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AN EQUAL PROTECTION STANDARD FOR NATIONAL ORIGIN SUBCLASSIFICATIONS: THE CONTEXT THAT MATTERS

Jenny Rivera *

Abstract: The Supreme Court has stated, “[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause.”¹ Judicial review of legislative race-based classifications has been dominated by the context of the United States’ history of race-based oppression and consideration of the effects of institutional racism. Racial context has also dominated judicial review of legislative classifications based on national origin. This pattern is seen, for example, in challenges to government affirmative action programs that define Latinos according to national origin subclasses.

As a matter of law, these national origin-based classifications, like race-based classifications, are subject to strict scrutiny and can only be part of “narrowly tailored measures that further compelling governmental interests.”² In applying this two-pronged test to national origin classifications, courts have struggled to identify factors that determine whether the remedy is narrowly tailored and whether there is a compelling governmental interest. While courts have appropriately focused on race specific themes and experiences when the central feature of the classification is race, courts have not uniformly applied a national origin “context” when the central feature is instead national origin. National origin classifications, such as “Latino,” often consist of members of various national origin subclasses. Thus, some courts have considered the historical and current discrimination against members of national origin subclasses as part of their equal protection analysis. However, courts often rely on race-based approaches to evaluating this history and do not uniformly assess subclass experiences.

* Professor of Law, City University of New York School of Law. J.D., New York University School of Law, LL.M., Columbia University School of Law. My deepest appreciation goes to Professor Ruthann Robson for her assistance and guidance. Without her input on several drafts and her encouragement throughout this writing process, this article would not have been completed. Thank you also to Professor Janet Calvo for providing very helpful feedback on prior drafts. My thanks also to Professor Raquel Gabriel for her research assistance and feedback on earlier drafts of the Article. Thank you to my colleagues at CUNY School of Law for their support of this research. Thank you also to my student research assistants, Sofia Aranda, Shalini Deo, Barbara Musmacher, and Mayra Rodriguez.

During 2007, Professor Rivera was on a leave of absence from CUNY School of Law and served as Special Deputy Attorney General for Civil Rights for the Office of the New York State Attorney General. The views and opinions expressed in this article are those of the author and not of the Office of the Attorney General of the State of New York.

1. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

2. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 507 (1989) (plurality opinion); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 285 (1986).

Some scholars and jurists have argued in favor of considering various cultural and ethnic components of national origin in such cases, including language and historical group assimilation. These approaches have neither comprehensively considered the full range of context relevant to an equal protection analysis of national origin subclassifications, nor have they gained a foothold in equal protection jurisprudence.

This Article argues that context that is specific to and conscious of the experience and legal position of national origin groups matters just as much as racial themes and context in race-based legislation. It analyzes equal protection challenges to Latino classifications and presents a new approach to equal protection doctrine and discourse in which Latino national origin subclassifications are contextualized and recognized as legally relevant and operative. The Article demonstrates that the context that matters in national origin classification cases depends on factors associated with country of origin subclassifications, as well as the homogeneous classification of all persons of Latin American and Latino Caribbean descent as Latino.

This Article's proposed uniform standard of review for national origin subclassifications depends upon the legal, historical, cultural, and political context of subclasses. To justify a contextualized definitional and constitutional analysis, it draws on the history surrounding the definition of "Latinos" and "Hispanics" in the United States. Subclassifications are constitutional if (1) the initial legislative or administrative decision to classify by national origin satisfies the current strict scrutiny standard, which requires a narrowly-tailored remedy that serves a compelling governmental interest; and (2) the subclassifications are based on the intragroup dynamics and histories of the relevant target subclass, focusing on the experience of individuals within the subclass as "Latinos" and as subclass members.

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INTRODUCTION

The Constitution's Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."³ The Supreme Court's equal protection jurisprudence designates all legislation identifying race-based categories for differential treatment as "suspect" and subject to "strict scrutiny."⁴ Similarly, legislative differentiation based on national-origin classification is also subject to this strict scrutiny standard.⁵ Although the Court has established that legislative national-origin classification is suspect and subject to strict scrutiny,⁶ the Court has yet to articulate a comprehensive method of analysis reflecting national origin-based discrimination in the United States. This Article considers equal protection challenges to the categorization of Latinos in affirmative action legislation, and the context of discrimination against Latinos in the United States.⁷ Such analysis is critical because the Court has stated

3. U.S. CONST. amend. XIV, § 1.

4. *Adarand*, 515 U.S. at 223, 227.

5. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (explaining that national origin classifications are subject to strict scrutiny); *see also Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 197 (1973) (stating that Hispanics constitute an identifiable class under the Fourteenth Amendment).

6. *See supra* note 5.

7. Courts have recognized the historical language-based group prejudice and significance of language and its interconnectedness to culture and national origin. *See, e.g., Katzenbach v. Morgan*, 384 U.S. 641, 646–47 (1966) (finding that New York's English literacy test was intended to prevent Puerto Ricans from voting); *Meyer v. Nebraska*, 262 U.S. 390, 397–98 (1923) (noting with approval

that “[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause.”⁸ This context is no less important to an equal protection analysis of classifications based on national origin.⁹

The need for a legal doctrine that considers such context is most visible in affirmative action cases involving national origin groups. In such cases, group-based remedies are contingent on how courts define the discriminatory experiences of members of national origin subclasses.¹⁰ In affirmative action cases involving national origin categories, courts have considered historical and current discrimination against members of various subclasses.¹¹ Race has played a central role in courts’ analysis of such national origin cases, but as discussed in this Article, race and its attendant aspects do not provide a sufficient foundation for legal analysis of national-origin classifications.

In addition to race, the roles of ethnicity, culture, language, and history should be central to a contextualized equal protection analysis of national origin categories. The question of the appropriate legal consideration owed to these factors in determining the lawfulness of national origin classifications is of immediate urgency to Latinos, who, as a group, are targets of discrimination based on national origin¹² as

the Supreme Court of Nebraska’s finding that the purpose of a state statutory prohibition on teaching in non-English language, applied to German language in this case, was to impose English on foreigners); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 328–50 (1992) [hereinafter Perea, *Demography and Distrust*] (discussing the United States’ history of prejudice and bias based on language).

8. *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

9. The *Grutter* case involved the constitutionality of a law school admissions process that considered race and national origin as part of its criteria in admissions determinations. *Id.* *Grutter* is a recent example of the Supreme Court’s historical application of one equal protection analysis to decisions based on race and national origin. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding that the Fourteenth Amendment extends its guarantees to all persons facing discrimination, and applying this rule to Chinese launderers imprisoned as a result of discriminatory city ordinances).

10. This assertion is examined in depth in Part III with discussion of *Jana-Rock Constr., Inc. v. N.Y. State Dep’t of Econ. Dev.*, 438 F.3d 195 (2d Cir. 2006), *Builders Ass’n of Greater Chicago v. County of Cook*, 256 F.3d 642 (7th Cir. 2001), *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730 (6th Cir. 2000) (*Drabik*), *Monterey Mech. Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997), *Peightal v. Metro. Dade County*, 26 F.3d 1545 (11th Cir. 1994) (*Peightal II*), *O’Donnell Constr. Co. v. Dist. of Columbia*, 963 F.2d 420 (D.C. Cir. 1992), and *Peightal v. Metro. Dade County*, 940 F.2d 1394 (11th Cir. 1991) (*Peightal I*).

11. See *infra* Part III.

12. See, e.g., JOSE LUIS MORIN, *LATINO/A RIGHTS AND JUSTICE IN THE UNITED STATES* 45–47 (2005) (chronicling history of discrimination against Mexicans); *id.* at 47–48 (describing similar history for Puerto Ricans).

well as racial animus,¹³ and who constitute the largest ethnic group in the United States.¹⁴ The success or failure of affirmative action legislation intended to help remedy this discrimination may hinge on this analysis.

Uncertainty as to how to define Latinos, and the lack of a paradigm of discrimination that easily reflects Latinos' experiences, have resulted in conflicting judicial decisions involving Latino subclassifications.¹⁵ Affirmative action legislation often defines Latinos, for purposes of inclusion in the program, in terms of national origin subclassifications (for example, "Puerto Ricans" or "Mexicans").¹⁶ Lower courts have applied different standards when considering the inclusion or exclusion of Latino national origin subclasses in these definitions of Latinos.¹⁷ The standards of review applied by lower courts to these definitions range from strict scrutiny to rational basis review.¹⁸ In determining whether a particular piece of legislation is constitutional, these courts have relied on the Supreme Court's race-based jurisprudence, as well as their own interpretation of historical discrimination against subclasses.¹⁹ These cases have thus compared national origin subclassifications to classifications based on race.

This Article proposes a new standard for evaluating the constitutionality of national origin subclassifications under the Equal Protection Clause. In doing so, this Article uses an exploratory model to examine equal protection cases that challenge the definition of the "Latino"/"Hispanic" category in affirmative action legislation.²⁰ Part I of

13. See, e.g., *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 568, 570–72 (2d Cir. 2000) (reviewing Latina's claims of race discrimination, retaliation for resisting sexual harassment, and hostile work environment against her former employer). See generally MORIN, *supra* note 12.

14. Press Release, U.S. Census Bureau, Hispanic Population Reaches All-Time High of 38.8 Million, New Census Bureau Estimates Show (June 18, 2003), available at <http://www.census.gov/Press-Release/www/2003/cb03-100.html>.

15. See *infra* Part III.

16. See *infra* Part III (discussing cases deliberating over the constitutionality of minority business set-asides, including *Jana-Rock Constr.*, *Builders*, *Drabik*, *Monterey Mech.*, *Peightal II*, *O'Donnell*, and *Peightal I*).

17. See generally *infra* Part III.

18. *Id.*

19. *Id.*

20. In this Article persons of Latin American and Latino Caribbean descent in the United States and Puerto Rico are referred to as "Latino," rather than "Hispanic." The Article uses the term "Hispanic" only for purposes of uniformity and clarity and when necessary, for example, when discussing or citing government classifications that refer to persons who are "Hispanic." When so used, the Article treats the "Hispanic" category title as interchangeable with "Latino."

The term "Latino" represents the experiences and histories of persons of Latin American and

this Article examines the “Hispanic” and “Latino” category, critiquing legal analysis that equates national origin classifications with race-based classifications. This Article’s review provides the basis for critique of current equal protection jurisprudence, which is singularly race-conscious in its historical perspective. Part I also describes and addresses the “Latino paradox”:²¹ the bounded legal status of Latinos due, in part, to the lack of a contextualized analysis of Latino identity and experience.

This Part elucidates how the homogenization of various subclassifications of Latinos under the “Latino” category at times masks inequities suffered unevenly among subclasses that differ racially, historically, and by national origin. As a consequence, Latinos’ status in the United States is reduced to simple and inaccurate markers of success or disadvantage, generalized to fit all Latinos equally. In addition, homogenization of Latinos permits the political construction of all national origin subclassification members as “non-American” foreigners, who are thus vulnerable to political and social attacks based on Latinos’ actual or perceived status as undocumented individuals.²² Legal recognition of national origin differentiation promotes Latinos’ method of self-identification.²³ Thus, country of origin is legally and socially recognized by courts and U.S. society as a viable legal identity reference marker.

Parts II and III center the equal protection discussion of this Article on an analysis of affirmative action Supreme Court decisions, and of circuit court cases that involve Latino subclassifications, in order to

Latino Caribbean descent. The term “Hispanic” is representative of Latin America’s connections and history as it relates to Spain and Europe exclusively, and does not recognize the influence on Latin America and Latinos of the history and cultures of indigenous peoples and people of African descent. MORIN, *supra* note 12 at 8–10. For further discussion of this definition *see infra* note 38.

For further discussion on the issues surrounding the use of the terms “Latino” and “Hispanic,” *see generally* MORIN, *supra* note 12 at 8–10; Jose Calderon, “Hispanic” and “Latino”: *The Viability of Categories for Panethnic Unity*, 19 LATIN AMERICAN PERSPECTIVES 37, 39 (1992); HISPANICS/LATINOS IN THE UNITED STATES: ETHNICITY, RACE, AND RIGHTS (Jorge J.E. Gracia & Pablo De Greiff eds., 2000).

21. The Supreme Court in 1991 referred to the “harsh paradox” faced by bilingual Latino prospective jurors: “one may become proficient enough in English to participate in trial . . . only to encounter disqualification because he knows a second language as well.” *Hernandez v. New York*, 500 U.S. 352, 371 (1991). This Article agrees that there is a unique “Latino paradox”—admittedly harsh—that reflects the uncertain and unstable position of Latinos under the law in the United States and exists because of the law’s failure to recognize the importance of ethnicity, culture, language, and history. *See infra* Parts I and IV.

22. *See infra* Part I.B.

23. *See infra* Part I.D.

expose the inadequacy of current equal protection analysis.²⁴ Part II summarizes the two seminal minority classification cases that have defined the Supreme Court's equal protection affirmative action jurisprudence.²⁵

In *City of Richmond v. J.A. Croson Co.*,²⁶ the Court held that state and local governmental affirmative action programs are subject to strict scrutiny.²⁷ In *Adarand Constructors, Inc. v. Peña*,²⁸ the Court applied strict scrutiny to a federal affirmative action program.²⁹ These two decisions set the stage for equal protection review of all government race-based classifications—state and federal—to be analyzed under the most rigorous of constitutional standards. All subsequent cases in the lower courts based on an equal protection challenge are measured by the standards set forth in these cases.³⁰

Thus, lower courts have had to consider how various classifications satisfy this two-prong “strict scrutiny” standard requiring the classifications to be “narrowly tailored measures that further compelling governmental interests.”³¹ National origin classifications have been subjected to arguments that they fail to meet either prong of this equal protection standard.³² Part III discusses and compares several of these circuit court equal protection cases involving various subclassifications used to define affirmative action program beneficiaries.³³ This Part critiques the analysis in these cases and reveals the shortcomings of an

24. The standard proposed in this Article is also applicable to other national origin and ethnic groups, but relies on the treatment of Latinos under the law to illustrate its viability and application.

25. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

26. 488 U.S. 469 (1989) (plurality opinion).

27. *Id.* at 493–506.

28. 515 U.S. 200 (1995).

29. *Id.* at 235–39.

30. See RONALD D. ROTUNDA & JOHN E. NOWAK, *CONSTITUTIONAL LAW* § 14.3 (7th ed. 2004). For a discussion of specific cases, see *infra* Part III.

31. *Adarand* at 227; see also *Croson*, 488 U.S. at 493–94; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 285 (1986).

32. See *infra* Part III.

33. *Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195 (2d Cir. 2006); *Builders Ass'n of Greater Chicago v. County of Cook*, 256 F.3d 642 (7th Cir. 2001); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730 (6th Cir. 2000); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997); *Peightal v. Metro. Dade County*, 26 F.3d 1545 (11th Cir. 1994); *O'Donnell Constr. Co. v. Dist. of Columbia*, 963 F.2d 420 (D.C. Cir. 1992); *Peightal v. Metro. Dade County*, 940 F.2d 1394 (11th Cir. 1991).

equal protection approach that does not consider the subclass's particular experiences of discrimination.

Part III demonstrates that none of the circuit courts' approaches adequately address the issues raised by an equal protection challenge to legislative differentiation based on national origin subclassifications. The inadequacies of these approaches are primarily due to the courts' reliance on race-based equal protection jurisprudence and the courts' attempt to compare national origin subclassifications to race-based categories.³⁴ National origin groups are not necessarily coextensive with racial groups, and national origin groups have histories of oppression and disempowerment that do not necessarily track those of racial groups.³⁵ This Part argues that the contextualization of subclassifications is a necessary component to meaningful equal protection review and would place national origin classifications on proper legal and historical footing.

Part IV proposes an equal protection standard for national origin subclassifications and applies it to the Latino category. Under this standard, subclassifications would be constitutional if (1) the initial legislative or administrative decision to classify and/or subclassify Latinos by national origin satisfies the current strict scrutiny standard, which requires a narrowly-tailored remedy that serves a compelling governmental interest;³⁶ and (2) the national origin subclassifications are based on the intragroup dynamics and histories of the relevant target subclass, focusing on the experience of individuals within the subclass as "Latinos" and as subclass members. For example, "Latino" subclassifications including "Puerto Rican" or "Mexican" would reflect the historical and political position of those who are of Latin American and Latino Caribbean descent—justifying their inclusion in the umbrella "Latino" category—as well as the particular Puerto Rican and Mexican subclass experiences of oppression and discrimination because of their affiliation with their country of national origin and with the "Latino" category.

34. See, e.g., *Hernandez v. Texas*, 347 U.S. 475, 479–80 (1954); *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 197 (1973).

35. See CLARA RODRIGUEZ, *CHANGING RACE: LATINOS, THE CENSUS, AND THE HISTORY OF ETHNICITY IN THE UNITED STATES*, 129–52 (2000) [hereinafter RODRIGUEZ, *CHANGING RACE*] (discussing definition of Latinos as an ethnic group and as multiracial on the U.S. Census); see also MORIN, *supra* note 12.

36. As discussed *infra* note 347, for pragmatic concerns and for purposes of this Article, I accept the current strict scrutiny standard as a necessary part of the equal protection analysis without critiquing the legal soundness and appropriateness of this strict scrutiny framework.

Under the proposed standard, the subclassifications are constitutional if they reflect the intra- and intergroup dynamics and histories of the Latin American and Latino Caribbean diaspora in the United States and the relevant state or locality. These subclassifications respond to the discrimination, bias, and subjugation experienced by persons in the Latino category and respective subclasses because of their subclass affiliation and because they are perceived as part of a Latino “class.”³⁷

I. EQUAL PROTECTION TREATMENT OF LEGALLY RELEVANT IDENTITY MARKERS: RACE, ETHNICITY, CULTURE, LANGUAGE, AND HISTORY

Race, ethnicity, cultural identity, linguistic ability, individual and ancestral national origin, U.S. citizenship, and physical characteristics are all markers that society uses to identify individuals as members of groups. Regardless of the specifics of these markers, persons of Latin American and Latino Caribbean descent are grouped under a “Latino” or “Hispanic” umbrella category.³⁸ The Latino category provides a legally

37. See *infra* Part IV and accompanying notes.

38. The term “Latino” in this Article refers to persons from or persons with ancestors from Latin America and the countries in the Caribbean where Spanish or Portuguese is the national language, referred to here as the Latino Caribbean. The Latino Caribbean includes, in alphabetical order, the following countries: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Puerto Rico, Uruguay, and Venezuela.

Puerto Rico is included in this list although it is a commonwealth of the United States because of its Latino Caribbean history and because of the position and identification of Puerto Ricans as Latinos in Latin American society and in the United States. See MORIN, *supra* note 12, at 22–28 (discussing Puerto Rico’s colonial history and relationship to the United States and Puerto Ricans’ status as Latinos in the United States); JUAN GONZALEZ, *HARVEST OF EMPIRE: A HISTORY OF LATINOS IN AMERICA* 246–67 (2000) (discussing Puerto Rico’s relationship with the United States); CLARA RODRIGUEZ, *PUERTO RICANS BORN IN THE U.S.A.* 1–25 (1991) (discussing the history of colonialism and migration of Puerto Ricans to the United States, and the impact of the migration experience on Puerto Ricans as an ethnic and racial group). See generally, *PUERTO RICO AND PUERTO-RICANS: STUDIES IN HISTORY AND SOCIETY* (Adalberto Lopez & James Petras eds., 1974) (collection of scholarly works on Puerto Rico under Spanish rule and as a U.S. commonwealth, and on Puerto Ricans living and working on the U.S. mainland); Ediberto Roman, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. UNIV. L. REV. 1 (1998) (arguing that the people of Puerto Rico have unequal citizenship status, in part shaped by U.S. racial and ethnic-based prejudices, which has resulted in an alien-citizen paradox); Ediberto Roman, *Empire Forgotten: The United States’s Colonization of Puerto Rico*, 42 VILL. L. REV. 1119, 1139–1211 (1997) (discussing Puerto Rico’s status under U.S. rule and the Puerto Rican people’s inability under such rule to control their own destiny).

