LATINOS AND THE LAW: CASES AND MATERIALS: THE NEED FOR FOCUS IN CRITICAL ANALYSIS

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I. Introduction: Panethncity and its Discontents

Latinos and the Law: Cases and Materials[1] represents an important contribution to the scholarship on Latina/o civil rights. A crisp read, the casebook nicely builds on the excellent reader, *The Latino/a Condition*, edited by Richard Delgado and Jean Stefancic, published a decade previously.[2]

The volume effectively pulls together basic materials concerning legal issues affecting the Latina/o community in the United States, along with relevant background. Importantly, *Latinos and the Law* stands to capitalize on the growing interest in teaching and scholarship in the general area of the law as it relates to Latina/os,[3] a growing and increasingly recognized presence in this country. The volume will no doubt prove to be helpful in teaching a "Latina/os and the Law" class to law students as well as to undergraduate and graduate students.

In our estimation, *Latinos and the Law*

> hits some balls out of the park and fouls some into the stands. As in baseball, . . . the hits are more notable than are the misses. Only . . . a few fans remember the soaring, parabolic foul balls of Mark McGwire and Sammy Sosa — most of us remember the exciting, towering home runs of the 1998 and 1999 pennant seasons.[4]

Our essay, as reviews are prone to do, will focus more on the foul balls than the home runs.

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[1] Richard Delgado, Juan F. Perea & Jean Stefancic, Latinos and the Law: Cases and Materials (2008) [hereinafter Latinos and the Law].

[2] *See* The Latino/a Condition: A Critical Reader (Richard Delgado & Jean Stefancic eds., 1998).

[3] *See, e.g.*, José Luis Morín, Latino/a Rights and Justice in the United States (2d ed. 2009); Symposium, *Latinos and Latinas at the Epicenter of Contemporary Legal Discourses*, 83 Ind. L.J. 1141 (2008).

[4] Michael A. Olivas, *Immigration Law Teaching and Scholarship in the Ivory Tower: A Response to* Race Matters, 2000 U. Ill. L. Rev. 613, 614.

One of the founders of Critical Race Theory, Richard Delgado long has blazed a staunchly nationalist trail in his civil rights scholarship.[5] Consequently, it should not be surprising that *Latinos and the Law*, with its focus squarely on Latina/os, is firmly situated in the nationalist genre. Although this approach unquestionably has its strengths, it also has its weaknesses, some of which are the subject of this article.

In looking exclusively at the Latina/o condition in the United States, *Latinos and the Law* declines to identify commonalities between Latina/os and the experiences of other communities of color. Establishing common ground might facilitate the construction of coalitions to combat common grievances. Social change through that model, however, is simply not the goal of the casebook.

Still the same, Latina/os and African Americans share common concerns with their place in U.S. social life. To offer one prominent example, the two groups have long been aggrieved by criminal law enforcement, through the excesses of anti-gang measures, racial profiling, disparate enforcement of the criminal laws generally, and many related issues.[6] Similarly, the immigration experiences of Latina/os and Asian Americans, and related stereotypes, result in some common grievances with U.S. immigration law and its enforcement.[7]

One of the strengths of critical Latina/o, or "LatCrit," theory has been its analysis of Latina/o civil rights as well as its analytical focus on the commonalities between and among various minority groups, with an eye toward building coalitions between groups with common interests.[8] The focus on commonalities between and among different minority groups in areas such as criminal law enforcement, employment discrimination, immigration, and education has shed critically important light on how racial subordination as a whole operates in modern American social life. Importantly, it also has offered direction on how one might build a political movement for social change.

However, perhaps with good cause, Delgado, Perea, and Stefancic seem to exhibit a profound ambivalence about a threshold question for the entire project—that is, whether the term "Latino" correlates with race or with

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[5] *See* Richard Delgado, *Linking Arms: Recent Books on Interracial Coalition as an Avenue of Social Reform*, 88 Cornell L. Rev. 855, 856 (2003) (book review) (criticizing the "preoccupation with interracial coalition").

[6] *See* Kevin R. Johnson, *The Case for African American and Latina/o Cooperation in Challenging Racial Profiling in Law Enforcement*, 55 Fla. L. Rev. 341 (2003).

[7] *See, e.g.*, Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 Cal. L. Rev. 1395, 1399-1400 (1997). *But see* Rachel F. Moran, *What if Latinos Really Mattered in the Public Policy Debate?*, 85 Cal. L. Rev. 1315, 1317-31 (1997) (questioning the commonalities between Asian American and Latina/o immigration experiences in the United States).

[8] *See, e.g.*, Francisco Valdes, *Foreword: Under Construction—LatCrit Consciousness, Community, and Theory*, 85 Cal. L. Rev. 1087, 1094 (1997). For analysis of the place of coalitions in critical theory, see Ediberto Roman, *Coalitions and Collective Memories: A Search for Common Ground*, 58 Mercer L. Rev. 637 (2007).

ethnicity. How should one unpack and understand the ambivalence of *Latinos and the Law* on this issue?

Robert Chang and Neil Gotanda responded to a provocative commentary in the *Los Angeles Times* by Tanya Hernández in which she characterized race relations between African Americans and Latina/os as "acrimonious."[9] Chang and Gotanda also noted that Los Angeles's Spanish-language daily, *La Opinión*, reported on growing tensions between Koreans and Latina/os and that "[t]wo out of three Latino employees say they would prefer to work for non-Koreans," even though "nearly 60 percent of Koreatown's labor force is Latino."[10]

Noting the chimerical, elusive quality of the categories used to describe race and ethnicity, Chang and Gotanda identify the "slippage" between the two:

> "Latino" is posed in opposition to "Black," suggesting that both "Black" and "Latino" are racial categories. "Korean" is posed in opposition to Latino, yet the quoted source is a "Colombian-born" immigrant. Here, "Korean" appears to be an ethnic designation while "Latino" appears to be a panethnic one, with an immigrant from Colombia being subsumed under the panethnic Latino designation. The Korean-Black conflict might be characterized as one between a racialized ethnic group and a racial group, at least within the ethno-racial vocabulary of the United States.[11]

In *Latinos and the Law*, Delgado, Perea and Stefancic include excerpts from articles by Angel R. Oquendo[12] and Ian Haney López,[13] as well as an

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[9] Robert S. Chang & Neil Gotanda, *Afterword: The Race Question in LatCrit Theory and Asian American Jurisprudence*, 7 NEV. L.J. 1012, 1013 & n.1 (2007) (citing Tanya K. Hernandez, Op-Ed., *Roots of Anger: Longtime Prejudices, Not Economic Rivalry, Fuel Latino-Black Tensions,* L.A. TIMES, Jan. 7, 2007, at M1).

[10] Aruna Lee, *Korean-Latino Relations Grow Icy*, NEW AMERICA MEDIA, Mar. 12, 2007, http://news.newamericamedia.org/news/view_article.html?article_id=956104e550c2a5e61502487bd2912c9e.

[11] *See* Chang & Gotanda, *supra* note 9, at 1014.

[12] LATINOS AND THE LAW, *supra* note 1, at 110 (excerpting Angel R. Oquendo, *Re-Imagining the Latino/a Race*, 12 HARV. BLACKLETTER L.J. 93, 93-98, 103-07, 109-10 (1995) (noting the "poverty" of the U.S. "concept of race" that is "problematically premised on the existence of an independently meaningful concept of race that applies to all people, including Latino/as. . . . The concept of race is incapable of . . . making significant distinctions between those who fall within and those who fall without a particular race. . . . [However,] I would argue that [racial] categories should not be simply quashed . . . [but] be [re-]anchored . . . on the cultural or spiritual life of peoples")).

[13] *Id.* at 115 (discussing Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143, 1146-47 (1997) ("[W]e should . . . use race as a lens . . . through which to assess the Latino/a experience . . . .")); *see also* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (10th anniversary ed., rev. 2006) (observing how society constructs "races" though practices, including laws pertaining to immigration, citizenship, and the right to marry); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S (2d ed. 1994) (analyzing the social construction of race in U.S. social life).

early piece by Delgado and Vicky Palacios[14] in which they argue that a combination of ancestry, language as a vessel of culture, and phenotype construct Mexican-Americans as a distinct, socially and legally cognizable group. Still, as Chang and Gotanda point out, there is a curious categorical asymmetry: Black is opposed to white, but Mexican-American, Chicano, or Hispanic is juxtaposed against "Anglo," which ostensibly is an ethnic, not a racial term.

One might say that, although racial categories are socially constructed and fluid, they also have multiple simultaneous dimensions in which class, race, gender, and nationality overlap—in a way similar to how early twentieth century quantum physicists ceased analyzing light as behaving like either a wave or a particle, after ultimately realizing that it was both. Leslie Espinoza did an excellent job of encapsulating the multidimensionality of racial identity,[15] as did George Martínez in carefully excavating the social and legal construction of whiteness in Mexican-American identity.[16]

Nevertheless, the multiple levels of Latina/o identity are not unproblematic. As Chang and Gotanda write,

> Juan Perea made a call [in 1997] that was heard by one of us as an attempt to shift the terms of the debate with regard to Latinas/os to ethnicity rather than race. . . . [because] "[t]he concept of Civil Rights is so dominated by the Black/White binary understanding of American racial identity that it is currently of little utility for Latinos" . . . . Later that day, Ian Haney López responded to Juan Perea's invitation to explore the question of Latinas/os and race and ethnicity, arguing that "[w]hile ethnicity offers a powerful paradigm for conceptualizing Latina/o identity, one that has been extensively and fruitfully used, . . . race remains indispensable to understanding Latino/a experiences and to improving the welfare of Latino/a communities."[17]

Asian American scholars have made important contributions to this debate. Yen Le Espiritu has defined panethnicity as "a conscious coming together of ethnic and national-origin groups in a new umbrella group."[18] Chang and Gotanda note that a panethnic Latina/o category emerged in LatCrit scholarship in the late 1990s; however, they

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[14] LATINOS AND THE LAW, *supra* note 1, at 117 (excerpting Richard Delgado & Vicky Palacios, *Mexican Americans as a Legally Cognizable Class Under Rule 23 and the Equal Protection Clause*, 50 NOTRE DAME LAW. 393, 393-94, 405-15 (1975)).

[15] *See* Leslie G. Espinoza, *Multi-Identity: Community and Culture*, 2 VA. J. SOC. POL'Y & L. 23 (1994).

[16] *See* George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINO L. REV. 321 (1997).

[17] Chang & Gotanda, *supra* note 9, at 1014-15 (footnotes omitted) (quoting Juan Perea, *Five Axioms in Search of Equality*, 2 HARV. LATINO L. REV. 231, 237 (1997), and Ian F. Haney López, *Retaining Race: LatCrit Theory and Mexican American Identity in* Hernandez v. Texas, 2 HARV. LATINO L. REV. 279, 280 (1997)).

