

Against Individualized Consideration

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INTRODUCTION

Are Cubans Hispanic? According to trial testimony cited by Justice Kennedy in his dissent in *Grutter v. Bollinger*, at least one University of Michigan Law School admissions officer concluded that they were not—at least for the purposes of the school's affirmative action policy. Cubans, as everyone knows, are Republicans.¹

Whether this hearsay was accurate, evidence of admissions officers attempting to define Hispanic was present in several places in the *Grutter* record. Other trial documents revealed that the admissions preference given to Hispanics extended to Puerto Ricans born on the United States mainland, but not to those born on the island itself.² The University of Michigan Law School's admissions bulletin also singled out Mexican Americans as requiring “special attention” in the admissions process, despite the formal policy's reference to Hispanics generally.³ Opponents of the University of Michigan Law School's affirmative action policy cited these distinctions to underscore the race-conscious bankruptcy of the school's policy, emphasizing the district court's finding that “there is no logical basis” for the school's choice of the “particular racial groups which receive special attention” from the admissions office.⁴

When all was said and done, however, this evidence of Latino parsing failed to make a negative impression on the Court. Indeed, the Court may have upheld the Michigan plan *because of* such evidence. The Hispanic hierarchy created by the University of Michigan Law School was an inevitable product of the very mechanism that saved the policy—individualized consideration.⁵ In *Gratz v. Bollinger*, the companion case to *Grutter*, the Court eschewed the mechanical points system adopted by the University's College of Literature, Science, and the Arts, according to which members of certain racial groups, namely African Americans, Hispanics, and Native Americans, were assigned twenty points (out of a possible total of 150) just by virtue of their race or ethnicity.⁶ The Court in *Gratz* concluded that such automatic assignments transformed race from a mere plus factor to a decisive factor “for virtually every minimally qualified underrepresented minority applicant.”⁷

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1. *Grutter v. Bollinger*, 539 U.S. 306, 393 (2003) (Kennedy, J., dissenting).

2. See Brief for the Petitioner at 43, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), available at http://www.cir-usa.org/legal_docs/grutter_v_bollinger_SupCt_brief.pdf.

3. *Id.* at 47.

4. See *id.* at 43. I explore the logical basis for these distinctions *infra* Part III.

5. The Court cited heavily to Justice Powell's opinion in *University of California Regents v. Bakke*, 438 U.S. 265, 315–20 (1978), in which he emphasized use of race as a mere “plus” factor, or one among many factors in an applicant's file, as essential to a constitutional affirmative action plan.

6. See *Gratz v. Bollinger*, 539 U.S. 244, 255 (2003).

7. *Id.* at 272.

The narrow tailoring component of the Michigan affirmative action cases presented the Court with a classic choice, between rules and standards. The Court chose the standards, demanding that the weight assigned to an applicant's race as part of an affirmative action policy vary according to admissions officers' judgments based on the entirety of each individual applicant's record.⁸ This method of consideration is required to ensure that every applicant is treated as an individual and not merely as a member of a race—the risk presented by race-conscious decision making that the Court has sought to avoid by imposing strict scrutiny on all racial classifications, whether benign or invidious.⁹

In my contribution to this symposium, *Latinos and Latinas at the Epicenter of Legal Discourse*, I argue that the Court got its narrow tailoring analysis backwards, and that the story of the excluded Cuban Republicans suggests why. The ultimate effect of individualized consideration is to augment rather than limit the harms of race-conscious decision making by the state, because individualized consideration gives state actors the power to make authenticity judgments concerning the identities of both individuals and groups, subsequently creating incentives for groups to define themselves using authenticity as a metric. When it comes to taking race into account to achieve compelling state objectives—a practice I accept but whose defense is beyond the scope of this Article—rules rather than standards should be the order of the day.

Assigning applicants a twenty-point bonus based on race or ethnicity may appear unseemly at first glance, particularly in contrast to a policy that permits race-based distinctions to take place behind closed doors. But individualized consideration is ultimately more likely to thwart the long-term objectives of reducing the salience of race in our society and eliminating race-based stereotyping. Individualized consideration demands that officials prioritize among members of a racial group according to race-related criteria, whereas mechanical decision making simply demands recognition of the existence of broad categories and the membership of certain individuals in those categories, based on individual self-identification. Standards like individualized consideration give state officials power to define the content of a racial category, and it is that process of definition, not the taking of race into account in and of itself, that undermines the integrity of the individual, the

8. See *Grutter*, 539 U.S. at 336–37 (discussing the “holistic, individualized” review given to each applicant by the University of Michigan Law School, according to which race is considered alongside a wide range of other variables).

9. For a discussion of the Court's use of individualized consideration over time and an argument that the Court has made such consideration the touchstone of narrow tailoring analysis in order to avoid balkanization, or inter-group tensions, see Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781 (2006). Siegel notes that the Court struck down the college admissions plan in *Gratz v. Bollinger* because it gave a clearly identifiable weight to race—a policy likely to lead to resentment from other groups—but upheld the law school plan because the use of race was camouflaged from the public, which meant that any resentment the plan engendered was likely outweighed by the balkanization that would have resulted from prohibiting the state from taking account of race to address inequalities. See *id.* at 798–99; see also Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 56–77 (2003) (noting that the distinction between the two plans underscores that appearances do matter, and that the Court stuck a balance between constitutional law and culture in a way that legitimized the concerns of both sides of the dispute).

protection of which is the supposed rationale for the pursuit of colorblindness and the Court's consequent deep skepticism of race-conscious decision making.

