

BEYOND THE BINARY: DECONSTRUCTING LATINIDAD AND RAMIFICATIONS FOR LATINX CIVIL RIGHTS

*Dianisbeth M. Acquie**

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“How, then, would the white nation deal with its Latinos – a hybrid people, a tiny portion part-Spanish, mostly-Indian, many part-African, speaking Spanish, and embodying the very ‘blot and mixture’ the Framers had thought so necessary to expel?”

—Juan F. Perea, *Los Olvidados: On the Making of an Invisible People*¹

I. INTRODUCTION

Hispanic. Latinx.² La Raza. Latino/a. Spanish. Chicano/a. Latin American. The seemingly endless list of names describing this swath of the population mirrors the rapidly expanding demographic itself. Over sixty million Americans are Latinx, thus accounting for eighteen percent of the American population.³ Some recent reports predict that by 2100, one in every three

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¹ Juan F. Perea, *Los Olvidados: On the Making of an Invisible People*, 70 N.Y.U. L. REV. 965, 975 (1995).

² The term “Latinx” is a gender-neutral term describing the minority group that identifies as Hispanic or Latino/a. For the purposes of this paper, I will be using Latinx to describe the population commonly referred to as Hispanic/Latino. For more information on the development and cultural significance of the term, see generally ED MORALES, *LATINX: THE NEW FORCE IN AMERICAN POLITICS AND CULTURE* (2018).

³ See Luis Noe-Bustamante et al., *U.S. Hispanic Population Surpassed 60 Million in 2019, but Growth Has Slowed*, PEW RSCH. CTR. (July 7, 2020), <https://www.pewresearch.org/fact-tank/2020/07/07/u-s-hispanic-population-surpassed-60-million-in-2019-but-growth-has-slowed/>, archived at <https://perma.cc/Y4A5-6NQJ>.

Americans will be Latinx.⁴ Pundits often refer to such statistics to boast about the spending and (latent) voting power held by the group, lumping millions of people together to increase the power of the demographic.⁵ Yet such claims often fail to grapple with critical questions: who classifies as Latinx, and according to whom? Who decides how these classifications apply to a heterogenous mass of individuals? Perhaps most pressingly, what are the ramifications of the construction of such an identity in the fight for racial and ethnic justice?

This Article explores these questions and argues that courts, aided by the political process, have played disproportionate roles in constructing Latinx identity and determining which characteristics of said identity are vital enough to protect. Courts have historically failed to protect Latinxs or offer legal remedies to discrimination because of their insistence on operating under traditional racial frameworks and an ill-founded reliance on essentialism. The construction of a mythical “Latinidad”—a term that has so often bulldozed over racial, ethnic, and socioeconomic complexities within Latinx communities—has been encouraged by courts and by government officials. It has also been championed by those who have attempted to position Latinxs closer to Anglo-American whites in order to obtain civil rights progress. These arguments raise questions about how civil rights battles for Latinxs have progressed and what the future will hold.

Part II of this Article explores the meaning of “Latinidad” and how it potentially excludes more than it includes. The idea of Latinidad as a unifying term is questioned, considering how the term has been used to oppress Afro-Latinxs in particular. Part III considers legal and political constructions of whiteness as a baseline in cases involving Latinx plaintiffs. Part IV explores how the Fourteenth Amendment’s Equal Protection Clause, historically used by civil rights advocates to pursue racial justice in theory, fails to fully protect Latinxs by operating within rigid racial confines. Part V examines a comparably popular vehicle for progress, Title VII of the Civil Rights Act of 1964, and how it has applied to Latinxs, before concluding that this paves a less-than-satisfactory road to progress as well. The purpose of this Article is not to undermine how the Equal Protection Clause and Title VII have been used to craft progress. We owe multiple meaningful civil rights to the interpretation of these two documents. Rather, it challenges whether these are the only ways to move closer to true equity and equality, and whether solely relying on these legal avenues risks excluding large swathes of the Latinx population.

⁴ See IAN HANEY-LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 144 (2d ed. 2006).

⁵ See Alex M. Saragoza et al., *Who Counts? Title VII and the Hispanic Classification*, in *THE LATINO/A CONDITION: A CRITICAL READER* 44, 49 (Richard Delgado & Jean Stefancic eds., 1998).

II. UNDERSTANDING AND MISUNDERSTANDING “LATINIDAD”

The concept of *Latinidad*—the term coined to describe the various attributes shared by Latin American people and their descendants—is paramount in this analysis.⁶ The invention of *Latinidad* has produced many important cultural and sociological considerations. However, the term is also challenging and exclusionary when considered more closely. *Latinidad* allegedly rejects racial essentialism, the belief in a genetic or biological essence that defines all individuals in a racial category.⁷ That said, *cultural* essentialism is prioritized in the construction of *Latinidad*. Cultural essentialism is the idea that “people are more or less passive carriers of their culture, whereby their attitudes, beliefs, and achievements are supposed to reflect typical cultural patterns.”⁸ This focus on cultural patterns seems to align with the popular argument that the “demarcation” line for Latinxs is culture and not race.⁹ Some may find the idea of *Latinidad* compelling, particularly those who believe that the greatest barrier to Latinx civil rights progress is a lack of unity among Latinxs, because it gives all Latinxs an opportunity to commingle under one term. However, rather than serving as a tool to unify, the term has often worked to marginalize and isolate individuals who identify as Afro-Latinx or Native American and Latinx. *Latinidad* fails to comprehend, much less prioritize, their intersectional experiences of grappling with multiple forms of discrimination along racial and ethnic lines. In practice, the cultural essentialism that is central to *Latinidad* has become a proxy for racial essentialism. *Latinidad* in many ways obscures the reality of how race operates within America—and within Latinx populations themselves.

The Latinxs who stand the most to gain from this cultural essentialism are not those most vulnerable to the legal system or those most likely to be neglected by political representatives. It will likely not be those most in danger of police violence, evictions, or wage theft. Fitting Latinxs into this one-size-fits-all term ignores the critical differences among Afro-Latinx communities, white-passing Latinxs, Asian Latinxs, and Latinxs who identify more strongly with indigenous communities. While proposing an accord in theory, it actually contributes to the marginalization of Afro-Latinidad in particular.¹⁰ We may look to late twentieth-century “Brown Power” movements as

⁶ See FELIX M. PADILLA, *LATINO ETHNIC CONSCIOUSNESS: THE CASE OF MEXICAN AMERICANS AND PUERTO RICANS IN CHICAGO* 2 (1985).

