's economy).

³⁸ See *Multigroup Oppression*, *supra* note 28, at 88 (noting that the new arrivals conferred a net gain); *Southern Dream*, *supra* note 28, at 321 n.113 (noting that the region boomed); see also *Hole-in-the-Wall*, *supra* note 28, at 754 (same).

³⁹ See *Hole-in-the-Wall*, *supra* note 28, at 753-54 (noting their popularity with the business community); *Southern Dreams*, *supra* note 28, at 316 (noting their popularity with employers).

⁴⁰ See *Hole-in-the-Wall*, *supra* note 28, at 756-57; *Multigroup Oppression*, *supra* note 28, at 91-92 (noting that immigrants often took jobs that were unattractive to native Americans, particularly blacks).

⁴¹ *Hole-in-the-Wall*, *supra* note 28, at 757 (noting this attitude among the new arrivals); *Multigroup Oppression*, *supra* note 28, at 92 (same).

⁴² See *Hole-in-the-Wall*, *supra* note 28, at 754 (noting the favorable reception by the region's business community); *Multigroup Oppression*, *supra* note 28, at 86 (same).

comparatively little drain on public resources.⁴³ Their crime rate was low.⁴⁴ They attended church more faithfully than the average American⁴⁵ and had very few babies out of wedlock.⁴⁶ Despite all this, many Southerners despised them and invented reasons why they should be deported.”⁴⁷

“Some of my black compatriots piled on, too,” I said. “Even though few relished the idea of harvesting heavy melons all day long under the hot sun or taking care of elderly white people in a retirement home.⁴⁸ The newcomers seemed too eager to work. They spoke accented English, which was hard to understand. And they struck us as cutting to the front of the line when our people have been waiting much longer for cushy jobs.⁴⁹ Of course, the jobs they took, like carving poultry carcasses on an assembly line under time pressure with very sharp knives were not exactly cushy. But many of us didn’t like to see them prospering, even if that only meant getting their foot on the bottom rung of the ladder.”⁵⁰

Rodrigo leaned forward, his face taking on an even more animated expression than usual. “This is where my new theory of multi-group oppression comes in. Professor, do you remember the Southern Strategy that the Republican Party deployed to elect Richard Nixon as President and cement their hold on national politics beginning in the middle of the last century?”

⁴³ See *Hole-in-the-Wall*, *supra* note 28, at 755; *Multigroup Oppression*, *supra* note 28, at 88; *Southern Dreams*, *supra* note 28, at 320-21; Miriam Jordan, *Welcome for Migrants Reveals a Farm Town Rift*, N.Y. TIMES, June 19, 2017, at A1 (observing that one town’s chamber of commerce welcomed migrants, while ordinary citizens did not).

⁴⁴ See *Southern Dreams*, *supra* note 28, at 320 & n.109 (noting how immigrants are often more productive, law-abiding, and pious than natives); Bret Stephens, *Only Mass Deportations Can Save America*, N.Y. TIMES, June 17, 2017, at A23.

⁴⁵ See *Southern Dreams*, *supra* note 28, at 320 (noting that the newcomers were pious); Stephens, *supra* note 44.

⁴⁶ See Stephens, *supra* note 44 (noting that immigrants on the whole consume few social resources).

⁴⁷ The reasons include that they supposedly don’t learn English, cluster together in enclaves, drive beat-up old cars too slowly, and make the neighborhood look messy by parking on their front lawns. See *Southern Dreams*, *supra* note 28, at 316-17.

⁴⁸ See *Multigroup Oppression*, *supra* note 28, at 91-92 (noting that few native citizens seek arduous jobs such as working in the fields under the hot sun); *Southern Dreams*, *supra* note 28, at 316 (same).

⁴⁹ See *Multigroup Oppression*, *supra* note 28, at 90 (noting this attitude).

⁵⁰ See *supra* notes 48-49 and accompanying text.

1. The New Southern Strategy – Step One: Reduce Latino Numbers

“Of course,” I said. “It turned on recruiting racially biased whites, mainly from the South, to the Republican Party by offering them the promise of a new, congenial home.⁵¹ This maneuver allowed Republicans to splinter the Democrats and leave them with a shrinking constituency of white liberals, minorities of color, and a few labor union diehards. It allowed Nixon to win two national elections.⁵² And it helped the party strengthen its hold on many state legislatures and governorships throughout that region.”⁵³

“Very good, Professor. You’re really up on your political history.”

“Never mind the flattery. I gather you believe the movement is reviving today?”

“Indeed it is. The Party sees the writing on the wall. It realizes it will become increasingly harder for a political party dominated by white folks with traditional attitudes to remain viable during a time of demographic change.”

“You mean as the country approaches a tipping point, sometime around 2044, when whites will cease to be the largest racial group?”⁵⁴

“Exactly. Power then logically ought to shift to a coalition of progressive whites and minorities. To stave off the day of reckoning, the Republicans plan to make things so hard on the Latinos that they will leave.⁵⁵ Or, at least, stop coming since they are currently the largest minority group and tend to vote Democratic.”

⁵¹ See REG MURPHY & HAL GULLIVER, *THE SOUTHERN STRATEGY* 3-5 (1971) [hereinafter *SOUTHERN STRATEGY*] (discussing President Nixon’s Southern Strategy, which tried to “remold the entire South into the new national base of support for the Republican Party”); *Hole-in-the-Wall*, *supra* note 28, at 755-56 (discussing the GOP strategy).

⁵² Specifically, the presidential election of 1968 and 1972.

⁵³ See PATRICK J. BUCHANAN, *THE GREATEST COMEBACK: HOW RICHARD NIXON ROSE FROM DEFEAT TO CREATE THE NEW MAJORITY* 48-80 (Crown Forum reprt. ed. 2015) (describing Nixon’s efforts at rebuilding the party starting at the state level); *Hole-in-the-Wall*, *supra* note 28, at 755-56 (noting the gains that accrued to conservative forces during this period).

⁵⁴ See D’Vera Cohn, *It’s Official: Minority Babies Are the Majority Among the Nation’s Infants, but Only Just*, PEW RES. CTR. (June 23, 2016), <http://www.pewresearch.org/fact-tank/2016/06/23/its-official-minority-babies-are-the-majority-among-the-nations-infants-but-only-just> (discussing the impending demographic tipping point).

⁵⁵ See *Hole-in-the-Wall*, *supra* note 28, at 756 (describing the first of two steps); *Multigroup Oppression*, *supra* note 28, at 89-90 (same). In addition, I seemed to recall reading that reduction of Latino numbers is beginning to set in. See Ana Gonzalez-Barrera, *More Mexicans Leaving Than Coming to the U.S.*, PEW RES. CENTER (Nov. 19,

“But not as reliably as do African Americans,” I caviled.

“That’s true. Only about 67 percent, compared to over 90 for African Americans. But still, that’s a lot of votes.”