[18] *Id.* at 1015 (citing YEN LE ESPIRITU, ASIAN AMERICAN PANETHNICITY (1992)).

> note one divergence based on regional focus: LatCrit scholarship on the Caribbean, Caribbean immigrants, and the North-South Dialogue tends toward an ethnicity or panethnicity analysis while LatCrit scholarship on the Southwest and Mexican Americans tends toward an implicit race analysis. . . . [T]he call of panethnicity may unite; the call of race may divide.[19]

Using the work of Claire Jean Kim,[20] Chang and Gotanda theorize that, because of the tensions between U.S. race and ethnicity categories, Blacks are "triangulated" or "positioned" as "American" against Asian Americans and Latina/os, who are "positioned" as "foreigners." In contrast, if Latina/os are positioned as "white," then Asian Americans and African Americans are positioned as "nonwhite."

In addition, relying on the scholarship of Angela Harris, Chang and Gotanda raise the issue of "Black exceptionalism" as a challenge to panethnicity claims within Latina/o and Asian American communities. Harris writes that "[i]n its strongest form, black exceptionalism argues that . . . Indians, Asian Americans, and Latino/as do exist. But their roles are subsidiary to, rather than undermining, the fundamental binary national drama. As a political claim, black exceptionalism exposes the deep mistrust and tension among American ethnic groups racialized as 'nonwhite.'"[21]

Politics and political identities may be crucially important to building, sustaining and expanding coalitions. However, such coalitions must grow out of recognition of the different social, economic, and political histories of different nonwhite groups in this country. If the romance of panethnicity obscures spaces that need to be addressed, there may be unity in the short run, at the expense of longer-term dissent and disagreement. On the other hand, if panethnicity allows the building of bridges and construction of alliances across the borders of race/ethnicity, might panethnicity be a necessary precondition for the meaningful exercise of policy agency and power at local, state, or even federal levels? When does the panethnic tent become so large that the analysis becomes meaningless or contradictory? Or, do the exclusions become arbitrary?

The next section assesses the absence of assorted nationalism and panethnicities in *Latinos and the Law*, finding this absence related to the lack of a section in the volume addressing the political positioning of Latina/os.

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[19] *Id.* at 1015-16 (footnote omitted).

[20] *See* Claire Jean Kim, *The Racial Triangulation of Asian Americans*, *in* ASIAN AMERICANS AND POLITICS: PERSPECTIVES, EXPERIENCES, PROSPECTS 39, 42 (Gordon H. Chang ed., 2001).

[21] Chang & Gotanda, *supra* note 9, at 1016-17 (quoting Leslie Espinoza and Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 CAL. L. REV. 1585, 1596 (1997)).

II. Critical Race Theory, LatCrit, FemCrit, QueerCrit, APACrit: Missing in Action in *Latinos and the Law*

What are the theoretical underpinnings, if any, of *Latinos and the Law*? It ultimately is something of a curious casebook, the work of prominent Critical Race Theorists but with little express reliance upon, or explanation of, Critical Race Theory (CRT) principles.[22] It might be classified as a "closeted" critical reader (at least to newcomers to Critical Race Theory scholarship who are unaware of the deep intellectual affiliations of its authors). Alternatively, is *Latinos and the Law* just another doctrinal critique of the status of the law, not wedded to any unified theoretical approach? The reader is left to answer this question.

Any express discussion of theory is fleeting in *Latinos and the Law*. The beginning of the casebook includes a mention of CRT,[23] which according to the index is the only express reference to CRT in the entire volume.[24] We use the word "express" cautiously because excerpts of the work of a number of influential Critical Race Theory scholars, including but not limited to the editors, are included in the casebook. However, it is left to the reader to connect and attach any theoretical underpinning to the collection of readings.

Moreover, and perhaps most surprisingly, critical Latina/o theory is not listed in the subject index to the volume.[25] This is nothing less than odd. In hundreds of pages of discussion of Latina/os and the law, *Latinos and the Law* fails to mention an intellectual movement, which the coauthors of the casebook have participated in, centered on the analysis of Latina/os and the law. Although the casebook excerpts the work of some influential LatCrit scholars,[26] little attempt is made to identify, much less credit, the movement for its intellectual focus. By so doing, the casebook effectively marginalizes, and to an extent delegitimizes (or at least fails to legitimate), LatCrit theory.[27] It is hard to fathom the reasoning behind the wholesale omission of the LatCrit movement from *Latinos and the Law*. Even if one questions the

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[22] For a primer on the fundamentals of Critical Race Theory, see Richard Delgado & Jean Stefancic, Critical Race Theory: An Introduction (2001).

[23] Latinos and the Law, *supra* note 1, at 3.

[24] *Id.* at 874.

[25] *Id.* at 873-83. In a chapter near the end of Latinos and the Law, *supra* note 1, at 732-47, there is a brief section on Critical Latina Feminism without a mention of LatCrit theory.

[26] *See, e.g.*, Martinez, *supra* note 16, *as reprinted in* Latinos and the Law, *supra* note 1, at 133; Margaret E. Montoya, *Mascaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 Harv. Women's L.J. 185 (1994), 15 Chicano-Latino L. Rev. 1 (1994), *as reprinted in* Latinos and the Law, *supra* note 1, at 737; Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 Cal. L. Rev. 1 (1995), *as reprinted in* Latinos and the Law, *supra* note 1, at 709.

[27] Richard Delgado has previously criticized mainstream civil rights scholars for failing to cite the work of minority scholars. *See* Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. Pa. L. Rev. 561, 573 (1984).

quality of some scholarship in this genre, as we have,[28] that would be a legitimate point worth making, discussing, and defending, rather than ignoring and marginalizing.

Without a theoretical lens for analysis, the review of the subject matter areas in certain respects resembles a traditional critique of law and its treatment of Latina/os, which is not what one would expect from this trio of coauthors, a most accomplished group of Critical Race scholars. Unfortunately, *Latinos and the Law* lacks a systemic, institutional,[29] or some other theoretical or thematic approach that links the different subjects covered in the casebook into a coherent whole. Consequently, the casebook in certain respects represents little more than a basic overview of the law's negative impacts on Latina/os in the modern United States.

However, even the overview has material omissions, arising in part from not fully engaging the tensions between ethnicity and race and the effects on political mobilization and power, but also from not fully engaging an overarching framework for the book. For example, consider voting rights.

The Fifteenth Amendment to the U.S. Constitution provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[30] Notwithstanding that Amendment, many states historically have employed a shameful assortment of devices, such as poll taxes,[31] literacy tests,[32] and intimidation and violence, to discourage African Americans and other minorities from exercising the right to vote.[33] The Vot-

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[28] *See* Keith Aoki & Kevin R. Johnson, *An Assessment of LatCrit Theory Ten Years After*, 83 IND. L.J. 1151 (2008). For strong criticism of LatCrit theory, see Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121, 122 (2003) (book review). Kevin R. Johnson, *Roll Over Beethoven: "A Critical Examination of Recent Writing About Race"*, 82 TEX. L. REV. 717 (2004), responds to the strident nature of this critique.

[29] *See, e.g.*, Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000).

[30] U.S. CONST. amend. XV, § 1.

[31] The Twenty-Fourth Amendment bans poll taxes in federal elections. U.S. CONST. amend. XXIV, § 1; *cf.* Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966) (banning poll taxes in state elections under the Equal Protection Clause). The latest incarnation of a poll tax reached the Supreme Court in *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008), which involved a challenge to an Indiana requirement that a voter must show government-issued photo identification in order to vote. In a plurality opinion, the Court upheld the Indiana law despite the burden that the law placed on the poor, the elderly, and minorities, including naturalized U.S. citizens. *See* Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737 (2008).

[32] Section 4 of the Voting Rights Act of 1965 suspended literacy tests. *See* Pub. L. No. 89-110, § 4, 79 Stat. 437, 438-39 (codified as amended at 42 U.S.C. § 1973b (2006)).

[33] *See generally Crawford*, 128 S. Ct. 1610. Consider also the prevalence of laws that deny the franchise to over four million felons, a majority of them African American and Latina/o. As John Calmore observed, "forty-seven states disenfranchise offenders while they are incarcerated. Thirty-two states go farther and disenfranchise parolees while twenty-nine states disenfranchise probationers. Remarkably, nine states . . . deny felons the right to vote for the

ing Rights Act of 1965 (VRA) instituted preclearance requirements that automatically suspended any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," until the jurisdiction obtained a declaratory judgment from a three-judge federal district court panel certifying that the proposed change would not have a racially discriminatory effect or purpose.[34]

In 1975[35] and 1982,[36] Congress amended the VRA to require the providing of bilingual election materials and extending preclearance provisions until 2007. (Congress in 2006 extended the VRA for an additional 25 years).[37] The 1982 amendments also reinstituted a disparate effects test for VRA claims, thereby overruling *City of Mobile v. Bolden*,[38] in which the Supreme Court imposed the requirement that the state act with a "discriminatory intent" to establish a VRA violation. The amendments also provided that language minorities were entitled to protection under the Act.[39]

Following passage of the 1982 amendments to the Voting Rights Act, one of the concerns was not merely ensuring ballot access, but challenging more sophisticated devices, such as redistricting to dilute the votes of minority groups.[40] The use of multimember at-large elections to dilute the electoral power of racial minorities occurs when, rather than dividing a city or county into single-member districts, a state legislature assigns candidates to

rest of their lives." John O. Calmore, *Race-Conscious Voting Rights and the New Demography in a Multiracing America*, 79 N.C. L. Rev. 1253, 1274 (2001) (footnotes omitted).

[34] 42 U.S.C. § 1973c (2006).

[35] Pub. L. No. 94-73, 89 Stat. 400 (1975).

[36] Pub. L. No. 97-205, 96 Stat. 131 (1982).

[37] Pub. L. No. 109-246, 120 Stat. 577 (2006); *see* Nw. Austin Mun. Util. Dist. No. 1 v. Mukasey, 573 F. Supp. 2d 221 (D.D.C. 2008) (upholding the 2006 extension of the Voting Rights Act preclearance provisions). In January 2009, the U.S. Supreme Court noted jurisdiction in *Nw. Austin Mun. Util Dist. No. 1 v. Mukasey*, 129 S. Ct. 894 (2009), which involves a challenge to Section 5 of the Voting Rights Act by a Texas utility that contends that Congress lacked the constitutional power to enact Section 5 and require certain state and local governments to "preclear" proposed changes to their voting systems with the Department of Justice. *See also* Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 Hous. L. Rev. 1 (2007); Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174 (2007).

[38] 446 U.S. 55 (1980), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982); *see* James U. Blacksher & Larry T. Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden*: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 Hastings L.J. 1 (1982).

