

BEING LATINO IN THE 21ST CENTURY: REEXAMINING POLITICIZED
IDENTITY & THE PROBLEM OF REPRESENTATION

SCOTT B. ASTRADA* & MARVIN L. ASTRADA**

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INTRODUCTION

Politicized identity, as a means to garner voting support, played a central role in U.S. political discourse during the months leading up to and including Election Day, November 8, 2016. Predictions made by academics, pollsters, pundits, and a plethora of other commentators relied upon the predictability of politicized identity to buttress sweeping claims that the Latino voting bloc would be a significant and incontrovertible factor in ensuring the success of the Democratic Party’s candidate on Election Day.¹ The results of this election, however, call into

* Scott B. Astrada (J.D., M.B.A, Marquette University) is a legislative and public policy professional in Washington, D.C.
** Marvin L. Astrada (M.A., PhD., Florida International University; J.D., Rutgers University Law School; M.A., C.A.S., Wesleyan University) teaches in the Politics & History Department at New York University – Washington D.C.

¹ Predictions for Latino support for Clinton was slated to be higher than President Obama’s in the last election, and that the election was already lost for the Donald Trump with his controversial remarks about Mexican-Americans. See, e.g., Lisa Mascaró, *Latino support for Clinton set to hit record high for a presidential candidate — and for Trump, a new low*, L.A. TIMES (Nov. 6, 2017, 9:17 AM), <http://www.latimes.com/nation/politics/trailguide/la-na-trailguide-updates-latino-support-for-hillary-clinton-at-1478451714-htmlstory.html> [https://perma.cc/A3HV-K9VE]

question the elements which ground and encapsulate politicized Latino identity as articulated by political and cultural Latino and non-Latino policy and political leaders, as well what this Latino identity actually signifies. That is, the observable disconnect between a distinctly politicized identity as employed by various commentators, e.g., mainstream media and academics, in making predictions and the actual behavior of those that were emplaced within that identity raises questions regarding its accuracy and its representational capacity. For instance, the issue of immigration may indeed be important to the variegated communities and individuals that fall under a politicized Latino identity, but it is neither the singular nor even the highest priority for defining communities' and individuals' interests. Politicized Latino identity, defined by political elites, media, academics, and others similarly situated, may therefore not accurately represent the realities of those that find themselves emplaced within its confines.² Contrary to what may seem a homogenous, unitary Latino identity or a collaborative collection of diverse subgroups, the actuality appears to be quite the opposite.³ In the case of the election results, in very direct and simple terms, "the first thing you have to do is to accept that Latino voters aren't monolithic, one-dimensional, or single-issue oriented . . . some of us may define ourselves first by our ethnicity while others just see ourselves as Americans. Period."⁴

In light of the foregoing, the question of whether there is a serious disconnect between the signifier of "Latino" as articulated and disseminated by elites in public discourse, and the verity and accuracy of the identity signifier's representational capacity grounds this article. We do not engage the politics of Latino identity as it is posited in mainstream political discourse, on its terms. We do not seek to explain and understand politicized Latino identity from the lens of the signifier. Rather than attempt to start from a meta-narrative of what Latino *is*, this article starts with the idea of Latino unity itself, viz., the signifier's capacity to capture, reflect, and represent multitudinous, diverse identities within the formal conceptual classification of "Latino" identity. We highlight and discuss the politics of Latino identity to draw attention to a broader issue and concern going forward after this election cycle: it is imperative that we revisit and reexamine how a distinct, politicized Latino identity finds expression in political discourse, and how effectively that identity represents the distinct and diverse communities that are circumscribed within its borders. To begin such a reexamination, we will focus on legal and political discourses that are

(predicting the Latino vote would play a crucial role in turning out for Hillary Clinton on election day); see also Dara Lind, *This is the Year of the Latino Vote*, VOX (Nov. 7, 2016, 10:00 AM), <http://www.vox.com/policy-and-politics/2016/11/7/13515248/latinos-vote-2016-clinton> [<https://perma.cc/99H8-CAL8>] (suggesting the "sleeping giant" Latino voting bloc could be awakening).

² The "blue firewalls" that Latinos were supposed to comprise in favor of the Democratic candidate failed to materialize in the manner in which they were predicted; we contend that the identity on which those expectations were based did not fully capture the actual, substantive identity of those who fall under the politicized Latino rubric. See, e.g., Suzanne Gamboa, *Latinos Who Voted, Campaigned For Trump Found Common Ground With Him*, NBC NEWS (Nov. 11, 2016, 12:38 PM), <http://www.nbcnews.com/news/latino/latinos-who-voted-campaigned-trump-found-common-ground-him-n682591> [<https://perma.cc/HS5R-HSBT>] ("Helen Aguirre Ferré, who had been a Trump critic before joining the Republican party staff to help elect him, said what needs to be understood is that Hispanics who voted for Trump were very American in their decision. They were concerned about school choice, the Supreme Court and ending abortions. They also agreed with him on immigration reform. . . . The campaign found heavy support among Hispanics who are concerned about abortion, particularly among Hispanic Christian evangelicals, including Puerto Ricans in Florida's I-4 corridor; a growing number of are becoming evangelicals, she said.").

³ *Id.*

⁴ Ruben Navarrette Jr., *Why the Latino Vote Didn't Save America*, THE DAILY BEAST (Nov. 9, 2016, 6:55 AM) <http://www.thedailybeast.com/articles/2016/11/09/why-the-latino-vote-didn-t-save-america.html> [<https://perma.cc/G2R2-JSF2>].

both products and producers of politicized Latino identity as it is presently articulated. Engaging in this exercise provides insight into the consequences that politicized identity has on public policy discourse, and the power dynamics that stem from an identity signifier's accuracy of its nexus with disparate Latino subgroups.

This work is exploratory in nature, and seeks to probe and question identity, race, and ethnicity, as well as the political consequences that accrue from subscribing to Latino as a unit of political analysis upon which to explain and understand the conceptual underpinnings of Latino identity construction.⁵ The aim is to provide fodder for critical inquiry as to the appropriate fate of politicized Latino identity as it presently stands, and thus reexamine Latino as politicized identity while seeking to provide an alternative conceptualization to render the signifier *Latino* more accurate and more equitable in representing those communities and individuals that fall within the identity signifier. We begin our analysis with a legal case that exemplifies the contentious, politicized, and highly problematic nature of the Latino identity signifier as presently articulated. We then discuss how this case reflects the broader problem that underpins Latino identity from a broader perspective. More specifically, we critically examine the notion of a unified, singular Latino identity and the limits of its representational capacity within the present identity discourse. Politicized Latino identity is further examined via historical contextualization and the Latino voter. Within our discussion, we offer an alternative conceptualization that may help make Latino a more representative identity signifier.

I. THE POLITICIZED LATINO IN LEGAL & POLITICAL DISCOURSE

A. *Problematizing Latino Identity: Exploring the Tensions Between Identity, Discourse & Representation*

In early 2016, the United States Court of Appeals for the Second Circuit held that, under federal law, "Hispanic"⁶ qualifies as a "race" when determining if a plaintiff can be afforded protection from discrimination under Title VII of the Civil Rights Act of 1964.⁷ More specifically, the Court of Appeals considered the question of whether or not "Hispanic" constitutes a racial category when interpreting Title VII. The court, relying on the interpretation that ethnicity is a race for purposes of 42 U.S.C. § 1981, held that the same should hold true for purposes of Title VII.⁸ By infusing an ethnic designation with race, thereby producing a racialized signifier, the court developed and built upon the politicized identity edifice that has been under active construction since the 1960s. The court supported its conclusion in part by noting that the U.S. Supreme Court has also assumed that Hispanic is in legal actuality a racial signifier.⁹ In the

⁵ We recognize there are potential economic, social, or other consequences of ascribing one identity to all Latinos; however, those considerations are beyond the scope of this article.

⁶ Note: While the court in *Village of Freeport v. Barrella*, 814 F.3d 594 (2016) employs the term "Hispanic" (acknowledging the deep historicity, complexity, and confusion that underlie *Hispanic* and *Latino* when used to define the same identity group) we use *Latino* because it better captures the highly politicized nature of identity on a micro as well as macroscopic level of analysis. We are aware there are very different interpretations and understandings of each signifier, but for the purposes of this article, we view the court's racializing of Hispanic to have the same effect as if it had racialized Latino. See *Id.* at 604 n. 21 for the court's discussion on Hispanic v. Latino.

⁷ *Id.* at 598.

⁸ *Id.*

⁹ *Id.* at 605 n.27, 607 n.45 (citations omitted); see also *Local 28 of Sheet Metal Workers' Int'l Ass'n v. E.E.O.C.*, 478 U.S. 421, 464 n.37 (1986) (plurality opinion) (discussing a potential Title VII claim based on "preferential

broader legal and public policy landscape, the Second Circuit has, by judicial fiat, collapsed ethnicity into race:

Despite societal confusion regarding Hispanic identity, the existence of a Hispanic “race” has long been settled with respect to § 1981. Although that statute never uses the word “race,” the Supreme Court has construed it as forbidding “racial” discrimination in public or private employment. The Court has further defined “racial discrimination,” for purposes of § 1981, as including discrimination based on “ancestry or ethnic characteristics.”¹⁰

Thus, the court claims that it is merely formalizing what is already an accepted practice in the broader social context, i.e., the racialization of Latino identity. This “new” formal designation has profound consequences for the individuals and communities subject to the racialized signifier, and for the way(s) in which identity is articulated and manifested within the public realm, e.g., public policy and the law. The Second Circuit, in its analysis and its conclusion that Hispanic is indeed a racial category, pondered what exactly constitutes Hispanic when interpreting federal law.¹¹ In its legal analysis, the court addressed a question that is as political as it is existential: *What does it mean to be Hispanic (Latino)?*¹²

treatment to blacks and Hispanics based on race”); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) (“The antidiscrimination provision [of Title VII] seeks a workplace where individuals are not discriminated against because of their racial, *ethnic*, religious, or gender-based status” (emphasis added)); *Hernandez v. New York*, 500 US 352, 375 (1991) (discussing whether peremptory challenges of Hispanic jurors constituted unconstitutional racial discrimination).

¹⁰ *Barrella*, 814 F.3d at 604-05 (footnotes omitted). 42 U.S.C. § 1981(a) provides, in relevant part, that “[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens.” *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 609 (1987).