“So keeping their numbers as low as possible is in the interest of the conservative party,” I said. “Hence those measures you saw springing up in the South and, now, in other states. But I think you said they had a couple of other reasons for beating up on the hard-working immigrants.”

2. Step Two: A Place for Blacks

“Right. A second one has to do with Republican intentions toward African Americans. Basically, they want them to get off welfare and get a job.”⁵⁶ He shot me a quick look, as though concerned that I might react defensively.

“I see,” I said. “Since African Americans are unlikely to be much help with the Republican agenda, the most that can be hoped is that they won’t drag it down too much. But I don’t see where the Latinos come in.”

“Oh, I should have explained myself. I hope that you won’t take this the wrong way, Professor. But once the Latinos are cleared out, your people are next on the chopping block. And not merely because your potential allies, the Latinos, will be gone or fewer in number.”

“That would be the old divide-and-conquer trick. But I gather you think that conservative forces have something else up their sleeves.”

“I do,” he said. But sensing that he might like to gather his courage before proceeding, I interjected: “But before we go on, you must be hungry. Would you like something to eat? I want to hear your second reason, but I have a feeling that you could use some food as much as I do around now.”

“Always,” he replied, with alacrity.⁵⁷ “They had nothing but salsa and chips at that law school fair. But are you sure that you’re up for walking outside? I noticed some nice-looking restaurants on my way

2015), <http://www.pewhispanic.org/2015/11/19/more-mexicans-leaving-than-coming-to-the-u-s>. My young friend might be onto something, I thought. But I wanted to hear more.

⁵⁶ See *Multigroup Oppression*, *supra* note 28, at 90-91 (noting the low regard in which many conservatives hold welfare recipients); *Southern Dreams*, *supra* note 28, at 340-41 (same).

⁵⁷ For examples of his famous appetite, see, for example Richard, Delgado, *Rodrigo’s Eighth Chronicle: Black Crime, White Fears — On the Social Construction of Threat*, 80 VA. L. REV. 503, 508 (1994).

here, but none of them on this block. Can you make it that far?" He looked down at my feet meaningfully.

"Actually, I was thinking of ordering in," I said. "There's a great Vietnamese place around the corner that delivers to the law school. I often use them when I'm working late and can't get home for dinner. In fact, I have their take-out menu right here." I got it out of my desk drawer and handed it to him.

While Rodrigo studied the menu, I looked out my office window. "It's just as well. It looks like a demonstration of some sort is gathering outside," I said. Then, after a pause: "Have you decided what looks good?"

"I'm thinking of having the marinated flounder with chestnuts," he said, returning the menu to me. "I had them once before and liked them a lot." And while I was studying the menu, he added: "On my way over, I saw people carrying signs, but couldn't see what they said."

"Probably a protest of some kind," I said. "They often start in the park down the block." Then, after a quick review of the menu: "I think I'll have the same as you. Everything on their menu is good. It's run by a family of immigrants."

I phoned in our orders, then looked up. "Where were we?"

"Oh, right," he said. "I bet you've already guessed my second reason. It's that many conservatives detest people on welfare.⁵⁸ They think they ought to work. Lounging around on the public dole is bad for one's character.⁵⁹ They find it particularly annoying when black people do this, particularly young males.⁶⁰ They would much rather have them working, especially performing labor for white people such as

⁵⁸ See *Multigroup Oppression*, *supra* note 28, at 90-91 (discussing this common attitude toward welfare recipients); see also *Hole-in-the-Wall*, *supra* note 28, at 756 (same); *Southern Dreams*, *supra* note 28, at 316-17, 340-41 (same).

⁵⁹ See *Multigroup Oppression*, *supra* note 28, at 62 (noting the conservative dislike for welfare recipients); *Southern Dreams*, *supra* note 28, at 316-17, 340-41; Paul Krugman, *Innocent Mistakes*, N.Y. TIMES (Nov. 10, 2007), <https://krugman.blogs.nytimes.com/2007/11/10/innocent-mistakes>.

⁶⁰ See Krugman, *supra* note 59 (noting that many conservatives believe that in a typical supermarket checkout line one is apt to see a "young buck" buying Porterhouse steaks with food stamps, and attributing the original remark to Ronald Reagan); see also *Multigroup Oppression*, *supra* note 28, at 90-91 (noting that the attitude has long cultural roots); *Southern Dreams*, *supra* note 28, at 340-41 (same); Yamiche Alcindor & Campbell Robertson, *Fight to Limit Benefits, and the Struggle to Scrape by*, N.Y. TIMES, June 1, 2017, at A11 (noting that many Trump supporters consider that the poor are loafers who would rather not work); Emily Badger, *Does "Wrong Mind-Set" Lead to Poverty, or Does Poverty Come First?*, N.Y. TIMES, May 31, 2017, at A14 (same).

fixing meals in restaurants, cleaning their houses — the women, that is — or taking care of their children.”⁶¹

“So, if I understand what you’re saying, the Republicans want the Latinos out of the way in order to be able to cut welfare to as near zero as possible.⁶² That way, blacks will have to take entry-level jobs they don’t like in order to avoid starvation. But for this to happen, the authorities have to clear out the Latinos first.”

“Exactly.”

“Clever,” I conceded. “Diabolical, actually. Come to think of it, I believe I read somewhere that some of them are actually thinking along those lines.⁶³ And of course they have long associated our people with welfare and loafing. But you said you had a third reason?”

But before he could answer, a knock on the door interrupted us. “Aha,” I said, as my young friend leaped up to open it, revealing a polite-looking young Asian man with a white towel over his arm and two identical cardboard boxes of savory-smelling food. “That was fast!”

“Come in,” I said, handing the delivery boy my credit card. “Oh, no, let me,” I said, brushing off Rodrigo’s offer. “You’re repaying me with your intriguing thesis.” And to the delivery boy, I said, “We’re both having the same order. Here’s your tip. Keep the change.”

He thanked us profusely and left, mentioning something about the crowd outside. Rodrigo and I craned our necks to look out the window. “I thought I heard a loudspeaker,” I said. “But I don’t see many people.”

“They seemed to be heading that way,” Rodrigo said, pointing in the direction of the park.

⁶¹ See *Hole-in-the-Wall*, *supra* note 28, at 756-57 (noting that many conservative Southerners prefer to see blacks working in traditional roles).

⁶² See *id.* at 757; *Multigroup Oppression*, *supra* note 28, at 91-92; see also Philip Bump, *A Reporter Pressed the White House for Data. That’s When Things Got Tense*, WASH. POST (Aug. 2, 2017), <https://www.washingtonpost.com/news/politics/wp/2017/08/02/a-reporter-pressed-the-white-house-for-data-thats-when-things-got-tense> (suggesting that the motivation behind recent proposals to curtail immigration may be the very one mentioned above); David Nakamura, *Trump, GOP Senators Introduce Bill to Slash Legal Immigration Levels*, WASH. POST (Aug. 3, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/08/02/trump-gop-senators-to-introduce-bill-to-slash-legal-immigration-levels>.