[39] Pub. L. No. 94-73, 89 Stat. 400 (1975); *see* 42 U.S.C. § 1973l(c)(3) (2006) ("The term 'language minorities' or 'language minority group' means persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage.").

[40] *See* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 Harv. L. Rev. 1663, 1679 (2001) ("Redistricting practices plainly reflect the relevance of groups to a representational system. One of the main purposes of redistricting is to facilitate vote aggregation by grouping individuals together on the basis of shared interests. Redistricters do so to enable individuals to communicate their needs to their representatives and to help legislators represent their districts effectively." (footnote omitted)).

run at-large. With at-large schemes, the political party that controls fifty-one percent of the vote wins one hundred percent of the seats.[41]

Before the 1982 amendments, the Supreme Court considered the applicable standards in scrutinizing whether at-large voting districts violated the rights of minorities. In *Whitcomb v. Chavis*,[42] the plaintiffs challenged the at-large voting system of Marion County, Indiana, arguing that the system unconstitutionally diluted the votes of inner-city African American residents.

In *White v. Regester*,[43] an important Latina/o voting rights case, plaintiffs challenged the 1970 reapportionment by the Texas House of Representatives, contending that the use of multimember districts diluted the voting power of Blacks in Dallas County and Mexican-Americans in Bexar County. The Supreme Court found that the Dallas and Bexar County multimember districts had unconstitutionally diluted Blacks' and Mexican-Americans' voting power, respectively. The Court specifically found that Mexican-Americans had been subjected to racially discriminatory treatment in Texas. The Court admitted that, with regard to electoral processes, "'[a] cultural incompatibility . . . conjoined with the poll tax and the most restrictive voter registration procedures in the nation have operated to effectively deny Mexican-Americans access to the political processes in Texas *even longer than the Blacks were formally denied access by the white primary*.'"[44] *White v. Regester* is a critically important case linking voter dilution claims arising from the Latina/o demographics of the Southwest with the Black/white demographics of the former Jim Crow Southern states.

Initially, the type of vote dilution litigated after the 1982 VRA Amendments occurred in states, such as North Carolina, with conceptions of race relations deeply embedded in the Black/white paradigm. *Thornburg v. Gingles*[45] involved a North Carolina General Assembly redistricting plan that utilized multimember districts. Black voters in the multimember districts filed suit under Section 2 of the VRA claiming that there were sufficient groupings of African American voters within multimember districts to constitute effective voting majorities. They sought disaggregation of multimem-

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[41] *See* Barbara L. Berry & Thomas R. Dye, *The Discriminatory Effects of At-Large Elections*, 7 FLA. ST. U. L. REV. 85 (1979).

[42] 403 U.S. 124 (1971).

[43] 412 U.S. 755 (1973).

[44] *Id.* at 768 (emphasis added) (quoting Graves v. Barnes, 343 F. Supp. 704, 731 (W.D. Tex. 1972) (the lower court decision that the Court affirmed in part, reversed in part, and remanded)).

Texas has a long history of discrimination against persons of Mexican ancestry. *See, e.g.*, Hernandez v. Texas, 347 U.S. 475 (1954) (finding that systematic exclusion of Mexican-Americans from grand juries in a Texas county violated the Equal Protection Clause); *see also* "COLORED MEN" AND "HOMBRES AQUÍ": *HERNANDEZ V. TEXAS* AND THE EMERGENCE OF MEXICAN-AMERICAN LAWYERING (Michael A. Olivas ed., 2006) (collecting essays analyzing *Hernandez v. Texas*). *See generally* NEIL FOLEY, THE WHITE SCOURGE: MEXICANS, BLACKS, AND POOR WHITES IN TEXAS COTTON CULTURE (1997) (studying the complex history of race and class relations in Texas); DAVID MONTEJANO, ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986 (1987) (same).

[45] 478 U.S. 30 (1986).

ber districts into single-member districts. The Supreme Court established a three-part test for evaluating the legality of at-large voting systems under Section 2; such systems would be unlawful if (1) the minority population was sufficiently large and geographically compact enough to create a single-member district with a majority of the minority group;[46] (2) minority voters were politically cohesive and had a history of voting for the same candi-

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[46] *Id.* at 50 ("[T]he minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district."). The "sufficiently large and geographically compact" prong raises questions on at least two levels: (1) how "large" is "sufficient" for a minority group to successfully make a showing under this prong? Fifty-one percent? Forty-nine percent?; and (2) what happens when you have several minority racial groups? This question was addressed by the Supreme Court in Bartlett v. Strickland, 129 S. Ct. 1231 (2009), which significantly narrowed the scope of Section 2 of the Voting Rights Act. After *Bartlett*, if minority plaintiffs challenge a jurisdiction for failing to create a majority-minority district pursuant to Section 2 of the Voting Rights Act, the jurisdiction may defend itself by establishing that it was not possible to draw a reasonably compact majority-minority district with at least fifty percent of the voting age population. *Bartlett* effectively reduces the number of majority-minority districts mandated by Section 2.

As to the first question,

> nonwhite populations tend to be disproportionately young. According to the 2000 census, while 77.3 percent of the non-Hispanic white population was of voting age, only 68.5 percent of blacks and 65.0 percent of Hispanics were. . . . [M]inority communities also historically have had lower voter registration and turnout characteristics than white communities. And there is some evidence that non-white voters tend to overreport registration and participation at a greater rate than whites. Thus, plaintiffs may realistically be no more likely to elect a candidate of their choice from a 51 percent black district than from a 40 percent one.

Samuel Issacharoff, Pamela S. Karlan & Richard H. Pildes, The Law of Democracy: Legal Structure of the Political Process 626 (3d ed. 2007) (citation omitted). For cases holding that plaintiffs must show that a particular minority constitute a majority of the voting age population in the multimember district where they are seeking a single member district, see Romero v. City of Pomona, 883 F.2d 1418 (9th Cir. 1989); Overton v. City of Austin, 871 F.2d 529 (5th Cir. 1989); Latino Political Action Comm., Inc. v. City of Boston, 609 F. Supp. 739 (D. Mass. 1985), *aff'd*, 784 F.2d 409 (1st Cir. 1986).

As to the second question, see Issacharoff, Karlan & Pildes, *supra*, at 622 ("The other common social science technique for estimating voter behavior is bivariate ecological regression. The word 'bivariate' refers to the fact that the analysis looks at two variables: the racial composition of the precincts and the votes garnered by particular candidates. The adjective 'ecological' refers to the kind of data used in the analysis: election returns reflect aggregate activity (they are usually reported on a precinct-by-precinct basis), rather than the direct observation of individual behavior. 'Regression' is a statistical technique for measuring the relationship between two or more variables . . . . [C]onsider the data in a hypothetical community where all the voters are either black or white and there are two candidates running for election, one black candidate and one white candidate. . . . The least precise data set would be one providing only the overall number of black and white residents within each precinct. If that were the data being used, adjustments would be necessary to account for the fact that a higher percentage of the minority population is likely to be ineligible to vote because of youth, and in the case of Asian-Americans and Hispanics, noncitizenship, as well as for the fact that minority turnout is often significantly lower than white turnout.")

date;[47] and (3) the candidates preferred by the minority community were usually defeated by cohesive voting by the majority group.[48]

When the voting dilution model moved from the South to the Southwest, Latina/os fully entered the picture, although *White v. Regester* foreshadows the multiracial nature of modern voting rights cases. What about multiracial, multiethnic cases arising in areas such as the Southwest, Florida,[49] or the urban North? Or the thorny question of exactly what constitutes a "minority group"—must they share a racial ancestry, a language, ethnicity, or religion? In *Growe v. Emison*,[50] the Supreme Court evaded answering that question, thereby allowing deep division in the lower courts.[51]

Latina/o civil rights organizations, such as the League of United Latin American Citizens[52] and the Mexican American Legal Defense and Educational Fund,[53] have been increasingly influential in developing the contours

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[47] *Thornburg*, 478 U.S. at 51 ("If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests."); *see* cases cited *infra* note 51.

[48] *Thornburg*, 478 U.S. at 51 ("[T]he minority group [must] demonstrate[ ] that submergence in a white multimember district impedes its ability to elect its chosen representatives."); *see* League of United Latin Am. Citizens v. Clements, 999 F.2d 831 (5th Cir. 1993) (en banc) ("[T]he scope of the [VRA] . . . extend[s] only to [electoral] defeats experienced by voters 'on account of race or color.' . . . [T]he failure of minority-preferred candidates to receive support from a majority of whites on a regular basis, without more . . . [does not suffice] to prove legally significant racial bloc voting . . . ."), *cert. denied*, 510 U.S. 1071 (1994).

[49] In South Florida, Cuban-Americans and African Americans have skirmished over the allocation of political power. *See, e.g.*, Johnson v. De Grandy, 512 U.S. 997 (1994); Meek v. Metro. Dade County, 908 F.2d 1540 (11th Cir. 1990), *cert. denied*, 499 U.S. 907 (1991); *see also* Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 969-71 (1995) (analyzing implications of *Johnson v. De Grandy*).

[50] 507 U.S. 25 (1993). In *Growe*, the Court assumed that different racial or language groups could be combined for a vote dilution claim (the groups in question were Blacks and Native Americans in Minneapolis), but concluded that there was no evidence to show there was the necessary historical political cohesion to support a *Gingles* claim. *See id.* at 41-42.

[51] *See* Nixon v. Kent County, 76 F.3d 1381 (6th Cir. 1996) (en banc) (dismissing the "coalition theory" underlying the "packing" claims made by Black and Latina/o plaintiffs in Kent County, Michigan, where a reapportionment created a new district with a 78.3% minority population—66.5% Black and 11.8% Latina/o—even though the combined Black and Latina/o population in Kent County as a whole was 10.8%). *But see* Badillo v. City of Stockton, 956 F.2d 884 (9th Cir. 1992); Concerned Citizens of Hardee County v. Hardee County Bd. of Comm'rs, 906 F.2d 524 (11th Cir. 1990); Campos v. City of Baytown, 840 F.2d 1240 (5th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989); Knox v. Milwaukee County Bd. of Election Comm'rs, 607 F. Supp. 1112 (E.D. Wis. 1985); *see also* Aylon M. Schulte, Note, *Minority Aggregation Under Section 2 of the Voting Rights Act: Toward Just Representation in Ethnically Diverse Communities*, 1995 U. ILL. L. REV. 441. *But cf.* Katharine I. Butler & Richard Murray, *Minority Vote Dilution Suits and the Problem of Two Minority Groups: Can a "Rainbow Coalition" Claim the Protection of the Voting Rights Act?*, 21 PAC. L.J. 619 (1990) (arguing that coalition vote dilution suits should be allowed "only in the most unusual of circumstances").