In the course of defending this proposition in the narrow context of affirmative action in education, I hope to make a broader point about the importance of conceptualizing the category of Latino expansively in public discourse, as well as in other legal contexts, such as the voting rights arena. There is a specific concept of individualized consideration particular to the affirmative action debate, but there is also a related and more general question about how specific or individuated the concept of Latino should be. Exploring the downsides of individualized consideration in one context can help build an argument in favor of broad-brush definitions in others. To put it simply, because I believe authenticity claims to be polarizing and antagonistic to a civil rights agenda that simultaneously rejects colorblindness but seeks Latino assimilation into a mainstream political culture, I believe it is essential, when defining Latino, to be inclusive along lines of race, class, national origin, citizenship status, and linguistic identification. There are plenty of arguments against a capacious definition of Latino, including that it distracts attention from the core civil rights concern of combating subordination and makes intra-group solidarity harder to promote, in part because a diffuse category becomes a less meaningful and cohesive category. But I hope that the upside of the argument for a broad definition—namely that it destabilizes the concepts of race and ethnicity¹⁰ without denying that those concepts are relevant to social life and status—will be sufficient to carry the day.

I elaborate these conclusions in three parts. First, I define what I mean by authenticity claims and explain why individualized consideration does more harm than good. Second, I discuss why the mechanical consideration of race actually advances the process of putting race into its proper perspective. Third, I acknowledge that individualized consideration may be more effective than mechanical programs at producing race-conscious policies that combat subordination and discrimination. By permitting admissions officers to draw distinctions among individual Latino applicants, or among different “types” of Latinos, individualized consideration enables decision makers to more accurately identify the sort of Latino who needs or deserves the protection of the civil rights agenda. But I conclude by arguing that the broad, undifferentiated use of racial classifications better balances the interest in ensuring the representation of disadvantaged or subordinated minority groups in public institutions and the political process with the imperative of keeping the definition of race fluid. As I will explain, realizing this balance by ensuring that the value of fluidity be given adequate weight is of considerable importance to Latinos. And the possibility of achieving balance represents the ultimate benefit of the diversity rationale as a governance framework for a multi-ethnic society, where race is recognized to exist but is understood to be plural.

I. THE PROBLEM WITH INDIVIDUATION

I assume for the sake of argument that we as a society will continue to maintain and rely on racial classifications in various ways: in affirmative action programs, in the

10. For the purposes of this short Article, I use the terms race and ethnicity interchangeably, unless specifically noted otherwise.

voting rights arena, in enforcing the civil rights laws, and in public discourse about equality. In each of these contexts, it must be determined who counts as a member of the groups given protection or benefits, or over whose welfare we should be concerned. Among the questions that must be answered is what role the state (and, by extension, lawmakers, lawyers, and participants in public discourse) should play in defining the scope of the group classifications at issue.

In the context of affirmative action, the Supreme Court has made clear that the state's judgments on this score should be nuanced. Individualized consideration has become the defining feature of a narrowly tailored affirmative action policy. In *Grutter v. Bollinger*, the Supreme Court leaned heavily on Justice Powell's previous elevation of the decision-making framework, emphasizing that he made clear in his opinion in *Regents of the University of California v. Bakke*¹¹ that "truly individualized consideration demands that race be used in a flexible, nonmechanical way."¹² The *Grutter* Court underscored that when using race as a "plus" factor in university admissions, a program "must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."¹³ In their evaluation of the student assignment plans adopted by Seattle and Louisville in *Parents Involved in Community Schools v. Seattle School District No. 1*,¹⁴ various Justices¹⁵ underscored the tight connection between permissible race-conscious decision making and individualized consideration.¹⁶ In his concurrence, Justice Kennedy concluded that the school assignment plans could not be considered valid on the basis of *Grutter* and *Gratz*, emphasizing that the plans¹⁷ represented an even cruder version of the point system struck down in *Gratz*, rather than a system that would permit students to be considered based on a "whole range of their talents and school needs with race as just one consideration," such as the plan upheld in *Grutter*.¹⁸

11. 438 U.S. 265 (1978).

12. *Grutter*, 539 U.S. at 334.

13. *Id.* at 337.

14. 127 S. Ct. 2738 (2007).

15. The statements in *Parents Involved* that emphasized individualized consideration came from Justices who either were in dissent in *Grutter* (Kennedy) or were not on the Court when *Grutter* was decided (Roberts).

16. In his plurality opinion, Chief Justice Roberts observed that the Court in *Grutter* "was exceedingly careful in describing the interest . . . as 'not an interest in simple ethnic diversity' . . . but rather a 'far broader array of qualifications and characteristics' in which race was but a single element." *Parents Involved*, 127 S. Ct. at 2763. He also emphasized that the Seattle and Louisville plans, which classify "every schoolchild as black or white" and use that "classification as a determinative factor in assigning children to achieve pure racial balance," could be regarded as less burdensome than the individualized consideration upheld in *Grutter*, in which the Court emphasized the "importance of individualized consideration" as "paramount," and upheld a plan in which "race was one factor in a highly individualized, holistic review." *Id.* at 1264.

17. The plans adopted in Seattle and Louisville differed in their details, but they each took account of the race of students, along with sibling attendance and geography, to ensure that the student populations of the districts' schools remained racially integrated. See *Parents Involved*, 127 S. Ct. at 2746–50.