⁶³ See, e.g., *Multigroup Oppression*, *supra* note 28, at 89 n.51.

3. Step Three: Decimate the Welfare State

We spread our steaming repasts on my office table and, by implicit agreement, ate in silence for a few minutes. Then, I looked up and said, “Your friend Laz isn’t like that at all. But I think you mentioned a third reason why the Republicans — some of them, at any rate — want to get rid of the Latinos.”

“Oh, yes,” he said. “They want to keep the Democrats from rallying their soft-hearted, welfare-loving followers around programs like Social Security that provide a safety net for the disabled and the retired, but require a constant base of working contributors to remain solvent.”⁶⁴

“And for this they need to oppress the Latinos? I don’t see the connection.”

“Let me explain. I’m sure you read how federal authorities and some southern states are striving to make more Latinos deportable by increasing the number of crimes that fall into the category of felonies. One of the new felonies is identity fraud.”⁶⁵

“And I gather that by that they include obtaining a Social Security card by false pretenses?”⁶⁶

“Exactly. Many of the undocumented workers purchase realistic-looking counterfeit cards to show to employers when they are signing up for a job. The employers know that under the law they have to insist on seeing one. The card doesn’t have to be legitimate. It just has to look that way, as a good counterfeit card will. The number can be completely made up and correspond to no existing account.”

“So the unauthorized entrant buys a fake card for a few hundred dollars, waves it in front of the employer who writes down the number, and goes to work the same day?”

⁶⁴ See John Wasik, *Three Ways Trump, GOP May Cut Social Security, Medicare*, FORBES (Nov. 16, 2016), <https://www.forbes.com/sites/johnwasik/2016/11/16/three-ways-trump-gop-may-cut-social-security-medicare> (noting that some Republicans want to scale back Social Security drastically).

⁶⁵ See Laila Lalami, *First Words: Over the Edge*, N.Y. TIMES, Apr. 20, 2017, at MM13 (describing the wave of new legislation creating felonies to facilitate deportation); Teresa Wiltz, *What Crimes Make Immigrants Eligible for Deportation?*, PBS NEWSHOUR (Dec. 28, 2016), <http://www.pbs.org/newshour/rundown/crimes-make-immigrants-eligible-deportation> (discussing the expansion of deportable crimes since 1988).

⁶⁶ See Lalami, *supra* note 65 (describing immigrants who cross the border illegally may now be charged with aggravated identity theft and document fraud); see also Wiltz, *supra* note 65.

“Right. And no one is the wiser until, years later, the immigrant comes to the authorities’ attention in some fashion, maybe for driving with a broken tail light.”

“Which isn’t a felony,” I added.

“Of course not. But if the cop asks for the driver’s identification, and the immigrant shows the false Social Security card, he’s guilty of a felony and can be deported.”⁶⁷

“Now I get it,” I said. “The whole thing is kind of ironic when you think about it.”

“It is,” he said. “The immigrant ends up paying into the Social Security system every month, knowing that he will never collect a cent. The money just sits there forever. The Social Security system stashes away about 12 billion dollars a year that immigrants pay that they will never take out.⁶⁸ Ordinary Americans benefit since it helps keep the system solvent, thanks to the hardworking immigrants with bogus accounts.”

“Each of whom risks jail not because they are defrauding the system, but because they are doing the exact opposite — performing a public good without any expectation of receiving a benefit in return.”⁶⁹

“A peculiar form of fraud,” I said dryly. “It’s as though the state created a crime of giving away presents, donating to orphanages, or helping little old ladies cross the street — and called it fraud.”

“The conservative crowd detest this kind of thing because it helps keep the Security System intact. They would rather that it implode, just as they would like Obamacare to do.⁷⁰ This would reveal the hollowness of the welfare state. In their view, everyone should be responsible for their own retirement and health care. We all make decisions, you see.”

⁶⁷ See *supra* notes 65-66 and accompanying text.

⁶⁸ See Eleanor Clift, *How Immigrants Will Save Social Security*, DAILY BEAST (Nov. 29, 2014, 6:45 AM), <http://www.thedailybeast.com/how-immigrants-will-save-social-security> (noting their sizeable contribution).

⁶⁹ For example, a donor who sent money anonymously or under a pseudonym to a charity or church would not be committing a felony. If a reader of this article donated \$20,000 to the U.S. treasury or the Social Security system with no strings attached, via an unsigned cashier’s check, no FBI agent would try to track him down to press charges. Donating money to a good cause is simply not a crime.

⁷⁰ See Joel White, *Conservatives, ‘Let Obamacare Implode’ is a Trap We Must Avoid*, FOX NEWS (Apr. 22, 2017), <http://www.foxnews.com/opinion/2017/04/22/conservatives-let-obamacare-implode-is-trap-must-avoid.html> (discussing this common attitude).

4. Step Four: Goodbye, Latinos

“So that’s why they want to deport as many undocumented immigrants as possible, namely to keep the Social Security system underfunded and on the brink of collapse. But wouldn’t the same reasoning apply to legal immigrants — even ones with valid Social Security cards and accounts? They help keep the fund solvent, too.”

“It would,” he said. “And some conservatives oppose legal immigration for that very reason. It has to do with the worker-to-retiree ratio. You see, as recently as twenty years ago, there were nearly twelve active workers for each retiree.⁷¹ The workers contributed enough each month to keep one retiree going. And when one of the workers retired, the same would happen to him. He’d receive a check every month and use it to pay for groceries, heat, shelter, and an occasional trip to see a granddaughter graduate from elementary school.”

“But this pyramid, as we know, has been shrinking. Because of our relatively low birth-rate, there are now only about five active workers for each retiree.⁷² Soon the number will be four.”⁷³

“Not only do we have too few babies. People are living longer — like you, Professor. With an aging population, the pyramid is getting both narrower and taller.”⁷⁴

“I see what you mean. Even a moderate rate of immigration could solve this problem. Republicans know this, too. Which is why they oppose even legal immigration.”

“My point exactly. Immigrants are, by and large, young, single, and childless, at least at first.⁷⁵ They increase the base of the pyramid. And they won’t draw on public resources and services until many years in the future, if ever. If they remain illegal, that date is never. Their

⁷¹ See Richard Delgado, *Si Se Puede, but Who Gets the Gravy?*, 11 MICH. J. RACE & L. 9, 17-18 (2005) [hereinafter *Si Se Puede*] (discussing the Social Security pyramid).

⁷² See *id.* On the current low birthrate, see Ariana Eunjung Cha, *The U.S. Fertility Rate Just Hit a Historic Low. Why Some Demographers are Freaking Out*, WASH. POST (June 30, 2017), <https://www.washingtonpost.com/news/to-your-health/wp/2017/06/30/the-u-s-fertility-rate-just-hit-a-historic-low-why-some-demographers-are-freaking-out>.

