



Fall 2014

## **Delgado's Darkroom: Critical Reflections on Land Titles and Latino Legal Education**

Richard Delgado

### **Recommended Citation**

Richard Delgado, *Delgado's Darkroom: Critical Reflections on Land Titles and Latino Legal Education*, 45 N.M. L. Rev. 275 (2014).

Available at: <https://digitalrepository.unm.edu/nmlr/vol45/iss1/9>

# DELGADO'S DARKROOM: CRITICAL REFLECTIONS ON LAND TITLES AND LATINO LEGAL EDUCATION

Richard Delgado\*

## ABSTRACT

Written in celebration of the life and achievements of Senator Dennis Chavez, this essay analyzes the intersection of two topics—civil rights and legal education—that lay close to the Senator's heart. A tireless crusader for justice who attended night law school at Georgetown in the 1920s and maintained a lifelong interest in legal education,<sup>1</sup> Chavez sponsored equal employment legislation,<sup>2</sup> pressed for Native American and Puerto Rican rights,<sup>3</sup> and defended the New Deal.<sup>4</sup> Born in New Mexico to a large family before statehood, he became the first United States senator of Latino heritage to serve a full term.<sup>5</sup>

---

\* John J. Sparkman Chair of Law, University of Alabama School of Law. J.D., University of California Berkeley, School of Law (Boalt Hall), 1974. This essay and celebration were sponsored by the Tristani family, Senator Dennis Chavez's descendants.

1. See *Chavez, Dennis*, HISTORY, ART, & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES (Oct. 11, 2014), <http://history.house.gov/People/Detail/10875?ret=True> (describing his early years and career in politics); ARTHUR R. GÓMEZ & CISSIE COY, CHAVEZ, EL SENADOR (1988) (describing Senator Chavez's life and thought); Rose Diaz, *Biography of Chavez*, THE DENNIS CHAVEZ FOUNDATION (Oct. 11, 2014), <http://www.dennischavez.org/archives/view/56/>; *About Us*, THE DENNIS CHAVEZ FOUNDATION (Oct. 11, 2014), [http://www.dennischavez.org/page/about\\_us/](http://www.dennischavez.org/page/about_us/) (information about the foundation dedicated to preserving his legacy).

2. See 150 CONG. REC. E1847 (Oct. 10, 2004) (remarks by Hon. Tom Udall); Diaz, *supra* note 1.

3. See Diaz, *supra* note 1.

4. See Diaz, *supra* note 1. Sen. Chavez also denounced Senator Joe McCarthy and his campaign against communist influences. See Remarks, *supra* note 2; ARCHIVES, *supra* note 1.

5. See Diaz, *supra* note 1.

## INTRODUCTION: THE CHEMICALS AND THE VAT

To clarify my opening metaphor, critical race theory<sup>6</sup> is the darkroom, and the photos soaking in the vat are recent land rights cases out of which I hope to develop a snapshot concerning Latino legal education, beginning in the late sixties and continuing until the present.<sup>7</sup>

My first article out of law school, published in the *New Mexico Law Review* forty years ago, discussed the legal education of Chicanos<sup>8</sup> and was written in Albuquerque with two University of New Mexico School of Law professors.<sup>9</sup> Between then and now, I have written and spoken on a host of topics.<sup>10</sup> But I keep coming back to this one.<sup>11</sup>

First, the darkroom. As the reader may know, critical race theory has been expanding recently in numerous directions, much like a photographer broadening his practice from wedding portraits into photojournalism and nature photography.

Following the early years when scholars such as Derrick Bell, Kimberle Crenshaw, Mari Matsuda, and Margaret Montoya wrote classic articles on interest convergence,<sup>12</sup> intersectionality,<sup>13</sup> and legal storytelling, the critical race theory movement spun off a number of subdisciplines, including critical Latino studies,<sup>14</sup> critical race feminism,<sup>15</sup> and

6. See RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2d ed. 2012) (discussing the movement).

7. See Part II *infra*, discussing four land rights cases.

8. See Leo M. Romero et al., *The Legal Education of Chicano Students: A Study in Mutual Accommodation and Cultural Conflict*, 5 N.M. L. REV. 177 (1975) (discussing how the changing composition of law school classes challenged the existing regime).

9. Leo Romero and Cruz Reynoso.

10. See *THE LAW UNBOUND! A RICHARD DELGADO READER* (Adrienne Katherine Wing & Jean Stefancic eds., 2010).

11. That is, the legal education of Chicanos and other minorities.

12. See Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (positing that the decision arrived as a result of a momentary convergence of majoritarian and minority interests); MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* (2000) (confirming Bell's hypothesis through an examination of official documents).

13. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (demonstrating how the interests of white and nonwhite feminists often diverge).

14. See, e.g., *LATINOS AND THE LAW: CASES AND MATERIALS* (Richard Delgado et al. eds., 2008) (discussing issues affecting Latinos).

queercrit theory.<sup>16</sup> The movement also expanded to a number of other fields, including psychology,<sup>17</sup> sociology,<sup>18</sup> education,<sup>19</sup> and postcolonial studies,<sup>20</sup> and migrated to other countries including England,<sup>21</sup> China,<sup>22</sup> New Zealand,<sup>23</sup> Canada,<sup>24</sup> and Australia,<sup>25</sup> where scholars employ its concepts to analyze the course of their own racial histories.<sup>26</sup>

The movement has also turned inward, examining the politics of daily life. Jean Stefancic shows how having an array of critical tools at one's disposal can help one recognize key moments in one's own life and take action.<sup>27</sup> For example, she points out how Derrick Bell seized oppor-

15. *E.g.*, CRITICAL RACE FEMINISM: A READER (Adrienne Katherine Wing ed., 2d ed. 2003) (discussing issues affecting women of color).

16. *E.g.*, SHANNON GILBREATH, THE END OF STRAIGHT SUPREMACY: REALIZING GAY LIBERATION (2011) (discussing gay rights from a critical perspective).

17. *See* James M. Jones, *Psychological Knowledge and the New American Dilemma of Race*, 54 (no. 4) J. Soc. Issues 641 (2013) (applying critical race theory to the field of psychology).

18. *See, e.g.*, *Critical Race Theory Overview*, UNIVERSITY OF MARYLAND DEPARTMENT OF SOCIOLOGY, <http://socy.umd.edu/research/critical-race-initiative-overview> (last visited Oct. 28, 2014) (discussing the role of race in social interaction).

19. *See* FOUNDATIONS OF CRITICAL RACE THEORY IN EDUCATION (Edward Taylor et al. eds., 2009) (discussing critical race theory in education).

20. *See* Chantal Thomas, *Critical Race Theory and Postcolonial Development Theory: Observations on Methodology*, 45 VILL. L. REV. 1195 (2000) (applying postcolonial theory to economic development law).