18. *Id.* at 2794 (Kennedy, J., concurring). Justice Kennedy noted that if *Gratz* were the

Contrary to this conventional wisdom, however, it is crude, mechanical decision making that ultimately restrains the state in its race consciousness. In his concurrence in *Parents Involved*, Justice Kennedy explained his aversion to race-consciousness by emphasizing that when the government “classifies an individual by race, it must first define what it means to be of a race.”¹⁹ Though this characterization may sound ominous, it is an overstatement that ultimately proves my point about individualized consideration. If we accept the need to maintain racial categories for certain purposes, then the need for the government to identify those categories in the abstract (for example, white, black, Hispanic, Asian) is inescapable. But it is by no means a necessary component of race-conscious decision making that the state also be the one to define what it means to be of these groups, or to determine who can claim membership in them. It is individualized consideration—the mechanism preferred by the Court as the means of reducing the weight given to race—that gives the state this power to define who and what counts as representative of a race. By contrast, mechanical interpretation leaves the power of definition to the individual—a claim I explore in Part II.

In permitting admissions officers to consider race as a mere plus factor, individualized consideration does not restrain their race-based judgments—it unleashes them. Individualized consideration gives state actors the power not just to notice race, as mechanical interpretation does, but also to define race, on a case-by-case basis. This power means that race will be treated as more relevant to some applicants than to others. This power is not simply the authority to decide when race will be decisive in a particular case; it is also the power to decide under what circumstances someone’s race will yield a contribution to the student body worth noting or valuing. As the probably off-hand comment by the admissions officer wondering whether to count Cubans as Hispanics demonstrates, the individualized decision-making mechanism allows individuals in positions of power to determine who the authentic members of a group are, and, thus, to articulate the contours of that group.

For two significant reasons, we should be wary of giving the state or its officials in decision-making positions this kind of power to determine authenticity and value.²⁰

measure for judging, the plans in Seattle and Louisville would be *a fortiori* invalid, because the *Gratz* plan placed much less emphasis on race. *Id.* Indeed, the college admissions plan at issue in *Gratz*, despite being mechanical in nature, took into account many more factors than the Seattle and Louisville plans, assigning points to applicants for their academic, artistic, athletic, and socioeconomic backgrounds, among other things, in addition to their racial and ethnic backgrounds. See *Gratz v. Bollinger*, 539 U.S. 244, 293–94 (2003) (Souter, J., dissenting).

19. *Parents Involved*, 127 S. Ct. at 2796 (Kennedy, J., concurring).

20. This criticism of individualized consideration is similar to Justice Thomas’s critique of affirmative action generally. In his concurrence and dissent in *Grutter v. Bollinger*, 539 U.S. 306, 349–50 (2003) (Thomas, J., concurring in part and dissenting in part), as in his concurrence in the school desegregation case *Missouri v. Jenkins*, 515 U.S. 70, 114–22 (1995) (Thomas, J., concurring), Thomas assails affirmative action and race-conscious decision making for the ways in which it permits the majority to patronize blacks for the majority’s own ends. When he deploys Frederick Douglass’s admonition to whites to let blacks rise and fall on their own merits, *Grutter*, 539 U.S. at 349–50, Thomas is arguing against the attempt to mold blacks in the white image, calling on whites to retire their assumptions that blacks can only succeed with the help and in the presence of whites. The force of this critique informs my opposition to individualized consideration. I part company with Justice Thomas, however, in believing that this critique does not require us to jettison race-conscious decision making in the educational

The first reason is that such power creates a stereotyping danger. By permitting admissions officers to decide “who counts,” individualized consideration opens the door to stereotypical decision making, because it gives admissions officers the power to determine which applicants’ races or ethnicities will contribute to the representation of those races or ethnicities.²¹ The ways in which non-Latinos (who probably make up the majority of university admissions officers) define Latino are more likely to be beset by expectations that particular narratives be present in the life of the applicant. Admissions officers may, for example, look for a narrative of discrimination and disadvantage, re-enforcing the social tendency to see Latinos through one lens—as those who have overcome obstacles, experienced poverty, come from uneducated stock, or speak accented English.²² Or, perhaps they believe that the Latino most likely to contribute is one who speaks Spanish, or can recount a harrowing family experience of escape from persecution. Or perhaps admissions officers will feel they have fulfilled their responsibility by admitting wealthy Latin Americans, rather than American Latinos, or white advantaged Latinos regardless of their connection to Latino culture, thus failing to include Latinos from across the socioeconomic and racial spectrum.²³

Though these selection biases are likely to emerge when state actors are permitted to pick and choose among members of any group, they are notoriously fraught in the Latino context.²⁴ Latinos do not share the same race, national origin, history, linguistic affiliations, or economic status, and intra-group solidarity thus can be hard to come

context. But I do believe that the way in which that decision making is conducted can contribute to affirmative action’s demeaning of the very groups it purports to benefit.

21. Cf. Kevin R. Johnson, *Comparative Racialization: Culture and National Origin in the Latina/o Communities*, 78 DENV. U. L. REV. 633 (2001) (analyzing how the popularity of Latin music and the Elian Gonzalez case highlight the ways in which Latino groups become racialized and stereotyped).