¹¹ See generally *Barrella*, 814 F.3d 594. In its analysis in footnote 21 of *Barrella*, the Second Circuit stated that the choice between Hispanic and Latino has provoked anxiety and controversy:

As we have previously observed, the terms reflect “nuanced differences of perspective” regarding personal or ethnic identity. *Latino Officers Ass’n, N.Y., Inc. v. City of New York*, 196 F.3d 458, 460 n. 1 (2d Cir.1999). “Hispanic” emphasizes links to the language, people, or culture of Spain. “Latino” avoids that connection to the “Mother Country” and points instead to “Latin” America, a geographic entity fostered, ironically enough, by French imperialists who hoped to gain influence over the region by emphasizing historical and linguistic ties between France and the former colonies of Spain and Portugal. *Id.* Despite occasional attempts to make one label more “correct” than the other . . . both terms have respectable pedigrees. The *Oxford English Dictionary* records “Latino” as first appearing in English in 1946, but the word does not seem to have entered widespread use until the 1960s . . . “Hispanic” began to be used in its modern ethnic sense in politics and public affairs at about the same time. See, e.g., *Br. of Amicus Curiae Louis J. Lefkowitz, Att’y Gen. of State of N.Y.*, at 39, *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (Nos.847, 877), 1966 WL 115487 . . . Federal courts began using both “Hispanic” and “Latino” in the early 1970s. See *Officers for Justice v. Civil Serv. Comm’n of City & Cty. of San Francisco*, 371 F.Supp. 1328, 1332 (N.D.Cal.1973) (first reported use of “Latino”); *Moss v. Stamford Bd. of Educ.*, 350 F.Supp. 879 (D.Conn.1972) (Jon O. Newman, J.) (first reported use of “Hispanic”).

Id. at 604 n.21.

¹² Many commentators and laypersons consider Hispanic/Latino as a cultural and ethnic identity and not racial per se. As Ian Haney-Lopez notes, Latinos “reside in the US with community identities not tied exclusively or even predominantly to a racial identity.” Ian F. Haney-López, *The Social Construction of Race: Some Observations on Illusion*,

From an identity standpoint, it is interesting to note that the Second Circuit rejected the defendants' argument that they could not be sued for racial discrimination by promoting a white Hispanic candidate over a non-Hispanic candidate because they were both racially white.¹³ The defendants argued that Hispanics do not constitute a race as a matter of law, and that because both the defendant, a self-identified white American originally born in Cuba, and the Plaintiff, an American-born non-Hispanic, were both "white," no racial discrimination could have occurred.¹⁴ The court, perhaps realizing the complexity of the question before it—"What is race?"—did not attempt to construct a comprehensive definition, but rather addressed the question of whether or not Hispanic—a politicized identity—is a race for purposes of Title VII.¹⁵ The court briefly discussed the ambiguity of the term Hispanic, the related convoluted relationship that race and ethnicity have in U.S. history,¹⁶ and recognized there is little resolution to these questions from any source. In holding that Hispanic is a race under Title VII (as it is in § 1981), the Court concluded that ethnicity constitutes a race, and that discrimination for the presence, or lack of, Hispanic ethnicity allows for a claim under Title VII.¹⁷

For the purposes of this article, the court's legal analysis and conclusion based on a racialized notion of Hispanic is significant, and the implications of its conclusion, including its reasoning in reaching it, apply to the broader legal and political discourse and the contexts that each produce. A judicial decree that Hispanic—considered by many commentators and laypersons to signify ethnicity, cultural orientation, or a mix of these factors with the concept of race¹⁸—is a race under the law has profound repercussions for how the term, as a racial signifier, is used in the broader legal and political discourse and practice, as well as policy analysis. The relationship between race, ethnicity, law, and society encompassed in the court's conclusion and reasoning thus require elaboration and critical examination, which the Second Circuit failed to provide. Collapsing ethnicity and race into a unified signifier is not only reflective of the more general tendency to simplify Latino identity, it is also an example of how a politically and legally manufactured formal identity may not accurately represent the substance of those subjected to the identity classification. Race "mediates every aspect of our lives . . . and the role . . . law [assumes] in reifying racial identities,"¹⁹ and has serious consequences for how identity is articulated, perceived, interpolated, and manifested.

Rather than attempt to start from a meta-narrative of what Latino *is*, this article, in contrast to the Second Circuit, questions the idea of Latino unity itself, viz., the identity signifier's capacity to actually capture, reflect, and represent multitudinous, diverse identities within the formal conceptual classification of "Latino." We contend that a unified notion of Latino identity (as expressed, for example, in *Barrella*) is a reductionist political construct that reflects the values, interests, and priorities of particular policy groups or political parties who have the

Fabrication, and Choice, 29 Harv. C.R.-C.L. L. Rev. 1, 9 (1994).

¹³ *Barrella*, 814 F.3d at 600-01.

¹⁴ *Id.* at 600-601.

¹⁵ *Id.* at 607.

¹⁶ *Id.* at 603.

¹⁷ *Id.* at 616-17.

¹⁸ See CRISTINA BELTRAN, *THE TROUBLE OF UNITY: LATINO POLITICS AND THE CREATION OF IDENTITY* (2010); Martha E. Gimenez, *Latino/"Hispanic"—Who Needs a Name?: The Case Against Standardized Terminology*, 19 INT'L J. HEALTH SERV. 557 (1989); Ana Gonzalez-Barrera & Mark Hugo Lopez, *Is being Hispanic a Matter of Race, Ethnicity, or Both?*, Pew Research Center, (June 15, 2015), <http://www.pewresearch.org/fact-tank/2015/06/15/is-being-hispanic-a-matter-of-race-ethnicity-or-both> [<https://perma.cc/ZC6M-MADD>].

¹⁹ Haney-López, *supra* note 12, at 3.

resources to articulate and disseminate the signifier within the broader legal and political public discourse. This article will therefore examine the notion of unity. The *Barrella* opinion, which we highlight in order to illustrate how politicized identity is manufactured in legal discourse—collapsing ethnicity and race into a unified signifier—exemplifies the pitfalls of Latino unity in a broader societal context. Our analysis seeks to shed light on the manner in which politicized Latino identity reflects, and affects discursive spaces of political representation.

B. *Beyond the Law: Critically Examining Latino Identity in the Larger Political Context*

We start from the premise that the idea of a pan-Latino identity is highly tenuous,²⁰ and using the terms “Latino” and “Hispanic” results in “an exercise of opacity – the terms are so comprehensive that their explanatory power is limited.”²¹ Collapsing ethnicity into race within legal discourse, for instance, is reflective of the problematic and contentious nature of Latino identity. Latino identity, as it presently stands within mainstream discourse of politicized identity, is problematic because it does not appear to accurately reflect the substantive aspects of those subjects’ identity located within the umbrella identity of Latino. Furthermore, if the notion of unity embodied in “Latino” is uncritically accepted then it can become a culturally authoritarian and politically expedient signifier. It can, for instance, empower those policy and political leaders that invest in and articulate the identity signifier to selectively include or exclude members based on partisan, formal politicized criteria, e.g., specified anatomical features, economic class, and prioritized public policy interests and goals. The identity signifier can thus serve and benefit those that invest in the formal signifier, rather than serving the members of the identity group. The Second Circuit’s legal construction rendering Latino a race therefore has serious repercussions in the broader political, social, and economic spheres. As Ian Haney-Lopez notes, racial construction “changes communities by emphasizing or even creating commonalities while eroding previously relevant differences. [Legal formalities] serve to shape communities by providing a common experience to people who earlier or in a different context may not have seen themselves as similar.”²² The court’s racializing Latino goes beyond the case in question; more significant is how racializing the Latino identity signifier promotes unity of a group through homogenization. Whether the court is “right” or “wrong” is not the focus of analysis; rather, examining how the formal signifier buttresses and promotes unity—and the consequences that stem from this for representation—is.

The question of whether the term Latino reflects and represents those who fall within its ambit is of central importance, particularly given the fact that in the 21st century politicized identity remains a salient factor in assessing the content, character, and conduct of law, society, and politics in the U.S. Indeed, politicized identity remains a viable political construct in the present articulation of public policy, broadly speaking. One need only reexamine the predictions surrounding the election and the way Latinos were thought to constitute a reliable, monolithic, and homogenized voting bloc.

In short, the Latino identity signifier is nebulous in both thought and practice. For example, as Chief Justice Roberts inquired during oral argument in a 2013 Supreme Court case: does being “one-eighth Hispanic” enable one to legitimately “check the Hispanic box” on a

²⁰ See BELTRAN, *supra* note 18, at 9-10; Gimenez, *supra* note 18, at 558 n.1.

²¹ BELTRAN, *supra* note 18, at 6.

²² Haney-Lopez, *supra* note 12, at 55.

college application?²³ Latino, as a racialized signifier, complicates rather than clarifies an already convoluted relationship with the signified. Put more directly, a racial determination of the essential characteristics of what allows one to *be* Latino, must be so inclusive to all other races that the determination essentially means nothing, because it means everything. For example, a self-identified Afro-Latino²⁴ and a Latino with racial roots in Spain and Europe are both considered to be the same race (Latino) under a *Barrella* standard. Yet the need for a sub-designation (i.e. Afro-Latino) points to the need for sub-groups to differentiate themselves from the meta-term Latino, because they do not find adequate representation within it (this is applicable to economic and social representation as well). Thus, in this case, the term Latino is not so much a connective bridge between a subgroup and the umbrella term, as it is the residual, precisely “that” which does not belong to both (a discontinuity under the perceived unifying term); and here is where the equity of representation breaks down by using the umbrella term in a racialized capacity. As noted by the Second Circuit in *Barrella*, Latino (Hispanic) is far from being clearly defined and applied:

Most courts have assumed that Hispanics constitute a “protected class” but without saying whether that protection derives from race or national origin. Others have declared expressly that the underlying rationale is irrelevant. [Courts] have also recognized claims based on “Hispanic *ethnicity*,” a term not used in Title VII.²⁵

An analysis of Latino as an identity signifier, as an expression of politicized identity in legal and political discourse, as a product of the power to name, classify—is merited in light of the profound demographic shifts that are reconfiguring the U.S. domestic political landscape. The Latino identity signifier, while problematic, nonetheless is the basis for the articulation of public policy regarding apperceived members of the identity group, e.g., economic and educational affirmative action programs designed to specifically benefit members of an exponentially growing identity group. Thus, however “analytically ‘soft’ a particular classification may be, making it a centerpiece of governmental resource-allocation will require that it be ‘hardened’ dramatically.”²⁶

There are noteworthy issues and problems that emerge when a using a politicized signifier that privileges and emphasizes sameness and attempts to emplace multifarious groups of people within a homogenized classification. The peoples of Latin America, the origin point for

²³ Oral Arg. Tr. at 33:9-11, *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013) (No. 11-345).

²⁴ See Carolina Moreno, *This is What it Means to be Afro-Latino*, Huffington Post, (February 25, 2015), http://www.huffingtonpost.com/2015/02/25/what-it-means-to-be-afro-latino_n_6690032.html [https://perma.cc/YL5Y-ME4R] (“Afro-Latino is not about being Black and Latino, Afro-Latina means to be a Black Latina/Latino hence why the term Afro-Latino came about in the late 70’s. Since Latino is not a race, its really not even an ethnic group, it is false to say that folks are Black and Latino, we are racially Black and then many refer to their ethnicity or i.e. Afro-Boricua, Afro-Dominican.”).

²⁵ *Barrella*, 814 F.3d at 606 (footnotes omitted); see also *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 19 (2d Cir. 1995) (describing requirements for showing “an inference of ethnic discrimination” under Title VII); *Alonzo v. Chase Manhattan Bank, N.A.*, 25 F. Supp. 2d 455, 459 (S.D.N.Y. 1998) (“Whether being Hispanic constitutes a race or a national origin category is a semantic distinction with historical implications not worthy of consideration here”).

