Rodrigo’s Roundelay:  
*Hernandez v. Texas* and the  
Interest-Convergence Dilemma

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**INTRODUCTION: IN WHICH RODRIGO AND THE PROFESSOR MEET BEFORE THE PROFESSOR’S PARTY AND DISCUSS CELEBRATORY JURISPRUDENCE**

I was staring glumly at the single birthday card propped up at the edge of my office desk and pondering my own mortality when I heard a brisk knock at the door.

“Professor, it’s me, Rodrigo. Have you got a minute?”

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The door opened to reveal the lanky figure of my smiling young friend. “I come bearing gifts,” he said, picking up a large flat package, wrapped in red ribbon, which he deposited on the floor outside my door. “This is from Giannina and me.”

I jumped up and shook his hand warmly, “What a pleasant surprise! I didn’t know you were in town. Come in.” Motioning toward my office couch, I said, “Have a seat. What brings you to these parts?”

“Giannina and I were at a conference in Houston. But our ticket allowed us to stop here for a couple of days on the way back. The two women swore me to secrecy. That’s why you didn’t hear about it.”

“I’m delighted to see you. But if this has something to do with my birthday, I hope you know I hate celebrations.”

“Don’t worry. Just a few friends, nothing fancy. Giannina is over at your place right now, getting things ready with Teresa. They sent me to pick you up and make sure you didn’t arrive before they finished. Open your present.”

I warily untied the ribbon, dug through the tissue paper, and picked up the contents. “Hey, what a great shirt!”

“It’s just like that Mexican one of mine that you admired last time. We had some extras from our trip and decided that this was just the one for you. Does it fit?”

I unfolded the brightly colored shirt with geometric designs and held it out in front of me. “Looks like it’s just my size. Maybe I’ll wear it to the party.”

“We’ve got lots of time. They told me to entertain you for an hour or so. What’s that you’re working on?” Rodrigo pointed to the twelve-inch stack of papers on my desk in front of me.

indifference (Richard Delgado, Rodrigo’s Remonstrance: Love and Despair in an Age of Indifference—Should Humans Have Standing?, 88 Geo. L.J. 263 (2000)); Latino civil rights (Richard Delgado, Rodrigo and Revisionism: Relearning the Lessons of History, 99 Nw. U. L. Rev. 805 (2005); and many other topics over the next few years. During this period, the brash, talented Rodrigo earns his LL.M. degree and embarks on his first teaching position. The professor meets Rodrigo’s friend and soul mate, Giannina, and her mother, Teresa; he also learns that Rodrigo’s father’s family immigrated to America via the Caribbean. His father, Lorenzo, looks black and identifies as such, but speaks perfect Spanish.

2 See Delgado, Rodrigo’s Third Chronicle, supra note 1, at 402 (introducing Giannina, Rodrigo’s life companion and soul mate. A published poet and playwright, Giannina recently enrolled in a law school in Rodrigo’s city).

3 Like Rodrigo, the Professor is a fictional character based loosely on a composite of many persons this author has known. He is a man of color in the late stages of his legal teaching career and the veteran of many civil rights struggles.

4 See Delgado, Rodrigo’s Remonstrance, supra note 1, at 266 (introducing Teresa, Giannina’s widowed mother, with whom the professor, a dignified, elderly gent, was immediately smitten).

5 See Delgado, Relearning, supra note 1, at 807 (recounting story of Rodrigo’s new shirt).
“The dreariest task imaginable—making an index for the next edition of my casebook. My publisher gave me the option of sending it out to a professional, but I decided to do it myself. Now I wish I hadn’t.”

Rodrigo looked sympathetic. “Anything I can do to help?”

“Not really. It’s a one-person job. But tell me about your conference. Was it the one about that Latino6 case? I know you’ve been exploring your Latino roots lately. I got a flyer in the mail last month and thought I saw you on the list of speakers.”

“That’s the very one. Timed to coincide with the fiftieth anniversary of Hernandez v. Texas,7 it drew some prominent law professors, historians, social scientists, and a large and receptive audience.”

In response to my blank expression, Rodrigo went on: “Hernandez was the first Supreme Court decision to hold that Latinos—specifically Mexican Americans—may sue for violations of their civil rights. It came down only two weeks before Brown.9 In fact, it is sometimes called the Latino Brown v. Board of Education because it bears so many similarities to that more famous case.”

“Right. I knew I recognized it. And see why you went. You’ve been interested in Latino civil rights lately.”

“I have,” Rodrigo acknowledged. “My dad’s family immigrated to the United States through the Caribbean, and most of them still speak perfect Spanish. I grew up around that culture. Plus, my mom is Italian, so I have latinity and romance languages all around me. As you know, I look more black than Latino. Though when we first met some years ago10 we talked mainly about African American issues, I also feel strongly connected to my Latino roots.”

“And you’ve been traveling in Latin America a lot and wearing Mexican and Guatemalan clothes. Not to mention learning to play the guitar, as I discovered last time.”11

“Right. I do love the many facets of Latino culture. But I’ve also become interested in Latino civil rights.”

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6 The term “Latino” is a broad one, encompassing a diverse collection of ethnic, cultural, and linguistic differences. Its unitary sense in this Article is not meant to diminish or ignore the significant differences that exist within the community. Rather, this Article uses the term partly for convenience and partly because the dominant legal and political culture of the United States has subscribed to an uncomplicated and undifferentiated view of Latinos as a single group. In using the umbrella term, this Article addresses the jurisprudence in its own terms, but without endorsing the blanket generalization.


10 Delgado, Relearning, supra note 1, at 806.

11 Id. (discussing Rodrigo’s new-found talent at playing the guitar).
“As might we all,” I said. “Latinos are now the largest ethnic minority in the United States—” 12

“And in some ways the worst off,” Rodrigo interjected, “with a high poverty rate and incidence of workplace injuries and accidents, in addition to having the highest school drop-out rate of any group.” 13 A United Nations study showed that if it considered all Latinos in the United States as a separate country, that country would rank thirty-fifth in the world on a combined index of social well-being; blacks would rank thirty-first.” 14

“Plus, I think you told me recently that Latinos are even more segregated in schools than blacks are.” 15

“Your memory is good, Professor.”

“I don’t know about that,” I said. “But the group can use all the help it can get. Now tell me more about that conference. Did you give a paper?”

“I did. An early draft. It created quite a stir.”

Noticing a telltale glint in Rodrigo’s eye, I took the bait, “Do I detect a new thesis coming on?”

“You do,” Rodrigo said, leaning forward on the couch and looking up animatedly. “If you have a minute, I could run it past you. Can I buy you a cup of coffee somewhere?”

“Sure, after working on that index all afternoon, I could use a break. We could go to that new coffee shop down the block. I’m parked right across the street from there. After we’re finished, I can give you a ride home.”

When he nodded in agreement, I closed down my computer, put a bookmark in the oppressive manuscript, and turned my answering machine to “on.”

Minutes later, we were at the counter of the Italian-style coffee shop, ordering our beverages. “I’d like a double espresso, Italian roast, if you have it,” said Rodrigo.

“A decaf latte for me,” I said. Then, to Rodrigo: “Doctor’s orders.”

The waiter took our order and said he’d bring our coffees to us when they were ready. He looked a little like one of my students. I wondered idly if he might be Latino.

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13 See infra notes 36–53 and accompanying text.

14 Cass R. Sunstein, Well-Being and the State, 107 Harv. L. Rev. 1303, 1321 (1994); see also United Nations, Human Development Report 2001, at 15, 141–42 (demonstrating that this disparity has grown even wider).

After we settled ourselves at a small clean table by the window, I asked, “Now, what’s this new thesis of yours?”

I. IN WHICH RODRIGO EXPLAINS HIS DISCONTENT WITH CELEBRATORY JURISPRUDENCE AND OUTLINES HIS INTEREST-CONVERGENCE HYPOTHESIS

“It started,” he began, “when one of the speakers praised Earl Warren for his role in writing the opinion in Hernandez.” He said that Warren was the only justice who understood Latinos because of his previous service as attorney general and Governor of California. During the comment session afterward, I asked the speaker if he had not succumbed to a style of history that emphasizes great men, wars, and generals at the expense of common people, unions, and activism. I pointed out that Warren had a poor record with respect to Asian civil rights and that many other forces besides one justice’s forceful personality may have contributed to Hernandez.”

“How did the audience take your question?”

“They were taken aback. Warren is a civil rights icon. Later, when they heard my own thesis, they were even less happy.”

We paused as the waiter arrived with our drinks. “Sugar, cream, and powdered chocolate are over there, if you want them,” he pointed out. “Refills are free this week.”

Sipping my latte, I said, “Mmmm. This may be decaf, but it’s as good as the real thing. How’s your espresso?”

“Almost as good as we had on our last trip to Mexico. Now, where were we?”

“You were explaining your quarrel with celebratory jurisprudence. What got you to thinking about that?”

A. In Which Rodrigo Explains His Quarrel with Celebratory Jurisprudence

“Oh, I was mulling over why I felt so differently about two types of celebration. I was actually thinking about your party. Why, I wondered,
was it okay to celebrate a friend’s birthday, but not to lavish attention on a single Supreme Court decision?"

“Randall Kennedy once wrote an article on that subject,” I noted. “Entitled Race Relations Law and the Tradition of Celebration, it takes issue with a kind of triumphalist view of civil rights history.”

“I know,” Rodrigo said. “It’s a fine article. And in some ways it captured my feeling about the hosannas that marked the conference, with speakers lavishing praise on Earl Warren and the Hernandez opinion, as though they solved all of our problems at once.”

“So, how did you explain your discontent to your audience?”

“During the question period, I explained it one way. Then, when I gave my own talk a little later, I elaborated a bit more.”

“What did you say the first time around?”

“Oh, I just pointed out that ordinary Latino people don’t celebrate Hernandez. While everyone loves a party, few regard Hernandez in the mythic terms in which some Latino academics do. Indeed, it seems likely that most of them have never even heard of it. Others are active skeptics.”

“Like Derrick Bell and Girardeau Spann among African Americans?” I asked.

“Exactly,” Rodrigo said enthusiastically. “And this skepticism is no recent development. Early Chicano folk literature, for example, includes corridos, cuentos, and carpas that tell of brutal Texas Rangers who gunned down innocent Mexican Americans, and of crooked lawyers, judges, and county land surveyors who stole ancestral lands guaranteed under the Treaty of Guadalupe-Hidalgo. The legal system appears in the oral literature as a trap for the unwary and a source of unfairness, arrests, hassling, land theft, deportation, and other disasters—best avoided if at all possible.”

“And how did your audience react?”

“Skeptically,” Rodrigo replied. “They suggested that things might be different nowadays.”

“And are they?”

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18 86 Colum. L. Rev. 1622 (1986).
19 See, e.g., The Derrick Bell Reader (Richard Delgado & Jean Stefancic eds., forthcoming 2005) (collecting examples of Bell’s skeptical, material-determinist view of black legal history); Girardeau A. Spann, Race Against the Court (1993) (articulating a similar view).
20 “Sagas, stories, and tent theater”: traditional story-telling techniques of Chicano oral history.
“Not really. El Teatro Campesino, for example, seems never to have put on a skit in which a lawyer, court, or judge emerges as a hero, or the Supreme Court as staunch defender of little people.\(^\text{22}\) As far as I can tell, The Royal Chicano Air Force\(^\text{23}\) has never depicted *Hernandez v. Texas* or any other legal decision in glowing terms. The legendary, drug-taking, fast-talking gonzo lawyer Oscar Zeta Acosta . . ."