21. *See* DAVID GILLBORN, RACISM AND EDUCATION: CONSPIRACY OR COINCIDENCE? (2008) (discussing critical race theory in Great Britain).

22. *See* CRITICAL HAN STUDIES: THE HISTORY, REPRESENTATION, AND IDENTITY OF CHINA'S MAJORITY (Thomas Mullany et al. eds., 2012) (applying critical race theory to social relations in China).

23. Interview with Riki Kotua in Pittsburgh, Pa. (Mar. 2014); E-mail from Mr. Kotua to Richard Delgado (Feb. 11, 2014) (discussing interest convergence in New Zealand discourse and thought). *See also* Tania M. Ka'ai, *Indigenising the Academy: Indigenous Scholars as Agents of Change* (2005) (unpublished manuscript), available at <http://eprintstetumu.otago.ac.nz/7/> (discussing interest convergence in New Zealand discourse and thought).

24. *See* Carol A. Ayward, CANADIAN CRITICAL RACE THEORY: RACISM AND THE LAW (1999) (discussing critical race theory in Canada).

25. *E.g.*, Dominique Allen, *Periodic Peaks of Progress: Applying Derrick Bell's Interest Convergence Theory to the Mabo Decision*, 26 TASMANIA L. REV. 63 (2007) (applying critical race theory to developments in native land law); Kotua, *supra* note 23 (discussing the role of Olympic aspirations in ending the white Australia policy).

26. In Australia, for example, these histories include termination of indigenous land rights. *See infra* Part II and the White Australia Policy, which for many years discouraged immigration of nonwhites to that continent.

27. Jean A. Stefancic, *Discerning Critical Moments: Lessons from the Life of Derrick Bell*, \_\_U. PITT. L. REV. \_\_ (forthcoming 2014) (noting how critical tools can facilitate analysis of events in daily life).

tunities to challenge entrenched practices at a number of institutions, leaving them in a better condition than they were before he arrived.<sup>28</sup>

In this essay, I move both inward, in the direction of soul-searching and introspection, and outward, examining four recent land rights cases—two foreign, two domestic—dealing with native title.<sup>29</sup> Most of the cases drew inspiration from the work of non-lawyers, such as historians<sup>30</sup> or itinerant preachers.<sup>31</sup> Why no lawyers, not even minorities or ones of a critical persuasion? For an explanation, we need to look at the politics of legal education beginning in the early and mid-1960s, when law schools first instituted affirmative action programs, and continuing until today.<sup>32</sup>

Part I begins with a brief overview of civil rights history, to situate my puzzle and the terms in which I address it. Part I also shows what may be possible without too great an investment in the form of law-school resources. Part II describes the four land reform cases to show what inspired them and how the litigants acquired the technical expertise necessary to proceed. Part III posits several explanations for the dearth of minority lawyers in these early high-stakes cases, including one—resting on the structure and ideology of legal education—that I think holds the most force.<sup>33</sup> As the reader will see, legal educators are not doing an extremely poor job in this area,<sup>34</sup> but we could be doing better. Our darkroom, in other words, needs an adjustment, perhaps a better safelight or stronger chemicals.

## I. HOWARD LAW SCHOOL IN THE THIRTIES

In the 1930s, Howard Law School was predominantly African American, with a small faculty and student body and a budget to match.<sup>35</sup> Black civil rights were then relatively underdeveloped—this was before

28. *Id.* (noting how Bell confronted racist practices, such as remedial lectures aimed at quelling student discontent over minority professors).

29. *See infra* Part II.

30. *See infra* notes 56, 72–74, 99, 111–112 and accompanying text (describing the role of historian Henry Reynolds).

31. *See infra* notes 82–89, 104 and accompanying text (describing the role of itinerant preacher Lopez Reyes (Reies) Tijerina).

32. *See infra* Part III.

33. *See infra* Part III-A (discussing the role of institutional failure).

34. To wit, equipping our students with the tools to pursue legal reform.

35. *See* Mark V. Tushnet, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 1925–1950*, at 30–32 (2004) (describing the role of Howard Law School in the march to *Brown*); Leland Ware, *Setting the Stage for Brown*, 52 *MERCER L. REV.* 631, 632–34 (2001) (describing the role of Howard Law School in the march to *Brown*).

*Brown v. Board of Education*<sup>36</sup> and the 1960s-era civil rights acts—and even the NAACP's legal arm was sparsely staffed and under-funded.<sup>37</sup>

Under Dean Charles Hamilton Houston, Howard set out to change all that. Located in downtown Washington, D.C., Howard Law School was streamlined, elite and focused on one thing—producing “social engineers”—lawyers who could usher in social change.<sup>38</sup> Dean Houston maintained close relations with the NAACP Legal Defense Fund, and taught students like Thurgood Marshall, Spottswood Robinson, Robert Carter, and others the latest theories to attack segregation and other barriers to black progress.<sup>39</sup> Many of those students would go on to work for the Fund, become famous warriors for civil rights, and, later, judges.<sup>40</sup>

Howard graduates were responsible for *Shelley v. Kraemer*<sup>41</sup> (the racial-covenants case), *Sweatt v. Painter*<sup>42</sup> (desegregating graduate education in Texas), *Brown v. Board of Education*<sup>43</sup> (which declared separate but equal pupil assignments unconstitutional) and many other breakthrough cases. They also had a hand in enacting the 1964 Civil Rights Act.<sup>44</sup> This small law school was arguably more effective than Harvard or Yale in changing society, despite a budget a fraction their size.

36. 347 U.S. 483 (1954).

37. Tushnet, *supra* note 35 (describing the role of NAACP lawyers). See JACK GREENBERG, *CRUSADERS IN THE COURT: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION*, 13–14 (1994).

38. Steven D. Jamar, *Biographical Sketches: Charles Hamilton Houston*, HOWARD LAW SCHOOL, *BROWN AT 50: FULFILLING THE PROMISE*, <http://www.brownat50.org/brownbios/BioCharlesHHouston.html> (last visited Oct. 8, 2014) (describing the law school's orientation toward social change).

39. *Id.*; Richard Wormser, *Jim Crow Stories: Charles Hamilton Houston*, [http://www.pbs.org/wnet/jimcrow/stories\\_people\\_houst.html](http://www.pbs.org/wnet/jimcrow/stories_people_houst.html) (last visited Oct. 8, 2014).

40. Thurgood Marshall became a federal appeals court judge and justice of the U.S. Supreme Court. Robinson and Carter became federal judges. See *Biographical Sketches: Spottswood William Robinson, III*, HOWARD UNIVERSITY, *BROWN AT 50*, <http://www.brownat50.org/brownbios/BioJudgeSpottswoodRobinson.html> (last visited Oct. 8, 2014).

41. 334 U.S. 1 (1948); Mark V. Tushnet, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT 1936–1961*, 89–90 (1994) (describing the role of the NAACP).