22. Cf. ROBERTO SURO, CHANGING CHANNELS AND CRISSCROSSING CULTURE: A SURVEY OF LATINOS ON THE NEWS MEDIA 2 (2006), available at <http://pewhispanic.org/files/reports/27.pdf> (reporting that representations of Latinos in Spanish-language media are generally more positive than in the mainstream, English-language press).

23. Defining “Latino” to include a wide array of experiences is a delicate enterprise. While I believe Latinos as a group have an interest in defining themselves as more than victims of race discrimination, I also do not want to discount the experience of discrimination or elide the ways in which “Latino” has been socially constructed as a race, or express overinvestment in the fact that there is such a thing as a “white” Latino, or an advantaged Latino.

24. For scholarly commentary on the subject, see, Berta Esperanza Hernández Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric, and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1994) (highlighting the varied demographics and histories of Latino subgroups); Kevin R. Johnson, *Immigration and Latino Identity*, 19 CHICANO-LATINO L. REV. 197 (1998) (exploring tensions between native-born and immigrant Latino groups); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994) (illustrating the fluidity of Latino identity and the challenges with respect to Latino self-identification in an American context focused on the black-white paradigm). Cf. Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 10 LA RAZA L.J. 57 (1998) (arguing that Latinos should be considered a race, because race is socially constructed and the Latino experience in the United States has been characterized by racialization and discrimination); Juan F. Perea, *Buscando América: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1425 (2004) (noting that the Spanish language is at the heart of the Latino experience in the United States).

by.²⁵ In other words, identifying “representative” Latinos will necessitate either stereotypical thinking or prioritization of characteristics—a process that threatens to “fix” racial identity in place while excluding important dimensions of the Latino experience from the definition of the category.

In making this point, I do not mean to suggest that definitional statements cannot be made about Latinos, or to claim that the category is incoherent and therefore irrelevant in civil rights debates. Universities, lawmakers, civil rights leaders, advertisers, and research centers all assume “Hispanics” exist. Rejecting the category altogether seems unnecessary—why cut off the nose to spite the face? But the substitution of specific national origin categories for the general grouping would be difficult to administer,²⁶ divisive, and increasingly less relevant (and based on difficult to defend inheritance theories of race) as the generations become removed from the immigrant experience.

Accepting that the category Latino exists, then, my ultimate aim is to underscore that the possibility of stereotyping is introduced when admissions officers are given the power to treat race as a substantive concept, rather than as a mere demographic fact, particularly when the racial grouping is a sprawling one. By giving state actors the power to consider how race relates to particular individuals and their potential contributions, we encourage the development of semi-official definitions of the category—the very sorts of definitions that produce stereotypical thinking and deny that the experience of race or ethnicity differs from individual to individual.²⁷ In other words, individualized consideration promotes a substantive race-consciousness that makes the state a direct participant in the elaboration of the meaning of race, rather than keeping the state as a mere observer, recorder, and perhaps facilitator of that process.

The second danger presented by the individualized model is what I like to call the personal essay problem: individualized consideration demands that people perform their ethnicity for admissions officers, either through their personal statements or in entrance interviews. These performances help shape the ways minorities see themselves and their role in the United States. Such forms of self-expression through an emphasis on one’s heredity, family, or racially-determined life experiences are by

25. I have elaborated on why I believe the Latino category to be a complex but meaningful one, despite these definitional difficulties, in other contexts. *See, e.g.*, Cristina M. Rodríguez, *From Litigation, Legislation*, 117 YALE L.J. 101, 136–138 (2008) (discussing “Latino” as a meaningful associational group in the voting rights context); Cristina M. Rodríguez, *Latinos and Immigrants*, 11 HARV. LATINO L. REV. 501, 509–13 (2008).

26. *Cf.* Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 888–90 (1995) (arguing that there is little inter-group definition among Latinos and emphasizing that the decision about which Latino sub-groups to include in an affirmative action policy should depend on a given law school’s rationale for its affirmative action program).

27. In her work on affirmative action, Lani Guinier expresses a preference for Justice Ginsburg’s dissent in *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting), which asserts that a transparent numbers-based system helps avoid dangers, such as the stereotyping of blacks in the name of affirmative action, that are endemic to an individualized consideration model. She also emphasizes that the individualized consideration model gives admissions officers the power to act as gatekeepers for a small elite, making judgments about minority applicants that reflect conscious and subconscious biases. Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 182–92 (2003).

no means illegitimate, and most, if not all, are likely sincere. But individualized forms of consideration give minority applicants powerful incentives to play to the script the dominant culture has written for its minorities. This script may encourage the telling of the immigrant narrative, the discrimination narrative, or the inter-generational culture clash narrative,²⁸ each of which requires Latinos to put their identities in a political frame, as opposed to allowing Latinos simply to live their identities. This demand to experience one's identity can be exhausting for the ethnic minority, and it is in tension with the long-term goal of reducing self-consciousness of race.

This personal essay dilemma is related to what Kenji Yoshino has described as the problem of "reverse covering," or the pressure an individual feels to behave in ways that conform to and signal how that individual's group is (stereotypically) different from the dominant culture.²⁹ My concern for the incentives the dilemma creates, like my concern for the stereotyping problem, also reflects anxiety about the possibility of group essentialization, or the fear that giving race substantive, cultural content is a way of freezing the definition of that identity in place and time, or declaring that it contains universal characteristics, or certain parameters within which anyone who truly belongs must fall.³⁰ Incentives to behave according to certain race-based expectations compromise the autonomy of the individual by inhibiting her capacity to self-define; they may even pressure her to identify with particular groups or ways of behaving that she might not freely choose absent the social expectations that prompt the behavior or identification. As a result, both from the perspective of the Court's long-term goal of reducing race consciousness and given what I consider to be the long-term objectives of the affirmative action and civil rights agendas—the incorporation of minorities such as Latinos into mainstream political culture and important social and political institutions on their own terms—individualized consideration can be counterproductive.