⁷³ See *Si Se Puede*, *supra* note 71, at 17.

⁷⁴ Jennifer M. Ortman, Victoria Velkoff & Howard Hogan, *An Aging Nation: The Older Population in the United States*, U.S. CENSUS BUREAU (May 2014), <https://www.census.gov/prod/2014pubs/p25-1140.pdf> (discussing the increasing number of elderly citizens).

⁷⁵ See Newsroom, *Immigrant Workers Less Likely to Use SNAP, Study Shows*, UC DAVIS HEALTH (June 15, 2017), <http://www.ucdmc.ucdavis.edu/publish/news/newsroom/12073> (noting that food stamps are less likely to be used by qualifying individuals whom are Hispanic, male, childless, or residing in California).

money stays in the Social Security Fund, building up interest. All of which makes it harder for the Republicans to argue that the system is likely to fail soon. The Latinos are spoil-sports then in two ways. They are young and hard workers. And they enable old people to retire, take things easy, and live longer. They both enable and necessitate a vigorous Social Security system.”

“It’s a strange argument, when you think about it,” I said, shaking my head. “Failure is good. Success is bad. Because the Latinos would rescue Social Security, the country must keep them out.”

II. IN WHICH WE DISCUSS JUDICIAL REVIEW OF MULTI-GROUP OPPRESSION

“So how should courts review oppression of this kind,” I prompted. “The kind that takes place in stages — one group now and the other later. And, by the way, how did you like your flounder?”

“Marvelous. The fish was tender and the seasoning delicate. And the chestnuts — done to a turn. Not too soft.” Then, “Laz liked my idea, too. I’m really going to miss him.”

“But back to your question,” he continued. “At first I thought my theory might have problems with proof of intent. After all, just because all this is happening, it doesn’t follow that Republicans are doing it intentionally. But my three-part theory of motivation makes it hard to deny that they have a degree of conscious intention in mind, especially when you consider that the Party did something similar before — with Nixon, I mean.”⁷⁶

“True,” I said. “And perhaps with generalized political harms, you might not need to prove intent at all. As we discussed, the *Carolene Products* footnote does not seem to require it as a precondition for judicial intervention. It merely flags political failings that can cause minority interests to be repeatedly disregarded. But what about standing? And, assuming that a court takes your case, what is the remedy? What should happen? What should judges — or ordinary people, for that matter — do?”

Rodrigo paused, a serious look crossing his handsome face. Then, after a quick sip of his green tea, he said, “Standing should not be a problem. What to do — the question of a remedy — is.”

“Go ahead and take them separately, if you like.”

⁷⁶ See *supra* notes 51-54 and accompanying text (describing the original 1960’s-era Southern Strategy).

A. Standing

“Standing should not be a problem because the injury in fact that confers standing in public-law cases⁷⁷ is present for every conceivable plaintiff challenging a structural harm to our political system as a whole. A multi-stage plan that kicks out a large segment of the populace, leaving millions of grieving relatives, and then seizes upon the newly created population imbalance to worsen conditions for a second minority group is such a harm. Almost all political theorists agree that the first Southern Strategy was a disaster for American democracy. The new version promises to be at least as harmful, if not more.”

“I have some doubts,” I said. “The times are different, the courts more skeptical.⁷⁸ But let’s say, for the sake of argument, that you get legal scholars, at least, to agree with you that something peculiar is going on. What’s the remedy?”

B. The Remedy

“Action should take place on two fronts,” he said. “Courts should adopt a new, stricter standard of review than they have historically applied in cases having to do with immigration and deportation, especially in ones having to do with racial or religious minorities. And citizens should step up resistance everywhere.”

Just then, we both jumped — an amplified voice was rallying a crowd outside. We walked over to my office window and saw a sizeable crowd starting to line up. A young man was handing out leaflets. I noticed that my ankle didn’t hurt anymore.

⁷⁷ See *Warth v. Seldin*, 422 U.S. 490, 523-29 (1975) (noting that the plaintiff “could not prove their allegations, which, if proved, would place them squarely among those persons injury-in-fact”). Standing in public law cases requires that a plaintiff demonstrate “injury in fact” — a concrete harm to himself personally, as opposed to a general harm to the community at large or to someone other than the plaintiff (officious intermeddling). Standing should be broad, however, in suits over action that endangers our political structure, since every citizen has a stake in our democratic framework. See Sharon LaFraniere, *Democrats in Congress Will Sue Trump*, N.Y. TIMES, June 14, 2017, at A14 (noting that over 200 members of Congress took this position in a recent challenge to Donald Trump); see also *infra* notes 79-80 and accompanying text.

⁷⁸ See Nina Totenberg, *Supreme Court Rules that Post-9/11 Detainees Can't Sue Top U.S. Officials*, NPR NEWS (June 19, 2017, 4:32 PM), <http://www.npr.org/2017/06/19/533556292/supreme-court-rules-post-9-11-detainees-cant-sue-top-u-s-officials> (discussing an example of judicial reluctance to attach blame to senior administration officials).

“It looks like they’re getting some last-minute instructions,” I said. “Where were we?”

“The two kinds of responses, I think,” he said. “The first one was for courts reviewing official action in an era of multi-group oppression.”

“Like now,” I said.

“Right. And the second is action that ordinary citizens could take to promote change.”

“The resistance, in other words. I’m all ears,” I said. “By the way, my ankle feels better.”

1. Intent

“Great,” he said. “I hope courts advance as quickly as your ankle is doing. For one thing, they will need to consider applying a stricter standard of review in cases having to do with immigrants and Latinos, especially when they suspect that some branch of government is targeting them with the aim of oppressing blacks, the classic suspect group, later.”⁷⁹

“There’s plenty of evidence — of your three kinds — that this is exactly what Trump and his friends have in mind.⁸⁰ But don’t immigration laws get zero or near-zero scrutiny? Won’t you have a problem even getting courts to take cases like yours seriously?”⁸¹

“True. Courts will need to reason broadly, starting with blacks and looking backward to assess current programs that appear to be targeting a different group. The idea would be that government ordinarily has the right to do pretty much what it wants in the way of enacting immigration quotas and rules, but can’t do it with a racial or otherwise improper motivation.”

“That is pretty much the teaching of Trump’s Muslim-ban cases, is it not?” I asked.⁸²

⁷⁹ African Americans are the paradigmatic suspect group — unable to change skin color, unable to form useful coalitions with other groups in the political process, and invested with a stigma. See *Hirabayashi v. United States*, 320 U.S. 81, 94-95 (1943) (defining the meaning of “suspect group” and giving the examples of race and alienage).

⁸⁰ See *supra* notes 51-71 and accompanying text.

