History and Public Policy: Title VII and the Use of the Hispanic Classification

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I.

At nearly eight in the evening of July 1, 1991, few people remained in the chambers of the San Francisco Civil Service Commission, when the commission began its final deliberations on the definition of the term "Hispanic" for the purposes of applying Title VII of the Civil Rights Act of 1964.1 After months of intermittent discussion, several articles and editorials in the local media, and even national coverage in various magazines and newspapers, the issue was finally to be decided by the commission.2 Specifically, the question centered on whether persons of Spanish descent were covered by the Hispanic classification. The meet-

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ing of the commission was necessitated by a complaint by Pete Roybal, a native of New Mexico and a veteran of the San Francisco Fire Department, who argued against the inclusion of Spaniards in the Hispanic category for the purposes of affirmative action. That night, nearly thirty years after the original passage of the legislation regarding affirmative action, in a city laced with reminders of its Spanish and Mexican past, the debate over the Hispanic classification for the application of Title VII turned bitter and deeply emotional.

Firefighters argued vehemently against the inclusion of Spaniards in the Hispanic category for purposes of affirmative action, contending that historically Spaniards have not been among the oppressed; rather they were responsible for the destruction of the indigenous culture in Latin America. Other firefighters countered this opposition arguing against the arbitrary definition of Hispanic that would unjustly exclude those of Spanish origin.

The controversy in San Francisco serves as a metaphor for a larger problem regarding the use of generic racial and ethnic terms in the implementation of civil rights legislation. None perhaps is more difficult than the term Hispanic, given its peculiar history and the complexities of defining Hispanic in light of the patterns of racism and prejudice in the United States. The intent of this essay is not necessarily to dispute the inclusion of Spaniards into the Hispanic category, nor to examine the San Francisco issue in detail. Rather, our purpose is to explore the basis of the controversy over the use of the term and its implications for Title VII programs.

The use of the Hispanic classification, however, is not confined to problems related to employment. Latino advocacy groups, such as the Mexican American Legal Defense and Educational Fund (MALDEF) and the National Council of La Raza, for instance, have relied on aggregated statistics to push for district elections as a means of increasing the

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3. The problem of defining the term “Hispanic” has often focused on Mexican Americans, given the complicated questions of immigration, migration, and legal status. See, e.g., Philip García and Lionel A. Maldonado, America's Mexicans: A Plea for Specificity, 19 Soc. Sci. J. 9 (1982) (misleading conclusions result when “Spanish origin” is used as a surrogate for Mexican American and when Mexican Americans are examined without regard to generational differences); José Hernández, Leo Estrada, and David Alvírez, Conceptually Defining the Mexican American Population, 53 Soc. Sci. Q. 671 (1973) (methodological and conceptual problems related to use of data according to different measures of identity); Leo Estrada, Spanish Heritage Classification in U.S. Census, 4 INTERCOM 12, 8 (1976) (confusion between racial and ethnic categorization prevents useful and accurate statistics on Spanish origin population); Leo Estrada, Racial/Ethnic Classification in U.S. Census, 4 INTERCOM 11, 8 (1976) (complexity of racial classification compounded by persons of Spanish origin who are mixtures of Caucasoid and partial Mongoloid to the extent that they are partially Indian and in the case of Caribbean Spanish origin, partly Negroid).
political representation of Latinos. Thus, the uses of the Hispanic classification hold repercussions beyond affirmative action. Our inquiry, therefore, raises a series of questions that encompass history, politics, legislation and legal decisions.

It is our contention that the politics of group identity in the 1960s framed the assumptions, including the notion of the homogeneity of Hispanics, surrounding legislation such as Title VII and the subsequent uses of the Hispanic classification. Those assumptions were in many respects mistaken or misinformed at the time, and the flaws inherent in that legislation have surfaced in the controversy over the application of the Hispanic category for affirmative action. In fact, the debate over the term itself fails to address a more fundamental question: how do we apply civil rights law to diverse groups of people that are aggregated under generic terms, such as Hispanic, Asian American, and arguably, Native American, and even perhaps African American.

The diversity of the groups commonly covered by the term Hispanic is complicated by a number of factors, including the particular aspects of the history of relations between the U.S. and Mexico, Puerto Rico, Cuba, and the seven distinct countries that make up Central America. Immigration from these areas has been directly impacted by domestic and foreign policies of the U.S. This is not to mention the individual histories and cultures of the rest of Latin America, including the Portuguese-speaking nation of Brazil, as well as the French and British influenced islands of the Caribbean. Furthermore, the wide range of patterns of race, ethnicity, and cultural expression in Latin America, extending from the Rio Bravo (Rio Grande) to the Patagonia defy easy generalization. More specifically, in the American Southwest a host of terms have emerged over time to describe a variety of groups currently covered by the Hispanic classification. As the historian Ramón Gutiérrez has concluded, "new terms were brought into the ethnic vocabulary to clearly

4. The term “Latino” is used throughout as a deliberate counter term to the use of the term Hispanic.
5. Aggregating diverse groups of people under generic terms raises questions for other groups, such as Native Americans. See generally Alexandra Harmon, When Is an Indian Not an Indian?: The “Friends of the Indian” and the Problems of Indian Identity, 18 J. ETHNIC STUD. 95 (Spring 1990); M. Annette Jaimes, Federal Indian Identification Policy: An Usurpation of Indigenous Sovereignty in North America, 16 POL’Y STUD. J. 778 (Summer 1988). On this question as it relates to African Americans see F. JAMES DAVIS, WHO IS BLACK: ONE NATION’S DEFINITION, 4-6, 74-77, 138-39, 158-59 (1991).
delineate those boundaries within the Hispanic community that had developed along class, age, generation, nationality, and political lines."

In short, there are no indelible physical characteristics, language, or cultural forms that are shared by all of the people south of the U.S.-Mexico border that would invariably unify them under one ethnic or racial term. Hence, the term Hispanic, even in the U.S., invites several difficulties of definition. Yet, the term suggests that such commonalities exist, and that these commonalities have been the subject of similar racist or discriminatory practices in the U.S. Despite the dubiousness of this proposition, Title VII was written without regard to the problems of applying such legislation to aggregated, diverse groupings as in the case of Hispanics. In this respect, as the discussion in Congress in 1964 makes clear, the overwhelming reference point for the civil rights act of that year were African Americans, and not the Latin American origin population of the United States. As a result, the courts were forced to clarify the applications of Title VII for a diverse group of people, a diversity not anticipated by the legislative language of that time.

II.

The operable terms in the Civil Rights Act of 1964 were "race" and "color". Congress, however, failed to precisely define these terms. For the groups currently included in the term Hispanic, both race and color were problematic categories of definition and identification. Congressional discussion over the legislation focused on Blacks, as certain assumptions framed the use of race and color. Even for Blacks, these categories presumed manifest physical similarities that held less often


9. The difficulties include the aforementioned problems of geography, history and patterns of race, ethnic, and cultural expression.

10. "Congress' primary purpose in enacting Title VII was to alleviate 'the plight of the Negro in our economy' by providing jobs for blacks so that through increased incomes they could afford to exercise their rights to equal participation in the 'mainstream of American society,' " (quoting 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey) in STEPHEN N. SHULMAN & CHARLES F. ABERNATHY, THE LAW OF EQUAL EMPLOYMENT OPPORTUNITY § 4.02[1], at 4-3 n.1-2 (1990)).