“The fellow who represented the L.A. Thirteen and Biltmore Hotel defendants in the days after the Sleepy Lagoon murders?” I asked.

“Yes, him.\(^\text{24}\) He comes in for an occasional admiring mention. Aside from that, veneration for law and lawyers is in short supply.”

“Was your audience convinced?”

“Not at all. I asked them to try a thought experiment: Imagine yourself walking into a gathering of ordinary Latino people, at a job site, for example, and announcing, ‘My name is ___________. I represent the law.’ Ask yourself whether your audience would smile and draw closer, or regard you with suspicion and edge closer to the exits.”

“Just for the sake of argument,” I said, eyeing my cup, which I had nearly drained, “what if the common people are wrong and the academics right? What if *Hernandez v. Texas* deserves greater attention than it has received from mainstream scholars and teachers of constitutional law? What if it really is, in its way, as momentous and farsighted as *Brown v. Board of Education* in framing a theory to protect the Latino community from the ravages of discrimination?”

“Answering that requires that I set out my thesis in further detail,” Rodrigo said. “Do you have the time?”

“I do,” I replied. “Although I might like a refill. What about you?”

As though reading our minds, the waiter appeared at our tableside to inquire, “Would you gentlemen like refills?” When we nodded, he repeated our order, which we confirmed, and left for the counter, our near-empty cups in hand.

“Good timing,” said Rodrigo admiringly. “Anyway, my thesis is that the ordinary people—the Latino restaurant workers, gardeners, janitors, and garment workers who do not sing the praises of *Hernandez* or any other legal decision—are right and the scholars wrong. Their skepticism, founded

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in long experience, is closer to the truth than the praises of the academy. They just don’t put forward a five-part argument, with footnotes and examples. What I’d like to do is just that.”

“This I’d love to hear,” I said, making room on the table for the fresh cups of coffee that the waiter had brought.

B. Offstage Forces: The Supreme Court as Manchurian Candidate

“I wonder, Professor, if you’ve seen the movie The Manchurian Candidate.”

When I shook my head, Rodrigo explained, “In a 1962 movie, remade in 2004, the stepson of a presidential candidate turns out to have been a prisoner of war who underwent interrogation at the hands of Chinese communists. When the young war hero begins acting in a peculiar robot-like fashion, some of his countrymen suspect that he is a potential assassin acting under some outside influence. When he makes a number of decisions that confirm their suspicions, a former member of his platoon, played by Frank Sinatra, takes matters into his own hands. Dimly remembering his own interrogation, Sinatra breaks through the cloud of hypnotic suggestion and, aided by his love interest Janet Leigh, saves the situation.”

“It does sound dimly familiar,” I said, smiling. “And I gather you think this has something to do with that decision your colleagues were celebrating?”

“I do,” Rodrigo said with conviction. “Some of my reasons parallel Derrick Bell’s when he cautioned his readers not to cheer Brown v. Board of Education and the rest of the 1960s-era civil rights breakthroughs too loudly, but rather to watch and see whether they delivered on their promises. He warned that civil rights gains almost always come as a result of a momentary convergence of interests between white elites and blacks.”

When Rodrigo paused for a sip of his high-octane brew, I continued, “And when that convergence ends, the breakthroughs slip away.”

“Right. The victim of administrative foot-dragging, narrow judicial construction, or delay. This happens every time. Blacks are soon back to where they were before the landmark decision, if not worse off.”

“And you think that will happen with Hernandez v. Texas?”

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25 The Manchurian Candidate (United Artists 1962).
26 Id. Film critic Roger Ebert posits that the Sinatra character himself may have been part of the communist plot and Janet Leigh the triggerwoman. Roger Ebert, The Manchurian Candidate, Chi. Sun-Times: Weekend Plus, Nov. 29, 2002, at 33.
28 Bell, Interest-Convergence, supra note 27.
“It might have happened already. Bell’s evidence consisted of a careful review of black history and some astute observations on white psychology.”

“His thesis received a great boost in a recent book by legal historian Mary Dudziak,” I added. “Entitled Cold War Civil Rights, it documents Bell’s thesis in great detail.”

Secret memo after memo show that elite decision makers, including some on the Supreme Court, engineered a breakthrough for blacks in order to boost America’s fortunes in the international arena.”


Secret memo after memo show that elite decision makers, including some on the Supreme Court, engineered a breakthrough for blacks in order to boost America’s fortunes in the international arena.”

“Exactly,” Rodrigo replied. “We were then in the earlier stages of a prolonged Cold War against the forces of godless, monolithic international Communism . . .”

“Competing for the loyalties of the Third World,” I added.

“Yes. Which was largely black, brown, or Asian,” Rodrigo continued. “Yet the world press had the nasty habit of splashing across its front pages stories of domestic atrocities like the murder of Emmett Till.”

“As well as lynchings and Southern sheriffs with cattle prods shocking peaceful civil rights protesters,” I added.

“Right,” Rodrigo continued. “I think you and I discussed this earlier. Even though our society has been conditioned to believe that Brown was a great victory for morality and equal rights, we agreed, as do many, that it was international appearances and not a moral breakthrough that prompted the Supreme Court to decide as it did in Brown.”

I paused for a moment and then looked up. “And you think that something similar explains Hernandez v. Texas? Is that why you asked if I was familiar with The Manchurian Candidate?”

“I do,” Rodrigo replied decisively. “If you examine Latino legal history, you see the same interest convergence that explains Brown v. Board of Education . . .”

“And that outraged many of Bell’s readers,” I interjected.

“Agreed,” Rodrigo said. “They found his thesis cynical and disillusioning, preferring to think of Brown as a great moral breakthrough, not a case of white people doing themselves a favor.”


30 Id.


32 Id.


34 Delgado, Relearning, supra note 1; see also Delgado, Explaining the Rise and Fall, supra note 31.

“But do go on,” I said. “This is fascinating. Has anyone else applied Bell’s material-determinist theory outside the area of black civil rights?”

“Not to my knowledge,” Rodrigo replied. “I ran a short version of my thesis past the audience at the conference. They seemed stunned. But now I’ve done some more research, and I’m even more sure of its truth. The judiciary responded to a similar set of forces in both cases, even if only dimly aware of it at the time.”

“This I’d love to hear,” I said. “Could you use another refill first?”

II. In Which Rodrigo Sets the Stage for His Astonishing Thesis

The waiter again seemed to walk out of nowhere. “Can I fill those cups for you, gentlemen?”

“Sure,” Rodrigo said, already happily caffeinated.

“Make sure mine’s decaf,” I said. Then, to Rodrigo, “Can’t have caffeine after noon or I’m up all night. But tell me, how did you structure your talk? Did you begin with a review of the Latino community? I imagine your audience did not know much about it. Even I know little more than the basics.”

A. Rodrigo Discusses Latinos in the United States

“I did,” said Rodrigo. “Going back to the early years, when U.S. society first encountered Latinos as the early settlers pushed westward to Texas, then California and the rest of the Southwest. The hardy farmers and ranchers they found there were unlike the Indians the dominant Anglos had fought and conquered. These Mexicans were peaceful. They had advanced agriculture, property and irrigation systems and close, intact families. Even though some of them were familiarly European, they all needed to be displaced to make way for American expansion.”


“I’m sure it will sound familiar. The Mexicans’ brown skin and indigenous appearance invited racism . . .”

“Indeed,” I interjected, “the term ‘Anglo-Saxon’ seems to have come into common use during this period precisely to justify the take-over of Mexican-owned land. I do know about that from reading Reginald Horsman.”

“I was just reading his book. It’s a compelling study,” Rodrigo said. “It explains how the United States rationalized a brutally aggressive war with Mexico. U.S. forces marched all the way to Mexico City and dic-

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36 See Delgado, Locating Latinos, supra note 15, at 492–93. Some of the Latinos were mestizo, with Indian forebears and features.

tated terms in which that country surrendered nearly one-half of its territory.”38

“And after the war, anti-Mexican attitudes justified shady lawyers and corrupt local officials in depriving the Mexicans of ancestral lands in the Southwest guaranteed to them under the Treaty of Guadalupe-Hidalgo.39 Another author I know, Rodolfo Acuña, writes about that,”40 I added.

“True. Just around that time,” Rodrigo continued, “pseudoscience, which until then had focused almost exclusively on African American defects, shifted to consider Latino genetic inferiority.41 Prominent eugenicists, such as Madison Grant . . .”

“I remember him,” I chimed in.

“Right. After focusing his scholarship on what was wrong with your ancestors, he turned to Latinos, writing that their mixed blood rendered them inferior even to the Southern Europeans and Slavs, who were then immigrating to the United States in large numbers, and put them hardly above blacks.”42

“Imagine that,” I said dryly.

“U.S. decision makers seem to have gotten the message. During the middle years of the twentieth century, the United States launched two large programs to deport excess Mexicans and Mexican Americans, many of them perfectly legal U.S. citizens of long standing.43 Carried out during times of economic downturn when jobs were scarce, these programs operated in tandem with labor contracting programs . . .”

“Sometimes called Bracero programs, no?” I interjected.

“Exactly. Those programs came into being when the U.S. economy was strong and the agricultural sector needed more, not fewer, Mexican workers.44 Things settled down for a time. Then, over the past few decades, immigration reform and the lure of jobs brought millions of new immigrants from Latin America.45 By the end of the 1980s, the growing Latino population once again began to cause alarm.46 English-Only47 and anti-immigration movements sprang up,48 while bilingual education and aid to immigrants and exiles came under fire.”49

38 Delgado, Locating Latinos, supra note 15, at 493.
39 See Perea et al., supra note 22, at 260–99.
42 Id.
43 Id. at 494.
44 See Perea et al., supra note 22, at 312–16, 320.
46 See Perea et al., supra note 22, at 835–36, 841 (describing the new nativism).
47 Id. at 541–48, 848–57.
49 Id.
“But the immigrants kept coming, if I’m not mistaken, and not just from Mexico,” I said.

“They did. Since the Bureau of the Census resumed counting Latinos—persons of Spanish/Hispanic origin—in 1980, the group has nearly tripled in size from 14 to 38.8 million, making Latinos the largest minority group in the country, slightly ahead of blacks. Nearly two-thirds of Latinos are Mexican Americans, who are also the fastest-growing subgroup. Then come Central and South Americans, totaling about 13%, then Puerto Ricans and Cubans with 11% and 5%, respectively.”

“Where do these groups live?” I asked.

“Mexican Americans are concentrated in the Southwest, but are beginning to form substantial settlements in the Midwest, South, and East. Large groups of Puerto Ricans live in New York and other large eastern cities, while most Cubans live in Florida.”

“Latinos as a group are severely disadvantaged, I think you said.”

“That’s right. Larger than the population of Canada, the group suffers from poverty and an extraordinary school dropout rate.” Rodrigo paused and took a sip of espresso.

“Thanks for the overview. I knew some of that, but it was good to hear it all at once. It puts your talk in context. Where did you go from there?”