²⁶ Christopher A. Ford, *Administering Identity: The Determination of Race in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1234 (1994).

politicized Latino identity in the U.S., share a common language²⁷ and colonial history, and an inherited culture from medieval Spain, indigenous groups, and African slaves. Commonality among the variegated communities that have evolved over the last five centuries has faded with the passage of time. Diversity in all aspects—localized economic, political, and social states of affairs—is the hallmark of the progeny of imperial Spain in the Americas, and the U.S. in particular. Thus, to impose a classification that dispenses with or minimizes difference and promulgates sameness is an exercise of classificatory authoritarianism that has profound consequences on those being defined by an identity signifier. Subjects become enmeshed in an identity that is produced for both internal consumption among and between Latinos, and external consumption by those groups residing in the larger identity universe (i.e. the *Latino* consumer, the *Latino* student, the *Latino* employee). A subject “is produced ‘as an effect’ through and within discourse, within specific discursive formations.”²⁸ Discourse based on politicized identity has the empirical effect of manufacturing a fictitious unity—an objective general will and accompanying interests that apply to all subjects that fall under the classificatory schema of a politicized identity signifier—that can have serious repercussions for those that reside within as well as without a politicized identity and its accompanying discourse. To racialize Latino, as the *Barrella* court has done, is to add an additional layer of complexity to an already stretched-to-capacity term.

C. *Complicating Representation: Identity & Demographics*

Generally, Latino, as indicator of personal and social identity, as a site for political mobilization and organization, lacks internal consistency. At the inception of the 21st century, the term Latino is rapidly losing “its coherence as a category, making it impossible to describe Latinos as the proverbial discrete and insular minority. The twentieth century constructs we still use to characterize the interests of racial and ethnic minorities are losing their descriptive validity and utility and must be adapted.”²⁹ Depending who, and how, you ask, the answer to the question “who is Latino?” in the U.S. will provide various, and quite likely contradictory, responses. One of the key disconnects between the racial signifier Latino, and those who identify as such, is the diversity of races (and the fluidity of the definition of race) within the term’s very own definition. For example, in responding to the 2010 U.S. census, 53% of self-identified Latinos listed their race as white, 2% listed their race as black, 0.7% listed indigenous, 37% listed “other,” and 6% listed two or more races.³⁰ A 2012 survey conducted by the Pew Center reported that 51% of Latinos identified as “some other race” or volunteered Hispanic/Latino as a race, while 36% identified as white and 3% identified as black.³¹ Further polemicizing the unity of the signifier, the sociocultural definition of Latino does not possess an internal homogeneity of identity on which unity can derive from. Additional polling shows that, even within the Latino population, there are internal divisions that reflect differing views Latinos have vis-a-vis other Latinos: only

²⁷ See *Hernandez v. New York*, 500 U.S. 352, 270 (1991) (“Language permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond”).

²⁸ Stuart Hall, Introduction: *Who Needs 'Identity'?*, in *QUESTIONS OF CULTURAL IDENTITY*, 10 (Stuart Hall & Paul Du Gay eds., 2003) (Text available at http://www.hu.mtu.edu/~jdslack/readings/CSReadings/Hall_Who_Needs_Identity.pdf [<https://perma.cc/XC8T-NNAA>]).

²⁹ Cristina M. Rodríguez, *Latinos: Discrete and Insular No More*, 12 HARV. LATINO L. REV. 41, 43 (2009).

³⁰ IDELISSE MALAVE & ESTI GIORDANI, *LATINO STATS: AMERICAN HISPANICS BY THE NUMBERS* 7 (2015).

³¹ *Id.*

72% of all Latinos “believe their success depends on the success of other Latinos [linked fate].”³² Additionally, 61% believe that “undifferentiated anti-Latino discrimination is an obstacle to Latino’s success in this country.”³³ Furthermore, almost 59% of Latinos responded that “Latinos of different heritages have ‘some’ to ‘almost nothing’ in common with Latinos of different heritages,”³⁴ and 30-40% of Latinos feel social and economic competition with Latinos from other heritages.³⁵ These data are indicative of how convoluted Latino identity has become at the macroscopic level of analysis. Who or what defines who is, or is not, authentically Latino? Politicians push legislation for their Latino constituents, national policy seeks to address issues facing Latino populations, advocacy groups expend millions of dollars advancing Latino causes, and marketing departments spend billions of dollars targeting Latino consumers. All of these interest groups take these actions in the name of all Latinos, or are catering to a unitary, homogenized notion of Latino identity, without explicitly recognizing that not all Latinos are concerned with the same legislation, policies, and causes, or have the same consumption habits as all other Latinos. Ultimately, by relying on a racial designation to resolve internal divisions, it becomes apparent that this only further polemicizes equitable representation under the umbrella term Latino.

With a population size of 53 million and steadily growing, it is easy to find differing—and sometimes conflicting—beliefs among the subgroups that comprise Latino, even though two sizeable groups, i.e., individuals that form communities from Mexico and Puerto Rico, make up nearly 75% of all Latinos in the U.S.³⁶ More than half of Latino immigrants come to the U.S. for some type of economic opportunities, generally with the belief that the U.S. not only offers more economic opportunities, but it is also a better place for raising children, and treats the poor better.³⁷ Yet, while the motive to immigrate may be similar across regions and countries, the experiences of the different sub-groups, such as Dominicans and Argentineans, with respect to economic opportunity and betterment are quite different. With just over half of Latinos identifying themselves first by national country of origin and residing in communities generally comprised of people from the same region or country, it is apparent that different national origin groups experience being Latino differently in an economic sense (in addition to a more collective experience of ethnic/racial discrimination).³⁸ The foregoing statistics and discussion provide an example of how heterogeneous Latino identity actually is.

In the face of changing demographics, it is important to note that traditional Pan-Latino unifiers, such as a shared colonial history, coming from the same region of the continent, and having Spanish as the basis for language, are becoming increasingly ineffective at supporting a holistic and seamless Latino identity. Just as importantly, it is essential to understand the extent to which certain subgroups or segments of Latinos are underserved, or lacking representation, in the national dialogue of Latino priorities. Presently, Latino identity eludes a clear definition, and has been described as a mosaic rather than comprising a clear cognizable term. Nevertheless, the

³² *Id.* at 123.

³³ *Id.*

³⁴ *Id.* at 124-25.

³⁵ *Id.* at 125.

³⁶ *Id.* at 4.

³⁷ *Id.* at 13.

³⁸ *Id.* at 65 (“The typical Dominican lived in a neighborhood with a median income nearly a third less than the median income in neighborhoods where most Whites live, while most South Americans lived in neighborhoods with a medium income nearly on a par with where most Whites live.”); *id.* at 124 (“Argentineans are best off financially with a median annual income of \$55,000, while Hondurans have the lowest median income of \$31,000.”).

marketing and business sectors spend billions of dollars in an attempt to capitalize on the purported billion-dollar buying power of an apperceived homogenous Latino population. Equally invested in Latinos—financially, legally, and politically—are voter research firms, legislatures, and courts, as well as political campaigns. However, the fact that those efforts are based on the utilization of such a nebulous term begs the question: how effective can those efforts be if they do not account for the substantive differences among Latino subgroups?

A major issue with the present Latino identity signifier lies in the politicization of identity. As Cristina M. Rodríguez has noted, “[i]t is hardly novel to note that the category ‘Latino’ consists of people of varied national origins, races, citizenship statuses, histories within and relationships to the United States, language abilities, and socioeconomic classes.”³⁹ Politicized identity is problematic, however, because identities are not amenable to unitary classification since they are “increasingly fragmented and fractured; never singular but multiply constructed across different, often intersecting and antagonistic, discourses, practices and positions. They are subject to a radical historicization, and are constantly in the process of change and transformation.”⁴⁰ Politicized Latino identity suffers from the fact that, in promoting sameness and unity, it detracts from its representative capacity for genuine political organization and mobilization that reflects the diversity of the peoples grouped together under the Latino signifier. It is therefore important to critically analyze and assess the character and content of “Latino” in present discourse because the peoples to whom the signifier has been affixed will become a demographic majority in the coming decades, and because the Latino signifier functions within a larger discourse of identity, law, politics, and power.⁴¹ This is especially true in light of the recent election, and the apparent miscalculation of how Latinos would vote and for whom.⁴²

³⁹ Rodríguez, *supra* note 29, at 44.

⁴⁰ Hall, *supra* note 28, at 4.

⁴¹ For example, the *Barrella* court noted in its opinion:

[T]wo people who both appear to be “white” in the vernacular sense of the term, and who would both identify as “white” on Census forms and the like, may nonetheless belong to different “races” for purposes of § 1981. Similarly, someone may belong to more than one “race” for purposes of that statute. For instance, in *Saint Francis College v. Al-Khazraji*, the Supreme Court found that employment discrimination “based on the fact that [a plaintiff] was born an Arab” constitutes racial discrimination under § 1981, even though “under current racial classifications Arabs are Caucasians.”

Barrella, 814 F.3d at 605.

⁴² While there are a variety of interpretations of exit poll data from this year’s election, including one researcher who claims that Latino turnout for candidate Donald Trump was lower than reported by numerous other sources, Francisco Pedraza & Bryan Wilcox-Archuleta, *Donald Trump did not win 34% of Latino vote in Texas. He won much less.*, WASH. POST (Dec. 2, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/12/02/donald-trump-did-not-win-34-of-latino-vote-in-texas-he-won-much-less/?utm_term=.b4eee3431139 [http://perma.cc/Q9NQ-AEAJ], this article is concerned with the data as reported as an entire range, with the understanding that the numbers will be updated as more information is put out. For example, a range of even 20 to 30% of Latinos voting for Trump is enough to warrant an analysis on the purported utility of an ideal or average Latino voter. See Geraldo L. Cadava, *Rural Hispanic voters — like white rural voters — shifted toward Trump. Here’s why.*, WASH. POST (Nov. 17, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/11/17/rural-hispanic-voters-like-white-rural-voters-shifted-toward-trump-heres-why/?utm_term=.c14160b77321 [https://perma.cc/4YA6-XRWA] (“Many observers contend that Hispanic voters will shape the future of American politics. But it’s not yet clear exactly what their influence will be. There’s been debate about whether they may portend a permanent Democratic majority; vote according to ethnic backgrounds—Mexican American, Puerto Rican, Cuban American; or hold political points of view that vary by economics or region, much like other Americans.”); Harry Enten, *Trump Probably Did Better with Latino Voters than Romney Did*,