13. SHULMAN & ABERNATHY, supra note 10, at 4-4.

than generally thought. The growing sense of Black nationalism and Black pride in the 1960s promoted the acceptance of the “one-drop rule” among African Americans.\textsuperscript{15} Thus, light-skinned African Americans, including those who could have “passed” for white, tended to self-identify with the term Black.\textsuperscript{16} At the time of the debate over the Civil Rights Act of 1964, self-identification and observation, i.e. perception, proved sufficient for defining race and color.\textsuperscript{17} Nevertheless, for most legislators in 1964 civil rights legislation referred primarily to Blacks, despite the amorphous use of the terms “race” and “color.”\textsuperscript{18} This ambiguity led to disputes “over whether a person is a member of a particular race . . . or indeed whether a certain classification, e.g. Hispanic, is a racial or other classification.”\textsuperscript{19}

The subsequent rulings that included Hispanics under Title VII reflect the twists and turns of its application.\textsuperscript{20} In this regard, the courts have usually referred to an earlier legislative act for the definition of discrimination: § 1981 of the Civil Rights Act of 1866.\textsuperscript{21} Yet, a historical reading of § 1981 “lessens the usefulness of any comparison made of included groups under § 1981 and Title VII and returns us to the question of what the 1964 Congress . . . considered racial versus ethnic or national origin discrimination.”\textsuperscript{22} The legal history on this issue has been confounded by the question of national origin discrimination, e.g. discrimination against a Mexican because of his or her place of origin as opposed to discrimination on racial grounds.\textsuperscript{23}

\begin{itemize}
\item \textsuperscript{15} Davis, supra note 14, at 5 (defining the “one drop rule” as “any person with any known African black ancestry . . .”).
\item \textsuperscript{16} See Davis, supra note 14.
\item \textsuperscript{17} See Shulman & Abernathy, supra note 10, § 4.02[1], at 4-3, 4-4 n.8.; see also 29 C.F.R. § 1602.13 (1987) (records as to racial or ethnic identity of employees should be maintained by employer).
\item \textsuperscript{18} See Davis, supra note 14.
\item \textsuperscript{19} Shulman & Abernathy, supra note 10, § 4.02[1], at 4-3.
\item \textsuperscript{21} See Shulman & Abernathy, supra note 10, § 4.02[1][b], at 4-4, 4-5.
\item \textsuperscript{22} Id., at 4-4, 4-5, n.14 (quoting Saint Frances College v. Al Khazraji, 107 S. Ct. 2022, 2026 (1987) Noting that perceptions of “race” and “ethnicity” have shifted since the 19th century. “Plainly, all those who might be deemed Caucasian today were not thought to be of the same race at the time § 1981 became law.”).
\item \textsuperscript{23} See Martinez v. Hazelton Research Animals, Inc., 430 F. Supp. 186, 188 (D. Md. 1977) (persons of Hispanic background claiming racial discrimination, even in a court holding that classification must be by national origin rather than by race, can amend complaint to state claim for national origin discrimination). For a discussion of whether discrimination against Hispanics or Mexican Americans is race based, see Comment, Developments in the Law-Section 1981, 15 Harv.
The courts have not been clear on the issue of whether discrimination based on national origin is actionable under § 1981.24 "Most courts


24. See Comment, supra note 23, at 82. Some courts have held that § 1981 does not encompass the claims of Hispanics when discrimination against them is viewed as national origin discrimination. See, e.g., Martinez v. Bethlehem Steel Corp., 78 F.R.D. 125 (E.D. Pa. 1978) (There is no "practical need" to extend § 1981 protection to national origin because discrimination based on national origin is prohibited by "the Civil Rights Act of 1964, 42 U.S. C. § 2000e, commonly known as Title VII."); Plummer v. Chicago Journeyman Plumbers Local 130, 452 F. Supp. 1127 (N.D. Ill. 1978) (Plaintiff allowed to amend complaint which initially asserted discrimination based on national origin. "it is well settled that discrimination based on national origin is not encompassed by section 1981."); Jones v. United Gas Improvement Corp., 68 F.R.D. 1, 15 (E.D. Pa. 1975) (The court limited § 1981 protection to cases of discrimination where anyone in the United States was denied equal rights as white citizens in the United States. "Discrimination on other grounds, such as religion, sex, or national origin, to which white citizens may be subject, as well as white non-citizens, or non-white non-citizens, is not proscribed by the statute." (emphasis in original); Gradilles v. Hughes Aircraft Co., 407 F. Supp. 865 (D. Ariz. 1975) ("The plaintiff's allegations in the instant matter being based solely on a claim for discrimination based on national origin are not within the confines or scope of 49 U.S.C., Section 1981.").

Other courts have allowed Hispanic plaintiffs and those of other ethnic groups to state a claim under § 1981 sufficient to survive a motion to dismiss. Nonetheless, courts have required the plaintiffs to amend their complaints to allege racial discrimination and to bear the burden of producing evidence that the alleged discrimination was of a racial character. See Ortiz v. Bank of America, 547 F. Supp. 550 (1982) (citing Bullard v. OMI Georgia, Inc., 640 F.2d 632, 634 (5th Cir. 1981) (recognizing that the distinction between national origin and racial discrimination is an extremely difficult one to trace and holding that plaintiff's allegations of racial discrimination were sufficient to survive a motion to dismiss); Apodaca v. General Electric Co., 445 F. Supp. 821, 823-24 (D.N.M. 1978) (Spanish surnamed plaintiff granted leave to amend complaint pursuant to § 1981 to allege discrimination motivated by racial perception and animus); Martinez v. Hazelton Research Animals, Inc., 430 F. Supp. 186, 188 (D. Md. 1977) (Hispanic plaintiff granted leave to amend to "allege adequately [his] racial background"); Gomez v. Pima County, 426 F. Supp. 816, 819 (D. Ariz. 1976) (Mexican American plaintiffs allowed to state a § 1981 claim for discrimination on the basis of race and color); Cubas v. Rapid American Corp., 420 F. Supp. 663, 665-66 (E.D. Pa. 1976) (Cuban American plaintiff's § 1981 action survived motion to dismiss on the ground that the court would not determine as a matter of law that the alleged discrimination did not contain elements of racial discrimination).

Compare with cases in which the courts have found that the scope of § 1981 cannot be limited by any strict notion of "race." Rather, the courts recognize that the line between racial and national origin discrimination may not exist. Some courts thus conclude that plaintiffs must state a valid claim under § 1981 regardless of whether their claim is characterized as one of national origin, race, alienage or ethnicity. See Manzanares v. Safeway Stores, Inc., 593 F.2d 968, 970-72 (10th Cir. 1979) (holding that plaintiff who alleged discrimination on the basis of his Mexican American descent had stated a valid claim under § 1981); Madrigal v. Certainteed Corp., 508 F. Supp. 310, 311 (W.D. Mo. 1981) ("Section 1981 should be construed to offer protection to persons who are the objects of discrimination because prejudiced persons may perceive them to be non-white, even though such racial characterization may be unsound or debatable."); Whatley v. Skaggs Companies, Inc., 502 F. Supp. 370, 376 (D. Colo. 1980) (plaintiff's allegations of discrimination on the basis of his Mexican American descent stated a claim under § 1981, citing Manzanares.); Aponte v. National Steel Service Ctr., 500 F. Supp. 198, 202-203 (N.D. Ill. 1980) (Plaintiff's allegation that he was discriminated against because he was Hispanic found to state a cause of action under § 1981, because "Hispanics" are frequently identified as "non-whites."); Garcia v. Rush-Presbyterian-St. Luke's Medical Ctr., 80 F.R.D. 254, 262-64 (N.D. Ill. 1978), aff'd 660 F.2d 1217 (7th Cir. 1981) (Mexican and Mexican-American plaintiffs found to state a cause of action under § 1981 because in analyzing discrimination against these groups race, national origin, and ethnicity may be indistinguishable);
facing the question have stated that national origin discrimination itself is
not covered by the statute [§ 1981]; however, where the same discrimina-
tion could be characterized as ‘racial,’ several courts have allowed plain-
tiffs to base their complaints on § 1981.” 25 For example, an Oklahoma
court noted that “the line between discrimination on account of race and
discrimination on account of national origin may be so thin as to be in-
discernible; indeed, to state the matter more succinctly, there may in
some instances be overlap.” 26 In Cubas v. Rapid Am. Corp., Inc., 27 the
court stated that national origin discrimination “is actionable only to the
extent that it is motivated by or indistinguishable from racial discrimina-
tion.” 28 Nonetheless, courts “have been unable to provide a consistent
definition of ‘race’ or ‘racial discrimination’ for purposes of § 1981 and,
as a result, have disagreed about which nonblack minority groups are
protected by the statute.” 29

