

# AUTHORS' REPLY

## CREATING AND DOCUMENTING A NEW FIELD OF LEGAL STUDY

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We'd like to thank Michael Olivas for his witty, compassionate, and thoughtful introduction.<sup>1</sup> He captures well the many dimensions, positive and negative, of the casebook-writing enterprise. We are also indebted to Rodolfo Acuña, Gerald López, Cristina Rodríguez, Leticia Saucedo, Keith Aoki, and Kevin Johnson for contributing their thoughts on Latino scholarship or on our casebook in particular. Subsequent casebooks, including our own second edition, will be the richer for their insights and critique.

Acuña<sup>2</sup> and López<sup>3</sup> offer, to our way of thinking, the strongest validation of our general approach. Although Acuña—easily one of the most prominent Latino scholars in the United States—does not address our book specifically, his excerpt reinforces our activist orientation that keeps theory in the background and places the real world issues of Latino people and students at the center.

Acuña explains how he sees the field of study he helped to establish. For this world-class intellectual, Chicano studies is primarily a vehicle for social change and for educating a cadre of future leaders.<sup>4</sup> He explains, in wry detail, some of the bruises he has suffered in his long career at the hands of younger scholars who wanted to teach as few students as possible and lived for their next theoretical argument at a conference or in an article taking issue with an academic competitor who embraced the wrong paradigm.<sup>5</sup> A scholar with a host of landmark books to his credit, Acuña nevertheless sees himself primarily as a teacher and cultivator of young talent.<sup>6</sup>

Much like Acuña's latest edition of *Occupied America*,<sup>7</sup> our casebook grows out of a broad range of primary and secondary materials, some of them written or compiled by contemporary scholars, others dating back

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<sup>1</sup> See Michael A. Olivas, *Introduction: The Art and Science of Casebooks: Latinos and the Law: Cases and Materials*, 12 HARV. LATINO L. REV. 1 (2009).

<sup>2</sup> See Rodolfo F. Acuña, *On Pedagogy*, 12 HARV. LATINO L. REV. 7 (2009).

<sup>3</sup> See Gerald P. López, *Changing Systems, Changing Ourselves*, 12 HARV. LATINO L. REV. 15 (2009).

<sup>4</sup> Acuña, *supra* note 2, at 8-9.

<sup>5</sup> *Id.* at 9-11.

<sup>6</sup> *Id.* at 12-13.

<sup>7</sup> See RODOLFO F. ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* (6th ed. 2007).

many years.<sup>8</sup> The hundred-plus-page Teacher's Manual tracks almost every question in the book,<sup>9</sup> opening up even more points to examine. In the next edition, we may try to supply links to timelines, maps, and pictures.

For his part, López explains in riveting detail how he came to his current position as a clinical teacher and scholar engaged in deprofessionalizing the law and bringing it down to everyday levels.<sup>10</sup> He also sides with community figures, activists, and organic intellectuals against those lawyers who hold themselves intellectually superior to their clients and do not trouble themselves to enter their clients' worlds or come to terms with their clients' own sharply-honed intelligences.<sup>11</sup>

López meets head-on the assumption that we have entered a post-racial society in which racism has nearly vanished.<sup>12</sup> Though this post-racial vision may be a reality for some whites and a few blacks, it is emphatically not so for many Latinos, particularly the ones he—and we—care about. Applying López's notion of a rebellious paradigm to the situation of Latinos in the United States today, one could say that the regnant approach has been a black-white binary conversation about race. If influential whites continue to insist that we are living in a post-racial society because the United States elected a black president—where does that leave Latinos? Our casebook offers history, postcolonial theory, storytelling, and litigation to show that Latinos suffer discrimination because of characteristics they hold in common. Whether one considers them an ethnic group or a race is almost irrelevant; they are embattled, beleaguered, and in need of legal representation.

The positions of Acuña and López are entirely harmonious with our own. Like them, we have tried to demystify our subject matter, eliminate jargon, and display the raw materials as clearly as possible, along with notes and questions that point to their inner structure.<sup>13</sup>

Rodríguez attributes the emergence of *Latinos and the Law* to the impressive growth in the Latino population in the United States today.<sup>14</sup> While positing that critical movements have passed their zenith, she nevertheless declines to join the voices calling for a post-ethnic or post-racial disengagement.<sup>15</sup> As does López, Rodríguez points out how the dominant approach to racial analysis puts blacks and whites at the center, leaving Latinos under-

<sup>8</sup> See RICHARD DELGADO, JUAN F. PEREA & JEAN STEFANCIC, *LATINOS AND THE LAW: CASES AND MATERIALS* (2008).