Latinos who migrated to other parts of the Caribbean and eventually to the United States are included within the definition of Latino as used in this Article if they have ancestral roots in any of

relevant basis for assessing discrimination and unequal treatment shared by all members of the group based on being Latino. This unified consideration of Latinos thus serves important legal and social ends and has continued relevance. Nevertheless, while maintaining the homogenous category as a way to secure equal protection under the law for Latinos, the law must continue to explore how Latinos experience discrimination and whether the Latino category is always the best measure of unequal and biased treatment.

The general "Latino" category is indispensable to recognizing discrimination and is an important basis for designing remedies, such as affirmative action programs. It has its limits, however. Where there are particular discriminatory experiences of Latino subclasses, homogenization of subclass members as "Latinos" masks inequalities in discrimination. Moreover, those hostile to Latinos have relied on Latino homogenization to facilitate the construction of all Latino subclassification members as foreigners, who are not entitled to or worthy of legal protections.³⁹ This construction neither accurately

the Latin American and Latino Caribbean countries listed in this footnote.

This definition of Latino includes a person born in or outside of Spain who has one biological parent of Latin American or Latino Caribbean descent. It excludes persons who are of Portuguese or Spanish descent who do not have familial ancestral roots in Latin America or the Latino Caribbean. It also excludes an individual born in Spain to parents who are not of Latin American or Latino Caribbean descent. Thus, a person born in or outside of Puerto Rico with one parent born in Spain and with one parent with ancestral roots in Puerto Rico comes within the definition of Latino, but a Spaniard who relocates to Puerto Rico does not come within this definition of Latino.

Spaniards and Portuguese are excluded from the definition of Latinos because from a national perspective their ancestral roots are "European." From a political and social perspective they are excluded because Latinos share a history and experiences as the objects of colonialism, imperialism, and oppression, which are not commonly shared by persons who are Spaniards or Portuguese. See JOHN CHARLES CHASTEEN, *BORN IN BLOOD AND FIRE: A CONCISE HISTORY OF LATIN AMERICA* 15 (2001) (beginning this history of Latin America by asserting that "[c]onquest and colonization form the unified starting place of a single story"); see also FRANK D. BEAN & MARTA TIENDA, *THE HISPANIC POPULATION OF THE UNITED STATES* (1987) (discussing generally the U.S. Latino population, including a discussion of ethnicity); GONZALEZ, *supra* (discussing colonialism and Spanish conquest and the current status of Latinos in the United States).

While this definition is not perfect, and the wisdom of excluding persons whose sole ancestry is Spanish or Portuguese is debatable, it is the definitional line that is drawn for purposes of this Article. The definition is based on the historical and cultural development of Latin America and the Latino Caribbean, and its population and ancestors in those countries and in the United States.

39. See Suzanne Oboler, *Racializing Latinos in the United States: Toward a New Research Paradigm*, in *IDENTITIES ON THE MOVE: TRANSNATIONAL PROCESSES IN NORTH AMERICA AND THE CARIBBEAN BASIN* 58 (Liliana R. Goldin ed., 1999) (arguing that Latinos in the United States are treated as foreigners, regardless of status and historical relationship to the United States); MORIN, *supra* note 12, at 62–63 (describing how Latinos are negatively stereotyped as foreigners, and as unemployed and uneducated); Suzanne Oboler, "It Must Be A Fake!" *Racial Ideologies, Identities,*

describes the actual status of any particular Latino, nor the fact that some subclasses, by law, are citizens—such as Puerto Ricans—or have legal work authorization or other lawful status—such as certain Central American immigrants.⁴⁰

The disadvantages of homogenization of identity and experience are compounded in equal protection discourse by the race-based referential nature of current equal protection analysis.⁴¹ Reliance on race-based

and the Question of Rights, in HISPANICS/LATINOS IN THE UNITED STATES: ETHNICITY, RACE, AND RIGHTS, supra note 20, at 125–44; see also FELIPE PIMENTEL, THE DECLINE OF PUERTO RICAN FULLTIME FACULTY AT THE CITY UNIVERSITY OF NEW YORK (CUNY) FROM 1981–2002 15–16 (2005) (recommending that data on Hispanic faculty be disaggregated to reveal data for Puerto Ricans as a separate group in order to avoid masking the apparent decline of Puerto Rican faculty at one of the largest public universities in the United States).

There is scholarship on the viability and desirability of a panethnic construction of Latinos and Latino identity. *See, e.g., LATINOS: REMAKING AMERICA* (Marcelo M. Suarez-Orozco & Mariela M. Paez eds., 2002) (collection of scholarly works on Latinos in the United States which consider various aspects of Latino experiences); Calderon, *supra* note 20 at 37–44 (discussing political and social consequences of panethnic approach to Latinos in the United States).

40. *See, e.g., The Nicaraguan Adjustment and Central American Relief Act (NACARA)*, Pub. L. No. 105-100, Title II, 111 Stat. 2160, 2193, codified in scattered sections of 8 U.S.C. NACARA provides certain Cubans and Nicaraguans present in the United States with an opportunity to apply directly for permanent residence. It also provides certain Guatemalans and Salvadorans with the opportunity to apply for relief from deportation under the more lenient pre-1996 rules. In addition, persons from some countries of the former Soviet Union may benefit from NACARA. Different requirements apply depending on the country of nationality. *See U.S. Citizenship and Immigration Services, Immigration through the Nicaraguan Adjustment and Central American Relief Act (NACARA) Section 203*, <http://www.uscis.gov> (follow “Services and Benefits” hyperlink, then follow “Humanitarian Benefits” hyperlink, then follow “Applying for Immigration Benefits through the Nicaraguan Adjustment and Central American Relief Act (NACARA)” hyperlink).

41. *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003) (relying on standards related to discrimination based on race and applying an equal protection standard based on racial classifications to uphold the use of race in admissions decisions in a case deciding that diversity of student body is a compelling interest in the law school admissions context, even though the challenged policy was committed to “racial and ethnic diversity with special reference to the inclusion of students . . . like African-Americans, Hispanics and Native Americans”); *Hernandez v. New York*, 500 U.S. 352, 371 (1991) (“Just as shared language can serve to foster community, language differences can be a source of division. Language elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn. Reactions of the latter type all too often result from or initiate racial hostility.”).

The manner in which “Latinos” are defined creates further confusion in developing an equal protection analysis for national origin discrimination experienced by Latinos. A discussion and critique on the formation and identification of Latino membership within national origin groups is beyond the scope of this Article, however. This Article proposes the legal standard for determining whether a Latino subclass should be part of a Latino category for a particular remedial purpose, but does not address how any particular individual is identified or otherwise labeled as a member of a subclass.

conduct or a “race surrogate” is central to equal protection claims.⁴² Race bias and privilege have tremendous impact on Latinos, but tell only part of the story of different treatment based on national origin.

Latinos’ national origin identity is not merely a “surrogate for race.”⁴³ Rather, it is intertwined with race, culture, ethnicity, language, and different histories of oppression in and outside of the United States. Latinos experience discrimination because they are perceived to be “Latinos”—based on these various aspects of identity—and because of national origin subclassifications (such as “Mexican” or “Cuban”), which are similarly reflective of these various identity markers. The Supreme Court’s reliance on a “race surrogate” does not adequately address national origin discrimination because it ignores these other aspects of national origin and their relationship to and dependence on racial privilege in Latin America, the Latino Caribbean, and the United States.⁴⁴

A. *The Centrality of Race to Equal Protection Analysis*

The Supreme Court has stated that the Equal Protection Clause protects “personal rights” that inure to the benefit of the individual.⁴⁵ Notwithstanding the Supreme Court’s apparent individual rights approach to equal protection, group affiliation based on race has been a vital concern in equal protection analysis. Society, government institutions, and the courts have historically considered association with a particular group—both an individual’s voluntary association and association based on societal perception—as fundamental to the individual and the treatment accorded to the individual in terms of equal protection.⁴⁶

42. See, e.g., *Hernandez*, 500 U.S. at 371 (“It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.”); see also *infra* Part I.A and .B.

43. Cf. *Hernandez*, 500 U.S. at 371.

44. See *infra* note 53 and accompanying text; see also Ariela J. Gross, “*The Caucasian Cloak*”: *Mexican Americans and the Politics of Whiteness in the Twentieth-Century Southwest*, 95 GEO. L.J. 337 (2007) (discussing complexity of White racial identity for Mexican-Americans and the legal system’s treatment of that identity).

45. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (citing *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)).

46. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (subjecting race, a group classification, to strict scrutiny “to ensure that the *personal* right to equal protection of the laws has not been infringed”); *Croson*, 488 U.S. at 505–06 (stating that the government failed to meet the narrowly-tailored prong of the equal protection analysis, because it failed to establish a history of

An equal protection analysis centered on race, and on how groups of people have been “racialized,”⁴⁷ is historically, as well as legally, justified. The United States’ history of enslavement of African Blacks,⁴⁸ legalized segregation based on Blackness and Whiteness,⁴⁹ and the institutionalization of race-based privileges that disadvantage Blacks and advantage Whites,⁵⁰ are more than sufficient reasons to support a race-based equal protection analysis. Federal and state laws have helped to establish the dominance of race as a factor in the establishment of unequal systems of justice.⁵¹ This historical and legal reality of the experience of African Americans and persons of African descent in the United States is the most recognized example within U.S. society of oppression and subjugation of one group over another, with disastrous consequences for the oppressed group (Blacks) and advantageous consequences for the benefited and privileged group (Whites).⁵²

past discrimination against certain listed groups in order to justify inclusion of those groups in affirmative action plan); *Plyler v. Doe*, 457 U.S. 202, 217 n.14 (1982) (“The experience of our Nation has shown that prejudice may manifest itself in the treatment of some groups. Our response to that experience is reflected in the Equal Protection Clause of the Fourteenth Amendment.”); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (noting that equal protection also serves to protect discrete and insular minorities); see also Taunya Lovell Banks, *What is a Community? Group Rights and the Constitution: The Special Case of African Americans*, 1 MARGINS 51, 53 (2001) (“constitutional rights in the United States are framed as individual rather than group rights. Courts, however, routinely recognized group rights.”).

47. See *infra* note 53 (discussing the “racialization” of Latinos).

48. See generally A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978).

49. See, e.g., *id.*; C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (2d ed. 1966); *Plessy v. Ferguson*, 163 U.S. 537, 548–49 (1896) (upholding race-based separate but equal treatment of Blacks and Whites); see also *Brown v. Bd. of Educ.*, 347 U.S. 483, 489–93 (1954) (discussing the history of segregation in the United States).

50. See DERRICK BELL, RACE, RACISM, AND AMERICAN LAW (5th ed. 2004); DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); *In re African-American Slave Descendants Litig.*, 471 F.3d 754 (2006) (discussing class action on behalf of Africans and their descendants in the United States for reparations based on private companies’ slave-based profits), *cert. denied*, ___ U.S. ___, 128 S.Ct. 92 (2007).

For a comprehensive introduction to critical race theory and critical race feminism, two scholarly schools that critique legal and political doctrine and discourse focused on race and race and feminism, respectively, see CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado & Jean Stefancic eds., 2d ed. 2000); CRITICAL RACE FEMINISM: A READER (Adrien Katherine Wing ed., 1997); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds. 1995).

51. See generally BELL, RACE, RACISM, AND AMERICAN LAW, *supra* note 50.

52. See generally *supra* notes 48–50 and accompanying citation. Whites have been privileged by their race, yet they often either do not recognize this privilege or deny being the beneficiaries of a

Race has also been part of the history of discrimination against Latinos; this history further illustrates the persistence and power of the U.S. racial hierarchy. However, ethnicity, culture, language, history, and the political and economic relationship of the United States to constituent countries within Latin America and the Latino Caribbean have also been at the core of discrimination against Latinos.⁵³ Indeed, race and the racialization⁵⁴ of Latinos have played a significant role in the development of Latino identity both in and outside of the United States. There is a rich body of scholarship wherein scholars have argued that race is relevant and important to understanding discrimination faced by Latinos, and that being racialized affects the opportunity for Latinos to seek legal recourse.⁵⁵ The law, as written and interpreted by the courts, lacks a framework to address the discrimination and inequality

racial hierarchy. See Douglas Hartmann, Joseph Gerteis, & Paul R. Croll, *Toward an Empirical Assessment of Critical Whiteness Theory 10* (2007) (unpublished American Mosaic Project working paper, on file with author and cited with permission) (data suggests that a significant number of Whites recognize that Blacks have been actively disadvantaged but do not see how Whites have been actively advantaged).

53. There exists a body of scholarly literature on race and Latinos, and the “racialization” of Latinos. Within this literature, several scholars have argued that race has, at times, overshadowed efforts to understand and eradicate national origin discrimination, and how Latinos have been “racialized” under the law. Scholars have also discussed how Latinos’ historical and cultural identities have been forged by political and economic struggles. See, e.g., MORIN, *supra* note 12, at 43–110; Obeler, *Racializing Latinos*, *supra* note 39 at 45–68; NEITHER ENEMIES NOR FRIENDS: LATINOS, BLACKS, AFRO-LATINOS (Anani Dzidzienyo & Suzanne Oboler eds., 2005) (collection of writings on race and Latinos); HISPANICS/LATINOS IN THE UNITED STATES; *supra* note 20 (collection of essays discussing Latino identity); THE LATINO/A CONDITION: A CRITICAL READER (Richard Delgado & Jean Stefancic eds., 1998) [hereinafter LATINO/A CONDITION] (collection of works on Latinos, including works on race and national origin); Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CAL. L. REV. 1213 (1997); Gloria Sandrino-Glasser, *Los Confundidos: De-Conflating Latinos/as’ Race and Ethnicity*, 19 CHICANO-LATINO L. REV. 69, 150 (1998) (“The fusion and confusion of [Latinos’] race and nationality has served to create an image of Latinos as a homogenized population, thus negating the different class experiences, linguistic, racial and ethnic distinctions within the Latino population.”); CRITICAL RACE THEORY: THE CUTTING EDGE, *supra* note 50, at 375 (stating that race is a driving force in the experience of Latinos in the United States: “Race should be used as a lens through which to view Latinos/as in order to focus our attention on the experiences of racial oppression. However, it should also direct our attention to racial oppression’s long-term effects on the day-to-day conditions encountered and endured by Latino/a communities.”).

In this Article I attempt to address several issues raised by these scholars about the role of race and the significance of Latino identity by concluding that Latinos are better protected under the law if the law accepts and considers the experience of being associated with the Latino category and with particular national origin subclasses.

54. See *supra* note 53 (reviewing scholarship on racialization of Latino population).

55. See *supra* note 53 for citations to significant scholarly work by various academics focusing on race and Latinos.

faced by Latinos in the course of Latinos' day-to-day existence.⁵⁶ This Article argues that courts should contextualize Latinos' experiences by focusing on other factors associated with national origin subclassifications in addition to race in the affirmative action context. Race and national origin are neither synonymous nor mutually exclusive.

Race alone is an ineffective measure of Latino experiences because the focus should be on the dynamic of oppression and subjugation, based on whatever identifiers and tools are currently being used by the dominant group. To the extent that race plays a role in the unequal treatment of Latinos, it must be recognized as relevant, but when other markers, such as ethnicity, culture, and language are the basis for oppressive and disadvantageous treatment, they must be considered in the analysis and subjected to constitutional scrutiny.

Despite the role of these other aspects of Latino identity, within equal protection discourse, race has been treated as a predominant factor in Latinos' experiences, resulting in viewing ethnic, cultural, and linguistic characteristics through the analytical framework of race-based legal doctrine.⁵⁷ Such treatment is not wholly unjustifiable as applied to Latinos because race *is* an ever-present aspect of Latinos' experiences and does have an immense impact on the lives of all Latinos.

In Latin America, the Latino Caribbean, and the United States, race is part of the social and political construction of individual subpopulation identity.⁵⁸ However, color, which refers to various shades of

56. The law's current inability to address the unequal legal and social status of Latinos, as illustrated throughout the case law presented in this Article, has also been discussed by many legal scholars. See, e.g., Gross, *supra* note 44; see also Tanya Katerí Hernández, *Latino Inter-Ethnic Employment Discrimination and the "Diversity Defense"*, 42 HARV. C.R.-C.L. L. REV. 259, 261 (2007) (explaining that "non-White racial hierarchies appear opaque to decisionmakers and other legal actors, who find it difficult to recognize the indicators of discrimination."). See generally Berta Hernandez-Truyol, Angela Harris & Francisco Valdés, *Beyond the First Decade: A Forward-Looking History of Latcrit Theory, Community and Praxis*, 17 LA RAZA L.J. 169 (2006).

57. See *infra* notes 38 & 39 and accompanying text; see also Sandrino-Glasser, *supra* note 53, at 69 (discussing the conflation of race and national origin and ethnicity as applied to Latinos and how this conflation undermines adequate legal responses to the discrimination experienced by Latinos); Perea, *supra* note 53, at 1213 (discussing how the racial Black/White binary paradigm results in the marginalization of Latinos and other people of color because it analogizes others to Blacks, without full consideration of experiences of Latinos and other people of color); MORIN, *supra* note 12 at 10–13 (discussing how hemispheric dominance, hegemony and racism have shaped the rights of Latinos/as in the United States, and "racialized" Latinos as foreign and inferior to Whites).

58. NEITHER ENEMIES NOR FRIENDS, *supra* note 53; Eduardo Mendieta, *The Making of New Peoples: Hispanizing Race*, in HISPANICS/LATINOS IN THE UNITED STATES: ETHNICITY, RACE, AND RIGHTS, *supra* note 20, at 45–59; Eduardo Bonilla-Silva & Karen S. Glover, "We are All Americans": *The Latin Americanization of Race Relations in the United States*, in THE CHANGING

pigmentation, is also significant to understanding how identity is constructed based on physical characteristics and their association with particular racial categories.⁵⁹ For many Latinos throughout Latin America, the Latino Caribbean, and the United States, race and color are the predominant identity characteristics of their quotidian existence. However, race and color are defined broadly, and include more than Black and White categories. Nevertheless, these Black and White categories of the identity hierarchies—whether considered to be race or color based—are positioned the same, whether in Latin America or the United States. The hierarchies elevate “White” to a privileged position and relegate “Black” to a disadvantaged position. Anything that is considered to lie in between is merely a degree away from one towards the other.⁶⁰

Notwithstanding the significance of race and color, race and the various physical characteristics associated with racial categories remain but one aspect—albeit a critical one—of Latinos’ experiences and identity.⁶¹ The courts should recognize and integrate into a legal framework the experiences of Latinos *as* Latinos. Equal protection scrutiny of national origin categories and of the history of national origin discrimination must consider the position of all identity aspects of national origin. Race and these other aspects of identity that are central to Latinos, whether they are the basis for adverse discrimination or remedial differentiation, should be subject to heightened scrutiny.

However, the Court’s constitutional analysis of Latino national origin categorization has been limited to consideration of bias derived from race-like animus—or what the Court has referred to as a “race surrogate.”⁶² When national origin claims devolve to race-based claims, or mirror or mimic claims of discrimination based on race, claims of

TERRAIN OF RACE AND ETHNICITY 149–83 (Maria Krysan & Amanda E. Lewis eds., 2004) (discussing how race has impacted Latinos and how race as experienced in Latin America has affected racial discourse in the United States).

59. Suzanne Oboler & Anani Dzidzienyo, *Flows and Counterflows: Latinas/os, Blackness, and Racialization in Hemispheric Perspective*, in NEITHER ENEMIES NOR FRIENDS, *supra* note 53, at 11 (discussing Latin American pigmentocracy as a graded system of prejudices based on shades of color); Seth Racusen, *Making the “Impossible” Determination: Flexible Identity and Targeted Opportunity in Contemporary Brazil*, 36 CONN. L. REV. 787, 790 (2004) (discussing affirmative action in the context of Brazil where Brazilians identify based on colors and appearance, rather than on races, ethnicities, or nations).