These decisions reflected the more general problem of defining
“race” by historians and social scientists, whose debates over the topic
provided judges with divergent guidance. 30 For instance, in Budinsky v.
Corning Glass Works 31 the court observed that “[t]he terms ‘race’ and
‘racial discrimination’ may be of such doubtful sociological validity as to be
scientifically meaningless . . . ” 32 More importantly, the court went
on in Budinsky to make a crucial statement:

Hispanic persons and Indians, like Blacks, have been traditional victims
of group discrimination, and, however inaccurately or stupidly, are fre-
quently and even commonly subjected to a ‘racial’ identification as ‘non-
whites.’ There is accordingly both a practical need and a logical reason
to extend § 1981’s proscription against exclusively ‘racial’ employment

Ortega v. Merit Insurance Co., 433 F. Supp. 135, 139 (N.D. Ill. 1977) (holding that for today at least persons of Hispanic origin must be accorded the protections of § 1981.); Enriquez v. Honeywell, Inc., 431 F. Supp. 901, 904-906 (W.D. Okla. 1977) (“the line between discrimination on account of race and discrimination on account of national origin may be so thin as to be indiscernible . . . ”); Budinsky v. Corning Glass Works, 425 F. Supp. 786, 788 (W.D. Pa. 1977) (dicta) (stating that although the term race “may be of such doubtful sociological validity as to be scientifically meaningless . . . ” there was still a commonly accepted notion of race which included whites, blacks, Hispanics and Indians as separate races protected by § 1981). See also, Ramos et. al. v. Flagship International, Inc., 612 F. Supp. 148 (1985) (discrimination practiced against any “non-white” group or class falls within purview of § 1981; groups based in national origin are not excluded).

25. See Comment, supra note 23, at 82-83.
28. Id. at 665. (Hispanic American entitled to introduce evidence to prove alleged discrimina-
tion was racial in character).
29. Comment, supra note 23, at 83.
30. WILLIAM PETERSEN, MICHAEL NOVAK, PHILIP GLEASON, CONCEPT OF ETHNICITY, 1-
problems inherent in scientifically distinguishing between “races,” and opting to distinguish between
“races” based on whether part of a group is “perceived” to be different from “white citizens.”).
32. Id. at 788.
discrimination to these groups of potential discriminates.\textsuperscript{33} The \textit{Budinsky} court recognized that Hispanics are racially classified as non-whites, therefore making § 1981 applicable to Hispanics.\textsuperscript{34} Still, the courts have responded in varying ways to cases involving people of Hispanic backgrounds, using different arguments to sustain discrimination. In \textit{Valdez v. VanLandingham},\textsuperscript{35} for instance, the court maintained that persons with a Spanish surname constituted a "racial class" protected by § 1981.\textsuperscript{36} Moreover, in \textit{Sabala v. Western Gillette, Inc.},\textsuperscript{37} the court utilized the notion of ethnic heritage as its standard of inclusion under the statute.\textsuperscript{38} In \textit{Gomez v. Pima County},\textsuperscript{39} the court noted the difficulty of holding that "the plaintiffs must be strictly non-caucasian in order to contend that they are not given the same employment opportunities as "white citizens."\textsuperscript{40} Courts have "steered a middle course" between a very narrow definition of race and an expansive one in Hispanic discrimination cases.\textsuperscript{41} An approach the courts take is to emphasize the extent to

\textsuperscript{33} Id.

\textsuperscript{34} Later courts have used this analysis in allowing Hispanics to sue under § 1981. \textit{See e.g.}, Ridgeway v. International Bd. of Elec. Workers Local 134, 466 F. Supp. 595, 597 (N.D. Ill. 1979) (The court found "that plaintiff Hispanics' charge of discrimination comes within the aegis of § 1981."); Garcia v. Rush Presbytarian-St. Luke's Medical Ctr., 80 F.R.D. 254, 263-64 (N.D. Ill. 1978) (There is a "practical need and a logical reason" to extend § 1981 protection to Hispanic persons, who "have been traditional victims of group discrimination."); Ortega v. Merit Ins. Co., 433 F. Supp. 135, 139 (N.D. Ill. 1977) (Recognizing that while the "pragmatic" approach presents difficulties in that groups may "drift within and later without Section 1981 protection, . . . there is both a practical need and a logical reason' today to include people of Hispanic origin as a group entitled to the protection of § 1981 against claims of discrimination."); Enriquez v. Honeywell, Inc., 431 F. Supp. 901 (W.D. Okla. 1977) (Adopting the \textit{Budinsky} approach accepting Hispanic classification as a class provided protection under § 1981.). \textit{See also} Aponte v. National Steel Service Ctr., 500 F. Supp. 198 (1980) ("Persuaded by the often quoted rationale set out in \textit{Budinsky}."); Badillo v. Central Steel & Wire Co., 89 F.R.D. 140 (1980) (Adopting the \textit{Budinsky} approach accepting Hispanic classification provided protection under § 1981.); Ortiz v. Bank of America, 547 F. Supp. 550 (E.D. Cal. 1982) (Allowing a Puerto Rican woman to sue under § 1981 by adopting the \textit{Budinsky} "practical needs and logical reasons" test to determine her "racial character.").

\textsuperscript{35} No. 76-1376 (10th Cir. July 27, 1977).

\textsuperscript{36} \textit{Id.}


\textsuperscript{38} \textit{Id.} at 1147.


\textsuperscript{40} \textit{Id.} at 819.

\textsuperscript{41} \textit{See e.g.}, Gonzalez v. Stanford Applied Eng'r, Inc., 597 F.2d 1298 (9th Cir. 1979) (Accepting plaintiff's position distinguishing between Mexican Americans with brown, as opposed to white, skin.); Apodaca v. General Elec. Co., 445 F. Supp. 821 (D.N.M. 1978) (Spanish-surnamed plaintiff allowed to amend complaint in order to show "that the discrimination she allegedly suffered was motivated by a racial perception and animus."); Enriquez v. Honeywell, Inc., 431 F. Supp. 901 (N.D. Okla. 1977) (Comparing racial discrimination cases to cases based on national origin discrimination.); Martinez v. Hazelton Research Animals, Inc., 430 F. Supp. 186 (D. Md. 1977) ("[T]his court finds that the allegation that the plaintiff is an Hispanic male, without more, is an insufficient allegation of racial background to support an allegation of racial discrimination and thus to state a cause of action under 42 U.S.C. § 1981."); Gomez v. Pima County, 426 F. Supp. 816 (D. Ariz. 1976) (Joining "circuits which have considered the question and hold § 1981 is available as a remedy against employment discrimination based on color."); Cubas v. Rapid Am. Corp., 420 F. Supp. 663
which the plaintiff "is racially different from white persons,"42 where skin color or the "non-caucasianness" of the plaintiff was taken into account.43

The second approach has focused on the extent to which the discrimination is based on "racial animus."44 Perhaps the most important case in this regard is Manzanares v. Safeway Stores Inc.,45 where the court's finding merits lengthy quotation:

The measure is group to group, and plaintiff has alleged that the ‘group’ to which he belongs—those he describes as of Mexican American descent—is to be measured against the Anglos as the standard . . . . In this holding we consider that Mexican American, Spanish American, Spanish-surname individuals, and Hispanics are equivalents, and it makes no difference whether these are terms of national origin, alienage, or whatever. It is apparent that a group so described is of such an identifiable nature that the treatment afforded its members may be measured against that afforded the Anglos.46

This interpretation by the court emphasized that prejudice is "a matter of practice or attitude in the community, it is usage or image based on all the mistaken concepts of 'race.'"47 In concert with this finding, "[i]f a group is commonly perceived to be racially different . . . it should be protected by § 1981, regardless of its 'objective' racial composition and regardless of the motive of the discriminator."48 According to this view, "[t]his 'common perception' approach thus adapts the statute to the reality of modern America while remaining true to the aim of its framers."49

(Edward D. Pa. 1976) (Plaintiff of Cuban American national origin allowed to present evidence that he had been racially discriminated against as an Hispanic American.).