42. 339 U.S. 629 (1950). See Ware, *supra* note 35, at 664–68; TUSHNET, *supra* note 41 (describing the NAACP's role).

43. 347 U.S. 483 (1954). See TUSHNET, *supra* note 41.

44. Ware, *supra* note 35, at 671–72; *NAACP Legal History*, NAACP, <http://www.naacp.org/pages/naacp-legal-history> (last visited Oct. 8, 2014) (discussing the organization's role in enacting the statute).

All this did not happen accidentally, but by careful design.<sup>45</sup> In his seminar, Dean Houston conducted intense “skull sessions” in which he challenged promising students like Marshall, Carter, and Robinson to decide which sector of society was most in need of reform. Segregated schools? The workplace? Housing? The criminal justice system? The entertainment industry? And why that sector and not another one?<sup>46</sup>

If the students answered that schools were the sector in most need of reform, which would they challenge first?<sup>47</sup> Elementary through high schools? Graduate schools? Undergraduate? In what order? And in which court, state or federal? Before which judge, and under what legal theory—equal funding or desegregated pupil school assignments? And with the aid of what social science evidence? What role for poor whites? For grassroots organizing and protests? Proceed cautiously and incrementally, hoping to build momentum, or press for a Supreme Court ruling as soon as possible?<sup>48</sup>

And so it was that the Fund conducted a decades-long, highly strategic campaign leading up to *Brown v. Board of Education*,<sup>49</sup> perhaps the most heralded breakthrough for black civil rights of all time.<sup>50</sup>

Their example proved so notable that Professor Gerald Rosenberg, who is skeptical of the possibilities for social reform through law, points out in a recent edition of his book, *The Hollow Hope*, how gay-rights activists borrowed from the NAACP’s campaign, consciously or not, in their struggle to repeal the military’s “Don’t Ask, Don’t Tell” policy and state prohibitions against gay marriage.<sup>51</sup>

---

45. See Robert L. Carter, *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 33, 36–37 (1991); Jamar, *supra* note 38; TUSHNET, *supra* note 41 (describing the behind-the-scenes planning that entered into the campaign for *Brown*).

46. On the rigorous, step-by-step planning that accompanied the march to *Brown*, see GENNA RAE McNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 134–35 (1983); TUSHNET, *supra* note 41; Jamar, *supra* note 38. On Dean Houston’s rigorous teaching style, see, e.g., Douglas O. Linder, *Before Brown: Charles H. Houston and the Gaines Case*, FAMOUS TRIALS, available at <http://law2.umkc.edu/faculty/projects/ftrials/trialheroes/charleshoustonessayf.html> (last visited Oct. 8, 2014).

47. For example, an early victory at the K-12 level would benefit black parents and schoolchildren, but could easily spark white resistance, especially in the South. See TUSHNET, *supra* note 41, at 151–52.

48. See Jamar, *supra* note 38; Wormser, *supra* note 39 (describing the strategic planning that entered into the campaign).

49. 347 U.S. 483 (1954).

50. See discussion in *supra* notes 43, 46 and accompanying text.

51. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 339–429 (2d ed. 2008) (discussing the campaign to recognize same-sex marriage).

But gay and lesbian activists have not been the only groups paying attention. Beginning in the late 1970s, conservative groups mobilized a multi-pronged campaign that included subsidized scholarship programs for promising conservative college students, legislative advocacy, and litigation to roll back the gains of the 1960s and set the country on a more conservative, pro-business course.<sup>52</sup> Their strategy suggested nothing so much as a carbon copy of the NAACP's, but in reverse.<sup>53</sup>

Individuals who are paying attention can see these same groups targeting ethnic studies programs beginning at the K-12 level and continuing through university curricula. In an upcoming article, Jean Stefancic shows how that machine limited the efficacy of a highly successful program of Mexican American Studies in Tucson, Arizona, first at the level of public discourse and opinion, then by passing a wide-ranging statute banning classes in Mexican American literature and history, and finally in court.<sup>54</sup> As our third grade teachers told us, planning counts!

## II. FOUR LAND REFORM CASES

Now let us look at four recent land reform cases, beginning with one from Australia.

### A. *Mabo v. Queensland*

*Mabo v Queensland*<sup>55</sup> began in the late 1970s when Eddie Mabo, a Torres Strait native, told a friendly history professor on the mainland campus where he worked as a gardener, about his desire to re-assert his rights to a tract of land in an offshore island that had belonged to his family for as long as anyone could remember and dating back to before Captain Cook supposedly discovered Australia in 1770.<sup>56</sup> The family did

---

52. See JEAN STEFANCIC & RICHARD DELGADO, *NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA* 9–135 (1996) (discussing the role of conservative think tanks and foundations in rolling back affirmative action, reducing welfare payments, declaring English the official language, and weakening consumer protection).

53. That is, employing many of the same strategies and careful planning.

54. Jean A. Stefancic, *Reflections on Reform Litigation*, 47 *J. MARSHALL L. REV.* (forthcoming 2014) (discussing the Tucson case and its implications for Mexican American schoolchildren).

55. *Mabo v Queensland* (No. 2) (1992) 175 CLR 1 (Austl.), as reprinted in *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 268–281 (Juan F. Perea et al. eds., 2d ed. 2007).

56. See Henry Reynolds, *The Mabo Judgment: Its Implications*, OXFAM AUSTRALIA, <http://www.oxfam.org.au/publications/reports/MABO/implications> (last visited Feb. 2014) (no longer available online, on file with author); reprinted in *Mabo: Its*

not recall ever selling it to a white settler family or losing it to the government by eminent domain or any other legitimate form of governmental action.<sup>57</sup> But Australia was treating the land as though it were its own—as though it could ignore native title.<sup>58</sup> Indeed, the authorities denied Mabo permission to leave the mainland to visit the area.<sup>59</sup>

It turned out that for many years, dating back to the era of colonization and settlement, Australian courts had been following the doctrine of *terra nullius*, or null land,<sup>60</sup> which is the idea that before English settlers arrived, no one owned the land.<sup>61</sup> Since the natives were few in number and their cultural and economic conditions not advanced—at least to British eyes—natives could not assert title to the land on which they lived, hunted, and raised their young.<sup>62</sup> Even though the natives might have passed over the land or lived on it for varying periods of time, their use did not rise to the level of ownership in the British sense, with fences, titles, plats, metes and bounds, and entries in the recorder's office.<sup>63</sup>

It was a bit like finding a five-dollar bill on the sidewalk next to a dog. You were under no obligation to ask the dog, "Excuse me, Mr. Dog. Is that, by any chance, your five-dollar bill?" A dog is not the sort of creature that can enter into a legally cognizable relation to a five-dollar bill. You might be under an obligation to inquire with a human being who might be nearby and looks as though he might have dropped it. But you need not ask the dog.<sup>64</sup>

Students of American legal history will recognize the resemblance between the British doctrine of *terra nullius*, the legal basis for the occupation of the entire continent of Australia, and the doctrine of Discovery, dating back to Justice John Marshall's 1823 Supreme Court opinion in *Johnson v. M'Intosh*.<sup>65</sup> In *M'Intosh*, the Chief Justice wrote that European nations followed the practice of ceding rights to each other over land in the new world based on first arrival in order to avoid unseemly disputes

*Meaning for Australia—Community Aid Abroad*, Background Report no. 4, August 1993, at 9–10.

