

---

2023

## Race or Class: New Directions for Critical Theory

Richard Delgado

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>

 Part of the [Law Commons](#)

---

### Recommended Citation

Richard Delgado, *Race or Class: New Directions for Critical Theory*, 74 Case W. Rsrv. L. Rev. 353 (2023)  
Available at: <https://scholarlycommons.law.case.edu/caselrev/vol74/iss2/6>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

# RACE OR CLASS: NEW DIRECTIONS FOR CRITICAL THEORY

*Richard Delgado*<sup>†</sup>

## CONTENTS

INTRODUCTION: IN WHICH RODRIGO RECOUNTS A HARROWING TALE OF URBAN POVERTY AT HIS SCHOOL.....	353
I. IN WHICH RODRIGO AND THE PROFESSOR DISCUSS POVERTY AND THE LAW .....	355
A. <i>Rodrigo and the Professor Consider Whether Literature’s Treatment of Poverty Is More Advanced than that of the Law.....</i>	357
B. <i>Rodrigo and the Professor Discuss Why Legal Remedies for Poverty Lag Behind Those for Race.....</i>	358
C. <i>The Professor Announces a Surprising Turn in His Thinking.....</i>	359
II. IN WHICH RODRIGO AND THE PROFESSOR DISCUSS INTEREST CONVERGENCE AND THE POOR.....	361
III. IN WHICH RODRIGO AND THE PROFESSOR CONSIDER HOW INTEREST CONVERGENCE MAY BE PUTTING CLASS ON THE FRONT BURNER. ....	362
A. <i>China: The Reality and the Threat .....</i>	362
B. <i>U.S. Power Brokers Taking Notice.....</i>	364
C. <i>Pressure Arising from Within the U.S.....</i>	365
D. <i>The Judiciary Beginning to Take Notice .....</i>	367
E. <i>Class Interest Rising.....</i>	368
1. <i>The Wealth Gap .....</i>	369
2. <i>Little Upward Mobility Among the Working Class .....</i>	369
IV. IN WHICH RODRIGO AND THE PROFESSOR DISCUSS CRITICAL ECONOMICS .....	370
V. OBSTACLES IN THE WAY OF PROGRESS FOR THE POOR .....	372
A. <i>Upstairs, Downstairs, and the Problem of Internalized Oppression .....</i>	372
B. <i>Red-Baiting and the Problem of the Fearful Judge or Bureaucrat.....</i>	372
C. <i>Objections from Racial Minorities Eager to Remain at the Center of Attention.....</i>	372
CONCLUSION.....	373

## INTRODUCTION: IN WHICH RODRIGO RECOUNTS A HARROWING TALE OF URBAN POVERTY AT HIS SCHOOL

Sitting at my desk with the office door half-shut, I was trying to balance my checkbook while wondering, for the tenth time, if my dear

---

<sup>†</sup> Distinguished Professor of Law, Seattle University. Thanks to Jean Stefancic for ideas and inspiration.

wife and I had put enough aside to retire someday. Footsteps in the hallway outside followed by a polite knock caused me to jump and push the checkbook aside a little guiltily. In truth, I hoped it was not a colleague or the Dean seeing me perform a personal task on company time.

“Rodrigo,”<sup>1</sup> I exclaimed, relieved to see the smiling figure of my young friend standing expectantly in my doorway. “I was just thinking about you. What brings you around?”

“It does seem like just the other day we were talking about the *Dobbs* decision,” he replied.<sup>2</sup> “Well, would you believe, Giannina is back again, this time for a meeting of women lawyers on urban homelessness.<sup>3</sup> I came too because I was hoping to talk with you about something that’s been on my mind. Do you have a minute?”

“For you, always,” I said. “Was it about that same issue—homelessness?”

“It started out that way. In fact, one of the clinics at our school held a big teach-in about it last week and the dean asked us for a report. We had just learned that several first-year law students were sleeping in their cars because they couldn’t afford an apartment. This came to

- 
1. See Richard Delgado, *Rodrigo’s Chronicle*, 101 YALE L.J. 1357, 1359–1375 (1992) (introducing my friend and alter ego, Rodrigo Crenshaw). Born in the United States, Rodrigo and his family moved to Italy when his father, an African American serviceman, was assigned to an outpost there. Rodrigo attended grade and high school on the base, then graduated with honors from an Italian university (“the oldest in the world, Professor”) and law school. *Id.* at 1363–64. When the reader meets him, he has returned to the States to investigate LL.M. programs in hopes of preparing for a career in teaching law. In the Professor’s office, the two discuss the young man’s plans and ideas on topics including affirmative action, standardized testing, and the decline of the West. *Id.* at 1367–68. Later chronicles discuss his adventures in law school and on the job market and his and his mentor’s thoughts on love, law and economics, black crime, and many other topics. One of my purposes in creating this series as I have done is to give readers a glimpse at what intellectuals of color talk about. Both Rodrigo and his narrator and straight man, “the Professor,” are fictional characters, composites of many people I have known and not to be identified with any one in particular.
  2. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (discussed in Richard Delgado & Jean Stefancic, *Dobbs, Right-Wing Revisionism, and Public Outrage: Rodrigo’s Late-Night Chronicle*, 72 AM. U. L. REV. 1469 (2023)).
  3. See Richard Delgado, *Rodrigo’s Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 STAN. L. REV. 1133, 1137 (1993) (introducing Giannina, a public interest lawyer, playwright, and Rodrigo’s partner and love of his life).

light when the registrar asked everyone for their mailing address, and they didn't have one."<sup>4</sup>

"Well, well," I said. "Something similar happened at my school. A minority student dropped out because his financial aid package was too low to cover his rent. The student bar association accused the school of reducing the amount of aid set aside for students from poor families in order to put more into the merit-based kind. They said that this was a socially irresponsible solution to the school's desire to keep its *U.S. News & World Report* ranking high and a crass abdication of its responsibilities toward the poor."<sup>5</sup>

"Come on in," I said. "I just finished unpacking. Can I offer you a cup of coffee?"

"Love one," he said, finding a seat on my office couch. "By the way, your new office looks nice. Not as spacious as the one you had before, but the view outside looks great. Is that your coffee maker?"

"Yes," I said. "The one I had before got damaged in the move. I bought this one just the other day."

"Someone told me that even good moving companies manage to lose or damage at least one thing every time. A metaphor for our times, I guess. But at least the four of us have checkbooks," he said, gesturing toward the one lying half-hidden on the corner of my desk where I had shoved it moments ago. "Mine's a mess, too. Last month, Giannina and I went over ours a dozen times but ended up having to write off \$109.99, exactly. I have no idea where it went."

I muttered something about automatic withdrawals and deposits making it hard to keep track of your balance these days. While I spooned out coffee grounds—"French Roast, the kind you still like, I assume?"—he nodded enthusiastically and began:

## I. IN WHICH RODRIGO AND THE PROFESSOR DISCUSS POVERTY AND THE LAW

"I'd like to hear your thoughts, Professor, not just about homelessness, but about poverty in general. Giannina and I were struck by how the U.S. system seems relatively insensitive to wealth disparities

- 
4. See, e.g., Kyle Spencer, *In College and Homeless*, N.Y. TIMES (Feb. 21, 2020), <https://www.nytimes.com/2020/02/20/education/learning/college-homeless-students.html> [<https://perma.cc/34M2-DVHL>] (citing a 2019 survey that found 17 percent of the sampled community college students in Philadelphia experienced homelessness in the last year).
  5. See, e.g., Christopher Drew, *Help for the Not So Needy*, N.Y. TIMES (July 17, 2012), <https://www.nytimes.com/2012/07/22/education/edlife/a-rise-in-students-receiving-merit-awards.html> [<https://perma.cc/L9WL-DU7V>] (explaining that advocates for low-income students have "long criticized" awarding merit-based aid because "money is more fruitfully spent" on need-based aid).

and poverty. Unlike other highly developed countries, we provide little in the way of a social welfare net,<sup>6</sup> including parental leave, childcare, and state-subsidized housing, much less free college education.<sup>7</sup> And our health-care system consistently ranks lower than most wealthy nations, unless you are very rich, in which case it is near the top.<sup>8</sup> Not to mention homelessness in big cities.”