42. Comment, supra note 23, at 87.
43. Comment, supra note 23, at 87 n. 109-10, (citing Martinez v. Hazelton Research Animals, Inc., 430 F. Supp. 186 (D. Md. 1977). Some courts have considered skin color the dispositive factor, see Gonzalez v. Stanford Applied Eng'rs, Inc., 597 F.2d 1298, 1300 (9th Cir. 1979) (Accepting plaintiff's position distinguishing between Mexican Americans with brown, as opposed to white, skin.); Gomez v. Pima County, 426 F. Supp. 816, 818-19 (D. Ariz. 1976) (Some prior cases "by clear implication stand for the proposition that Mexican Americans of brown race or color can sue under the statute."); Manzanares v. Safeway Stores, Inc., 593 F.2d 968 (10th Cir. 1979) (Accepting plaintiff's proposition that the 'group' to which he belongs — those he describes as of Mexican American descent — is to be measured against the Anglos as the standard.); Apodaca v. General Elec. Co., 445 F. Supp. 821 (D.N.M. 1978) (Defendant's argument "amounts to no more than a denial that the defendant perceived the plaintiff as a member of an identifiable non-caucasian race and acted on that basis.").
45. 593 F.2d 968 (10th Cir. 1979).
46. Id. at 970.
47. Id. at 971.
49. Id. at 90. See also Ortiz v. Bank of America, 547 F. Supp. 550 (E.D. Cal. 1982) (Common perception approach "employs the common law technique of the application of law to changes in the factual reality while limiting the scope of the statute in a way consistent with the apparent intent of
Nonetheless, the reasoning of the *Manzanares* court maintains ambiguous notions, such as "identifiable nature" and "common perception." This construction reinforces the debatable assumption that Hispanics have distinguishable characteristics of one kind or another, and it assumes that dark-skinned Mexicans and the light-skinned Chileans with a French last name are equally perceived. Furthermore, the concept of "common perception" underestimates the variability over time of such perceptions. As Ramón Gutiérrez has concluded, "[f]ar from being a homogeneous group, the Hispanic population of the Southwest is complexly stratified and has a variety of historically constituted social boundaries which define it." 51 Gutiérrez emphasizes "the process by which people define themselves and are defined by others is dynamic. Cultural identity is not a fixed and static entity; rather it ebbs and flows as history unfolds." 52 Evidence suggests the particular applicability of the *Manzanares* ruling for Mexican Americans. 53 Yet, even here, the authors qualified their conclusion: "[o]f course, as with other groups generally perceived as nonwhite, individuals of Mexican descent 'pass' into the majority population." 54 They went on to state, "both the existence and virulence of discrimination has varied in different geographic areas and different times." 55

On the other hand, for some Puerto Ricans skin color remains a key basis of discrimination, as the court found in *Felix v. Marquez.* 56 In this case, the court noted that "color is usually mixed with or subordinated to claims of race discrimination, but considering the mixture of races and ancestral national origins in Puerto Rico, color may be the most practical claim to present." 57 But for light-skinned Puerto Ricans, claims of racial discrimination, given the reasoning in *Manzanares*, may be based on very different grounds. How then is a Puerto Rican commonly perceived?

The question remains whether the evidence marshalled in the article by Greenfield and Kates, and the *Felix* case, extends to the expansive

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50. The historical basis for the prejudice against the Spanish-speaking in the United States had various origins over time, including anti-Catholicism, imperial rivalries, anti-miscegenation attitudes and racial notions. See, e.g., Raymond Paredes, *The Origin of Anti-Mexican Sentiment in the United States, in New Directions in Chicano Scholarship* 139 (Ricardo Romo & Raymond Paredes eds., 1978).

51. Gutiérrez, supra note 7, at 37.
52. Id.
54. Id. at 729.
55. Id.
57. Id.
interpretation implied in *Manzanares*. In brief, discrimination based on skin-color is central in *Felix* because of the particular history of race relations in Puerto Rico, notably the visible influence of the island's African origin population. In contrast, the African influence is less apparent in the physical characteristics of the overwhelming majority of Mexicans. The courts recognize that discrimination against Latinos may result from physical appearance, national origin, language use, surname, cultural identification, or a combination of elements. Thus, there is no common basis for discrimination against Hispanics; and we would submit there is no common perception as well.

Anyone familiar with the history of race and ethnicity in Latin America is aware of the complexities and nuances to be encountered in the understanding of racial prejudice in that region. The *Manzanares* ruling implies that in the United States such complexities and nuances do not exist and, that there is a "common understanding" regarding Latinos. This reasoning is essentially ahistorical. For instance, as David Montejano has observed for Texas in the 1920's, the definition of Mexicans as racially inferior was closely linked to their class position. We would argue therefore that the interpretation contained in the *Manzanares* decision sustains a number of arguable premises and invites further confusion, rather than clarifying the definition of discrimination for Latinos in the United States. The discussion in Congress regarding the Civil Rights Act of 1964 and Title VII (as amended) should provide, one would expect, some guidance in determining the intent of the legislation for Latinos. Unfortunately, a reading of the Congressional Record during that particular historical period only adds to the confusion.

III.

The discussion in Congress during the passage of the Civil Rights Act of 1964 and subsequent legislation demonstrates the apparent confusion over which terms should apply to the groups currently encompassed by "Hispanic". Indeed, from about 1964 to 1972, the term "Hispanic" incorporated several terms. The terms Mexican American, Spanish surname, and Spanish-speaking, among others, were usually used interchangeably by government officials, reports, and public statements to identify what would later be subsumed under "Hispanic." Time and again in the Congressional Record, legislators used ambiguous terminology, making it difficult to decipher their exact meaning. Though the evidence suggests that they usually implied Mexican American and Puerto

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60. Id. at H10480.
Rican, and perhaps Cubans, the statements of the members of Congress failed to define their terms precisely. When legislators referred to specific groups, in most cases they cited Mexican Americans or Puerto Ricans, usually along regional lines. Representatives from the Southwest usually referred to Mexican Americans, and those from the Northeast invariably mentioned Puerto Ricans. Mexican American, Spanish surname, Spanish speaking, from the standpoint of legislators, were all essentially the same, but the specific references of congressmen at the time indicate the group or groups that they associated with the terms. To cite one example in 1967, Congressmen Kazen managed to support a statement issued by Congressman Roybal by saying the following:

I want to add my voice in praise to a President [Johnson] who... made a pledge to open avenues of opportunities to Latin Americans of this country... Just recently, he [Johnson] nominated another Spanish-speaking American [as] ambassador to Paraguay... Since my childhood, I have heard of the Government's failure to recognize [the] talent of our Mexican American people.

Even representatives from the the Southwest, who presumably should have known better, were just as apt as easterners to use ambiguous terms. Congressman Udall of Arizona, for example, attempted to justify a point on Mexican Americans by using data for Spanish-surname people in the United States that would include many groups other than just Mexican Americans. This lack of clarity also afflicted the few legislators of Mexican-American descent. For example, Congressman Edward Roybal of Los Angeles used three different terms of identification in remarks made in 1965:

The Mexican-American group argued that legislation such as the Civil Rights Act... was designed to combat inequality wherever it existed.