⁷ See Nur Soylu Yalcinkaya, Sara Estrada-Villalta, & Glenn Adams, *The (Biological or Cultural) Essence of Essentialism: Implications for Policy Support Among Dominant and Subordinated Groups*, 8 *FRONT. PSYCHOL.* 1, 1 (2017).

⁸ *Id.* at 2.

⁹ Charles Kamasaki & Raul Yzaguirre, *Black-Hispanic Tensions: One Perspective*, 21 *J. INTERGROUP REL.* 17, 19 (1995).

¹⁰ See Vianny Jasmin Nolasco, *Doing Latinidad While Black: Afro-Latino Identity and Belonging*, THESES & DISSERTATIONS (2020), <https://scholarworks.uark.edu/etd/3713>, archived at <https://perma.cc/6BAL-P8WR> (“The equivocation of ‘Latino’ with ‘brown’ has led to the erasure of diversity that exists among Latino people. As such, there now exists an image of Latinos as one raza, one people, with similar issues, beliefs, and cultures that does not necessa-

an example. They may be perceived as triumphant beacons in the name of progress and mobilization. However, these and other movements that have sought to harness pan-Latinx solidarity have also attempted to focus on similarities among Latinx groups and used “cultural essentialism . . . as a political ploy,” leading only to superficial relationships and chronic misunderstandings about Latinx identities.¹¹ Brown Power glossed over differences among Latinx subgroups, both intentionally and unintentionally excluding Afro-Latinxs.¹² The concept of Brown Power demonstrates the pressure to identify with a color within the structures of American racial dualism. While purporting to create a universal movement, Brown Power and similar ideas actually disempowered many Latinxs under the guise of giving them greater agency.

For a closer examination of how Latinxs have been consistently disempowered, we must turn towards the courts. In *Lopez Tijerina v. Henry*, 398 U.S. 922 (1970), the Supreme Court declined to permit Mexican Americans to define themselves within the context of a class action suit and determined that the term “Mexican American” was too vague to constitute a class within the Federal Rules of Civil Procedure, a decision that forbade this group from defining themselves.¹³ Nancy MacLean writes, “There is no common basis for discrimination against Hispanics . . . as the courts have acknowledged it, [discrimination] may result from physical appearance, national origin, language use, surname, cultural identification, or a combination of these elements.”¹⁴ Though MacLean is correct in her assessments, that there is no common basis for discrimination and that Latinx plaintiffs have brought suits under each of these causes of action, she overstates the “acknowledgment” of discrimination against Latinxs on the basis of a “combination of these elements.”¹⁵ Courts have repeatedly demonstrated discomfort when grappling with culture, national origin, or language use, because they are not “coextensive with racial classifications” and in turn, have often refused to apply strict scrutiny, instead subjecting many characteristics held by significant percentages of the Latinx population to rational basis review.¹⁶ The courts fall into a chasm created by relying on or even

rily reflect the lived experiences of all Latinos, especially those that have historically experienced marginalization in Latin America, such as Black and Indigenous peoples.”)

¹¹ PADILLA, *supra* note 6, at 4.

¹² *See* Saragoza, *supra* note 5, at 49.

¹³ *See* George A. Martinez, *Mexican Americans and Whiteness, in THE LATINO/A CONDITION: A CRITICAL READER* 175, 177 (Richard Delgado & Jean Stefancic eds., 1998).

¹⁴ NANCY MACLEAN, *FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE* 182 (2006).

¹⁵ *Id.*

¹⁶ *See, e.g.,* *Frontera v. Sindell*, 522 F.2d 1215, 1219–20 (6th Cir. 1975) (finding no suspect classification based on nationality or race in case brought by Spanish speakers challenging English-only civil service examination); *see also* *Pemberthy v. Beyer*, 19 F.3d 857, 871 (3d Cir. 1994) (holding that classification based on foreign language ability is subject only to rational basis review because language ability is not comparable to the “history of discrimination based on factors such as race or national origin” (internal citation omitted)). For a comprehensive list of cases in which courts have declined to exercise strict scrutiny when they do not perceive a trait as a characteristic standing in for race, *see* Jenny Rivera, *An Equal Protection*

bolstering Latinidad as the sole marker of Latinx identity, by conflating Latinx identity with race, or aligning Latinxs with a singular race. Judicial discomfort with considering many of the aforementioned elements of Latinx identity has, in many cases, not led judges to reconsider how they view Latinx plaintiffs. Rather, it has led to reductionist and ultimately harmful perspectives in civil rights cases.

Due to their reliance on racial dualism, courts have demonstrated a tendency to see civil rights discourse in terms of the Black-white binary without accounting for other relevant factors.¹⁷ Jurisprudence that operates solely within the traditional concepts of the Black-white binary denies the complexities of bilingualism and similar unique traits. It limits remedies for Latinx plaintiffs on the basis of national origin, language, or culture. In attempting to lay out a framework for what a Latinx is and thus what corresponding protections can be afforded to this segment of the population, the courts have “legitimate[d] the existence of races”¹⁸ and have often “invite[d] a steady stream of litigation that will end in having the Court tell us which attributes are a constitutive part of Latino identity and which are not.”¹⁹ While attempting to forge a single Latinx identity, courts have bent over backwards to construct legal fictions in order to ensure that Latinxs fall into the spectrum of white or non-white—therefore constructing their own ideas of what Latinidad is and falling into the traps discussed above. Courts have required people to “conform their identities to . . . rigid categories [recognized by law] if they seek legal protection from discrimination.”²⁰ As Juan F. Perea writes, creating a judicial “binary paradigm interferes with liberation and equality” for Latinx populations.²¹ To advance these efforts, courts have ignored many pertinent traits for the purposes of shaping jurisprudence.²²

Though this Article focuses on the pressures and constructions of identity proposed by the judicial system, it is worth noting that said pressure has not exclusively stemmed from the judicial branch. The other two branches of the federal government have also played disproportionate roles in trying to compartmentalize Latinxs and fit them into traditional conceptions of racial identity. Over the past two hundred years, the government has referred to Latinxs across different platforms as “Spanish-speaking Americans, Spanish-surnamed Americans, Hispanics, and Latin Americans . . . part of a

Standard for National Origin Subclassifications: The Context That Matters, 82 WASH. L. REV. 897, 914 n.69 (2007).