[52] *See* League of United Latin American Citizens, Mission Statement, http://www.lulac.org/about/mission (last visited Apr. 26, 2009) ("The Mission of the League of United Latin American Citizens is to advance the economic condition, educational attainment, political influence, housing, health and civil rights of the Hispanic population of the United States.").

[53] *See* Mexican American Legal Defense & Educational Fund, About MALDEF, http://maldef.org/about/mission/ (last visited Apr. 26, 2009) ("Founded in 1968, MALDEF is the

of the law of vote dilution in states with large Latina/o populations such as California and Texas. For example, in *Garza v. County of Los Angeles*,[54] Latina/o voters in Los Angeles County, California challenged the district boundaries created in reapportionment. They alleged that the boundaries "cracked" Latina/o voting power, effectively making it impossible to elect a Latina/o to the Board of Supervisors. The County argued that, at the time of the reapportionment, it was not possible to have drawn such a single-member minority-majority district, although it was possible by the time the litigation had ripened. The Ninth Circuit, however, said that the first *Gingles* prong ("sufficiently large") was irrelevant in a case involving *intentional* vote dilution.[55]

Another Ninth Circuit decision, *Gomez v. City of Watsonville*,[56] examined the question of whether there was a necessary level of concentration of minority voters within a particular district to sustain a vote dilution claim. Watsonville had a mayor and six-member city council, all elected in at-large elections. In 1980, *almost half of the city's population was Latina/o*, although only thirty-seven percent of the city's voting-age residents were (because of alienage status and age demographics) and *no Latina/os had ever been elected to local office*.[57] About two-thirds of Watsonville's Latina/o population lived in three of nine census tracts, but only one-third of the city's Latina/o population would have been placed within the two majority Latina/o districts in the plaintiff's proposed plan; the district court held that the city's Latina/os were not sufficiently compact. The Ninth Circuit reversed:

> [t]he district court erred in considering that approximately 60% of the Hispanics eligible to vote in Watsonville would reside in five districts outside the two single-member, heavily Hispanic districts . . . . The fact that the proposed remedy does not benefit all of the Hispanics in the City does not justify denying any remedy at all.

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nation's leading non-profit Latino legal organization. Often described as the 'law firm of the Latino community,' MALDEF promotes equality and justice through litigation, advocacy, public policy, and community education in the areas of employment, immigrants' rights, voting rights, education, and language rights. MALDEF strives to implement programs that are structured to bring Latinos into the mainstream of American political and socio-economic life; providing better educational opportunities; encouraging participation in all aspects of society; and offering a positive vision for the future.").

[54] 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991); *see* J. Morgan Kousser, *Beyond* Gingles*: Influence Districts and the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. Rev. 551, 571-73 (1993); Stanley Pierre-Louis, Comment, *The Politics of Influence: Recognizing Influence Dilution Claims Under § 2 of the Voting Rights Act*, 62 U. Chi. L. Rev. 1215 (1995); *see also* Kevin R. Johnson, *Latinas/os and the Political Process: The Need for Critical Inquiry*, 81 Or. L. Rev. 917, 925-28 (2002) (analyzing implications of the *Garza* decision).

[55] *Garza*, 918 F.2d at 769-72.

[56] 863 F.2d 1407 (9th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989).

[57] *Id.* at 1409; *see* Kevin R. Johnson, *A Handicapped, Not "Sleeping," Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 Cal. L. Rev. 1259, 1264-71 (2008) (analyzing diminished political power of Latina/os in large part as a result of fact that a significant percentage are not U.S. citizens and thus cannot vote).

> . . . It is sadly ironic that the district court concluded that because many Hispanic voters would still not be able to elect representatives of their choice under the [City's] proposed plan, no Section 2 claim could be maintained, thereby relegating all Hispanic voters to having no political effectiveness.[58]

Gomez v. City of Watsonville illustrates the dilemma confronting those who seek to redraw voting district boundaries: should they try to maximize the number of minority voters drawn into majority-minority districts in order to maximize the numbers of individual voters who can elect a candidate? Or does this result in dilutive "packing" wherein there may be assured minority group representation in the legislature but such representation will be effectively marginalized because members of the minority group will be unable to achieve a legislative critical mass on issues of significance to the minority community? The importance of clarity of definitions and the understanding of the costs and benefits of panethnicity in this area above is highlighted by cases in which there are intra-group disagreements and conflicts about what constitutes appropriate representation, which have arisen within Latina/o and Native American groups.[59]

Latina/os are central to the development of the law of vote dilution. Their advocates, for example, have filed amicus briefs in U.S. Supreme Court cases such as the required government-issued photo identification case, *Crawford v. Marion County Election Board*,[60] and *LULAC v. Perry*,[61] which challenged the post-2000 Texas reapportionment scheme. Although the law of voting rights is at times both arcane and complex, the role of Latina/os should not be obscured or ignored. In a book entitled *Latinos and the Law*, the area of voting rights and political representation could provide concrete examples to rigorously explore issues of race, ethnicity, identity, and coalitional politics.

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The cessation of the violence and institutionalized vote suppression of African American voters in the Jim Crow South has undoubtedly worked deep changes on the U.S. political landscape. In addition, the Voting Rights Act and subsequent cases and amendments have had significant effects on

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[58] *Gomez*, 863 F.2d at 1414.

[59] *See* Frank J. Macchiarola & Joseph G. Diaz, *The 1990 New York City Districting Commission: Renewed Opportunity for Participation in Local Government or Race-Based Gerrymandering?*, 14 Cardozo L. Rev. 1175, 1211 (1993) (detailing conflicts between Puerto Ricans and Dominicans in Manhattan and conflicts between U.S.-born and Caribbean-born Blacks in Brooklyn); Keith Aoki, *A Tale of Three Cities: Thoughts on Asian American Electoral and Political Power After 2000*, 8 Asian Pac. Am. L.J. 1, 24-33 (2002) (describing conflicts in New York City between Chinese immigrants centering around land of origin, namely, Taiwan versus mainland China, and intraethnic class conflicts within the Chinese community regarding drawing of boundaries for a city council district); *see also* Arizonans for Fair Representation v. Symington, 828 F. Supp. 684 (D. Ariz. 1992) (describing the conflict between the Navajo and Hopi tribes that resulted in each tribe being drawn into separate Congressional districts).

[60] 128 S. Ct. 1610 (2008).

[61] 548 U.S. 399 (2006).

Latina/o voters in the West and Southwest, and also exemplify Latina/o political agency in developing voting rights law. Consider that, in the 2008 Presidential elections, three Southwestern states—Nevada, Colorado, and New Mexico—played pivotal roles in the election of President Barack Obama. In Colorado, the Hispanic share of voter turnout rose from eight percent in 2004 to thirteen percent in 2008; in Nevada, the Hispanic share of voter turnout rose from ten percent in 2004 to fifteen percent in 2008; and in New Mexico the percentage rose from thirty-two percent in 2004 to forty-one percent in 2008.[62] Hispanic voters also supported Obama by a two-to-one margin.[63] The increasing Hispanic participation in electoral politics has the potential to transform the state and federal political landscape.[64] By 2040, it is projected that thirty-eight percent of voters will be Hispanics or African Americans.[65] The increasing significance of Latino/as on U.S. politics and law thus cannot be underestimated and warrants discussion and analysis.

III. A Possible Unifying and Organizing Principle for *Latinos and the Law*: Immigration and the Immigrant Experience

As previously discussed,[66] *Latinos and the Law* does not employ a theoretical lens to critically analyze the various topics touching on the Latina/o experience. Nonetheless, the result remains an interesting casebook covering a broad array of subjects revealing different aspects of the Latina/o experience with the law in the United States.

A theoretical lens, of course, is not the only effective way to focus and organize a casebook. *Latinos and the Law* could have been organized around the immigration experience of Latina/os in the United States and the treatment of Latina/os—citizens and noncitizens alike—as perpetual foreigners to this land.

True, immigration is one of the issues reviewed in *Latinos and the Law*.[67] However, rather than compartmentalizing immigration in the casebook, immigration might easily have been a thread woven through the

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[62] *See* Mark Hugo Lopez, Pew Hispanic Ctr., The Hispanic Vote in the 2008 Election 1 fig.2 (2008), *available at* http://pewhispanic.org/files/reports/98.pdf.

[63] *See id.* at 1 fig.1.

[64] On a bittersweet note, one must ask why a majority of Blacks and Latina/os voted in favor of Proposition 8, a deeply controversial state ballot measure passed by California voters that amended the state constitution to provide that marriage in California must only be between a man and a woman. *See* Patrick Range McDonald, *Dirty Laundry Over Prop. 8: Blame-Game Erupts over Latino and Black Support for the Gay Marriage Ban*, L.A. Weekly, Nov. 13, 2008, *available at* http://www.laweekly.com/2008-11-13/news/the-left-39-s-dirty-laundry-over-prop-8/.

[65] *See* Ron Brownstein, *Dems Boosted by Demography, Destiny: Population Trends That Gave Party November Edge Show No Sign of Slowing*, MSNBC, Jan. 9, 2009, http://www.msnbc.msn.com/id/28579278/.

[66] *See supra* text accompanying notes 22-29.

[67] *See infra* text accompanying notes 79-82.

various chapters (and subjects) of the entire volume.[68] Incorporating the thread of immigration throughout the casebook might have tightened its organization and helped demonstrate the many interrelationships between the various topics, as well as the many dimensions of U.S. social life that contribute to the overall subordination of Latina/os in the social hierarchy of the United States.[69]

Many, perhaps most, of the different parts of *Latinos and the Law* directly or indirectly touch on immigration, a critical aspect of the Latina/o experience in the United States. The discussion of the histories of different Latina/o national origin groups, language regulation, education (with *Plyler v. Doe*[70] and the education of undocumented immigrant children in the public schools central to the discussion), hate speech, and the workplace, all naturally tie in one way or another with immigration to modern America. Although most Latina/os living in the United States did *not* immigrate to this country, the stereotype of all Latina/os as perpetual foreigners[71] significantly (and negatively) affects Latina/o citizens as well as immigrants in many different realms of American social life, from education to employment, criminal justice to immigration enforcement.[72]

Besides lacking an intellectual anchor, *Latinos and the Law* missed some important opportunities to educate the readers about the racially disparate intents and impacts of modern immigration law and its enforcement in the United States. First, the casebook fails to identify how the intricacies of the U.S. immigration laws and their operation effectively obfuscate and

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[68] Such an organizational device was effectively employed in an immigration anthology edited by one of the coauthors of *Latinos and the Law*. *See* IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed., 1997). The topics reviewed in this anthology include nativism, immigration law and reform, the "English only" movement, citizenship, and membership.