“Or even law schools,” I added. “We do provide free legal representation for the poor who are accused of crime.<sup>9</sup> I guess our society wants to look good in at least that respect. But when Thurgood Marshall proposed extending similar relief in other settings, including education and welfare, the idea went nowhere.”<sup>10</sup>

I poured in distilled water from a pitcher and added, “It seems that *Gideon v. Wainwright*<sup>11</sup> was the high-water mark for poverty as a suspect class.<sup>12</sup> I assume you have some ideas on why this is so?”

- 
6. Anu Partanen & Trevor Corson, *Finland Is a Capitalist Paradise: Can High Taxes Be Good for Business? You Bet.*, N.Y. TIMES (Dec. 7, 2019), <https://www.nytimes.com/2019/12/07/opinion/sunday/finland-socialism-capitalism.html> [https://perma.cc/68L2-KGRC] (describing the overall satisfaction and economic mobility of people in a fully capitalist economy coupled with high taxes, well-financed schools, and many social benefits for all residents).
  7. *E.g.*, Samantha Valente, *Social Safety Nets: An International Comparison*, 28 NEW LAB. F. 44, 44–45, 48–49 (2019).
  8. See Claire Parker, *U.S. Health-Care System Ranks Last Among 11 High-Income Countries, Researchers Say*, WASH. POST (Aug. 5, 2021, 12:39 PM), <https://www.washingtonpost.com/world/2021/08/05/global-health-rankings/> [https://perma.cc/Y536-8PGH]; *Health and Health Systems Ranking of Countries Worldwide in 2023*, STATISTA (Apr. 12, 2023), <https://www.statista.com/statistics/1376359/health-and-health-system-ranking-of-countries-worldwide/> [https://perma.cc/QFC8-9BTZ].
  9. *Gideon v. Wainwright*, 372 U.S. 335, 342, 344 (1963) (requiring state-appointed counsel for indigent defendants charged with serious crimes).
  10. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 70, 110–12, 115 & n.74, 130–32, 130 n.98 (1973) (Marshall, J., dissenting).
  11. *Gideon*, 372 U.S. at 335. See *Defender Services*, U.S. CTS., <https://www.uscourts.gov/services-forms/defender-services> [https://perma.cc/QJV4-VFRB] (describing the Criminal Justice Act, 18 U.S.C. § 3006(A), which was enacted one year after the *Gideon* decision).
  12. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (positing that a searching standard of review might be in order in cases where the government has afforded unequal treatment to discrete and insular minority groups); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 4–5, 7 (1980) (identifying problems with prevailing theories of judicial review including interpretivism and noninterpretivism).

*A. Rodrigo and the Professor Consider Whether  
Literature's Treatment of Poverty  
Is More Advanced than that of the Law*

"I do," he said. "Other wealthy countries seem ahead of us in that respect.<sup>13</sup> Even in our own society, law suffers by comparison to fields like literature. As early as Charles Dickens, novelists wrote about the plight of poor families unable to put food on their children's tables.<sup>14</sup> In our times, novelists like F. Scott Fitzgerald (*The Great Gatsby*)<sup>15</sup> and John Steinbeck (*The Grapes of Wrath*),<sup>16</sup> as well as nonfiction writers such as Upton Sinclair (*The Jungle*)<sup>17</sup> and Ralph Nader (*Unsafe at Any Speed*)<sup>18</sup> address some of the same problems."

"You could go back to Biblical times," I said, "when followers of Jesus wrote about how he taught kindness and mercy for the poor, the halt, the blind, and the lame.<sup>19</sup> And the Framers of the Constitution were careful to provide equal representation for poor and rich states."<sup>20</sup>

"Even if they conveniently left the slaves out," he added.

"True," I conceded. "Including some of my own ancestors. Society relented, of course, with the Reconstruction Amendments<sup>21</sup> and again

- 
13. *E.g.*, Partanen & Corson, *supra* note 6.
  14. *See* LYNN HUNT, *INVENTING HUMAN RIGHTS* 35, 38–39 (2007) (discussing how early novelists wrote about the plight of the poor and defenseless).
  15. *See generally* F. SCOTT FITZGERALD, *THE GREAT GATSBY* (1925) (describing a man's attempt to fake a wealthy life).
  16. *See generally* JOHN STEINBECK, *THE GRAPES OF WRATH* (1939) (chronicling a poor family's westward journey during the Dust Bowl).
  17. *See generally* UPTON SINCLAIR, *THE JUNGLE* (1905) (describing the abhorrent working conditions in the meat-packing industry).
  18. *See generally* RALPH NADER, *UNSAFE AT ANY SPEED* (1965) (explaining that the Ford Pinto, a poorly designed, inexpensive car, was favored by many blue-collar people); *see also* BARBARA EHRENREICH, *NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA* (2001) (describing the miseries of American life when making minimum wage).
  19. *E.g.*, *Luke* 14:21 (urging that his followers go forth to aid the poor, the crippled, the blind, and the lame).
  20. *E.g.*, *About the Senate and the Constitution*, U.S. SENATE, <https://www.senate.gov/about/origins-foundations/senate-and-constitution.htm> [<https://perma.cc/B6CT-ULEA>] (noting that the Constitution provides for an equal number of senators from each state, large or small); *see also* DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* 41–43 (6th ed. 2008) (noting how the Framers provided for representation of southern states in the form of several "slavery compromises").
  21. *See* U.S. CONST. amends. XIII, XIV, and XV (abolishing slavery and guaranteeing equal protection and the right to vote).

in the sixties.<sup>22</sup> And presidents like Franklin Roosevelt and Lyndon Johnson enacted broad anti-poverty measures.<sup>23</sup> But since then, the government has done comparatively little to ease the plight of those born into the underclass.”

“Especially for African Americans and Latinx farmworkers and domestics, who were neatly left out of many of the New Deal programs,” he added.<sup>24</sup>

*B. Rodrigo and the Professor Discuss Why Legal Remedies  
for Poverty Lag Behind Those for Race*

“Maybe part of the reason,” I said, “is that in the back of our minds we think that poverty is the legislature’s concern, not the judiciary’s, or that in a system such as ours with its horrific history, racial discrimination is the prime candidate for redress, not the kind based on destitution or social class.<sup>25</sup> Socialism may work for Europe and Scandinavia, we seem to think, but the U.S. is based on capitalism, which has its winners and losers.”<sup>26</sup>

When he shot me a searching look, I explained that though we fought a war over race,<sup>27</sup> aside from a few skirmishes and shoot-outs over unionism and strikes,<sup>28</sup> economic grievances have not grabbed our