¹⁷ Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CALIF. L. REV. 1347, 1354 (1997).

¹⁸ HANEY-LÓPEZ, *supra* note 4, at 87.

¹⁹ Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 796 (2011).

²⁰ HANEY-LÓPEZ, *supra* note 4, at 88.

²¹ Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 RESEARCH CALIF. L. REV. 1213, 1238 (1998).

²² *Id.* at 1231.

broad category that included others of Spanish descent.”²³ These imposed and artificial labels carry rippling effects on group consciousness, voting interests, political participation, and civic duties. As Paula D. McClain and Joseph Stewart Jr. write:

The way individuals identify themselves and how they are identified by others is more than semantic interest. Self-identification, often referred to as group consciousness, and other identification can promote or thwart nation building and can affect, as we shall see later, people’s ability and willingness to participate in the political system.²⁴

In the late twentieth century, the United States Census Bureau invented the term “Hispanic”—a term that scholars argue is “devoid of any theoretical or political context.”²⁵ The Bureau added “Latino” to the 2000 Census as a synonym for “Hispanic.”²⁶ Government forms, educational surveys, and medical records, among hundreds of thousands of documents, use these terms as identifiers. These labels have squeezed millions of people stemming from disparate national, class, racial, and linguistic backgrounds into a single category. Umbrella terms like Hispanic “obscure[] rather than clarif[y] the varied social and political experiences in U.S. society of more than [twenty-three] million citizens, residents, refugees, and immigrants with ties to Caribbean and Central and South American countries.”²⁷ This question, of whether someone identifies as “Hispanic/Latino,” usually precedes the question of race on the census. The Census Bureau has spent “years . . . trying to persuade Hispanics to choose a standard race category” and, despite brief attempts to consolidate “Hispanic/Latino” into its own category, it continued to ask Latinxs to fill out their ethnicity in addition to their race in 2020.²⁸ The Census Bureau has continued to push standard classifications of race despite the fact that 97 percent of people who checked “some other race” in the 2010 Census were Latinx, indicating uncertainty, indifference, or even flat-out refusal to fall into the predetermined racial categories laid out by the Census Bureau.²⁹

²³ MACLEAN, *supra* note 14, at 182.

²⁴ PAULA D. McCLAIN & JOSEPH STEWART, JR., “CAN WE ALL GET ALONG?” RACIAL AND ETHNIC MINORITIES AND AMERICAN POLITICS 5 (4th ed. 2006).

²⁵ *Id.* at 6.

²⁶ D’Vera Cohn, *Census History: Counting Hispanics*, PEW RSCH. CTR. (Mar. 3, 2010), <https://www.pewsocialtrends.org/2010/03/03/census-history-counting-hispanics-2/>, archived at <https://perma.cc/5YWL-8973>.

²⁷ Suzanne Oboler, *Hispanics? That’s What They Call Us*, in *THE LATINO/A CONDITION: A CRITICAL READER* 3, 4 (Richard Delgado & Jean Stefancic eds., 1998).

²⁸ D’Vera Cohn, *Seeking Better Data on Hispanics, Census Bureau May Change How It Asks About Race*, PEW RSCH. CTR. (Apr. 20, 2017), <https://www.pewresearch.org/fact-tank/2017/04/20/seeking-better-data-on-hispanics-census-bureau-may-change-how-it-asks-about-race/>, archived at <https://perma.cc/F2YS-HVCS>.

²⁹ *See id.*

III. PROXIMITY TO WHITENESS, PROXIMITY TO OTHERNESS: LEGAL AND POLITICAL CONSTRUCTIONS OF WHITENESS RELATIVE TO LATINX IDENTITY

“That law constructs race is evident.”³⁰ Law has intervened in Latinxs’ abilities to define themselves, and actors within the legal system have demonstrated eagerness to prescribe either whiteness or non-whiteness onto the entire population. The law, as Ian Haney-López argues, “refers to a complex, incoherent system of practices, rather than to a monolith.”³¹ Yet these incoherent practices share consistencies across both state and federal lines as they relate to Latinx populations. Namely, the law has intervened and has unsuccessfully tried to define Latinxs as either “white” or “nonwhite” for two hundred years, trying to fit Latinxs in while using whiteness as a baseline. The idea of whiteness is “an uneven process, resulting in racial identities that change across contexts and time.”³² Similarly, the legal construction of Latinx identity produced by the pens of the courts has not been linear.

For many years following the Treaty of Guadalupe-Hidalgo, American courts toyed with the question of Latinx racial status in proximity to whiteness. *In re Rodríguez*, 81 F. 337 (W.D. Tex. 1897) is perhaps the most well-known example. Ricardo Rodríguez, a Mexican resident of what was once Mexican land and has since become Texas, asked the federal district court in Texas to approve his application for United States citizenship. His opponents in this case were two Texan politicians, T.J. McMinn and Jack Evans. They argued that Rodríguez could not qualify for naturalization because he was not “a white person, nor an African, nor of African descent, and is therefore not capable of becoming an American citizen.”³³ They clearly fell into the chasm left by the Black-white binary. As a result of their arguments, Rodríguez too fell into the gap created by the judicial binary. Judge Thomas Maxey, a former Confederate soldier, wrote the court’s opinion, and determined that Rodríguez was able to be naturalized.

This might seem like a victory on the surface for Latinx enfranchisement, yet the alarming basis for the court’s opinion demonstrates both how the political process creates racial categories and how these racial decisions are reified in courthouses. Judge Maxey ruled that Rodríguez could be naturalized because “Congress must have intended that Mexicans were white within the meaning of the naturalization laws . . . [t]hrough the give and take of treaty making, Mexicans became ‘white.’”³⁴ Under this reasoning, this case fails to promote true racial progress and justice. Judge Maxey’s opinions were ill-conceived because they upheld a hierarchy where Latinxs were otherized (as distinguished from white Anglo-Americans) and yet still permitted to succeed at the expense of Black Americans or Asian Ameri-

³⁰ HANEY-LÓPEZ, *supra* note 4, at 79.