The ideas that racial or ethnic categories exist, have cultural content, and should be taken into account when considering whether our institutions and political processes are sufficiently inclusive need not be rejected to avoid the personal essay problem. Instead, my primary claim is that the content of terms like Hispanic should be defined primarily by those who might bear that designation, in dialogue with other members of the group and the general culture, and not by the state. Facilitating this sort of definitional process driven by minorities and individuals means not only that state actors should not have the power to distinguish among types of Latinos, but also that Latinos as a group must support the broad definition of the parameters of the category,

28. Cf. RICHARD THOMPSON FORD, *THE RACE CARD* 251–52 (2008) ("Admissions officers noticed a minor literary genre of 'cooking smells' essays, in which the applicant waxed nostalgic about the evocative aroma of a distant relative's ethnic cuisine. Students of every color and hue described their diverse backgrounds and experiences.").

29. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 910 (2002). Yoshino observes that women are more likely to be expected to reverse cover than non-whites and gays, because stereotypically feminine traits are "more likely to be valued as appropriate to at least some spheres of life." *Id.*

30. Cf. RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* (2005) (arguing that civil rights protections should be focused on race discrimination, not discrimination on the basis of possession of cultural traits); CORNEL WEST, *RACE MATTERS* 21–32 (2001) (discussing the problems with assessing race through an authenticity lens).

even as they may experience and make sense of their own Hispanicity or Latinidad in highly specific, individualized terms. Latinos may define first and foremost as Puerto Ricans or Cubans, and they may have wildly divergent experiences as Latinos in the United States, but acknowledging this specificity is not inconsistent with recognizing a capacious definition of the terms Hispanic and Latino for the purposes of social and political discourse. I discuss the benefits of this approach and the compatibility of mechanical rules with its objectives in the next Part.

II. IN DEFENSE OF THE MECHANICAL

If individualized consideration represents a form of race consciousness that gives state actors the wrong kind of power, what might be the alternative? Contrary to the conventional wisdom that has solidified in Supreme Court jurisprudence, numerically based, mechanical schemes constrain the state in its use of race. Such schemes authorize the state to assign only pre-determined values to applicants' racial and ethnic identities, not to explore their relative values on case-by-case bases. There are at least three key benefits of this sort of approach.

The most obvious defense of mechanical interpretation was offered by Justice Ginsburg in her dissenting opinion in *Gratz v. Bollinger*—the benefit of transparency.³¹ She chides the Court for preferring the “winks” and “nods”³² inherent in the amorphous standards of individualized consideration to the transparency that is emblematic of mechanical, rule-based formulae. Under an individualized model, it is impossible for anyone outside an admissions committee to determine how much weight is being given to race generally, or to particular racial subgroups, but under a mechanical scheme, the state actor pre-commits to a particular weight and applies it evenly across the board.³³ In other words, the mechanical state is more forthright about its use of race than the individualized state, thus quelling potential conspiracy theories about corrupt racial spoils systems and enabling the public to hold the state accountable when it believes the weight being given to race is either too great or too little.³⁴

31. See *Gratz v. Bollinger*, 539 U.S. 244, 298–305 (2003) (Ginsburg, J., dissenting).

32. *Id.* at 305.

33. Cf. Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517, 559 (2007) (concluding that the law school admissions scheme gave more weight to race than did the undergraduate admissions program and emphasizing that in upholding the law school plan despite evidence that it differentiated among applicants more than the undergraduate plan, the Court was expressing something of an aesthetic preference against overt quantification).

34. The Court in *Grutter* may well have approved of individualized consideration precisely because of its black box quality—because it enables the state to conceal its use of race—either for appearances sake or in an attempt to tamp down the majority's resentment of affirmative action. But the very existence of an affirmative action policy, regardless of its execution, is likely sufficient to generate the sort of majority opposition that leads to litigation and efforts to stop affirmative action by referendum. Indeed, even in the wake of the *Grutter/Gratz* compromise, voters in Michigan approved the Michigan Civil Rights Initiative, which essentially banned affirmative action, despite *Grutter* having left the state with the authority to do no more than engage in individualized consideration. In other words, the costs of individualized consideration described in Part I are unlikely to be offset by the supposed benefit

Second, and more importantly, mechanical decision making ensures that the precise use of race is triggered by the individual's self-identification, rather than the judgments of the admissions officer. In *Parents Involved*, Justice Kennedy laments that the danger of racial classifications in general, and crude mechanical applications in particular, is that individuals are "forced to live under a state-mandated racial label," which is "inconsistent with the dignity of individuals in our society," because it assigns labels "that an individual is powerless to change."³⁵ But this conclusion is classic Kennedy overstatement that fails accurately to describe mechanical affirmative action policies. To be sure, in adopting them, the decision maker has made a judgment that certain groups require special attention, or extra "points," to ensure their inclusion in a given institution. But whether we are talking about the admissions context, where the individual is invited to specify race on his or her application, or the voting rights context, where population is determined through responses to the Census, decision making based on the *fact* of someone's racial identity can easily be constructed to take its cues from how individuals choose to categorize themselves.