- 
22. *E.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in 42 U.S.C.).
23. *See* Juan F. Perea, *Doctrines of Delusion: How the History of the G.I. Bill and Other Inconvenient Truths Undermine the Supreme Court’s Affirmative Action Jurisprudence*, 75 U. PITT. L. REV. 583, 589–90 (2014) (noting that racially discriminatory undertones lurked in 1930s-era New Deal and 1960s-era G.I. Bill legislation); Emily Bazelon, *Why Is Affirmative Action in Peril? One Man’s Decision.*, N.Y. TIMES (Mar. 4, 2023), <https://www.nytimes.com/2023/02/15/magazine/affirmative-action-supreme-court.html> [<https://perma.cc/PCN4-8WQ8>].
24. *See* Perea, *supra* note 23, at 589 (discussing the exclusion of farmworkers, household service workers, and other low-paid categories of workers); Bazelon, *supra* note 23. *See also* BELL, *supra* note 20, at 40–43 (discussing the slavery compromises which had an even more deleterious effect on the Black population).
25. *See* ELY, *supra* note 12, at 7–8 (offering a defense of counter-majoritarian judicial review).
26. *See* KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 429 (Frederick Engels ed., Samuel Moore & Edward Aveling trans., Charles H. Kerr & Co. 1906) (1867) (discussing how competition drives economies built along capitalistic lines).
27. To wit, the Civil War. John Coski, *Myths & Misunderstandings: What Caused the Civil War*, AM. CIV. WAR MUSEUM (July 24, 2017), <https://acwm.org/blog/myths-misunderstandings-what-caused-civil-war/> [<https://perma.cc/G9H6-EMFL>].
28. *See e.g.*, 1892 Homestead Strike, AM. FED’N OF LAB. & CONG. OF INDUST. ORGS., <https://aflcio.org/about/history/labor-history-events/1892>

attention in the way Indian massacres, wars with nations of brown-skinned people such as the one with Mexico, and demonstrations over police killings of Black men have done.

After a pause I added: “Some are urging that minorities, with their growing numbers, can now fend for themselves and elect leaders of their own.<sup>29</sup> For them, the counter-majoritarian basis for judicial protection of minorities has run its course.<sup>30</sup> It may be time for the rights of the poor to move up and for racial minorities to take a back seat for a while. Most days, I actually believe that.”

*C. The Professor Announces a Surprising Turn in His Thinking*

Rodrigo sat bolt upright. “I’m surprised to hear you say that, Professor, coming from someone who has devoted his life to critical race theory and the rights of minorities. But just the other day I was reading about another well-known writer who advocates doing away with race-based affirmative action in favor of a version based on family income and social class.”

“I assume you mean Richard Kahlenberg,”<sup>31</sup> I said. “Many of the amici in the Harvard suit urge much the same thing.<sup>32</sup> The Supreme Court is probably going to rule in their favor.”<sup>33</sup>

---

-homestead-strike [<https://perma.cc/RK7F-FVVQ>] (categorizing the 1892 Homestead strike as a “transformational moment” in United States history).

29. *E.g.*, *Shelby County v. Holder*, 570 U.S. 529, 557 (2013) (finding that changing times may require modifications in voting rules protecting the integrity of the Black vote).
30. *See supra* notes 12 and 19 and accompanying text (explaining how discrimination against weak and insular minorities may call for strict judicial review).
31. *See generally* RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* 188–89 (1996) (setting out the case for class-based admissions).
32. *See generally* Petition for Writ of Certiorari, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (No. 20-1199) (describing the suit against Harvard for discriminating against Asian American applicants in favor of African Americans with lower test scores and GPAs). For a description of some of the amici’s arguments, see Ellena Erskine, Angie Gou & Elisabeth Snyder, *A Guide to the Amicus Briefs in the Affirmative-Action Cases*, SCOTUSBLOG (Oct. 29, 2022, 6:44 PM), <https://www.scotusblog.com/2022/10/a-guide-to-the-amicus-briefs-in-the-affirmative-action-cases/> [<https://perma.cc/5LYD-T9JL>].
33. *See* Adam Liptak & Anemona Hartocollis, *Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C.*, N.Y. TIMES (Oct. 31, 2022), <https://www.nytimes.com/2022/01/24/us/politics/supreme-court-affirmative-action-harvard-unc.html> [<https://perma.cc/NL87-8WS8>] (suggesting that the Asian American plaintiffs are likely to win).



“And I gather you think it’s not a bad idea?”

“I do. By the way, your coffee is ready. You see, many minorities are poor, so programs that target poverty would help them. By the same token, increasing numbers of poor people are minorities. So programs based on class would encourage admissions officers to focus on which minorities really need the help. The proverbial son or daughter of a Black neurosurgeon would actually have to work hard and get good grades to get into Harvard. Your son Gus might have to, too.”<sup>34</sup>

He looked a little shell-shocked, so I added, “Actually, I think we ought to offer a helping hand to both groups, but social class might be the harder sell. As you know, Thurgood Marshall first raised the idea in *San Antonio Independent School District v. Rodriguez*,<sup>35</sup> a school funding case where he pointed out that the poor are, in many respects, weak and insular minorities, just like African Americans and Latinos. Stigmatized, too.”

“I’m sure you agree with that.”

“I do, even though the Supreme Court majority didn’t, at least back then. I think they may have been hung up on the idea that class is not permanent, like skin color. But it is intractable, as writers like Thomas Piketty (*Capital in the Twenty-First Century*)<sup>36</sup> have been pointing out. Countries like the United States, which protect labor rights only weakly and disdain socialized medicine, universal childcare, and free university education, find it easy to blame the poor and attribute their condition to poor work habits and a culture of dependency.”

“Easy to do,” he conceded. “For everyone has heard about the rare genius who rises from the lower ranks to a life of fame and fortune. But most poor people do not.”<sup>37</sup>

---

Indeed, shortly after our conversation concluded, the Supreme Court ruled much as predicted. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023).

34. See Richard Delgado, *Children’s Rights to a Livable Future*, 71 ALA. L. REV. 261, 263, 286–89 (2019) (introducing “Gus,” Rodrigo’s adventurous thirteen-year-old son).
35. 411 U.S. 1, 70 (1973) (Marshall, J., dissenting).
36. See generally THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., Harvard Univ. Press ed. 2017) (2013).
37. See generally Richard Delgado, *The Myth of Upward Mobility*, 68 U. PITT. L. REV. 882 (2007) (reviewing MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH* (2005) and CHARLES MURRAY, *IN OUR HANDS: A PLAN TO REPLACE THE WELFARE STATE* (2006)) (discussing barriers in the way of upward mobility in the U.S.).

“Somebody we know wrote about that,”<sup>38</sup> I said. “Upward mobility remains relatively rare. The poor, as they say, are always with us, and the class of poor people remains very similar in size, and even in composition, generation after generation.<sup>39</sup> A courageous judge could easily announce one day, ‘That’s what I mean by immutable,’ cite Thurgood Marshall, and use strict scrutiny to lift some of the burden from the poor, as the Court did in *Gideon v. Wainwright*,<sup>40</sup> but in one area—criminal procedure—alone.”

## II. IN WHICH RODRIGO AND THE PROFESSOR DISCUSS INTEREST CONVERGENCE AND THE POOR

Rodrigo paused for a second to drain his coffee cup and stole a quick look at my coffee maker. I asked if he would like a refill.

“Thanks,” he said. “Maybe in a minute. It seems we agree that increased judicial solicitude for the poor is at least technically feasible. A new legal movement, the ClassCrits, has been pointing that out.<sup>41</sup> But relief is unlikely to arrive without a strong outside motivation comparable to the combination of forces that led to the breakthrough for Black schoolchildren in *Brown v. Board of Education* in 1954.”<sup>42</sup>

“Do you mean a new international competitor similar to the Soviet Union that prompted decision-makers in the early fifties to enact a major breakthrough for American Blacks?”

He nodded. So on a hunch I added, “And I bet you think that the new competitor is China. But before we go on, how about that second cup of coffee?”

“Yes, on both counts,” he said.