⁸¹ See generally *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (discussing plenary power doctrines that limit our system of checks and balances); NATSU TAYLOR SAITO, *FROM CHINESE EXCLUSION TO GUANTÁNAMO BAY: PLENARY POWER AND THE PREROGATIVE STATE* (2006).

⁸² See *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (enjoining a presidential travel ban); Ruthann Robson, *Ninth Circuit Affirms Injunction on Muslim Travel Ban*, CONST. L. PROF. BLOG (June 12, 2017), <http://lawprofessors.typepad.com/conlaw/2017/06/ninth-circuit-affirms-injunction-against-muslim-travel-ban.html>

“Yes, and in our case, the sequence of events leading to discrimination is even clearer than it is in those other cases. Moreover, the aim is to protect a suspect group, a domestic not a foreign one, with a long history of discriminatory mistreatment.”⁸³

“What’s more, all this happens in ways reminiscent of Nixon’s strategy,” I said.

“Which practically everyone now condemns because it harmed not just racial minorities but the whole political system. The threat to blacks in what Republicans are doing now to the Latinos, then, is not merely hypothetical but clear to anyone, once you point it out.”⁸⁴

“Then, why do I think that a court might hesitate to grant relief?”

a. *Paradigms of Race*

“The reason isn’t so much the standard of review. It’s that most people think of race in terms of two groups, and two only — the white and the black. This is what Juan Perea calls the normal science of racial discourse — the black-white binary paradigm of race.”⁸⁵

“Do you think that’s true of judges, too?”

“I do. A few judges have ventured beyond this binary, but not many. Persons who grow up in our culture tend to see non-black minorities as also-rans, even wannabes.⁸⁶ They occupy a type of nether zone, not white, but not quite black either. We don’t know whether they deserve strict scrutiny or not.”⁸⁷

“In some cases, they receive it,” I said. “In my course, we cover cases like *Mendez v. Westminster*⁸⁸ and *Hernandez v. Texas*⁸⁹ where they did, after a fashion. But we also cover cases like the New York jury-

(same).

⁸³ Namely, African Americans. See *supra* note 79 and accompanying text (defining the term “suspect group”).

⁸⁴ See *supra* notes 77-80 and accompanying text (discussing the test for standing, which is immediate harm or causation-in-fact).

⁸⁵ See generally Juan Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CALIF. L. REV. 1213 (1997) (showing how an implicit black-white binary paradigm shapes racial discourse and limits the ability of nonblack groups to make their concerns heard).

⁸⁶ See, e.g., *id.* at 1214-15, 1219-21 (noting how an implicit binary paradigm of race marginalizes groups other than the central two).

⁸⁷ See Tanya Kateri Hernandez, *Roots of Latino-Black Anger*, L.A. TIMES (Jan. 7, 2007), <http://www.latimes.com/news/la-op-hernandez7jan07-story.html>.

⁸⁸ 64 F. Supp. 544 (S.D. Cal. 1946) (striking down school segregation for Latino children in a California town).

⁸⁹ 347 U.S. 475 (1954) (holding discrimination against Latino jurors unconstitutional in Texas).

discrimination case, where the Supreme Court rejected the idea of strict scrutiny.”⁹⁰

“Not to mention lower-court language discrimination cases like *Garcia v. Spun Steak Co.*,”⁹¹ Rodrigo added. “Latinos and Mexicans seem to get judicial protection only when they succeed in analogizing their treatment to a variety that also targets blacks.⁹² Few black people will suffer discrimination by reason of their foreign accent or habit of speaking a foreign language with co-workers on the job.”⁹³

“So in situations like that, the Latino is apt not to receive relief. The court can’t easily see the Latino’s treatment as analogous to one that regularly targets blacks. Courts are apt to reason that the treatment is a reasonable workplace rule, something that the Latino has to get used to.”⁹⁴

“Few courts would tell an African American that they have to learn to speak standard English⁹⁵ or not to act, seem, talk, or dress so black.”

“Right. Or stay out of the sunlight so that their skin doesn’t darken. Any type of oppression that Latinos suffer uniquely — that they don’t have in common with blacks — is apt to go unpunished.⁹⁶ That’s the problem, then, with falling outside the black-white binary of race. If the main actors on your racial stage are blacks and whites, you can only invoke remedial case law by analogy to one of those two,” I said.⁹⁷ “What can your Latino, Asian, and Native American friends do to avoid this predicament?”

⁹⁰ *Hernandez v. New York*, 500 U.S. 352 (1991) (excusing Spanish-speaking jurors); see generally Mari Matsuda, *Voices of America: Accent, Anti-Discrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991) (criticizing discrimination against foreigners who speak accented English).

⁹¹ 998 F.2d 1480 (9th Cir. 1993) (upholding English-only rules in a workplace).

⁹² See RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 77-84 (3d ed. 2016) [hereinafter *CRITICAL RACE THEORY: INTRODUCTION*] (discussing the black-white binary paradigm of race).

⁹³ See *id.* at 77-78.

⁹⁴ See, e.g., *supra* notes 92-93 and accompanying text.

⁹⁵ See Matsuda, *supra* note 90 (discussing accent discrimination as a form of implicit racism).

⁹⁶ See *CRITICAL RACE THEORY: INTRODUCTION*, *supra* note 92, at 77-84 (noting structural inequities of a system of black-white racial discourse).

⁹⁷ See *id.*; see also Perea, *supra* note 85, at 1213, 1239-52 (noting that the binary paradigm “contributes to the marginalization of non-black peoples of color” and how the need to draw analogies to black case law and experience limits legal recourse for such groups).

b. *A Thought Experiment: The Anglo-Latino Binary Paradigm of Race*

"We can start by trying to get the legal community to ponder what the world would be like if Latinos were the most numerous and significant minority group, and blacks, Asian Americans, and Indians were smaller and less important, historically and culturally."

"Hold on a minute," I said. "Your group, Rodrigo, is in fact the largest minority group, is it not?"⁹⁸ I thought I read that, just a few years ago, Latinos surpassed blacks as the largest minority group of color with about 17 percent of the population."⁹⁹

"Right. African Americans are now just under 13 percent."¹⁰⁰

"So, couldn't you argue that the basic paradigm of race — the one that fits current circumstances — ought to consist of whites and Latinos, with everyone else off to the side? This takes some getting used to, but I don't see why it's counterintuitive at all."

"My point precisely. And if you'll bear with me, Professor, I'd like to draw out some of the implications of this way of thinking."

(1) *The Latino-Anglo Binary of Race — Or Why We Should Retire All the Binaries and Treat Everyone as an Equal Moral Agent*

"Please do," I said. "I'm starting to catch your drift and find it fascinating. And it sounds like something is happening outside, too."

"Yes. And maybe the marchers are blasting the paradigms. Look at that — they are all mixed up, with Latinos and blacks, and some Middle Eastern looking people all standing around together. Some are even holding hands."