³¹ *Id.* at 80.

³² *Id.* at 75.

³³ *In re Rodríguez*, 81 F. 337, 337 (W.D. Tex. 1897).

³⁴ Martínez, *supra* note 13, at 175.

cans. We may wonder, for example, if Judge Maxey would be as eager to connect Mexicans to whiteness had Rodríguez been Afro-Latinx. Similar to cases in the 1920s considering Asian naturalization, the court “resorted instead to the common knowledge of those already considered White” in making its decision.³⁵ This early case shows a judicial tendency to place Latinxs within a racial dichotomy by comparing Rodríguez to baseline whites, separating him from Anglo-Americans, and yet granting him privileges and rights on the basis of proximity to whiteness.

One might ask whether the court’s imposition of white identity on Mexican Americans and Latinxs was preferable to the alternative, considering the turbulent and troubled history of racism in the United States and within the legal system. As George A. Martinez writes, “[w]hite identity traditionally has served as a source of privilege and protection.”³⁶ However, relying on proximity to whiteness is ill-advised for multiple reasons. First, the mainstream perception of Latinxs as foreigners precludes many of the privileges and protections that overlapping whiteness and Latinidad would produce. Focusing on whiteness ignores the fact that Latinxs are disempowered by being continually constructed as foreign or non-American. Most Anglo-Americans perceive Mexicans and other Latinxs as other than white.³⁷ Some scholars have argued that the understanding of Latinxs as outsiders operates as a “racialized category in daily life” and eliminates any privileges that arise from being “blonde or blue-eyed.”³⁸ Though we should be skeptical of completely disregarding the privileges that arise from being a blonde, blue-eyed, or generally white-passing Latinx, the spectrum of “otherness” on which Latinxs exist limits the legal construction of whiteness from benefiting Latinxs fully. As Jenny Rivera writes, “Latinos are still considered ‘foreign’ persons who speak a language other than English, notwithstanding characterizations of ‘looking’ White.”³⁹ Second, if a law were to find Latinxs to be proximate to Anglo-American whites today, this would alienate and reject the experiences of Afro-Latinxs, darker-skinned Latinxs, and Latinxs of indigenous descent. Some would benefit enormously at the expense of others. The single racial classification of “Latinx” would grow to “mask inequalities in discrimination,” as all Latinxs would theoretically be considered white and yet suffer from very different experiences in everyday life.⁴⁰ This is not true progress, nor is it true racial justice.

This Article previously discussed how the United States Census Bureau affected Latinx nomenclature and self-identification—it collected millions of Latinxs under umbrella terms. The Bureau’s classifications were also influenced by and, conversely, influenced constructions of Latinidad as com-

³⁵ HANEY-LÓPEZ, *supra* note 4, at 23.

³⁶ Martinez, *supra* note 13, at 177.

³⁷ See LUPE S. SALINAS, U.S. LATINOS AND CRIMINAL INJUSTICE 17 (2015).

³⁸ SONIA SONG-HA LEE, BUILDING A LATINO CIVIL RIGHTS MOVEMENT: PUERTO RICANS, AFRICAN AMERICANS, AND THE PURSUIT OF RACIAL JUSTICE IN NEW YORK CITY 7 (2014).

³⁹ Rivera, *supra* note 16, at 924.

⁴⁰ *Id.* at 906.

pared to whiteness. Whiteness was a defining concept in the Bureau's earliest decisions. Beginning in 1930, the Census Bureau distinguished Mexican-American individuals from "whites," but resistance from the Mexican government and Department of State led the Census Bureau to classify Mexican Americans as white beginning in 1950.⁴¹ The classification of Latinxs as white allowed some to avoid de jure segregation, but it did not spare them from de facto segregation at the hands of white employers, landlords, and law enforcement.⁴² It also did nothing to alleviate or consider the needs of those who could not pass for white. This harmed those who straddled Latinx and African-American communities and hampered potential coalitions in the name and pursuit of racial justice. This also negatively impacted the rights of Black Americans, as the classification permitted the federal government to keep minority children segregated under the guise of desegregation. As Paula D. McClain and Joseph Stewart, Jr. write:

OCR, the federal government's school desegregation enforcement agency, had originally treated Hispanics as whites for desegregation purposes; thus, they could remain segregated without arousing federal interest. In addition, local school districts could send both black and Hispanic students to the same schools to achieve some desegregation, leaving other schools all Anglo.⁴³

Though government officials and courts unmistakably had the upper hand in defining Latinxs, it would be amiss to not mention that elite, often white-passing leaders in the Latinx community have historically made arguments relying on narrow conceptions of race, as long as Latinxs fell closer to whiteness on the spectrum of racial binaries or used whiteness as the baseline. American racism and government policies historically "steered Mexican Americans to define themselves publicly as white and to seek advancement through assimilation and respectability; the strategy seemed commonsensical to the largely middle-class and lighter-skinned American citizens who led the major Mexican-American civil rights groups."⁴⁴ Civil rights attorney and League of Latin American Citizens (LULAC) founder Alonso S. Perales, for example, claimed that Latinxs were members of the white race.⁴⁵ He and other attorneys often used this strategy to combat discrimination in the courtroom. It was LULAC, "the most mainstream and middle class of Mexican-American organizations," that began advocating for the name "Latin Americans" in order to distinguish wealthier Latinxs from poorer and more systemically marginalized Mexican Americans.⁴⁶

⁴¹ Martinez, *supra* note 13, at 176.

⁴² See, e.g., Phoebe C. Godfrey, *The "Other" White: Mexican Americans and the Impotency of Whiteness in the Segregation and Desegregation of Texan Public Schools*, 42 EQUITY & EXCELLENCE EDUC. 247 (2008).

⁴³ McCLAIN & STEWART, *supra* note 24, at 165.

⁴⁴ MACLEAN, *supra* note 14, at 157.

⁴⁵ See SALINAS, *supra* note 37, at 15.

⁴⁶ MACLEAN, *supra* note 14, at 161.