60. See, e.g., Oboler & Dzidzienyo, *supra* note 59.

61. See *supra* notes 53 & 56 and accompanying text.

62. See, e.g., *Hernandez v. New York*, 500 U.S. 352, 371–72 (1991).

national origin discrimination are subjected to strict scrutiny and are often determined to be equal protection violations.⁶³ Equal protection challenges to classifications based on national origin will receive the same strict scrutiny as classifications based on race only where those national origin classifications are coextensive with racial classifications. This treatment of national origin is problematic because it undervalues other identity markers, and because it fails to consider how non-Latinos perceive and treat Latinos and how Latinos perceive themselves, based on country of origin.

B. National Origin as Equal Protection Race Surrogate: The Racialized Latino Paradox

A review of Supreme Court precedent reveals that the Court has focused its equal protection jurisprudence on race as a primary and defining characteristic of national origin. In *Hernandez v. New York*,⁶⁴ a leading Supreme Court equal protection decision regarding Latinos, the Court made it clear that national origin characteristics must mirror race characteristics to receive automatic application of heightened scrutiny: “[i]t may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.”⁶⁵ Unless language or some other Latino identity characteristic acts as a race surrogate, equal protection review is limited to the deferential rational basis test.⁶⁶

In *Hernandez*, the Court stated that language-based treatment does not constitute a violation of the Equal Protection Clause if there is a race-neutral explanation.⁶⁷ Nevertheless, the Court specifically allowed for

63. See, e.g., *id.* at 372 (stating that language discrimination under certain circumstances, “may be found . . . to be a pretext for racial discrimination”); *Hernandez v. Texas*, 347 U.S. 475 (1954) (exclusion of Mexicans from jury service because of ancestry or national origin violates the Fourteenth Amendment). Several authors have noted the comparison of national origin to race in civil and criminal cases and the flaws in such comparisons. See Perea, *Demography and Distrust*, *supra* note 7, at 269, 350–77 (language is national origin proxy not recognized as discrimination); Juan F. Perea, *Hernandez v. New York: Courts, Prosecutors, and the Fear of Spanish*, 21 *HOFSTRA L. REV.* 1 (1992) (discussing the impact of the *Hernandez* decision); Sandrino-Glasser, *supra* note 53, at 131–50 (discussing the conflation of race and ethnicity in judicial decisions).

64. 500 U.S. 352 (1995).

65. *Id.* at 371.

66. See *supra* note 7 (citing cases in which language claims are reviewed under rational basis because they do not constitute national origin discrimination).

67. *Hernandez*, 500 U.S. at 371.

the possibility of a successful language-based claim where such claim is the equivalent of a race-based claim of discrimination.⁶⁸ The Court opined that language discrimination, under certain circumstances, “may be found . . . to be a pretext for racial discrimination.”⁶⁹

The Supreme Court’s focus on race as the core organizing principle of its equal protection analysis is also illustrated in its recent affirmative action decision involving admissions in higher education. In *Grutter v. Bollinger*,⁷⁰ the Court upheld a law school admissions procedure that considered both race and ethnicity.⁷¹ Although the procedure emphasized both factors, the Court mentions race 360 times, compared

68. *Id.* at 371–72.

69. *Id.* at 372. Circuit courts have similarly rejected a *per se* rule on language discrimination in cases involving constitutional and statutory-based claims. These courts often reject these claims absent some showing that language is a mere proxy for race or country of origin based-national origin discrimination. *See, e.g.,* *Pemberthy v. Beyer*, 19 F.3d 857, 871 (3d Cir. 1994) (holding that classification based on ability to speak a foreign language is subject only to rational basis review because such language ability is “‘relevant to the achievement of [a] legitimate state interest’,” is not immutable, and is not comparable to the “history of discrimination based on factors such as race or national origin” (quoting *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985))); *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1487–90 (9th Cir. 1993) (finding no evidence of disparate impact in a case involving the application of an English-only rule to bilingual Latinos because speaking at the workplace is a privilege of employment, bilingual Latinos can easily comply with the rule and noncompliance would be a matter of individual preference, and rejecting EEOC guidelines that an English-only policy is a *per se* violation of Title VII where there was nothing “in the legislative history to Title VII that indicates that English-only policies are to be presumed discriminatory”); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981) (holding that application of English-only rule during parts of the work day does not constitute national origin discrimination). Courts have also rejected claims of group bias based on language in cases involving government decisions to provide service information only in English to limited English and non-English speakers. *See, e.g.,* *Soberal-Perez v. Heckler*, 717 F.2d 36, 41–42 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984) (holding that the government’s refusal to provide social security information in Spanish is subject to rational basis review and not strict scrutiny because provision of English language information does not result in group discrimination against Hispanics); *Frontera v. Sindell*, 522 F.2d 1215, 1219–20 (6th Cir. 1975) (finding that no suspect classification based on nationality or race exists in case on behalf of Spanish-speakers, Puerto Ricans, and persons of Spanish-American ancestry challenging English-only civil service examination); *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir. 1973) (holding that the government’s provision of English-only unemployment benefit notices does not deny equal protection to Latino plaintiffs).

70. 539 U.S. 306 (2003).

71. *Id.* at 343. While the Court and the admission policy do not explicitly articulate “national origin” within the diversity considerations, the admission policy notes “racial and ethnic diversity” with particular attention to “students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.” *Id.* at 316 (citing Michigan Law School Admission Policy).

to a mere twenty-one mentions of ethnicity and national origin, which it usually mentions in tandem with race.⁷² The Court includes fluency in a language other than English with other “possible bases for diversity admissions” other than race, including “liv[ing] or travel[ing] widely abroad . . . overcom[ing] personal adversity and family hardship . . . exceptional records of extensive community service, and . . . successful careers in other fields.”⁷³ These other bases are, of course, race-neutral, but they are also ethnicity- and national origin-neutral. They are wholly independent and unrelated to national origin as a category of prohibited classification. Thus, fluency in a language other than English is neither part of nor a proxy for a prohibited classification; it is not a characteristic of race and therefore, it is not part of national origin or ethnicity.

Even though fluency in a language other than English was a favored skill in this case and potentially benefited bilingual Latinos and non-Latinos alike, this analysis of language fluency fails to consider the role that language plays for native speakers and for those for whom language is not merely a mode of communication but also a cultural marker. By failing to consider the cultural and historical roles of language, the Supreme Court equates the use of a language other than English by national origin groups to the use of a second language by someone who learns the language for the sole purpose of communication, without reference to a cultural or ethnic connection. The two do not experience or necessarily deploy language for the same reason. Thus, under the Supreme Court’s analysis, only the “Racialized Latino”—and here I mean the person for whom the law has elevated race above other aspects of identity—has a claim subject to strict scrutiny under the Equal Protection Clause.

The Supreme Court has erroneously interpreted national origin characteristics and has sought to compare them to race. Discrimination against Latinos may occur not solely because of any perceived racial affiliation, but also because of society’s reactions to other aspects of Latino identity. At different times in the history of the United States non- and limited-English language speakers, persons from non-American cultures, non-European immigrants, individuals affiliated with Latin America and the Latino Caribbean, and persons with political and economic loyalties to other countries based on their national origin have

72. *See id.*

73. *Id.* at 338.

experienced discrimination and have been distrusted by the majority population.⁷⁴ The scrutiny of all things “foreign” and all people perceived as not American, or not American enough, is particularly contentious in a post-9/11 United States, where linguistic and national loyalties are front and center and equated with an oath of honor to the United States.⁷⁵

For Latinos, a connection to a country of national origin outside of the United States, the Spanish or Portuguese languages, and a culture that resonates with the experiences and community mores of Latin America and the Latino Caribbean, are precisely the cultural capital that solidifies a sense of being part of a Latino group. Affection for and reclamation of a country of national origin is of primary importance to Latinos.⁷⁶ Thus,

74. See *Meyer v. Nebraska*, 262 U.S. 390, 402–03 (1923) (evaluating the constitutionality of a statute which prohibited the teaching of any language but English in grade schools); *Katzenbach v. Morgan*, 384 U.S. 641, 643–45 (1966) (examining New York literacy test that had the effect of disproportionately denying New York City residents who migrated from Puerto Rico the right to vote); *Korematsu v. United States*, 323 U.S. 214, 217–18 (1944) and *Hirabayashi v. United States*, 320 U.S. 81, 85–88 (1943) (reviewing subjection of persons of Japanese ancestry to curfew and detention during World War II); *Ping v. United States*, 130 U.S. 581, 606 (1889) (upholding Chinese exclusion); see also *Balzac v. Porto Rico*, 258 U.S. 298, 311 (1922) (holding that the Constitution did not fully apply in U.S. territories not incorporated into the United States, and thereby distinguishing between Puerto Ricans as individual U.S. citizens and as inhabitants of Puerto Rico for purposes of enjoying full rights of citizenship); *Ocampo v. United States*, 234 U.S. 91, 98 (1914) (explaining that the Fifth Amendment right to a grand jury indictment did not apply to the inhabitants of the United States’ Philippine territory); *Dorr v. United States*, 195 U.S. 138, 145–46 (1904) (holding no right to jury trial for inhabitants of the U.S. Philippine territory); *Hawaii v. Mankichi*, 190 U.S. 197, 214–18 (1903) (holding no constitutional or statutory right to indictment by grand jury or conviction by unanimous petit jury for inhabitants of the Hawaiian islands during the interim period between annexation and formal incorporation); *infra* note 75. See generally BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850–1990* (1993).

75. This type of sentiment has previously been seen in U.S. society, for example during the Japanese internment during World War II. See *Korematsu*, 323 U.S. at 223–24 (recognizing national security as a compelling government interest that provides for constitutional discrimination). The challenges to the detainment of persons at Guantánamo Bay, Cuba, also indicate the tense rhetoric and legal differences in asserting claims of those who are viewed as a security risk and “not American.” See Sarah M. Riley, Comment, *Constitutional Crisis or Déjà Vu? The War Power, the Bush Administration and the War on Terror*, 45 DUQ. L. REV. 701 (2007); Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029 (2007); see also Cam Simpson & Flynn McRoberts, *U.S. Ends Muslim Registry: Program that Profiled by Nationality Yielded no Terrorism Charges*, CHI. TRIB., Dec. 2, 2003, available at <http://www.chicagotribune.com/news/specials/ch0312020136dec02,0,2821264.story> (discussing the Department of Homeland Security’s domestic registration program implemented in summer 2002 and “largely scrapped” in December 2003).

76. See PEW HISPANIC CENTER/KAISER FAMILY FOUNDATION, 2002 NATIONAL SURVEY OF LATINOS (2002), <http://pewhispanic.org/files/reports/15.pdf> [hereinafter PEW HISPANIC CENTER, 2002 NATIONAL SURVEY OF LATINOS]; see also SHIRIN HAKIMZADEH & D’VERA COHN, PEW

what connects Latinos to being part of the Latino group is in many ways a source of discrimination in the United States.

Latinos' struggle for self identification reflects the history of Latinos in the United States and is necessarily dependent on Latinos' national origin countries' sovereignty and their relationships to the United States.⁷⁷ For example, a Puerto Rican is defined by the individual's corresponding membership and connection to all Latinos in the United States, but the individual's identification and status within the United States is also determined by the relationship of Puerto Rico to the United States as a Commonwealth, rather than a sovereign nation within Latin America and the Latino Caribbean.⁷⁸ This type of experience is true for all Latino subclasses. Mexicans constitute the largest Latino subclass,⁷⁹ and they too are defined by who they are in the United States, as well as by Mexico's relationship to the United States and the rest of Latin America.⁸⁰ The group and country relationships define and set the boundaries or borders of the individual's status and identification within the United States.⁸¹

HISPANIC CENTER, ENGLISH USAGE AMONG HISPANICS IN THE UNITED STATES (2007), available at <http://pewhispanic.org/files/reports/82.pdf> [hereinafter ENGLISH USAGE AMONG HISPANICS STUDY]. This Article argues that country of national origin is of consequential significance to many Latinos. The Article does not explore whether the degree of significance varies amongst subclasses or whether the degree of significance is related to any level of assimilation or acculturation.

77. See generally MORIN, *supra* note 12 (discussing the legal history of Latinos in the United States and the relationship of particular national origin Latino subgroups to the United States).

78. Hernandez-Truyol, et al., *supra* note 56, at 187 n.89 (listing various articles discussing issues of Latino/a identity as related to nationality and language).

79. BETSY GUZMAN, U.S. CENSUS BUREAU, THE HISPANIC POPULATION, CENSUS 2000 BRIEF 2 (2001), <http://www.census.gov/prod/2001pubs/c2kbr01-3.pdf> [hereinafter HISPANIC POPULATION, CENSUS 2000] (reporting that 58.5% of the Hispanic population identified as Mexican in the 2000 Census).

80. See, e.g., Gross, *supra* note 44; Hernández, *supra* note 56.

81. See, e.g., The Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, Title II, 111 Stat. 2160, 2193, codified in scattered sections of 8 U.S.C. (legislating disparate treatment based on nationality within the Central American nations for purposes of eligibility for legal immigrant status).

Latinos, like African Americans, have been racialized and colorized.⁸² They have also been classified according to their national origin and their linguistic association with the Spanish language.⁸³ This has been the experience of Latinos regardless of whether they have ever been outside of the United States, whether they have multiple sources for their national origin, and whether they speak any Spanish.⁸⁴ While African Americans and Latinos are defined by race and color, Latinos are also categorized by country of national origin, language, accent, ethnicity, and culture.⁸⁵ A definition that continues to racialize the histories of Latinos based on the history of Whites and people of African descent in the United States limits the ability of the law to respond to discrimination and inequality based on Latino identity. Such a definition is also bound to remain contingent upon political restructuring of Latinos' relationship to the United States.

The law treats race and those aspects of nationality that appear to resemble race as prohibited classifications subject to strict scrutiny under the Equal Protection Clause.⁸⁶ Under this doctrine, differential treatment based on race and any national origin race surrogate that appears to act like a race marker is subjected to strict scrutiny.⁸⁷ However, this limited

82. See Taunya Lovell Banks, *Mestizaje and the Mexican Mestizo Self: No Hay Sangre Negra, So There is No Blackness*, 15 S. CAL. INTERDISC. L.J. 199, 199–200 (2006) [hereinafter *Mestizaje and the Mexican Mestizo Self*] (“Throughout the twentieth century in the United States a person with any known African ancestry is raced black.”) (footnotes omitted); Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705 (2000); Taunya Lovell Banks, *What is a Community? Group Rights and the Constitution: The Special Case of African Americans*, 1 MARGINS 51, 54–55 (2001); Leonard M. Baynes, *If it's Not Just Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow than Lightness?: An Investigation and Analysis of the Color Hierarchy*, 75 DENV. U. L. REV. 131 (1997) (exploring the impact of colorism and the impact of a dark-light paradigm on African Americans and Latinos).

83. BEAN & TIENDA, *supra* note 38 at 36–55 (discussing how Latinos have been categorized based on Spanish ancestry); RODRIGUEZ, *CHANGING RACE*, *infra* note 35.

84. See, e.g., Luis Angel Toro, “*A People Distinct from Others*”: *Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15*, 26 TEX. TECH. L. REV. 1219 (1995) (critiquing the census classification system as grouping persons based on a possible common history of connection to Spanish language or culture).

85. It is the opinion of this author that in reality all persons in the United States are assessed based on status (citizen, permanent resident) and language (English speaker), as well as race. As the number of Blacks who are not U.S. citizens grows, certainly Blacks—who have historically been defined based on race—will increasingly experience this same national origin categorization. However, the categorization of Blacks will continue to be overshadowed by race, as demonstrated by police brutality cases involving African and other non-White immigrants.

86. See *supra* note 5 and accompanying text.

87. See *supra* note 5 and accompanying text.

view of Latinos lacks consideration of significant national origin identity markers. In addition to race, subclass affiliation and association with country of national origin are significant to the inequality of Latinos in society. Therefore, Latinos are entitled to this same strict scrutiny independent of whether these characteristics function or act as a surrogate for race.⁸⁸

Latinos may experience discrimination because they are perceived to be “Latinos” and because they are members of a national origin subclassification based on country of ancestral origin.⁸⁹ Thus, an individual of Puerto Rican, Mexican, Cuban, Dominican, or other Latin American descent may experience different treatment not only because the person is part of a Latino population within the United States, but also because the person’s ancestral roots are located within Latin America or the Latino Caribbean. A constitutional doctrine that presumes the suspect nature of national origin classifications must consider this duality, as well as the roles of ethnicity, culture, language, and history in defining national origin identity and experience. Discriminatory treatment based on national origin classifications and characteristics should not be presumptively suspect only when they are surrogates for race. National origin characteristics, being Latino, and being a member of a national origin subclass, also merit heightened scrutiny.

An equal protection standard must incorporate an understanding of categories that are the basis for equal and unequal treatment. Thus, deciding who is included in the “Latino” category is a necessary first step to legal analysis.

C. *Redefining Latinos*

The relationship of Latinos to the United States has been marked by wars over land and strategic position,⁹⁰ distrust,⁹¹ xenophobia,⁹² race,

88. See generally Hernandez-Truyol, et al., *supra* note 56; Toro, *supra* note 84; see also Katzenbach v. Morgan, 384 U.S. 641, 658 (1966) (affirming constitutionality of statute barring states’ denial of vote to persons educated in Puerto Rico).

89. See generally MORIN, *supra* note 12.

90. Prime examples are the various wars that the United States has fought or been involved in throughout Latin America, including the Spanish-American War, which resulted in the United States’ conquest of Puerto Rico; battles with Mexico resulting in the annexation of parts of the present South and Southwest—including Arizona, California, New Mexico, and Texas—as reflected in such treaties as the Treaty of Guadalupe Hidalgo which ended the war between Mexico and the United States in 1848; and invasions in the Caribbean in the Dominican Republic and Cuba. See

ethnic and gender-based discrimination,⁹³ immigration policy that adversely impacts Latino immigrants,⁹⁴ and international agreements.⁹⁵ All have influenced or been a consequence of government and general public⁹⁶ uncertainty about where Latinos “fit” into U.S. society.⁹⁷ The United States’ struggle to define “Latinos,” or “Hispanics,” reflects a societal indeterminacy about persons who are of Latin American and Latino Caribbean descent and a rejection of the role of Latinos in the development of North America.⁹⁸ The more the United States struggles to define “Latino,” the more it struggles with its own history of racial and national origin-based oppression.⁹⁹

CHASTEEN, *supra* note 38, at 175.

91. Latino distrust of government and law enforcement is easily demonstrated by various community reactions to police brutality and anti-immigration legislation. See MORIN, *supra* note 12, at 95–110 (discussing experiences of police brutality and Latino community responses in New York and Los Angeles). Private sector acts of employment discrimination based on language, ethnicity, and gender also test Latino tolerance of unfair treatment. See, e.g., Cruz v. Coach Stores, Inc., 202 F.3d 560 (2d Cir. 2000) (addressing a Title VII employment discrimination case by Latina claiming discrimination based on gender and national origin wherein Latina physically defended herself from the supervisor’s harassment).

92. See, e.g., Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture’s Diminishment, but Not Its Demise*, 24 N. ILL. U. L. REV. 153 (2004) (discussing gendered aspects of U.S. immigration policy and its impact on immigrants, including Latinos and Latinas); Perea, *Demography and Distrust*, *supra* note 7, at 350–77 (stating that language is national origin proxy not recognized as discrimination).

93. See generally ANNETTE B. RAMIREZ DE ARELLANO, COLONIALISM, CATHOLICISM, AND CONTRACEPTION: A HISTORY OF BIRTH CONTROL IN PUERTO RICO (1983) (discussing U.S.-sanctioned forced sterilization in Puerto Rico); Cruz, 202 F.3d 560 (addressing Title VII gender and national origin employment discrimination case by Latina); Joe R. Feagin, *Toward an Integrated Theory of Systemic Racism*, in THE CHANGING TERRAIN OF RACE AND ETHNICITY, 203, 217–19 (Maria Krysan & Amanda E. Lewis eds., 2004) (discussing impact of binary racist ideology on Latinos and other people of color who are not African American).

94. See, e.g., Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a (2000 & Supp. V 2005); Hoffman Plastic Compounds, Inc. v. N.L.R.B., 535 U.S. 137 (2002) (stating that undocumented immigrant employees are not protected by U.S. labor laws and therefore cannot recover relief in action against employer for violation of federal labor laws).