"At least in the first few rows," I said, craning my neck to see better. "Someone is beating a drum. I wonder if they got a parade permit."

"If they read that other case in your casebook, Professor, they probably at least applied for one," Rodrigo said, pointing out a thick brown book on my shelf.¹⁰¹ "I mean, of course, Martin Luther King's case. . . ."

"*Walker v. City of Birmingham*,"¹⁰² I said. "And by the time of his Good Friday march, he was starting to become more ecumenical,

⁹⁸ Renee Stepler & Anna Brown, *Statistical Portrait of Hispanics in the United States*, PEW RES. CTR. (Apr. 22, 2016), <http://www.pewhispanic.org/2016/04/19/statistical-portrait-of-hispanics-in-the-united-states-key-charts>.

⁹⁹ *See id.*

¹⁰⁰ *See id.*

¹⁰¹ *See generally* JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (3d ed. 2015) (discussing many of the cases covered in this article).

¹⁰² 388 U.S. 307 (1967) (ruling that civil rights marchers needed to have applied

reaching out to workers, Latinos, women, and all other groups, including sexual minorities and poor whites.”¹⁰³

“As Derrick Bell did toward the end of his career,” I said. “They both began moving away from the black-white paradigm of race.”¹⁰⁴

“Right, in Bell’s case, urging that whites step up and take their parts in the fight for interracial justice.¹⁰⁵ But tell me more about your new paradigm. Do you mean to decenter whiteness?”¹⁰⁶

“Yes, but all the other groups, too,” he said. “You would start by trying to get an audience to imagine how the world would look if the main actors were white people, Anglos, on the one hand and Latinos on the other. Blacks and other racial minorities would be there, too, but in the Anglo group.”

(2) Blacks as Anglos, Latinos as the Paired Oppositional Group

“You certainly have a way of flipping things and turning them around. If I understand right, you’d have us evaluate African American complaints by analogy to what happens between whites and Latinos. If the analogy to Latino case law failed to hold for a particular type of discrimination, the plaintiffs — African Americans — would go without a remedy. All this is a little hard for me, at least, to get my head around. Can you give me an example?”

“Sure,” he said. “In this paradigm, African Americans would be Anglos. In one way of looking at it, they actually are: They speak native English. Most of them have lived their entire lives here. Their music, jazz, food, mannerisms, styles, and manner of walking and holding themselves are popular and deeply woven into the fabric of American life. They are as Anglo as anyone can be.”¹⁰⁷

for a permit first).

¹⁰³ See Goodstein, *supra* note 27 (mentioning King’s subsequent Poor People’s campaign and a Georgia minister’s plans to organize a second one).

¹⁰⁴ See generally Derrick Bell, *Wanted: A White Leader Able to Free Whites of Racism*, 33 UC DAVIS L. REV. 527 (2000) (noting the need for white participation in African American freedom struggles).

¹⁰⁵ See *id.* at 531-32 (noting that the author “does not promise new legal strategies but instead calls for new leadership in the fight against racism — to be more specific, new white leadership”).

¹⁰⁶ See John T. Bennett, *Critical Race Theory: A Cult of Anti-White Resentment*, AM. THINKER (Mar. 22, 2012), http://www.americanthinker.com/articles/2012/03/critical_race_theory_a_cult_of_anti-white_resentment.html (accusing critical race theorists of an anti-white attitude).

¹⁰⁷ See Angela Harris & Leslie Espinoza, *Afterword: Embracing the Tar-Baby — Lat-Crit Theory and the Sticky Mess of Race*, 85 CALIF. L. REV. 1585, 1596-603 (1997) (noting the prominent part African Americans have played in American history and

"But what about discrimination," I said, a little plaintively. I was finding Rodrigo's idea a little hard getting used to.

"Oh, yes," he said. "They would be an unlucky kind of Anglo. A kind that the rest of the Anglos often treat rather badly. But still Anglos."

"Oh, I get it," I said. "That's just like how some African Americans marginalize Latinos by insisting that they are not real minorities. These blacks say, 'I consider you white.' And when you — a Latino, that is — look incredulous or dumbfounded, they reply, 'Well, you have lighter skins than we do. Some of you even pass as white or fill out your census forms that way.'¹⁰⁸ Or you could get away with it if you wanted to. So, I consider you a white person."¹⁰⁹

Rodrigo looked pensive.

After a pause, I added: "I guess it is kind of insulting. No racially sensitive person should profess to tell a minority person what he is or isn't."

"Yes, that's it! To a thoroughgoing Latino nationalist, African Americans are part of the oppressor class.¹¹⁰ Not all of you, of course. But you're Anglos — to us, anyway. Nobody is trying to deport you — you guys can stay here as long as you want, so long as you don't make waves. No one will ask you to show your citizenship papers during a traffic stop. The cops may treat you harshly if you talk back, but if they do, it's not a case of real discrimination — the kind that can get you deported. It can get you banged up, even shot. But at least you don't wind up standing on some street corner in a Latin American country you haven't lived in for years."

"Yes, and from time to time, one of us makes things harder for you folks by saying that you take our jobs,"¹¹¹ I admitted.

"Don't mistake what I'm saying. I don't mean that African Americans are paradigmatic Anglos, like people from Norway or Yorkshire. But

culture).

¹⁰⁸ See Tanya Kateri Hernández, *Census Racial Categories and the Latino "Culture" of Black Invisibility*, SALT LAW BLOG (Oct. 25, 2012), http://www.nilpnetwork.org/AQE_NiLP_Reader_2013_B.pdf.

¹⁰⁹ See Roy L. Brooks & Kirsten Widner, *In Defense of the Black/White Binary: Reclaiming a Tradition of Civil Rights Scholarship*, 12 BERKELEY J. AFR.-AM. L. & POL'Y 107, 130-41 (2010) (making the case for black exceptionalism).

¹¹⁰ See NICOLAS C. VACA, *THE PRESUMED ALLIANCE: THE UNSPOKEN CONFLICT BETWEEN LATINOS AND BLACKS AND WHAT IT MEANS FOR AMERICA* 85-107 (2004) (noting how African Americans have at times excluded Latinos from political office such as during the Los Angeles mayoral election in 2001).

¹¹¹ See Brooks & Widner, *supra* note 109, at 135-37 (positing that Latino lynchings were not real lynchings, but ordinary murders).

how one carves up reality is largely a matter of what's important to you at the moment. The point of my thought-experiment is that many of us — judges, too — take the black-white binary paradigm of race as though it were engraved in stone somewhere. Through custom, we come to see things through that lens: Either-or. White or black, when today, things are often more complicated than that, with shades of gray.”

“And I think you’re saying that if we fail to realize that, we cannot easily correct a certain form of oppression, namely the kind that proceeds in multiple stages. How should judges handle cases like that?”