This same group which left the Capital full of hope and confidence now points to the fact that no improvement has been made and the Spanish-speaking community continues to be ignored by almost all departments of the Federal Government. While we compliment the progress that is being made in making available employment for Negro Americans, we cannot help but point to the obvious lack of Latin American personnel in those same offices.  

The confusing nature of the term reflected to a large extent the confusion among government data gathering agencies, none more important than the Census Bureau. It is beyond the scope of this essay to chronicle the long history of various terms used by the Census to describe the heterogeneous groups now covered by Hispanic. As several scholars have noted, however, the extant terms at the time of the 1964 Civil Rights Act and its immediate aftermath only added to the amorphous usage of generic terms for distinct ethnic groups encompassed by terms such as "Spanish-speaking." In fact, during the late 1960s, Congress criticized the Census Bureau for failing to count Mexican Americans as a distinct group.  

Ironically, in the effort to promote legislation aimed at Mexican Americans, for instance, legislators were forced to use data based on the term used in the 1960 census, "Spanish surname." In short, the Census Bureau and similar agencies provided little guidance in clarifying the definition of those groups to be covered by the 1964 legislation and Title VII. 

Recognizing the confusion, Congressman Roybal, an intrepid advocate of Mexican American civil rights, had the following comments by his colleague from Texas, Congressman Gonzalez, read into the Congressional Record on June 15, 1967: 

In the first place, there is the problem of definition. There is not even a generally accepted name for this minority group. Americans of Spanish surname are called Mexicans, Mexicanos, Latins, Latinos, Latin Americans, Mexican Americans, and Hispanic Americans. . . . This group of people is so scattered about the land and so disparate in its origins that it has problems defining itself, just as the government has problems in defining it.

Gonzalez's comments become poignant in retrospect when he added at the time:

The Spanish surnamed American is unique from other minorities in still other ways. His is not a single origin. He has come from different places,

68. See Leo Estrada, Spanish Heritage Classification in U.S. Census, 4 INTERCOM 8, 12 (1976).
at different times and for different reasons. He is different from other immigrant groups because his homeland, his mother country, is not across the sea. There is no ocean between his cultural home of Mexico and America; Mexico is but a short drive away.\footnote{72}{\textit{Id.}} Congressmen Roybal and Gonzalez were concerned by the lack of definition. They understood that the term Hispanic could be read inclusively to extend protection to those from "across the sea," presumably Spaniards, who, because of their experiences and origins, were different from those of Mexico.

Statements from the Congressional Record during the period of time surrounding the Civil Rights Act of 1964 and its amendment in 1972 fail to clearly define the understanding or intent of Congress for groups known by several descriptive terms.\footnote{73}{\textit{See supra} notes 54 and 56 and accompanying text.} It appears that most congressmen assumed the applicability of civil rights legislation to certain groups, such as Mexican Americans and Puerto Ricans.\footnote{74}{\textit{See} 111 \textit{Cong. Rec.} S22627-22628 (1965) (statement of Rep. Roybal); 112 \textit{Cong. Rec.} H10479 (1966) (statement of Rep. Gonzalez); 112 \textit{Cong. Rec.} H10486 (1966) (statement of Rep. Ryan); 114 \textit{Cong. Rec.} S30954 (1968) (statement of Sen. Montoya).} The establishment in 1968 of the Interagency Commission on Mexican American Affairs provides additional evidence of the coverage intended by Congress at the time. This agency was created by President Johnson, according to the agency's first report, "to help meet the pressing needs of more than 10,000,000 Spanish-surnamed Americans—the Mexican Americans of the Southwest, the Puerto Ricans on the mainland, the Cubans, and others."\footnote{75}{114 \textit{Cong. Rec.} H25703 (1968).} Further evidence of the targeted groups comes from the remarks of Senator Montoya in 1969 when he urged Congress to re-fund the agency.\footnote{76}{115 \textit{Cong. Rec.} S1958 (1969) (statement of Sen. Montoya).} He pointed out the "striking" diversity of Spanish-speaking Americans, "ranging from native born Mexican Americans and Puerto Ricans to emigrants from Latin America."\footnote{77}{\textit{Id.}} In spite of the name of the agency, and Montoya's suggestive comment (and neglect to mention Spaniards), one is still left with the enigmatic "and others." The confusion over the use of terms such as Spanish surname was not addressed directly by Congress.

In the period between the original legislation in 1964 and its amendment in 1972, Congress was aware of the problematic nature of "lumping" diverse groups together. In 1971, for instance, Senator Tunney of California had a report sponsored by the Mexican American Legal Defense and Educational Fund (MALDEF) read into the Congressional
This report raised the issue of lumping and its effects. MALDEF's report indicated that the federal government refused to separate Mexican Americans in the enumeration of the Census. As a result, MALDEF contended in its report that the practice led to "an exaggerated count of Mexican-American employees, particularly at higher positions, due to the inclusion of Central and South Americans, and often incorrectly, Portuguese and Italian Americans." (Evidently, the report did not address the issue of Spaniards). Congress apparently failed to take notice of the report and its implications. What groups were intended to be covered or not covered by the legislation continued to be unclear, forcing the courts to eventually provide such definition. Nonetheless, regulatory agencies charged with the enforcement of the legislation, and specifically Title VII, had to contend with the question without much authoritative guidance from either Congress or the courts during the initial implementation phase of the legislation.

IV.

The information on the definition of groups covered by Title VII gathered by the staff of the San Francisco Civil Service Commission vividly indicates the continuing confusion over terms and their meaning. Virtually all of the agencies surveyed by the commission's staff used the guidelines established by the Equal Employment Opportunity Commission (EEOC) to define Hispanics. Though, the interpretation of the guidelines varied, "[a]ll of the public employers surveyed include in the definition of Hispanic persons with heritage from Spain." For example, the San Francisco Civil Service Commission staff found that the Boston Fire Department included in its definition "community recognition" and "coming from a Spanish-speaking household." Furthermore, the Commission found employers that did not include persons from Spain in the application of the term Hispanic—a practice that was also the case in the San Francisco Unified School District. The Commission also found that the San Francisco Human Rights Commission did not even use the term "Hispanic," and that their preferred term "Latino" referred to people of "Mexican, Puerto Rican,
Cuban, Central or South American” background.87

In response to this confusion, the Commission’s staff went to federal records to ascertain a better definition. Their finding was telling: “[r]esearch indicates that federal agencies have used different definitions for Hispanic.”88 The staff of the commission found that various federal agencies had confronted the problem in 1979, including the Department of Transportation, the Department of Housing and Urban Development, the Department of the Interior, the Environmental Protection Agency, and the Economic Development Agency.89 At that time (March 1980), the Department of Transportation decided to exclude persons of European origin, though they allowed for “a person of Spanish or Portuguese culture with origins in Mexico, South or Central America, or the Caribbean islands, regardless of race.”90 Nevertheless, the Department of Transportation later that year issued a revised definition, making it more expansive. It included persons with origins in Spain, and it established a separate minority category for Portuguese.91 The other agencies party to the original decision in March apparently did not issue at that time any public revisions of their definitions. The staff of the San Francisco Civil Service Commission concluded that “state and federal agencies have not provided clarity on this issue . . . .”92

In light of this background, the courts had no option but to clarify the term and, implicitly, its application. Still, the Commission report included a revealing comment: “[a]rguments for changing the definition are primarily based on the interpretation of legislative intent. Advocates believe that the minority group Hispanics was intended to include persons with origins from Latin American countries, and not those from Europe.”93 Given the comments by Mexican-American legislators and other congressmen cited earlier, there is evidence to suggest that the staff report accurately assessed the problems that would arise from an overly broad definition of “Hispanics.” Yet, few if any congressional representatives have challenged the more expansive interpretation of the definition of Hispanic. In fact, the regional office counsel of a major Latino civil rights organization, MALDEF, petitioned the commission to maintain the expansive definition, rejecting the complaint of Pete Roybal (no relation to the congressman from Los Angeles) to exclude Spaniards from the Hispanic category.94 Little if any research has examined the reasons

87. Id.
88. Id.
89. Id.
90. Id.
91. Id.
92. Id. at 4.
93. Supra note 82, at 4.
94. Manuel A. Romero, Statement of MALDEF before the Civil Service Commission of the
for the support of MALDEF and similar organizations for the broad definition of the term Hispanic for the purposes of Title VII.