95. The North American Free Trade Agreement and the proposed Central American Free Trade Agreement are only the most recent examples of international agreements between the United States and Latin America. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993); Dominican Republic-Central American Free Trade Agreement Act of 2005, Pub. L. No. 109-53, 119 Stat. 462 (codified as amended at 19 U.S.C.A. §§ 4001–4111 (2007)).

96. Here I refer to the non-Latino general population of the United States.

97. See *supra* notes 53, 56 & 88, and accompanying text.

98. See various articles by Taunya Lovell Banks, *supra* note 82.

99. See generally Delgado & Jean Stefancic, *supra* note 53.

The complexity of defining who is a Latino is evident in the public debate over whether to use the word “Latino” or the word “Hispanic” to describe members of the class.¹⁰⁰ Despite this debate over a homogenous general title, data suggests that country-based subclassifications are most relevant to those who would be included within the Latino category.¹⁰¹ Latinos self identify with their individual or ancestral country of national origin.¹⁰² Consequently, persons of Latin American descent refer to themselves according to their subclassification, such as Puerto Rican, Mexican, Dominican, Cuban, or some combination.¹⁰³ These members of the subclasses also self identify as members of a group—Latinos—with a shared language, culture, and history, based on a common geographic and cultural affiliation.

The definition of Latino has also been subject to external exigencies, such as the need to fit Latinos within a particular racial category for purposes of differentiation.¹⁰⁴ Latinos contend with a particular racial and ethnic genealogical history composed of indigenous, African, Iberian, Asian, and European roots that took hold in Latin America and the Caribbean. These roots continue to develop in the United States. Latinos also face the tension between how they self identify—which may include a single racial category or a multiracial, or varied color categorization—and their national origin subclass.¹⁰⁵

Even a cursory review of the Census and scholarly examinations and critiques of the Census reveals the contentious and unstable nature of this “labeling” and “counting” project.¹⁰⁶ The Census has focused on whether to classify Latinos as a specified race—namely White—or as an ethnic group; whether to permit Latinos to self-identify as “Latinos,” “Hispanics,” or “Other”; or whether to permit Latinos to select a national origin subgroup and a race.¹⁰⁷ For the 2000 Census, Latinos were

100. See, e.g., Christine Granado, ‘Hispanic’ vs. ‘Latino’: A New Poll Finds that the Term ‘Hispanic’ is Preferred, HISPANIC MAGAZINE, December 2000, available at <http://www.hispaniconline.com/magazine/2000/dec/Features/latino.html>.

101. See PEW HISPANIC CENTER, 2002 NATIONAL SURVEY OF LATINOS, *supra* note 76.

102. *Id.*

103. *Id.*

104. Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143 (1997).

105. See RODRIGUEZ, *CHANGING RACE*, *supra* note 35; see also Racusen, *supra* note 59, at 790.

106. RODRIGUEZ, *CHANGING RACE*, *supra* note 35, at 101–04 (discussing how Latinos have been variously classified in several U.S. Censuses).

107. *Id.*; see also MORIN, *supra* note 12, at 13.

categorized under the ethnic group "Hispanic" and also permitted to select a separate racial category.¹⁰⁸

This Census classification affects how Latinos are classified in government reports, charts and summaries, wherein they are referred to as "Hispanic," a potential member of any race.¹⁰⁹ The ethnic/racial categorization places all Latinos within a column usually labeled "Hispanic, nonwhite" followed by a notation that "Persons whose ethnicity is identified as Hispanic may be of any race."¹¹⁰ This racial/ethnic duality has spawned a new category: non-Hispanic White.¹¹¹ As Latinos have been cast as a dual minority, Whites have been placed within a category that secures racial privilege and further anchors racial hierarchy to exclude Latinos from unambiguous White categorization.

The legal and social construction that Latinos can be of any race, except non-Hispanic White, appears even more groundless, given this new categorization secured for Whites who are not ethnically Hispanic. The designation of Latinos as capable of being of any race, which implies that Latinos can be "White," ignores the political, cultural and social histories of Latinos living in the United States, as well as the consequences of these histories as represented in socio-economic demographics. By most socio-economic measures, Latinos have fared poorly compared with those in the "non-Hispanic White" race category.¹¹² Even though a majority of Latinos who select a race self

108. U.S. Census Bureau, Persons of Hispanic or Latino Origin, percent, 2004, http://quickfacts.census.gov/qfd/meta/long_309545.htm (last visited Oct. 13, 2007) [hereinafter U.S. Census Bureau, Persons of Hispanic or Latino Origin]. The 2000 Census provided the following racial category selections: White, Black, American Indian/Alaskan Native, Asian, Native Hawaiian and Other Pacific Islander, Other. U.S. Census Bureau, USA QuickFacts from the US Census Bureau (August 31, 2007), <http://quickfacts.census.gov/qfd/states/00000.html>.

109. See U.S. Census Bureau, Persons of Hispanic or Latino Origin, *supra* note 108.

110. See, e.g., Bureau of Labor Statistics, Employment Status by Hispanic or Latino Ethnicity, <http://www.bls.gov/web/cpseea17.pdf> (last visited Oct. 13, 2007).

111. See U.S. Census Bureau, Persons of Hispanic or Latino Origin, *supra* note 108.

112. See *id.*; see also RAKESH KOCHHAR, PEW HISPANIC CENTER, LATINO LABOR REPORT, 2006: STRONG GAINS IN EMPLOYMENT (2006), <http://pewhispanic.org/files/reports/70.pdf> (discussing the delayed and slow decrease in Latino unemployment since its peak in mid 2003, although improvement mostly driven by construction sector jobs); MEGAN ELLIOTT, NATIONAL COUNCIL OF LA RAZA, HISPANIC WOMEN AT WORK, (2005), <http://www.nclr.org/content/publications/detail/32940> (analyzing data on Latinas in the U.S. workforce indicating that Latinas have lower annual incomes than their peers, have the lowest labor force participation rate of all major U.S. racial and ethnic groups, and are two times more likely than White women to be unemployed); ANGELA M. ARBOLEDA, NATIONAL COUNCIL OF LA RAZA, LATINOS AND THE FEDERAL CRIMINAL JUSTICE SYSTEM (July 2002),

identify as “White,”¹¹³ various indicators of racial status and privilege support the conclusion that in U.S. society Latinos are non-Whites.¹¹⁴

Latinos cannot simply “be of any race”—they cannot recreate themselves as members of a privileged White race through self-identification.¹¹⁵ Latinos are perceived by Whites to be non-White, and as a group, Latinos experience oppression and injustice not common to Whites.¹¹⁶ Latinos do not share similar benefits and privileges to those enjoyed by members of the White majority.¹¹⁷

<http://www.nclr.org/content/publications/detail/1414> (discussing the statistically disproportionate number of Latinos in the criminal justice system, and noting that (1) the proportion of Latinos in prison is three times their proportion of the national population, (2) Hispanic men between 25 and 29 years old were three times as likely as Whites to be in prison, and (3) one in four of the federal inmate prison population in 1997 was Hispanic).

113. TAFOYA, *infra* note 121 (noting nearly half—forty-eight percent—of Hispanics reported White as their race on the 2000 Census); *see also* Census Overview of Race and Hispanic Origin, *supra* note 100, at 10 (reporting nine out of ten Hispanics select either White or Other in response to racial identity on the census). *See generally* Ian F. Haney López, *White by Law*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 626 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000); John A. Powell, *A Minority-Majority Nation: Racing the Population in the Twenty-First Century*, 29 *FORDHAM URB. L. J.* 1395, 1408 (2002) (forty-eight percent of Hispanics self-identified as White in 2000) (citing Orlando Patterson, Editorial, *Race by the Numbers*, *N.Y. TIMES*, May 8, 2001 at A27).

114. While Latinos’ experiences may not be similar to those of Whites, Latinos are at times perceived as “non Black,” which in a racial hierarchy based on color as well as race—as is the case in the United States—may have some incremental value for those treated as non-White rather than Black. *See* Powell, *supra* note 113, at 1413 (proposing that racial subordination and white supremacy be considered on a white/non-white and black/non-black paradigm); Baynes, *supra* note 82 (discussing survey indicating positive perceptions associated with lighter color skin pigmentation); *see also* RODRIGUEZ, *CHANGING RACE*, *supra* note 35, at 129–130 (discussing Hispanics and the U.S. Census). *See generally* Jenny Rivera, *The Availability of Domestic Violence Services for Latinas in New York State: Phase II Investigation*, 21 *BUFF. PUB. INT. L.J.* 37 (2003); Jenny Rivera, *Extra! Extra! Read All About it: What Plaintiff “Knows or Should Know” Based on Officials’ Statements and Media Coverage of Police Misconduct for Notice of a § 1983 Municipal Liability Claim*, 28 *FORDHAM URB. L.J.* 505 (2000); Jenny Rivera, *Preliminary Report: Availability of Domestic Violence Services for Latina Survivors in New York State*, 16 *IN PUB. INTEREST* 1 (1997–1998); Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 *B.C. THIRD WORLD L.J.* 231 (1994).

115. While I do not believe that Latinos can be of any race for purposes of privileged status acquisition, it is nonetheless historically true, at times, that Latinos have been “raced” as “White.” *See generally* RODRIGUEZ, *CHANGING RACE*, *supra* note 35; Haney López, *supra* note 113. However, racing Latinos as White simultaneously benefits non-Hispanic Whites by reinforcing the privileged status of “Whiteness.”

116. *See supra* note 114. Latinos are viewed by the general public as non-Whites. *See, e.g.*, Anushka Asthana, *Changing Face of Western Cities: Migration Within the U.S. Makes Whites a Minority in 3 More Cities*, *WASH. POST*, Aug. 21, 2003, at A03 (discussing influx of Hispanics to Phoenix, Tucson and Denver was reason, along with “white flight,” for decrease in White population).

117. *See* U.S. Census Bureau, *Minority Links, Facts on the Hispanic or Latino Population*,

This classification also reinforces and maintains race as a significant and valid aspect of Latinos' identity within the ethnic and national origin category. This dual identity is a racialization¹¹⁸ of the Latino population which reveals and helps foster the Latino struggle for racial privilege, whereby Latinos seek to attain the "White race" label, while simultaneously securing the "ethnic/national origin" category. This dual strategy allows Latinos to distance themselves from the "Black race"¹¹⁹ label, in order to thwart efforts to treat Latinos as "non-White."¹¹⁹ Historically, Latinos gained some ground in their efforts to be labeled White.¹²⁰ The race to be part of, or to be the other, "White race" is illustrated by Latino self-identification as Whites on the Census and in their affiliation with being White within Latino popular discourse.¹²¹

Despite this ongoing struggle over racial position and the majority of Latinos' self-identification as White, Latinos are still considered "foreign" persons who speak a language other than English, notwithstanding characterizations of "looking" White.¹²² The public

<http://www.census.gov/pubinfo/www/NEWhispML1.html> (last visited Oct. 9, 2007); ROBERTO R. RAMIREZ, U.S. CENSUS BUREAU, WE THE PEOPLE: HISPANICS IN THE UNITED STATES, CENSUS 2000 SPECIAL REPORTS 10 (2004), <http://www.census.gov/prod/2004pubs/censr-18.pdf>; see also *supra* notes 38, 53 & 114.

118. This racialization has historical roots and, as discussed *supra* Part I.B, has effects that continue to shape the experiences of Latinos in and outside the United States. See MORIN, *supra* note 12, at 40.

The racialization of Latin Americans as racially inferior not only served to justify U.S. conquests and policies, it helped rationalize the subsequent subordination of Mexicans and Puerto Ricans in the United States, establishing the pattern of treatment for Latinos/as who followed. . . . [T]his racialized image of Latin Americans formed the basis for prejudice and discrimination for all other Latinas and Latinos. *Id.*

119. See *Mestizaje and the Mexican Mestizo Self*, *supra* note 82, at 201.

120. See, e.g., *Mendez v. Westminster Sch. Dist. of Orange County*, 64 F. Supp. 544, 545-46 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947) (noting that the parties conceded that there was "no question of race discrimination" in the plaintiffs' challenge of a school segregation ordinance whereby 'persons of Mexican or Latin descent or extraction' were segregated from White or Anglo-Saxon children); Powell, *supra* note 113, at 1408 (noting that 1940 Census required all census interviewers to report all Mexicans as White unless interviewer observed the individual was of another race).

121. A study by the Pew Hispanic Center found evidence that Latinos self identify as White and that for Latinos "[f]eeling white seems to be a reflection of success and a sense of inclusion." SONYA TAFOYA, PEW HISPANIC CENTER SHADES OF BELONGING 3 (2004) available at <http://pewhispanic.org/files/reports/35.pdf>. A recent empirical study also reveals that a significant number of Whites recognize that they constitute a racial group, but also believe that they had "a culture that should be preserved." Hartmann et al., *supra* note 52, at 21.

122. See, e.g., Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CAL. L. REV. 1, 25 (2007) ("Latinos, Asian Americans and Native Americans are stamped as inherently 'exotic' or 'foreign.'"). Robinson goes on to note that Latino

reactions to current proposed immigration legislation illustrate the precarious and contingent position of Latinos in the United States, especially for those who associate directly with their countries of national origin.¹²³

As part of the anti-Latino rhetoric, Latino immigrants have been recast from the positive immigrant stereotype of hardworking, underpaid, low-wage laborers, to the negative stereotype of subversives who steal jobs from hardworking “real” Americans, and who are criminals to be feared.¹²⁴

actors “who speak fluent English . . . report being told to ‘fake a Spanish accent to be more convincingly Hispanic.’” *Id.*

123. See Robert Pear, *Failure of Senate Immigration Bill Can Be Lesson for Congress, Experts Say*, N.Y. TIMES, June 30, 2007, at A13 (noting conservative Republican senators saw the demise of a 2007 immigration bill as evidence that “lawmakers had heeded public opinion”); see also Randal C. Archibold, *Reactions Run Gamut, but Immigrants Work On*, N.Y. TIMES, June 30, 2007, at A1 (reporting the responses and perspectives of various immigrant workers and advocacy groups in the aftermath of the failed immigration reform defeated in Congress); Julia Preston, *Immigration is at Center of New Laws Around U.S.*, N.Y. TIMES, Aug. 6, 2007, at A12 (recognizing a surge in state legislature consideration and subsequent enactment of immigration laws “[s]purred by rising resentment in the country over illegal immigration and by the collapse of a broad immigration bill in the Senate in June”).

After participants in the public marches and demonstrations against the legislation initially carried and waved flags from different Latin American countries, there was an immediate and visceral negative reaction, articulated in some conservative media outlets. See Clarence Page, *The Foreign Flag Rule*, BALTIMORE SUN, Apr. 14, 2006, at 11A. In response, protestors replaced the flags of different countries with U.S. flags. *Id.*; see also Charles Krauthammer, Editorial, *Immigrants Must Choose*, WASH. POST, Apr. 14, 2006, at A17. Demonstrators went out of their way to publicly proclaim their loyalty, love for and affiliation with the United States. By carrying the U.S. flag, the demonstrators sought to gain public support by distancing themselves from their countries of national origin.

124. RUBEN G. RUMBAUT, ET AL., MIGRATION POLICY INSTITUTE, *DEBUNKING THE MYTH OF IMMIGRANT CRIMINALITY: IMPRISONMENT AMONG FIRST-AND SECOND-GENERATION YOUNG MEN* (2006), <http://www.migrationinformation.org/Feature/display.cfm?id=403> (discussing how public opinion and policy historically have been based on stereotypes of immigrants as criminals, and illustrating that high-level political leaders share these views; quoting U.S. President George W. Bush’s May 15, 2006 address to the nation, wherein he stated that “[i]llegal immigration puts pressure on public schools and hospitals, it strains state and local budgets, and brings crime to our communities”). Although the anti-immigrant, anti-Latino rhetoric was particularly vitriolic in 2006, data indicates that these are long-standing, broadly held public opinions about immigrants. The 2000 General Social Survey indicated that in the sample of adults surveyed and asked:

whether ‘more immigrants cause higher crime rates,’ twenty-five percent said ‘very likely’ and another forty-eight percent ‘somewhat likely’—that is, about three-fourths (seventy-three percent) believed that immigration was causally related to more crime. That was a much higher proportion than the sixty percent who believed that ‘more immigrants were [somewhat or very] likely to cause Americans to lose jobs,’ or the fifty-six percent who thought that ‘more immigrants were [somewhat or very] likely to make it harder to keep the country united.’

Id.

As the discussion above regarding labeling, self-identification and the Census reveals, Latinos are indeed perceived as a racial group, but Latinos are also perceived as and labeled an ethnic and national origin group.¹²⁵ The common thread running through all of these categorizations is that Latinos are not part of the United States, or “American.”¹²⁶ Instead, Latinos are often viewed as recent immigrants undeserving of legal protections and as a linguistic minority unwilling to assimilate and learn English.¹²⁷ As discussed below, that position is similarly reflected in affirmative action case law.

D. *The Racialized Latino Paradox*

Jurists have struggled to categorize Latinos within a legal framework. Judges and Supreme Court Justices have traditionally defined Latinos mostly by comparison to African Americans, rather than by delineating the histories and experiences of Latinos.¹²⁸ While the relationship of Latinos to the United States and to non-Latino Whites is one of oppression and domination marred by racial privilege, Latinos’ experiences are also grounded in the centrality of national origin status and language. The Courts have yet to adequately develop a legal equal protection analysis that sufficiently addresses the role of these aspects of Latino and Latino subclass identity.

As discussed in this Article, the current legal framework is inadequate to address these issues. What is surprising, perhaps, is the extent to which the current framework obstructs Latinos’ struggle for equality under the law. Current legal analysis limits legal remedies available to Latinos for claims of national origin discrimination based on national origin characteristics.¹²⁹

125. See *supra* note 53.

126. See *supra* note notes 83–85 for citations and accompanying text. The rejection of Latinos as authentically “American” is not only ahistorical but ironic. Latinos were landowners and inhabitants of parts of what are today the United States before annexation of those lands. Ramón A. Gutiérrez, *Mexican-Origin People In the United States*, in 3 THE OXFORD ENCYCLOPEDIA OF LATINOS & LATINAS IN THE UNITED STATES 129–38 (Suzanne Oboler & Deena J. Gonzalez eds., 2005); see also Ronald Takaki, “Occupied” Mexico, in THE LATINO/A CONDITION: A CRITICAL READER 152–54 (Richard Delgado & Jean Stefancic eds., 1998).

127. See Juan F. Perera, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 981–91 (1995).

128. See *supra* notes 53–58 and accompanying text, and *infra* Part III.

129. See *supra* Part I.B and accompanying notes (presenting the construction and racialization of Latino identity).

To the extent Latinos demonstrate and assimilate American historical and social characteristics—including English language skills or English monolingualism, affiliation with the United States as country of origin and nationality, adoption of cultural mores of individualism, and privilege hierarchies built on racial categories and racial stereotypes—Latinos' claims to protected category status under the law become more precarious.¹³⁰ As Latinos are perceived to be more like “Americans”—read “White Americans”—the less likely Latinos are to benefit from affirmative action programs designed to address the needs of racial groups that are not treated equally to White Americans. Paradoxically, the less “American” that Latinos are perceived to be by society, the less likely it is that law protects Latinos for discrimination based on national origin characteristics because these characteristics are perceived as no longer relevant or a basis for discrimination that needs to be remedied. Thus, Latinos perceived by society as appearing more like “real” Americans, and Latinos perceived as undocumented immigrants who are not Americans, have limited legal recourse based on Latino identity and national origin affiliation. In either case, Latinos are left without a way of communicating their experiences of national origin discrimination unless they reference race or a race surrogate. Without such a surrogate, English language acquisition, American culture adaptation, and U.S. citizenship do not ensure full protection under the law against discrimination.