57. *Id.*

58. *Id.* (describing Eddie Mabo's surprise at learning the truth about his family's property).

59. *Id.*

60. Perea et al., *supra* note 55, at 271–72 (summarizing the court's findings).

61. *Id.* at 270–75 (explaining the doctrine and its early adoption).

62. *Id.* at 274 (explaining the basis for rejecting this notion).

63. *Id.* at 275–78.

64. Animals cannot sue for violation of most rights. See PETER SINGER, *ANIMAL LIBERATION* (1975) (discussing the legal standing of nonhuman animals).

65. 21 U.S. 543 (1823) (holding that European discovery established ownership over North American lands and extinguished native title).

among themselves and to promote stability in land rights in the new continent.<sup>66</sup> Thus, the Spanish got Florida, the British received New York and much of Canada, the French Haiti, and so on. It was not necessary to ask the native people first.

Eddie Mabo and the friendly history professor<sup>67</sup> gathered oral evidence for five years, and then convened a student conference on land rights in Australia, the outcome of which was a determination to file a claim on behalf of the Torres Strait Islanders.<sup>68</sup> In *Mabo*, the High Court of Australia for the first time subjected the doctrine of terra nullius to searching examination and found it inadequate, thereby throwing into question the ownership of much unoccupied land in that vast country.<sup>69</sup> When the settlers arrived, the High Court held, the Crown had not, in fact, regarded Australia as terra nullius, so that any settler could occupy any tract he felt like, put a fence around it, and ask any natives to leave.<sup>70</sup> Instead, the Crown expected the settlers to negotiate with the aborigines in light of the degree of civilization in which they found them and arrange to buy, rent, or trade for the land.<sup>71</sup> Don't treat it, in other words, like the five dollar bill next to the dog and walk away with it.

In the wake of *Mabo*, Australian tribunals have been holding hearings and turning over vast swatches of the continent to the aborigines, to the great displeasure of the mining industry, which had had its eyes on much of it.<sup>72</sup> Most of the research the Court based its opinion on came from Professor Henry Reynolds, whose book *The Law of the Land*<sup>73</sup> stemmed from the abovementioned conversations with the gardener, Eddie Mabo, as well as from the student conference. It is worth noting that

66. *Id.* at 572–78.

67. *See supra* text and notes 55–56, describing how they met.

68. Reynolds, *supra* note 56.

69. Perea et al., *supra* note 55, at 275 (“Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitant of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted.”).

70. *Id.* (“It was only on the hypothesis that there was nobody in occupation that it could be said that the Crown was the owner because there was no other. If that hypothesis be rejected, the notion that sovereignty carried ownership in its wake must be rejected too.”).

71. Perea et al., *supra* note 55, at 276–77 (“Unless the sovereign power is exercised in one or other of those ways, there is no reason why land within the Crown’s territory should not continue to be subject to native title. . . . The notion that feudal principle dictates that the land in a settled colony be taken to be a royal demesne . . . is mistaken.”).

72. *See* Reynolds, *supra* note 56.

73. HENRY REYNOLDS, *THE LAW OF THE LAND* (Penguin Books 1987) (discussing the history of land titles in Australia).

Reynolds has not been resting on his laurels. He is reportedly now researching the doctrine of sovereignty with a view to determining whether the basis on which the Anglo government has been ruling Australia for the last two centuries is sound or not.<sup>74</sup> If he decides it is not and the courts agree with him, the country would need to go back and do everything all over again, this time, presumably, with the participation of the aborigines.

### B. *Calder v. British Columbia*

In Canada, a similar process of land redistribution took place after the Supreme Court decided *Calder v. British Columbia*<sup>75</sup> in 1973, which clarified that the arrival of European settlers in a region did not extinguish native rights to the land. In a later case, *Delgamuukw v. The Queen*,<sup>76</sup> the same court upheld the use of oral testimony by First Nation claimants defending their titles to land by showing continuous occupancy.<sup>77</sup> The opinion ends by decisively reminding readers, “We are all here to stay.”<sup>78</sup>

The impetus for law reform decisions in Canada appears to have come not from lawyers but from a coalition of tribal elders, which began meeting before the turn of the century to air grievances and petition the government.<sup>79</sup> Before their success in *Calder*, evidently few Canadians of European origin questioned the traditional system of land tenure under which nearly all of Canada was in the hands of whites, who either owned it directly or managed it for the citizenry at large.

### C. *Lopez Reyes Tijerina and the Tierra Amarilla Raid*

The third case arose in New Mexico in the late 1960s when an itinerant preacher named Lopez Reyes (“Reies”) Tijerina with little formal education became gripped by the conviction, developed in the course of research in various libraries, that Kit Carson national forest still belonged

---

74. Henry Reynolds, *After Mabo, What About Native Sovereignty?* (1996), <http://www.australianhumanitiesreview.org/archive/Issue-April-1996/Reynolds.html>.

75. *Calder v. British Columbia*, [1973] S.C.R. 313 (Can.) (reconsidering the basis for native land titles in Canada).

76. *Delgamuukw v. The Queen*, [1997] 3 S.C.R. 1010 (Can.) (holding that First Nations may prove land titles through oral evidence).

77. *Id.* par. 4 (“A new trial was warranted because the trial judge erred in his treatment of the oral histories.”).

78. *Id.* at no. 186 (Conclusion).