Under a mechanical scheme, race becomes relevant to an admissions decision because it is a fact that the individual has acknowledged about him or herself, not a characteristic whose meaning to the individual the state has discerned, or the admissions officer has determined is likely to contribute to the education of others. The assignment of points has a limited dignitary impact on the individual when seen from this perspective, because it simply amounts to recognition of membership in a group, or a demographic fact. What is arguably demeaning is the conclusion that Latinos or blacks require preferences at all to succeed. But once we accept this premise, it is difficult to see how being recognized as Latino by the state, when one has identified herself as such, demeans the individual, or forces her into an identity box she would rather avoid.³⁶

It is, of course, possible to find the very act of recognizing racial differences abhorrent, even when the act is responsive to self-identification. In 2000, for example, a district court in South Texas heard a constitutional challenge to the Census requirement that individuals classify themselves on the basis of race or ethnicity.³⁷ The plaintiffs in the suit claimed that Congress had failed to articulate a compelling justification for the racial classifications imposed by the Census³⁸ and contended that such self-classification "can do nothing to propel this country toward a society in which race and ethnicity do not matter."³⁹ Being forced to self-classify on the basis of race or ethnicity, they argued, deprived them of their ability to describe themselves

of obfuscation.

35. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2797 (2007) (Kennedy, J., concurring).

36. Recognizing this point does not preclude also acknowledging that the specific point value given to race might itself have demeaning effects if the point value is considerable, or appears excessive. Those designing mechanical points system should be attentive to these sorts of concerns, which the Court in *Gratz* seemed to be flagging by criticizing the twenty points assigned on the basis of race as inflexible, out of proportion to point values assigned for other attributes, and decisive in most cases. See *Gratz*, 539 U.S. at 272. I discuss this issue *infra* notes 42–43 and accompanying text.

37. See *Morales v. Daley*, 116 F. Supp. 2d 801 (S.D. Tex. 2000).

38. *Id.* at 810–11.

39. *Id.* at 814.

simply as Americans.⁴⁰ The court found, however, that the requirement of self-classification does not violate the Fifth Amendment, suggesting that state data gathering on the basis of race for the basic purpose of acquiring the information necessary to govern is fundamentally different from state use of suspect classifications without a compelling interest.⁴¹ Though the court did not say so explicitly, the fact that the classifications were not imposed by the state seemed to make the application of strict scrutiny inapposite.

Unlike the Census, of course, requests for self-classification in the affirmative action context are for more than information-gathering purposes; they lead directly to the state assigning benefits and burdens on the basis of race. But as in the Census context, the classifications the state uses under a mechanical affirmative action plan arise from the guidance and with the imprimatur of the person in question, which at least guards against the danger of the state forcing an identity on the individual. And when compared to individualized consideration programs, the state's removal from the process of classification becomes all the more apparent. The kind of assignment of racial groupings that occurs under mechanical affirmative action programs is ultimately not much different from the sorts of race-conscious policies Justice Kennedy approved in his concurrence in *Parents Involved*, such as race-conscious school siting or district-drawing decisions. In the admissions context, the mechanical classification of people into racial and ethnic groups does operate more directly on the individual, to be sure. But the act of classification in each instance, because it is based on the noting of a demographic fact, is not terribly different.

Finally, as the dissenters in *Gratz* point out, mechanical schemes can be designed to treat race as one of many factors in an individual's application, and the weight given to race can be adjusted to balance the need to ensure its utility in securing the admission of minorities with the expectation that applicants will be considered for the totality of their talents.⁴² But not only does the mechanical version of this process have the advantage of restraining the state from assigning value to the *content* or *substance* of race, it also ensures that all members of a given racial grouping are treated equally. In this sense, mechanical interpretation is substantially less race-conscious than individualized consideration. While points schemes, precisely because of their transparency, may contribute to white/non-white tensions more than an individualized consideration regime under which neither the precise weight given to race nor the extent of the preference across individuals can be discerned, a mechanical scheme is less likely to contribute to intra-group resentment and competition.

This insight is of particular importance to Latinos. The perception that certain Latinos are valued or counted more than others can give rise to petty grievances, competition, and racism. The point is not necessarily that Latinos should consider themselves all to be locked in common cause. Rather, the importance of treating all Latinos as equally Latino stems from the fact that neither the Latino population nor the

40. *Id.* at 815.

41. *Id.* at 814.

42. *See Gratz v. Bollinger*, 529 U.S. 244, 293–97 (2003) (Ginsburg, J., dissenting) (“The college simply does by a numbered scale what the law school accomplishes in its ‘holistic review,’ . . . the distinction does not imply that applicants to the undergraduate college are denied individualized consideration or a fair chance to compete on the basis of all the various merits their applications may disclose.”) (citations omitted).

objective of producing a functional, plural society is served when the state appears to prefer certain Latinos over others, for whatever reason. If the state is perceived to prefer as representative of Latino identity the poor or the affluent; the fully assimilated or the bicultural; the white, brown, or black Latino; or the Mexican, Puerto Rican, or Cuban, then it is participating in the sort of identity definition that leads to stereotyping, resentment, and alienation of those groups not considered to qualify for membership or recognition. The perception of intra-group competition pushes Latinos to distinguish themselves from one another, not for the sake of specificity or asserting one's particular heritage, but for the sake of claiming a benefit, or denying the authenticity of another Latino subgroup.