II. LATINIDAD, THE PAN-LATINO & REPRESENTATIVENESS—COMING UP SHORT?

A. *The Latino Identity Signifier: A Sameness—Difference Nexus*

The Latino identity signifier is a relative construct that disproportionately emphasizes sameness and concomitantly minimizes difference among the subjects that comprise the unified identity. This selectiveness renders Latino as a cohesive group classification and a political construct designed to augment and enhance political power while undercutting the actual representative capacity of the signifier. Yet, the “problem with group classifications arises where the categories employed are neither genuinely ‘objective’ . . . nor susceptible to legitimation by reference to a decision-making entity . . . whose authority to make such decisions is unquestioned.”⁴³ Latino identity is neither objective nor is there an overarching authority to authenticate a singular Latino group identity. Latino is a purely politicized signifier and, thus, is subject to the ebb and flow of subjectivity and relativity. For example, despite the Second Circuit’s contention in *Barrella* that race and ethnicity are synchronic, Latino has had an unstable relationship with race and ethnicity as far as distinguishing and providing a core basis for what exactly constitutes identity.⁴⁴ Even within the modern legal system, a historical arbitrator in terms of defining distinct social classes and identities within the law, the definition of race has always been unstable and subject to fluidity.⁴⁵ However, this fluidity has had a completely different effect in the public policy realm. The ambiguity of the term Latino has resulted in, among other things, the term becoming a strategically malleable concept for policy professionals to utilize for voter-base appeal and coalition building in response to policy issues. The ostensible uniformity of the term in public policy is rooted in a linguistic uniformity leveraged by the federal government,⁴⁶

FIVETHIRTYEIGHT (Nov. 18, 2016, 2:25 PM), <http://fivethirtyeight.com/features/trump-probably-did-better-with-latino-voters-than-romney-did/> [<https://perma.cc/8HRX-ZBDM>]; Gamboa, *supra* note 2; Alan Gomez, *Another election surprise: Many Hispanics backed Trump*, USA TODAY (Nov. 9, 2016), <http://www.usatoday.com/story/news/politics/elections/2016/2016/11/09/hispanic-vote-election-2016-donald-trump-hillary-clinton/93540772/> [<https://perma.cc/Z774-UJTP>] (“The Hispanic vote was bigger and more influential in the 2016 presidential election, just as predicted, but it also provided one surprise: more support for President-elect Donald Trump than expected.”); Fernanda Santos, *In Arizona County Where Latinos Have an Edge, So Did Trump*, N.Y. TIMES (Dec. 13, 2016), https://www.nytimes.com/2016/12/13/us/politics/yuma-county-arizona-latinos-trump.html?_r=0 [<https://perma.cc/A33G-KSGX>] (“For all the talk on the campaign trail of a border wall and mass deportations, it was Donald J. Trump’s pledge to create more jobs, lift wages and increase opportunities that persuaded Latinos in this majority-minority city 30 miles north of Mexico to vote for him.”); Sarah Wheaton & Steven Shepard, *Latino Groups Argue Exit Polls Were Too Generous to Trump*, POLITICO (Nov. 11, 2016, 6:09 PM), <http://www.politico.com/story/2016/11/latino-groups-exit-polls-donald-trump-231268> [<https://perma.cc/Y9DF-5BYM>].

⁴³ Ford, *supra* note 26, at 1238.

⁴⁴ See MALAVE & GIORDANI, *supra* note 30, at 7.

⁴⁵ The Supreme Court has acknowledged the nebulous, relative, politicized, and plastic nature of race/ethnicity in its jurisprudence. For example, in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 295-96 (1978), Justice Powell noted that “the difficulties entailed in varying the level of judicial review according to a perceived ‘preferred’ status of a particular racial or ethnic minority are intractable. The concepts of ‘majority’ and ‘minority’ necessarily reflect temporary arrangements and political judgments. . . . [T]he white ‘majority’ itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals . . . There is no principled basis for deciding which groups would merit ‘heightened judicial solicitude’ and which would not.” See also *McCleskey v. Kemp*, 481 U.S. 279, 316 n.39 (1987) (“[I]n our heterogeneous society the lower courts have found the boundaries of race and ethnicity increasingly difficult to determine.”) (citations omitted).

⁴⁶ See G. CHRISTINA MORA, *MAKING HISPANICS* 41-49 (2014). In the 1960s and 1970s, Government offices avoided defining what the term Hispanic meant in an effort to avoid conflicts between Mexican American and Puerto

and from a country-of-origin homogeneity⁴⁷ in terms of social coalition building.⁴⁸ However, today this commonality of country of origin has become less unifying in light of increased immigration from all over Latin America and successive generations being born in the United States.⁴⁹

This state of affairs, coupled with the diversification of political platforms and economic status between and among Latino communities, requires a fundamental reassessment of what it means to be Latino in terms of political representation and coalition unity.⁵⁰ There are critical consequences in the political sphere in shifting away from a unified idea of Latino identity. Of central importance is the question of the tradeoff between the political leverage stemming from a unified identity and the benefits of developing an inherently representative and inclusive identity when it comes to being Latino. As will be explored below, we offer an alternative conceptualization of the Latino signifier to initiate debate and begin the process of reconfiguring Latino going forward.

B. *The Latino Voter: Probing Identity & Representation*

Although 70% of Latinos in national polls tend to favor the Democratic Party,⁵¹ they tend to be much more socially conservative on social issues: for instance, 51% oppose abortion, only 58% believe that homosexuality should be accepted, and a little less than half support interracial marriage.⁵² At the same time, Latino voters tend to prioritize economic issues and education among their top concerns when voting, and immigration is their sixth highest concern.⁵³ This intersection of conservative social and liberal economic perspectives further complicates attempts to define an overarching unity in terms of a homogenous voting bloc.

The Latino voter, as imagined by a legal and political discourse unifying the collective voting power of individuals identifying as such, has long been classified as part of a collective “sleeping giant.”⁵⁴ This metaphor, particularly utilized in the space of electoral politics, creates, as Cristina Beltran describes it, “[an] enduring depiction of Latinos as untapped potential [that] is intrinsically linked to an impression of Latinos as politically passive and difficult to mobilize: the giant that seemingly *cannot* be roused from its slumber.”⁵⁵ The “giant” trope perfectly captures

Rican advocacy groups, and instead grouped Hispanics under a common shared language and general culture. Eventually Cubans, who differed sharply in many respects from their Mexican American and Puerto Rican Counterparts, were brought under the label Hispanic based solely on a commonality of language.

⁴⁷ See *id.* at 2-3. Throughout the early to mid-20th century (and, for the most part, continuing today) most Latinos emigrated from two major countries and a U.S. territory: Mexico, Cuba, and Puerto Rico, respectively. See MALAVE & GIORDANI, *supra* note 30, at 4. This trend largely continues today. *Id.*

⁴⁸ Beltran, *supra* note 20, at 6-7.

⁴⁹ See Jens Manuel Krogstad & Mark Hugo Lopez, *Hispanic Nativity Shift*, PEW RESEARCH CENTER (April 29, 2014), <http://www.pewhispanic.org/2014/04/29/hispanic-nativity-shift/> [<https://perma.cc/M9FM-JHHF>] (“Since 2000, the U.S.-born Latino population continued to grow at a faster rate than the immigrant population. As a result, the foreign-born share of Latinos is now in decline.”).

⁵⁰ We leave aside, for purposes of this paper, the very relevant counterpart to this contention, namely that there is in fact a space for new conceptions of race and identity within established ideas of race in a socio-anthropological context. We instead focus here on the question of political representation and legal understanding.

⁵¹ See MALAVE & GIORDANI, *supra* note 44, at 26.

⁵² MALAVE & GIORDANI, *supra* note 30, at 32.

⁵³ *Id.* at 31-32.

⁵⁴ BELTRAN, *supra* note 18, at 1-10.

⁵⁵ *Id.* at 4.

the binary nature of the Latino voting bloc: both empowered by the aggregate number of voters, but also in need of vitalization and momentum to rouse the “sleeping giant” from its slumber. This slumber can be defined as a political disinterest, a voter disenfranchisement in a civil rights context, or, as is the focus of this paper, the lack of a fundamental homogeneity of representation in the realm of political representation. There are numerous explanations for voter disenfranchisement, for instance, both in political science and civil rights contexts, but it is an oversimplification to explain this ostensible ineptitude of the “sleeping giant” to exercise its political will as a matter of mere unrealized political power. As Beltran further points out, “[t]he widespread invocation of Latinos as a sleeping giant is more than an inaccurate political cliché or a simple metaphor for political agency. . . . An implicit assumption of the metaphor is that Latinos will behave politically as an ‘ethnic bloc’ [sharing a] collective will.”⁵⁶

The notion of a common political will is one that bypasses internal differences and synergizes conflicting and disparate group interests among subgroups—groups demarcated by local cultural iterations, gender, sexual orientation, political beliefs, country of origin, etc. As a political strategy, “[w]hen confronting an interest-group paradigm that rewards national over regional interests and sees strength in numbers, Latino political elites have found it beneficial to portray Latinos as a large and cohesive group capable of being mobilized around a recognizable set of issues.”⁵⁷ From this dynamic a central question emerges: who does this giant represent? Whose political will does it embody? The history of this larger whole, this “sleeping giant,” is a segment of a long and convoluted history of modern Latinos in America, a history that is defined around a central theme of *Latinidad*.⁵⁸ However, of significant importance surrounding the question of the “sleeping giant” is the power dynamic between the collective will that ostensibly represents the unified political will of Latinos and the increasingly diverse subgroups that comprise it. The framing of Latino identity as a mosaic, which acknowledges diversity among Latinos, is both the source of the potential power of the Latino vote as well as what makes it susceptible to internal fragmentation and balkanization. Even more concerning is that this power dynamic is precisely where the concept of Latino identity can become very unrepresentative and undemocratic for existing and emerging subgroups that fall within the sameness-based Latino identity signifier.

Latinidad has political, legal, sociocultural, and emotional components. The term has its roots in the social movements of the 1960s,⁵⁹ predominantly stemming from the struggles of Mexican Americans and Puerto Ricans mobilizing parallel and distinct cultural movements.⁶⁰ Yet, for all that Latinos share in common, on the political stage, with more than 50 million Latinos living in the U.S., there are always contradictory forces at play within identity formation and politics.

Given such deep diversity, should we be surprised that characterizations of this Leviathan appear so contradictory and incoherent? . . . [T]here is simply no clear way to pin down the presence and actions of a figure so murky and ambiguous. How does one “awaken” a political figure whose very political existence is so uncertain.”⁶¹ The formation of *Latinidad* is a quintessential representation of a key paradox in democracy, namely “how movements founded

⁵⁶ *Id.*

⁵⁷ *Id.* at 6-7.

⁵⁸ *Id.* at 5 (“Understood as a *political* category, *Latinidad* presumes that Latinos as a group share a common collective consciousness.”).

⁵⁹ *Id.* at 26

⁶⁰ *Id.* at 21-55.