In landmark civil rights cases like *Independent School District v. Salvatierra*, 33 S.W. 2d 790 (Tex. Civ. App. 1930), LULAC argued that Mexican-American students were being denied equal protection under the Fourteenth Amendment because they were being placed in segregated schools.⁴⁷ LULAC's original argument was actually that because Mexican Americans were white, they were being unfairly discriminated against due to their identities as *white children*. This argument failed to protect or even acknowledge Afro-Latinxs or Latinxs who identified as belonging to a *mestizo* heritage, yet LULAC explicitly encouraged the court to find proximity to whiteness. The court ultimately distinguished "the Mexican race" from "all other white races," yet agreed with school officials who wished to permit segregation on the basis of language.⁴⁸ "The school board could continue to segregate Mexican Americans on the grounds of irregular attendance and, more important, language, which the court found permissible on educational grounds."⁴⁹ The classification of Latinxs as white created significant barriers to desegregating schools and improving educational opportunities for millions of children of color. It kept African-American and Latinx children in poorly-funded schools while asking them to share miniscule resources—resources that Latinx parents wanted to spend on bilingual education and ethnic studies, preferences not necessarily shared by African-American parents but which may have interested Afro-Latinx ones. Legally, Latinxs had the privileges of being white (or white-adjacent, at least for government purposes) and yet realistically could only live in highly-segregated, predominantly African-American communities and attend highly-segregated schools that suffered from educational inequities. Because of the strains and burdens that the government was able to legally put on majority-minority school districts due to the legal construction of Latinxs as white, minority coalitions were less likely to cooperate and more likely to contest the other's needs in terms of political representation and school spending.

One cannot understate how the impositions of whiteness on Latinxs (and the voluntary, knowing acceptance in some elite circles) hindered the possibility of minority coalitions, particularly with African-American communities. Clarence Mitchell of the NAACP argued against Latinx inclusion in the 1975 Voting Rights Act, "VRA," extension, saying, "Blacks were dying for the right to vote when you people [Latinxs] couldn't decide whether you were Caucasian."⁵⁰ The frustration is understandable in light of the aforementioned efforts of some Latinxs and courts to align Latinidad with whiteness. However, Mitchell assigned agency in decision-making to the Latinxs who would most greatly need the protection of the VRA; the individuals and entities tasked with trying to determine whether Latinxs were Caucasian or not were not necessarily those in danger of having their

⁴⁷ *Indep. Sch. Dist. v. Salvatierra*, 33 S.W.2d 790 (Tex. Civ. App. 1930).

⁴⁸ *Id.* at 796.

⁴⁹ McCCLAIN & STEWART, *supra* note 24, at 163.

⁵⁰ Kamasaki & Yzaguirre, *supra* note 9, at 23.

voting rights stripped. Mitchell's statement demonstrates the chilling reality of how intergroup relations and minority coalitions were stoppered by animosity and resentment over the classification of Latinxs as white—a decision that was imposed by courts and the Census Bureau, among other institutional actors. Even more chillingly, we must realize that among elite circles, this classification (as long as there was some connection to baseline whiteness) was tacitly accepted, with these leaders perpetuating discrimination against Black Americans while still relying on their victories to pave the way for Latinx courtroom victories.

IV. LATINXS AND THE EQUAL PROTECTION CLAUSE: CLOSE READING OF *HERNANDEZ V. NEW YORK*

Some of the most important civil rights cases in American history have been products of Equal Protection Clause jurisprudence. The Equal Protection Clause is often heralded as a tool to protect minority rights, but we must look beyond that broad statement to consider the realities lurking underneath. Alexandra Natapoff argues convincingly that “[t]he [Supreme Court] should reinterpret the Equal Protection Clause to acknowledge racial group factionalism in general and the persistence of white majority influence in particular.”⁵¹ Natapoff's argument, which relates to whiteness as a baseline, discussed earlier in this Article, hones in on how courts have repeatedly drawn boundaries between whites and non-whites without acknowledging the potential differences within minority groups and how the Equal Protection Clause might treat them distinctly. While there is civil litigation featuring Latinx plaintiffs that may demonstrate this, a criminal case featuring a Latinx defendant demonstrates how insidious this treatment of the Equal Protection Clause can be, and how it can affect fundamental liberties and criminal rights.

In *Hernandez v. New York*, 500 U.S. 352 (1991), New York State charged Dionisio Hernandez with two counts of attempted murder and two counts of criminal possession of a weapon. He was indicted by a grand jury and tried in Kings County. While selecting the jury, the Assistant District Attorney intentionally excluded bilingual Latinx jurors, claiming that they would have an unfair advantage when it came to Spanish-language evidence submitted to the jury. Hernandez was ultimately convicted by a jury that had excluded these bilingual Latinx jurors and was sentenced to time in prison.⁵²

Hernandez appealed up to the Supreme Court, which granted certiorari to determine whether the prosecutor's intentional exclusion of bilingual Latinx jurors from a case featuring a Latinx defendant and Spanish-language original materials violated the Equal Protection Clause on the basis of

⁵¹ Alexandra Natapoff, *Trouble in Paradise: Equal Protection and the Dilemma of In-minority Group Conflict*, 47 STAN. L. REV. 1059, 1059 (1995).

⁵² See CARLOS R. SOLTERO, *LATINOS AND AMERICAN LAW: LANDMARK SUPREME COURT CASES* 159 (2006).

ethnicity, national origin, or Spanish-speaking ability.⁵³ The crux of Hernandez's argument was that there was a "high correlation between Spanish-language ability and Latino ethnicity in New York (State)," and so the exercise of prosecutorial peremptory strikes on the basis of bilingualism effectively eliminated a majority of Latinxs from the jury pool in cases such as his own, where Spanish-language materials might be present.⁵⁴ The State argued that excluding bilingual Latinx jurors (or "Hispanics," as the prosecutor stated) from this case was race-neutral and based on reasonable doubt over "[the potential jurors'] ability to defer to the official translation of courtroom materials presented originally in Spanish."⁵⁵