The arguments prepared by MALDEF for the meeting were not seriously considered, however, by the Commission. Scant attention or comment was generated by the brief document prepared by the MALDEF counsel. Rather, it was obvious that the key to the Commission’s decision to maintain the expansive definition lay in other than legal arguments, historical evidence, or academic discussions of race and ethnicity. For three of the commissioners in particular—one Puerto Rican, one African American, and one Asian American (who pointed out that she was married to a Chicano)—their decision rested on issues of unity, solidarity, and divisiveness. The emotional testimony of fire fighters, both for and against inclusion of Spaniards had an impact on the commissioners, especially those who were sympathetic to affirmative action. The reaction of these commissioners offered a critical insight into a process that has been scarcely examined by students of affirmative action in general, and those specifically interested in its implications for “Hispanics.” Clearly, in our view, the expansive definition of Hispanic resonated with a crucial aspect of the historical moorings of the civil rights movement: the significance of group politics and ethnic nationalism.

V.

The civil rights movement of the 1960s, more so perhaps than in the past, emphasized the importance of unity and common struggle in overcoming institutional racism. As many studies have shown, sharp disagreements took place within the Black civil rights movement over tactics, strategy, and ultimate goals. In this respect, the differences between Martin Luther King, Jr. and Malcolm X have become the usual example, but the lack of consensus punctuated the civil rights movement throughout the 1960s and into the subsequent decade. Thus, the tendency to use the singular “movement” was a misrepresentation of actual events and processes at that time. Nonetheless, such differences consistently met with efforts, both public and private, to lessen if not eliminate the conflicting possibilities of political differences within or among civil rights organizations. Repeatedly, it was argued that division among African Americans and other minority groups only held benefits for “white racists”; division was both a tool and an advantage of institutional racism.
and its supporters. The exaltation of this principle—though more often observed in the breach than in practice—led to the lumping of subgroups into monolithic communities as a politically expedient tactic.

The example of African Americans in this regard was important: the constant rhetoric portraying the African American community as a singular experience marked the political strategy of Black civil rights advocates during the 1960s. Other ethnic and racial groups paralleled African Americans in this strategy, though with much less public notoriety.77 This political essentialism among African Americans quickly became widespread, due especially to the news media. For most of the American public the issue of race in this country generally implied Blacks. The “other” minority groups failed to achieve in this period the visibility or political clout, particularly in Congress, given to Blacks. This frustrated Mexican American legislators, as indicated in the remarks of Senator Montoya of New Mexico in 1972:

We are the “invisible minority.” While the black man has made the crying needs of his Ghetto children part of the nation’s known history and collective conscious, we remain unseen. . . . Our efforts are fragmented. . . . And so in fragmented disorder we remain impotent; given hand-me-down programs; counted but not taken into account; seen with hindsight but not insight; asked but not listened to; a single brown face in a sea of black and white . . . .

As suggested in Montoya’s comments, the strategy of Blacks to stress their group experience had been effective, pushing the senator from New Mexico to acknowledge a similar lack of cohesion among “Hispanics.” In sum, Mexican American legislators desired their own form of political essentialism—Hispanic versus white—with the same level of political privileges granted to Blacks.

A crucial element in the development of this emphasis on political essentialism in the civil rights arena derived from the resurgence of nationalism among Blacks, Chicanos, and other groups.99 Among Mexican origin and Puerto Rican based civil rights groups this new nationalism was often couched in cultural terms, leading to forms of cultural essentialism. These forms varied in expression and content, with everything from the vernacular (the celebration of “pachuco” talk) to traditional Mexican music and dance (the ubiquitous appearance of mariachi bands

79. “While we compliment the progress that is being made in making available employment for Negro Americans, we cannot help but point to the obvious lack of Latin American personnel in those same offices, bureaus, and departments . . . . This despite the fact that Spanish-speaking Americans face the same economic problems, and have suffered the ravages of discrimination in housing, education, and employment for generations.” 111 Cong. Rec. H2267 (1965) (statement of Rep. Roybal).
and folkloric dancers) at Chicano student sponsored “cinco de mayo” events at innumerable college campuses by the late 1960s and into the present. Hence, the “Chicano” movimiento (and its corollaries among “Boricuas” for example) sought to emphasize the commonalities among “Latino” groups as an extension of cultural essentialism and as a political ploy. As Felix Padilla has shown for Chicago, this quickly led to a new style of political activism, what he has termed “situational” Latino politics. Where expedient and/or necessary, Mexican American and Puerto Rican groups in Chicago forged alliances in order to increase their collective access to governmental programs, political decision-making, and publicly funded services.

On the other hand, the essentialist, nationalist discourse unleashed by the movimientos created certain tensions in this new, group politics that encompassed more than one ethnic subgroup under a generic term. Padilla noted the reasons for this generic group identity:

[T]he politicization of a situational Latino ethnic identity and consciousness entails almost a related irony and paradox. It stresses, ideologizes and sometimes virtually recreates the distinctive and unique national-cultural identities of the groups that it mobilizes, precisely at the historical moments when these groups are being asked to take on a Latino ethnic consciousness.

Thus, the nationalism of the movimiento implied an expansive notion of group identity, e.g. La Raza, that both reified particular identities (“Chicanismo” for instance), as well as a more inclusive concept embracing other Latin American origin groups (such as Puerto Ricans). Not insignificantly, the critique of the role of the United States in Latin America in the late 1960s and early 1970s added to this notion of group identity. In this view, Latin Americans were oppressed by the consequences of U.S. policy in that region, not unlike the oppression of Latinos living in this country.

Despite the anomalies and ambiguities of this new style of group politics, the benefits led to the increased use of the group identity, especially during the community action program era of the late 1960s and early 1970s. The political benefits of “lumping” the group allowed for aggregate figures to be used to justify resources for community action groups, welfare rights organizations, and manpower training programs,

100. “Boriquas” are individuals of Puerto Rican descent. The term connotes the political power of Puerto Ricans as does the analogous term “Chicanos” for Mexican-Americans.


103. It should be noted here that no text has been found by the author to suggest that this new, expansive concept of La Raza, for instance, was extended to people from the Iberian peninsula, i.e., Spaniards.
among other initiatives. Distinctions due to immigration, class, national origin, length of residence in the United States or legal status were subsumed under the political expediency of generic terms whether for subgroup or for the more expansive groupings. Hence, Chicano activists spoke of the Chicano community with scant attention to the importance of differentiation among people of Mexican origin in the United States. Moreover, when politically useful, Chicano advocates of civil rights legislation aggregated all Latino subgroups as one. Differences were glossed over by the rhetoric of "Brown power" and similar notions.\(^{104}\) If only implicitly, the assumptions of this strategy suggested that all the groups suffered equally and similarly from past racist practices directed at people of Latino background.