⁶¹ *Id.* at 8.

on progressive visions of inclusion, empowerment, and enhanced presence can simultaneously limit opportunities for democratic discussion and debate.”⁶² Given the broad-based historical discrimination faced by Mexican and Puerto Rican communities, Latinidad emerged as a response, as a defense against prejudice and racial stereotyping, and created a group-based narrative to shed light on economic and racial inequalities.⁶³ Yet it is this unity that creates problems for the Latino signifier being representative of the constituent subgroups that comprise the mosaic. An emphasis on sameness over difference obfuscates the distinctiveness of individuals and subgroups and embeds representative inequality. And conversely, simply acknowledging the internal diversity of subgroups without incorporating their divisive or potentially problematic interests (endangering the unity of the whole), is stymieing the representative equity of the signifier. For example, at the start of the 1960s Latino movements, the creation of and call for broader definitions for the unity of the larger group cemented racial and gender inequalities among Latino subgroups, and the rise of feminism *within* the Latino movement, which was dominated by men, was met with significant resistance.⁶⁴ As Latinos become more diverse racially, economically, religiously, and across all major metrics, Latino politics continue to have an outsized focus on group unity, creating a tension that, as in the movements of the 1960s,⁶⁵ gauges civic health by how well an individual fits into a narrative of political group unity. Once the Latino identity signifier creates a narrative that must be adopted in order to *be* Latino, rather than the converse, there is a potential threat to the fundamental representative nature of Latino identity. As a corollary, in the social realm, as opposed to the Latino voter, there is a mantra of inclusion; with the rise of afro-Latino, trans communities, non-denominational church members, and a higher-than-average interracial marriage rate,⁶⁶ Latino has been expanded to its outermost capacity. In the political realm, a similar expansion would essentially be inclusive to the point of making the term “the Latino voter” mean everyone, which, in turn, means it represents no one.

The critique of Latino identity being less or non-representational is in line with the tenets of contemporary critical race theory. While we do not attempt a comprehensive discussion surveying the very broad and disparate components of critical race theory (hereinafter “CRT”⁶⁷) in this article, it is useful nonetheless to draw from CRT to illuminate the representational pitfalls of the “sleeping giant” specifically and Latino identity generally.⁶⁸ In contemporary CRT, the main debate is between those utilizing essentialist approaches and those using anti-essentialist approaches concerning the central question: “Do all oppressed people have something in common?”⁶⁹ More precisely, do all oppressed groups share a common, politically manifested

⁶² *Id.* at 15.

⁶³ *Id.* at 7.

⁶⁴ *Id.* at 47-55.

⁶⁵ *See Id.* at 56.

⁶⁶ MALAVE & GIORDANI, *supra* note 30, at 61 (“Across the major racial and ethnic groups in the country, Latinos and Asians have the highest intermarriage rates. In a recent study, 26 percent of Latino newlyweds married a person of a different race or ethnicity . . . compared to 9 percent of Whites”).

⁶⁷ *See* RICHARD DELGADO AND JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (3rd ed. 2017); RICHARD DELGADO AND JEAN STEFANCIC, *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberle Crenshaw, et al., eds., 1996).

⁶⁸ The familiar metaphor was used up until the morning of the election. *See, e.g.*, *Ciro Scotti, Trump Awakens a Sleeping Giant: Record Turnout for Latino Voters*, CNBC (Nov. 8, 2016 9:33 AM), <http://www.cnbc.com/2016/11/08/hispanic-voters-trump-awakens-a-sleeping-giant-record-turnout-for-latinos.html> [<https://perma.cc/5YRD-YZ3E>].

⁶⁹ RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 62-65 (2d ed.

ethos, despite experiencing vastly different forms of oppression based on a combination of sociocultural, economic, racial, and geopolitical factors? For example, is race a prerequisite for identifying as a colonized subject under CRT, considering the historical records of decades of enslavement of Europeans by other Europeans, Asians enslaved by other Asians, or Africans enslaved by other Africans, before the founding of the “New World?”⁷⁰ It may also be said that even among oppressed groups the stated means-and-ends goal of a “unified” group may not accurately reflect the goals of its constituents and factions, but is justified overall because the larger group benefits from the aggregate power of its numbers. This accumulation comes at a cost in the political realm, however, for “[i]t takes a multitude of the oppressed to make their voices heard and felt. But what about the voices that do not fit into one single category of oppression? Will social progress let them slip through the cracks?”⁷¹ Although Latino is an effective construct within the administration of identity,⁷² in the overarching machinery of law, politics, and power, subjects themselves may get lost in translation due to the simplification of identity premised on an artificially emphasized sameness, or the simple multiplicity of terminology, i.e. an outsized focus on identity intersectionality⁷³ rather than attempting to redefine aspects of identity that cannot be readily absorbed by traditional concepts of race and ethnicity.

By positing that all oppressed groups should compromise their differences and unify into a single overarching will, there is a danger of creating a system of disparate gains and uneven benefits among subgroups, in terms of who benefits from the larger group’s advancements. This of color is distinct for being self-consciously intersectional: building bridges while simultaneously challenging the exclusions and silences that exist within all forms of community.⁷⁴ The CRT movement has carried this type of critique further with trans-critical theory, critical feminist theory, and a myriad of other factions (beyond the scope of this paper). This critique is further complicated when one considers the trends of individuals from marginalized groups moving up the economic ladder and beginning to prioritize and incorporate disparate economic and fiscal interests compared to their counterparts who are still disenfranchised. While those ascending individuals still encounter discrimination, and there is undoubtedly a palpable sense of group unity among disparate Latino subgroups, it becomes more problematic to find or manufacture a plausible uniform political will. This is where the presence of authentic representation within a group-based model of identity is most at risk and fragile. If the analytical “softness” of the Latino identity signifier is indeed made denser or more substantive by the unified Latino “voice” narrative, then the unrepresented and the elite within the signifier-articulators can harden into a stratified, unrepresentative system that eschews genuine diversity, difference, and representation, and instead becomes solely an effective tool in the “administration of identity.” Is the political will of Latinos better understood as a coalition of, rather than a *home* for, diverse subgroups containing contradictory priorities? Is the “coding algorithm” of politicized Latino (based on

2012).

⁷⁰ Thomas Sowell, *Economic Facts and Fallacies* 180 (2011). Sowell also points out that Europeans were not the only ones to transport human slaves from one continent to another: “North Africa’s Barbary Coast pirates alone captured and enslaved at least a million Europeans from 1500 to 1800, carrying more Europeans into bondage in North Africa than there were Africans brought in bondage to the United States and to the American colonies from which it was formed.” *Id.*

⁷¹ DELGADO & STEFANCIC, *supra* note 66, at 63.

⁷² See generally Ford, *supra* note 26.

⁷³ See DELGADO & STEFANCIC, *supra* note 66, at 57 (“‘Intersectionality’ means the examination of race, sex, class, national origin, and sexual orientation, and how their combination plays out in various settings.”).

⁷⁴ BELTRAN, *supra* note 54, at 62-64

artificially emphasized sameness) that embodies “a number of curious assumptions,”⁷⁵ in need of analytic reevaluation and reconfiguration? It seems that politicized Latino is more a coalition brought together out of necessity than natural affinity.

C. *Latino Identity: Concretizing a Politicized Identity*

In the mid-20th century, especially among Mexican youths, there was a radical break from a prior trend of an assimilationist identity by Mexicans in the Southwest U.S. This was parallel to a related yet distinct movement among New York Puerto Ricans seeking self-determination and poverty alleviation. Among Mexican-Americans, the movement was based on notions of a collective identity tied to Mexican land itself, and a call for the return of that land by the U.S.⁷⁶ This was a movement toward separatism, identifying Mexican-Americans as part of a separate colonized nation within the U.S. that should seek its independence from surrounding society.⁷⁷ In contrast, the youth movements of Puerto Ricans in the Northeast during this time were very concerned with the independence of the island of Puerto Rico, and urban poverty in New York, rallying around a Marxist ideology of “awakening” the community from its “False Consciousness.”⁷⁸ While the history of these movements is enlightening, what is central here is that these movements gave way to a professional “lobby-ization” of the “Hispanic” vote in the 1970s and 1980s.⁷⁹ The radical character of the earlier movements shifted to a centralized mainstream policy machine, becoming a means of effectively administering identity (along with other racialized/ethnic identities such as African-American), reliant and intertwined with corporate America and reliant on federal government funding. As Beltran points out,

In the era of mass participation and protest, movement activists made demands and mobilized communities to support their efforts. Contemporary Latino politics has shifted toward the electoral realm, with advocacy groups and politicians focusing on electoral politics and questions of representation. In other words, when speaking of Latino political interests today, we are more likely to frame the discussion in terms of the “Latino vote” rather than social movements and grassroots activism.⁸⁰

This transition was strategic, coordinated, and implemented by policy leaders within the community, such as the heads of activist and mobilization organizations, the federal government, and corporate America.⁸¹ During the 1960s, Mexican Americans, Cuban Americans, and Puerto Ricans made up the overwhelming majority of Latin American diaspora, but they lived in separate worlds and in separate parts of the country.⁸² Mexicans were the majority—more than twice the number of Puerto Ricans—and were clustered in the Southwest, where political organizations were focused on farmworkers’ rights and bilingual education. Puerto Ricans were primarily living in the Northeast, where they established civic groups in cities like New York and Philadelphia and

⁷⁵ Ford, *supra* note 26, at 1258.

⁷⁶ BELTRAN, *supra* note 18, at 33.

⁷⁷ *See id.* at 33-34.

⁷⁸ *Id.* at 28-29, 37-39.

⁷⁹ For a detailed discussion of this transformation, *see* MORA, *supra* note 46, at 50-83.

⁸⁰ BELTRAN, *supra* note 18, at 99-100.

⁸¹ *See* MORA, *supra* note 46, at 1-17.

⁸² *Id.* at 17-50.

organized primarily around urban poverty and island independence.⁸³ The small but growing Cuban American community, centered in Miami, organized around foreign policy and was especially concerned about combatting the Cuban Revolution.⁸⁴ Mexican and Puerto Rican advocates were often at odds in terms of access to resources and recognition on the national stage, while upper middle-class Cubans found themselves distanced from both groups.⁸⁵ Furthermore, during the period, racial differentiation among Latinos was very apparent. Whereas Mexicans proclaimed themselves part of a brown racial mix of indigenous and European bloodlines, arguing they were a subjugated minority in the U.S., Puerto Rican nationalists acknowledged and honored the island's African heritage and aligned with black activist groups; the first wave of Cuban immigrants identified as white, and many distanced themselves from minority group labels.⁸⁶

Two main factors enabled the rise of a pan-Hispanic Latino signifier. The first was the establishment of a series of networks between State and non-State actors, such as executive offices under the Johnson and Nixon Administrations, the Census Bureau, activists, and media executives; the second was the group's definitional ambiguity.⁸⁷ In the judicial branch, there was a parallel struggle with the definition of "Latino."⁸⁸ It is essential to note that the formation of Latino identity was strategic, and many times the very definition of Latino was subject to significant—and oftentimes contentious—debate among sub-groups, with some Latino congressional members going so far as to argue "Spanish Speakers" were those who suffered from discrimination, poverty, and unemployment. Those who had assimilated, however, were a different matter[.]⁸⁹ This was accompanied by a growing "professionalization" of Latinos, moving away from the 1960s radicalism, and more reliant on corporate America, which took an active role in shaping strategy.⁹⁰ For policy and ensuring influence, advocacy originations began to restrict and redefine what were acceptable categories in which to embrace diversity (i.e. culture, food, music), and those that would prove problematic to fostering political unity (i.e., wealth,

⁸³ *Id.* at 17-33.