As he walked over to my coffee maker, cup in hand, I said, “It’s certainly true that China has been making waves with its Belt and Road initiative.<sup>43</sup> I’m sure countries in the developing world have been paying attention.”

---

38. *Id.*

39. *Id.* at 879.

40. *See supra* text accompanying notes 9, 11–12.

41. *ClassCrits Mission Statement*, CLASSCRITS, [https://www.classcrits.org/content.aspx?page\\_id=22&club\\_id=459418&module\\_id=275558](https://www.classcrits.org/content.aspx?page_id=22&club_id=459418&module_id=275558) [<https://perma.cc/C9DT-8P4L>] (click on “Mission Statement” link) (describing the organization as a network of academics and activists focused on economic justice, and describing its programs).

42. 347 U.S. 483, 492–94 (1954) (explaining the importance of education in “awakening the child to cultural values” and that separating children in school based on race “generates a feeling of inferiority . . . that may affect their hearts and minds in a way unlikely to ever be undone”).

43. *See* David E. Sanger & Mark Langer, *Biden Tries to Rally G7 Nations to Counter China’s Influence*, N.Y. TIMES, (June 12, 2021), <https://>

“They have been,” he said. “And our leaders in Washington have been noticing. Giannina and I were looking into this recently. Are you interested in what we found?”

“Very much so,” I said. “Although I can see obstacles that might lie in the way of legal protection for working-class people even in the face of foreign competition.<sup>44</sup> Incidentally, you can ignore that blinking light on my new coffee maker. I have no idea what it does.”

### III. IN WHICH RODRIGO AND THE PROFESSOR CONSIDER HOW INTEREST CONVERGENCE MAY BE PUTTING CLASS ON THE FRONT BURNER

#### *A. China: The Reality and the Threat*

He examined the machine, picked it up to take a closer look, and said, “I think it’s a warning light. Some of these new models have a sensor that tells you when it’s running low. That way, you don’t burn the bottom of the carafe.”

He emptied the pot into his cup and said, “See, it went off. Interest convergence.”

I thanked him for helping me, once again, cope with modern technology. He then whipped out a well-worn sheet of paper and began. “It seems China claims that it has completely eliminated absolute poverty.<sup>45</sup> Only a few years ago, many of its citizens were desperately poor.<sup>46</sup> They accomplished much of this through massive infrastructural improvements that confer benefits on all its citizens, such as the one

---

[www.nytimes.com/2021/06/12/world/europe/biden-china-g7.html](https://www.nytimes.com/2021/06/12/world/europe/biden-china-g7.html) [https://perma.cc/AQ6E-NJPU]. See also James McBride, Noah Berman & Andrew Chatzky, *China’s Massive Belt and Road Initiative*, COUNCIL ON FOREIGN RELS., (Feb. 2, 2023, 4:30 PM), <https://www.cfr.org/backgrounder/chinas-massive-belt-and-road-initiative> [https://perma.cc/5HZG-S7YN].

44. See *infra* Part V.

45. Press Release, World Bank, *Lifting 800 Million People out of Poverty—New Report Looks at Lessons from China’s Experience* (Apr. 1, 2022), <https://www.worldbank.org/en/news/press-release/2022/04/01/lifting-800-million-people-out-of-poverty-new-report-looks-at-lessons-from-china-s-experience> [https://perma.cc/K5AF-AU5L]; Spencer Bowley, Note, *Learning from History: Predicting the Development of Class-Based Interest Convergence*, 101 B.U. L. REV. ONLINE 125, 132 (2021) (noting that China says it has brought its poverty rate to near zero from 99 million only eight years ago). See also Richard Delgado & Jean Stefancic, *Does Interest Convergence Today Offer Opportunities for the Working Class, Much as It Did for Minorities in the Fifties and Sixties?* 101 B.U. L. REV. ONLINE 148, 149–50 (2021) (building on some of Bowley’s findings).

46. Bowley, *supra* note 45, at 132; Delgado & Stefancic, *supra* note 45, at 149–50.

you just mentioned.<sup>47</sup> Uncommitted nations in Africa, Latin America, the Middle East, and elsewhere have taken note and begun pursuing trade, economic, and strategic relations with China.”<sup>48</sup>

“This sounds interesting. Tell me about some of them.”

“Iran, for example, negotiated a broad coalition with it, covering trade, culture, politics, and mutual security.<sup>49</sup> Brazil entered into a deal to sell iron ore and agricultural products that China needs to feed a growing population.<sup>50</sup> According to the Council for Foreign Relations, it has been developing commercial ties with Oceania, Africa, and several countries in Asia and even begun purchasing farmland in Latin America, probably with a view to hiring local workers to tend the crops.”<sup>51</sup>

---

47. See *supra* text accompanying note 43.

48. McBride et al., *supra* note 43. See also Chris Buckley, ‘*The East is Rising*’: *Xi Maps Out China’s Post-Covid Ascent*, N.Y. TIMES (Sept. 9, 2021), <https://www.nytimes.com/2021/03/03/world/asia/xi-china-congress.html> [<https://perma.cc/WN7M-2RTM>] (reporting President Xi’s emphasis on China’s healthy economy coming out of the COVID-19 pandemic); Jonathan Gilbert, Andrew Rosati & Ethan Bronner, *China Finds a New Way to Dominate the U.S. in South America*, BLOOMBERG LAW, (Feb. 17, 2022, 4:00 PM), <https://www.bloomberg.com/news/articles/2022-02-17/china-is-south-america-s-top-trading-partner-why-can-t-the-us-keep-up> [<https://perma.cc/2JFE-B96Z>] (noting China’s rise in South America).

49. Associated Press, *Iran, China Sign Strategic Long-Term Cooperation Agreement*, POLITICO, (Mar. 27, 2021, 8:20 AM), <https://www.politico.com/news/2021/03/27/iran-china-agreement-478236> [<https://perma.cc/E5JF-5SYM>]; Alam Saleh & Zakiyeh Yazdanshenas, *Iran’s Pact with China Is Bad News for the West*, FOREIGN POL’Y (Aug. 9, 2020, 1:00 AM), <https://foreignpolicy.com/2020/08/09/irans-pact-with-china-is-bad-news-for-the-west> [<https://perma.cc/ZFP3-XVS6>] (discussing the agreement with Iran).

50. See Celio Hiratuka, *Why Brazil Sought Chinese Investments to Diversify Its Manufacturing Economy*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Oct. 18, 2022) <https://carnegieendowment.org/2022/10/18/why-brazil-sought-chinese-investments-to-diversify-its-manufacturing-economy-pub-88194> [<https://perma.cc/88NF-K5LE>]; Kenneth Rapoza, *Brazil Is Back to Being a China Story*, FORBES (June 4, 2020, 7:00 AM), <https://www.forbes.com/sites/kenrapoza/2020/06/04/brazil-is-back-to-being-a-china-story/?sh=77cc5c962f88> [<https://perma.cc/WGT7-ZFEZ>] (discussing Brazil’s intention to develop commercial ties with China).

51. McBride et al., *supra* note 43 (noting China’s aggressive rise). Chinese business leaders are beginning to set up factories in northern Mexico to supply materials and parts to U.S. industries unwilling to incur the costs and disruptions of long supply chains. See Peter S. Goodman, *Why Chinese Companies Are Investing Billions in Mexico*, N.Y. TIMES, (June 20, 2023), <https://www.nytimes.com/2023/02/03/business/china-mexico-trade.html> [<https://perma.cc/7VFG-D483>].