“Since some members of my audience were legally trained, I discussed the subsequent history of Hernandez. Then, I showed how the case was a product of interest convergence, not some sort of moral breakthrough by the Supreme Court. Then, at the end I returned to my theme of celebratory jurisprudence. Each of these subsections made my audience progressively angrier.”

“This I’d love to hear,” I said, smiling. “I’ve stirred a few people up in my day.”

Rodrigo grinned. “Like father, like son. You’ll have to be the judge of whether they were justified in getting mad at me or not. Do you have time for all three topics?”

“Fire away,” I said. “I’m delighted to have an excuse not to work on my index. And I’m sure the women are having a good time catching up with each other. What time are the guests supposed to arrive?”

Rodrigo looked at his watch. “We’ve got about an hour and a half. Although Giannina wanted me to pick up a few things on our way there.”

“There’s a convenience store and a food chain right on our way,” I said.

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51 Id. at 503.
52 Id.
53 Id.
54 Id.
55 Id. at 503–04.
“Then we’ve got plenty of time. How familiar are you with *Hernandez v. Texas*?”

“Not very. You’d better start with the basics.”

**B. The Hernandez v. Texas Decision**

“The case got started,” Rodrigo began, “when Pete Hernandez murdered another Latino after an altercation in Jackson County, Texas, in 1952. When his lawyer challenged the jury pool for containing no Mexican Americans in a region with a heavy Latino concentration, the trial court rejected the challenge on the ground that Mexican Americans were not a separate racial group apart from whites. Because Hernandez was not seen as black, the court considered him white. As the jury was composed of white citizens, the court ruled that he would receive a trial by a jury of his peers.”

“A familiar trick,” I said. “I think I heard that school authorities in the Southwest used to do something similar.”

“Right,” Rodrigo replied. “They would mix fifty percent Latino and fifty percent black kids in one school and declare it integrated. Then they’d point out that Latinos themselves insisted they were white.”

“But I gather the Court in *Hernandez* saw through this shabby strategy?”

“It did. After reviewing evidence of pervasive discrimination against Mexicans in southern Texas, including whites-only bathrooms and signs declaring Mexicans unwelcome in local restaurants, it found that regional prejudice marked Mexicans and Mexican Americans as a separate, stigmatized group. The Court also found that Jackson County’s history of never having had a Mexican on its jury panel bespoke racism. It ordered that Hernandez receive a new trial in front of a jury from which Mexicans had not been systematically excluded.”

“I can see why Chicano legal scholars, at least, regard the case as a breakthrough.”

“It is, in a way,” Rodrigo conceded. “But the opinion, which appears in the United States Reporter immediately before the better known *Brown v. Board of Education*, is brief, running slightly over six pages, and devoid of the soaring rhetoric and citations to social science that marked the landmark decision. Its analysis and reasoning are also more crabbed.”

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57 *Id.* at 477–78.
59 Delgado, *Locating Latinos*, supra note 15, at 519; see, e.g., Wilson, supra note 58.
61 *Id.* at 480–82.
62 *Id.*
“How so?”

“Brown’s broad language declaring segregation a constitutional evil practically invited future litigants to expand it to a host of other settings, such as school faculty and staff, 63 public transportation, 64 and lunch counters. 65 In contrast, Hernandez is riddled with a number of surprising and seemingly gratuitous qualifications. For one thing, it limits its own scope to regions where Latinos can prove a history of local discrimination, thus requiring that they establish their own racialization every time they sue. 66 It also relies heavily on the jury-trial guarantee.”

“I see. That makes it problematic to extend beyond that setting,” I observed. “Did the opinion contain any other limitations?”

“It did,” Rodrigo replied. “It turned on the Fourteenth Amendment’s Equal Protection Clause, 67 a familiar vehicle imported from the black civil rights struggle. In analogizing Latinos to blacks with brown skin, the Court blithely adopted an approach that proved ill-fitted to redress many of the harms this group suffers.” 68

“Hmm, I’ll definitely want to hear about that,” I said. “But first, why don’t you tell me about Hernandez’s subsequent history. I gather the case had much less effect than some of your fellow conferees were willing to admit?”

C. Later Courts’ Treatment of Hernandez

“Much less,” Rodrigo said. “Despite the smattering of celebrations marking its anniversary, Hernandez exerted relatively little influence on subsequent Supreme Court jurisprudence. The Court itself has cited it a mere thirty-eight times, only a handful of which are for the proposition that Mexican Americans or Latinos are a group that experiences redressable discrimination.” 69

“I think I might be able to guess some of those cases,” I said. “White v. Regester, the voting rights case?” 70

“Right,” said Rodrigo. “And, of course, Keyes v. Denver School District No. One, the Denver school segregation case.” 71

“Of course,” I said. “Along with blacks, Chicanos were one of two groups that brought suit.”

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66 Hernandez, 347 U.S. at 478 (“Whether such a group exists within a community is a question of fact.”).
67 Id. at 479 (discussing “discrimination prohibited by the Fourteenth Amendment”).
68 See Delgado, Relearning, supra note 1.
Then there’s Castaneda v. Partida,” Rodrigo continued, “another jury
discrimination case.72 The only other similar mention of Hernandez in
Supreme Court jurisprudence came in Tijerina v. Henry, in which the
Court dismissed an appeal from the District Court of New Mexico.”73

“I think I’ve heard of that case,” I said. “Plaintiffs sought to file a
class action on behalf of Latinos in that state, charging several types of
discrimination.74 They described their class as ‘Indo-Hispano, also called
Mexican, Mexican American and Spanish American . . . mixed Indian
and Spanish ancestry and . . . [speakers of] Spanish as a primary or ma-
ternal language.’75 I was reading the opinion just the other day. The lan-
guage is so striking that it stayed with me.”

“That’s the very case,” Rodrigo went on. “The lower court declined
to certify the complaint, holding that the definition of the class was too
vague.76 Dissenting from the dismissal of the appeal, Justice William Doug-
las cited Hernandez and stated that in light of the record of discrimina-
tion against Latinos in the Southwest, he would have allowed the suit to
go forward.”77

When Rodrigo looked up expectantly, I took the bait and asked, “And
those four cases are it?”

“They are. And though they did aid Mexican Americans and Latinos
in challenging discrimination, cases like them have been relatively few.
Hernandez has more commonly been cited for other propositions, and in
cases in which blacks and other groups sought relief. These include chal-
lenges to the death penalty78 and laws forbidding interracial cohabita-
tion.79 They also include affirmative action cases, like Regents of Univer-
sity of California v. Bakke80 and City of Richmond v. J. A. Croson Com-
pany,81 cases concerning mainly African Americans, and other cases stem-
mencing from black civil rights activism, like Garner v. Louisiana,82 an early
lunch counter case.

“Overall, only a handful of Supreme Court citations to Hernandez
stand for the proposition that Latino plaintiffs deserve relief from dis-

74 Id. at 922 (Douglas, J., dissenting from dismissal of appeal).
75 Id.
76 Id. at 924–26.
77 See McClesky v. Kemp, 481 U.S. 279, 316 n.39 (1987) (citing Hernandez in unsuc-
sessful challenge to disproportionate imposition of the death penalty on black defendants).
78 See McLaughlin v. Florida, 379 U.S. 184, 191 (1964) (citing Hernandez in success-
ful challenge of a law forbidding “[a]ny negro man and white woman, or any white man
and negro woman, who are not married to each other” from living together).
79 438 U.S. 265, 295 (1978) (citing Hernandez in case determining limits of affirmative
action in higher education admissions).
80 488 U.S. 469, 523 (1989) (Scalia, J., concurring) (mentioning Hernandez in decision
invalidating a minority set-aside).
crimination. A number of lower court cases distinguish or refuse to follow it, some on the ground that local attitudes are rarely uniform, or that the category is difficult to define or discern.

“Ah, the limitation you mentioned clicking in,” I observed.

“And with a vengeance,” Rodrigo agreed. “Others cite it for the proposition that discrimination against a group must be situation-specific and proved each time.” By comparison, the Supreme Court has cited its own decision in *Brown* 176 times.

“And for a wide variety of propositions, you said earlier.”

“Right. Not just in student desegregation cases, but in ones dealing with school faculty and staff, courtroom seating, voting districts, poll taxes, public transportation, city-owned restaurants, and tax exemptions for charities that discriminate. It has also cited *Brown* to condemn public enforcement of private discrimination and to support its disapproval of discrimination against groups other than blacks, such as Chinese Americans, illegitimate children, whites, and undocumented Mexican schoolchildren. *Brown* has been the subject of over forty law review symposia this anniversary year alone.”

“And *Hernandez*?” I asked.

“To my knowledge, only one.”

“What about outside the legal realm?” I asked.

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84 See, e.g., Rodriguez, 588 F.2d at 1007.


99 See Symposium, supra note 8. *Hernandez* has commanded relatively little attention from the legal academy at large. See LexisNexis U.S. Law Reviews and Journals, Combined Database (showing that *Hernandez* has been cited 392 times; *Brown*, well over 3000) (last consulted Oct. 6, 2005).
Recent scholarship has demonstrated that *Brown v. Board of Education*, whatever its doctrinal significance, had relatively little effect beyond the legal spectrum. *Hernandez* appears to have had even less. The Latino community today is as impoverished and marginalized as it was fifty years ago.

Why do you think *Hernandez* had so little influence? I asked.

Well, for one thing, the case did not come on the heels of a long, carefully orchestrated campaign, like that which led up to *Brown*. *Hernandez*’s focus was narrowly procedural, rather than substantive. Few members of the public were likely to sympathize with a man convicted of murder; Pete Hernandez was not nearly as appealing a plaintiff as little black schoolchildren walking to school in starched dresses.

Latinos’ struggle for equality started later than that of blacks, I chimed in. “It also commanded less public attention, perhaps because *Brown* overturned the sixty-year-old separate but equal doctrine, while *Hernandez* merely extended the jury trial guarantee to a new group. It lacked tension and drama.”

That it did, Rodrigo seconded. “That Texas might resist the Court’s mandate and force the President to send in the National Guard to assure Latinos an opportunity to serve on juries was just not in the cards.”

And then there was that peculiar proof requirement that you mentioned. What part did that play? I asked.

“A large one. Following in *Hernandez*’s footsteps is costly. The opinion made Mexican Americans’ cognizability a matter of fact requiring proof each time.” A lawyer considering filing suit on behalf of a Latino might have to prove its case in light of his decision.

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102 See Perea et al., supra note 22, at 156–61. On how the *Hernandez* decision came about, see A Cotton Picker Finds Justice! The Saga of the *Hernandez* Case (Ruben Munguia ed., 1954), available at http://www.law.uh.edu/Hernandez50/saga.pdf. The decision seems to have been the work of three attorneys, backed by a number of community organizations that were pressing for educational desegregation as their top priority. The decision drew relatively little attention, even in the Latino community. If it was an establishment ploy to buy domestic peace, it failed. See generally Ian F. Haney Lopez, *Racism on Trial: The Chicano Fight for Justice* (2003) (describing outbreak of Brown Power and Latino activism only a short time later).

103 For example, it was concerned with the mode of trying a case and the kind of jury available as a matter of right. See *Hernandez*, 347 U.S. at 477–482.

104 See supra note 66 and accompanying text.

105 See supra note 66 and accompanying text.

106 See *Hernandez v. Texas*, 347 U.S. 475, 478 (1954); see supra note 66 and accompanying text.
easily find a skeptical court requiring him to produce costly evidence of local discrimination, especially during a time, such as now, when the ‘community norms’ have turned to colorblind racism and everyone pretends that race and racism do not exist. A pragmatically oriented lawyer might find other avenues and theories more promising.”