The Court accepted this argument, holding that the peremptory strikes "may have acted like strikes based on race, but they were *not* based on race."⁵⁶ The majority ruled in favor of the State and failed to find any violations of the Fourteenth Amendment's Equal Protection Clause. Justice Anthony Kennedy wrote for the majority holding that the prosecutor's peremptory challenges did not violate the Equal Protection clause, yet noted, "it is a harsh paradox that one may become proficient enough in English to participate in trial . . . only to encounter disqualification because he knows a second language."⁵⁷ Hernandez's argument regarding discrimination on the basis of national origin was rejected because the characteristics of national origin did not sufficiently mirror race characteristics to merit the application of heightened scrutiny.⁵⁸ The Court refused to uphold the legitimacy of Hernandez's argument because there was no proximity to either whiteness or Blackness, and it did nothing to fit the confines of a racial dichotomy. This logic does a particular disservice to those who grapple with multiple historically marginalized characteristics at once. Curiously, the majority opinion stated that in some communities, "proficiency in a particular language, like skin color, should be treated as a surrogate for race."⁵⁹ Language was not valid as a standalone characteristic in the eyes of the Court. Rather, this puzzling language seems to indicate that when courts grant strict scrutiny to discrimination on the basis of language, they will only do so when language aligns with race and meets the requirements of racial essentialism. Justice Sandra Day O'Connor and Justice Antonin Scalia's concurrence in *Hernandez* offers some of the clearest language of how judges have stubbornly refused to budge from their established racial framework: "No matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race."⁶⁰

⁵³ See *id.* at 157.

⁵⁴ *Id.* at 162.

⁵⁵ *Hernandez v. New York*, 500 U.S. 352, 353 (1991).

⁵⁶ *Id.* at 375.

⁵⁷ *Id.* at 371.

⁵⁸ See Rivera, *supra* note 16, at 908.

⁵⁹ *Hernandez*, 500 U.S. at 354.

⁶⁰ *Id.* at 375.

The Court's "oversimplified view of race"⁶¹ asks Latinxs to construct their identities and legal claims in ways that revolve around reductionist understandings of race rather than a multi-dimensional consideration of legal and cultural identity. The denial of differences by the courts can function as a type of "divide-and-conquer mechanism, in addition to being a form of disrespect."⁶² The racial essentialism ascribed to by the courts codifies existing categories of race and legitimizes the practice of categorization instead of considering how groups define themselves in relation to each other and against the landscape of whiteness; this fosters divisions within minority groups instead of arming them against the structures of white supremacy. Under this framework, "by restricting analysis to a single-trait approach [race], the law isolates and disempowers Latinos/as by creating a landscape where both [non-Latinx whites] and non-Latina/o Blacks see Latinas/os as other."⁶³ Afro-Latinxs are caught once again, in the chasm between societal views of race and identity.

Furthermore, the connection between identity and language is quite germane for Latinxs. Scholars such as Jenny Rivera have argued that national origin identity "is intertwined with race, culture, ethnicity, language, and different histories of oppression in and outside of the United States" for Latinxs.⁶⁴ Arguably, language ability is just as intertwined for millions of Latinxs—whether they speak Spanish, Portuguese, Cantonese, or indigenous languages. Language ability cannot stand in for race, nor should courts require the exact same standards for race and language to find that there is a valid cause of action for discrimination. *Latinidad* is not one and the same with language. We cannot collapse the two, just as we cannot collapse Latinx identity with race without erasing entire swaths of the population. Yet for many, language "is at least a primary, constitutive part of Latino racial identity."⁶⁵ Perhaps there is some truth to Juan Perea's claim that "the Spanish language lies at the heart of the Latino experience in the United States," though I argue that we should be more critical about what truly lies at the core of *Latinidad*, if the term actually means anything at all.⁶⁶ Courts have not allowed Latinxs to seek recourse against language-based discrimination because language discrimination has not been recognized within the Black-white binary, nor has it been recognized as one of the elements, alongside dozens of others, that distinguish Latinxs from Anglo-Americans in the context of racial discrimination under the Fourteenth Amendment.⁶⁷ In *Her-*

⁶¹ HANEY-LÓPEZ, *supra* note 4, at 74.

⁶² Natapoff, *supra* note 51, at 1061.

⁶³ Berta Esperanza Hernández-Truyol, *Building Bridges: Latinas and Latinos at the Crossroads*, in *THE LATINO/A CONDITION: A CRITICAL READER*, 24, 29 (Richard Delgado & Jean Stefancic eds., 1998).

⁶⁴ Rivera, *supra* note 16, at 908.

⁶⁵ Juan F. Perea, *Buscando América: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1431 (2004).

⁶⁶ *Id.* Perea's statement also does not appreciate those who identify as Latinx but speak Portuguese, indigenous languages, or only English.

⁶⁷ See Rivera, *supra* note 16, at 927.

nandez, the Court fundamentally misunderstands the ability and desire of bilingual individuals to “defer” to translations. It incorrectly assumes that any of the millions of Latinxs who speak multiple languages could or should be able to mute the parts of themselves that speak any additional languages in order to serve on a jury. This particular case castigates Spanish speakers, and in a way, also demonstrates how little progress has been made since *Salvatierra*, where the court agreed that “the school board could continue to segregate Mexican Americans on the grounds of . . . language.”⁶⁸

The *Hernandez* decision undermined seemingly-established principles of racial justice as well. Five years prior, the Supreme Court decided *Batson v. Kentucky*, 476 U.S. 79 (1986), ruling that the intentional exclusion of Black jurors violated the Equal Protection Clause.⁶⁹ *Hernandez*’s lawyer, Kenneth Kimmerling from the Puerto Rican Legal Defense and Education Fund (PRLDEF), referred to the *Batson* decision in his opening arguments, and stated that this issue was important to “the petitioner here but [also] to every other Puerto Rican and Latino in this country.”⁷⁰ The *Hernandez* Court read *Batson* to require “only that the prosecutor’s reason for striking a juror not be the juror’s race.”⁷¹ Yet the majority opinion in *Hernandez* fails to consider the situation of bilingual or multilingual Afro-Latinxs who will nonetheless be excluded from juries—perhaps not explicitly because of their racial identity, but because of how that identity is entangled with other characteristics, including language. *Hernandez* did not actively promote the ideals in *Batson*; rather, this method of thinking undercut the progress made just a few years earlier. The Court’s refusal to tie together race and language as two of many characteristics that comprise Latinx identity in one case thus had the unfortunate consequence of unraveling multiple strands of racial justice at a time.