In emphasizing the virtues of mechanical interpretation, I certainly recognize its limitations. First, I acknowledge that the twenty points assigned on the basis of race to applicants under the scheme in *Gratz*—a point total that eclipsed what could be assigned for the personal essay or musical talents (five points), but that was equal to the points given to athletes and persons from socioeconomically disadvantaged backgrounds⁴³—could appear stark, excessive, and therefore demeaning. In my view, the primary argument against mechanical interpretation is that it does not permit individual minority students to avoid the “taint” of affirmative action. The major benefit of individualized consideration is that it gives the individual minority (though not minorities as a group) plausible deniability, or the ability to conclude that he or she as an individual was admitted without the benefit of a racial preference. This advantage may well help reduce the stigmatizing effects of affirmative action, not only because the individual minority is freed from feeling that she would not have been admitted but for her race, but also because it helps prevent the population as a whole from assuming that all minorities have achieved what they have due to preferences.

Second, rejecting individualized consideration would not necessarily put an end to Latino parsing by the state.⁴⁴ An affirmative action policy could explicitly call for special attention to Mexican Americans, for example, as the University of Texas policy struck down by the Fifth Circuit in *Hopwood v. Texas*⁴⁵ did.

But on the first score, I am skeptical that individualized consideration has any meaningful effect on the general population's perceptions of minorities in a world with affirmative action, or that permitting an admissions office to obfuscate its precise use of race actually diminishes the resentment affirmative action engenders (Barbara Grutter did bring suit, after all).⁴⁶ The core of the critique of *Gratz*-like programs is not so much an indictment of mechanical interpretation itself, but of the way in which the mechanical scheme is constructed.

43. See *Gratz*, 539 U.S. at 279 (O'Connor, J., concurring).

44. The most obvious instance in which Latino parsing continues to occur is in the Census, which permits individuals and families to define their races and ethnicities with ever-greater specificity. My claims in this Article about broad definition of racial groupings are not meant to suggest that this trend is misguided. To the contrary, for information-gathering purposes, as well as out of respect for those who participate in the Census, it is important to develop as clear a sense as possible of how our demography breaks down and how large, socially salient groups break down internally along lines of race, national origin, income, language ability, etc.

45. 78 F.3d 932, 934 (5th Cir. 1996).

46. See *supra* note 34 for further discussion of this point.

And with respect to the second concern, for the same reasons that individualized consideration presents problems that have not been fully appreciated by the Court or commentators, it is vital that decision makers constructing mechanical schemes avoid introducing the nuances that might otherwise arise in an individualized decision when determining the racial categories to be taken into account. School admissions policies, whether at the primary or university level, are part of the process of defining our democratic society's demographic profile, or of constructing the sort of plural community we believe should be represented in our institutions.⁴⁷ In other words, school admissions officers do not just define Latino for the sake of admissions; they socially construct the category. Not only might we want schools to represent the broader society in micro form, but the broad and equal distribution of educational opportunities is essential to future equal participation. Because of the social construction that admissions policies and other race-conscious decision making represent, I believe it is crucial that the definitions of ethnic groups, to the extent that we maintain them, be broad. It is unnecessarily divisive for the state to declare certain subgroups socially salient and others not.⁴⁸

At the end of the day, the Court's elaboration of the individualized consideration model does little to advance a more general theory of how the state should engage in race-conscious decision making. Individualized consideration is simply not an available mechanism for most any other context in which race and ethnicity present representational, participatory, or distributional concerns. Despite Justice Kennedy's invocation of the concept in *Parents Involved*, numerous commentators have pointed out that the technique has little relevance or utility in the context of assigning students in elementary or secondary schools, where "merit" has yet to become a meaningful concept.⁴⁹ In the other context in which race-conscious decision making is still clearly permitted—the voting rights arena—individualized consideration means even less, because the concerns are necessarily those of group power.⁵⁰

47. See Guinier, *supra* note 27, at 135 (discussing how the task of constituting a class is a political act, because it implicates the institution's sense of itself as a community, as well as the larger society's sense of itself as a democracy, in the context of exploring how colleges have evolved from being elite, exclusionary institutions to being engines of economic and social mobility).

48. Similar claims can be made for our understanding of what the category "Asian" means, or "African American" for that matter. In the former case, the issue does not arise in the affirmative action context, because most Asian groups do not require race-based preferences in order to gain admissions to elite universities in large numbers, though it may well be that under a diversity calculus like the University of Michigan Law School's, Asian applicants are benefiting. However, the category "Asian" paints with an exceptionally broad brush, obscuring the fact that certain Asian groups, such as Filipinos and Cambodians, may not be succeeding at the same rate as other students of Asian descent.

49. See, e.g., Goodwin Liu, *Seattle and Louisville*, 95 CAL. L. REV. 277 (2007) (arguing that narrow tailoring is context-dependent and that individualized consideration is inappropriate in the primary school assignment context); James E. Ryan, *Voluntary Integration: Asking the Right Questions*, 67 OHIO ST. L.J. 327 (2006) (arguing that it would be inappropriate for the Court to apply an individualized consideration requirement in the school assignment cases because the goal in the primary school context is diversity in itself, without the overlay of merit-based competition).