When Rodrigo was silent for a moment, I said, “That’s a serious set of hurdles. No wonder the opinion did not change the world overnight.” When Rodrigo was still silent, I added, “But I gather you think there’s more?”

III. IN WHICH RODRIGO EXPLAINS HERNANDEZ IN THE FRAMEWORK OF INTEREST-CONVERGENCE

“I do,” Rodrigo said with conviction. “The decision came about because the United States needed to burnish international appearances during a time of Cold War tensions. It also needed to quell rumblings in the Latino community about decorated veterans unable to eat a meal in their local restaurants. But the opinion was especially the result of concern over communist threats in Latin America.”

I leaned forward in my chair. “What a fascinating thesis! This I want to hear. It parallels, and expands upon, some important writing about the black civil rights movement. Do go on.”

“Do you recall, Professor, the world political situation that prevailed during the period when Hernandez was making its way up to the Supreme Court?” When I nodded, Rodrigo continued. “As you know, the United States had just concluded a prolonged struggle against the original axis of evil and was in the early stages of the Cold War, in which it was competing with the Soviet Union for the loyalties of the Third World.”

“Much of which was nonwhite,” I added.

“Right. But as you know, the world press publicized our racial troubles, and the Soviets seized on them to win propaganda victories. Re-

109 See Perea et al., supra note 22, at 315 (describing this and similar accounts).
110 See infra notes 114–200 and accompanying text. For incisive analyses of this period, see Walter LaFeber, Inevitable Revolutions: The United States in Central America (2d ed. 1993); Lars Schoultz, Beneath the United States: A History of U.S. Policy Toward Latin America (1998). For a popular overview of Latino history, including this formative period, see Himilce Novas, Everything You Need to Know About Latino History (3d ed. 2003).
111 See, e.g., Bell, Interest-Convergence, supra note 27; Delgado, Explaining the Rise and Fall, supra note 31; see also Dudziak, supra note 29.
112 Delgado, Explaining the Rise and Fall, supra note 31, at 372.
113 Id.
cent scholarship demonstrates that the need to fortify international appearances exerted a great deal of backstage pressure for the Supreme Court to decide *Brown v. Board of Education* the way it did.\(^\text{114}\)

“You’re thinking of the work of Mary Dudziak and, before her, Derrick Bell, I assume?”

“Right. And what I posit is that similar pressures may have underlain *Hernandez v. Texas*. My evidence falls into two groups.”

Just then, a student of mine materialized next to our table. “Hi, Professor.” Then, to my companion: “Excuse me, but are you Rodrigo Crenshaw?”

When Rodrigo nodded yes, the student continued: “We’ve been reading your stuff in our study group. Like it a lot.” He paused for a moment. “Well, sorry to disturb you. Nice to see you, Professor. I’ve been enjoying class.”

With a wave and a smile, the student disappeared. “Nice kid,” Rodrigo said. “Good taste in reading, too.”

“I actually assigned a number of your pieces,” I said. “But I didn’t know they were discussing them in their study group. You must have been a hit.”

“We’ll see if they like my current thesis. My fellow speakers at the conference were certainly skeptical.”

“Do go on. Sorry about that interruption. That’s what I like about students. They’re so spontaneous.”

“Don’t worry. I enjoy the notoriety. Everybody needs a little ego boost now and then. Where were we?”

“You were going to tell me about two kinds of evidence of majoritarian interest convergence in the *Hernandez* litigation.”

**A. Cold War Politics and Brown v. Board of Education**

“Right. Most people believe that *Brown* and *Hernandez* came down when they did because American decision makers had an epiphany. They realized, for the first time, that segregating little black schoolchildren could scar them for life. Derrick Bell\(^\text{115}\) and Mary Dudziak\(^\text{116}\) have shown that this was not the only or even the primary reason.”

“Of course not,” I added. “The NAACP had been litigating school desegregation cases for decades, losing each time, or winning, at best, very narrow victories.\(^\text{117}\) Then, in 1954, the skies opened. The Supreme Court held, for the first time in a school desegregation case, that separate is never equal.”\(^\text{118}\)

\(^{114}\) See id.; see also *Dudziak*, supra note 29; Bell, *Interest-Convergence*, supra note 27.

\(^{115}\) Bell, *Interest-Convergence*, supra note 27.

\(^{116}\) *Dudziak*, supra note 29.


\(^{118}\) *Id.* at 372–73.
“Why just then?” Rodrigo asked. “Derrick Bell was the first to offer an explanation. In his famous article, Brown v. Board of Education and the Interest-Convergence Dilemma,119 he posited that Brown came down when it did not because the Supreme Court achieved a moral breakthrough, but because the result was necessary to advance the United States’ Cold War objectives.”

“So the interests of minorities and those of white elites coincided, for a short time,” I added.

“Producing a breakthrough for black civil rights. But advancing black interests was only a secondary consideration. Brown was also necessary to broadcast to the uncommitted Third World that the United States had their interests at heart.”120

“And what Mary Dudziak added was the documentation.”

“Right. She proved what Bell only posited. Producing document after document, memo after memo, international headline after headline, she proved Bell’s hypothesis that U.S. elites, in the State Department and elsewhere, prevailed upon the Justice Department and judiciary to grant blacks a major concession.”121

“To gain an edge on our Soviet rivals,” I added. “But I think you mentioned a second objective.”

“I did. Elite decision makers were also concerned about potential civil disruption.122 Hundreds of thousands of black servicemen and women had just returned from fighting for American democracy and against the forces of evil. They were unlikely to return peaceably to the old regime of shining shoes and ‘no sir,’ ‘yes, sir.’ For the first time in years, the prospect of domestic disruption loomed.123 A major civil rights breakthrough would demonstrate to domestic blacks that things were getting better and that the federal government, at least, had their interests at heart.”

“This part of your thesis ought to have been familiar to your audience,” I said, “at least those who had studied legal history or critical theory. What about your second part?”

**B. Documenting Interest-Convergence in Hernandez v. Texas**

“I think that interest-convergence explains Hernandez at least as convincingly as it does Brown v. Board of Education. It, too, was a civil rights breakthrough that would broadcast to the world that the United States was serious about improving conditions for minorities. But, in addition, interest-convergence exhibited a second, even more powerful, dimension.”

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119 Bell, Interest-Convergence, supra note 27.
120 Id.
121 See supra notes 29–30 and accompanying text.
122 Delgado, Explaining the Rise and Fall, supra note 31, at 372.
123 Id.
“The specter of Latin American communism, I think you said.”
“Yes, and here I think you’ll find some of my evidence exciting. To my knowledge, at least, no one else has collected it or shown its relevance to Hernandez.”
“This I’d love to hear,” I said. “It promises to extend and strengthen Bell’s already powerful analytical tool, but also to generalize it and show how it explains the zigs and zags of another group’s fortunes, not just blacks. But first, can I buy you a little snack? You’ve been going strong for nearly [I looked at my watch] an hour. I don’t want to wear you out. I have a feeling you are planning to perform again at my party.”
“How did you know I was going to sing?” Rodrigo asked in surprise.
“You read my mind. I did bring my guitar and learned a few new songs, all in Spanish, including ‘Cumpleaños Feliz.’” He laughed at my puzzled look, “That’s ‘Happy Birthday’ in Spanish.”
“I’ve known you for a while,” I said. “Reading minds is an old professor’s trick. We learn to get inside our students’ heads. Not that you’re a student—just much younger than I. Anyway, let’s go get one of those good looking muffins I saw behind the counter.”

We got up and walked over to the counter. The same clerk took our orders and answered my question about the ingredients in a certain muffin that had caught my eye. (“It’s half bran, half whole wheat, Professor. Very good for you. I eat one for breakfast every day.” I wondered idly how he knew I was a professor.)

We returned to our table. After eating in tacit silence for a few seconds, Rodrigo began:

1. The Specter of Indigenous Communism

“Consider what was going on around and just before the time of Hernandez. In addition to the events we just mentioned . . .”
“Having to do with the general civil rights situation, you mean?”
“Right. In addition to that, writers such as John Steinbeck exposed the dismal condition in which many Mexican Americans lived. The United States Communist Party began agitating for the rights of Mexican farm and mine workers. Emma Tenayuca led a pecan shellers’ strike and pub-


125 Bean & Rawls, supra note 124, at 338–39; Operation Wetback, supra note 124, at 196–97; Gilbert G. Gonzalez, Chicano Education in the Era of Segregation 118–27 (1990) (describing how U.S. Latinos organized, beginning in the 1930s, for better labor conditions, and were willing to work with Communists and radicals on strikes).
lished ‘The Mexican Question’ in *The Communist* (1939).\(^{126}\) Earlier, Eleanor Roosevelt called attention to the plight of Mexican Americans.\(^{127}\) The Latino community was up in arms over stories of decorated veterans returning from World War II or Korea only to be refused service in their local restaurants,\(^{128}\) and outraged over two large-scale deportation programs that forcibly repatriated more than a million Mexicans and Mexican Americans, some of them residents of long standing.\(^{129}\)

“What you are saying is that Latino unrest, like the black variety,loomed for the first time in a long while.”

“Exactly. But an even more powerful factor was the great concern U.S. elites were beginning to feel about the threat of communist infiltration of Latin America.”

“What evidence do you have for that?” I asked. “This explanation of the civil rights process is new to me.”

“A great deal of evidence,” Rodrigo replied. “I’m finding more every day. And not for just this period. I believe I can show that interest-convergence—the international situation, the needs of the U.S. economy . . .”

“Especially the agricultural sector, I bet,” I interjected.

“Especially there,” Rodrigo agreed. “Plus, the rise and fall of nativism and economic upturns and downturns—all account for the advances and setbacks that this poor group has experienced over the years. But I’m getting ahead of myself.”

I smiled at my young protégé’s eagerness to spell out a new thesis. “You were going to tell me about the fear of Latin American communism and the role it may have played in the *Hernandez* decision.”

“That, plus worry over people’s movements, Indian uprisings and land revolts,” Rodrigo said. “U.S. decision makers saw them all in the same light—part of a worldwide communist conspiracy that could end up in a second front, right on our doorstep.\(^{130}\) After the conference, one Latin American expert told me that during that period he was a paper boy in


\(^{127}\) See Novas, *supra* note 110, at 89, 144. *Braceros* (guest workers) received such poor treatment in Texas during the war years that the Mexican government intervened and received an official apology and a promise that the conditions would not recur. Id. at 91–94; see also Acuña, *supra* note 40, at 267 (discussing the poor conditions for *braceros* and the resulting political tensions between the U.S. and Mexico).

\(^{128}\) See *supra* notes 109–110 and accompanying text.


\(^{130}\) See Gonzalez, *supra* note 125 (reporting that the first Latin American labor unions formed around this time to oppose U.S. exploitation of workers and natural resources).
Los Angeles. The newspaper he delivered carried stories warning about the Red Army massing in Tijuana.131

“Bizarre!” I said, “It had enough trouble massing within its own borders, after the huge losses it sustained during World War II.”