79. See Edward Allen, *Letter from British Columbia: Reflections on the Fortieth Anniversary of the Calder Decision*, NORTHERN PUBLIC AFFAIRS, Sept. 2014, available at <http://www.northernpublicaffairs.ca/index/wp-content/uploads/2014/03/Allen.pdf> (describing the role of a council of elders and a lawyer named Berger).

to the local Mexican American population, rather than to Smoky the Bear.<sup>80</sup> Located in northern New Mexico, the forest is beautiful with trails, campsites, lookout points, horseback riding, rangers' offices, and a visitors' center.<sup>81</sup>

Accompanied by a few of his men, Tijerina occupied the forest, declared it property of the people, captured two park rangers, and tried them in an impromptu people's court for trespass and public nuisance. After convicting the rangers, the tribunal mercifully let them go on the condition that they behave themselves in the future and desist from interfering with other peoples' property.<sup>82</sup>

The United States government was not amused. It quickly captured, charged, and convicted Tijerina and his men, and the park today remains just as it was before this quixotic conflict.<sup>83</sup> But not before the Tijerina organization filed a number of lawsuits, including *Tijerina v. Henry*,<sup>84</sup> which grapples for the first time with whether Mexican Americans are a legally cognizable class for purposes of suing to desegregate the public schools.<sup>85</sup>

Within a few years of the Tijerina conflict, Congress was receiving enough queries about land claims in the Southwest like the one that riled Tijerina and his men that it asked the Government Accountability Office (GAO) to research these claims, determine whether any of them were valid, and analyze what, if anything, the government ought to do about them.<sup>86</sup> The GAO issued a long report in June 2004. Entitled *Treaty of*

80. See RODOLFO ACUNA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* 340-41 (3d ed., 1998) (describing the incident); RICHARD GARDNER, *GRITO! REIES TIJERINA AND THE NEW MEXICO LAND GRANT WAR OF 1967* (1970) (describing Tijerina's life and career); PETER NABAKOV, *TIJERINA AND THE COURTHOUSE RAID* (2d ed. 1970) (describing Tijerina's life and career); IAN F. HANEY LOPEZ, *LEGAL VIOLENCE AND THE CHICANO MOVEMENT*, IN *THE LATINO CONDITION: A CRITICAL READER* 308, 311 (Richard Delgado & Jean A. Stefancic eds., 2d ed. 2011) (describing Tijerina's life and career).

81. See *Carson National Forest*, UNITED STATES DEPARTMENT OF AGRICULTURE FOREST SERVICE, [www.fs.usda.gov/carson](http://www.fs.usda.gov/carson) (describing the region).

82. ACUNA, *supra* note 80, at 340-41; IAN F. HANEY LOPEZ, *LEGAL VIOLENCE*, *supra* note 80.

83. See discussion *supra* note 80.

84. 48 F.R.D. 274 (D.N.M., 1969) (holding that Mexican-Americans may not sue for class-wide relief).

85. See Richard Delgado & Victoria Palacios, *Mexican Americans as a Cognizable Class under Rule 23 and the Equal Protection Clause*, 50 NOTRE DAME L. REV. 393 (1975) (critiquing the ruling and suggesting its modification).

86. See Government Accountability Office, *TREATY OF GUADALUPE HIDALGO: FINDINGS AND POSSIBLE OPTIONS REGARDING LONGSTANDING COMMUNITY LAND GRANT CLAIMS IN NEW MEXICO* 1-3 (2004) (analyzing irregularities leading to confis-

*Guadalupe Hidalgo: Findings and Possible Options Regarding Long-standing Community Land Grant Claims in New Mexico*, the 200-page report describes the abuse-ridden system by which Anglos had dispossessed many Mexicans of their lands in the early days of Anglo rule and outlines a number of options Congress could take in redressing some of the dispossessions.<sup>87</sup> One is simply returning the land to the Mexicans who lost it via fraudulent lawsuits.<sup>88</sup> Tijerina may have taken a beating in court and in the court of public opinion—particularly after a subsequent courthouse raid that ended disastrously<sup>89</sup>—but thanks to the bureaucrats in the Governmental Accountability Office, he may still have the last laugh.

#### D. Lobato v. Taylor

The fourth and final incident took place a few years after the Tijerina conflict when a land developer named Jack Taylor in Southern Colorado—on the other side of the Sangre de Cristo Mountains from where Tijerina had created a short-lived ruckus—closed a large tract of land to local residents, many of whom were Mexican Americans who had been using it for fishing, hunting, and gathering water and firewood for generations.<sup>90</sup> This practice stemmed from a document written by a French-Canadian settler named Beaubien in 1863, shortly before his death and only a few years after the land became part of the United States.<sup>91</sup> A wealthy landowner, Beaubien had encouraged many of his friends and neighbors to settle on his land, apparently wanting their companionship and perhaps their labor.<sup>92</sup> His instrument granted them the abovementioned rights, which his successors continued to honor over the intervening 100 years.<sup>93</sup>

---

cation of Mexican-owned land in years following the War with Mexico and discussing possible remedies).

87. *See id.* at 161–70 (Ch. 5, discussing options).

88. *Id.*

89. *See NABAKOV, supra* note 80 (describing the raid and its setting).

90. *See Lobato v. Taylor*, 71 P.3d 938 (2003); Ryan Golten, *Lobato v. Taylor: How the Villages of the Rio Culebra, the Colorado Supreme Court and the Restatement of Servitudes Bailed out the Treaty of Guadalupe Hidalgo*, 45 NAT. RESOURCES J. 457 (2005) (discussing how the opinion turned on Spanish and Mexican property law doctrines).

91. 71 P.3d at 943.

92. *Id.* (“In the early 1850s, Beaubien successfully recruited farm families to settle the Colorado portion of the Sangre de Cristo grant. He leased a portion of his land to the United States government to be used to establish Fort Massachusetts and recruited farmers to settle other areas.”).

93. *Id.* at 943–44 (tracing the chain of title).

That is, until Taylor, a lumber merchant from North Carolina, bought the land, arrived on the scene, and locked the gate.<sup>94</sup> Perhaps having heard of Tijerina's escapades in the neighboring state, the villagers, after doing lay research, sued Taylor to enforce their right to use the land as they and their ancestors had for years.<sup>95</sup>

This suit in turn required the Colorado Supreme Court to construe the meaning of "the Beaubien document" against a background of the times—the period just before and after northern Mexico became the United States.<sup>96</sup> The story had a happy ending when pro bono lawyers prevailed on the Colorado Supreme Court to find in the town-peoples' favor.<sup>97</sup> This portion of the opinion is part of a longer and interesting story about the relevant law to apply to a contract dispute centering on the meaning of key terms in a document that entered into force at a time when Mexican traditions still ran strong, because that country had been the sovereign until recently—but sought to be enforced later, when the sovereign was the United States.<sup>98</sup>

### III. MISSING IN ACTION: WHY SO FEW NATIVE LAWYERS IN THESE LAND-REFORM CASES

But the proper meaning of the Beaubien grant is not the point I want to explore. Rather, it is the role of native lawyers in each of these cases. In most it is negligible, even though these are the groups suing for

---

94. *Id.* at 943 ("In 1960, Jack Taylor, a North Carolina lumberman, purchased roughly 77,000 acres of the Sangre de Cristo grant . . . from a successor in interest to William Gilpin. Taylor's deed indicated that he took the land subject to 'claims of the local people by prescription or otherwise to right to pasture, wood, and lumber and so-called settlement rights in, to, and upon said land'. Despite the language in Taylor's deed, he denied the local landowners access to his land and began to fence the property.").