“Kind of a reverse-Bracero program,” I said in wonder. “I’m sure you remember those wartime programs that enabled Mexican farmworkers to enter the country under short-term visas.”<sup>52</sup>

“I do. And the Chinese are even looking to acquire farms in economically depressed parts of the United States<sup>53</sup> and giving Latin American countries vaccines as a way of currying favor there.”<sup>54</sup>

*B. U.S. Power Brokers Taking Notice*

“Impressive,” I conceded. “I imagine that little of this has escaped the attention of our foreign policy establishment.”

“It hasn’t,” he said. “U.S. leaders seem as wary of China’s current threat to our hegemony as their counterparts in the Department of State and Justice were in the days of Cold War competition with the Soviets.”<sup>55</sup>

“Can you give me an example or two?”

“Sure.” He fished out a second sheet of paper from his coat pocket and said, “The U.S. Trade Ambassador recently warned that without decisive action, including severe sanctions, China is apt to gain the lead

---

52. See 1942: *Bracero Program*, LIB. OF CONG., <https://guides.loc.gov/latinx-civil-rights/bracero-program> [<https://perma.cc/H4MA-P66N>].

53. See Lars Erik Schönander & Geoffrey Cain, *China Is Buying the Farm*, WALL ST. J. (Sept. 8, 2022, 6:29 PM), <https://www.wsj.com/articles/the-chinese-are-buying-the-farm-north-dakota-hong-kong-land-food-shortage-supply-chain-usda-11662666515> [<https://perma.cc/S894-BRZZ>]; J. David Goodman, *How U.S.-China Tensions Could Affect Who Buys the House Next Door*, N.Y. TIMES (Feb. 7, 2023), <https://www.nytimes.com/2023/02/07/us/texas-china-ownership-real-estate-ban.html> [<https://perma.cc/PJ5J-89Y5>] (noting that “Chinese owners have very slowly expanded their holdings in U.S. agricultural land in recent decades”).

54. See MARÍA EUGENIA BRIZUELA DE ÁVILA, RIYAD INSANALLY, CLAUDIA TREVISAN & BOSCO MARTI, ATL. COUNCIL, *US-CHINA VACCINE DIPLOMACY: LESSONS FROM LATIN AMERICA AND THE CARIBBEAN* 3–4 (2022), <https://www.atlanticcouncil.org/wp-content/uploads/2022/02/US-China-vaccine-diplomacy-Lessons-from-Latin-America-and-the-Caribbean.pdf> [<https://perma.cc/Z5M5-CG36>]. China may already be the top trading partner with South America. Ciara Nugent & Charlie Campbell, *The U.S. and China Are Battling for Influence in Latin America, and the Pandemic Has Raised the Stakes*, TIME (Feb. 4, 2021, 6:07 AM), <https://time.com/5936037/us-china-latin-america-influence/> [<https://perma.cc/MPE9-Q73Q>] (noting China’s aggressive expansion in Panama).

55. Compare MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 48, 56, 58–61 (2000) (noting that a host of establishment figures were keeping a wary eye on Soviet overtures to developing countries), with Richard Delgado, *Rodrigo’s Roundelay: Hernandez v. Texas and the Interest-Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23, 25, 28, 36 (2006) (noting the same skepticism in connection with a Supreme Court decision expanding Latinx civil rights and protection in jury trials).

in technology, which will strengthen that country's appeal to developing nations.<sup>56</sup> And a Chinese spokesman announced that his country stands ready to fill some of Afghanistan's needs in the wake of America's unceremonious withdrawal,<sup>57</sup> while another warned a visiting U.S. Deputy Secretary of State that his country's rise is unstoppable.<sup>58</sup>

"Didn't President Xi say the same thing just the other day?" I asked.

"He did. On the hundredth anniversary of China's communist party.<sup>59</sup> So all this comes straight from the top."

*C. Pressure Arising from Within the U.S.*

"Sobering," I said. "An early warning system, like that light on my coffee maker. But with *Brown v. Board of Education*, you had not only international competition fueling the breakthrough, but also *internal* pressure as well. Black servicemen and women were returning home from foreign wars, where they had risked their lives fighting monolithic, atheistic communism. They were unlikely to settle back into former lives of menial work and 'yes sir, no sir.' A spectacular breakthrough

- 
56. Robert E. Lighthizer, *America Shouldn't Compete with China with One Arm Tied Behind Its Back*, N.Y. TIMES (July 27, 2021), <https://www.nytimes.com/2021/07/27/opinion/us-china-trade-tariffs.html?searchResultPosition=1> [<https://perma.cc/S29C-5C5Z>]; Edward Alden, *Trump's Trade Warrior Takes the Fight to Beijing*, POLITICO (Feb. 13, 2019), <https://www.politico.com/magazine/story/2019/02/13/donald-trump-bob-lighthizer-china-trade-225025/> [<https://perma.cc/Y4VE-W4YH>].
57. Zhou Bo, *In Afghanistan, China Is Ready to Step into the Void*, N.Y. TIMES (Aug. 20, 2021), <https://www.nytimes.com/2021/08/20/opinion/china-afghanistan-taliban.html?smtyp=cur&smid=tw-nytopinion> [<https://perma.cc/A4YG-MZTD>] (noting that China has been making overtures toward Afghanistan's new leadership); *see also* Fareed Zakaria, *GPS*, CNN AUDIO (Aug. 22, 2021), <https://www.cnn.com/audio/podcasts/fareed-zakaria-gps/episodes/8bfd8aa7-3452-4f80-92a9-ad8c00ff03b7> [<https://perma.cc/D9KX-E6AK>] (discussing the repercussions of U.S. troops' withdrawal from Afghanistan).
58. *See* Chris Buckley & Steven Lee Myers, *From 'Respect' to 'Sick and Twisted': How Coronavirus Hit U.S.-China Ties*, N.Y. TIMES (July 14, 2021), <https://www.nytimes.com/2020/05/15/world/asia/coronavirus-china-united-states-cold-war.html> [<https://perma.cc/JW9D-87DT>] (reporting developments in the world of economic and political competition).
59. Lucas Niewenhuis, *China's Rise Is 'Unstoppable,' Xi Declares in Tiananmen Speech Marking 100th Anniversary of CCP*, CHINA PROJ. (July 1, 2021), <https://thechinaproject.com/2021/07/01/chinas-rise-is-unstoppable-xi-declares-in-tiananmen-speech-marking-100th-anniversary-of-ccp/> [<https://perma.cc/95UN-TVLN>]; Chris Buckley & Keith Bradsher, *Marking Party's Centennial, Xi Warns that China Will Not Be Bullied*, N.Y. TIMES (Sept. 21, 2023), <https://www.nytimes.com/2021/07/01/world/asia/xi-china-communist-party-anniversary.html> [<https://perma.cc/T538-4EJQ>].

for Black civil rights would go far to ward off domestic unrest as well as position the United States favorably in competition for the loyalties of uncommitted nations.<sup>60</sup> Is something similar going on today?”

“It is!” he practically shouted. “Professor, I love the way you push me. Blue-collar populism is just now starting to challenge the wealth gap and other manifestations of class bias<sup>61</sup> and not just from the left-hand side of the compass or mere students.<sup>62</sup> A number of conservative organizations, and even Trump in his last days in office, have charged that liberal programs, such as green energy, will only enrich causes and sectors dear to the left and urged that new ones start at the local level, incentivize people to work, and include members of blue-collar organizations like the National Guard.”<sup>63</sup>

I must have widened my eyes again, for I recalled that the *New York Times* had only recently urged that the United States increase spending on K–12 education, infrastructure, and other programs favored by blue-collar people and the middle class, precisely to counter China’s \$1.2-trillion Belt and Road plan.<sup>64</sup>

---

60. See RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 23–24 (4th ed. 2023).

61. See William A. Galston, *Right-Wing Populism May Rise in the U.S.*, WALL ST. J. (Sept. 27, 2022, 12:35 PM), <https://www.wsj.com/articles/right-wing-populism-may-rise-in-the-u-s-giorgia-meloni-italy-europe-immigration-working-class-college-educated-11664277816> [<https://perma.cc/Q2FR-PUQ2>].