⁸⁴ *Id.*

⁸⁵ *Id.* at 20-28, 66-67.

⁸⁶ *Id.* at 4-5, 168.

⁸⁷ *Id.* Government and media officials never actually defined who Hispanics were; instead, they made broad, ambiguous references to the group's unifying culture and created a pan-Hispanic category based on qualitative cultural beliefs, rather than ideological and economic priority profiles. *Id.* at 46-49.

⁸⁸ *Id.* In the courts, definitional ambiguity has abounded, yet there has been a tendency to otherize Latinos (which gives rise to a host of additional issues vis-à-vis the representational capacity of the politicized Latino identity), and to treat Latino as a quasi-racial or racial category. *See, e.g.,* Casanova v. General Mills Restaurants, Inc., No. 94-CV-4386, 1997 WL 473840, at *1 n.1 (E.D.N.Y. Aug.15, 1997) (holding that the plaintiff's claim for discrimination based on her "Hispanic origin" was a claim for race-based discrimination); Elias v. New York City Transit Auth., No. 95 Civ. 1083, 1997 WL 214968, at *1 n.1 (S.D.N.Y. April 28, 1997) ("I need not decide whether bias against Hispanics better fits within the rubric of 'race' or 'national origin' discrimination. I will refer to this claim as one of race discrimination, as [plaintiff] does in his complaint."); Ridgeway v. International Bhd. of Elec. Workers, 466 F. Supp. 595, 597 (N.D. Ill. 1979) (noting that Hispanics are often thought of as being of a different race than whites); Gomez v. Pima County, 426 F. Supp. 816, 819 (D.Ariz. 1976) (same); *see also* Quiros v. Ciba-Geigy Corp., 7 F. Supp. 2d 380, 381-83 (S.D.N.Y. 1998) (analyzing plaintiff's claim that he was subjected to racial and national origin discrimination because his employer denied him promotions and paid him less than similarly situated employees since he is Hispanic and Costa Rican); *cf.* Albert v. Carovano, 851 F.2d 561, 572 (2d Cir.1988) (en banc) (finding that "in accordance with the understanding of the statute's drafters, 'race' for the purposes of Section 1981 comprehends ethnicity") (citing Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987)).

⁸⁹ MORA, *supra* note 46, at 33-34, 36.

⁹⁰ *Id.* at 69-73.

partisan politics, and the grass roots radical positions of separatism and legal independence), in order to ensure that the Latino community they spoke for was uniformly broad and national.⁹¹ Once the radicalness of the 1960s grassroots movements had been reshaped by the Nixon and Ford Administrations' priorities and federal policy⁹², the rise of the professional lobby leveraged the idea of a Pan-Latino bloc, in order to gain greater access to resources and federal funding.⁹³

The National Council of La Raza (hereinafter "NCLR") established itself as the voice for this burgeoning Pan-Latino-Hispanic group, but it also faced challenges.⁹⁴ For example, NCLR struggled with the recruitment of Cubans because of political views that directly countervailed against Mexico's relationship with the Castro Regime that rose to power in the 1960s.⁹⁵ In addition, the first wave of Cuban refugees considered themselves white and were upper middle class, which did not fit into the narrative of profound economic disparity put forth by NCLR and other professional lobbyists.⁹⁶ However, after the second wave of immigration from Cuba in the 1980s, which tended to be composed of racial minorities from lower economic positions, NCLR absorbed Cuban interests by establishing refugee centers.⁹⁷ NCLR attempted to "authoritatively" define Latino identity, publishing articles in its central newsletter, but it still relied on cultural and historical similarities and never addressed the fractured nature of the subgroups that the organization represented.⁹⁸ NCLR employed a strategy to link local issues to national Latino issues, reframing them as something affecting Latinos as a whole. For example, the issue of striking farmworkers being beaten by police was reframed as "police brutality in the Hispanic community."⁹⁹ This was a key strategy for retaining non-Mexican affiliates.¹⁰⁰

These transitions have resulted in a framework for Latino politics as one of representation rather than one of social movements and activism. This shift was facilitated by the notion of a pan-ethnic identity for Latinos, but it also bolstered the identity as well, e.g., what do Latinos want, who they vote for, and why? As Beltran explains:

Advocates and politicians who claim to speak for or on behalf of Latinos continue to put forward theories of empowerment that rely on presumptions of Latinos as a cohesive electorate. . . . Understood as a sign of political literacy, pan-ethnic identification is often characterized as a sign of proper political socialization: subjects who identify with their fellow Latinos are often

⁹¹ *Id.* at 58-59.

⁹² *Id.* at 48.

⁹³ *Id.* at 47 ("[B]ureaucrats focused on rearticulating the demands of Mexican Americans and Puerto Ricans alike. Specifically, the committee concentrated on issues that best fit the institutional capabilities of the federal government, such as bilingual education, housing, unemployment, and the administration's agenda"). This was opposed to the main demands that the movements put forth in the 1960s: Island independence and the return of Federal Land to Chicanos.

⁹⁴ *Id.* at 66 ("The National Council of la Raza attempted to define the term Hispanic through a series of publications, but the articles never mentioned the different political and class issues that actually fractured these subgroups. Diversity was discussed in terms of foods, customs, and skin tone, but not in terms of Republican or Democratic leanings or socio-economic status.").

⁹⁵ *Id.* at 63-64.

⁹⁶ *Id.* at 7, 65-67, 122.

⁹⁷ *Id.* at 63-64.

⁹⁸ *Id.* at 66.

⁹⁹ *Id.* at 68.

¹⁰⁰ *Id.* at 69.

characterized as displaying civic agency and voice, while those who lack such a perspective are depicted as disempowered and politically ineffectual.¹⁰¹

Here is where internal dissent and accurate representation are at their most fragile. This concept of group unity occupies a space of power as well as a space where ideological and cultural identification can purge internal diversity as something that needs to be remedied or corrected, and where a hard exclusionary conceptualization of Latino identity can emerge. This model frames a Latino identity that cannot readily incorporate internal dissention—especially considering voting trends of Latinos in the most recent presidential election. In light of the problematic nature of Latino identity in its modern manifestations, we discuss an alternative conceptualization of politicized Latino identity that is more representational of the complex demographic it claims to encompass.

III. A REPRESENTATIONAL FOUNDATION FOR LATINO IDENTITY: THE FORMAL & COMMUNAL LATINO

The futility of attempting to authoritatively posit an authentic Latino identity (ascriptive or electively embraced) is not lost upon the authors. The *Barrella* court's reconceptualization of an ethnic signifier to a racialized one is part of a long history of a signifier that has, since its inception, suffered from a lack of an empirically verifiable and agreed-upon authenticity calculus. As the court in *Budinsky v. Corning Glass Works* noted:

The terms "race" and "racial discrimination" may be of such doubtful sociological validity as to be scientifically meaningless, but these terms nonetheless are subject to a commonly-accepted, albeit sometimes vague, understanding. . . . On this admittedly unscientific basis, whites are plainly a "race" susceptible to "racial discrimination;" Hispanic persons . . . have been traditional victims of group discrimination, and, however inaccurately or stupidly, are frequently and even commonly subject to a "racial" identification as "non-whites."¹⁰²

For the remainder of the article, we offer an initial attempt to better ground and flesh out the representational capacity of the Latino identity signifier to better reflect the components that characterize the diverse peoples and individuals that fall within its bounded space.

Unlike the political iteration of Latino identity, a *communal* notion of Latino encompasses the distinctive sociocultural dimensions of particular sub-groups within the Latino identity signifier, and is indicative of the day-to-day function and operation of communities. Communal identity as a local phenomenon provides the cognitive identity maps that individuals, as members of a localized community, employ to conceive of the self, navigate, and maneuver within the infinitely complex morass of relations and interactions that define a polity. Communal Latino identity is distinct from an explicitly political or legal Latino signifier.¹⁰³

¹⁰¹ BELTRAN, *supra* note 18, at 100-01.

¹⁰² 425 F. Supp. 786, 788 (W.D. Pa. 1977).

¹⁰³ The Supreme Court noted this in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion), reasoning that, "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by . . . simple racial politics."

Latino, then, has two very distinct spheres of meaning and application in public discourse: the formal and the communal. Those spheres, we contend, are at times conflated, resulting in sameness being artificially emphasized and difference being severely minimized. This further results in the production of exclusionary effects that undermine, rather than enhance, the wellbeing of Latinos from a macroscopic communal perspective. By distinguishing politicized identity from the communal identity embodied within Latino, we explore how Latino functions to manufacture coalitions, how it forges a confederation of different identities under an umbrella term that is constantly leveraged for political ends, and how it represents a unity of wills and interests in service of a “common” goal for all those who reside within the confines of Latino identity.

Is the term Latino one that disparate subgroups can draw from, one that buttresses particular goals and desires with the full force of all Latinos? Or is Latino a signifier that is in constant flux, rife with tensions? Does it have the character of a “Rousseauesque” social contract? Fleshing out the limitations of the Latino signifier makes for more honest and effective dialogue and political engagement between and among the variegated communities that the term is supposed to serve. Unlike Latino as employed by the Second Circuit, professional identity lobbyists, or policy leaders, a communal notion of Latino is more representational. What, therefore, does it mean to be Latino in the U.S. in the 21st century?

A. *Clarifying the Latino Signifier: Culture & Communal v. Societal Notions of Identity*

In order to facilitate a clearer explanation and understanding of what Latino signifies, how it manifests in public discourse, and its limits in terms of representational capacity, it is important to explicitly demarcate the politicized form of Latino from its non-politicized form. Conflating these two distinct dimensions, or using each interchangeably with the other, can lead to distortion by essentializing racial and/or sociocultural traits within the broader public policy discourse. Latino can thus be viewed as encompassing two different types of sociality as articulated by the noted sociologist Ferdinand Tönnies: a societal and a communal type. Tönnies’ notions of Community (*Gemeinschaft*) and Society (*Gesellschaft*) effectively capture and clarify the complexity embodied in the Latino identity signifier. Community and society encompass two different types of sociopolitical engagement and interaction that nevertheless coexist with each other in a demarcated sociopolitical unit of analysis. According to Tönnies, social ties can be categorized, on one hand, as belonging to the realm of personal social interactions among members of a group and the roles, values, sentiments, and beliefs that ground such interactions,¹⁰⁴ or, on the other hand, as belonging to formal direct and indirect social interactions among members of a group and impersonal roles, formal ties, and beliefs based on such interactions.¹⁰⁵

Tönnies’ concept of community describes binding, primary interactional relationships based on sentiment and on a unity that finds expression in the formation of a common “will,” which emerges from social relationships and contributes to a common good, a unity that forms a distinct community. Common unity in the classic conception of communal identity is based on (1) folkways and values, (2) common-wealth, and (3) religion. Values and morals, which inform and provide a basis for self-conceptualization and interests, are ends in and of themselves.¹⁰⁶ Natural

¹⁰⁴ James A. Christenson, *Gemeinschaft and Gesellschaft: Testing the Spatial and Communal Hypotheses*, 63 SOC. FORCES 160, 161 (1984-1985).