“But that’s just the tip of the iceberg. I’m reading government documents and reports right now. No fewer than eighteen commissions and official inquiries examined the threat of Latin American communism.”132

“Joe McCarthy, John Foster Dulles, and George Kennan sounded the alarm, if I recall.”133

“Among others. And with reason, as many viewed the normal state of affairs in Latin America as consisting of a group of military-controlled countries doing the United States’ bidding and suppressing their own people.”

“Was that the same period when Fidel Castro and Che Guevara were becoming active?” I asked.

“It was. They were both young and in their university days.134 But they were both beginning to write tracts, give speeches, and come to the attention of Latin American intellectuals.135 Guevara, a student of Marxist-Leninist ideology, led a revolt against President Juan Peron of Argentina.136 When it failed, he went to Guatemala, where he joined the regime of leftist Arbenz Guzman.137 That was in 1953.”

131 Interview with Joe Thome, Professor of Law, University of Wisconsin, in San Francisco, Cal. (Jan. 8, 2005). Mexican newspapers at this time carried cartoons and editorials highlighting U.S. mistreatment of Mexican Americans and guest workers. Operation Wetback, supra note 124, at 169–71.


133 LaFeber, supra note 110, at 110 (describing role of John Foster Dulles); Schoultz, Beneath, supra note 110, at 334 (describing role of Dulles and McCarthy); id. at 335 (role of George Kennan); Gonzalez, supra note 125, at 116–17 (role of Nelson A. Rockefeller, who headed the Office of Inter-American Affairs, in countering anti-American sentiment in Latin America and assuring a steady supply of forest and soil products to America).

134 See Novas, supra note 110, at 184–87.

135 They were also coming to the attention of the U.S. government. See, e.g., Schoultz, supra note 110, at 350, 354–57 (describing official concern over Castro’s rising influence); Novas, supra note 110, at 184–87 (describing the rising star of these two young leaders).


137 Id.
“Just a year before Hernandez and Brown. Didn’t the CIA overthrow Arbenz?”

“It did. He was a liberal, redistributing unused land to the Indians. American-owned fruit companies didn’t like that, so they arranged a coup.”

“What happened to Guevara?”

“He left for Mexico and joined young Fidel Castro, who had been kicked out of Cuba for agitating against the corrupt dictator Batista. Castro was a young law graduate and a member of the Social Democratic Party. He had launched a daring raid on an army barracks in Santiago, hoping to seize arms and spark a popular uprising. It failed; he was captured and sentenced to fifteen years in prison.”

“When did this happen?”

“In that same year, 1953. Like Guevara, he was not easily discouraged. While in prison, he wrote History Will Absolve Me, a famous revolutionary tract setting out his anti-colonial and nationalist views. Two years later, the government granted him amnesty on the condition that he leave the country. He returned to Mexico, where he announced, to great fanfare, a new program for Latin American reform and revival.

“Violating the terms of his release, he returned to Cuba, where he devoted himself to mobilizing the peasantry against the repressive government. Joined by idealistic students and workers, he drew the support of several foreign countries and was covered favorably in the New York Times, which portrayed him as a brave figure. Within a few years, the Batista government could see the handwriting on the wall.”

“But you mentioned, I think, that all of Latin America was in turmoil.”

“Not all, but much of it.” Rodrigo continued. “And close to our doorstep. Nicaragua, for example, had been suffering under the rule of Somoza, a corrupt, murderous military dictator. In 1956, a young poet, Rigoberto Lopez Peres, assassinated the general at a ball. The general’s son then took over. By the early 1960s, the Sandinista National Liberation Front was mobilizing against the tyrannical regime.

138 Id. at 249; SCHULTZ, supra note 110, at 340–44.
139 NOVAS, supra note 110, at 186–87.
140 Id. at 184.
141 Id.
142 Id.
143 Id.
144 Id.
145 Id. at 185.
146 Id. This favorable attitude quickly shifted. See SCHULTZ, supra note 110, at 361–62 (describing CIA plots on Castro’s life); ACUÑA, supra note 40, at 373 (same).
147 NOVAS, supra note 110, at 254–56.
148 Id. at 256; LAFEBER, supra note 110, at 131–32.
149 NOVAS, supra note 110, at 255–58.
“In the Dominican Republic, Trujillo, a murderous dictator, always sided with the United States, supplying us with food during World War II and backing our Cold War policies against the Soviet Union. By the mid-1950s . . .”

“Again, the very period you mention,” I noted.

“Right. By that very period, he was becoming an embarrassment after kidnapping and murdering a Columbia University professor who had criticized his regime. This was too much for the United States Congress, which was furious about the abduction. Oh, and I forgot Honduras, where much of the same was going on. This country with a lagging economy turned revolutionary when banana workers struck in 1954. This catalyzed a series of events, including agrarian reform in the liberal tradition of Guatemala’s Arbenz. For a short time, Honduras maintained friendly relations with Castro’s Cuba. This was again too much for the United States, which launched efforts to rein in the new regime. By 1963, the army and American interests had things well in hand.”

When Rodrigo paused, as though to gather his thoughts, I said, “That’s quite a story.”

“It is,” he continued. “And that’s only a sampling. Much more was occurring that the U.S. government found worrisome, including Puerto Rican nationalism.”

“From what I remember, the movement was strong during that period,” I said.

“It was. A few years earlier, Abizu Campos and other nationalists were charged with conspiring to overthrow the United States government. Members of his Nationalist Party, which advocated complete independence, launched an attack in November, 1950, on Blair House, which Harry Truman was using as the official guest house. The group hoped to assassinate the President. They succeeded in killing one Secret Service agent, but Truman himself escaped.

“Then, on March 1, 1954, Puerto Rican nationalists positioned in the visitors’ gallery in the House of Representatives opened fire on U.S. legislators, wounding five Congressmen.”

“Interesting timing,” I said. “That was only a few months before Brown and Hernandez.”

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150 Id. at 218; Schoultz, Beneath, supra note 110, at 318.
151 Novas, supra note 110, at 218.
152 Id.
153 See LaFeber, supra note 110, at 178–79.
154 See id.
155 See id.
156 See id.
157 Id. at 146.
158 Id.
159 See LaFeber, supra note 110, at 146.
“Exactly,” Rodrigo confirmed. “It must have made an impression on the members of the Supreme Court.”

“I should think so,” I replied. “Especially since it occurred only a block away. Rodrigo, you’ve made a powerful case, based on Cold War politics, for an interest-convergence understanding of Hernandez. Building on the work of Bell and Dudziak, you have shown how fear of Latin American communism could easily have played a part in producing Hernandez. But to assemble a fully persuasive case, it seems to me that you still need to do three things. You must show that domestic currents added force to the growing picture you have painted. Then, you must demonstrate that high-ranking government officials knew of the events you have described and reacted in the way you posit. And finally, you must show that individual justices on the Supreme Court heeded those concerns when they crafted the Hernandez decision. Can you do all those things?”

“I think I can,” Rodrigo said quietly. “Let me start. This is a project of a lifetime.”

“Or at least a casebook,” I joked.

“At least that,” he replied, smiling. “Remind me to tell you about my plans along those lines sometime.”

“Just don’t get stuck making your own index,” I quipped.

“I’ll trust you on that one,” he replied. “Let me touch briefly on the three areas you mentioned. Then, I have some final thoughts about celebratory jurisprudence.”

“That’s your final task, it seems to me—to offer a materialist, economic-determinist explanation of the resistance your interest-convergence theory sparked.”

“I do have one,” Rodrigo replied. “As you’ll see, interest-convergence explains resistance to the very idea of interest-convergence. How much time do we have?”

I looked at my watch. “About 30 minutes,” I said. “I’m all ears.”

2. Domestic Concerns and the Threat of Unrest

“We can move quickly, because some of this is familiar ground. In 1952, Cesar Chavez was organizing and publicizing the plight of Mexican American farm workers in California and the Southwest. The Community Service Organization (“CSO”) was doing the same. A charismatic, humble leader with Christian-democratic leanings and a nonviolent philosophy, Chavez won the hearts of American consumers, seventeen million of whom eventually joined his boycott of California grapes and lettuce. His organization succeeded in winning labor contracts, better wages, and

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160 Id. at 104. See also GONZALEZ, supra note 125, at 119.
161 NOVAS, supra note 110, at 104.
162 Id. at 104–05.
safer working conditions for hundreds of thousands of poor, migrant farm
workers and was one of the earliest examples of successful coalition forma-
tion between outgroups, namely Filipinos and Mexican Americans.”

“While this occurred on the agricultural front, cities such as Denver
and Los Angeles saw outbreaks of Chicano activism, as I recall. Wasn’t
there a large-scale civil disturbance a few years earlier?”

“Yes, the Sleepy Lagoon incident—a rigged prosecution of Mexi-
can American youth during a period of moral panic over ‘gangs’—took
place in 1942, followed by the Zoot Suit riots the next year, in which
U.S. servicemen on leave beat up dozens of Mexican teenagers on the
streets of East Los Angeles for wearing distinctive ghetto-style clothes
that the servicemen interpreted as defiant and un-American.”

“Ian Haney Lopez covers some of those incidents in a recent book,” I
added.

“And a good one, too. But unrest was not confined to California. In
the late forties, racism in Texas became so severe that the Mexican gov-
ernment demanded fair treatment for braceros in that state. They won
an official apology. Several mainstream U.S. organizations, including
the Americans for Democratic Action, National Council of Churches of
Christ, AFL-CIO, and the National Catholic Welfare Council had expres-
sed concern. And, as we mentioned earlier, Eleanor Roosevelt and writers
such as John Steinbeck had been taking up their cause.”

When Rodrigo paused and looked up, I took the cue. “Yes, Rodrigo,
you’ve made a strong case that domestic events threatened to blacken the
eye of the United States in world opinion. That would have strengthened
the hand of the communists. Coming on top of concerns for Latin Ameri-
can people’s movements, United States elites could have perceived a two-
pronged threat developing: impoverished conditions in Latin American
countries supplied a fertile ground for communist agitation, while abusive
treatment of domestic Latinos created a tinderbox situation here. Do you
have any evidence that they actually saw the situation that way?”

3. Documentary Evidence

“I do,” Rodrigo replied. “For example, in May 1950, Assistant Secre-
tary of State Edward Miller announced a new U.S. policy toward Latin
America. Expressly warning of the danger of communist political ag-

164 Acuña, supra note 40, at 247–50.
165 Id. at 251–52, 259.
166 Haney Lopez, supra note 102. See Delgado, Relearning, supra note 1.
167 Acuña, supra note 40, at 267–68; Novas, supra note 110, at 92.
168 Novas, supra note 110, at 92.
169 Id.
170 See supra notes 124–126 and accompanying text.
171 See LaFeber, supra note 110, at 95–96.
gression in that region, he promulgated the Miller doctrine, which later served to justify United States interventions in Central America, including the overthrow of the populist Arbenz regime in Guatemala. That same year, George Kennan made containing communism the centerpiece of his own policy toward Latin America. After touring the region and coming away deeply impressed by its poverty and vulnerability to communist influence, he announced a corollary—the Kennan Corollary—to the Monroe Doctrine under which the United States would see any effort to advance socialism in that area as a threat to its interests.

“John Foster Dulles in 1953 warned that

[T]he conditions in Latin America are somewhat comparable to . . . China in the mid-thirties when the Communist movement was getting started . . . if we don’t look out, we will wake up some morning and read in the newspapers that there happened in South America the same kind of thing that happened in China in 1949.