In time, this tactic of "situational politics" became a more formal political strategy, fueled by the use of statistical evidence in dealing with employment discrimination.\(^{105}\) In *Griggs v. Duke Power Company*,\(^{106}\) the Supreme Court opened the doors to this tactic in dealing with job discrimination, commonly referred to as the disparate-impact theory. As legal scholar Melvin Urofsky has noted, "[p]laintiffs could establish the discriminatory nature of a particular practice . . . by statistics demonstrating the racial imbalance resulting from that practice."\(^{107}\) Urofsky points out that in the 1977 ruling, Justice Stewart declared that statistics by themselves could prove the existence of employment discrimination.\(^{108}\) Consequently, by establishing hiring goals, the aggregation of Latinos inflated the figures utilized as the reference point for calculating the disparities to prove employment discrimination. For certain areas of the United States, this was initially perhaps unimportant; the number of Puerto Ricans in San Antonio was comparatively as insignificant as the number of Mexicans in New York. Hence, the aggregation of Latinos as a monolithic group for the purposes of compiling statistical data for discrimination cases made political sense in various, specific locations.

However, for many localities, the mix of Latinos was much more complex, and the increase in immigration in the 1970s, especially from Central America, added yet more diversity than ever before to the generic meaning of "Latino," "La Raza," "Hispanic," etc. Nonetheless,

\(^{104}\) See Rodolfo O. de la Garza, 'And then there were some...': Chicanos as National Political Actors, 1967-1980, 15 Aztlan 1, 20 (1984) ("Estimates of potential Chicano voting power may be exaggerated because large segments of the "Chicano community" are made up of legal residents and illegal aliens and migrants ineligible to vote. The groups give an exaggerated image of potential Chicano political clout."). See also RUFUS P. BROWNING, ET AL., PROTEST IS NOT ENOUGH (1984).

\(^{105}\) See generally Padilla, supra note 101, at 60-64.

\(^{106}\) 401 U.S. 424 (1971).


\(^{108}\) Id.
the strategy of aggregating Latino subgroups into one category received further political value as the Democratic and Republican parties each attempted to garner support from Latinos in key electoral states, such as New York, Florida, Texas, and California. The emergence of the so-called Latino vote as an important consideration in the political calculations of the major parties furthered the utility of the "unity" strategy for an increasing number of Latino political interests, particularly the "mainstream" organizations. In the scramble for political clout, Latino political interests realized the necessity and value of using the "lumping" approach. In brief, the more the major parties courted the "Latino vote," the more the lumping strategy compelled the use of a generic term for the grouping of vastly different segments of the Latin American origin population of the U.S.

The "them versus us" character of the civil rights movements and its attendant rhetoric produced a simplistic view of the workings of racism against Latinos in American society. The complexities of the Latino experience were lost in the political expediency of the moment, eclipsing a deeper, more accurate understanding of that experience with American racism. The gains derived from such a strategy, redoubled by the concentration of certain Latino groups in politically sensitive states, eventually compelled the use of a generic term to reflect the lumping strategy. Thus MALDEF, among other organizations, increasingly reflected the political logic of the aggregation of Latinos into one grouping. This was not due to economic aggrandizement or political opportunism, in our opinion, as others have implied. Rather, the troublesome outcomes of following such a strategy were perhaps only dimly understood at the time, as the benefits of the strategy gained momentum. For example, the redistricting and representation cases of recent years clearly demonstrate the usefulness of the aggregation strategy for opening the political process to Latino voters. In contrast, for the purposes of af-


110. For a more in-depth critique of population increases on political representation, see Tatcho Mindiola, Jr. and Armando Gutierrez, Chicanos and the Legislative Process: Reality and Illusion in the Politics of Change, in LATINOS IN THE POLITICAL SYSTEM, 349 (1988) ("a positive relationship between increased political representation and improvement in socioeconomic status should not be accepted as an axiom.").


113. See ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS (1989) (Listing data tables showing the high percentage of Hispanics in the population.). See also Garza v. County of Los Angeles, 918 F.2d 763, 773 n. 4-5; Gomez v. City of Watsonville, 863 F.2d 1407, 1417 (1990) (Citing statistics showing that "racial bloc voting occurs in
firmative action, the utility of the strategy has proven to be much more problematic.

Nevertheless, any criticism or questioning of the lumping strategy has become understandably divisive in the minds of those promoting it. And in the minds of those imbued with the principles enshrined in the civil rights struggle, raising concerns over the aggregation approach only nourishes the backlash against affirmative action specifically, and the civil rights movement in general.

VI.

"Hispanic" became the generic term that gained usage and widespread acceptance during the 1980s. But the definition of the term for Title VII contained a number of problems revealed by the controversy in San Francisco. And, as this essay has attempted to point out, the legal history of the interpretation of Title VII for Hispanics has not clarified the relationship between the intent of the original legislation and its application.

Given the implications of the position of MALDEF's regional counsel, a series of questions remain to be addressed not only by MALDEF, but by other Latino civil rights organizations as well. It is likely that in the near future the courts will be pressed to answer them, unless legislation appears to contend with these issues.

Undoubtedly, one contemporary area of concern will revolve over the issue of Latin Americans allowed to enter the country under the provisions of the new immigration guidelines implemented in October, 1991. Will wealthy and/or highly trained Latin Americans and/or their children qualify for affirmative action? More generally, this issue raises the question over Latin American immigrants whose backgrounds provide them with economic and educational advantages as compared to U.S.-born Mexican Americans. Indeed, the University of California for the purposes of statistical reporting on Hispanic academic employees includes many if not most Latin American-born scholars. Is this consistent with the original meaning of affirmative action? Can an academic department nominate a prominent Mexican scholar as an "affirmative action hire," given that a Mexican born student is counted as an Hispanic

115. For some observers, the question is at best a moot point. As the regional counsel of MALDEF implied at the commission hearing, the number of Spaniards and Spanish immigrants is so small that in fact it did not matter in the application of affirmative action for Latinos.
for admissions purposes? In light of the decision of the San Francisco Civil Service Commission, should a Spanish engineer hired by Caltrans, for instance, be counted as an Hispanic?

It is estimated that over 300,000 Nicaraguans live in the Los Angeles metropolitan area. Many will remain in California, and under the family reunification provisions of immigration law, many will undoubtedly bring relatives to the U.S. Given the middle and upper class backgrounds of many Nicaraguan refugees currently in the state, it is likely that many of those brought under family reunification provisions will come from similar advantaged backgrounds. They will compete with California-born Mexican Americans, again as an example, for jobs. These issues raise uncomfortable questions with no clear answers. It is our contention that these questions are neither minor nor moot. Rather, they raise serious issues over the use of political essentialism and the meaning of affirmative action for Latin American origin people in the U.S.

More recently, largely in response to the criticisms of Black scholars and commentators, the issue of class background has added further fuel to the volatile debate over affirmative action. Latino critics of affirmative action have followed similar arguments, emphasizing that middle and upper class Latinos benefit disproportionately from affirmative action programs. Several questions arise from this criticism of affirmative action, e.g., to what extent should class background be taken into account in the implementation of Title VII? Or put another way, was the intent of affirmative action centered on helping primarily the Latino working poor? For certain critics, the answer is obvious: affirmative action has become a tool of cooptation, used to deflate the participation of the middle class in civil rights activism. However, is the query of this matter tied to class or to equitable representation of Latinos in the workplace? Further, if certain segments of the Latino population have benefited more than others, is the problem one of implementation of the law or is it related to the original intent of the legislation?

The initial unwillingness or inability to ask these questions—by legislators, federal agencies, or proponents of affirmative action—created an inherent problem in applying Title VII to "Hispanics," or whatever generic term would have emerged. The current debate about the specific use of the term 'Hispanic' misses the point, for the term "Latino" (or others that have been offered) also fails to address the fundamental questions and problems noted above. The lack of understanding or knowledge of the experience of people of Latin American origin in the U.S.

inhibited the recognition of the differences in applying Title VII to African Americans, for instance, as opposed to "Hispanics." As this essay has noted earlier, this initial flaw in the 1964 legislation forced the courts to develop a definition, and forced government agencies to create language to cover an amorphous group that was in fact several groups.