2. Framing Judicial Review: Judges’ Training and Experience

“I have some thoughts,” he said with that charming combination of insouciance and modesty that I remembered from our early days. “When oppression proceeds in two steps, judges should review it under the same standard as they do for the ordinary kind, except that the temporal range of evidence they would permit would expand.¹¹² When they find *prima facie* evidence of multi-group oppression taking the form that I have described, they should review it with even more exacting scrutiny than usual, since both the degree and extent of the oppression would likely be greater and the damage to our political system even more severe than it is when a single group finds itself singled out.”¹¹³

“Of course the oppression would be harder to counter through the political process,” I added. “If the country decimates Latinos’ numbers in order to oppress African Americans more effectively, African Americans not only will be forced into unwanted jobs. They will lack allies whom they might have been able to count on in opposing their mistreatment.”¹¹⁴

“Correct,” he replied. “For their part, the Latinos might be so caught up in countering their own oppression that they don’t notice that the blacks are next in line for more of it.¹¹⁵ And blacks might not notice — or care — when, in the first stage, Latinos come in for harsh

¹¹² See *Multigroup Oppression*, *supra* note 28, at 66-67 (describing the need for careful review).

¹¹³ Quantitatively, that is, since it would target two groups, not one; and qualitatively, since it would aim at changing the broad political system, making it less responsive to popular will. See generally SOUTHERN STRATEGY, *supra* note 51.

¹¹⁴ See generally *id.*

¹¹⁵ See *supra* notes 57-63 and accompanying text (noting that African American fortunes would come in for reversal next).

treatment. Some of them might withhold their support for the Latinos, believing them line-jumpers or persons who steal black jobs.¹¹⁶ Others might sit things out when society oppresses the Latinos, out of sheer inertia, not realizing that they are next.”¹¹⁷

“Even judges might be slow out of the gate,” I said. “They may be trained to recognize oppression and take steps to counter it, such as by applying strict scrutiny, insisting on a compelling state interest and no less onerous alternative. But they would need to be more vigilant than usual when complex new forms of it appear, such as the kind you’ve been describing. Nixon’s Southern Strategy lasted for a long time and still warps our politics even today. And the black-white binary makes it hard for almost everyone to imagine Latinos as objects of discrimination.”¹¹⁸

“Exactly. Judges’ training could easily incline them to deem oppression against Latinos as just another case of legitimate governmental action, applying the lax form of scrutiny they afford to immigration laws and quotas.”¹¹⁹

a. The Level of Scrutiny — Strict or Lax

“Just as they did in some of the lower-court cases you mentioned,¹²⁰ and as the Supreme Court has done in certain cases, like *Chae Chan Ping*, having to do with immigration and aliens,” I said.¹²¹ “If judges proceed in the usual way, the conservative strategy could easily survive scrutiny. The strategy draws on one type of oppression — the kind that targets Latinos and is, for all intents and purposes unreviewable — to deliver a second kind. This second kind targets a clearly protected group — African Americans — but does so in a way that looks like ordinary supply-side economics, namely, forcing everyone to work who can.”¹²²

“Even if they are sick or single parents of six young children,” he chimed in.¹²³

¹¹⁶ See *supra* notes 47-49 and accompanying text; *Southern Dreams*, *supra* note 28, at 316, 338-39 (discussing inter-ethnic rivalries and their consequences).

¹¹⁷ See *supra* note 50 (discussing oppression that proceeds in separate stages).

¹¹⁸ See LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1077 (1978) (discussing the characteristics of a suspect group).

¹¹⁹ See *supra* notes 91-93 and accompanying text (discussing English-only cases).

¹²⁰ See *id.*

¹²¹ See *supra* note 81 and accompanying text.

¹²² See *supra* notes 62-63, 94 and accompanying text.

¹²³ See Rachel L. Swarns, *Mothers Poised for Workfare Face Acute Lack of Day Care*, N.Y. TIMES (Apr. 14, 1998), <http://www.nytimes.com/1998/04/14/nyregion/mothers->

“I know it sounds preposterous. Still, can you show that conservative forces intend this method of achieving their ends? Maybe they hit on the strategy accidentally and are following it merely because it seems to be working. Oppress the Latinos, and they leave. Cut social benefits, and a few black welfare mothers will start looking for work, then more and more.”

To drive home the point, I added: “Even if it means working at Wal-Mart for seven dollars an hour, and leaving the kids with an unreliable babysitter who can’t help them with their algebra homework.”

After a pause, he looked up: “I can prove intent at certain points of the strategy, but not all.¹²⁴ But I wonder if I should have to. Structural distortions of the political process should not require intent. They are harmful for democracy, and that should be enough to warrant relief.”¹²⁵

b. Res Ipsa Loquitur

“Maybe you could try *res ipsa loquitur*,” I ventured. “The patient looks sick. Something must be wrong.¹²⁶ A barrel rolls out of a warehouse and hits a pedestrian on the head. They are both cases of negligence *per se*.¹²⁷ The plaintiff does not have to prove negligence or a careless frame of mind on the part of the hospital team or warehouse operator.”

“That would definitely help,” he said, nodding vigorously. “Or take the Declaration of Independence. It laid a litany of complaints at the

poised-for-workfare-face-acute-lack-of-day-care.html.

¹²⁴ See *Multigroup Oppression*, *supra* note 28, at 89 n.51 (citing *Extreme Files: Peter Brimelow*, SO. POVERTY L. CTR. (2015)); see also Carol Anderson, *The Policies of White Resentment*, N.Y. TIMES, Aug. 6, 2017, at SR1 (Sun. Rev.) (positing that Trump’s agenda aims to intensify white resentment and put in place policies of white rage to undermine minority advances).

¹²⁵ See *supra* notes 75-76 and accompanying text. Over 200 members of Congress take the position that they may sue the president under the Emoluments Clause without demonstrating that the president intended to enrich himself when he ran for the office, only that he in fact did so by maintaining control and ownership of certain businesses that prospered as a result of his celebrity (i.e., may presume intent). See LaFraniere, *supra* note 77.

¹²⁶ For example, a patient emerges from the operating room of a hospital with a broken foot that was fine when he or she went in. Since these things do not happen without negligence, tort law presumes that someone on the operating team dropped her when she was unconscious under anesthesia.

¹²⁷ See *Byrne v. Boadle*, 2 Hurl. & Colt, 722, 159 Eng. Rep. 299 (Exch. 1863) (“It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and . . . such a case would, beyond all doubt, afford *prima facie* evidence of negligence.”).

doorstep of the King of England.¹²⁸ The colonials did not have to prove, to the satisfaction of the rest of the world, that the King intended each one to make their lives miserable. He just did it, justifying the colonists in breaking the bonds with the mother country.”¹²⁹

“How much more important, then, for courts to intervene forcefully to keep those ties strong, to keep the country united and to prevent it from flying apart,” I said. “Maybe your *res ipsa loquitur* idea could benefit from merely displaying, in the brief somewhere, a chart of all the Southerners in Trump’s cabinet.¹³⁰ The New York Times commented on this just the other day.”¹³¹

III. LIKE A SERIES OF HAMMER BLOWS

“Then there are all those unilateral actions that Trump and his administration have taken, starting early in his presidency. They’re like hammer blows. When I heard those thumping sounds coming from the other side of your office door, I was reminded of them.”