He said that the approach would be made through colonies of European émigrés.”

“Wasn’t Joe McCarthy raising the same alarm?” I asked.

“He was. Some of his House Un-American Activities Committee hearings looked into that. Perhaps he drew support from Secretary of State Kellog who as early as 1927 provided the Senate Foreign Relations Committee, which was then holding hearings about policy toward Nicaragua, with a memo warning of Bolshevist arms and policies in Mexico and Latin America. Or maybe he found confirmation from Milton Eisenhower, who in 1953, in the wake of his own Latin American fact finding tour, wrote of the need to boost economic development in the region or succumb to communism introduced by ‘insidious process of infiltration. Highly disciplined groups of Communists are busy, night and day,’ he said.”

“Sounds like me with that infernal index,” I joked.

“Night and day,” Rodrigo replied. “Elites in this country were unceasing in their stridency over Latin America’s revolutionary potential. An

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172 Id. at 125–27. Have these concerns subsided? See Ginger Thompson, Old Foe of U.S. Trying for a Comeback in Nicaragua, N.Y. Times, Apr. 5, 2005, at A5 (reporting that reappearance of popular socialist leader Daniel Ortega in Nicaragua has revived alarms in Washington over “backslide away from democratic principles” in Latin America).

173 Tom Wolfe, The Doctrine that Never Died, N.Y. Times, Jan. 30, 2005, at 17 (Wk. in Rev.).

174 LaFeber, supra note 110, at 110–11 (internal citation omitted).

175 SCHOULTZ, supra note 110, at 334.


177 SCHOULTZ, supra note 110, at 335.

178 Id. at 335–36.

179 Id. at 336.
influential article by Louis Halle entitled On a Certain Impatience with Latin America\textsuperscript{180} in Foreign Affairs magazine warned of instability in the region. He later provided the Eisenhower administration with justification for overthrowing the Arbenz government in Guatemala.\textsuperscript{181} For his part, Eisenhower saw Latin America as a row of dominos ready to fall\textsuperscript{182} and this country’s treatment of domestic Mexicans as a moral and international embarrassment.\textsuperscript{183}

“Didn’t the United States establish some kind of counter-insurgency school around this time?”

“Yes. I almost forgot. It established the School of the Americas in the Canal Zone to counter insurrections and train Latin American officers in anti-Communist techniques.”\textsuperscript{184}

“Economies of scale, I guess,” I pointed out acerbically.

“Right. If you’re worried about events in a dozen countries, it makes sense to train all the local tinpot dictators and their torturers, henchmen, and secret police all at once. Oh, I almost forgot. Speaking of centralization, the C.I.A. has apparently received so many queries and Freedom of Information Act requests dealing with its role in the overthrow of Arbenz in Guatemala that it established a website with official documents and memos describing how it infiltrated the country and arranged the coup.”\textsuperscript{185}

“Sobering,” I said. “I certainly see how U.S. decisionmakers might easily have decided to produce a breakthrough for domestic minorities . . .”

“Specifically Mexican Americans . . .” Rodrigo chimed in.\textsuperscript{186}

“Right, exactly at this period. So many Latinos have strong connections to family in the countries from which they immigrated that political movements abroad could easily become movements inside the United States. It would make sense: sending a message to Latinos both here and abroad that the United States had their interests at heart and that it was not necessary to make trouble, organize, read communist propaganda, or make common cause with our enemies.”

“And did the Supreme Court pay attention to this message?”

\textsuperscript{180} Id. at 341–42.
\textsuperscript{181} Id. at 342.
\textsuperscript{182} Id. at 343.
\textsuperscript{183} See Operation Wetback, supra note 124, at 164–65; Eli Ginsberg & Douglas W. Bray, The Uneducated 51 (1953) (finding a high correlation between illegal labor supply and rejection rates for military service; Eisenhower initiated the project when serving as president of Columbia University).
\textsuperscript{184} LaFeber, supra note 110, at 106, 153–54.
\textsuperscript{186} Mexican Americans were the group whose fortunes were before the Court in Hernandez. See supra notes 9, 56–60 and accompanying text. The government was also concerned, of course, over other types of activism, such as Puerto Rican nationalism and unrest in Cuba, at the same time. See supra notes 124–159 and accompanying text.
4. The Role of the Justices

“I have suggestive but indirect evidence of that,” Rodrigo said. “The transcript of the oral argument in Hernandez has seemingly been lost. No one knows whether the spectre of communism entered into the exchange between the lawyers and the justices. What we know is that at least three justices were intensely aware of Cold War concerns and likely gave them great weight in deciding the two big civil rights cases, Brown and Hernandez.”

“William Douglas, for example, wrote about how America’s race discrimination hurt its standing abroad. When he traveled in India in 1950, he recalled how the first question he received at a press conference in New Delhi was, ‘Why does America tolerate the lynching of Negroes?’ In his book, Strange Lands and Friendly People, published a year later, he recalled the incident and highlighted the importance that color consciousness took on in other countries’ assessments of the United States. Not long afterward, he returned to Asia for a Himalayan trek. Upon arriving home he repeated his observation that other nations looked at us through the prism of race, specifically mentioning a ‘Mongol prince’ who told him that the Soviet Union would prevail over the United States for the affections of Asia because of its failure to act for social justice. The United States may lead the world in inventions and military power, the prince told him, but the Soviet Union leads in ideas.

“And while sick during a trip to Panama, he wrote to a friend back home that this impoverished area was ripe for communism. In another letter he described a second Latin America trip where he paid his own way to talk with university students trying to persuade them not to join the Communist Party. He also described his work on behalf of a foundation that brought young Latin American talent to study at U.S. universities like U.C.L.A.”

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187 See supra notes 184–186; see infra notes 188–200 and accompanying text; see also Michael McGough, High Court Case Tinged by Foreign Policy, Pittsburgh Post-Gazette, Mar. 29, 2005, at A7 (reporting that U.S. Supreme Court justices during oral argument struggled with international law concerns in a case of a Mexican convicted of murder and rape).

188 DUDZIAK, supra note 29, at 104.

189 Id. at 104–05.

190 Id. at 105.

191 Id.

192 Letter from William O. Douglas to John Cooper Wiley, Apr. 24, 1953, in THE DOUGLAS LETTERS 292 (Melvin I. Urofsky ed., 1987) (urging that American intellectuals no longer ignore the region and that a “well-worked out program should be designed”).

“Douglas certainly seems to have been aware of the threat of Latin American communism. What about some of the other justices?” I asked.

“At least two shared the concern that America’s treatment of its domestic minorities deprived us of political capital in the fight against world communism. Hugo Black worried that foreign enemies could seize on ‘ugly facts’ to do us harm.194 Many members of the Court traveled widely during this period and must have come in contact with foreign news coverage of American civil rights abuses and seen how powerful an impact these stories made.”195

“What about Chief Justice Earl Warren? He’s the other great liberal who served on the Court during this period. Didn’t he write both opinions?”

“Yes, both Hernandez and Brown. Before joining the Supreme Court, he served as Governor and, before that, attorney general of California.”

“What a connection!” I exclaimed. “It brings everything back full circle. That very same Warren must have known of the Zoot Suit riots, Operation Wetback, and other disgraceful measures his state took against the hapless Latinos.196 Now in higher office, he might have been concerned over how these events would appear on a world stage.”

“It’s a plausible explanation. We do know from his memoirs and biography that he deeply regretted his earlier role in marshalling sentiment against the Japanese in the early World War II years.197 He was a principal architect of internment, a policy that sent tens of thousands of California and West Coast Japanese, most of them United States citizens, to distant camps, where they spent the war years behind barbed wire.”198

“Many of them losing homes, businesses, and farms in the process,”199 I added. “It’s one of the most shameful episodes in American history.”

“That it is,” Rodrigo seconded. “The government finally issued an apology and awarded reparations to those who suffered relocation.”200

“Do you suppose Warren also repented his role in encouraging Operation Wetback?”

“I’m looking into that. It stands to reason that he would. The operation was similar to internment, but larger. And there was even less justification for it because it did not take place during wartime.”

194 Dudziak, supra note 29, at 106–07.

195 Id. at 106.

196 See Acuña, supra note 40, at 250–53, 276, 288–89, 352–53 (describing the Zoot Suit riots during Warren’s governorship and later mass deportations of Latinos during periods of economic downturn and xenophobia); Perea et al., supra note 22, at 317, 320 (describing Operation Wetback); Operation Wetback, supra note 124, at 157 (indicating that Warren did, indeed, know of the “wetback problem” and was a proponent of strong measures).

197 Cho, supra note 17; Simon, supra note 193.


199 Takaki, supra note 198, at 392–94.

200 Perea et al., supra note 22, at 411–12.
“I was just reading that the earlier of those two mass-deportation programs was the subject of a class action filed by some of the survivors,” Rodrigo replied.

“I noticed that, too,” Rodrigo replied. “It’ll be interesting to see if the case gets anywhere. But speaking of Warren, he spoke or wrote on at least two occasions about how the war against communism was a war of ideas and how the judiciary could play an important role in that battle. Just before Hernandez came down, he wrote a speech he would later deliver to the judges of the Fourth Circuit Court of Appeals. It expressed his belief that the world looked to the United States as a model of justice, not might, and that our conception of justice was what separated us from other political systems.

“In a speech he delivered later that same year to the American Bar Association, he again underlined how our system was on trial abroad and how adhering to the Constitution and Bill of Rights would make us more secure than would an entire stockpile of hydrogen bombs. And earlier, as attorney general of California, he waged war furiously against communists and subversives.”

“What about Hernandez’s lawyers?” I asked. “Were they attuned to Cold War concerns?”

“Unless that missing transcript turns up, we’ll never know,” Rodrigo replied. “We do know that, during their trip to Washington, they took the opportunity to meet with the national staffs of several progressive organizations to call their attention to the problems of Latinos in the Southwest. Some of these organizations, such as the American Friends Service Committee and AFL-CIO, were quite sympathetic to indigenous movements and even socialism.”

“So Cold War concerns were probably on the minds of Hernandez’s lawyers?”

“It’s a reasonable suspicion.”

“Fascinating,” I commented. “You’ve really done your research. It certainly sounds like some of the justices had international appearances in mind when they handed down Hernandez and Brown. But I’m anxious to hear your thoughts on celebratory jurisprudence. You’ve put together an intriguing case for expanding Derrick Bell’s interest convergence the-

201 Delgado, Locating Latinos, supra note 15, at 494.
202 Dudziak, supra note 29, at 105–06.
203 Id. at 106.
204 Id.
205 Long, supra note 17.
207 For a recent decision indicating awareness of international opinion and law, see Roper v. Simmons, 543 U.S. 551 (2005).
ory to Latinos. I’m curious why you thought your audience reacted negatively toward it. Are you ready to move on to this next topic?”

IV. IN WHICH RODRIGO PUTS FORWARD FIVE REASONS TO AVOID CELEBRATORY JURISPRUDENCE

“I am,” Rodrigo said. “I don’t want to be too harsh. When I first gave the paper, I had not developed my thesis as fully as I’ve done today. Some people in the audience may simply have wanted more documentation.”

“But I think you said that others were outright hostile. They thought your rather downbeat take on that landmark decision was inappropriate on a celebratory occasion, or perhaps took away from the gallantry of the lawyers who argued it before the Supreme Court.”