But the political die had been cast by the 1970s. From our research, we found no major effort by any of the key Hispanic civil rights organizations to take up the issue. While there was a spate of articles condemning the use of the term Hispanic, most critics dealt with the cultural, linguistic, and political aspects of the term. The policy and legal ramifications of the term and the larger problem represented by its usage has remained essentially ignored.

Ironically, under pressure from Latino civil rights groups concerned with the adverse consequences of inaccurate counting procedures, the Census Bureau for the 1990 census began to disaggregate the "Hispanic" category. Carried to its logical conclusion, for certain groups this may mean the establishment of hiring goals that take into account the number of Salvadorans in the work force, for instance, to determine the extent of their exclusion from certain job categories. In our view, such "fine tuning" does not address adequately the problems and questions raised in this essay.

At a minimum, we would argue that the definition of Hispanic for the purposes of Title VII should take into account the economic status of the person and their social background, e.g., the economic position of parents. Currently, the process of selecting employees takes into account a number of factors of a subjective nature, such as years of schooling, job experience, personality traits, and others. It is conceivable that questions related to economic status and social background could be considered in the same vein for the purposes of affirmative action.

We believe, however, that the questions raised in this essay regarding the "Hispanic" classification go beyond the practical consequences of implementing Title VII. Rather, we would extend the criticism to question whether the racism practiced against people of Latin American origin in this country is necessarily identical or of such similarity to warrant the same legislative remedies, as that practiced against Asian Americans, Native Americans and African Americans. Institutional racism against people of Latin American origin shares several features with that experienced by African Americans, for example, but major differences also occurred in the past and into the present. As the legislation of 1964 and its amendment in 1972 make clear, these distinctions failed to be recognized fully. The diversity among Latinos was also minimized as Title VII re-

118. See 1990 census forms.
lected the assumptions that racism worked against them in essentially the same manner as it did against Blacks. This was not the case then, nor is it now.

VII.

At a time when affirmative action seems to be under caustic and widespread criticism, it may appear that this essay is intended to continue that assault. Quite the contrary. The authors of this work strongly support affirmative action. But this essay has raised questions that need to be confronted by advocates of the concept. We are faced with these questions largely because they were not addressed by Latinos in determining and defining the applicability, as well as the limits, of legislation such as Title VII. In this respect, the purpose of our essay is to generate discussion on these thorny issues, if for no other reason than that the 1990 Census will provide the most complete picture of the diversity of the "Hispanic" population in the United States in the history of this country—despite the evident undercount. The problematic nature of the term "Hispanic," moreover, extends beyond that of affirmative action and its implementation. As noted earlier, the use of aggregation for Latinos also holds political and electoral implications.

As a consequence, a new round of issues will arise over the appropriateness of using aggregate figures to justify generic remedies, social or political. The aggregation strategy obviously "works" in areas where Latinos as a whole represent a large, powerful constituency in statistical terms, as is the case in Los Angeles. On the other hand, the divisive possibilities of the strategy are also apparent. First, as Latinos exercise their collective muscle, they will encroach on the established political presence of other minorities. When Latino civil rights groups pushed for district elections in Los Angeles, for example, the effort necessitated intense, and at times tense, negotiations with Black representatives. This tension had surfaced earlier in a dispute over minority hiring in which Latinos accused Blacks of being less than earnest in employing Latinos. Again in Los Angeles, the political jockeying generated by Latin-

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120. Recently, this has also held true for companies and advertisers who have launched efforts to capture the "Hispanic Market." See, e.g., Barbara Caplan, Linking Cultural Characteristics to Political Opinion, in IGNORED VOICES: PUBLIC OPINION POLLS AND THE LATINO COMMUNITY, 158, 161 (Rodolfo O. de la Garza, ed., 1987) ("While Hispanics in the United States were not homogeneous, the differences among Puerto Ricans, Cubans, Mexicans, and other Hispanics were found to revolve around migration history and the strength to emotional ties to the homeland. Differences blurred when consumer behavior and media usage patterns were at issue. Thus, it was concluded, the markets could consider all Hispanics in aggregate as a consumer segment."). Id. at 161.
121. See Howard Gleckman, The 'Other Minorities' Demand Their Due, BUS. WEEK, July 8, 1991, at 62.
tino political demands contributed to the electoral loss of an Asian American on the county board of supervisors.122

Second, the political divisions within the Latino communities are manifest to knowledgeable observers, but with the arrival of increasing numbers of refugees and their relatives in recent years, these differences have extended the ideological disparities even further. A large proportion of Nicaraguan refugees, for example, possess very conservative political views, including strong support for U.S. foreign policy in Latin America. 123 On the other hand, many Latinos maintain more "liberal" or less conservative views, concerning, for instance, the role of the U.S. in Central American politics.124 Thus, in the representation of "Latino" political views, Nicaraguans may not necessarily identify with the perspective of other Latino elected officials.

Third, one can anticipate a growing number of Hispanic critics of affirmative action and related concepts in the future. The recent publication of Linda Chavez' Out of the Barrio signals the recognition of the flawed nature of the aggregation strategy and its vulnerability to criticism.125 Indeed, Chavez makes telling points in the conclusion of her book on the faults of the lumping strategy. She notes, for instance, that Hispanic leaders "are willing to have everyone included in order to increase the population eligible for the [entitlement] programs ... ."126 In this regard, she mentions the Pete Roybal case in San Francisco as an example of the problems of this approach.127 She goes on to raise the issue of class difference in the application of affirmative action. Undoubtedly, as in the case of Richard Rodriguez and the English-only movement, Chavez will be used by opponents of affirmative action to discredit the concept in the same way that Shelby Steele and others have been exploited.128 On the other hand, Chavez acknowledges the persistence of

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123. See generally, BEAN & TIENDA, supra note 117, at 112-15.

124. For another example of this political diversity, see Alejandro Portes & Rafael Mozo, The Political Adaptation Process of Cubans and Other Ethnic Minorities in the United States, in LATINOS AND THE POLITICAL PROCESS 152, 167 (1988).


126. Id. at 169. See also, Ronald Brownskin, Beyond Quotas, L.A. TIMES, July 28, 1991 (Magazine), at 18, 38, 40, 42-43.

127. CHAVEZ, supra note 125, at 167.

discrimination, though "not as severe as it was [is] against blacks." Chavez suggests that current laws and legal procedures adequately protect "Hispanics" from discrimination. Yet, she fails to address the question why, after decades of these legal remedies, racist practices continue to affect Latinos. In sum, Chavez refuses to confront the nature and depth of American racism and its particular impact on people of Latin American origin. Hence, her efforts to describe the diversity among Latinos only serve to magnify questions generated by the persistence of discrimination.

The recognition of the diversity of Latinos and its implications seems to have increased among Latino scholars, and even the media has begun to note the differentiation within this group. It is no longer tenable to sweep the issue under the proverbial rug. The problems generated by the reconciliation of affirmative action with the inherent diversity of the Latino population should not deter us from confronting the issue. Advocates of Latino civil rights should not evade the question. The history of the struggle for Latino civil rights has been a long, heroic, and illustrious one. Many if not most of the people of Latin American origin who read this essay have been beneficiaries, in one way or another, of that struggle. There is a debt to be paid and a challenge to be met. It is hoped that this essay will spur Latinos and their allies to continue this new chapter in that history.

129. CHAVEZ, supra note 125, at 171.
130. See Suro, supra note 114; see also Frank del Olmo, TV Dispute Sheds Light on the 'Hispanic' Myth, L.A.TIMES editorial, May 29, 1989, at 5.