95. *Id.* at 945 (describing how local residents, upon learning that Taylor had fenced the property, resolved to pursue claims to "graze livestock, gather firewood and timber, hunt, fish, and recreate . . ." as they had done for generations).

96. *See id.* at 946–50 (describing the document and its interpretation).

97. *Id.* at 956 ("We hold that the landowners have implied rights in Taylor's land for the access detailed in the Beaubien document—pasture, firewood, and timber. These easements should be limited to reasonable use."); *id.* at 942 (listing lawyers for the petitioners).

98. *See id.* at 942 (noting that "[t]he history of this property rights controversy began before Colorado's statehood, at a time when southern Colorado was part of Mexico . . . when all of the parties' lands were part of the one million acre Sangre de Cristo grant, an 1844 Mexican land grant. Here we determine access rights of the owners of farmlands . . . now known as the Taylor Ranch.").

vindication of their rights. In *Mabo*, the driving force was a non-lawyer, the historian Henry Reynolds together with his students.<sup>99</sup>

In the New Mexico case, an uneducated migrant preacher drove the litigation, unaided by a lawyer even though his cause was plainly not baseless—else Congress and the GAO would not have taken the action they did.<sup>100</sup> In the Colorado case, *Lobato*, MALDEF was nowhere to be seen, and the main lawyers listed do not have Spanish surnames, but Jewish-sounding ones and seem to have been working pro bono.<sup>101</sup> In the recent Tucson schools case,<sup>102</sup> the attorney of record is a local practitioner named Martinez but he seems to have had little help until the case reached the Ninth Circuit, with a record badly loaded against him.<sup>103</sup> Although the case is vitally important, with a potential reach almost equal to that of the school desegregation cases the NAACP litigated in the period leading up to *Brown*, it seems to have enjoyed little formal or institutional support from the Mexican American bar.<sup>104</sup>

With the three American cases in mind, one might ask, why not? By the time Tijerina was peering at land records in the county recorder's office in a little town in northern New Mexico and beginning to consider taking action, Arizona State (where I started my own teaching career around this time), the University of Arizona, and a few other law schools were turning out Indian and Mexican American lawyers in considerable numbers, probably near the level that they are producing today.<sup>105</sup> Yet few of those lawyers were anywhere to be found in these landmark cases.<sup>106</sup> The mystery of the missing legal talent deepens when we glance a couple of states over. In California, Cesar Chavez's farmworkers union had a lawyer named Cohen, who evidently was a man of courage—he had his head bashed in a demonstration on behalf of la Causa—but not a Chicano.<sup>107</sup> It was not for lack of trying. I uncovered a letter from Cesar

---

99. See *supra* discussion accompanying notes 67–68, 73–74.

100. See *supra* Part II-C (describing the Tijerina raid).

101. See *supra* discussion accompanying note 97.

102. See *supra* discussion accompanying notes 53–54.

103. See Stefancic, *supra* note 54.

104. Aside from the single abovementioned attorney, that is.

105. Law schools began practicing affirmative action in the late 1960s. See *LATINOS & THE LAW: CASES AND MATERIALS* 372 (Richard Delgado et al. eds., 2008).

106. See *supra* discussion accompanying notes 100–103.

107. See Robert D. McFadden, *Jerry S. Cohen, 70, Labor and Class Action Lawyer, is Dead*, N.Y. TIMES (Jan. 1, 1996), <http://www.nytimes.com/1996/01/01/nyregion/jerry-s-cohen-70-labor-and-class-action-lawyer-is-dead.html> (describing Cohen's life and career) (last visited Oct. 5, 2014); *WORK IN AMERICA: AN ENCYCLOPEDIA OF HISTORY, POLICY, AND SOCIETY* 571 (Carl E. Van Horn & Herbert A. Schaffner eds., 2004) (describing how he was attacked and injured by Teamsters).

beseeking California Rural Legal Assistance, which then was staffed by many Latino lawyers, for help in its struggle against the powerful growers, with their army of strikebreakers, high-paid lawyers, and heavy-hitting thugs.<sup>108</sup> He received a brusque reply reminding him that CRLA had its own priorities and was in no position to be anybody's personal lawyer, not even Cesar's.<sup>109</sup>

Latino lawyers during these years were busy writing wills, defending criminals, and suing for divorce. Others helped small businesses incorporate, ran for mayor in small towns, sued for back pay on behalf of blue collar workers, and otherwise performed much ordinary legal work, doing, certainly, a lot of good, at least for their clients at the time.<sup>110</sup>

But this work is like putting rivets in a metal beam in a construction project. Sometimes, one wants an imaginative engineer or architect who can think of a better way of building a bridge or skyscraper, or that is more secure than one sealed with rivets. Others were doing this law-reform work, but they were preachers, historians, or law students, some of them Anglo or, at any rate, non-Latino.<sup>111</sup>

This incongruity begs for a reason. Several lie close to hand, in some of which I readily admit my own complicity. Here we enter into two realms—causation and the human mind—that are notoriously subjective. Everyone has an opinion, and even if not, they feel free to posit one. I expect that many of my readers will, too.

But despite its inevitable subjectivity, the question—why so few minority lawyers in these important land rights cases—begs for analysis. Lawyers wield real power, and the way we teach can orient future lawyers in one direction or another.<sup>112</sup> They will be attuned to this or that kind of

108. See Peter Dreier, *Cesar Chavez's Legacy*, HUFFINGTON POST (Mar. 30, 2014), [http://www.huffingtonpost.com/peter-dreier/cesar-chavez-legacy\\_b\\_5059319.htm](http://www.huffingtonpost.com/peter-dreier/cesar-chavez-legacy_b_5059319.htm)

109. See Telegram from Cruz Reynoso to Cesar Chavez (May 13, 1970), available at [https://libraries.ucsd.edu/farmworkermovement/essays/essays/MillerArchive/034%20Telegram%20From%20Reynoso%20\(1\).pdf](https://libraries.ucsd.edu/farmworkermovement/essays/essays/MillerArchive/034%20Telegram%20From%20Reynoso%20(1).pdf); Letter from Cruz Reynoso to Cesar Chavez (May 19, 1970), available at <https://libraries.ucsd.edu/farmworkermovement/essays/essays/MillerArchive/036%20Memo%20From%20Cruz%20Reynoso%20CRLA.pdf>

110. See Richard Delgado, *1998 Hugo Black Lecture: Ten Arguments against Affirmative Action—How Valid?*, 50 ALA. L. REV. 135, 136–38 (1998) (describing career paths of Boalt Hall alumni).

111. See *supra* notes 95–99 and accompanying text (discussing instigators of four major land-reform cases).

112. For example, if we teach constitutional law in the first year, students may more readily perceive broad structural issues arising in private-law cases that they could otherwise miss. If we teach it in the second year, they may perceive those same issues in courses such as evidence, federal courts, or tax, which they usually take in a following year.

inequity—or not. Future lawyers will miss possibilities in a situation that a historian might see—or vice versa. The courses we teach and the way we teach them is apt to make a big difference in the world years into the future, shaping the destiny of entire regions or even continents.