“Some did resist the entire idea of looking at the case from an interest-convergence perspective,” Rodrigo conceded. “Why that happened is an interesting story. It can’t have been the novelty of the claim, for everyone in the room—at the speaker’s table, at any rate—was familiar with Derrick Bell’s version of it.”

“As applied to blacks, you mean.”

“Right. His Harvard article is a classic of critical race theory. Everyone reads it. It’s in all the critical race readers and casebooks. Even our students know about it.”

“So why do you think you encountered such resistance in applying that same theory to Latinos?”

“For two or three reasons,” Rodrigo continued. “First, everyone likes a celebration. In a little less than an hour, we celebrate your birthday. Nothing is wrong with that.”

“But you think celebrating historical events and civil rights milestones are different?”

“I do. Celebration stills our critical instincts. Recall how, early in our history, Frederick Douglass said in a famous address that he could not join in celebrating the Declaration of Independence, and how, more recently, Thurgood Marshall declined to join in the 1987 celebrations marking the Bicentennial of the U.S. Constitution. Those documents mean something different to the sons and daughters of former slaves from their meaning to white people.”

“At the beginning of our talk, you mentioned that, by and large, the Latino people do not celebrate the law. Is that part of the great divide you mean?”

208 Bell, Interest-Convergence, supra note 27.
209 PEREA ET AL., supra note 22, at 106–07 (reprinting Douglass’s speech declining to celebrate the Fourth of July).
211 See supra notes 22–24 and accompanying text.
“It is, in a way. But affirmative reasons, not just culture or habit, counsel that we avoid excessive celebration. They fall into a number of categories and include interest-convergence itself.”

“I’d love to hear them. I’ve always had my doubts about all of those conferences and symposia marking the tenth, twentieth, thirtieth, fortieth, and now the fiftieth anniversaries of Brown. Maybe you can help give shape to my intuitive reluctance to join in with these celebrations.”

“I’ll try. My reasons fall into three categories: analytical, historical, and psychological. Which would you like to hear first?”

“All of them, in whichever order you see fit. All of this interests me very much.”

A. Rodrigo’s First Reason—The Gulf Between the People and Their Elites

“My first reason for rejecting celebratory jurisprudence is simply that I side with the people and their experience. As we mentioned before, if the ordinary Latino people distrust law and lawyers, and academic elites exalt them, the ordinary people are apt to be right. Their experience with the law is likely to be direct and immediate; that of the Latino academicians, abstract and theoretical. In these matters, the combined wisdom of thousands of people over many years is likely to be more valuable than that of a few critical scholars who derive most of their learning from texts and articles.”

“That’s not the most persuasive reason in the world,” I observed. “I hope you have more arrows in your quiver than that.”

B. Rodrigo’s Second Reason—Celebratory Jurisprudence’s Lulling Effect

“I do. Another reason is psychological and has to do with how celebratory jurisprudence disables you from seeing your actual condition. This may not be accidental, for it benefits the establishment. Recall how fondly Southern whites remember the old days when the darkies would sing their spirituals in the evening, and the sweet notes would waft through the dusk to the veranda, where the Southern family was enjoying after-dinner drinks.”

“So you are saying that when Latinos—or any other group—celebrate a civil rights advance, this benefits the majority?”

After a short pause, Rodrigo said with determination, “Yes, I do. It implies that the disempowered group is satisfied and will demand no more. It is the first step to complacency, toward making peace with the group that has been keeping you down.”

“Toward being satisfied with your condition, in other words,” I added.

“Exactly. Which leads to my third reason.”
C. Rodrigo’s Third Reason—The Plastic Steering Wheel

“Please go on.”

“My third reason has to do with stilling the critical faculties of the oppressed group. Professor, you’re a little older than I. But do you know how parents on a long car trip will sometimes give their child in the back seat a plastic steering wheel?”

“You mean so they can pretend they are steering the car?”

“Yes. The child thinks she is in control, and so tolerates the long trip. At the end, the parent comes and takes the steering wheel away.”

“So your point, Rodrigo, is that triumphalism encourages the oppressed group to believe, mistakenly, that it has been in charge all along, when this may not be so. As with Brown v. Board of Education and Hernandez v. Texas, a landmark decision may have been the product of forces far beyond the group’s agency. If you examine those forces, you may find that they are simply cases of white society quietly doing itself a favor. Is that your point?”

“It is. And those minorities who sing and dance in the streets after a great breakthrough victory can easily forget what happened the last time, when the great victory melted away as soon as the celebrations died down.”

“You lose your critical judgment, in other words,” I summarized. “That sounds like a sensible caution. What other reasons do you have?”

D. Rodrigo’s Fourth Reason—The Rise of the Broker Class

“This one also has to do with the role of minority elites, in particular the conflicted role of Latino academics and community leaders.”

“Do you mean the rise of the broker class about which Rodolfo Acuña writes?”

“Precisely. Professor, have you heard of Pocahontas and La Malinche?”

“Of course, although I know a little more about the Indian maiden who went over to the colonials’ side and married one of their leaders than I do about La Malinche. I’m not sure I see what they have in common.”

“Let me explain. Pocahontas, the favorite daughter of Chief Powhatan, saved Captain John Smith’s life after he ventured into Rappahannock territory and was about to be executed for a number of alleged crimes. The Captain apparently made an impression on Pocahontas, because she later

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212 See supra notes 27–35, 104–201 and accompanying text. This is not to diminish the gallantry of the lawyers who litigated Brown and Hernandez. It is merely to point out the factors that might explain why these breakthroughs happened when they did.


214 Acuña, supra note 40, at 357–58.

215 Perea et al., supra note 22, at 867–68.
intervened a number of times to extend economic aid and political advice to Smith and his colonial buddies. Later, a different Captain encountered Pocahontas and seized her as a hostage, had her instructed in Christianity, and used her services in negotiating peace between her father’s people and those of her new fiancée, John Rolfe, an early pioneer in tobacco cultivation in Virginia. Now Rebecca Rolfe, Pocahontas gave birth to a son, Thomas Rolfe. A year later she went to England with her husband and child, where she met the Queen and, unexpectedly, her former lover John Smith. She died in England in 1617, just as she was planning to return to Virginia.  

"An intriguing story. What about La Malinche?" I asked.

"In one common version of her story, La Malinche was an Aztec noblewoman who was presented to Cortes when he landed in Veracruz in 1519. She later served him as translator and lover and advised him on military tactics and the local terrain. She lives in myth and fiction as the creator of a new race—mestizos—as she played a role in starting the practice of racial mixture and intermarriage between the Spanish invaders and local Indian women. Some also see her as a whore who slept with the enemy for personal gain."

"I think I see what the two figures have in common."

"They both aided the very forces that were oppressing their people. They gave them cultural secrets that the white colonials used to exterminate their brothers and sisters; and in the case of Pocahontas, to wipe them out almost entirely."

"A serious indictment," I said. "And you think that minority elites today are in danger of falling into the same trap?"

"I do. Rodolfo Acuña, the great Chicano historian, describes how college-educated Latinos are being co-opted to act as middlemen between the Anglo power elite and their people. The new brokers serve in government or in business. In the business world, they occupy jobs as diversity directors, human resources personnel, or marketing directors."

"Charged with helping a corporation figure out how to pitch a product..."

"Such as cigarettes, beer, credit cards, or trendy, expensive clothes," Rodrigo continued, "to the Latino or black community. Some of them take on the function of political adviser, helping to assure that the minority community knows who to vote for or understands the importance of funneling their reformist fervor into legitimate channels."

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216 Id.
217 Id. at 870.
218 Id.
219 Acuña, supra note 40, at 358; see also Rodolfo Acuña, Occupied America 384–427 (2d ed. 1981) (devoting expanded treatment to the same topic). While such behaviors do not characterize all professional-class Latino, it is important to note the phenomenon at work.
“Voting, for example, or polite petitions, not rowdy street demonstrations,” I added.

“Exactly. These brokers use cultural information, as Pocahontas and La Malinche did, to help whites administer death. Or, if that’s too uncharitable, profits.” Rodrigo looked up as though to judge my reaction. “Do you think I’m being too harsh?”

“No, not at all,” I said. “We blacks have plenty of examples on our own side, plenty of brothers and sisters willing to make common cause with the enemy, trash affirmative action, preach self-empowerment, and so on. And you think this may have had something to do with the resistance you encountered to your revisionist reinterpretation of Hernandez as an interest convergence case?”

“I do,” Rodrigo replied. “But this requires a little background.”

1. Mid-Twenty-First Century Economics and the White Middle Class Squeeze

“Go ahead. I find this fascinating, if mildly paranoid.”

“Paranoid?” Rodrigo grinned and shot me an appraising look. “Remember what Huey Newton once said: ‘It’s not paranoia if they’re really out to get you.’”

I grinned back. “I don’t mean to be critical. I like the originality of your thesis and find it intriguing how you are beginning to look for internal class differences among the Latino group. I’ve always thought that critical race theory lacked a class analysis. But I don’t mean to sidetrack you. Please continue.”

“To see whether my thesis holds water, consider some economic projections that most writers see for America in the years ahead.” Rodrigo looked up to see if I wanted to hear more. When I nodded encouragingly, he continued. “The baby boomers are starting to retire, which will place great stress on Social Security and other retirement systems.”

“Such as Medicare,” I added. “And maybe private and state pension systems, too.”

“Exactly. As recently as a few years ago, twelve workers were contributing to support a single retiree on Social Security, and roughly the same was true of those other plans. Now, the ratio is about three to one, and in a few years it will be two to one.”

220 Attributed to Newton, the Black Panther Party’s defense secretary, the expression has entered national discourse. See Richard Delgado, Rodrigo’s Fourteenth Chronicle: American Apocalypse, 32 HARV. C.R.-C.L. L. REV. 275, 289 (1997); see also Robert Lipsyte, Backtalk: The Vanity of Human Wishes, Once Again on Display, N.Y. TIMES, Jan. 16, 2000, at § 8, 13.


222 Id.
“Middle-class families are having fewer children,” I added. “The birth rate is dropping, particularly among whites and the middle class.”

“So, where are the new workers going to come from?” Rodrigo asked.

“Latin American immigration is one source. Latino immigrant workers labor long hours in hard jobs. Their morale is high; they are delighted to have a source of income. Many of the men work two, or even three, full-time jobs. By and large, they pay their taxes, do not complain, and stay out of trouble.”

“The perfect laborers to prop up the Social Security system,” I said.

“Exactly. And consider all those baby-boomer retirees who will be going into nursing homes. Who is going to take care of them—cook their meals, clean their rooms, empty their bed pans?”

“Latinos?” I asked.

“Who else? The perfect group—as they are for dozens of other service-sector jobs—gardening, cooking, serving coffee, cleaning hotel rooms, custodial work . . .”

“And don’t forget nannies,” I said. “A friend of Teresa’s and mine just hired a nanny and housekeeper from Guatemala. They are very happy. They say they don’t know whether Maria is a legal immigrant or not, and they don’t want to know.”

“Pressured two-earner Anglo families have to work harder than ever these days to earn the same salaries that they earned before. Companies cut their benefits and health care packages every year. Both parents have to work. Who gets to take care of little Junior and clean up the apartment every week when the two yuppies arrive, exhausted, at the weekend and don’t have the energy or inclination to fix up their own place?”