[69] Despite the growing attention paid to the growing Central American, Dominican, and other Latina/o communities in the popular press and scholarship, *see, e.g.*, The COLUMBIA HISTORY OF LATINOS IN THE UNITED STATES SINCE 1960 (David G. Gutiérrez ed., 2004); CECILIA MENJÍVAR, FRAGMENTED TIES: SALVADORAN IMMIGRANT NETWORKS IN AMERICA (2000); Esmeralda Bermudez, *In L.A., Speaking 'Mexican' to Fit In*, L.A. TIMES, Nov. 3, 2008, at A1, *Latinos and the Law* virtually ignores Latina/o sub-groups other than Mexican-Americans, Puerto Ricans, and Cuban-Americans.

[70] 457 U.S. 202 (1982) (invalidating Texas law effectively barring undocumented children from public elementary and secondary schools), *as reprinted in* LATINOS AND THE LAW, *supra* note 1, at 329; *see* Michael A. Olivas, Plyler v. Doe, *The Education of Undocumented Children, and the Polity*, *in* IMMIGRATION STORIES 197 (David A. Martin & Peter H. Schuck eds., 2005) (analyzing background of this important case).

For insightful analysis of Latina/os in the public schools in California, see Jennifer M. Chacón, *Race as a Diagnostic Tool: Latinas/os and Higher Education in California, Post-209*, 96 CAL. L. REV. 1215 (2008).

[71] *See* Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965 (1995). *See generally* STEVEN W. BENDER, GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION (2003) (analyzing stereotypes of Latina/os in the United States and their impact on the development of the law).

[72] *See* Kevin R. Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101, 118-29 (1997).

mask their racially disparate intents and impacts.[73] Second, *Latinos and the Law* could have done more to educate the reader about the basic facts of immigration to the United States. By so doing, the casebook could have offered an important corrective to fundamental misinformation that circulates in the public discourse on this volatile and deeply contested subject.[74] Finally, in our estimation, *Latinos and the Law* surprisingly understates the direct role of race and racism in the modern debate—especially at the state and local levels—over immigration law and the operation of the immigration laws.[75]

A. What's the Law? The Need for Careful Interrogation of the Immigration Laws and How They Generate Disparate Racial Outcomes

Although *Latinos and the Law* offers a general overview of U.S. immigration law and policy, as well as of the debates surrounding possible reform, the casebook does not adequately explore the nuts-and-bolts of U.S. immigration law to demonstrate how the facially neutral, colorblind law significantly contributes to the racial subordination of Latina/os. We have previously advocated increased critical scrutiny of immigration law and policy and its racial impacts.[76] To be effective critiques, however, such inquiry requires rigorous analysis of those laws and their enforcement, as well as demonstration of how the law in practice differs from the law on the books.[77]

Only through close analysis of the U.S. immigration laws can one fully appreciate how they inevitably disadvantage prospective Latina/o immigrants (as well as Latina/o citizens who seek to bring family to this country) and injure U.S. citizens of Latina/o ancestry in the United States (as well as prospective immigrants from Asia and Africa). And the laws do so in ways that are thoroughly obfuscated through a full array of legal complexities, including numerical formulas, annual limits and ceilings, and related schemes that serve to limit immigrant admissions.[78] Ultimately, there is

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[73] *See infra* text accompanying notes 76-96.

[74] *See infra* text accompanying notes 97-110.

[75] *See infra* text accompanying notes 111-39.

[76] *See* Aoki & Johnson, *supra note* 28, at 1188-94; *see also* Kevin R. Johnson, *Race and the Immigration Laws: The Need for Critical Inquiry*, *in* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 187 (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002), *as reprinted in* LATINOS AND THE LAW, *supra* note 1, at 518; Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 535-46 [hereinafter Johnson, *Race Matters*]. Other scholars have made similar calls. *See* Jennifer Gordon & R. A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 FORDHAM L. REV. 2493, 2502-07 (2007) (analyzing the need of conventional immigration scholars and Critical Race Theorists to interrogate the role of race in U.S. immigration law and enforcement).

[77] *See* Johnson, *Race Matters*, *supra* note 76, at 543-44.

[78] It has been stated that only the Internal Revenue Code rivals the intricate, lengthy, and frequently obtuse Immigration & Nationality Act. *See* Castro-O'Ryan v. INS, 847 F.2d 1307,

much more to be said than is sketched out in *Latinos and the Law* about immigration and the Latina/o experience in the United States.

Indeed, *Latinos and the Law* fails to offer much in-depth analysis of the immigration laws, which are rich with provisions that have intertwined racial and class impacts on prospective immigrants to the United States as well as in U.S. citizens of Latina/o ancestry in the country. For example, Chapter 15, entitled "Immigration and the Law," offers foundational principles about the limited judicial review of the U.S. immigration laws.[79] Attention is given, as is appropriate, to the infamous "plenary power" doctrine, an oft-analyzed doctrine that holds that the executive and legislative branches possess virtually unbridled discretion—denoted "plenary power"—over immigration and that the decisions of the political branches of government on the substantive criteria for exclusion, admission, and removal are immune from meaningful judicial scrutiny.[80] Through this doctrine, the Supreme Court has effectively immunized from constitutional challenge the immigration laws passed by Congress with racial, class, gender, and other classifications[81]—even though similar classifications in domestic law would be constitutionally suspect.[82] The all-important missing link in *Latinos and the Law* is rigorous critical analysis of the immigration laws enacted by Con-

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1312 (9th Cir. 1988) ("With only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.'" (quoting Elizabeth Hull, Without Justice for All 107 (1985)); *see also* Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977) (stating that U.S. immigration laws resemble "King Minos's labyrinth in ancient Crete").

[79] Latinos and the Law, *supra* note 1, at 501-39.

[80] *Id.* at 501-13; *see, e.g.*, Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 606 (1889) (emphasizing that if Congress "considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, ... [*Congress's*] *determination is conclusive upon the judiciary*" (emphasis added)).

For a sampling of criticism of the plenary power doctrine, see T. Alexander Aleinikoff, Semblances of Sovereignty: The Constitution, the State, and American Citizenship (2002); Gerald L. Neuman, Strangers to the Constitution: Immigrants, Borders, and Fundamental Law (1996); Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 U.C. Davis L. Rev. 701 (2005); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. Rev. 1 (1998); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 Wis. L. Rev. 965.

[81] *See, e.g.*, Fiallo v. Bell, 430 U.S. 787 (1977) (upholding gender discrimination in nationality laws); *The Chinese Exclusion Case*, 130 U.S. at 606 (refusing to disturb congressional bar of Chinese immigrants to the United States). To illustrate the contours of the doctrine in modern times, Latinos and the Law, *supra* note 1, at 501-07, excerpts the sensational case of *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000), which dealt with the public spectacle of Elián González, a child whose Cuban father sought his return to Cuba from Miami, where relatives sought to keep him. *See* Berta Esperanza Hernández-Truyol, *On Becoming the Other: Cubans, Castro, and Elian — A LatCritical Analysis*, 78 Denv. U. L. Rev. 687 (2001). Needless to say, this is not the run-of-the-mill immigration case or the kind of case in which the courts ordinarily invoke the plenary power doctrine. There are more ordinary—and illustrative—plenary power cases in modern times involving Latina/os. *See, e.g.*, Reno v. Flores, 507 U.S. 292, 305-06 (1993) (rejecting challenge to policy of detention of juvenile immigrants and release only to close relatives); Mathews v. Diaz, 426 U.S. 67, 79-80 (1976) (refusing to disturb congressional denial of certain health insurance benefits to lawful immigrants).

[82] For explanation of the disjunction between the constitutional review of ordinary laws and immigration laws, see Kevin R. Johnson, *Minorities, Immigrant and Otherwise*, 118 Yale L.J. Pocket Part 77 (2008), http://yalelawjournal.org/images/pdfs/715.pdf.

gress, the very thing that the plenary power doctrine immunizes from judicial review and that in operation have starkly disparate racial impacts.

Nary a mention of the comprehensive immigration law, the Immigration and Nationality Act of 1952 (INA),[83] forged by Cold War suspicions of anything foreign and amended regularly by Congress over the last fifty-plus years, can be found in *Latinos and the Law*. While some of the amendments to the INA are listed in the index, the INA is not.[84] This is a glaring omission because any kind of serious review of the disparate racial impacts of U.S. immigration law must begin with the INA's provisions and continue to analyze the actual operation of that law. Some LatCrit scholarship has looked at the racially disparate operation of the immigration laws, and has considered, for example, the plenary power doctrine in connection with analyzing the controversy over the eligibility of undocumented immigrants for driver's licenses.[85]

Nor is our objection simply a formalistic cheap shot aimed at a mere failure to specifically name the governing U.S. immigration statute in a review of U.S. immigration law. Most importantly, the materials excerpted in the casebook fail to spell out in a meaningful way how the modern immigration laws, through per country ceilings, public charge exclusions, and a myriad of other facially neutral devices, operate to harshly treat—and effectively discriminate against—noncitizens from the developing world, especially those from Latin America.[86] Here are just a few examples.

The family and employment visas—the primary avenues for legal immigration to the United States spelled out in the INA—fail to offer legal avenues for many poor and working people from the developing world to come lawfully to this country.[87] Restrictions on *lawful* immigration serve as a powerful incentive for *undocumented* immigration, which long has been primarily a migration of labor (i.e., workers) to the United States. Put differently, legal immigration is so circumscribed in the U.S. immigration laws that unlawful migration to the United States is the *only* viable option for many would-be immigrants who seek to work in this country.

In addition, the per country ceilings in the INA—annual limits on the number of immigrants from any particular country—require thousands of noncitizens from Mexico, the Philippines, China, and India, as well as other developing nations, seeking certain immigrant visas to wait many years, in some instances decades, longer than prospective immigrants from other countries—namely, the developed world populated predominantly by

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[83] Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

[84] LATINOS AND THE LAW, *supra* note 1, at 876-77.

[85] *See, e.g.*, Raquel Aldana & Sylvia R. Lazos Vargas, *"Aliens" in Our Midst Post-9/11: Legislating Outsiderness Within the Borders*, 38 U.C. DAVIS L. REV. 1683, 1700-01, 1711-22 (2005) (book review).

[86] *See* Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. (forthcoming 2009) (manuscript on file with authors).

[87] *See id.* (manuscript at 15-17).

whites—for admission to the United States.[88] Congress for the first time extended the ceilings to North America in 1965 legislation with the clear intent of reducing immigration from Latin America. By creating unrealistic waiting periods, the ceilings create an incentive for undocumented immigration by noncitizens seeking to come to this country from those nations.