“Right,” I said. “Clomp. Clomp. Clomp. I bet you’re thinking of Trump’s virulently anti-Latino immigration measures such as the wall he proposes to build along the Mexican border;¹³² his attempt to enact a ban against Muslim immigration;¹³³ his efforts to weaken national health insurance;¹³⁴ his attempts to eliminate federal subsidies for women’s procreative services, children, and the poor;¹³⁵ his bellicose,

¹²⁸ See THE DECLARATION OF INDEPENDENCE (U.S. 1776) (reciting that the colonists had suffered a train of abuses and insults at the King’s hands, including leaving them at the mercy of bloodthirsty savages and levying unfair taxes).

¹²⁹ See *id.* para. 1 (“When in the Course of human events it becomes necessary for one people to dissolve the political bonds which have connected them with another and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them, a decent respect to the opinions of mankind requires that they should declare the cause which impel them to the separation.”).

¹³⁰ See Chris Kromm, *South Rising: Political Clout Growing Under Trump*, FACING SOUTH (Apr. 22, 2017), <https://www.facingsouth.org/2017/04/south-rising-regions-political-clout-growing-under-trump>; see also Howard Koplowitz, *White House Staffers with Alabama Ties and Six-Figure Salaries Working for Trump*, AL.COM (June 30, 2017), http://www.al.com/news/index.ssf/2017/06/white_house_staffers_with_alab.html.

¹³¹ See *Donald Trump’s Cabinet is Complete. Here’s the Full List*, N.Y. TIMES (May 11, 2017), <https://www.nytimes.com/interactive/2016/us/politics/donald-trump-administration.html>.

¹³² See Goodstein, *supra* note 27.

¹³³ See *supra* notes 78, 82 and accompanying text.

¹³⁴ See Goodstein, *supra* note 27.

¹³⁵ See *id.*

go-it-alone foreign policy;¹³⁶ and his rollback of environmental protections and global climate measures.”¹³⁷

“I was,” he said. “Also his executive order insisting that all federal agencies that promulgate a new regulation delete two existing ones,¹³⁸ his dismissive or racist treatment of certain federal judges,¹³⁹ and his atrocious statements about women.¹⁴⁰ Just like the reverberations from your walker, everyone in the vicinity gets used to them; they become the new normal. Teresa hears your tread and thinks, ‘There goes Gus and his walker again.’ By the same token, when Trump or one of his officials does something outrageous, the Europeans roll their eyes.¹⁴¹ The left here in the U.S. are outraged,¹⁴² but nothing happens.”

“But when you consider all the pieces together, you see a picture emerging.”

“Like a photo in a darkroom tub,” he said. “We must learn to see what’s in front of our eyes.”

“Transcend narrow binaries.”

“March arm-in-arm with brothers of different colors and backgrounds.”¹⁴³

“Before it’s too late.”

¹³⁶ See, e.g., Editorial, *President Trump Fails NATO*, N.Y. TIMES (May 26, 2017), <https://www.nytimes.com/2017/05/26/opinion/donald-trump-nato-russia.html>.

¹³⁷ See Goodstein, *supra* note 27; Editorial, *Our Disgraceful Exit from the Paris Accord*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/opinion/trump-paris-climate-change-agreement.html>.

¹³⁸ See Editorial, *Mr. Trump’s Bad Two-for-One Deal*, N.Y. TIMES (Feb. 3, 2017), <https://www.nytimes.com/2017/02/03/opinion/mr-trumps-bad-two-for-one-deal.html>.

¹³⁹ See Editorial, *Donald Trump and the Judge*, N.Y. TIMES (May 31, 2016), <https://www.nytimes.com/2016/06/01/opinion/donald-trump-and-the-judge.html>.

¹⁴⁰ See Lindy West, *Donald and Billy on the Bus*, N.Y. TIMES (Oct. 8, 2016), <https://www.nytimes.com/2016/10/09/opinion/sunday/donald-and-billy-on-the-bus.html>.

¹⁴¹ See *Highlights: In Brussels, Trump Scolds Allies on Cost-Sharing and Stays Vague on Article 5*, N.Y. TIMES (May 25, 2017), <https://www.nytimes.com/2017/05/25/world/europe/trump-brussels-nato.html>.

¹⁴² See, e.g., Tom Nichols, *Chill, America – Not Every Trump Outrage is Outrageous*, DENVER POST (May 25, 2017, 4:46 PM), <http://www.denverpost.com/2017/02/02/chill-america-not-every-trump-outrage-is-outrageous>. *But see* Goodstein, *supra* note 27 (noting the upsurge of activism aimed at countering Trump’s anti-democratic program).

¹⁴³ Ages, too, it seems. See Sarah Leonard, *Why Young Voters Love Old Socialists*, N.Y. TIMES, June 18, 2017, at SR3 (noting that many young people today are seeking common cause with Bernie Sanders and members of his generation, and skipping the in-between generation of Bill Clinton, Tony Blair, and other centrists).

CONCLUSION: IN WHICH THE PROFESSOR THROWS AWAY HIS WALKER,
AND HE AND RODRIGO JOIN THE RESISTANCE

I took a last deep draught of my Vietnamese tea and looked up at Rodrigo. He pushed his tray aside, stood up, and looked out the window. "They're starting to move," he said, pointing to the demonstration outside.

I joined him at the window. "And look at that!" I exclaimed, indicating a cluster of placards. "It looks like many of them are protesting immigration policy and Trump's wall."¹⁴⁴

"What do you say, Professor," he said, looking up at me expectantly. "Want to join them? Are you up for that?"

He walked over to my closet, retrieved my walker, and held it out for me to grasp.

"Thanks," I said, taking it from his hand. Then, tossing it aside, I opened my office door and stepped outside.

"Come on," I said. "I feel fine. Let's go. They need all the numbers they can get."

My ankle felt much better already.

¹⁴⁴ See Peter Baker & Jennifer Stenhauer, *Wall "Will Get Built," Trump Insists, as He Drops Funding Demand*, N.Y. TIMES (Apr. 25, 2017), <https://www.nytimes.com/2017/04/25/us/politics/mexico-wall-spending-trump.html>; see also Goodstein, *supra* note 27 (quoting Rev. Dr. William J. Barber II, a pastor from North Carolina, that "Rosa Parks didn't just decide to sit down one day We can't choose the moment that the flame bursts out, but we can be the kindling When we see signs of a rising fascism . . . we know that we cannot be silent").