<sup>9</sup> RICHARD DELGADO, JUAN F. PEREA & JEAN STEFANCIC, *TEACHER'S MANUAL TO ACCOMPANY LATINOS AND THE LAW: CASES AND MATERIALS* (2008).

<sup>10</sup> See López, *supra* note 3, at 16-29.

<sup>11</sup> *Id.* at 29-33.

<sup>12</sup> *Id.* at 35-37.

<sup>13</sup> See DELGADO, PEREA & STEFANCIC, *supra* note 8, at 1 (noting that the volume aims at a readership of "student[s] [and] teacher[s] interested in the legal fortunes of this large and interesting group"); see also *id.* at 2 (describing the forces that have shaped the group's history and present predicament).

<sup>14</sup> Cristina M. Rodríguez, *Latinos: Discrete and Insular No More*, 12 HARV. LATINO L. REV. 41, 42-44 (2009).

<sup>15</sup> *Id.* at 42.

theorized.<sup>16</sup> Her thought-provoking meditation on the many possible futures of Latinos in the United States—assimilation, dominance through sheer voting power, and cultural intermixture to the point of disappearance—may, and probably will, shape the textbook of the future.

Although, like our first two commentators, we remain squarely focused on contemporary issues, we hope that Rodríguez continues to explore the implications of demographic change. When 2050 arrives, will Latinos cease to be a minority for purposes of antidiscrimination law? Will they whiten by intermarriage or choice, thus enabling whites to hang on to majority status? Will acceptance of Latino popular culture hybridize race, so that most of us will come to consider ourselves mixed-race and mixed-culture people? How will laws crafted to address problems of African Americans redress civil rights issues for Latinos? Tantalizingly, Rodríguez suggests that the political process rather than the courts may prove a more fertile avenue of redress.<sup>17</sup>

We do not know whether any casebook on labor law contains a chapter on the special problems of Latinos and workplace discrimination. If not, we fervently hope that Leticia Saucedo will write such a chapter. Saucedo makes a case for labor law litigation as a vehicle for understanding the nexus of Latino workers' rights and Latino immigrants' rights.<sup>18</sup> She describes the underlying assumptions in employment discrimination law that make the ideal worker Anglo and male, and that do not take account of national origin discrimination.<sup>19</sup>

Saucedo brings to the forefront the immense contribution of MALDEF (the Mexican American Legal Defense and Educational Fund) in litigating two of the main cases in this section.<sup>20</sup> Indeed, since its inception in 1968, MALDEF has been a key force in enforcing Latino rights in the arenas of the workplace, voting, and education, and in challenging anti-immigration ordinances.<sup>21</sup> Although we do include some material by MALDEF in the casebook, we may, in the next edition, be able to include even more, perhaps in our section on rebellious lawyering.

Aoki and Johnson<sup>22</sup> wish we had given more thorough treatment to immigration;<sup>23</sup> made our theoretical premises more explicit than we

<sup>16</sup> *Id.* at 41.

<sup>17</sup> *Id.* at 46-49.

<sup>18</sup> Leticia M. Saucedo, *National Origin, Immigrants, and the Workplace: The Employment Cases in Latinos and the Law and the Advocates' Perspective*, 12 HARV. LATINO L. REV. 53 (2009).

<sup>19</sup> *Id.* at 56-58.

<sup>20</sup> *Id.* at 58-70 (discussing MALDEF's role in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), and *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973)).

<sup>21</sup> DELGADO, PEREA & STEFANCIC, *supra* note 8, at 478 (reproducing a MALDEF memorandum on *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007)).

<sup>22</sup> Keith Aoki & Kevin R. Johnson, *Latinos and the Law: Cases and Materials: The Need for Focus in Critical Analysis*, 12 HARV. LATINO L. REV. 73 (2009).

<sup>23</sup> *Id.* at 86-92. The two also wish that we had not used the term "wave" to discuss the recent surge of immigration, reasoning that this implies a negative attitude toward immigration and immigrants on the part of the authors of the casebook. This concern is misplaced. Waves

did;<sup>24</sup> and endorsed a particular school of Latino legal thought.<sup>25</sup> They also wish we had given greater treatment to voting rights,<sup>26</sup> and less to “law’s negative impacts on Latina/os.”<sup>27</sup> They also believe that we were excessively nationalistic in focusing, as we did, on the problems of one group, thus overlooking opportunities for multiracial coalitions.<sup>28</sup>