V. LATINX IDENTITY AND TITLE VII

Courts have also failed to protect Latinxs in claims brought through statutory efforts to achieve civil rights progress, namely through Title VII of the Civil Rights Act of 1964. Title VII was written in order to obtain equal opportunity with respect to the terms, conditions, and privileges of employment of all workers, regardless of race, color, religion, sex, or national origin.⁷² Title VII has opened the door for employment victories in landmark cases like *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *United Steelworkers v. Weber*, 443 U.S. 193 (1979). Despite the advances made possible through judicial interpretation of Title VII, there is an inconsistent legal history in terms of how courts have applied the anti-discrimination protections

⁶⁸ McCLAIN & STEWART, *supra* note 24, at 163.

⁶⁹ See SOLTERO, *supra* note 52, at 159.

⁷⁰ *Id.*

⁷¹ *Hernandez v. New York*, 500 U.S. 352, 375 (1991).

⁷² See Cameron, *supra* note 17, at 1352.

afforded under Title VII to Latinxs. This stems in no small part from judicial reluctance in diverging from racial essentialism to consider multi-faceted and expansive views of identity. A refusal to abandon the Black-white binary and categorize Latinxs along racial lines (in some ways, encouraged by elite leaders) has had complicated results.

Perhaps this was baked into the construction of the statute. Several scholars argue that Title VII was written without applying legislation to “Hispanics” at all.⁷³ The political process did not solicit Latinx feedback or focus on Latinx communities; this might explain why the Equal Employment Opportunity Commission (EEOC) saw only seventy-two complaints by Latinxs (chiefly Mexican-Americans) filed in its first year, out of thousands of others.⁷⁴ Courts have produced narrow definitions of “national origin” discrimination in interpreting Title VII. The question of national origin has “confounded” judges, as they have hesitated in the best case and refused in the worst case to find “discrimination against a Mexican because of his or her place of origin as opposed to discrimination on racial grounds.”⁷⁵

Legal uncertainties over how to construct the meaning of national origin arose prominently in *Espinoza v. Farah Mf. Co.*, 414 U.S. 86 (1973). In this case, the plaintiff hoped to be employed as a seamstress at Farah Manufacturing Company. She was a Mexican citizen and had permission to work in the United States. The company declined to hire her due to a longstanding company policy that they did not hire “aliens.”⁷⁶ The Court’s majority opinion, delivered by Justice Thurgood Marshall, ruled that “aliens are protected from discrimination under the Act, but nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage.”⁷⁷ Justice Marshall circumvented the interpretive guidelines provided by the EEOC and relied upon by the trial court in making its ruling, which stated that “a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship.”⁷⁸ The Supreme Court refused to hold that Title VII permitted remedies on the basis of “alienage,” which nonetheless serves as a proxy for the multiple other ways in which Latinxs can suffer discrimination. As one scholar writes, “the United States Supreme Court held that Title VII’s ban on national origin discrimination does not mean what it appears to say, and, in fact, permits an employer to deny a job to a lawful resident alien from Mexico.”⁷⁹

The questions about language raised in *Hernandez* have also been deemed contentious in Title VII jurisprudence. In *Garcia v. Spun Steak Co.*, 998 F.2d 1480 (1993), Latinx plaintiffs brought a claim against their employer for imposing an English-only rule that would “promote racial har-

⁷³ See, e.g., Saragoza, *supra* note 5, at 45.

⁷⁴ See MACLEAN, *supra* note 14, at 182.

⁷⁵ Saragoza, *supra* note 5, at 46.

⁷⁶ *Espinoza v. Farah Mf. Co.*, 414 U.S. 86, 87 (1973).

⁷⁷ *Id.* at 95.

⁷⁸ *Id.* at 92.

⁷⁹ Cameron, *supra* note 17, at 1351.

mony” in the workplace. The Ninth Circuit determined that the bilingual plaintiffs were not eligible for relief because “Title VII is not meant to protect against rules that merely inconvenience some employees, even if the inconvenience falls regularly on a protected class.”⁸⁰ However, what the Ninth Circuit understood as linguistic inconvenience actually infringed upon the liberty of bilingual and Spanish-speaking employees to freely associate with one another in the workplace. This is similar to the rationale espoused in *Hernandez*, that the capacity to speak Spanish as well as English is a mutable rather than an immutable characteristic. The Fifth Circuit arrived at a similar conclusion in *Garcia v. Gloor*, 618 F.2d 264 (1980), where a panel determined that an employee’s firing of a bilingual employee for speaking Spanish at work did not violate Title VII: “Neither the statute nor common understanding equates national origin with the language that one chooses to speak.”⁸¹ This is yet another example of how courts have clung to their traditional and harmful perceptions of racial dynamics under the guise of “common knowledge,” thus impeding progress all around and preventing new paths to pursuing racial progress and justice from blossoming.⁸²

Recent jurisprudence is no more promising. More recently, the Second Circuit held that discrimination based on “Hispanicity” constitutes racial discrimination under Title VII. In *Village of Freeport v. Barrella*, 814 F.3d 594 (2d Cir. 2016), the mayor of Freeport sought to appoint the village Chief of Police and ultimately selected Lieutenant Miguel Bermudez, who is Cuban. Christopher Barrella, an Italian-American candidate for the position, filed a complaint with the EEOC claiming that Mayor Hardick had discriminated against him and refused to consider him for the position based on his race (non-Latinx white) and national origin (American). He received a right-to-sue letter from the EEOC and ultimately filed a suit, alleging Title VII and § 1981 violations. The jury in the Eastern District of New York found that Hardwick had intentionally discriminated against Barrella on the basis of race. The defendants appealed to the Second Circuit, arguing that both Barrella and Bermudez were white, and thus promoting Bermudez could not have constituted racial discrimination. The latter arguments are similar to historical efforts to align Latinxs with whites, as discussed earlier. The defendants, in arguing that “Hispanic” is not a race (which is correct, as conflating the two eliminates intersectional perspectives), chose instead to engage with whiteness as the baseline. What complicates this argument is the idea that the alternative to this argument, the one ultimately espoused by the Second Circuit, undercuts affirmative action programs by promoting white resistance to selecting individuals of color who have historically been marginalized for employment and educational opportunities.