62. See *id.*

63. See, e.g., *Welfare*, HERITAGE FOUND., <https://www.heritage.org/welfare/heritage-explains/welfare> [<https://perma.cc/FS5P-RDRY>] (setting out the organization’s basic position against additional welfare spending and advocating for welfare reform); David Ditch, *Democrats’ Budget Agreement Would Burn the Economy*, HERITAGE FOUND. (July 19, 2021), <https://www.heritage.org/budget-and-spending/commentary/democrats-budget-agreement-would-burn-the-economy> [<https://perma.cc/3AKC-YVGC>] (arguing that an infrastructure spending bill with funding for programs like the Green New Deal will “create the largest expansion of welfare benefits since the 1960s” and “build a cradle-to-grave welfare state”). See also Deidra Miniard, Joe Kantanbacher & Shahzeen Attari, *Both Liberals and Conservatives Want a Green Energy Future, but for Different Reasons*, THE CONVERSATION (May 5, 2020, 8:20 AM), <https://theconversation.com/both-conservatives-and-liberals-want-a-green-energy-future-but-for-different-reasons-134534> [<https://perma.cc/HD6J-5VEE>] (asserting that Republican support for renewable energy is based on the desire to reduce energy costs, not to curb climate change).

64. Farah Stockman, ‘*China Has Risen.*’ *And It Is Hungry for Competition.*, N.Y. TIMES (June 30, 2021), <https://www.nytimes.com/2021/06/30/opinion/china-us-competition.html> [<https://perma.cc/5GU5-67ZJ>] (observing that China wants to beat the United States at its own game).

Rodrigo jotted something down, looked up, and said, “And of course Biden’s administration is beginning to move in this direction,<sup>65</sup> with measures aimed at improving infrastructure, and touting how they can create new jobs for working-class people without college degrees.”<sup>66</sup>

*D. The Judiciary Beginning to Take Notice*

“What about courts and the judiciary?” I asked. “We talked recently about sixties-era innovations like implied warranty of habitability in housing law, unconscionability in consumer transactions, and no-fault divorce.<sup>67</sup> Are courts weighing in today much as they were in the era of Cold War competition?”

“Just beginning to,” he said. “Beginning with relief from student debt,<sup>68</sup> predatory mortgages,<sup>69</sup> and noxious dumps and waste sites located in poor communities.<sup>70</sup> Some are considering holding businesses responsible for climate change.”<sup>71</sup>

“And you think this trend will continue?”

---

65. *See id.*

66. President Joseph R. Biden, State of the Union Address (Feb. 7, 2023) (transcript available at <https://www.whitehouse.gov/state-of-the-union-2023/> [<https://perma.cc/CFQ6-7FDR>]) (noting that his administration has created many such jobs and intends to create even more).

67. *See* Richard Delgado & Jean Stefancic, *Do Judges Cry? An Essay on Empathy and Fellow-Feeling*, 70 CASE W. RES. L. REV. 23, 34 & n.86 (2019) (discussing these and other sixties-era reforms).

68. *See* Eric Levitz, *Has Biden Abandoned Wide-Scale Student-Loan Forgiveness?*, N.Y. MAG.: INTELLIGENCER (Aug. 20, 2021), <https://nymag.com/intelligencer/article/biden-student-loan-forgiveness.html> [<https://perma.cc/Z5W2-39RL>] (discussing President Biden’s hopes of enacting a student debt relief program).

69. Richard Wolf, *Supreme Court Says Cities Can Sue Banks over Predatory Loans*, USA TODAY (May 1, 2017, 1:45 PM), <https://www.usatoday.com/story/news/politics/2017/05/01/supreme-court-says-cities-can-sue-banks-over-predatory-loans/100890224/> [<https://perma.cc/XV45-VE2J>].

70. *See* LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 31–33 (2001) (discussing how liberal lawyers fomented a revolution in consciousness regarding environmental hazards in poor communities).

71. *MONTANA: Judge Sides with Youth Plaintiffs in Climate Case*, ENV’T NEWS SERV. (Aug. 11, 2021), <https://ens-newswire.com/montana-judge-sides-with-youth-plaintiffs-in-climate-case/> [<https://perma.cc/HTC9-4CZ3>] (noting recent such cases that have survived summary judgment and seem bound for trial in the near future). For a comprehensive list of climate change litigation worldwide, see the Climate Change Litigation Databases compiled by Columbia Law School’s Sabin Center for Climate Change Law. *Climate Change Litigation Databases*, CLIMATE CASE CHART, <https://climatecasechart.com/> (last visited Jan. 15, 2024).



“It might,” he said. “The law is conservative and slow to change.<sup>72</sup> But the poor are beginning to realize that without concerted action, they are apt to remain stuck, unlikely to win a fortune in a lottery or game show, or be discovered by a talent scout for Hollywood or a record company.<sup>73</sup> Even the *Washington Post* agrees that future prospects for the poor are little brighter than they were.<sup>74</sup> Keeping up the pressure is the only way to create a second wave of reform.”

*E. Class Interest Rising*

“It’s kind of sobering when you hear it all at once,” I conceded. “Of course, that ClassCrit movement you referred to seems to be doing its best to get things rolling.<sup>75</sup> We may not be Finland or another highly socialized society in which a smart child of working-class parents may go to a top state university, graduate, and open a business or lead a good life as a machinist in a safe, well-run factory making world-class cars.<sup>76</sup>

“But by putting pressure on during times of international competition, working-class people may, perhaps, win concessions from the ruling class, just as Black Americans did in the aftermath of *Brown v. Board of Education*.<sup>77</sup> I think you’re right about that. Even conservative think tanks are beginning to add to the pitch.”<sup>78</sup>

- 
72. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2749, 2751 (2014) (coining the term “demosprudence” to describe new efforts to effectuate social change through judicial rulemaking).
73. See, e.g., Eyal Press, Opinion, *America Runs on ‘Dirty Work’ and Moral Inequality*, N.Y. TIMES (Aug. 13, 2021), <https://www.nytimes.com/2021/08/13/opinion/us-dirty-work.html> [<https://perma.cc/5NST-6UHP>] (implying that prison guards, meat-processing workers, and others who perform “dirty work” are beginning to mobilize against unfair wages and conditions).
74. See Editorial, *The U.S. Is Growing More Unequal. That’s Harmful—and Fixable*, WASH. POST (July 16, 2021, 11:16 AM), <https://www.washingtonpost.com/opinions/2021/07/16/sharing-the-wealth/> [<https://perma.cc/YP9R-LPTS>] (discussing the need for proposals to redistribute wealth and improve the social safety net).
75. See *supra* notes 41–42 and accompanying text (discussing the ClassCrits organization).
76. See Partanen & Corson, *supra* note 6.
77. 347 U.S. 483, 495 (1954) (ruling that separate-but-equal public education violates equal protection of the law).
78. See, e.g., Eric Posner, *You Deserve a Bigger Paycheck. Here’s How You Might Get It.*, N.Y. TIMES (Sept. 23, 2021), <https://www.nytimes.com/2021/09/23/opinion/antitrust-workers-employers.html> [<https://perma.cc/5FSJ-VG8B>] (providing links to economic papers from conservative think tanks and discussing how in industries where workers have little choice among employers, employers can “charge” low wages); Thomas L.