*A. Reasons Related to the Lawyers Themselves: Agency and Individual Choice*

1. Collusion with the Oppressors

One set of explanations centers on the agency of the lawyers themselves. An early generation of Latino lawyers might have realized full well that land claims like the ones I mentioned—or the Tucson school case, for that matter—were colorable but nevertheless decided not to pursue them. Laura Gomez's book, *Manifest Destinies: The Making of the Mexican American Race*,<sup>113</sup> shows how, a hundred years earlier, Mexican elites in New Mexico went along with the new Anglo regime, which needed many low-level administrators, sheriffs, and small-town mayors to keep order over the larger Spanish-speaking and native population.<sup>114</sup> Much as the British in colonial India offered mid-level jobs in the civil service to courteous, well-educated Indians in exchange for their tacit promise not to lead an insurrection, the establishment may have communicated to many new Chicano lawyers that their role was to keep the region running smoothly and not to file suits that could turn the social order upside down.<sup>115</sup> Self-interest has a way of encouraging a cautious view of one's role and destiny. Even non-elite lawyers might thus have shied away from litigation that could earn the disapproval of the ruling class.

2. Pecuniary Self Interest

Gomez's book points out a second possibility for the lack of native lawyers in the above land-rights cases. Changes in land rules stood to bring great financial gains to those on the winning side. Statehood, for example, stood to triple the value of New Mexico land.<sup>116</sup> Carson National

113. LAURA E. GOMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN-AMERICAN RACE* (2007).

114. *See id.* at 47–80 (Ch. 2, Where Mexicans Fit in the New American Racial Order), 81–116, 138 (Ch. 3, Mexican American Relations with Indians and African Americans); Laura E. Gomez, *Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico*, 25 *CHICANO-LATINO L. REV.* 9 (2005).

115. *See* *MANIFEST DESTINIES*, *supra* note 113, at 47–80; Gomez, *supra* note 114, at 11, 15–24, 41.

116. *See* Gomez, *supra* note 114, at 71.

Forest would today be of much lower value to thousands of tourists and lovers of nature if it changed hands and reverted to the surrounding community.<sup>117</sup> Similarly, the Australian mining industry was at first perturbed over the possible consequences of the *Mabo* decision, since the industry wanted undeveloped land to be available later, just in case it turned out to have mineral deposits on it.<sup>118</sup> It preferred the land undeveloped, fallow, and cheap—just the opposite of Kit Carson Park.<sup>119</sup>

In the years following the War with Mexico, many Mexican American opportunists conspired to transfer collectively owned lands to speculators such as Thomas Catron, who became wealthy this way.<sup>120</sup> Many villagers lost communal land in this fashion—a process that the Supreme Court would later uphold in *United States v. Sandoval*<sup>121</sup>—and a bitter insurrection sprang up as a result, the Gorras Blancas movement.<sup>122</sup> Therefore, one reason for the low representation of minority lawyers in the recent land-rights cases may have been that they were not uninterested in them—they were just on the other side.

### 3. Rise of the Broker Class

A final possible explanation for the dearth of minority lawyers in the law-reform cases has to do with a role that some of them may have assumed, if only unwittingly. Rodolfo Acuna, a prominent Chicano Studies historian, writes in a recent edition of his textbook, *Occupied America*,<sup>123</sup> of the rise of the “broker class”—meaning minorities who occupy positions such as marketing director, mediating between powerful corporations and their own communities, selling them cigarettes, liquor, and luxury items they often cannot afford, or securing votes for a political

---

117. It would lack, for example, developed roads, campsites, and other facilities and would, instead, consist of undeveloped land used by the residents for hunting, gathering firewood, grazing cattle, and the like. See discussion *supra* notes 89–95 and accompanying text (describing the historical uses to which the local residents put the land).

118. See Reynolds, *supra* note 56 (describing reaction of the mining industry to the ruling).

119. Most jurisdictions limit mineral development, such as large, open-pit mines, in scenic national parks or forests or developed settlements or towns. Hence, Australia's mining establishment stood to forfeit easy access to much of that country's outback if it changed hands and reverted to aboriginal ownership and control.

120. See MANIFEST DESTINIES, *supra* note 113, at 127–28.

121. See *United States v. Sandoval*, 157 U.S. 278 (1897).

122. See MANIFEST DESTINIES, *supra* note 113, at 130.

123. See RODOLFO ACUNA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* 386–421 (4th ed. 2000).

candidate.<sup>124</sup> These jobs resemble the ones that the Brits offered to educated Indians helping to rule that country during colonial occupation.<sup>125</sup> In Colorado, by the late 1960s, Mexican American lawyers were no doubt practicing in the southern part of the San Luis Valley, where the Taylor Ranch is located.<sup>126</sup> But they may have hoped for business representing the Anglo developer,<sup>127</sup> and so refrained from representing the Mexican farmers.

## B. Legal Curriculum and Ideology

### 1. Teaching Eurocentric or “White”<sup>128</sup> Law

A more likely explanation places the reason for so few minority lawyers in the lands rights cases not at the doorstep of the early Chicano lawyers, but of legal education, which is where self-introspection comes in. As one who began teaching in the era<sup>129</sup> when the two United States cases (*Tijerina* and *Lobato*) arose, I think legal education may explain the absence of minority lawyers for three related reasons. First, we taught students, including students of color, “white” law. When affirmative action brought substantial numbers of Latinos, blacks, and Asian Americans to law school for the first time in the late 1960s, we did not at the same time change the law schools that would receive them.<sup>130</sup> Rather, we expected the newcomers to adapt to them.<sup>131</sup> And so, we taught them the usual courses—civil procedure, contracts, torts, criminal law, property, and so on—that we had been teaching all along and in much the same Socratic fashion and with an emphasis on the classic cases like *Pennoyer*

124. *Id.*; see also Richard Delgado, *Rodrigo’s Portent: California and the Coming Neocolonial Order*, 87 WASH. U. L. REV. 1293, 1302 (elaborating on this role).

125. See *supra* notes 108–109 and accompanying text.

126. See *supra* notes 99–104 and accompanying text.

127. That is, brokers.

128. By white law I mean a curriculum that places problems and issues of the white majority, such as banking, trusts, family inheritance, and intellectual property, at the center of the curriculum, and devotes little attention to civil rights, law of slavery, immigration quotas, and the like. See Black Hawk Hancock, *Put a Little Color on That!*, 51 SOC. PERSPECTIVE 783, 788 (2008) (“[W]hiteness [is] the unacknowledged dominant set of norms, aesthetics, and values from which all others are defined and judged.”).