Even if eligible for a legal immigrant visa, other legal barriers exist to admission to the United States of prospective immigrants from developing nations populated by people of color. The INA's public charge exclusion is one of the most frequently invoked substantive grounds for barring an otherwise eligible noncitizen from admission to the United States. This exclusion makes it difficult for many prospective immigrants of modest means from Mexico and the rest of Latin America, as well as from the entire developing world, to lawfully come to this country.[89] This exclusion is but another incentive for undocumented immigration to this country, especially by putative working class immigrants from the developing world who seek to live and work in the United States.

Not coincidentally, the U.S. government has consistently enforced the INA's removal grounds in ways resulting in the vast majority of noncitizens who are removed from the United States each year being from Mexico and Central America.[90] Deportations, as well as the detention of immigrants awaiting removal from the United States, have increased dramatically over the last decade with the passage of tough immigration reform legislation in 1996.[91] As Congress debated more generous immigration reform beginning

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[88] The per country ceiling of less than 26,000 generally limits the number of immigrants from any single country that can be admitted to the United States in any one year. *See* INA § 202(a), 8 U.S.C. § 1152(a) (2006). The disparate impact of the per country ceilings on particular nations has long been roundly criticized. *See, e.g.*, Bernard Trujillo, *Immigrant Visa Distribution: The Case of Mexico*, 2000 WIS. L. REV. 713; Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of* Loving, 2007 WIS. L. REV. 345, 359-60; Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNAT'L L. 319, 321 (1993); Jan C. Ting, *"Other Than a Chinaman": How U.S. Immigration Law Resulted from and Still Reflects a Policy of Excluding and Restricting Asian Immigration*, 4 TEMP. POL. & CIV. RTS. L. REV. 301, 309 (1995).

[89] *See* INA § 212(a)(4), 8 U.S.C. § 1182(a)(4) (2006) ("Any alien, who . . . is likely at any time to become a public charge is inadmissible."). The INA further provides that the receipt of public benefits by an immigrant within five years of entry also may result in his or her deportation. *See* INA § 237(a)(5), 8 U.S.C. § 1227(a)(5) (2006). For LatCrit analysis of the public charge exclusion, see Lisa Sun-Hee Park, *Perpetuation of Poverty Through "Public Charge"*, 78 DENV. U. L. REV. 1161 (2001).

[90] *See* OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2007 YEARBOOK OF IMMIGRATION STATISTICS 102-03 tbl.37 (2008), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2007/ois_2007_yearbook.pdf (compiling statistical data showing that approximately two-thirds of all aliens deported in 2007 from the United States were from Mexico).

[91] *See, e.g.*, Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000). *See generally* BILL ONG HING, DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY (2006) (analyzing critically increasing numbers of deportations pursuant to 1996 immigration reforms); DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007) (analyzing history of deportation under U.S. immigration laws).

in late 2006,[92] the Bush administration increasingly employed immigration raids at workplaces in the interior of the United States,[93] presumably in order to show the President's willingness to vigorously enforce the immigration laws. These raids not surprisingly have had racial and class impacts on particular subgroups of immigrant workers, namely low-skilled Latina/o immigrants.[94]

These features and impacts of the actual operation of the U.S. immigration laws all support the central point made in the immigration section of *Latinos and the Law*—that the so-called colorblind immigration laws in operation negatively impact Latina/os. The LatCrit concept of "discrimination by proxy," or use of a proxy for race—in this instance, immigration status—to discriminate against people of color, is one explanation for this form of discrimination.[95] However, the casebook misses the opportunity to specifically identify and critique the law's direct and inevitable role in generating those racially disparate impacts through facially neutral provisions.

The racially disparate results of the current legal regime are an issue of modern relevance to the debate over immigration reform. Any effort at "comprehensive" immigration reform that fails to address the limited ability to migrate lawfully, the per country ceilings, and the public charge exclusion will only tinker at the margins of the U.S. immigration laws,[96] not meaningfully change them. Absent deep and across-the-board reforms, we can expect continuing disparate class and racial impacts in the operation of the U.S. immigration laws. Deportations with disparate racial and nationality impacts will persist as well.

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[92] LATINOS AND THE LAW *supra* note 1, at 468-73, outlines the general contours of the recent contentious national debate over immigration reform. For a variety of perspectives on immigration reform proposals considered by Congress in 2006 and 2007, see Symposium, *A New Year and the Old Debate: Has Immigration Reform Reformed Anything?*, 13 NEXUS 1 (2008); Symposium, *Immigration Reform and Policy in the Current Politically Polarized Climate*, 16 TEMP. POL. & CIV. RTS. L. REV. 309 (2007); Katherine L. Vaughns, *Restoring the Rule of Law: Reflections on Fixing the Immigration System and Exploring Failed Policy Choices*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 151 (2005).

[93] *See, e.g.*, Raquel Aldana, *Of* Katz *and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1092-96 (2008); Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137 (2008); Sandra Guerra Thompson, *Immigration Law and Long-Term Residents: A Missing Chapter in American Criminal Law*, 5 OHIO ST. J. CRIM. L. 645, 654-58 (2008); David B. Thronson, *Creating Crisis: Immigration Raids and the Destabilization of Immigrant Families*, 43 WAKE FOREST L. REV. 391 (2008).

[94] *See* Johnson, *supra* note 86 (manuscript at 15-18).

[95] *See* Kevin R. Johnson & George A. Martínez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227 (2000), *as reprinted in* LATINOS AND THE LAW, *supra* note 1, at 254.

[96] For significantly broader calls for reform than that contemplated by Congress in recent years, see KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS (2007); JASON L. RILEY, LET THEM IN: THE CASE FOR OPEN BORDERS (2008).

B. Correcting Misperceptions About Immigration and the "Alien Invasion"

Latinos and the Law identifies many of the modern issues in the public debate over immigration. Unfortunately, the casebook might leave the reader with some fundamental misunderstandings about the deeply contested area of immigration law and enforcement, which has been the subject of vociferous public debate in the United States for many years. A particularly jarring example goes to one's fundamental understanding of immigration, immigrants, and the need for immigration reform.

The text of *Latinos and the Law* introducing the section on immigration states that the United States is "in the midst of a *massive wave of immigration*, *much of it undocumented*."[97] This claim is not substantiated, qualified, or, as we shall see, necessarily accurate.

Although the excerpts on immigration in *Latinos and the Law* do not betray a restrictionist bent (indeed, the opposite arguably is the case),[98] the blunt characterization of the current level of immigration to the United States as a "massive wave" just as easily could appear in the work of Samuel Huntington,[99] Victor Davis Hanson,[100] Michelle Malkin,[101] or Peter Brimelow,[102] all ardent restrictionists whose writing seeks to capitalize on public fears—racial, cultural, economic, social, environmental, and otherwise—of immigration and immigrants. Such a fast-and-loose (and inaccurate) characterization of the current state of immigration, uncharacteristic of the scholarship of these authors, plays into and reinforces the oft-made dire claims of an "alien invasion" of the United States, an unwanted massive influx of racially and culturally foreign outsiders that restrictionists frequently contend requires immediate, drastic, and almost invariably harsh action.[103]

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[97] Latinos and the Law, *supra* note 1, at 405 (emphasis added).

[98] For example, the casebook excerpts readings summarizing the public debate over the economic costs and benefits of immigration, *see id.* at 440-68, and questions about the efforts to limit Latina/o immigration, *see id.* at 468.

[99] *See* Samuel P. Huntington, Who Are We?: The Challenges to America's National Identity (2004). Huntington expresses special concern with the "Hispanization" of immigration and the increasing number of Mexican immigrants coming to the United States. *See id.* at 221-56. For a response, see Kevin R. Johnson & Bill Ong Hing, *National Identity in a Multicultural Nation: The Challenge of Immigration Law and Immigrants*, 103 Mich. L. Rev. 1347 (2005) (book review), which is excerpted in Latinos and the Law, *supra* note 1, at 471-73.

[100] *See* Victor Davis Hanson, Mexifornia: A State of Becoming (2003).

[101] *See* Michelle Malkin, Invasion: How America Still Welcomes Terrorists, Criminals, and Other Foreign Menaces to Our Shores (2002).

[102] *See* Peter Brimelow, Alien Nation: Common Sense About America's Immigration Disaster (1995). Kevin R. Johnson, *Fear of an "Alien Nation": Race, Immigration, and Immigrants*, 7 Stan. L. & Pol'y Rev. 111 (1996), offers a response to Brimelow's attacks on immigration in *Alien Nation*.

[103] For analysis of the "alien invasion" trope regularly invoked by immigration alarmists, see Ediberto Román, *The Alien Invasion?*, 45 Hous. L. Rev. 841 (2008). Terminology and tone often proves critical to the framing of the immigration debate in the United States. *See* Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construc-*

To assuage the alarm expressed over the number of immigrants coming to the United States today, *Latinos and the Law* should have laid out to the reader the basic facts about the current flow of immigrants to this country. Here are a few of the more salient facts. Over the last decade, somewhere in the neighborhood of a million immigrants—out of a total U.S. population population of more than 300 million (or less than half of one percent)—have lawfully come each year to the United States.[104] Today, a total of roughly twelve million undocumented immigrants—roughly four percent of the population—live in the United States, with about sixty percent born in Mexico.[105]

The bottom line is that the amount of immigrants in the United States today—although numerically much greater than past periods of our history—is not all that different as a percentage of the total U.S. population from that in the early twentieth century.[106] Indeed, the percentage of immigrants of the total U.S. population is equaled, and in some instances surpassed, by rates in the early twentieth century.[107] Growing pains resulted from the flow of immigrants during this time,[108] but ultimately the nation for the most part accomplished the integration into U.S. society of this "wave" of immigrants.[109] Nor are all undocumented immigrants from Mexico.

In short, the reference in *Latinos and the Law* to "a massive wave of immigration" to the United States today is not supported by a rather cursory review of the evidence. As is often the case with respect to immigration, simple statements can be wildly inaccurate and exacerbate public concerns and social tensions. This fundamental error, which frames the readings on immigration in the casebook, plays into the hands of those with restrictionist sympathies and might give the uninitiated student a very wrong impression of the realities of immigration. More should have been done in the casebook

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tion of Nonpersons, 28 U. MIAMI INTER-AM. L. REV. 263 (1996-97) (analyzing how the term "alien" to refer to noncitizens in the Immigration and Nationality Act adversely affects their treatment and effectively denies them personhood). *See generally* MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004).

[104] *See* OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., U.S. LEGAL PERMANENT RESIDENTS: 2007 1 fig.1 (2008), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/LPR_FR_2007.pdf. This statistic does not include immigrants who have returned home each year; outmigration reduces the net increase to the U.S. population attributable to immigration.