Aoki and Johnson also assert that we “exhibit a profound ambivalence about . . . whether the term ‘Latino’ correlates with race or with ethnicity.”<sup>29</sup> They cite no support for this from our book, but rather quote an article by Robert Chang and Neil Gotanda exploring the “race question.”<sup>30</sup> We are not ambivalent. Race is the most useful concept for understanding Latinos because Latinos are a profoundly racialized group that has been subject, over the years, to racism of the many forms we document in the book.<sup>31</sup> It is true

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can be either positive or negative, as, for example, a wave of emotions. Johnson himself uses hydraulic metaphors in discussing immigration. See, e.g., KEVIN R. JOHNSON, *OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS* (2007) (using a hydraulic metaphor in the title); *id.* at 12 (discussing immigration as a “flow[ ]”); see also Aoki & Johnson, *supra* note 22, at 81-85 (their article in this issue uses the term “dilution” to describe action that reduces Latinos’ voting efficacy—which would seem to imply that they see the group, for some purposes at least, in hydraulic or aquatic terms). We do wonder why Aoki and Johnson single out a single instance of our use of a neutral term to equate us with restrictionists like Samuel Huntington, Victor Davis Hanson, Michelle Malkin, or Peter Brimelow. See *id.* at 93. The inference seems unwarranted, particularly since they use the term, and similar ones, themselves.

<sup>24</sup> Aoki & Johnson, *supra* note 22, at 78-79.

<sup>25</sup> *Id.* at 78 (criticizing us for not citing LatCrit scholarship by name). Aoki and Johnson have evidently changed their minds recently on the value of this school of scholarship. See Keith Aoki & Kevin R. Johnson, *An Assessment of LatCrit Theory Ten Years After*, 83 IND. L.J. 1151, 1170-73 (2008) (noting a “certain laxness in LatCrit scholarship”; noting its “fail[ure] to demonstrate fresh insights and intellectual relevance”; and observing the “uneven quality of LatCrit scholarship”).

By way of contrast, we believe much of this school of scholarship has value. See, e.g., DELGADO, PEREA & STEFANCIC, *supra* note 8, at 844 (“In recent years, a ‘Lat/Crit’ movement has sprung up that considers some of the issues covered in this book, along with much else. The movement features an annual conference and sponsors field trips to foreign countries.” (citations omitted)).

Some LatCrit scholars we cite or excerpt include: Elvia Arriola, Steven Bender, Christopher Cameron, Gilbert Carrasco, Yvonne Cheren-Pacheco, Leslie Espinoza, Laura Gómez, Ian Haney López, Angela Harris, Elizabeth Iglesias, Sylvia Lazos Vargas, Guadalupe Luna, Pedro Malavet, George Martínez, Margaret Montoya, Maria Ontiveros, Laura Padilla, Jenny Rivera, Ediberto Román, Mary Romero, Lupe Salinas, Gloria Sandrino-Glasser, Leticia Saucedo, Antoinette Sedillo López, Luis Angel Toro, Francisco Valdes, Siegfried Wiessner, and Eric Yamamoto. See DELGADO, PEREA & STEFANCIC, *supra* note 8, at xxxi-xliii (Table of Authorities).

Perhaps Aoki and Johnson would wish that we had given this movement even greater prominence in our book. However, our purpose was not to demonstrate brand loyalty, but to place Latinos, not legal scholars, at the center of the discussion. We hope that by facilitating a Latino-intensive study, we are, at least, supporting the aims of Lat/Crit.

<sup>26</sup> Aoki & Johnson, *supra* note 22, at 79-86.

<sup>27</sup> *Id.* at 79.

<sup>28</sup> *Id.* at 74.

<sup>29</sup> *Id.* at 74-75.

<sup>30</sup> *Id.* at 75 (quoting Robert S. Chang & Neil Gotanda, *Afterword: The Race Question in LatCrit Theory and Asian American Jurisprudence*, 7 NEV. L.J. 1012 (2007)).

<sup>31</sup> It is true that one of us, Juan Perea, in early work, advanced the idea that ethnicity is the best lens for viewing the study of Latinos. He has, however, long since abandoned that view. And our casebook nowhere takes that position. Instead, the three of us agree with Ian Haney

that part of the racialization of Latinos occurs through characteristics like language, which is usually not understood as part of race. However, we embrace the broad understanding of race and its social construction articulated by Omi and Winant.<sup>32</sup> Part of what is interesting theoretically about Latinos is that to understand their racial oppression one must include characteristics that become objects of racism, like language or perceived foreignness, which are not encompassed within the usual black-white understanding of race.