129. I began teaching in 1974. See ASS’N OF AM. LAW SCH., DIRECTORY OF LAW TEACHERS 2011–2012, 542 (2012).

130. See E. Scott Fruehwald, *How to Help Students from Disadvantaged Backgrounds Succeed in Law School*, 1 TEX. A. & M. L. REV. 83, 83 (2013) (observing that “law school education has changed little in reaction to the new kind of students it must educate. [It continues] to use the casebook/Socratic method . . . [T]hese efforts have not helped to the extent hoped.”).

131. *Id.*

*v. Neff*,<sup>132</sup> *Regina v. Dudley and Stevens*,<sup>133</sup> and so on. It should be no surprise then, that these students of color went on to careers that were in most cases similar to those of their white classmates, with perhaps a few more solo practitioners and legal services lawyers mixed in.<sup>134</sup> Even those who entered planning to be radical lawyers engaged in defending draft-dodgers, militants, and communists would tell us that after a year or two of law school their aspirations had turned more conventional.<sup>135</sup> We did little to dissuade them; some of us might even have quietly cheered the prospect of minorities tracing conventional career paths, mirroring, perhaps, our own.

## 2. Buying a Short-Lived Peace

Consider that around this time, elite universities were purging their ranks of leftist professors out of concern that they might teach the new minority students who were marching up the educational ladder in the years after *Brown v. Board of Education* and would soon be knocking on the door of these elite schools.<sup>136</sup> Top educators had just been through a harrowing period—the 1960s—when student riots and demonstrations roiled campuses and were in no mood for more of the same, particularly from minorities who might have even more justification for being discontented than the upper-class white students who had given them such a hard time just a few years earlier.<sup>137</sup> College presidents most certainly did not want the new, impressionable minorities learning social analysis from closet Marxists and socialists, hence the purge that began around 1970, went on for a few years, and cost many hundreds of university professors their jobs and careers.<sup>138</sup>

Might law schools' cautious responses to the new minorities have been part of the same reaction? Except for Howard, few schools set out to teach students to look for opportunities to overturn the social order, and not many more of them do so now.<sup>139</sup> Corporate interests recently

132. 95 U.S. 714 (1878) (holding that in personam jurisdiction requires that a plaintiff encounter the defendant within the territorial confines of the state in which he or she brings suit and serve him or her with process there).

133. 14 Q.B. 273DC (1884) (discussing whether starving survivors of a shipwreck may sacrifice one of their members for food).

134. See comment in *supra* note 104.

135. Interview with Anonymous, Professor of Law at UC-Berkeley (n.d.).

136. See Richard Delgado, *Liberal McCarthyism and the Origins of Critical Race Theory*, 94 IOWA L. REV. 1505, 1515 (2009).

137. *Id.* at 1516.

138. *Id.* at 1517.

139. The handful of exceptions include Howard, CUNY, and UCLA, whose critical race studies program teaches a rigorous program of social analysis.

sponsored a guide for the Republican Party on how to ingratiate itself with Latinos and turn them into right-thinking clones of the upper middle class.<sup>140</sup> Might some of us have conducted a quieter version of this campaign with our own minority students, doing our best to turn them into middling practitioners who would go on to careers indistinguishable from those of the rest—that is, defending criminals, incorporating small businesses, helping couples divorce, writing wills, and drafting contracts? Nothing is wrong with any of this, of course. It helps the wheels of America turn around. But sometimes, the wheels need recalibrating or a determined push that will get them going in a different direction. Here is where we may have fallen short.

### 3. The Role of Foundations and Government Money

If so, we had plenty of help. The Ford Foundation was giving grants to community activists like Corky Gonzales, founder of the Denver-based Crusade for Justice, in hopes of turning them away from militant action and toward community economic development, that is, capitalism.<sup>141</sup>

The Foundation also helped establish moderate organizations like MALDEF get a foothold in the Mexican American legal community, thus assuring itself a piece of the action there.<sup>142</sup> The American intelligence community kept a close watch on radical groups, particularly ones of color, and even Martin Luther King.<sup>143</sup> The State Department was so fearful of the threat of Latin American communism (as well as the domestic kind epitomized by Emma Temayuca's pecan workers union) that it may have prevailed on the Supreme Court to decide *Hernandez v. Texas*,<sup>144</sup> a 1954 companion case to *Brown v. Board of Education*, as it did—a second spectacular breakthrough designed, in part, to send a message to the rest

---

140. See *Koch-Backed Group Uses Soft Touch in Wooing Hispanics*, HUFFPOST POLITICS, April 22, 2014, at [http://www.huffingtonpost.com/2014/04/22/rpt-conservative-koch-bac\\_n\\_5190323.html](http://www.huffingtonpost.com/2014/04/22/rpt-conservative-koch-bac_n_5190323.html).

141. See *Liberal McCarthyism*, *supra* note 136, at 1522 (discussing role of foundation money in channeling discontent).

142. See Ency. Amer. L., MEXICAN AMERICAN LEGAL AND EDUCATIONAL FUND (MALDEF), <http://www.fofweb.com/History/MainPrintPage.asp?iPin=EAL0255&DataType=AmericanHistory&WinType=Free> (describing the organization's early years).

143. See WARD CHURCHILL & JIM VANDER WALL, *THE COINTELPRO PROGRAM* (2001) (describing the program and its activities).

144. 347 U.S. 475 (1954).

of the world that the United States was not comprised entirely of Southern sheriffs, police dogs, and all-white juries that excluded Mexicans.<sup>145</sup>

### CONCLUSION: RESCUING BABIES IN THE RIVER

If we want to equip our students, particularly ones of color, to be agents of change, we must resist pressures like these. We need to change the way we teach to give our students tools such as curiosity, broad imaginations, and the determination to remedy large-scale injustices that most people take for granted—"just how things are." This may not win popularity contests or a governmental grant, but it may be a good thing to do anyway.

I am reminded of the man who went down to the river on hearing a friend call for help. The friend was wading in the water, beckoning the man to assist. He had just rescued a baby who was floating down the river in a basket, and the man could see others drifting downstream in the same direction.

The man helped his friend rescue one or two others, then left the river, shook his clothes off, and began striding determinedly upstream. "Where are you going?" his friend cried. "Aren't you going to help me rescue the babies? Here come a few more."

"No," the man replied. "I'm going to take a look up-river to see who is putting all the babies in the water and try to do something about it."

We might need to equip our students with not just the instincts and tools to carry out river rescues, but also the curiosity and determination to discover and fix what is causing the release of all those babies into dangerous waters. This is what I believe Senator Dennis Chavez would have wanted and would have made him proud.

---

145. See Richard Delgado, *Rodrigo's Roundelay: Hernandez v. Texas and the Interest-Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV 23 (2006) (tracing this connection).