¹⁰⁵ *Id.* at 162.

¹⁰⁶ *Id.* at 161.

will drives those actions that are engaged in for their intrinsic worth or their own sake, such as justice and morality. Natural will is the basis for unconditional emotional bonding and a reverence for tradition. *Gemeinschaft* refers to bonds of family, kin, faith, traditions, habit, and duty that undergird relations and directly inform and impact societal interactions. In the context of the U.S. polity, patriotism, political democracy and freedom, and national progress are all foundational aspects of common-wealth.¹⁰⁷ *Gesellschaft*, on the other hand, describes an interactional system characterized by formal relations based primarily on self-interest, competition, and negotiated accommodation. Relationships are rationalistic in structure, instrumental in form, individualistic in motivation, and exploitive in consequences.¹⁰⁸ Social interaction is a construct stimulated, in part, by modern politics steeped in production and a money economy.¹⁰⁹ Within a *Gesellschaft* lens, relations in a group are defined by (1) rationality, (2) negotiated order (e.g., contracts, regulations), and (3) individuality.¹¹⁰ Within a *Gesellschaft* lens, social order is grounded in the Hobbesian idea of mutual self-interest. Through negotiated social interaction and guided by rational will, individuals can be freed from natural bonds of family, kin, faith, traditions, habit, and duty.¹¹¹ The ideological basis of *Gesellschaft* can be found in values such as freedom, material success, conspicuous consumption, rationality, and individualism.¹¹²

B. *Culture, the Community & Society*

Using the methodology developed by Tonnies, we can elucidate the dual components that define culture, as well as explore how these concepts frame the question of Latino identity and its communal and societal aspects. It is the societal version of Latino that has found potent expression in public discourse, crowding out and effacing the diverse and localized character and nature of the variegated peoples upon whom the formal societal designation has been affixed. Thus, this allows courts to conclude that, for some legal questions, “[w]hether being Hispanic constitutes a race or a national origin category is a semantic distinction with historical implications not worthy of consideration.”¹¹³

A communal notion of Latino preempts this type of conclusion, while a societal or formal one enables it. This is the case because identity is rooted in cultural explanations and understandings of the Self and its relationship to the Other and the World. Cultures provide all groups with an ideational template that enables subjects to perceive and evaluate, reason and conclude, determine options and act upon them. “Culture is not a stable set of beliefs or values that reside inside people. Instead, culture is located in the world, in patterns of ideas, practices, institutions, products, and artifacts.”¹¹⁴ Culture is at the root of perception, identity, policy, interests, and the options available to those emplaced within its milieu. The menu of options available is culturally constrained.

Broadly speaking, culture can be conceived as “a conceptual umbrella.”¹¹⁵ Cultural

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 162.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Alonzo v. Chase Manhattan Bank, N.A.*, 25 F. Supp. 2d 455, 459 (S.D.N.Y. 1998).

¹¹⁴ Hazel R. Markus & Shinobu Kitayama, *Cultures and Selves: A Cycle of Mutual Constitution*, 5 *PERSP. ON PSYCHOL. SCI.* 420, 422 (2010).

¹¹⁵ Lowell Dittmer, *Political Culture and Political Symbolism: Toward a Theoretical Synthesis*, 29 *WORLD*

precepts, which are firmly rooted in ontological, teleological, and epistemological touchstones that define universes of possibility, explicitly impact policy. General and specific behavior within the context of an identity group flow from an imparted and preexisting ideational cultural superstructure of meaning and identity that undergirds perception, interpretation, and implementation. Culture thus consists of a

broad label that denotes collective models of . . . identity Culture refers to both a set of evaluative standards (such as norms and values) and a set of cognitive standards (such as rules and models) that define what social actors exist in a system, how they operate, and how they relate to one another.¹¹⁶

Communal identity is powerfully representational, as it is explicitly premised upon a cultural basis that reflects those who reside within the purlieu of a said culture.

Culture has proven to be an elusive concept that defies an “authoritative” and consistent definition.¹¹⁷ Culture, as an ordering principle and unit of analysis, involves interpretative categories such as history, politics, morality, values, and ideology. In essence, culture is meta-expansive because it embodies the collective knowledge of an identity group. Culture is thus a repository for identity and identification; it provides fodder for a dynamic, structural, systemic, and comprehensive knowledge base that directly affects the cognition of members and the elite that represent the group and act to shape policy. Communal identity embodies a particular cultural ethos. Race, ethnicity, gender, class, morality, custom, politics, economy, law, institutions, values, geography, philosophy, history—though not a compendious registry, each of these constituent elements of culture assumes a noteworthy role in delimiting and contouring how “data” is perceived, interpreted, and applied by a subject. Culture, broadly speaking, provides an ideational superstructure, a system of meaning and signification, layered or rather grafted onto the material superstructure that informs identity and the politics of identity that emerge when groups compete for power.

Culture, though not amenable to rigid categorization or definition, nevertheless anchors collective and individual identity and processes of identification, as well as perceptions and interests. Culture can be conceived as a catalogue that enumerates possible interpretations of a subject’s or identity group’s experience. Groups and individuals grasp and comprehend their “essence,” distinctive identity, by identifying what they are not. Perceptions and interests are filtered through the sieve of culture, and it has the concomitant effect of reifying conceptions of identity while entrenching notions of Self, World, and Other. Culture thus consists of socially constructed and established “structures of meaning”¹¹⁸ that mediate the terms that subjects of a polity utilize to situate, organize, and define relationships between space, place, and identity. This occurs via the production and projection of symbolic systems that under-gird cultural templates.

POL. 552, 552 (1977).

¹¹⁶ Peter J. Katzenstein, *Introduction: Alternative Perspectives on National Security*, in *THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS* 1, 6 (Peter J. Katzenstein ed., 1996).

¹¹⁷ See Michael Walzer, *On the Role of Symbolism in Political Thought*, 82 POL. SCI. Q. 191, 198-200 (1967).

¹¹⁸ See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* 312, 325 (1973).

C. *Latino: Signification & Politicized Identity—The Societal & The Communal*

Using the dual communal/societal schema of Tonnies, combined with the brief discussion of culture in the previous section, the communal Latino identity emerges as a localized, mutual notion of identity that reflects the dynamic interaction between the internal and the external, between the subject and cultural context—a context that is permeated with difference as well as common elements that constitute a shared basis for identity among Latino sub-communities that reside within a macroscopic Latino identity signifier. The societal Latino signifier—that of politicized identity—locates culture and identity within the subject in order to create a bounded and specific sense of identity and being that is composed of a common, stable, and shared set of values and beliefs that all members of the identity group share. There is an essential “Latino-ness” that can be located, identified, and ascribed to a subject that has the specified politicized traits that constitute membership in the identity group. Latino as a politicized state of affairs perpetuates a reductionist identity that is premised on being objectively real, that possesses stability, and that is readily recognized and accessed by members, producing solidarity among different subgroups.

Latino as an expression of politicized identity can be placed within a formal societal rubric. As a formal signifier, as a discursive signifier that serves to organize and mobilize an identity group, Latino is a rational construct that serves specific political ends. Latino, as a mechanism and expression of power, ostensibly makes identity the source of mobilization and organization. Yet, because Latino bestrides form and substance, society and community, the reverse can also be the case: politicized identity can be the product of efforts by elites within an identity or sub-group to mobilize and organize. Latino as politicized identity is an expression of power due to its selective nature in bringing sameness to the fore and intertwining these traits, such as common history and language.¹¹⁹ The discourse of politicized Latino identity draws upon (implicitly or explicitly) essentialist notions in order to create a schema that can unify a disparate community for political aims. In foisting form upon substance, society upon community, essentialized notions of self and the group are deployed to create an additional layer of identity based on the notion of a common Latino identity.¹²⁰ This additional layer of politicized identity, however, can overshadow the substantive, communal component of Latino because of the reductionist and limited nature of politicized identity. A pitfall of this is that politicized identity, given its narrowness due to its privileging of sameness over differences, can “imprison individuals in spheres of prescribed action and expectation.”¹²¹ The societal, functional, politicized manifestation of Latino in politics fosters, to some degree a sense of the “collective’s members . . . internaliz[ing] these qualities, suggesting a unified, singular social experience, a single canvas against which social actors [construct] a sense of self.”¹²²

The formal, societal Latino draws from the communal identity-based notion of Latino in a way that produces a simplified and distorted picture of a comprehensive Latino identity. Communal Latino captures the dynamism and, more importantly, the differences that permeate the identity group.

¹¹⁹ For a discussion of how power-relations between a dominant and dominated group shapes individual identity and a subject’s actuality, see GLORIA ANZALDÚA, *BORDERLANDS/LA FRONTERA: THE NEW MESTIZA* (1987).

¹²⁰ See Francisco Valdes, *Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 *La Raza L.J.* 1, 15-17 (1996).

¹²¹ Karen A. Cerulo, *Identity Construction: New Issues, New Directions*, 23 *ANN. REV. OF SOC.* 385, 388 (1997).

¹²² *Id.* at 387.

Many studies . . . have found ethnicity to be more emergent than primordial, ethnic group boundaries to be more fluid than fixed, ethnic conflicts to arise more from clashes of contemporary interests than from ancient animosities, ethnic history and culture to be routinely revised and even invented, and the central essence of ethnicity—ethnic identity—to be multifaceted, negotiable, and changeable.¹²³

The multifaceted, negotiable, and changeable nature of (ethnic) identity—which would reject equivocation of ethnicity with race by the *Barrella* court as well as other courts—requires that difference be accorded as much weight as sameness when it comes to determining what constitutes the meaning of an identity. In the case of districting and voting blocs, for instance, communal Latino identity rather than formal identity is more in line with the Court’s reasoning that,

[i]t is true that redistricting in most cases will implicate a political calculus in which various interests compete for recognition, but it does not follow from this that individuals of the same race [(and/or ethnic identity)] share a single political interest. The view that they do is “based on the demeaning notion that members of the defined racial groups ascribe to certain ‘minority views’ that must be different from those of other citizens[.]”¹²⁴

Difference is of equal significance as sameness in a communal expression of Latino.

Latino in a communal sense is a *category of practice*—which encompasses categories of “everyday social experience, developed and deployed by ordinary social actors, as distinguished from the experience-distant [(or distorting)] categories”¹²⁵—rather than a *category of analysis*, which is analytic in nature and employed by policy leaders and power brokers for pursuing political and public policy agendas. The realm of the everyday reflected in communal Latino as a category of practice incorporates difference into the identity calculus when the analyst’s gaze is directed toward the multiple groups and subgroups that constitute the composite identity superstructure upon which the formal, generalized identity of Latino emerges. “From this perspective, every collective becomes a social artifact—an entity molded, refabricated, and mobilized in accord with reigning cultural scripts and centers of power”¹²⁶ because of the agency accorded to the everyday actors that are employing and reconfiguring practice in the day-to-day—and by doing so shape the contours and parameters of communal identity.