### 1. The Wealth Gap

We paused for a moment while I shuffled some papers. “Speaking of think tanks, I was just reading . . . Oh, here it is,” I said, picking up a journal that lay half-open on my desk, “that the United States suffers a wealth gap that international observers and economists are beginning to find worrisome.<sup>79</sup> The Pew Research Center noted that the richest 5 percent of families in the United States nearly doubled their wealth in a recent period, while that of the rest of the population stagnated.<sup>80</sup> The median net worth of the wealthiest 20 percent of Americans increased 13 percent to \$1.2 million.<sup>81</sup> By contrast, for families in the second quintile of wealth, it fell 39 percent to \$19,500 in the same period.<sup>82</sup> Between 1989 and 2016, the ratio of wealth between the richest 5 percent of families and families in the second quintile increased from 114 to 248.”<sup>83</sup>

### 2. Little Upward Mobility Among the Working Class

“I had no idea,” he said. “I’d like the citation to that report, if it’s not too much trouble.”

“Not at all,” I said. I scribbled it down on a sticky note and shook my hand vigorously when it refused to let go. “Here it is. It’s a gold mine. It seems that not only are low-wealth families losing ground compared to their richer counterparts,<sup>84</sup> the same is true for earnings. Income inequality is now greater here than in any other highly developed society.<sup>85</sup> With low salaries, as well as income, the poor in America can’t readily invest in the stock market, open a business other than the

---

Friedman, *China to America: Your Imperial Decline Is Showing*, SEATTLE TIMES (Mar. 26, 2021, 7:41 PM), <https://www.seattletimes.com/opinion/china-to-america-your-imperial-decline-is-showing/> [<https://perma.cc/XQ76-ULQX>] (“China can still get big things done. America not so much.”).

79. See Anshu Siripurapu, *The U.S. Inequality Debate*, COUNCIL ON FOREIGN RELS. (Apr. 20, 2022, 5:14 PM), <https://www.cfr.org/backgrounder/us-inequality-debate> [<https://perma.cc/LH2P-6LNE>].

80. Juliana Menasce Horowitz, Ruth Igielnik & Rakesh Kochhar, *Most Americans Say There Is Too Much Economic Inequality in the U.S., but Fewer Than Half Call It a Top Priority*, PEW RSCH. CTR. (Jan. 9, 2020), <https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-ineq> [<https://perma.cc/XX4S-P8ZR>].

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

smallest kind, or enroll in a top college. A family in the lowest echelon has virtually no chance of ending up anywhere near the top.”<sup>86</sup>

“So populism does not just arise from resentment or watching too many movies about the lives of the rich and famous,” he said. “The poor and the working class are stuck, with little realistic prospect of improving their position. Just like that sticky note of yours that wouldn’t let go.”

“I wonder if the government will intervene at some point,” I mused, “if only to stave off disruption.”

“Beginning around 1954 and lasting for two decades, it did,” he said. “But mainly for minorities. Today, with homeless people, single mothers, and a few of what it considers the deserving poor, the Biden administration is beginning to offer concessions, whether out of idealism, political self-interest, or both.”<sup>87</sup> Capitalism may soon find it to its advantage to produce breakthroughs, and not just to select groups, but broadly. Do you agree?”

#### IV. IN WHICH RODRIGO AND THE PROFESSOR DISCUSS CRITICAL ECONOMICS

“Possibly,” I said. “In one way of looking at it, capitalism is a kind of shell game. As Marx pointed out, it requires a constant stream of new markets—in his day, colonies—to sustain itself.”<sup>88</sup> Factory workers, for example, do not get to take home the full value of what they produce. The ‘surplus value’ theory of labor holds that a business owner, having invested money and undergone risk, takes a certain amount of the value produced by the worker’s labor for himself in the form of profit.”<sup>89</sup>

“So the whole thing is unstable?”

---

86. See Delgado, *supra* note 37, at 879–80, 901–03, 907 (noting the small amount of upward mobility, particularly for those mired near the bottom).

87. See Tracy Jan, *Biden Stimulus Targets Homelessness with \$5 Billion in First Set of Grants*, WASH. POST (Apr. 8, 2021, 3:52 PM), <https://www.washingtonpost.com/us-policy/2021/04/08/homeless-hud-marcia-fudge/> [https://perma.cc/QYF3-KJ89]. See also *supra* notes 64–67 and accompanying text; *infra* note 96 and accompanying text (discussing additional such programs in President Biden’s agenda).

88. See generally MARX, *supra* note 26.

89. *Id.*; see also RICHARD DELGADO, LETICIA M. SAUCEDO, MARC-TIZOC GONZÁLEZ, JEAN STEFANCIC & JUAN F. PEREA, *LATINOS AND THE LAW: CASES AND MATERIALS* 717 (2d ed. 2021) (suggesting that similar dynamics operate in connection with Latino farm labor).

“According to Marx and his followers, it is. I think we may have discussed this once.<sup>90</sup> In some industries, such as manufacturing, the skimming is more overt and exploitive than in others. In the typical law firm, for example, the work is hierarchical, but the manner in which those at the top of the hierarchy, the partners, profit from the labor of the underlings, the associates, is somewhat hidden from view and generally accepted.”<sup>91</sup>

“But now,” I said, “consciousness is rising in formerly colonized countries at the same time that a new power, China, is offering solidarity and attractive trading deals.<sup>92</sup> At times like this, a mature nation like the United States will find it in its interest to create or discover new *internal* markets to buy the products and services that formerly supported an unstable pyramid.”

“And those new markets,” he added, “would logically have to be either the current U.S. poor<sup>93</sup> or else new immigrants eager to buy products like refrigerators, used cars, and convenience food at neighborhood outlets.<sup>94</sup> Is that what you are getting at?”

“It is,” I said. “Unless the system puts more money into the pockets of blue-collar people and the working class, the economy will suffer a crisis.<sup>95</sup> It is only a matter of time before national leaders realize how

- 
90. Richard Delgado, *Rodrigo's Bookbag: Brimelow, Bork, Herrnstein, Murray, and D'Souza—Recent Conservative Thought and the End of Equality*, 50 STAN. L. REV. 1929, 1938–40 (1998).
91. See JEAN STEFANCIC & RICHARD DELGADO, HOW LAWYERS LOSE THEIR WAY: A PROFESSION FAILS ITS CREATIVE MINDS 64 (2005) (discussing high-pressure workplaces and the associate-partner pyramid of law-firm organization).
92. *E.g.*, Farnaz Fassihi & Steven Lee Myers, *China, with \$400 Billion Iran Deal, Could Deepen Influence in Mideast*, N.Y. TIMES (Mar. 29, 2021), <https://www.nytimes.com/2021/03/27/world/middleeast/china-iran-deal.html> [https://perma.cc/98LP-RZZP] (discussing Chinese plan to gain influence in the Mideast). See also *supra* notes 45–58 and accompanying text.
93. With new money in their pockets, that is, from new and better jobs or from a strengthened welfare safety net.
94. See Robert Leonard & Matt Russell, *Why Rural America Needs Immigrants*, N.Y. TIMES (July 21, 2021), <https://www.nytimes.com/2021/07/21/opinion/rural-america-immigrants.html> [https://perma.cc/Q3XZ-K3ZF] (noting that the population loss in many rural communities puts them in danger of becoming ghost towns and suggesting that “flexible visa programs . . . could address the problem quickly”).
95. Era Dabla-Norris, Kalpana Kochhar, Evridiki Tsounta, *Growth's Secret Weapon: The Poor and the Middle Class*, INT'L MONETARY FUND BLOG (June 15, 2015), <https://www.imf.org/en/Blogs/Articles/2015/06/15/growths-secret-weapon-the-poor-and-the-middle-class> [https://perma.cc/88XB-VHYL].

precarious the situation is and take steps to stabilize it. The foreign service establishment will press them as well.”<sup>96</sup>

## V. OBSTACLES IN THE WAY OF PROGRESS FOR THE POOR

“Earlier, you expressed doubt that this will happen any time soon,” he said. “Before I dash off to meet Giannina at the train station, could you run your reasons past me? That way, I can share them with her on the way back.”