At the beginning of its majority opinion, the court asked broadly: “This case asks us to resolve a vexed and recurring question: what does it mean to

⁸⁰ *Id.* at 1488.

⁸¹ *García v. Gloor*, 618 F.2d 264, 268 (5th Cir. 1980).

⁸² HANEY-LÓPEZ, *supra* note 4, at 23.

be Hispanic? Specifically, it presents the question of whether ‘Hispanic’ describes a race for purposes of § 1981 and Title VII.”⁸³ The court answered its own question: the majority stated, correctly, that “courts and litigants alike have struggled with the proper characterization of claims based on Hispanicity.”⁸⁴ In past Title VII suits, the Second Circuit noted, courts had never specified whether Latinxs were protected based on their race or national origin. The court in *Barrella* continued by stating that the meaning of the word “race” was “a question of law for the court,”⁸⁵ before holding that discrimination based on ethnicity, which includes on so-called “Hispanicity,” constitutes racial discrimination for the purposes of Title VII.⁸⁶ The case was upheld in *Barrella*’s favor. On one hand, it is positive to have a federal circuit court acknowledge that a plaintiff can allege employment discrimination on the basis of ethnicity. However, this ruling undermines affirmative action programs and efforts to diversify civil workforces. It also perpetuates and expands the power that courts have to determine what constitutes race and ethnicity. If race is a question of law, then how can judges make fact-based inquiries that appreciate the multitude of characteristics that make up Latinx identity?

Solutions may arise at the legislative level. Some Latinx Critical Race (LatCrit) theorists have argued that advocates should lobby Congress to amend Title VII to explicitly apply to discrimination based on “ethnicity” and “ethnic traits.”⁸⁷ This amendment would be more consistent with the original legislative intent of Title VII. In the original iteration of Title VII, Congress had included the word “ancestry”—likely to expand the reach to Latinxs and Asian Americans who might be more likely to suffer due to foreign origins or heritage.⁸⁸ “Ancestry” was ultimately removed from the language of Title VII, though a House report indicated that the removal of the term was not supposed to be a material change.⁸⁹ Today, the status of national origin claims under Title VII remains tricky for Latinxs to use against discriminatory employers but presents a potential avenue for exploration moving forward.

VI. CONCLUSION

As the aforementioned cases and scholarship demonstrate, courts are predisposed to consider Latinidad to be a single, monolithic entity that both replaces all of the characteristics embedded in Latinx identity (a supersonic cultural essentialism, so to speak, to the detriment of individuals) and also falls neatly within the racial binary. As a result, the conceptions of Latinidad

⁸³ *Vill. of Freeport v. Barrella*, 814 F.3d 594, 598 (2d Cir. 2016).

⁸⁴ *Id.* at 606.

⁸⁵ *Id.* at 607.

⁸⁶ *Id.*

⁸⁷ See SOLTERO, *supra* note 52, at 103.

⁸⁸ See CAMERON, *supra* note 17, at 1352.

⁸⁹ See *id.*

are necessarily limited. Those who are already most vulnerable and most excluded from the discourse are further marginalized. This is devastating for a host of reasons. The Black-white binary that courts rely upon is not only detrimental to Latinx plaintiffs, but also to non-Latinx Black plaintiffs, Asian and Asian-American plaintiffs, and all members of marginalized communities who have been forced to rely on courts and government decisions for affirmations of their rights.

As mentioned at the beginning of this Article, some might argue that the greatest barrier to Latinx civil rights progress is not what the courts or political actors have done in shaping constructions of Latinidad, nor is it the reliance on any sort of essentialism. Rather, they might argue that the greatest barrier is the lack of unity among Latinxs. It is true that social movements among Latinxs have been narrow in scope, and there has been no true pan-Latinx effort.⁹⁰ However, we cannot forget that this lack of coalition has been in no small part affected by the courts. Judicial short-sightedness over what constitutes ethnic discrimination might lead fewer Latinxs to bring claims or see themselves as part of a larger struggle against white supremacy. Judicial constructions of Latinidad and limits on remedies have distracted advocates, organizers, and community lawyers from the only real commonality that joins segments of Latinxs together: “[w]hat really unites Latino/as is their unique history of oppression.”⁹¹ It is a rich history and yet one that is critically under-taught. A shared history of marginalization and subjugation is perhaps more unifying than the languages or national origins that it is assumed Latinxs share. However, Latinx attorneys must also be self-aware and recognize that this history of oppression has been partially dismantled in the courtrooms by Black Americans who led the way on Equal Protection and Title VII cases. We can argue that the Black-white binary is harmful to the pursuit of Latinx civil rights progress and demonstrate the inadequacy of pre-established, common vehicles such as Title VII and yet still recognize the progress made thus far using these tools. The two ideas are not mutually exclusive.

Self-definition is the first step in dismantling this oppression; looking beyond the titles imposed by the Census Bureau or the courts is key. But this is only the first step. It is only when judges become cognizant of the limitations of racial dualism and essentialism that self-definition will become an actual possibility for Latinx communities. We must depend on leaders within the community to avoid the temptation to align themselves with instruments of whiteness. Perhaps most critically, we must remember that justice is not synonymous with what happens in a courtroom. Community activism and grassroots organizers have historically led the call to action on civil rights advances. The case of Latinx civil rights should be no exception, and attorneys must aim to uplift this work without overshadowing it. It is only then

⁹⁰ See McCLAIN & STEWART, *supra* note 24, at 54.

⁹¹ Angel R. Oquendo, *Re-Imagining the Latino/a Race*, in *THE LATINO/A CONDITION: A CRITICAL READER* 60, 60 (Richard Delgado & Jean Stefancic eds., 1998).

that we can forge a route to deconstruct historical notions of Latinidad and work towards true progress. For there to be this progress, Latinidad (if it ever exists) cannot allow itself to become synonymous with “Brown Power,” invalidating countless others under the façade of harmony. It cannot resort to a cultural essentialism that is simply disguised as racial essentialism. Most importantly, it cannot exclude and undermine others in the pursuit of civil rights progress for some, rather than for all.