[105] *See* JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. 5 (2006), *available at* http://pewhispanic.org/files/reports/61.pdf. Reports in the fall of 2008 suggest that the lagging U.S. economy has resulted in somewhat of a reduction in the undocumented population. *See* Jerry Kammer, *Illegal Immigrants Flows Have Slowed, Study Says*, GANNETT NEWS SERVICE, Oct. 3, 2008.

[106] *See* Peter H. Schuck, *Alien Rumination*, 105 YALE L.J. 1963, 1969-78 (1996) (book review) (analyzing similar claims of record highs of immigration and "invasion" of the United States by immigrants in the early 1990s).

[107] *See* Migration Policy Inst., Foreign-Born Population and Foreign Born as Percentage of the Total US Population: 1850 to 2007, http://www.migrationinformation.org/datahub/charts/final.fb.shtml (last visited Apr. 28, 2009).

[108] For analysis of nativism in the early twentieth century, see JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925 (rev. ed. 2002).

[109] *See generally* PETER D. SALINS, ASSIMILATION, AMERICAN STYLE (1997).

to educate the reader about the true facts about immigration to this country with an effort to place the current claims of an "alien invasion" in their proper historical context. LatCrit scholarship, which has attempted to do precisely that, might have served as a helpful corrective.[110]

C. The Role of Race in the Modern Immigration Debate

Some of the racism encoded in the U.S. immigration laws is rather subtle, often buried in complex provisions of facially neutral laws.[111] But some is not. The section in *Latinos and the Law* on the efforts of local governments to enforce the federal immigration laws, a very topical area of ferment in both immigration scholarship and on the ground, understates the anti-immigrant and anti-Mexican sentiment fueling these measures as well as the anti-immigrant movement generally in the United States.[112]

Until recently, the conventional wisdom had been that federal power over immigration is exclusive, leaving little room for state and local regulation.[113] Nonetheless, in the last few years, a growing number of state and local governments frustrated with the failure of Congress to enact comprehensive immigration reform, and increasingly uneasy over the real and imagined changes brought by new immigrants to their communities,[114] have

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[110] *See, e.g.*, Raquel E. Aldana, *Introduction: The Subordination and Anti-Subordination Story of the U.S. Immigrant Experience in the 21st Century*, 7 NEV. L.J. 713, 713-16 (2007); Sylvia R. Lazos Vargas, *Foreword: Emerging Latina/o Nation and Anti-Immigrant Backlash*, 7 NEV. L.J. 685, 691-96 (2007).

[111] *See supra* text accompanying notes 76-110.

[112] LATINOS AND THE LAW, *supra* note 1, at 473-82; *see infra* text accompanying notes 113-39. This understatement seems odd given that one of the casebook's coauthors has written about the racism afflicting certain groups offering financial support for the anti-immigrant movement. *See* Jean Stefancic, *Funding the Nativist Agenda*, *in* IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES, *supra* note 68, at 119.

[113] *See, e.g.*, De Canas v. Bica, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is *unquestionably exclusively a federal power*." (emphasis added)).

However, an increasing number of scholars in recent years have contended that there is greater room for state and local involvement in immigration and immigrant regulation than the conventional wisdom would allow. *See, e.g.*, Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57; *see also* Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459 (2008) (outlining what kinds of immigration legislation states can enact that is not preempted by federal law). For a vigorous defense of the conventional wisdom, see Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449 (2006); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27; Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965 (2004); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV 493 (2001). *See also* Rose Cuison Villazor, *What Is a "Sanctuary"?*, 61 SMU L. REV. 133 (2008) (analyzing the meaning and impacts of the "sanctuary" cities that exist in the United States).

[114] *See* Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619 (2008) (questioning the claim that recent efforts of local governments to regulate immi-

adopted harsh measures—after deeply divisive public debates that frightened many Latina/os—that purport to address undocumented immigration and immigrants. Class and race, as well as more legitimate concerns, such as the equitable distribution of the costs and benefits of immigration,[115] unquestionably have influenced the passage of these measures.[116]

Consider the following description of an anti-immigrant rally in Hazleton, a rural town in Pennsylvania,[117] home of much-publicized immigration ordinances that generated national controversy:

> I'm not Latino, but the anger displayed at the rally – held in support of Hazleton's anti-immigration mayor, Lou Barletta – was enough to give anyone with a soul a serious case of the chills.
>
> . . . .
>
> About 700 people attended the rally, where some in attendance tried to link illegal Mexican immigrants with the 9/11 attacks. Other speakers accused illegal immigrants of carrying infectious diseases, increasing crime and lowering property values.
>
> *If Alabama's late segregationist Gov. George Wallace had been present, he would have wondered who hired away his speechwriters.*[118]

gration and immigrants represents a response to the failure of Congress to pass comprehensive immigration reform); *see also* Rick Su, *Notes on the Multiple Facets of Immigration Federalism*, 15 Tulsa J. Comp. & Int'l L. 179 (2008) (analyzing complex issues raised by local involvement in immigration and immigrant law).

[115] Some costs imposed by immigration, such as elementary and secondary school education for undocumented students, for the most part are paid by state and local governments, while the federal government reaps the bulk of tax revenues attributable to immigration and immigrants. *See* Johnson, *supra* note 97, at 152-55. This "fiscal disconnect" contributes to local concern with immigration and immigrants.

[116] *See* Johnson, *supra* note 86, (manuscript at 26-40).

[117] *See* Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (invalidating Hazleton's immigration ordinances on the grounds that they were preempted by federal law and violated the Due Process Clause). Caselaw is beginning to emerge in this area. As the court did in *Lozano*, the district court in *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043 (S.D. Cal. 2006), enjoined enforcement of an ordinance that penalized property owners for the "harboring of illegal aliens" by renting housing to undocumented immigrants. *Lozano* and *Garrett* concluded that, because federal immigration policy is complex and discretionary, local responses are preempted by federal law and policy. In contrast, *Villas at Parkside Partners v. City of Farmers Branch*, 496 F. Supp. 2d 757 (N.D. Tex. 2007) (striking down an ordinance requiring landlords to check for evidence of citizenship), and *Equal Access Education v. Merten*, 305 F. Supp. 2d 585 (E.D. Va. 2004) (challenge to Virginia Attorney General opinion that undocumented immigrants could be barred from enrolling in public higher education that was held preempted to the extent it used standards different than those established by the federal government to determine whether persons were undocumented), seem to assume that federal immigration law is simple and self-executing. This suggests that if localities hew tightly to federal definitions and standards for determining "unlawful presence," their laws will not be found to be preempted by federal law. *See also* Hiroshi Motomura, *Immigration Outside the Law*, 108 Colum. L. Rev. 2037 (2008) (discussing these and related issues).

[118] Mike Seate, Op-Ed., *Rage Over Illegals Brings '60s to Mind*, Pitt. Trib.-Rev., June 7, 2007 (emphasis added); *see, e.g.*, John Keilman, *Hispanics Rue City's New Rules*, Chi. Trib., Oct. 29, 2006, at C3 (reporting that Latina/os feel under attack by local ordinances like Hazleton's); Michael Powell & Michelle Garcia, *Pa. City Puts Illegal Immigrants on Notice*, Wash. Post, Aug. 22, 2006, at A3 (to the same effect).

In a similar troubling vein, the mayor of Valley Park, Missouri, which enacted immigration ordinances similar to Hazleton's,[119] complained that: " 'You got one guy and his wife that settle down here, have a couple kids, and before long you have *Cousin Puerto Rico and Taco Whoever moving in*.' "[120] Similar examples abound. Maricopa County, Arizona, Sheriff Joe Arpaio, known as "America's Toughest Sheriff," has made a career of pursuing controversial immigration and other law enforcement policies—such as forcing detainees to wear pink underwear and engaging in racial profiling—that regularly draw the ire of the civil rights and immigrant rights communities.[121] Escondido, California's efforts to address the "problem" of undocumented immigrants through a variety of means has been challenged as nothing less than an indirect effort to rid the city of persons of Mexican ancestry.[122]

Latinos and the Law does cover some more subtle racial discrimination, such as racial profiling in law enforcement, including immigration enforcement,[123] a topic that has been much-litigated and ana-

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Mayor Barletta failed in a 2008 run for Congress. *See* Kent Jackson, *Barletta Gets Back to Work in Hazleton*, TIMES TRIB. (Scranton, Pa.), Nov. 6, 2008 (reporting that Mayor Barletta's staunch anti-immigrant stance may have cost him votes in the election among Latina/o and other groups of voters).

[119] *See* Gray v. City of Valley Park, No. 4:07CV00881 ERW, 2008 U.S. Dist. LEXIS 7238, at *101-*02 (E.D. Mo. Jan. 31, 2008) (holding that city immigration ordinance was not preempted by federal law). For background on the Valley Park ordinance, see Sarah E. Mullen-Domínguez, Comment, *Alienating the Unalienable: Equal Protection and Valley Park, Missouri's Illegal Immigration Ordinance*, 52 ST. LOUIS U. L.J. 1317 (2008).

[120] Kristen Hinman, *Valley Park to Mexican Immigrants: "Adios, Illegals!"*, RIVERFRONT TIMES (St. Louis), Feb. 28, 2007, *available at* http://www.riverfronttimes.com/2007-02-28/news/valley-park-to-mexican-immigrants-adios-illegals (emphasis added); *see* Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55, 95 (2008) (discussing Valley Park ordinance).

[121] *See* JJ Hensley, *Activists Aim to Continue Fight*, ARIZ. REPUBLIC, Nov. 7, 2008, Valley & State, at 1, *available at* http://www.azcentral.com/news/articles/2008/11/07/20081107whatnow1107.html. A reality television show featuring Arpaio premiered in December 2008. *See* Randy Cordova, *Sheriff Joe Arresting in New TV Show*, ARIZ. REPUBLIC, Nov. 22, 2008, Arizona Living, at 1, *available at* http://www.azcentral.com/arizonarepublic/arizonaliving/articles/2008/11/22/20081122sherifftv1122.html.

[122] *See* Johnson, *supra* note 86 (manuscript at 32-33). A retired sheriff maintained that the city's motives behind its immigration measures are nothing less than invidious; in his view, Escondido is " 'looking for a way to reduce the number of brown people' " within the city limits. *See* Anna Gorman, *Undocumented? Unwelcome: Escondido is Using a Wave of Policies to Try to Drive Away Illegal Immigrants*, L.A. TIMES, July 13, 2008, at B1. It would not be unheard of for a local government to seek to remove persons of Mexican ancestry from its jurisdiction. *See generally* FRANCISCO E. BALDERRAMA & RAYMOND RODRÍGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930s (rev. ed. 2006); Kevin R. Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the "War On Terror"*, 26 PACE L. REV. 1 (2005) (analyzing the forced "repatriation" by state and local governments, with the assistance of the U.S. government, of approximately one million persons of Mexican ancestry during the Great Depression).