Cases involving assertions of national origin discrimination claims based on language are prime examples of this paradox.¹³¹ In these cases bilingual and monolingual Spanish-speaking Latinos were unable to seek legal recourse against language-based discrimination, because language discrimination was not recognized as unlawful bias.¹³²

130. Paula M. L. Moya provides a thought-provoking analysis of the detrimental aspects of assimilation and promoting the alternative of being *asimilao*, whereby groups and individuals “adapt to their new surroundings by retaining some values and cultural practices and by changing others—absorbing other ways of being in the world from among the various cultural groups they come into contact with.” Paula M. L. Moya, *Cultural Particularity Versus Universal Humanity*, in *HISPANICS/LATINOS IN THE UNITED STATES: ETHNICITY, RACE, AND RIGHTS* 77, 89 (Jorge J. E. Gracia & Pablo De Greiff eds., 2000) (referring to JUAN FLORES, “*Que assimilated, brother, yo soy asimilao*”: *The Structuring of Puerto Rican Identity in the U.S.*, in *DIVIDED BORDERS: ESSAYS ON PUERTO RICAN IDENTITY* 191–92 (1993)).

131. See *infra* Part III.

132. See, e.g., Cristina M. Rodriguez, *Language and Participation*, 94 CAL. L. REV. 687, 688–89 (2006) [hereinafter Rodriguez, *Language and Participation*] (describing various disputes over English-only requirements involving Latinos and attempts to speak Spanish, specifically a judicial decision based on language skills in child custody cases, a Little League English-only rule, a

In *Hernandez v. New York*,¹³³ the Supreme Court rejected the argument that exclusion of prospective bilingual Latino jurors that was based solely on language constituted an equal protection violation.¹³⁴ The Court concluded that the prosecutor's exclusion of bilingual Latinos from the jury through the use of peremptory challenges was based on a valid, race-neutral concern that bilingual jurors would not follow the official translation of Spanish-language trial testimony.¹³⁵ As the plaintiffs and the dissent noted, this use of preemptory challenges would lead to the systematic exclusion of Latinos since Latinos speak or understand Spanish in disproportionate numbers, compared to the general population and the population of the venire.¹³⁶ It also means that Latinos who are eligible to serve because they speak English are the most likely to be struck from the pool. The majority noted the apparent "harsh paradox" created by its decision: "one may become proficient enough in English to participate in trial, only to encounter disqualification because he knows a second language as well."¹³⁷ Of course, since English language skills are required to serve on juries,¹³⁸ this requirement leaves as eligible to serve only those Latinos who are neither bilingual nor monolingual in Spanish. This is a small percentage of the Latino population.¹³⁹

Other examples of this paradox extend beyond constitutional equal protection claims and are found in employment discrimination cases involving bilingual Latino employees who allege that employer rules mandating that only English be spoken at the workplace constitute national origin discrimination in violation of Title VII.¹⁴⁰ In several of these cases bilingual employees' claims have been dismissed because the courts have concluded that since they can speak English they have

landlord/tenant dispute, and an English-only rule in a public high school).

133. 500 U.S. 352 (1990).

134. *Id.* at 362.

135. *Id.* at 361, 367–68.

136. *Id.* at 359, 379 (Stevens, J., dissenting); Pet'r's Br. at 7.

137. *Hernandez*, 500 U.S. at 371 (internal citation omitted).

138. See, e.g., N.Y. JUDICIARY LAW § 510 (McKinney 2003) (New York English language requirement to serve on juries in state court).

139. ROBERTO R. RAMIREZ, U.S. CENSUS BUREAU, WE THE PEOPLE: HISPANICS IN THE UNITED STATES, CENSUS 2000 SPECIAL REPORTS 10 (2004), <http://www.census.gov/prod/2004pubs/censr-18.pdf>.

140. 42 U.S.C. § 2000e-2 (2000) (prohibits discrimination in the workplace based on national origin); see Rodriguez, *Language and Participation*, *supra* note 132, at 754–57 (discussing adverse impact of English-only workplace rules on bilingual and non-English speaking employees).

not suffered discrimination.¹⁴¹ This reasoning leaves this class of individuals with claims only for discrimination based on their being perceived as part of a national origin group—as people who are perceived as not fully American.

At the other end of the spectrum are cases which deny Latino workers some of the rights afforded to other workers.¹⁴² In these cases, Latinos based on language acquisition or immigrant status are denied equal protection under the laws.¹⁴³ The courts have concluded there is no group-based constitutional denial of equal protection by providing information solely in English,¹⁴⁴ thus, Latinos most in need of Spanish language services and information can be denied such information without recourse in the courts.

These different types of cases, involving on the one hand challenges against differential treatment in the employment context of Latinos who speak and understand English, and on the other challenges against providers of services who deny necessary information to those who do not sufficiently understand English or have no English language acquisition, illustrate the range of analyses applied to Latino claims of discrimination. The cases indicate that judges perceive bilingual Latinos as unable to establish discrimination based on national origin if they acquire English language skills or have no Spanish language skills.¹⁴⁵ Latinos in this category would be the most familiar with and perhaps most assimilated to U.S. culture. Yet, Latinos who, in these cases, do not have sufficient English language acquisition, who may have vulnerable immigrant status, and who are perceived as not fully American, similarly do not have uniform legal protection for their participation in U.S. society. Indeed, they are the most vulnerable to abuse.

As this discussion illustrates, the more Latinos associate linguistically and culturally with their country of national origin they experience fewer

141. See, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1487 (9th Cir. 1993); *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980).

142. See, e.g., *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002) (holding that undocumented employees who are not legally authorized to work in the United States are not eligible for back pay awards for employer's violation of labor laws).

143. See, e.g., *id.*

144. See, e.g., *Soberal-Perez v. Heckler*, 717 F.2d 36, 42 (2d Cir. 1983) (English-only social security information does not result in group discrimination against Hispanics); *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir. 1973) (English-only unemployment benefit notices do not deny Latinos equal protection).

145. See *supra* note 144.

rights and more negative outcomes under the law.¹⁴⁶ Yet, disassociation from country of national origin does not necessarily secure greater rights or the full range of rights available to non-Latino White U.S. citizens.¹⁴⁷ Categorization as “Latino” and association with country of national origin are critical legal constructs.

II. THE SUPREME COURT’S EQUAL PROTECTION ANALYSIS OF AFFIRMATIVE ACTION CLASSIFICATIONS

The Equal Protection Clause prohibits laws or government practices that distinguish impermissibly between classes of persons.¹⁴⁸ The Constitution requires that government not discriminate, but does not require or permit government to remedy general, unspecified societal discrimination.¹⁴⁹ Societal discrimination, as a general matter, cannot be challenged as a violation of the Equal Protection Clause.¹⁵⁰ Where government has discriminated, however, government and the courts may fashion a remedy to address those injured by the discrimination.¹⁵¹ Federal, state, and local governments have implemented affirmative action programs to address discrimination against various classes of people who have historically been the subjects of discrimination, including Latinos.¹⁵² These programs have been challenged as

146. See *Hoffman Plastic Compounds*, 535 U.S. at 140; see also *supra* notes 7 & 9 (discussing examples of Court-sanctioned denial of services and legal remedial benefits).

147. The continued economic and political status of African Americans illustrates how difficult it can be to attain equality even without obstacles related to linguistic or citizenship status. Assimilation and acculturation in no sense provide a secure position of privilege for sexual minorities. See generally Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 *TEMPLE L. REV.* 709 (2002), 712–13, 731–33 (discussing the constitutional implications of assimilation as an anti-equality theorem and challenging progressive constructions of assimilation).

148. *The Civil Rights Cases*, 109 U.S. 3, 24 (1883).

149. *Id.* (holding that the Fourteenth Amendment only prohibits discriminatory action by the state); see also *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948) (holding that judicial enforcement of a racially restrictive covenant violates the Fourteenth Amendment because it constitutes discriminatory state action); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 178–79 (1972) (holding that a state’s liquor regulatory scheme, as applied to discriminatory club, did not constitute state discrimination for Fourteenth Amendment purposes); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619–24 (1991) (distinguishing between state and private discrimination and providing a test for determining what constitutes impermissible state action under the Fourteenth Amendment).

150. See, e.g., *Shelley*, 334 U.S. at 13; *Edmonson*, 500 U.S. at 619.

151. See, e.g., *United States v. Paradise*, 480 U.S. 149 (1987) (upholding a district court order that set a numerical goal for the promotion of black troopers in a state police department).

152. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 803, 826 (7th ed. 2004).

unconstitutional by persons not covered by the program.¹⁵³ The challengers argue that the law unconstitutionally benefits certain classes of people over others and that they have been excluded from coverage as a result.¹⁵⁴

A. *The Supreme Court's Equal Protection Jurisprudence*

The Supreme Court defined the contours of its equal protection standard as applied to affirmative action programs in cases involving access to government contracts for applicants defined according to race, national origin, and gender. Following its seminal decisions in *City of Richmond v. J.A. Croson Co.*,¹⁵⁵ and *Adarand Constructors, Inc. v. Peña*,¹⁵⁶ for over a decade the Court has subjected government "racial classifications" contained in affirmative action programs to strict judicial scrutiny, requiring that the classifications "are narrowly tailored measures that further compelling governmental interests."¹⁵⁷ The courts have applied strict scrutiny to affirmative action cases based on national origin.¹⁵⁸

Challengers to affirmative action programs for minority-owned businesses have generally asserted that the government classification violates the equal protection clauses of the Constitution because the government cannot justify its classification on the basis of race.¹⁵⁹ Claimants have alleged that the government cannot establish that the

153. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding the University of Michigan Law School's affirmative action program in admissions).

154. *Id.* (The plaintiff, Grutter, was a white female Michigan resident.).

155. 488 U.S. 469 (1989).

156. 515 U.S. 200 (1995).

157. *Id.* at 227; see also *Croson*, 488 U.S. at 486; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 285 (1986).

158. See *Jana-Rock Constr., Inc. v. N. Y. State Dep't of Econ. Dev.*, 438 F.3d 195, at 204 (2d Cir. 2006) (stating that the plaintiff must allege intentional discrimination based on race or national origin in order for strict scrutiny to apply to the plaintiff's equal protection claim) (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)); *Hayden v. County of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999)).

The focus of this Article is an equal protection standard for national origin classifications without consideration to gender. Notably the Court has subjected gender discrimination to a less demanding standard than race or national origin discrimination. Classifications based on gender must have an "exceedingly persuasive" justification, and serve "important governmental objectives." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (internal quotations omitted). The possible implications for a hybrid legal analysis involving women of color is beyond the scope of this Article.

159. See *infra* Part III.

classification is necessary to remedy past discrimination, or that the means chosen is not sufficiently narrow or limited in scope to fit the governmental interest.¹⁶⁰

I. City of Richmond v. J.A. Croson Co.

In *City of Richmond v. J.A. Croson Co.*, the Court held that governmental affirmative action programs are subject to strict scrutiny.¹⁶¹ In the *Croson* case, Richmond, Virginia's City Council adopted a minority business plan applicable to the construction industry, intended to increase the amount of City-awarded contract dollars that went to Minority Business Enterprises (MBEs) by setting aside thirty percent of the dollar value of its contracts to MBEs.¹⁶² The City defined an MBE as a business where "at least fifty-one (51) percent of which is owned and controlled . . . by minority group members,"¹⁶³ defined as "citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts."¹⁶⁴ A construction company challenged the plan after the City rejected its bid on a City contract because it did not meet the MBE requirement.¹⁶⁵

The Supreme Court reaffirmed that all race classifications are subject to strict scrutiny equal protection review, regardless of legislative intent, and that generalized allegations of discrimination—even with proof of nationwide discrimination—are insufficient to establish the necessary quantum of discrimination that justifies a race-based remedial program.¹⁶⁶ The Court concluded that the City failed to establish that the plan served a compelling governmental interest and that it was narrowly tailored to remedy effects of prior discrimination.¹⁶⁷

160. See *infra* Part III.

161. *Croson*, 488 U.S. at 493.

162. *Id.* at 478.

163. *Id.*

164. *Id.*

165. *Id.* at 481–83.

166. *Id.* at 493–94, 500. "Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice But when a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals." *Id.* at 500.

167. *Id.* at 500, 507.

2. Adarand Constructors, Inc. v. Pena

In *Adarand Constructors, Inc. v. Pena*, the Court considered whether strict scrutiny applied to a federal affirmative action program's categories of beneficiaries.¹⁶⁸ *Adarand* involved an equal protection challenge¹⁶⁹ to a federally-funded highway contracts program that sought to increase the number of small business subcontractors controlled by "socially and economically disadvantaged individuals."¹⁷⁰ The Small Business Act set a minimum participation goal for small businesses controlled by "socially and economically disadvantaged individuals" of five percent of the total value of all prime and sub contract awards in a fiscal year.¹⁷¹ Under the law, the government presumed that

socially and economically disadvantaged individuals include[d] Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act.¹⁷²

Presumptions were rebuttable by a third party's "evidence suggesting that the participant is not, in fact, either economically or socially disadvantaged."¹⁷³

168. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 223–25 (1995).

169. The Supreme Court restated in *Adarand* that its analysis of Fifth and Fourteenth Amendment equal protection claims are the same, and that Fifth Amendment-based equal protection claims are subject to the same standards as those asserted under the Fourteenth Amendment's Equal Protection Clause. *Id.* at 217–18 (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638, n.2 (1975); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *United States v. Paradise*, 480 U.S. 149, 166, n.16 (1987) (plurality opinion of Brennan, J.) (internal quotations omitted)).

170. *Id.* at 204.

171. *Id.* at 206 (quoting 15 U.S.C. § 644(g)(1)).

172. *Id.* at 205 (citation omitted). The Small Business Act (SBA) defines "socially disadvantaged individuals" as persons "who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5) (2006). The SBA defines "economically disadvantaged individuals" as "socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* § 637(a)(6)(A).

The Court noted that SBA's subcontracting program, set forth in section 8(d) of the statute, was subject to regulations that stated, "members of minority groups wishing to participate in the 8(d) subcontracting program are entitled to a race-based presumption of social and economic disadvantage." *Adarand*, 515 U.S. at 207–08 (citing 48 C.F.R. §§ 19.001, 19.703(a)(2) (1994)).

173. *Adarand*, 515 U.S. at 208 (citing 13 C.F.R. §§ 124.111(c)–(d), 124.601–124.609 (1994)).

The federal government awarded Mountain Gravel & Construction Company the prime contract for a highway construction project in Colorado in 1989.¹⁷⁴ Mountain Gravel thereafter solicited bids for a subcontract on the project, and Adarand Contractors submitted the lowest subcontract bid. Mountain Gravel rejected this bid and instead accepted the bid submitted by Gonzalez Construction Company.¹⁷⁵ According to its prime contract terms with the federal government, Mountain Gravel would receive additional compensation for hiring subcontractors “certified as small businesses controlled by ‘socially and economically disadvantaged individuals.’”¹⁷⁶ Mountain Gravel rejected Adarand’s bid because Adarand was not certified as a “socially and economically disadvantaged individual.”¹⁷⁷ Adarand challenged the statute as discriminatory, claiming that the presumption of disadvantage for persons listed in the statute based on race constituted an equal protection violation of the Fifth Amendment’s Due Process Clause.¹⁷⁸

The Court concluded that racial classifications by any federal, state or local government actor are subject to strict scrutiny and can only survive a challenge if the classification is narrowly tailored to further a compelling governmental interest.¹⁷⁹ An express classification, plain on the face of the legislation, is “inherently suspect,”¹⁸⁰ and requires that the government establish a compelling interest and that the classification is narrowly tailored to further such interest.¹⁸¹ The Court did not decide whether the federal government had or could establish a compelling interest, or had designed a program narrowly tailored to meet that interest. Instead, the Court remanded so the lower courts could decide the matter after proper application of the strict scrutiny test.¹⁸²

174. *Id.* at 205.

175. *Id.*

176. *Id.* (citation omitted).

177. *Id.* at 205. Gonzales Construction Company was certified as a small business controlled by “socially and economically disadvantaged individuals.” *Id.* at 205.

178. *Id.* at 204–06.

179. *Id.* at 235.

180. *Id.* at 223 (quoting *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964)).

181. *Id.* at 219–21.

182. *Id.* at 237–39 (remanding for further proceedings as Court of Appeals had erroneously applied intermediate scrutiny).

B. *Overinclusive and Underinclusive Programs*

The Court has expressed concern with programs that are overinclusive because they provide remedial relief to individuals who have not been discriminated against, as well as those that are underinclusive for failing to include individuals who have suffered discrimination. In *Croson*, the Court rejected the government affirmative action plan in part because the government had included persons from groups which it failed to establish had suffered past discrimination in the Richmond, Virginia construction industry.¹⁸³ The government thus did not establish that the affirmative action plan was solely implemented to address past discrimination (the compelling government interest prong), nor did the government show that the classifications were narrowly tailored to address the alleged discrimination in the Richmond construction industry (the narrowly-tailored program prong).¹⁸⁴

The Supreme Court's decision in *Adarand* held that government affirmative action programs are subject to strict scrutiny,¹⁸⁵ but it did not address whether strict scrutiny or some other standard of review applied to subclassifications within the constitutionally challenged group categories—for example when a state defines Latinos as including all Spanish-speaking persons with Latin American or Caribbean ancestry but excludes Spaniards or those whose ancestors are from Spain—or whether review of such classifications was encompassed within the narrow-tailored prong of strict scrutiny. Given that subclassifications are often a part of definitions of large ethnic group classifications in affirmative action legislation, the level of scrutiny required is a significant legal issue. Indeed, as discussed in this article there have been challenges to the exclusion and inclusion of particular national origin groups from subclassifications within the larger classification in the remedial program.¹⁸⁶

The question remains whether, once government makes the initial choice to implement such a program and provide for group-based assistance, the subclass definitions are similarly subject to strict scrutiny,

183. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989) (plurality opinion).

184. *See id.*

185. *Adarand*, 515 U.S. at 227.

186. *See infra* Part III.A (discussing *Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195 (2d Cir. 2006), in which the statute at issue was challenged on underinclusiveness grounds as it did not include persons of direct Spanish and Portuguese descent in its definition of "Latino").

subject to a lesser standard of review, or absolved from further review. For example, if a governmental actor decided to include in the Latino classification everyone with Latin American ancestry and excluded Spaniards, would that be subject to strict scrutiny analysis, rational basis analysis, or intermediate scrutiny—or would the court simply defer to legislative wisdom? Although *Croson* and *Adarand* do not directly address this question, they provide guidance as to how the Court would decide if presented with a direct challenge to a subclassification. In these two cases, the Court considered the parameters of the classifications as relevant to both prongs of the strict scrutiny inquiry.¹⁸⁷ It would be contrary to Supreme Court precedent to subject broad classifications to strict scrutiny but apply some lesser standard of review to subclassifications that set forth the defining characteristics of the broad classifications. The government would be able to subvert the Supreme Court's directive that all classifications be justified by an important governmental goal and be designed to "fit" that goal merely by using subclassifications that include persons who would not otherwise satisfy both prongs of strict scrutiny,¹⁸⁸ or by excluding persons who satisfy the requirements and who, but for the government's definition, otherwise meet the goals of the affirmative action plan.

III. EQUAL PROTECTION CHALLENGES TO AFFIRMATIVE ACTION PROGRAMS

This section discusses seven circuit court decisions that have analyzed subclassifications as part of their review of an equal protection challenge to a government-sponsored minority-owned business affirmative action program.¹⁸⁹ As discussed further in this section, the inadequacies of the approaches adopted in these decisions are primarily due to the courts' reliance on race-based equal protection jurisprudence and the courts'

187. *Adarand*, 515 U.S. at 234–37; *Croson*, 488 U.S. at 493–508.

188. See *infra* Part III (several circuits have considered whether affirmative action programs are overinclusive in their selection of racial and ethnic groups. This Article contends that the decisions in these cases do not properly analyze national origin subclassifications under the Equal Protection Clause).