“Latinos?”


“I think I see where you are going with this,” I said. “The demand for Latino labor is explosive and across-the-board. Latinos are going to experience great demand for child care, old age homes, maintenance work, and hundreds of service-sector jobs. And the new middlemen will sell them. Or if that’s too harsh, mediate the terms on which they introduce themselves into American society and the work force.”

“And that includes law professors, do you think?”

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224 See Delgado, Relearning, supra note 1.
225 The proportion of Latinos in U.S. prisons, for example, is about 15%, only slightly higher than their proportion in the population at large, and notably low for a relatively young group that endures a high degree of police suspicion and surveillance. See Richard Delgado & Jean Stefancic, Editorial, Let’s Welcome Latinos to Pittsburgh; The Region Would Benefit from Concrete Steps to Bring More Working-Class Latino Immigrants Here, Say Richard Delgado and Jean Stefancic, Pittsburgh Post Gazette, Sept. 18, 2005, at K2.
“They may not manage the work crews or supervise the gardeners,” Rodrigo said, “but many of them will gain tenure by writing about immigration, bilingualism, citizenship, racial history, and other topics integral to the whole process. They will explain the two groups to each other. They will serve as cultural intermediaries, interpreting Latinos to the Anglos and the Anglos to their Latino countrymen and women.”

“And so that explains your chilly reception at the conference. Your audience of middle-class Latino law professors and professionals did not want to be reminded of the role of profits and Anglo self-interest undergirding civil rights advances and retreats.”

“It hits too close to home,” Rodrigo replied. “They would rather think that they are bringing the blessings of liberty to a benighted and impoverished group.”

“That there is no downside,” I added.

“Much less that they might bear a resemblance to Pocahontas or La Malinche, supplying information and aid that the overlords will use to oppress their own people.”

“Yikes,” I added. The weight of what Rodrigo had been saying hit me with full force. I shuddered involuntarily for a second and then said something about how we all legitimate an unfair system, merely by agreeing to teach in institutions that have terrible records on matters of race.

“You can even convince yourself that identity politics and diversity are good for capitalism, and that by preaching a cheerful, optimistic view of racial history you are helping everybody stay on the right track,” Rodrigo concluded.

E. Optimism and Pessimism: The Half-Full/Half-Empty Syndrome

“And I gather that you disagree with this feel-good philosophy,” I said. “But, for the sake of argument, what’s wrong with looking on the bright side? After all, things are improving for minorities, are they not? Thirty years ago, we were being lynched and beaten. You don’t hear about that any more. Isn’t that progress?”

Rodrigo measured his words. “I’m the last one to deny progress, although I think it’s not what it’s cracked up to be. We do move ahead, from time to time, and on this measure or that. More sociology PhDs. A few more Latino plumbers and trade unionists. But the gap between whites and blacks stays the same, year after year. They keep advancing, too, and we bring up the rear. Only the rear moves ahead just as the head of the column marches forward.”

“Sounds like the proverbial half-full, half-empty phenomenon,” I said, determined to push my young protégé as hard as I could. “Isn’t that, in the end, the difference?”

Rodrigo hesitated. “No. I think it’s more than that. Hope and pessimism instead play wholly different roles for minorities and whites.”
“And that accounts for your treatment at the conference?”
“I’ll let you decide,” said Rodrigo. “Here’s my thought. For minorities—ordinary people, not the elites—hope is not the way to emotional wholeness. For whites, it is. They need, above all, guilt-assuagement, the sense that they are not responsible, or that if they are, at least things are getting better for blacks and Latinos. If they are, it should follow that in time, people of color will be on a par with whites. Nothing special need be done. Whites can go about their business.”
“They can put all that messy stuff of race out of mind,” I added. “Bragero programs. Lynching. Slave ships. Chinese Exclusion Acts. Japanese internment. Indian extermination. Gay-bashing. Don’t ask, don’t tell programs. They think that society is improving, every day becoming more liberal, fairer, more just and more inclusive than the last. If America is not yet perfect with regard to racial matters, it is still the fairest, most just nation in the world. Why else would all those immigrants be flooding across our borders?”
“Exactly. So, for whites, the tonic is optimism and faith in progress. But had you considered what it is for minorities, Professor?”
“Let me guess. No, I can’t. Why don’t you continue? I’m curious where this leads.”
“For minorities,” Rodrigo began, “it’s realism. What they need is knowledge of their own histories—of the terrible tale of stolen lands, butchered ancestors, raped grandmothers, Jim Crow laws, and biased employment doctrines and tests that excluded them from society’s bounty and are now responsible for their low estate. They need to realize that their high rates of incarceration, poverty, and despair are not entirely their fault. That the social pathology one sees in minority communities is not the product of some intrinsic defect but of racism, oppression, and outright plunder. What others would see as hanging onto the past . . . ”
“Refusing to let bygones be bygones,” I added.
“Exactly. That way lies psychic healing. That way lies health, and the willingness to forge ahead even though one’s current situation may be unpromising.”
“And so that explains the downbeat, satirical, laugh-in-spite-of-it attitude toward what we can only call racial villainy that you described earlier. Chicanos’ refusal to sign on to celebrations, but instead to relish street theatre, corridos, cuentos, and folktales that celebrate resistance against injustice, the choice to hang onto and almost revel in the brutalities that the community had to put up with, helps them to survive.” I looked at Rod-

\footnote{227 See Richard Delgado, Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?, 97 YALE L.J. 923, 928–41 (1988).}
\footnote{228 Id.}
\footnote{229 Id.}
\footnote{230 See supra notes 21–24 and accompanying text.}
 Rodrigo with new admiration. “Now I see how your thesis holds together. The psychological, the historical, and the analytical. Derrick Bell would be proud. At least I am, and I’m of his generation.”

“Thanks, Professor. Your praise means a lot to me. Among other things, it encourages me to press ahead and look for more evidence of interest convergence in the Hernandez case. I still need a piece or two of the puzzle. These things are hard to track down. They are buried in archives, memoirs and in headlines in hard-to-find newspapers of the period. Sometimes my eyes glaze over.”

“You should continue,” I encouraged. “I think you’re onto something. If interest-convergence worked for Brown v. Board of Education, I see no reason why it can’t work for Hernandez.”

“And maybe for all of Latino history. Remember how Derrick Bell extended his Harvard interest-convergence article and its analysis to the full sweep of black history.”

“In his casebook and later articles,” I said. “I use that casebook in my class. It’s a powerful tool.”

“I see no reason why I can’t apply the same sort of material-determinist analysis to help understand the twists and turns of Latino legal history.”

“I agree,” I said. “For example, I can see you looking at labor and immigration law and at such things as the bracero program, which waxed and waned as American agribusiness’s needs shifted and changed.”

“I’ll see what I can do,” Rodrigo replied. “Maybe I’ll send you a draft of the introduction. An article, too. I’ll incorporate notes from this conversation. You’ll see your imprint.”

“I don’t know about that,” I said. “As usual, I’ve learned ten times more from our conversations than you have. But I’ll be glad to look at what you come up with.”

**Conclusion: Rodrigo’s Prescription—What the Latino Community Needs**

“Speaking of coming up with something,” Rodrigo said with a start. “I was supposed to produce you . . . ,” he looked at his watch, “five minutes ago.”

“My goodness,” I said. “Time does pass quickly when you’re having fun. You haven’t told me about your quarrel with equal protection jurisprudence. That may have to wait for another time.”

“Afraid so,” Rodrigo said, fishing in his pocket for some change to leave as a tip. “We used their table for a long time. I hope we haven’t worn out our welcome.”

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231 See Derrick Bell, Race, Racism, and American Law (5th ed. 2004).
“No chance of that,” said the friendly waiter who materialized at our table to bus the cups and plates. “You gentlemen are in a hurry. I’ll clean up. Just make sure to come back.” Then, after a smile, “Regresen pronto.”

“We will,” I said with a start. “How long did you say you were in town for, Rodrigo?”

“Two days.”

“Well, maybe we’ll be able to meet again after the party for a second round. This time, maybe Giannini and Teresa can join us. I know Teresa would be fascinated by your thoughts on equal protection. She’s an avid social reformer, as you know.”

As we made our way out of the restaurant and walked the short block to the parking lot, Rodrigo asked, “Professor, have you seen the movie The Pianist or read the book?”

“I haven’t. It’s on our list. Teresa and I want to see it soon. Why do you ask?”

“Because, in a way, the movie reminds me of some of the things we have talked about today and serves as both a summary and a warning.”

“How so?”

“In it, the Jews whom the Nazis have herded into the Warsaw ghetto are worried and apprehensive about their fate. Why have they been rounded up and made to leave their homes and friends? Why do Nazi guards and watchtowers surround the one area in their old city in which they are permitted to live? What is the meaning of the checkpoints and humiliating interrogations that they must endure from brusque, unsmiling German soldiers? Why can they not leave and travel freely?

“What does the future hold for them? Lacking knowledge about what lies ahead, they speculate. Are they being prepared for extermination? Will the Nazis come to their senses and release them? Will life return to normal? If they are being prepared for the death camps, desperate measures would be in order. They should steal or improvise weapons and make a break for freedom.

“Optimists in their group, however, offer a more reassuring interpretation: the inmates represent such a valuable source of skilled labor that the Nazis would surely be loath to forfeit it.

“The Jews desperately need to know what the future holds. Then, one day, a genius among them figures it out. The trains heading past the ghetto, bearing passengers from a similar enclave further down the line, return a few days later empty. That can mean only one thing. The Nazis are holding them for their own trip to the death camps.

“After absorbing the implications of that chilling information, the Jews begin gathering their resources for a futile, but gallant, escape attempt.”

232 “Come back soon.”
233 THE PIANIST (Focus Features 2003).
Rodrigo was silent for a moment as we walked along the darkening street. “And the conclusion you draw from this allegory for Latinos is . . . ?” I asked.

“It is that in a much less desperate situation, Latino people—the common, working-class people, I mean—need clear-eyed vision from their leaders. Celebrations that overlook unpromising realities do little to advance their cause. We academics owe our brothers and sisters, who suffer in refugee camps and labor in the country’s sweatshops, farm fields, kitchens, and hotels, the same sort of service the black community received from Thurgood Marshall, William Hastie, Derrick Bell, and the other gallant warriors who brought suit on behalf of the sons and daughters of former slaves. We do not discharge that duty when we cheer victories that bring little fruit, when we rest satisfied with forms of legal redress that do little to combat the discrimination that our community endures, and pretend that medicine aimed at remedying one form of a disease is equally suitable for another.”

“Surely you don’t mean to compare the plight of the two groups, do you?” I asked.

“No, not at all. I just mean that optimism can blind us to the cruel realities of our situations. The Pianist reminded me that Latinos can learn from the horrible atrocities of the past as we move forward, pursuing civil rights.”

“Here’s the car,” I said. “That’s a powerful metaphor. I hope your readers don’t take it the wrong way. As for me, I can’t wait to hear round two of this conversation. I guess I’ve got to go through this infernal birthday party you’ve cooked up first. If that’s the price of admission, it will be well worth it.”

“We’ll see. I’m sure I’ve gotten as much out of this conversation as you, Professor. You always push me and help me clarify my thoughts.”

“You’re too kind,” I said. “I can’t wait to see that article.”