[123] In the section on racial profiling, the casebook excerpts *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975), in which the Supreme Court held that "Mexican appearance" may be one factor considered by the Border Patrol in an immigration stop. *See* LATINOS AND THE LAW, *supra* note 1, at 525-29. The casebook, however, fails to mention a more recent court of appeals decision that finds that "Hispanic appearance" is not a proper consideration in

lyzed.[124] To its credit, the casebook also includes an excerpt about the racially-tinged campaign culminating in the landslide passage of California's Proposition 187, an anti-immigrant measure that was nothing less than an immigration milestone of the 1990s.[125] Still, in our estimation, *Latinos and the Law* understates the role of race in the current immigration debate, especially at the state and local levels.

The influence of racism on the immigration debate has real life impacts on Latina/os in the United States. As anti-immigrant rhetoric escalated in the last few years, hate crimes against Latina/os living in the Unites States have gone up dramatically.[126] Several examples demonstrate the seriousness of this phenomenon. In 2008, Latino immigrants were killed in vicious attacks in rural Pennsylvania and suburban New York.[127] The facts surrounding the 2008 killing of a lawful Ecuadoran immigrant, Marcelo Lucero, in

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an immigration stop because it is an overinclusive proxy for unlawful immigration status. *See* United States v. Montero-Camargo, 208 F.3d 1122, 1132-34 (9th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 889 (2000).

[124] *See, e.g.*, United States v. Lara-Garcia, 478 F.3d 1231, 1233-35 (10th Cir. 2007), *cert. denied*, 550 U.S. 948 (2007); Farm Labor Org. Comm. v. Ohio State Highway Patrol, 308 F.3d 523 (6th Cir. 2002); Murillo v. Musegades, 809 F. Supp. 487 (W.D. Tex. 1992). *See generally* Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000) (analyzing prevalent racial profiling in enforcement of the U.S. immigration laws).

After September 11, 2001, racial profiling increased in prominence after implementation of various security measures that focused primarily on Arab and Muslim noncitizens. *See* Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002); Stephen H. Legomsky, *The Ethnic and Religious Profiling of Noncitizens: National Security and International Human Rights*, 25 B.C. THIRD WORLD L.J. 161 (2005). Ultimately, large numbers of immigrants from Mexico and Central America, who had nothing remotely to do with terrorism, suffered as a result of the measures as well as the increased immigration enforcement. *See* Steven W. Bender, *Sight, Sound, and Stereotype: The War on Terrorism and Its Consequences for Latinas/os*, 81 OR. L. REV. 1153 (2002); Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849 (2003); *see also* Sylvia R. Lazos Vargas, *Missouri, the "War on Terrorism," and Immigrants: Legal Challenges Post 9/11*, 67 MO. L. REV. 775, 798-825 (2002) (analyzing the negative impact of September 11th on debate over driver's license eligibility for undocumented immigrants).

[125] LATINOS AND THE LAW, *supra* note 1, at 469-71, excerpts Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995).

[126] *See* FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIME STATISTICS 2007 (2008); Mark Potok, *Anti-Latino Hate Crimes Rise for Fourth Year in a Row*, HATEWATCH, Oct. 29, 2008, http://www.splcenter.org/blog/2008/10/29/anti-latino-hate-crimes-rise-for-fourth-year/. A chapter on hate speech in LATINOS AND THE LAW, *supra* note 1, at 593-630, does not specifically discuss hate speech directed specifically at Latina/os but rather hate speech directed at racial minorities generally. One of the coauthors of *Latinos and the Law* wrote a pathbreaking article on the subject. *See* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

[127] *See* Editorial, *A Death in Patchogue*, N.Y. TIMES, Nov. 11, 2008, at A28, *available at* http://www.nytimes.com/2008/11/11/opinion/11tue3.html; Sean D. Hamill, *Mexican's Death Bares a Town's Ethnic Tension*, N.Y. TIMES, Aug. 5, 2008, at A12, *available at* http://www.nytimes.com/2008/08/05/us/05attack.html; Regina Medina, *Attack in Shenandoah Follows Immigrant's Fatal July Beating*, PHILA. DAILY NEWS, Sept. 17, 2008, at 3.

Long Island, are especially troubling. A group of young men allegedly began the events of a hate-filled evening with the statement: "Let's go find some Mexicans."[128] The *New York Times* later reported: "Every now and then, perhaps once a week, seven young friends got together . . . to hunt down, and hurt, Hispanic men. They made a sport of it, calling their victims 'beaners,' . . . prosecutors said . . . ."[129]

The increase in hate crimes against Latina/os appears tied to the heated, at times hateful, public debate regarding immigration, which has included the scapegoating of immigrants and Latina/os for social ills, ranging from crime to environmental degradation to destroying "American culture."[130] It hardly seems mere coincidence that hate crimes against Latina/os are on the rise at the same time there has been an (over)heated debate about immigration and immigrants at the state and local levels and immigrants have been blamed for just about every social ill imaginable.[131]

Consider the context surrounding the hate murder of Marcelo Lucero, where the local county executive had railed against undocumented immigrants for months.[132] Tempers flared and a gang subsequently killed a Latino immigrant. In Shenandoah, Pennsylvania, earlier in 2008, a group of young men beat to death an immigrant from Mexico.[133] Not that long before, tensions ran high with passage of the anti-immigrant ordinances (which a court enjoined) in Hazleton, a rural Pennsylvania town about twenty miles away.[134]

The unabashed racism expressed at the local level, which has been the subject of LatCrit scholarship,[135] deserves considerably more scrutiny than it

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[128] *See* Editorial, *supra* note 127.

[129] Cara Buckley, *Teenagers' Violent 'Sport' Led to Killing, Officials Say*, N.Y. TIMES, Nov. 21, 2008, at A26, *available at* http://www.nytimes.com/2008/11/21/nyregion/21immigrant.html.

[130] *See* ANTI-DEFAMATION LEAGUE, IMMIGRANTS TARGETED: EXTREMIST RHETORIC MOVES INTO THE MAINSTREAM 2, 7, 23 (2008), *available at* http://www.adl.org/civil_rights/anti_immigrant/Immigrants%20Targeted%20UPDATE_2008.pdf; David Holthouse & Mark Potok, S. Poverty Law Ctr., *The Year in Hate: Active U.S. Hate Groups Rise to 888 in 2007*, INTELLIGENCE REP., Spring 2008, *available at* http://www.splcenter.org/intel/intelreport/article.jsp?aid=886. During the presidential campaign, Senator (later President) Obama criticized the scapegoating of immigrants and the rise in hate crimes against Latina/os. *See* Albor Ruiz, *Bigots Show True Colors in Attacks on Immigrants*, DAILY NEWS (N.Y), Feb. 3, 2008, at 42, *available at* http://www.nydailynews.com/ny_local/2008/02/03/2008-02-03_bigots_show_colors_in_immigrant_attacks.html.

After the tragic events of September 11, 2001, hate crimes directed at Arabs and Muslims rose dramatically. *See* Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259 (2004); Bill Ong Hing, *Vigilante Racism: The De-Americanization of Immigrant America*, 7 MICH. J. RACE & L. 441 (2002).

[131] *See supra* text accompanying notes 111-22.

[132] *See* Editorial, *The High Cost of Harsh Words*, N.Y. TIMES, Nov. 14, 2008, at A32, *available at* http://www.nytimes.com/2008/11/14/opinion/14fri2.html.

[133] *See* Medina, *supra* note 127.

[134] *See supra* text accompanying notes 117-18.

[135] *See, e.g.*, Steven W. Bender, *Introduction: Old Hate in New Bottles: Privatizing, Localizing, and Bundling Anti-Spanish and Anti-Immigrant Sentiment in the 21st Century*, 7 NEV. L.J. 883 (2007); Mary Romero & Marwah Serag, *Violation of Latino Civil Rights Resulting from INS and Local Police's Use of Race, Culture and Class Profiling: The Case of the Chan-*

received in *Latinos and the Law*. The local measures serve as a bellwether for the racism that generally influences the formation of the federal, state, and local immigration and immigrant laws and their enforcement.[136] The animus, which generally speaking is most visible at the local level where it tends to be less sanitized than the debate in Washington, D.C., almost inexorably animates at least some of the debate over immigration reform at the national level. For example, despite its invalidation by a court, Proposition 187, with anti-Mexican animus at its core,[137] led to aggressive federal action to tighten the border, to limit benefits eligibility for lawful immigrants,[138] and dramatically increased noncitizen detention and deportation.[139]

IV. Conclusion

Latinos and the Law makes important contributions to the civil rights literature. As identified here, however, it missed a few opportunities, which can be expected in an innovative book of this type. Some areas of further exploration are reviewed in LatCrit scholarship,[140] which suggests the need for greater attention to this body of scholarship.

In addition, a unified theoretical lens would add much to the analysis. Critical Latina/o Theory, which goes unmentioned in the entire book, would have offered a natural theoretical focal point.[141] Alternatively, a focus on the Latina/o experience in the United States through reference to immigration law and enforcement would have helped provide a much-needed unifying thread to the book.[142]

We advocate and encourage the detailed analysis of the operation of the voting rights laws and U.S. immigration law through sophisticated lenses. To do so, Critical Race Theorists must look carefully at the law and its application to unmask its racial intents and impacts, take the opportunity to dispel the myths surrounding, for example, modern immigration to the United States, and highlight how racial animus animates much of today's anti-immi-

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dler Roundup in Arizona, 52 Clev. St. L. Rev. 75 (2005); *see also* María Pabón López, *The Phoenix Rises from El Cenizo: A Community Creates and Affirms a Latino/a Border Cultural Citizenship Through Its Language and Safe Haven Ordinances*, 78 Denv. U. L. Rev. 1017 (2001) (analyzing the language and immigration ordinances enacted by a small border town).

[136] In this way, the racism at the local level might be said to be the "miner's canary" revealing the depths of racial animus directed at many immigrants and deeply influencing the national immigration debate. *See* Lani Guinier & Gerald Torres, The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy (2003).

[137] *See supra* text accompanying note 125.

[138] *See* Johnson, *supra* note 96, at 150-55, 193.

[139] *See supra* text accompanying notes 90-94.

[140] *See supra* text accompanying notes 25-28.

[141] *See supra* text accompanying notes 25-28.

[142] *See supra* text accompanying notes 67-72.

grant sentiment, in ways similar to how it did in past episodes of U.S. history.[143] *Latinos and the Law* will hopefully commence greater inquiry on these and related issues.

[143] *See* Kevin R. Johnson, The "Huddled Masses" Myth: Immigration and Civil Rights 13-54 (2004) (analyzing history of racial discrimination in U.S. immigration laws).