189. *Jana-Rock*, 438 F.3d 195; *Builders Ass'n of Greater Chicago v. County of Cook*, 256 F.3d 642 (7th Cir. 2001); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730 (6th Cir. 2000) (*Drabik*); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702 (9th Cir. 1997); *Peightal v. Metro. Dade County*, 26 F.3d 1545 (11th Cir. 1994) (*Peightal II*); *O'Donnell Constr. Co. v. Dist. of Columbia*, 963 F.2d 420 (D.C. Cir. 1992); *Peightal v. Metro. Dade County*, 940 F.2d 1394 (11th Cir. 1991) (*Peightal I*).

attempt to compare national origin subclassifications to race-based categories. The cases cover approximately fifteen years, with the most recent decision issued in 2006 and the earliest in 1991.¹⁹⁰ All were decided post-*Croson*,¹⁹¹ and four were decided post-*Adarand*.¹⁹² The majority of these circuits analyzed subclassifications as part of the narrow-tailoring prong of strict scrutiny.¹⁹³ Half of these circuits also assessed subclassifications as part of their determinations that the program was “overinclusive.”¹⁹⁴ The Second, Sixth, and Eleventh Circuits considered whether the subclassifications were so specifically underinclusive as to render the programs unconstitutional.¹⁹⁵ One of these circuits applied rational basis to the subclassification challenge, but left open the possibility that a claimant could persuade the court to apply strict scrutiny if the claimant established that there was intentional discrimination by the government.¹⁹⁶ Thus, the court adopted a type of flexible equal protection analysis to subclassifications.

Neither of these approaches—overinclusiveness nor underinclusiveness—adequately addresses the issues raised by an equal protection challenge to national origin subclassifications. National origin groups are not necessarily coextensive with racial groups, and national origin groups have histories of oppression and disempowerment that do not necessarily track those of racial groups.¹⁹⁷ While exclusion from programs benefiting individuals and denial of access to policymaking positions are common experiences for all minority and disempowered groups—whether categorized by race, national origin, or ethnicity—there are individual and community experiences that do not always overlap among members of these groups. These experiences constitute histories that merge for national origin and ethnic groups, expand and

190. See *supra* note 189.

191. The seven cases were decided between 1991 and 2005, see *supra* note 189, and *Croson* was decided in 1989, 488 U.S. 469 (1989).

192. *Jana-Rock*, *Builders*, *Drabik*, and *Monterey Mech.* were decided after the *Adarand* decision in 1995.

193. *Builders*, 256 F.3d at 647; *Drabik*, 214 F.3d at 740; *Monterey Mech.*, 125 F.3d at 714; *O'Donnell*, 963 F.2d at 427; *Peightal II*, 26 F.3d at 1560–61; *Peightal I*, 940 F.2d at 1408–10.

194. *Builders*, 256 F.3d at 647; *Monterey Mech.*, 125 F.3d at 714; *O'Donnell*, 963 F.2d at 427.

195. *Jana-Rock*, 438 F.3d at 212–14; *Drabik*, 214 F.3d at 737; *Peightal II*, 26 F.3d at 1560–61; *Peightal I*, 940 F.2d at 1408–10.

196. *Jana-Rock*, 438 F.3d at 211.

197. See generally MORIN, *supra* note 12; RODRIGUEZ, *CHANGING RACE*, *supra* note 35.

contract for subclasses within these groups, and overlap or diverge from other group categories.

To the extent that these histories, commonalities and dissimilarities are relevant to equal protection doctrine,¹⁹⁸ the circuit court decisions discussed below have not adequately considered the legal import of subclassifications. The cases are discussed in reverse chronological order, beginning with the most recent decision.

A. *Jana-Rock Construction, Inc. v. New York State Department of Economic Development*

In *Jana-Rock Construction, Inc. v. New York State Department of Economic Development*,¹⁹⁹ the Second Circuit concluded that the rational basis test, rather than strict scrutiny, applied in an equal protection challenge to the State's statutory definition of "Hispanic" in its minority-owned business affirmative action program.²⁰⁰ The Second Circuit developed a "flexible" equal protection standard of review that presumptively applies strict scrutiny to all challenges to race, national origin, and ethnic categories, but subjects challenges to national origin and ethnic category subclassifications to rational basis review.²⁰¹ The Second Circuit approach allows the plaintiff to argue for more rigorous review, but in so doing shifts the burden to the plaintiff to establish discriminatory motive in the choice to exclude a specific national origin subclass.²⁰²

The plaintiff in *Jana-Rock* claimed that the State of New York's definition of "Hispanic" violated the Fourteenth Amendment Equal Protection Clause because New York did not include persons of Spanish or Portuguese descent in its definition.²⁰³ The definition thus excluded him as he was the "the son of a Spanish mother whose parents were born in Spain."²⁰⁴ Under New York's minority-owned business program,

198. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989) (exploring the history of discrimination against particular groups relevant to determination of whether program is narrowly tailored to compensate for past discrimination).

199. 438 F.3d 195 (2d Cir. 2006).

200. See *id.* at 212.

201. *Id.* at 210.

202. *Id.* at 211.

203. *Id.* at 199.

204. *Id.* (quotation omitted). The State argued that although the plaintiff had previously been certified and recertified several times as a minority business enterprise, the intention was to certify the plaintiff for the federal minority-owned affirmative action business program with the U.S.

“[h]ispanic[s]” are defined as “persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American [*sic*] of either Indian or Hispanic origin, regardless of race.”²⁰⁵ The plaintiff did not challenge the program as wholly unconstitutional. The plaintiff—presumptively in order to participate in the program—conceded that New York had a compelling government interest to address discrimination against Hispanics, and that the program otherwise was narrowly tailored to address this interest.²⁰⁶

The Second Circuit divided the plaintiff’s underinclusiveness challenge into two alternative arguments, and rejected both. Under the first argument, the court interpreted the plaintiff’s challenge to demand application of strict scrutiny to New York’s program on the ground that the program generally is underinclusive.²⁰⁷ This argument would require New York to justify its decision not to remedy discrimination against groups excluded from its classifications.²⁰⁸ The court rejected this argument, concluding that the State did not have to establish why excluded groups do not merit inclusion in its program.²⁰⁹ According to the court, to hold otherwise would permit a plaintiff to proceed with a challenge under strict scrutiny based on the government program’s alleged underinclusiveness, an outcome incompatible with the Supreme Court’s narrow-tailoring requirement.²¹⁰ It appears the Second Circuit believed that since the narrow-tailoring prong of strict scrutiny seeks to avoid overinclusiveness, it would be illogical to assume that a state’s effort to establish an underinclusive program was similarly constitutionally infirm.

Department of Transportation (USDOT), not the state program. Pursuant to state law, and in accordance with federal requirements, the State ensures compliance with the federal USDOT minority-owned business affirmative action program and, to that end, certifies minority owned businesses. *Id.* at 201–02.

205. N.Y. EXEC. § 310(8)(b) (McKinney 2005). The State of New York, however, certified the plaintiff in *Jana-Rock* for participation in the federal USDOT minority-owned business program. *Jana-Rock*, 438 F.3d at 202. The USDOT implemented regulations which define “Hispanic Americans,” a category under the federal program, as “persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race.” 49 C.F.R. § 26.5 (2006).

206. *Jana-Rock*, 438 F.3d at 206–10.

207. *Id.* at 205.

208. *Id.*

209. *Id.* at 206.

210. *Id.* at 207. (“Evaluating underinclusiveness as a prong of strict scrutiny would be incompatible with the Supreme Court’s requirement that affirmative action programs be no broader than demonstrably necessary.”).

The second argument considered in favor of applying strict scrutiny analysis and rejected by the court focused specifically on the statutory definition of "Hispanic."²¹¹ Under this argument, the court would have to subject the definition to strict scrutiny analysis, but ultimately find that it failed this test because the definition was underinclusive.²¹² To survive such a challenge, New York would have to justify its choice of a particular definition of "Hispanic" over an alternative definition.²¹³

The court rejected this argument because, "'strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.'"²¹⁴ Once the government satisfies the strict scrutiny test for the use of race, the specific applications of the program are not subject to heightened review but rather left to the government.²¹⁵

The court's rejection of this argument appears to be centered on prudential concerns about the appropriate role of the judiciary once the government defines its selected groups. The court indicated its concern with the automatic application of strict scrutiny to an inherently imprecise process.²¹⁶ According to the court, since any racial classification "will always exclude persons who have individually suffered past discrimination and include those who have not [suffered discrimination]," the court's role should be limited to the initial determination that the remedy for the discriminatory evil may, as a constitutional matter, include racial and national origin classifications.²¹⁷

An underinclusive program, according to the court, nevertheless may be subject to strict scrutiny if the plaintiff establishes that the underinclusiveness was motivated by a discriminatory purpose.²¹⁸ Where the plaintiff claims that the government has chosen to benefit only certain "Hispanics," strict scrutiny may apply if the plaintiff establishes intentional discrimination against "the groups of Hispanics that were excluded."²¹⁹ This shifts the burden to the plaintiff to show legislative

211. *Id.* at 200, 209.

212. *See id.* at 205, 210.

213. *Id.* at 205.

214. *Id.* at 210 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003)).

215. *Id.* at 210.

216. *See id.*

217. *Id.* at 210–11.

218. *See id.* at 211.

219. *Id.*

discriminatory intent before the court will apply the strict scrutiny standard. The court concluded that the plaintiff failed to establish “anti-Spanish animus,” and therefore failed to trigger strict scrutiny.²²⁰ Reviewing the plaintiff’s challenge under the rational basis test, the court easily determined that “it was not irrational for New York to conclude that Hispanics of Latin American origin were in greater need of remedial legislation.”²²¹

The difficulty with this “flexible” standard is that it turns on its head equal protection doctrine, which has historically placed the burden on the government to justify its decision to treat persons differently based on race or national origin. The choice to categorize based on race and national origin is suspect, and this is the reason that such choices are subject to strict scrutiny.²²² Indeed, treating such categorizations as suspect is the core of the Supreme Court’s equal protection jurisprudence.

In part, the Second Circuit recasts the burden of the underinclusiveness argument onto the plaintiff because of the court’s mischaracterization of the plaintiff’s claim as a challenge to a “racial definition.”²²³ Although the court states that it is assessing a claim about the definition of “Hispanic,” and throughout the decision refers to the challenge as based on national origin and ethnic categories, it vacillates between its characterization of the claim as one based on race and one based on national origin.²²⁴ Its analysis lacks any deep understanding of the difference between race, national origin and ethnic categories. While a racial category is not static and may have different apparitions, it is generally perceived to be centered on one common physical characteristic shared by the group members, namely “race” or pigmentation.²²⁵ It can be defined merely by reference to this singular characteristic. A national origin category, by contrast, includes members of various backgrounds and histories that may share multiple common overriding and solidifying characteristics, but that are defined by certain

220. *Id.* at 212.

221. *Id.* at 214.

222. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

223. *Jana-Rock*, 438 F.3d at 210–11.

224. *Id.* Indeed, the court referred to race twenty-nine times in its opinion, almost three times more than national origin, to which it referred eleven times, and almost fifteen times more than the number of times it referred to ethnicity, which was a mere two times. See *id.*

225. See, e.g., Haney López, *supra* note 113.

differences.²²⁶ Latinos share common characteristics generally including the Spanish or Portuguese language and a history of Spanish or Portuguese dominion and conquest.²²⁷ However, a “Latino” or “Hispanic” category consists of diverse subclasses of members from different countries within Latin America and the Latin Caribbean, and with different histories and cultures represented by these discrete national origins.²²⁸ Latinos’ connections and affiliations to their individual or ancestral country of national origin, and those countries’ respective cultures and histories are not insignificant or overshadowed by their presence in the United States.²²⁹ Latinos define themselves based on their country of national origin—their affiliation to ancestral and historical roots outside of the United States.²³⁰ Regardless of their U.S. citizenship status, Latinos self identify as part of a national origin subclass, for example, Puerto Rican, Mexican, Dominican.²³¹

Moreover, “Latinos” as an equal protection group share a history of discrimination and disempowerment in the United States and are defined by their status within U.S. society as compared to members of other groups.²³² The definition of Latino then is based on relationships forged inside and outside of the United States. It is one based on self identification and on identification by non-Latinos.

In practice, the Second Circuit’s approach will result in strict scrutiny which is “fatal in fact.”²³³ A plaintiff arguing underinclusiveness under this approach has the particularly arduous task of establishing animosity towards a specific subclass. This is so mainly because if the plaintiff

226. See *supra* Part I.B.

227. See ENGLISH USAGE AMONG HISPANICS STUDY, *supra* note 76.

228. LATINOS: REMAKING AMERICA 1–37 (Marcelo M. Suárez-Orozco & Mariela M. Páez eds. University of California Press 2002) (providing an overview of the heterogeneity of Latino population in the United States).

229. See MORIN, *supra* note 12, at 8–10; PEW HISPANIC CENTER, 2002 NATIONAL SURVEY OF LATINOS, *supra*, note 76; TAFOYA, *supra* note 121.

230. See PEW HISPANIC CENTER, 2002 NATIONAL SURVEY OF LATINOS, *supra* note 76.

231. See *id.*

232. See *supra* Part I.

233. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (concluding that strict scrutiny applied to any and all race-based government decisions does not result in strict scrutiny that is “strict in theory, but fatal in fact.” (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980)) (Marshall, J., concurring in judgment)). *But see Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (upholding, in a 5–4 decision, the University of Michigan Law School’s use of race as a factor in student admissions, after subjecting the program to strict scrutiny, but signaling that affirmative action may be subject to a short-term deadline, stating that “[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

seeks to participate in the program, the plaintiff will necessarily concede that there is a compelling interest and that, but for the underinclusiveness of a group category, the program is narrowly tailored to further the compelling interest. Left with a narrow basis to challenge the category, which cannot include an argument that the government could have done more,²³⁴ a plaintiff would have to show that their subclass was specifically targeted for exclusion. Such a showing is nearly impossible to make given that there is considerable misunderstanding and misinformation about Latinos as a group and as a collection of various subclasses.

The Second Circuit's approach is at odds with equal protection doctrine and is an unworkable standard of judicial review of government national origin classifications.

B. Builders Association of Greater Chicago v. County of Cook

In *Builders Association of Greater Chicago v. County of Cook*,²³⁵ the Seventh Circuit concluded that the County's minority- and women-owned business enterprise program was unconstitutional because the government locality did not establish the need for the remedy, and because it was overinclusive.²³⁶ The court concluded that the ordinance was overinclusive because the County's "laundry list of favored minorities" included persons whose ancestors were from Spain or Portugal—persons whom the court stated common sense dictated "have never been subject to significant discrimination by Cook County."²³⁷

In *Builders*, Cook County passed an ordinance establishing the Minority- and Women-Owned Business Enterprise Program, which provided that thirty percent of the total value of the County's construction contracts be awarded to enterprises that were at least fifty-one percent owned by minorities, and ten percent of the total value of County contracts to enterprises that were at least fifty-one percent owned by women, requirements that could be met with subcontractors.²³⁸ The

234. The Second Circuit stated that the legislature did not violate equal protection under rational basis review if it did not attempt to remedy at once all forms of discrimination. *Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 213 (2d Cir. 2006) (stating that "[u]nder rational basis review, '[t]he legislature may select one phase of one field and apply a remedy there, neglecting the others.'" (citing *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 489 (1955))).

235. 256 F.3d 642, 645–46 (7th Cir. 2001).

236. *Id.* at 645–46.

237. *Id.* at 647.

238. *Id.* at 643.

challenge asserted that the ordinance constituted an equal protection violation.²³⁹

Ostensibly, the County had argued it was seeking to remedy past discrimination in the construction industry.²⁴⁰ The court concluded that there was “no credible evidence that Cook County in the award of construction contracts ever intentionally (or for that matter unintentionally) discriminated against any of the groups favored by the program.”²⁴¹ The court then concluded that the ordinance similarly failed to comply with the narrow tailoring requirement because “the remedy goes further than is necessary to eliminate the evil against which it is directed.”²⁴²

The court set forth its interpretation of who could properly be determined to have suffered discrimination because of “Hispanic ethnicity”:

[T]he concern with discrimination on the basis of Hispanic ethnicity is limited to discrimination against people of South or Central American origin, who often are racially distinct from persons of direct European origin because their ancestors include [B]lacks or Indians or both; of course they may instead or as well be ethnically distinct on the basis of culture or language. The concern with racial discrimination does not extend to Spanish or Portuguese people, or the concern with ethnic discrimination to persons of Spanish or Portuguese ancestry born in the United States; but even as to those born abroad, there is nothing to differentiate immigrants from Spain or Portugal from immigrants from Italy, Greece, or other southern European countries so far as a history of discrimination in the United States is concerned.²⁴³

Following the Supreme Court’s directive to apply heightened scrutiny to race-based discrimination, the Seventh Circuit applied the existing

239. *Id.*

240. The Seventh Circuit stated that Cook County failed to provide evidence to support any argument that the ordinance sought to remedy past discrimination in the award of construction contracts by the County, or as a result of the County having served as a “passive participant” in private discrimination by prime contractors. *Id.* at 645 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1167, 1175 (10th Cir. 2000), *cert. granted*, 532 U.S. 941 (2001)).

241. *Id.* at 645 (citing *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735–37 (6th Cir. 2000)).

242. *Id.*, at 647.

243. *Id.*

strict scrutiny equal protection analysis and concluded that there was no compelling interest established, and that the program was not narrowly tailored even if there was a compelling interest to support the ordinance's remedial plan.²⁴⁴ The Seventh Circuit's discussion of the "Hispanic" category appears to consider the differences between subclasses of Latinos and members of other ethnic or racial groups.²⁴⁵ Here too, as in *Jana-Rock*, the court relies on its understanding of race and racial categories to define who is "Hispanic." As the court states specifically, discrimination related to Hispanic ethnicity "is limited to discrimination against people of South or Central American origin, who often are racially distinct from persons of direct European origin because their ancestors include [B]lacks or Indians or both."²⁴⁶ However, the court also recognizes that there are other legally consequential differences: "of course they may instead or as well be ethnically distinct on the basis of culture or language."²⁴⁷

Despite appearances, the court's definition of "Hispanic" is dependent on narrow presumptions of who is "Hispanic." This distinction is clearly illustrated in the court's comparison of Spanish and Portuguese people to Hispanics, and the reasoning employed by the court in concluding that Spaniards and Portuguese cannot be considered "Hispanic."

The concern with racial discrimination does not extend to Spanish or Portuguese people, or the concern with ethnic discrimination to persons of Spanish or Portuguese ancestry born in the United States; but even as to those born abroad, there is nothing to differentiate immigrants from Spain or Portugal from immigrants from Italy, Greece, or other southern European countries so far as a history of discrimination in the United States is concerned . . . Anyone of recent foreign origin might be able to demonstrate that he or she was a victim of ethnic discrimination, but to *presume* such discrimination merely on the basis of having an ancestor who had been born in the Iberian peninsula is unreasonable.²⁴⁸

The Seventh Circuit's analysis is wholly dependent on a definition of "Hispanic" as a non-White race of foreign born immigrants. Although

244. *Id.* at 645–47.

245. *Id.* at 647.

246. *Id.*

247. *Id.* at 645.

248. *Id.* (citing *Peightal v. Metro. Dade County*, 26 F.3d 1545, 1559–61 (11th Cir. 1994)).

the court references a “history of discrimination in the United States,”²⁴⁹ its analysis lacks grounding in that history and in the history relevant to the equal protection analysis—the history of discrimination suffered by Latinos in Cook County and in Illinois. The court limits its references to Hispanics as persons of South or Central American origin, without mention of Puerto Ricans as a Caribbean population present in Cook County and throughout Illinois. The court also presumes that Hispanics are foreign-born immigrants, when Puerto Ricans are U.S. citizens at birth, and both Puerto Ricans and Mexican Americans in Illinois and Cook County have been present in Illinois—and the United States—for over a century.²⁵⁰ Thus, while the Seventh Circuit properly recognized the significance of culture, language and history of discrimination in the United States as relevant to the definition of “Hispanic” and its attendant subclasses, it based its definition on presumptions that are not an accurate representation of who is Latino.