### *A. Upstairs, Downstairs, and the Problem of Internalized Oppression*

We both heard a slight shuffling from outside my office door. “It sounds like someone is waiting,” I said. “So let me run through them quickly. One is that many poor people may eschew class consciousness and identify with their masters, the rich.”

“Hoping for favors, I suppose,” he said. “Or as in the British television series, *Upstairs Downstairs*, the butler takes on upper-class mannerisms and loyalties, even though he is not much better off than the scullery maid. If the staff stage a small revolt over, say, too little time off for the holidays, the butler may side with the family of the household, even though he, too, would benefit from time off to spend with his family and kids.”

“What’s the next one?” He sneaked a quick look at his watch, so I resolved to sketch my final two reservations as succinctly as possible.

### *B. Red-Baiting and the Problem of the Fearful Judge or Bureaucrat*

“A second problem,” I began, “comes up in connection with the members of the ‘upstairs’ contingent who are afraid of repercussions from those even higher up. They may shrink from enacting even modest reforms for fear that their peers and higher-ups will accuse them of being soft on communism or being closet socialists.”

### *C. Objections from Racial Minorities Eager to Remain at the Center of Attention*

“And the third?” he asked.

“It’s the reaction I heard from you earlier. You expressed surprise at the idea that I, a long-time race reformer, was prepared to put race on the back burner in favor of mitigating repressive social structures for the working class. If even small numbers of minorities side with white hegemony to oppose measures like cancellation of student debt, merely because they will redound to the benefit of some struggling whites, the path forward will indeed be long and difficult.”

---

96. See, e.g., Tyler Pager & Tony Romm, *At an Economic Inflection Point, Biden Leans into Expansive Populist Agenda*, WASH. POST (Sept. 16, 2021, 5:55 PM), <https://www.washingtonpost.com/politics/2021/09/16/biden-economy/> [<https://perma.cc/JF76-VUNU>] (discussing President Biden’s “dramatic expansion of the country’s social safety net”).

Rodrigo pricked up his ears, as though hearing something outside. “I think that could easily happen, Professor, particularly with hard-core minority leaders and organizations—nationalists, in short. Programs like the ones you mentioned may well leave them cold.”

“Or strike them as less worthy than ones, like affirmative action, that target Black folks directly,” I added.

“I may have to be leaving pretty soon, Professor, and want to mention a possible ray of hope. Even if, as you say, some upward-striving minorities—white wannabes<sup>97</sup>—side with whites and against their own struggling brothers and sisters, might we not end up with a surprising new set of allies?”

“And who might that be?”

“Poor whites. Remember the old-time radical you mentioned earlier?<sup>98</sup> In his answer to a journalist’s question about the upcoming affirmative action case, Richard Kahlenberg pointed out that ending affirmative action may have an unintended benefit for minorities, namely improving solidarity between poor Blacks and the white working class.<sup>99</sup> As he put it, ‘If you want working-class white people to vote their race, there’s no better way to do it than to give explicitly racial preferences in deciding who gets ahead in life.’<sup>100</sup> By the same token, ‘if you want working-class whites to vote their class, you would try to remind them that they have a lot in common with working-class Black and Hispanic people.’”<sup>101</sup>

## CONCLUSION

Our conversation quickly concluded. We both heard the train whistle from the station two blocks away, and my visitor quickly gathered his things, thanked me, and departed, vowing to get together again soon. After he left, I went over what we had discussed.

I thought he and Giannina had a point in holding that it was time for thinkers to begin focusing on class, even though he seemed taken aback at some of the implications of his own thesis. In particular, he

---

97. See *supra* Part V(A) (discussing minorities who side with the oppressor in an effort to better their own personal circumstances).

98. See generally KAHLENBERG, *supra* note 31 and accompanying text.

99. See Anemona Hartocollis, *The Liberal Maverick Fighting Race-Based Affirmative Action*, N.Y. TIMES (Apr. 3, 2023), <https://www.nytimes.com/2023/03/29/us/richard-kahlenberg-affirmative-action.html> [<https://perma.cc/YXH5-SCGZ>] (reporting Richard Kahlenberg’s comments on the then-upcoming Supreme Court decision in the 2023 affirmative action cases against Harvard and University of North Carolina).

100. *Id.*

101. *Id.*

seemed shocked to learn that I not only agreed but was prepared to put racial analysis aside for a time in favor of focusing on class.

I thought that competition from China for the loyalties of uncommitted nations, particularly those in need of rapid development, could easily spur concessions for struggling people in regions of intense poverty, such as Appalachia and certain inner cities, and wondered how our two law schools would handle the problem of their own students sleeping in cars.

Moments later, I started an email to the two of them raising a few questions for future analysis.<sup>102</sup> I had just returned, for comic relief, to my checkbook, which still would just not balance no matter what I did. In the midst of my dithering, I was interrupted by a hesitant knock on my door. Standing there was a young-looking student whom I vaguely remembered from an earlier class.

“Hi, Professor,” he said. “You may not remember me, but I’m Jaime Gonzalez, and I got an A in your class last year. I’m one of those students who has been sleeping in his car, and I’d like to talk to you about it.”

“Well, well,” I said, motioning him to come in and resolving to take careful notes.<sup>103</sup> “I gather you are not one of the ones who dropped out.”

He smiled and shook his head firmly.

“I’m very glad,” I said. “Please tell me about it.”

---

102. Specifically, I wanted their thoughts on whether a new movement of the kind we discussed might turn out to be more promising than might appear at first sight. Many critical race theorists might readily adapt their highly honed analytical skills to the new area, since race and class present a number of similar challenges. *See e.g., supra* Part II (discussing the challenge of locating and defining interest convergence). Some might readily agree to the transition, seeing it as a breather from withering attacks by white nationalist figures and legislatures. *See* Russell Contreras, *A Critical Race Theory Founder Says He is Being Inundated with Threats*, AXIOS (Dec. 3, 2021), <https://www.axios.com/2021/12/03/critical-race-theory-founder-threatening-messages> [<https://perma.cc/AUN5-XSWQ>]. Class analysis might also offer the opportunity for coalition with poor whites, as well as the promise of reforming a second central organizing principle for society, comparable in many ways to race.

103. Later, I was very glad I did. In a hunch, I located the campus newspaper article I had mentioned to Rodrigo when he had first arrived. Entitled “*Les Miserables on (Under) Campus*,” it described a small community of impoverished students and street people living in underground tunnels that had once served as heat conduits for the campus buildings. It also described the role of a law student named Jaime in organizing the residents into a union to demand better conditions from the authorities. *See generally* VICTOR HUGO, *LES MISÉRABLES* (1862). *See* Michael J. Mooney, *Light at the End of the Tunnel*, DESERET NEWS (Sept. 25, 2021, 12:00 AM), <https://www.deseret.com/2021/9/24/22689821/light-at-the-end-of-the-tunnel-las-vegas-tunnel-system-shine-a-light-paul-vautrinot> [<https://perma.cc/3RK2-LKEA>] (describing underground communities in contemporary Las Vegas that parallel the Parisian communities that Victor Hugo described in his writing).