Latino as an expression of communal identity is more substantive than the formal societal notion of Latino, and how one employs the term in public discourse will have variegated effects on the subject population being represented in the general discourse of laws, politics, and power. Communal Latino, as a category of practice, differs immensely from societal (politicized) Latino as a category of analysis, especially when it concerns signification and representation of the subject population whose identity is being interpreted and projected by those who employ and deploy politicized identity. Identity is concomitantly a category of practice and analysis.

¹²³ Joane Nagel, *American Indian Ethnic Renewal: Politics and the Resurgence of Identity*, 60 AMERICAN SOC. REV. 947, 948 (1995).

¹²⁴ *Miller v. Johnson*, 515 U.S. 900, 914 (1995) (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting)).

¹²⁵ Rogers Brubaker & Frederick Cooper, *Beyond Identity*, 29 THEORY AND SOC’Y 1, 4 (2000).

¹²⁶ Cerulo, *supra* note 113, at 387.

As a category of practice identity is used by folks in day-to-day affairs to help “make sense of themselves, of their activities, of what they share with, and how they differ from, others. It is also used by political entrepreneurs to persuade people to understand themselves, their interest, and their predicaments in a certain way, to persuade certain people that they are . . . ‘identical’ with one another and at the same time different from others, and to organize and justify collective action.”¹²⁷

IV. CONCLUSION – GOING FORWARD

As a product and producer of discourse and power, Latino, as an expression of politicized identity, provides an analytic mechanism by which to explain, interpret, and understand the interconnections that bind culture, identity, and politics.¹²⁸ Pressing questions that emerge and that have profound relevance for American politics going forward revolve around the problem of representation: “Who can speak for someone else? Who can stand in for me [(as an individual or member of a sub-group)] to advance my interests and remind others who I am?”¹²⁹ A formal Latino identity provides a simplified signifier that enables a disparate array of subgroups and individuals to gravitate toward a centralized locus of a generalized umbrella identity concept as a site of political organization and mobilization. The “political uses of identities seem to be pressing people toward demanding representatives who look like themselves,”¹³⁰ who share common cultural, racial, ethnic, etc., traits. The ideational and the empirical coalesce within the bounded political space of Latino; the power exercised by deploying Latino in a politicized manner can be observed in its capacity to evoke “images of representation” around which communal configurations of Latinos are organized and which inform how people “build their lives, and decide their behavior.”¹³¹ Latino, as a site to organize and mobilize is deeply identity-laden, and relies upon sameness to create a seamless, unified representative image of a bounded group. Yet, the problem of representation, in light of the rapidly changing demographic, and the influx of very diverse groups immigrating to the U.S. from Latin America, challenges the efficacy of having the formal, politicized Latino serve as *the* signifier for a general Latino identity. One problem that emerges is that gaps “between the representative who shares the group trait and the interests and needs of people in the group may lead to debates over authenticity and over the relationship between identity and experience.”¹³² As the Supreme Court noted in *Miller*,

“when members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes.” But where the State [(or other entity with the power to impact identity)] assumes from a group of voters’ race that they “think alike, share the same political interests,

¹²⁷ Brubaker & Cooper, *supra* note 117, at 4-5.

¹²⁸ See generally Mary Bernstein, *Identity Politics*, 31 ANN. REV. OF SOC. 47 (2005).

¹²⁹ Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647, 650 (1996).

¹³⁰ *Id.* at 649.

¹³¹ MANUEL CASTELLS, *THE POWER OF IDENTITY: THE INFORMATION AGE: ECONOMY, SOCIETY AND CULTURE* 359 (1997).

¹³² Minow, *supra* note 121, at 653-54.

and will prefer the same candidates at the polls,” it engages in racial stereotyping.¹³³

The Court’s reasoning highlights the distortion that occurs when the communal is divorced from the formal. It is our contention that the two complement each other, and that each is necessary in the process of hardening the very pliable analytic underpinnings of Latino identity in legal and political discourse.

In light of the foregoing, one may be inclined to ask how to determine what constitutes an authentic representative identity signifier. Does experience matter most? Mere physical traits? Cultural affinity? We feel that the communal notion of Latino does a better job at contextualizing identity for the purpose of being representative of the variegated subgroups that comprise the Latino identity mosaic. Politicized identity and the imbrication of ideology into a construct serve a strategic purpose. Yet, although it is commonplace for policy leaders within subgroups to “try to use single identities for strategic political goals . . . simply invoking a shared trait of identity does not produce political solidarity and action.”¹³⁴ The Latino identity signifier is specifically designed to provide a point of reference for an individual subject; commonality and sameness provide the lynchpin for elite actors such as the Second Circuit and professional identity lobbyists to more effectively administer identity within legal and political discourse. The formal version of Latino identity is strategically deployed to provide a space within which Latinos can be placed to organize and mobilize collective group action as defined by policy leaders.

Identity is a malleable concept; how a subject perceives itself, and how it interprets the relationship between Self, Other, and World, flows from internalized rules of formation and principles of construction provided by the communal cultural superstructure upon which identity is derived. It is the meaning ascribed to identity, “not its existence, that determines political consequences.”¹³⁵ Latino is a character on a legal and political stage that has a very specific meaning; its function is to garner support and enthusiasm, exercise control, channel angst, worry, and despondency, rally emotions and sentiment, and provide a viable means by which to affect and effect legal protections and public policy through the consolidation and exercise of power. Policy leaders within and without the politicized identity group actively seek to define and deploy Latino with specific aims designed to enhance, augment, and maintain power. This is not limited to a particular ideological party, platform, or program.

Formal Latino reflects politicized identity in service of a power agenda, and is a power-effect of discourse that seeks to homogenize, emphasize sameness, and create political affinities between individual members and subgroups of a disparate and highly diverse group. A political identity bloc that moves toward uniformity and a singular expression of Latino Pathos is made possible by having a catchall, hyper-expansive term to capture the Latinized subject. Despite the profound degrees of difference that separate different sub-groups within the U.S., Latino has become part of mainstream domestic discourse when it comes to classifying, categorizing, naming, and ultimately creating the “reality” of a group of people that all fall under the term Latino. Mexicans, Cubans, Guatemalans, Bolivians, Peruvians, Argentines, Brazilians, Dominicans, Puerto Ricans, and Venezuelans are all very different types of groups—with immense diversity within these classificatory schemas. A common language and a common

¹³³ Miller v. Johnson, 515 US 900, 920 (1995) (quoting Shaw v. Reno, 509 U.S. 630, 646-47 (1993)).

¹³⁴ Minow, *supra* note 121, at 654.

¹³⁵ Leonie Huddy, *From Social to Political Identity: A Critical Examination of Social Identity Theory*, 22 POL. PSYCHOL. 127, 130 (2001).

history, while certainly powerful bases of sameness, do not obliterate or overshadow the differences. The hyphen-American does not dispense with or nullify the vast differences that define the aforementioned groups.

By taking the communal into account when utilizing the formal notion of Latino identity, a more comprehensive construct emerges, and difference and diversity can find expression in law and politics. There are variegated Latino communities that have some common structural components, such as language and history, but there is no singular Latino community. Unlike African-American and Asian, Latino does not lend itself, even superficially, to racial classification as the term has been used in modern parlance and political and legal discourse, such as the conflation of race and ethnicity in *Barrella*. Latino is patently ethnic, and furthermore can be broken down into distinct communities that have a diversity of interests. Communal and Formal bifurcation of Latino produces a more accurate and representational construct on which to base law and public policy. Distinct communities have distinct interests. Mexican communities are distinct from Cuban communities, which are distinct from Guatemalan communities, which are distinct from Argentinean communities, ad infinitum.¹³⁶

Latino as a formal, politicized identity serves to undermine individual identity and self-interest, as well as homogenize a heterogeneous set of subgroups that reside in the confines of the hyper-expansive Latino signifier. The individual subject is actually isolated as opposed to enmeshed in trait-based grouping: each configuration of intersecting identities creates unique individuated circumstances, cognitive maps, and experientially-based interpretive tools, perceptions, and structures of meaning which only the individual subject possesses. The formal, politicized Latino ablates the communal; it produces an artificial macroscopic signifier that attempts to bridge disparate “Latino” identities into a singular *will*—the Latino voter, the Latino consumer, the Latino viewer, the Latino student. Politicized identity groups acquire homogeneity through the deprivation of members’ autonomy, agency. Deprivation of individual autonomy can take place in variegated ways. For example, individual autonomy includes being able to subscribe to one’s choice of ideology. Yet, in some subgroups political and policy leaders equivocate a particular ideological position with identity. Linking an identity signifier with ideology has the effect of portraying “members as an ideological monolith in pursuit of a single set of political objectives. Providing their members with ideological autonomy would, indeed, be directly adverse to the political interests of . . . identity groups.”¹³⁷

Latino is therefore a politicized subject, one that is hyper-expansive, yet very narrowly construed. It functions as a tool by which a Latinized subject is rendered part of a systemic enterprise to define and advance a political and ideological agenda by elite sectors of the polity.

¹³⁶ Additionally, it is also interesting to note the demographic and generational differences that affect the character and content of a particular Latino community’s identity. For example, consider President Obama’s historic visit to Cuba and the thawing of relations between Cuba and the U.S. A serious rift has emerged within the Cuban community in south Florida, usually perceived as staunchly Republican and the most ardent supporters of the Cuban embargo. The Cuban-American community has lost its majority in south Florida to newer immigrants, primarily Puerto Rican, and to an aging demographic replaced by a younger generation that has favored “practicality over ideology.” As one Cuban-American told President Obama during his last visit: “To the rest of the world, it is a battle between Cuba and the United States. For Cuban Americans, this is an issue between Cubans.” See Jon Lee Anderson, *A New Cuba*, THE NEW YORKER, Oct. 3, 2016, at 6, available at <http://www.newyorker.com/magazine/2016/10/03/a-new-cuba> [https://perma.cc/V8VL-Q547]; *Florida: Where Past and Future Collide*, THE ECONOMIST, Oct. 1, 2016, at 2, available at <http://www.economist.com/news/united-states/21707975-most-important-state-battle-looks-likely-be-another-nail-biter-where-past-and-future> [https://perma.cc/7M2L-972Q].

¹³⁷ Jessica Knouse, *From Identity Politics to Ideology Politics*, 2009 UTAH L. REV. 749, 762 (2009).

Latino manufactures a high degree of macroscopic sameness in order to posit a unitary notion of a politicized identity group. The “cultural normalization of ideology . . . is caused, in part, by identity politics.”¹³⁸ Latinos, in light of the communal and formal dimensions of identity, are not a “mosaic,” rather Latino subgroups are contradictory both internally and in their relations to other Latino communal groups. Sameness and similarity are emphasized by a politicized societal notion of Latino, but difference defines groups and subgroups at the community level. Exploring the use of Latino in political discourse from a communal or societal and communal perspective enriches and enhances the representational capacity of Latino as an identity group signifier. The two, used in conjunction, help to alleviate the inherent pitfalls of using politicized identity as a basis for political strategy and mobilization, and help avoid perpetuation of essentialized notions of Latino-ness that, in turn, lead to legal reasoning and policy that is skewed and distorts the realities and needs of the very different groups that populate the political landscape of Latino in the U.S.

¹³⁸ *Id.* at 758.