C. Associated General Contractors of Ohio, Inc. v. Drabik

The Sixth Circuit held in *Associated General Contractors of Ohio, Inc. v. Drabik*,²⁵¹ that Ohio’s Minority Business Enterprise Act (MBEA) was unconstitutional because there was no evidence of a compelling government interest, and because the MBEA was both over- and underinclusive and therefore not narrowly tailored.²⁵²

The MBEA set aside five percent of all state contracts for exclusive bidding by state certified minority-owned business enterprises (MBE).²⁵³ The MBEA permitted MBEs to bid on all contracts but limited non-MBEs to non-set-aside contract bids.²⁵⁴ The State defined an MBE as a business at least fifty-one percent owned and controlled for at least one year prior, by “members of one of the following economically disadvantaged groups: Blacks, American Indians, Hispanics, and

249. *Id.* at 645–47.

250. See Rob Paral et al., *Latino Demographic Growth in Metropolitan Chicago*, RESEARCH REPORTS, UNIVERSITY OF NOTRE DAME INSTITUTE FOR LATINO STUDIES app. 1, December 2004, at 22–23, available at <http://latinostudies.nd.edu/pubs/pubs/paral.pdf>.

251. *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730 (6th Cir. 2000) (*Drabik*).

252. Prior to the Supreme Court’s decisions in *Croson* and *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), the Sixth Circuit had upheld the constitutionality of the MBEA. *Ohio Contractors Ass’n v. Keip*, 713 F.2d 167 (6th Cir. 1983).

253. *Drabik*, 214 F.3d at 733 (citing OHIO REV. CODE ANN. § 123.151(C)(1)).

254. *Id.* at 733.

Oriental.”²⁵⁵ The plaintiffs represented a group of trade associations²⁵⁶ who asserted an equal protection challenge to the MBEA-mandated exclusion of their non-minority members from bidding on part of a construction project of the Toledo Correctional Facility.²⁵⁷

Applying the traditional strict scrutiny standard to the plaintiffs’ claims, the Sixth Circuit acknowledged the State would have a compelling interest in “assuring that public dollars . . . do not serve to finance the evil of private prejudice,”²⁵⁸ as well as in “remedying the effects of past discrimination.”²⁵⁹ However, the court concluded that the State failed to carry its burden and establish the State’s own prior discrimination or any private discrimination in which the State served as a passive participant.²⁶⁰

The circuit court then considered the second constitutional prong of the equal protection test and concluded that the MBEA was not narrowly tailored.²⁶¹ In its discussion the Sixth Circuit noted that the MBEA was both over and underinclusive.²⁶² By “lumping together”²⁶³ various groups within the definition of minority the MBEA allowed for preferences absent discrimination, making the MBEA overinclusive.²⁶⁴ At the same time, it potentially failed to allow “relief to groups where discrimination might have been proven,”²⁶⁵ making it underinclusive. The MBEA included within its coverage Blacks, Native Americans, as

255. *Id.* (citing OHIO REV. CODE ANN. § 122.71(E)).

256. The plaintiffs were Associated General Contractors of Ohio and Associated General Contractors of Northwest Ohio. *Id.* at 733.

The irony of state-proscribed exclusive bidding for minority contractors, and the non-minority contractors’ competing desire for the right to bid, on the Toledo Correctional Facility—where people of color are the majority of the prison population at the Toledo Correctional Facility—is only one of the interesting facets of this case. Another curious aspect of the case is the absence of any mention of the trade associations’ responsibility to the interests of their minority members.

257. *Id.*

258. *Id.* at 734–35 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (plurality opinion)).

259. *Id.* at 735 (citing *Croson*, 488 U.S. at 503; *United Black Firefighters Ass’n v. City of Akron*, 976 F.2d 999, 1010–11 (6th Cir. 1992)).

260. *Id.* at 735. For a discussion of the insufficiency of the State’s evidence and the type of evidence that would have been appropriate, see *id.* at 735–37.

261. *Id.* at 737–38.

262. *Id.* at 737.

263. *Id.*

264. *Id.*

265. *Id.*

well as undefined categories of “Hispanics” and “Orientals.”²⁶⁶ The court determined that the MBEA was not a narrowly-tailored remedy because it placed African-Americans—a group that has historically suffered discrimination in Ohio—on the same footing as other minority groups that recently arrived to Ohio and are therefore unlikely to have experienced historical discrimination in Ohio.²⁶⁷

The Sixth Circuit’s analysis of national origin categories merely pits one category against another—African Americans against Asians. The court did not have before it any definition of the “Hispanic” category from which to base an analysis about whether subclasses should be subject to strict scrutiny. It appears from the court’s example of the Thai contractor²⁶⁸—an obvious reference to a subclass from the “Oriental” category—that the circuit court applied strict scrutiny’s second prong, requiring narrowly-tailored programs across the board, irrespective of category or subclassification status. The advantage of this approach is simplification and uniformity; the disadvantage is that it does not consider the historical commonalities of discrimination shared by members of the subclass, which are taken into consideration by inclusion in the umbrella category.

D. *Monterey Mechanical Co. v. Wilson*

The Ninth Circuit concluded in *Monterey Mechanical Co. v. Wilson*²⁶⁹ that California’s minority contract set-aside program was unconstitutional.²⁷⁰ At issue in *Monterey Mechanical* was the California Public Contract Code, which required that general contractors subcontract part of the work to subcontractors at least fifty-one percent owned and controlled by minorities, women and disabled veterans.²⁷¹ The statute set forth percentage work goals for the subcontractor groups:

266. *Id.* at 733, 737. I consider the term “Oriental” to be an inappropriate and racially and ethnically inaccurate name for a category that appears to encompass Asians of various backgrounds. I have used the term in quotes because it is the exact terminology found in the challenged legislation.

267. *Id.* at 737 (describing how under the MBEA, an African-American contractor in Ohio might not receive a state contract while a contractor of Thai origin who recently arrived in Ohio might receive ten percent of the state contracts, in satisfaction of the statutory percentage set-asides).

268. *Id.*

269. 125 F.3d 702 (9th Cir. 1997), *reh’g denied*, 138 F.3d 1270 (9th Cir. 1998).

270. *Id.* at 715 (holding that the California minority business set-aside program violated the Equal Protection Clause).

271. *Id.* at 704.

fifteen percent for minority business enterprises, five percent for women, and three percent for disabled veterans.²⁷² In the alternative, a contractor could still bid if it made a good faith effort to hire such subcontractors, and properly documented such efforts.²⁷³ California Polytechnic State University, San Luis Obispo sought bids for a utilities upgrade.²⁷⁴ The plaintiff, Monterey Mechanical, had the lowest bid but lost to the second lowest bidder.²⁷⁵ Monterey Mechanical was disqualified from the bidding for failure to comply with the California Public Contract Code.²⁷⁶ Monterey Mechanical did not hire subcontractors from within the targeted groups, and although it claimed it made efforts to hire, it failed to properly document such efforts.²⁷⁷ Although the bid awardee also failed to hire subcontractors from the Code groups, it properly and adequately documented its “good faith efforts” within the meaning of the statute.²⁷⁸

The court concluded that the plaintiffs were entitled to a preliminary injunction because they were likely to succeed on their equal protection claim, first because the Act was not supported by legislative or judicial factual findings of past discrimination, and second, because it was overbroad and not narrowly tailored.²⁷⁹ Discussing the second requirement of the strict scrutiny standard, the Ninth Circuit found the statutory definition of “minority” extended to “groups highly unlikely to have been discriminated against in the California construction industry.”²⁸⁰ According to the Ninth Circuit, the inclusion of Aleuts—for whom there is no history of active or passive discrimination in

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at 713–14. The Ninth Circuit set forth the strict scrutiny standard for race-based classifications and the “exceedingly persuasive justification” standard for sex-based classifications, although it did not address what if any would be the appropriate standard of the two as applied to a case involving a woman of color. *Id.* The court concluded that the State’s statute was not justified because there was not proof of government discrimination, and thus specifically avoided other related issues, including the quantum of proof necessary to satisfy the classifications. *Id.* at 713 (“Because the state made absolutely no attempt to justify the ethnic and sex discrimination it imposed, we do not reach the questions of how much proof, or what kinds of legislative findings, suffice.”).

280. *Id.* at 714.

California, or at the California State Polytechnic University at San Luis Obispo—in the definition of Native American established the statute's overbreadth and constitutional deficiency.²⁸¹ Comparing *Monterey Mechanical* to *Croson*, where the Supreme Court noted disapprovingly of the inclusion of Aleuts in the Richmond County plan because they lacked a history of discrimination in the County,²⁸² the Ninth Circuit stated that, "some of the groups designated are, in the context of a California construction industry statute, red flags signalling [sic] that the statue is not, as the Equal Protection Clause requires, narrowly tailored."²⁸³ In *Monterey Mechanical*, the Ninth Circuit evaluated a subclassification and found it lacking.²⁸⁴ In this case Aleut was a statutory subclass of Native American.²⁸⁵

As in *Drabik*, the circuit court did not discuss the definition of "Hispanic." Unlike the court in *Drabik*, however, the circuit court in *Monterey Mechanical* did have before it a statutory definition for "Hispanic."²⁸⁶ The California Code defined "Hispanic" as, "a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin regardless of race."²⁸⁷ Nevertheless, the subclassification would have been subject to the same deficiency as that noted for the inclusion of Aleuts. The inclusion of persons who are Spanish or Portuguese, as the Seventh Circuit noted in *Builders Association of Greater Chicago*,²⁸⁸ may well have rendered the statutory definition overbroad and incapable of satisfying the narrowly-tailored requirement of strict scrutiny if the court could not find a history

281. *Id.* 714–15.

282. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989).

283. *Monterey Mech.*, 125 F.3d at 714.

284. *See id.* at 714–15 (1997).

285. *Id.* at 714 (quoting CAL. PUB. CONT. CODE, § 10115.1(d) (1994), which defines a Native American person as "an American Indian, Eskimo, Aleut, or Native Hawaiian").

286. *Id.*

287. *Id.* The court quoted CAL. PUB. CONT. CODE § 10115.1(d) (1994), which states:

"Minority," for purposes of this section, means a citizen or lawful permanent resident of the United States who is an ethnic person of color and who is: Black (a person having origins in any of the Black racial groups of Africa); Hispanic (a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin regardless of race); Native American (an American Indian, Eskimo, Aleut, or Native Hawaiian); Pacific-Asian (a person whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, or the United States Trust Territories of the Pacific including the Northern Marianas); Asian-Indian (a person whose origins are from India, Pakistan, or Bangladesh); or any other group of natural persons identified as minorities in the respective project specifications of an awarding department or participating local agency.

288. *Builders Ass'n of Greater Chicago v. County of Cook*, 256 F.3d 642, 647 (2001).

of discrimination against persons of Spanish and Portuguese ancestry by the State of California.

Although the analysis appears watertight, in reality the court's sole reliance on a history of prior discrimination against the subclass failed to consider the connection to the national origin and ethnic "Hispanic" category, and whether that connection resulted in discrimination that justified inclusion within the government's definition of "Hispanic." In addition to discrimination suffered as a direct consequence of affiliation with a particular national origin subclass, Latinos are also subject to discrimination as members of the perceived monolithic and homogeneous "Hispanic" group. This latter basis for discrimination is based on common language, and cultural and historical similarities. That is "sameness." The former basis is dependent on recognition of the varied histories of the subclass itself—in other words on "difference."

E. *Peightal v. Metropolitan Dade County I & II*

The Eleventh Circuit's 1991 decision in the protracted litigation involving a challenge to the Metropolitan Dade County firefighter affirmative action hiring plan in *Peightal v. Metropolitan Dade County (Peightal I)*,²⁸⁹ kept alive the plaintiff's equal protection challenge, and concluded that the plan was neither over- nor underinclusive due to the plan's treatment of Hispanics.²⁹⁰ The 1991 decision remanded the case to the district court for consideration of the equal protection claim.²⁹¹ The circuit court in 1994 affirmed the subsequent district court decision that the plan survived strict scrutiny in *Peightal v. Metropolitan Dade County (Peightal II)*.²⁹² In that decision, the circuit court again concluded that the plan was neither over- nor underinclusive.²⁹³ Both decisions predated *Adarand*.²⁹⁴

289. *Peightal v. Metro. Dade County*, 940 F.2d 1394 (11th Cir. 1991) (*Peightal I*). This litigation is placed in this Article chronologically prior to the 1992 case of *O'Donnell Construction Co. v. District of Columbia*, 963 F.2d 420 (D.C. Cir. 1992), because this section discusses both the 1991 and 1994 appeals in the *Peightal* litigation.

290. *Peightal I*, 940 F.2d at 1408–10.

291. *Id.* at 1411.

292. *Peightal v. Metro. Dade County*, 26 F.3d 1545, 1548 (11th Cir. 1994) (*Peightal II*).

293. *Id.* at 1560–61.

294. Although both decisions predate the Supreme Court's decision in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), they are included in this discussion because they continue to be good law within the Eleventh Circuit, and because they have been cited recently by the Second Circuit in *Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195 (2d Cir. 2006).

Under the County plan, applicants for firefighter positions with the Dade County Fire Department took an examination and were placed on a hiring list.²⁹⁵ The County's program sought to address the low number of minorities in the Fire Department workforce, and to that end pursued hiring goals to increase the number of women, Blacks, and Hispanics in the Department.²⁹⁶ The hiring list grouped and ranked applicants by score within the applicant's particular race and gender classification.²⁹⁷ The plan included the following group classifications: "Black males, Black females, White females, Hispanic males, Hispanic females, and White males."²⁹⁸

In the 1991 appeal, the plaintiff alleged that the plan was overinclusive because White European Spaniards were included in the Hispanic classifications although they showed "no significant cultural or linguistic discernability from non-Hispanic [W]hite persons."²⁹⁹ The plaintiff further argued that the plan was underinclusive because it did not include members of non-Hispanic "national and ethnic groups that are susceptible to similar discrimination,"³⁰⁰ as those within the "Hispanic" group.

Dade County defined Hispanic as "[a]ll persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race."³⁰¹ The plan further required that a person's claimed identification with a racial or ethnic group "should accompany strong visible indication that the person *culturally* and *linguistically* identifies with the group he or she claims."³⁰²

The plaintiff's arguments illustrate how his claims of over- and underinclusiveness were interwoven with stereotypes of racial and ethnic characteristics, confusing "race," "color," "national origin," "ethnicity,"

Thus, the Eleventh Circuit's cases are a legally valid part of the discourse on national origin subclassifications.

295. *Peightal I*, 940 F.2d at 1395-96.

296. *Id.* at 1395. The County's goal was to increase the number of women and minorities in the Fire Department as compared with the number of women and minorities in the general population. *Id.* at 1396 ("The stated long-term goal of the Department's Plan was 'to attain parity [between the Department's work force and] the population.'").

297. *Id.* at 1396.

298. *Id.*

299. *Id.* at 1408.

300. *Id.* at 1409.

301. *Id.* Dade County applied the Equal Employment Opportunity Commission's (EEOC) definition of "Hispanic." *Id.*

302. *Id.* (footnote omitted). The plan adopted this requirement from the EEOC. *Id.*

and “culture.” For example, the plaintiff claimed overinclusiveness because anyone who could trace their ancestry to Spain was included in the definition, even though, the plaintiff argued, “white European Spaniards with no visibly discernable ‘Hispanic’ characteristics have not been subjected to past or present discrimination”³⁰³ The court rejected this argument because of the plan’s self-identification verification process which required, as described above, “visible indication” of the person’s cultural and linguistic identification with the racial or ethnic group.³⁰⁴

The plaintiff’s underinclusiveness claim fared no better before the court. The court subjected the underinclusiveness claim to a rationality test similar to the Second Circuit’s approach in *Jana-Rock*.³⁰⁵ The plan excluded persons of European national origin, Middle Eastern national origin, and Slavic/Russian national origin, but included persons of Spanish origin.³⁰⁶ The plaintiff argued that the plan should have included members of other groups who are “culturally and linguistically discernable and subject to discrimination in the work place as a result of their ethnic characteristics.”³⁰⁷ Such exclusion, the plaintiff argued, rendered the plan underinclusive and therefore unconstitutional.³⁰⁸ The Eleventh Circuit concluded that the Equal Protection Clause does not require that the plan provide “for every ethnic group that may exist in a community.”³⁰⁹ The circuit court found that a state acts rationally if it may “conclude that the groups . . . preferred had a greater claim to compensation than the groups it excluded.”³¹⁰ Since “[B]lack and Hispanics” are “the two most prevalent minority groups” in Dade County, the circuit court concluded that the choice to address past discrimination against them was rational.³¹¹

Whether the Eleventh Circuit subjected the plaintiff’s underinclusiveness argument to strict scrutiny and the narrowly-tailored

303. *Id.* The plaintiff argued that due to this extension to those not discriminated against, the plan was not narrowly tailored and could not survive strict scrutiny. *Id.*

304. *Id.*

305. *See id.* at 1409–10.

306. *See id.*

307. *Id.* at 1409.

308. *Id.*

309. *Id.*

310. *Id.* at 1409–10 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 359 n.35 (1978)).

311. *Id.*

prong of that test, or to the rational basis test, the court relied for its rejection of the plaintiff's argument on an erroneous comparison of "Hispanic"—treated as a homogeneous ethnic group—to other groups.³¹² This comparison was initiated by the plaintiff in his argument in support of the unconstitutionality of the program.³¹³ As discussed above, the circuit court's approach ignores the historical and cultural realities of the various populations included within the category of "Hispanic."

In his 1994 appeal, the plaintiff again charged that the plan was both overinclusive and underinclusive because the definition of "Hispanic" was amorphous and improperly relied on a self-identification process.³¹⁴ He argued that the plan was overinclusive because "it encompass[e] the same variety of ethnic and racial characteristics as are found in the generalized classification of all English speaking nations"³¹⁵ Thus, he claimed the plan did not properly incorporate distinct racial characteristics for members of the "Hispanic" category. The circuit court rejected this argument. In order to avoid inclusion of persons not within the definition, the County applied the approach of the EEOC which required "'strong visible indication that the person *culturally* and *linguistically* identifies with the group he or she claims."³¹⁶ The court concluded that this procedure ensured the plan would not be overinclusive because it would screen out non-minorities not eligible for relief.³¹⁷ Thus, the court explicitly endorsed the program's reliance on cultural identification as a basis for inclusion in the race-based program.

The investigatory procedures utilized by the affirmative action office operated as a check to the self-identification procedure and also operated to narrow the definition of the protected group to those with strong visible indications of cultural and linguistic identification with the group, thus ensuring that non-minorities would not erroneously receive race-conscious relief.³¹⁸

312. *See id.* at 1407–09.

313. *See id.* at 1408–09.

314. *See* Peightal v. Metro. Dade County, 26 F.3d 1545, 1559 (11th Cir. 1994) (*Peightal II*).

315. *Id.*

316. *Id.* at 1559.

317. *Id.* at 1559–61.

318. *Id.* at 1559–60. The court also notes linguistic identification as a basis for inclusion in the program. *Id.*

The court rejected the underinclusiveness argument because the plaintiff failed to establish that those excluded from the program—such as people of Portuguese descent—suffered prior discrimination.³¹⁹ Thus, like the Second Circuit in *Jana-Rock*, the court firmly placed the burden on the plaintiff to establish the record of subclass discrimination.³²⁰ Yet the Eleventh Circuit stated that there is difficulty in defining a group without relying on some social stereotype:

The most troubling facet of defining a group who have [sic] been the victims of prior discrimination is the derivation of the definition itself Because of the irrationality of the definitional process underlying social stereotypes, it is equally vexatious to develop a definition, or to criticize one that has been developed, without resort to the same stereotypes which application of the definition seeks to eradicate.³²¹

The Eleventh Circuit’s approach to the “Hispanic” definition and subclassifications is based on stereotypes of racial parameters and comparisons. First, the court’s analysis of the overinclusiveness argument relies on the construction of “Hispanics” as a racial minority, a minority that can be discerned based on physical characteristics. Although the circuit court speaks of “cultural and linguistic identification with the group”³²² as a basis to determine category members, the court provides no basis for establishing such identification other than “strong *visible* indications” that ensure “non-minorities would not erroneously receive race-conscious relief.”³²³ The court equated visible markers and cues with legal evidentiary proof of racial minority status. The court did not clarify how language and culture can be used as legal proof of racial minority status.