As for negativity, we did not set out to construct a celebratory casebook, nor one that proceeds in the comparative mode. We used the latter approach for our *Race and Races* casebook,<sup>33</sup> which deals with five racial groups, but is not designed for a semester-long course on Latinos. Does the new book have a set of premises or a viewpoint? The reader need only read carefully the introduction to see that we outline our main theoretical approaches, including critical race theory and postcolonial thought. We also listed there some of the sections where we made use of these approaches to interpret the case material.<sup>34</sup> Does our book cover every topic about Latinos, such as voting, or any topic in great depth, such as immigration? Of course

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López that race is the most appropriate way to view most Latino experience in the United States. See, e.g., Juan F. Perea, *Buscando América: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1426 (2004) (“I argue, therefore, that language should be treated as an aspect of race and that language discrimination should be treated as race discrimination.”); Juan Perea, *Five Axioms in Search of Equality*, 2 HARV. LATINO L. REV. 231, 233-34 (1997) (“Our understanding of race and racism must be amplified so that the concepts also encompass ethnic characteristics, which often form the basis for prejudice and racism against Latinos/as, Asian Americans and Blacks.”).

<sup>32</sup> MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* (2d ed. 1994).

<sup>33</sup> See JUAN F. PEREA, RICHARD DELGADO, ANGELA P. HARRIS, JEAN STEFANCIC & STEPHANIE M. WILDMAN, *RACE AND RACES: CASES AND MATERIALS FOR A DIVERSE AMERICA* (2d ed. 2007).

<sup>34</sup> Aoki and Johnson write that they found only one express reference to critical race theory, aside from the discussion on page 3. See Aoki & Johnson, *supra* note 22, at 78. We wonder how hard they tried. On that same page, we tell exactly where postcolonial thought and critical race theory enter into the rest of the book. See, e.g., DELGADO, PEREA & STEFANCIC, *supra* note 8, at 133 (noting that “[a] tenet of both critical legal studies and critical race theory is legal indeterminacy—the notion that a court, by invoking suitable precedent, can make a case come out practically any way it wants”); *id.* at 459 (explaining how “critical race theory can help illuminate debates over immigration”); *id.* at 554 (explaining cultural stereotyping “[f]rom a [p]ostcolonial and [c]ritical [r]ace [t]heory [p]erspective”); *id.* at 732 (introducing “Critical Latina Feminism”); *id.* at 843 (“Storytelling [a prime tenet of critical race theory] has also caught on in the law . . .”).

The other approach—postcolonial theory—that Aoki and Johnson had trouble locating appears explicitly in *Latinos and the Law*. *Id.* at 178 (“For discussion of postcolonial theory, which contains this as a major theme, see . . .”); *id.* at 178-80 (excerpting an article with “postcolonial theory” in the title); *id.* at 209-11 (summarizing postcolonial theory on the subject of native languages); *id.* at 303 (introducing a section on education with the words: “Postcolonial writers such as Albert Memmi, Edward Said, and Arundhati Roy write about how the colonial subject mounts resistance to the overlords by withdrawing support, working slowly” and comparing this history to the story of Latino resistance to segregated schooling); *id.* at 419 (explaining “[t]he role of neocolonialism” and globalization in controversies over immigration); *id.* at 525, 645 (applying postcolonial theory to understand immigration law and workplace discrimination); *id.* at 554 (applying postcolonial theory, by name, to understand

not. We agree that the voting rights cases are important<sup>35</sup> and that immigration law has a disparate negative impact on Latinos in many areas, some of which we pursued and others not.

While an immigration focus might be appropriate for an immigration casebook, it seems entirely inappropriate for a comprehensive book like ours. An important theme in our book is that Latinos are *not* just a relatively recent group of immigrants to the United States, but rather subjects and objects of law with depth and history worthy of detailed study. Indeed, the United States produced Mexican Americans, and later Puerto Ricans, through conquest, not immigration.<sup>36</sup>

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We hope that our casebook and the foregoing reactions to it will pique the curiosity of readers to examine the burgeoning literature about the legal treatment of Latinos/as in the United States, for much more remains to be examined and analyzed. We realized from the start that our efforts would not be perfect or satisfactory to all. Though the task of producing a casebook such as *Latinos and the Law* has at times been daunting, we offer the final product in hopes of calling to the attention of a larger audience the legal issues facing this multifaceted and growing group.

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cultural and media stereotypes); *id.* at 563 (applying postcolonial theory to explain struggles over language).

<sup>35</sup> Indeed, in the casebook, we specifically state that “This casebook does not cover voting rights and criminal justice, which deserve separate books of their own.” DELGADO, PEREA & STEFANCIC, *supra* note 8, at 4.

<sup>36</sup> See, e.g., LAURA E. GÓMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* (2007); PEREA, DELGADO, HARRIS, STEFANCIC & WILDMAN, *supra* note 33, at 285-383.