319. *Id.* at 1561.

320. *Id.*

321. *See id.* at 1561 n.25.

322. *Id.*

323. *Id.* at 1559–60 (emphasis added). In further rejecting the plaintiff’s overinclusiveness argument, the circuit court relied on *Croson*’s statement that inclusion of racial groups that have not suffered prior discrimination could indicate the plan was not narrowly tailored. *See id.* at 1560 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989)). The circuit court also noted that Peightal had not shown that a non-minority received race-conscious relief:

The affirmative action office interviewed applicants or employees whose minority status was challenged, applying the EEOC guidelines to the person’s self-identification [The plaintiff] failed to adduce one instance in which application of the definition and guidelines produced an overinclusive result, whereby a non-minority received race-conscious relief.

Id. at 1560.

The court's analysis is particularly troubling since its other reference to language as a "Hispanic" category marker is used to demonstrate the difficulty in developing accurate definitions:

[A] number of affirmative action programs have tried to develop a narrower substitute for the term "Hispanic" [T]hese alternative definitions may similarly suffer from the infirmity of overinclusiveness under the analysis employed by [the plaintiff]. For example, Spanish-surnamed individuals could include those individuals who have married someone of Spanish ancestry but who themselves lack Spanish heritage. *Similarly, the group of Spanish-speaking individuals could include persons of Caucasian ancestry who have simply chosen to learn a second language.*³²⁴

While the Eleventh Circuit struggles with a basis for constitutionally testing the validity and propriety of the Hispanic category definition and its constituent subclassifications, it relies on race-based measures and relegates linguistic markers to the status of mutable characteristics with little probative value. Yet, as discussed in this Article, language is not merely a method of communication, but is a significant cultural and national group identifier.³²⁵ The court's decision is another example of the strained analysis courts apply to national origin categories and subclassifications and the judicial uncertainty as to the appropriate consideration and treatment to accord language and culture, independent of their connection to race.

F. O'Donnell Construction Co. v. District of Columbia

Analysis of case law in this area would not be complete without an overview of *O'Donnell Construction Co. v. District of Columbia*,³²⁶ a Fifth Amendment Equal Protection case decided after *Croson* and before *Adarand*. Although it did not address Latino or other subclassifications, the District of Columbia Circuit Court of Appeals held that the District of Columbia's Minority Contracting Act ("Act") violated the plaintiff's equal protection right.³²⁷

324. *Id.* at 1560 (internal citations omitted) (emphasis added).

325. *See supra* Part I.B.

326. 963 F.2d 420 (D.C. Cir. 1992).

327. *Id.* at 421. In accordance with the Fifth Amendment, the Fourteenth Amendment's Equal Protection principles apply to the District of Columbia's legislation. *Id.* at 424 (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976)).

In deciding that the plaintiff in *O'Donnell* was entitled to a preliminary injunction, the circuit court considered the constitutionality of the Act's requirement that each District agency allocate its construction contracts in order to provide thirty-five percent of the monetary value of the contracts to local minority business enterprises (MBE).³²⁸ The Act defined "minority" as: "Black Americans, Native Americans, Asian Americans, Pacific Islander Americans, and Hispanic Americans, who by virtue of being members of the foregoing groups, are economically and socially disadvantaged because of historical discrimination practiced against these groups by institutions within the United States of America."³²⁹

To achieve the thirty-five percent goal, the District of Columbia set up a sheltered market program, under which agencies set aside contracts and subcontracts for bidding exclusively among MBEs.³³⁰ While MBEs could bid on both sheltered market and non-sheltered market contracts, non-MBE contractors could only bid on non-sheltered market contracts.³³¹

The court concluded that the Act could probably not survive constitutional review.³³² There was no constitutionally competent evidence to establish that "agencies of the District of Columbia had been favoring [W]hite contractors over non-[W]hites, or that the typical bidding process was somehow rigged to have this effect."³³³ Moreover,

328. *Id.* at 422.

329. *Id.* (quoting D.C. CODE ANN. § 1-1142(1)). The District of Columbia passed legislation, entitled the "Small, Local, and Disadvantaged Business Enterprise Development and Assistance Act of 2005," D.C. CODE ANN. § 2-218.01, that provides mandatory set-asides of contracts for "disadvantaged business enterprises." See *id.* § 2-218.46(a)(1) (2007) "Disadvantaged business enterprises" includes a business enterprise owned, operated, and controlled by economically disadvantaged individuals. See *id.* § 2-218.33(a)(1). An "economically disadvantaged individual" is statutorily defined as:

an individual whose ability to compete in the free enterprise system is impaired because of diminished opportunities to obtain capital and credit as compared to others in the same line of business where such impairment is related to the individual's status as socially disadvantaged. An individual is socially disadvantaged if the individual has reason to believe that the individual has been subjected to prejudice or bias because of his or her identity as a member of a group without regard to his or her qualities as an individual.

Id. § 2-218.02.

330. *O'Donnell*, 963 F.2d at 422.

331. *Id.*

332. *Id.* at 428–29 (finding that the plaintiff had made a strong showing that it was likely to prevail in its equal protection challenge and reversing the district court's denial of the plaintiff's motion for a preliminary injunction).

333. *Id.* at 425 (comparing the lack of evidence of historical discrimination with *Associated Gen.*

due to the insufficiency of the evidence, the court could not assess “whether the sheltered market approach is a remedy ‘narrowly tailored to remedy prior discrimination.’”³³⁴ The court noted that “the scope of that remedy must depend upon the scope of the violation.”³³⁵

The court similarly concluded that there were no findings that all of the groups listed within the definition of “minority” had suffered discrimination.³³⁶ Specifically, the court stated:

[T]he Council has never made any findings with respect to discrimination in the construction industry against Hispanic Americans, Asian Americans, Pacific Islander Americans, or Native Americans . . . [T]here is no way of saying whether the remedy the Council has chosen is narrowly tailored to provide remedial relief for the amalgam of minority groups covered by the Act.³³⁷

Although it appears that there were no findings whatsoever regarding “Hispanics” and the other groups cited by the court, any such findings would have had to set forth the boundaries of the definition in order to properly assess the nature of the discrimination.

IV. AN EQUAL PROTECTION STANDARD FOR LATINO NATIONAL ORIGIN SUBCLASSES

The strict scrutiny and rational basis tests are not the proper legal standards for assessing national origin subclassifications because these tests as applied have given too much weight to the role of race as compared to other characteristics. National origin subclassifications should be assessed according to a contextualized analysis of discrimination against Latino members of the subclass; such analysis must incorporate more than race-based discrimination. I propose an equal protection standard responsive to national origin discrimination against Latinos, experienced because they are members of a general “Latino” category, *and* because they are members of particular

Contractors of Cal. v. Coal. for Econ. Equity, 950 F.2d 1401, 1414 (9th Cir. 1991), where that court noted substantial findings of prior discrimination in the local construction industry).

334. *Id.* at 427 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989)).

335. *Id.* at 425 (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419-20 (1977)).

336. *Id.*

337. *Id.*

subclasses that constitute that category.³³⁸ The standard seeks to contextualize culture, ethnicity, language, and historical status, along with race.³³⁹ Moreover, the proposed equal protection subclassification standard would require not only a consideration of how the subclasses' experiences may be varied, but also on how they share commonalities. These commonalities are captured in categorization as "Latinos."

Peoples from different Latin American and Latino Caribbean countries have made their home in the United States for over a century.³⁴⁰ For various political and social reasons, these populations from different countries with different histories have been placed under the homogeneous categories of "Latino" and "Hispanic."³⁴¹ While these homogeneous categories efficiently identify disparate peoples who share common languages (Spanish and Portuguese), regional histories of conquest and dominion,³⁴² and similar discriminatory experiences within the United States,³⁴³ these categories mask the heterogeneity of the subpopulations that make up "Latinos" in the United States. As has been discussed in this Article, subclassifications are the national origin subpopulations that constitute the "Latino" and "Hispanic" category membership recognized by government and the U.S. population, and they are the primary groups that Latinos use for self-identification.³⁴⁴ As a legal matter, these subclassifications are necessary in order to deconstruct the "Latino" and "Hispanic" category into its constituent members, to "dehomogenize" the "Latino" identity, and to assess the constitutionality of treatment based on affiliation with a particular country of national origin.

Courts have taken different approaches to assessing the Latino category and subclassifications, generally focusing on the race-focused

338. See *supra* Part I.C and accompanying notes. The standard proposed in this Article is also applicable to other national origin and ethnic groups, but relies on the treatment of Latinos under the law to illustrate its viability and application.

339. As discussed in this Article, context matters. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (stating that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause").

340. See Héctor Cordero-Guzmán & Ted Henken, *Immigration, in 2 THE OXFORD ENCYCLOPEDIA OF LATINOS & LATINAS IN THE UNITED STATES* 340–46 (Suzanne Oboler & Deena J. Gonzalez eds., 2005).

341. See *supra* Part I.B & .C.

342. See generally MORIN, *supra* note 12.

343. See *supra* note 90.

344. See PEW HISPANIC CENTER, 2002 NATIONAL SURVEY OF LATINOS, *supra* note 76, at 23; see also *supra* Part I.B and accompanying notes.

strict scrutiny/rational basis dichotomous analytic model.³⁴⁵ These approaches do not sufficiently consider the range of Latino experience, in particular the varied histories of particular national origin subclasses. A more appropriate subclassification equal protection analysis would instead hold subclassifications constitutional if the broad governmental classification based on national origin or ethnicity³⁴⁶ survived *Adarand* and *Croson* strict scrutiny.³⁴⁷ In order to survive constitutional review the inclusion of subclassifications, however, must be based on intragroup dynamics and histories of the relevant target subgroup. Thus, the national origin group “Latino” or “Hispanic” would be defined by subclassifications that reflect the historical and political position of persons from specific subgroups of Latin American and Latino-Caribbean descent known within the jurisdiction. Although the Equal Protection Clause protects persons not groups,³⁴⁸ the Supreme Court has recognized that the history of groups with which individuals identify has a place within equal protection analysis.³⁴⁹ Therefore, there is Supreme Court precedent for a full analysis of the propriety of subclassifications based on the historical and political context of the target subgroup.

Applying the proposed standard to the circuit court cases discussed in the prior section illustrates this analysis. The New York statute at issue in *Jana-Rock* defined those eligible to participate in its minority-owned business program to include Hispanics.³⁵⁰ This group is defined in the statute as “persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American [sic] of either Indian or Hispanic origin,

345. See *supra* Part III and accompanying notes.

346. The broad categories have usually included race, national origin, ethnicity and, occasionally, gender. See RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* 733 (4th ed. 2007).

347. In this Article, I have not explored or critiqued the propriety of the Court’s Equal Protection analytical framework. I have objections to the current Equal Protection analysis applied by the courts based on Supreme Court precedent. However, since it appears that the existing framework, with its attendant requirement that all race and national origin-based governmental classifications satisfy strict scrutiny, will continue to hold validity with the Supreme Court for some time, I have accepted, for purposes of the discussion in this Article, that national origin subclassifications must comply with the existing Equal Protection Clause scrutiny framework, regardless of legislative motive.

348. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (“[T]he ‘rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.’” (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948))).

349. See *supra* Part I.A.

350. N.Y. EXEC. LAW § 310(8)(b) (2005).

regardless of race.”³⁵¹ Under the proposed equal protection standard, New York’s decision to provide a program based on national origin (the “Hispanic” category) must survive strict scrutiny. The program must be narrowly tailored to serve a compelling governmental interest. In *Jana-Rock* the plaintiff did not challenge the State’s decision to institute an affirmative action program, so the court did not have occasion to consider whether New York could institute such a program.³⁵² Assuming that affirmative action would be a legitimate programmatic approach to discrimination against minority-owned businesses, the court would move to the next stage of the analysis.

The court would then determine whether the subclassifications as defined reflect a historical, cultural and political reality and experience of discrimination and inequality by members of the subclass. For example, New York would have to provide a basis for including within its definition of “Hispanic” persons who identify as Puerto Rican. In the case of New York this would be a rather straightforward analysis of the history of discrimination and inequality of Puerto Ricans in New York State as relevant to the establishment of Puerto Rican-owned businesses. A similar burden of proof would apply to the other subclassifications. Although the court specifically stated that the question whether Spaniards also suffer comparable discrimination to that suffered by Hispanics was not before it and did not take a position on this issue,³⁵³ it is exactly the type of question that would be resolved under the proposed standard.³⁵⁴ Since as the court noted there was evidence of discrimination against Hispanics and no such evidence of a similar history in the case of Spaniards, under the proposed standard New York’s choice of Latino subclasses would survive based on the evidence of discrimination against Hispanics generally and subclasses specifically, and the lack of comparable evidence in the case of Spaniards.

Ostensibly, the court in *Builders Association* recognized the significance of the historical and political context of discrimination against members of the subclassifications.³⁵⁵ The Seventh Circuit’s

351. *Id.*

352. *Jana-Rock Constr., Inc. v. N.Y. State Dep’t of Econ. Dev.*, 438 F.3d 195, 210 (2d Cir. 2006).

353. *Id.* at 213 n.8.

354. In *Jana-Rock*, the court correctly concluded that the plaintiff could not establish anti-Spanish animus because “it was not irrational for New York to conclude that Hispanics of Latin American origin were in greater need of remedial legislation.” 438 F.3d at 214.

355. See *Builders Ass’n of Greater Chicago v. County of Cook*, 256 F.3d 642, 647 (7th Cir.

approach thus is similar to the standard proposed in this Article. However, the Seventh Circuit narrowly defined Hispanic, as discussed above.³⁵⁶ The equal protection standard suggested in this Article would not, as the Seventh Circuit did, grant coverage to Latino subclasses solely because they are a non-White race of foreign born immigrants. The equal protection standard would also consider the discrimination suffered as Latinos and members of subclasses in Cook County and Illinois, including discrimination suffered irrespective of immigrant status or pigmentation. The experiences based on race or immigrant status would be considered under this approach but would not necessarily be the focus of the analysis. Discrimination, for example, based on cultural differences or language may also be considered.

Although the court's decision in *Drabik* does not contain a definition or discussion of the Hispanic category and any potential subclasses, it does refer to another national origin subclass.³⁵⁷ It also further indicates the court's requirement of a race conscious justification.³⁵⁸ The Sixth Circuit's comparison of the Thai subclass to African Americans lacks any consideration of how the experiences and position of the subclass is related to the larger category—here the "Oriental" category³⁵⁹—a comparison integral under the proposed subclassification equal protection standard's approach. Moreover, the court's approach compares a subclass to a broader category,³⁶⁰ rather than comparing the Hispanic category to the African American category, a more meaningful and accurate comparison set.

The *Monterey Mechanical* court had before it the statutory subclassifications for the Hispanic category.³⁶¹ Unlike the court in *Drabik* which focused on the propriety of the subclass as compared to a larger category,³⁶² the court in *Monterey Mechanical* focused on the

2001).

356. See *supra* Part III.B.

357. *Associated Gen. Contractors of Ohio v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000) (*Drabik*).

358. *Id.* at 738.

359. *Id.* at 737.

360. *Id.*

361. *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 714 (9th Cir. 1997) (quoting CAL. PUB. CONT. CODE, § 10115.1(d) (1994), which defined Hispanic as "a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin").

362. *Drabik*, 214 F.3d at 737–38.

subclass history of discrimination.³⁶³ Here the court failed to consider the subclass's connection to the Hispanic category.

Under the proposed equal protection analysis, the term "Hispanic" in the statute at issue in *O'Donnell Construction Co.* would be determined based on the experiences of Latinos in Washington, D.C.. These experiences would include those based on association with the Latino category and with national origin subclass affiliation.

The approach of the court in the *Peightal I & II* litigation is vastly different from the proposed subclassification standard.³⁶⁴ The *Peightal II* court focused on physical or visible characteristics, thus relying on racialized markers.³⁶⁵ Moreover, the court also treated linguistic identification as the equivalent of language acquisition³⁶⁶—which it is not, because for Latinos language serves as more than a mode of communication.³⁶⁷ In contrast, the proposed subclassification standard would consider the way Latinos and subclasses of Latinos are treated based on race, culture and language, and would not prioritize visual physical markers, or discount the role of linguistic identification.

The equal protection subclassification standard proposed in this Article requires government to develop the basis for its subclassification structure. While it may appear as an additional burden on government not intended by the Supreme Court in *Adarand*, it is wholly in line with *Adarand's* equal protection analysis and the Court's Fourteenth Amendment jurisprudence. At a minimum, it is arguably the type of analysis required of the government by the narrow-tailoring prong of equal protection analysis. The difference is that while the Supreme Court has specifically applied this prong to the broad categorization of "race" and "national origin," it has only commented on how the subclassifications and further demarcations of protected groups must be justified and rationalized as narrowly tailored to further a compelling interest.³⁶⁸

363. *Monterey Mech.* at 714 (considering the propriety of including the subclassification "Aleut" in an affirmative action statute in California).

364. See *Peightal v. Metro. Dade County*, 940 F.2d 1394 (11th Cir. 1991) (*Peightal I*); *Peightal v. Metro. Dade County*, 26 F.3d 1545 (11th Cir. 1994) (*Peightal II*).

365. *Peightal II*, at 1559–60.

366. *Id.* at 1560.

367. See *supra* Part I.B.

368. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (plurality opinion); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

This Article proposes that the subclassification analysis is no less consequential than the analysis of the broad category of “Hispanic” or “Latino.” The government must do its work so that the subclassification can withstand review and so that government genuinely and properly responds to the needs of the subclasses encompassed within “Hispanic” and “Latino” categories. Thus, as in *Jana-Rock*,³⁶⁹ a Puerto Rican subclassification can survive review, but a subclassification that includes persons who identify as Spaniards and Portuguese may be unable to survive a searching review if the government is hard-pressed to establish a history of discrimination and exclusion, or a cultural and political experience of marginalization that disenfranchises or disempowers those who identify with these subclasses, as compared with subclasses with Latin American and Latino Caribbean histories.

CONCLUSION

The outcome-determinative question of how subclassifications within national origin categories are legally evaluated has immediate currency because the federal government and state governments rely on subclassifications to define “Latino” and “Hispanic” for minority business assistance programs.³⁷⁰ The question also demands consideration as the United States continues to grow and transform into a nation of people representing highly stratified racial and ethnic categories. Federal, state, and local governments will continue to develop policies and strategies for equitably distributing government funds and contracts to a highly diverse populace with competing claims on interventionist policies and programs. To the extent that society and government officials view such contract opportunities as vital to national and local economies, questions about how to define and categorize those interested in such opportunities must be resolved. Governments’ choices about how to denote program beneficiaries within a particular classification scheme have been and will continue to be subject to claims of unfair and unjustifiable racial and national origin classifications. As governmental officials strive to ensure that their procedures and

369. *Jana-Rock Constr. v. N.Y. State Dep’t of Econ. Dev.*, 438 F.3d 195 (2d Cir. 2006).

370. *See, e.g.*, 15 U.S.C. § 637(d)(3)(C) (2000); N.Y. EXEC LAW. L. §§ 310–318 (2005). These programs are best known as “affirmative action” programs for minority-owned businesses, even though they are actually remedial programs designed to remedy past discrimination and thus are more akin to remedies that will compensate the recipient for something they were due and denied because of their race or national origin.

substantive criteria are fair and workable, they should also continue to recognize groups that have been historically deprived access to and excluded from such economic opportunities. That task as applied to Latinos should also encompass a response to the various subgroups that form Latino identity in the United States.

An analysis that explores the relevance of ethnicity, culture, language, and race is paramount to protecting and ensuring the rights of all members of a multicultural and multilingual population. This Article has proposed a standard based on historical and socio-political experiences of persons in the Latino category and within its distinct subclasses, as well as the relational marginalization of subclasses based on intra- and intergroup subclass status. The future of equal protection discourse depends on reconstruction of equal protection analysis and on new standards which adequately respond to the experiences of Latinos and other national origin groups.