50. I discuss the significance of group power as it relates to the definition of Latino in the

Of course, the acceptable use of race may legitimately vary from context to context. But it is important to be aware that one of the costs of elevating individualized consideration as the model of the proper state use of race has been the creation of a misplaced presumption against mechanical rules—a problem particularly evident in *Parents Involved*. The fact that we use mechanical groupings that cohere as the result of individual self-identification and not state-initiated sorting in contexts such as the voting rights arena should give us greater confidence that the use of broad and mechanical groupings can succeed.⁵¹ Mechanical rules have their place and should not be rejected on the dubious grounds that their use demeans the individual.

CONCLUSION: DIVERSITY AS (WELCOME) DISTRACTION

Most Cuban Americans and island-born Puerto Ricans would be aghast if told of the assumptions made by the University of Michigan Law School admissions officer with which I began this Article. Under any common sense definition of the general term Hispanic, Cuban Americans and island-born Puerto Ricans unquestionably qualify. What is it about Cubans, in particular, that would lead someone to the opposite conclusion? The fact that they are overwhelmingly Republican? That they are a political force to be reckoned with in South Florida and therefore in national politics? That they have succeeded economically as a group? That many Cuban Americans are white? Is “Latino” the opposite of each of these things?

Despite the surface absurdity of the Cuban American exclusion, a logical basis for the distinctions *does* exist. Michigan justified its affirmative action policy as a means of achieving diversity with “special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, *who without this commitment might not be represented* in our student body in meaningful numbers.”⁵² A strong case can be made that it has been mainland Puerto Ricans and Mexican Americans whose histories in the United States have been the most marked by discrimination and disadvantage, thus leading to their under-representation in elite law schools and other similar institutions. The University of Michigan Law School admissions officers may well have been trying to identify the subset of Hispanics particularly likely to be underrepresented, either in their applicant pool, or in society at large, and to ensure that those groups were included. Perhaps a mechanical rule that assigned points to all applicants who were Latino would have failed to reach these groups, thus re-enforcing the already advantaged state of Latinos such as Cuban Americans, island Puerto Ricans, and others.

As an empirical matter, it is by no means clear that a mechanical system could not be structured to address this concern. Perhaps the twenty points assigned by the process at issue in *Gratz* were meant to ensure that even the least-represented Latinos would be reached. Efforts to adjust point totals to reach the most disadvantaged Latinos may result in the over-inclusion of minorities who have suffered no discrimination or disadvantage, or those who are undeserving of having the limitations of their grades, test scores, and other attributes offset by a race-based preference. But

voting rights context elsewhere. See Rodríguez, *From Litigation, Legislation*, *supra* note 25.

51. For a more extended discussion of this point with a view to the evolution of the Court’s standards for determining whether section five of the Voting Rights Act has been violated, see *id.*

52. *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003) (emphasis added).

this overinclusiveness is a different problem from the failure to reach truly disadvantaged minorities and is not itself a reason to disfavor mechanical policies as a means of addressing subordination concerns.⁵³

But, more to the point, decision making that draws these sorts of distinctions among minority applicants does not sit well within the terms of equal protection doctrine, even after *Grutter*. The justification the school advanced for its affirmative action policy and that the Court ultimately accepted as compelling was the pursuit of diversity. The Court repeatedly expressed strong support for a broad and inclusive definition of diversity and reiterated Justice Powell's rejection of "reducing the historic deficit of traditionally disfavored minorities in medical schools" as an unlawful interest in racial balancing.⁵⁴ In other words, the evolution of equal protection doctrine has made it necessary to define the Hispanic category broadly.

As countless commentators have noted, however, and as the admissions officers' parsing of the term Hispanic suggests, Michigan Law School did appear to have been bootstrapping an antidiscrimination rationale into its diversity justification. The law school was arguably circumventing the Court's very clear determinations in *City of Richmond v. J.A. Croson, Co.*⁵⁵ and *Adarand Constructors, Inc. v. Peña*⁵⁶ that race-conscious efforts to remedy past discrimination are only justified to redress discrimination committed by the decision maker in question—a justification unavailable as a legal matter to the University of Michigan Law School. Indeed, its particular admissions track record included no evidence of past discrimination against mainland Puerto Ricans and Mexican Americans.⁵⁷ By ignoring the evidence of Latino parsing, the Court may have been legitimizing this reformulation of the discarded societal discrimination rationale for affirmative action into a diversity framework.⁵⁸

53. Overinclusiveness is a problem generally with mechanical rules; applicants can claim membership in a group without having to prove their bona fides. But leaving aside the fact that essays, too, can be manipulated to present a dishonest but appealing minority profile, I ultimately prefer to tolerate overinclusion in exchange for restraining the state from determining who constitutes a deserving minority *qua* minority.

54. *Id.* at 323.

55. 488 U.S. 469, 485–86 (1989) (striking down set-aside program for minority contractors adopted by city of Richmond, Virginia, on the ground that it did not address historical discrimination against the beneficiaries of the program by the city).

56. 515 U.S. 200 (1995) (striking down scheme administered by Department of Transportation to give preference to minorities when awarding contracting and subcontracting jobs).

57. See *Grutter*, 539 U.S. at 328. *But cf. Adarand*, 515 U.S. at 200 (requiring showing that the state institution utilizing affirmative action must itself have discriminated against preferred group in order for remedying past discrimination to qualify as a compelling state interest that justifies a narrowly tailored affirmative action plan).

58. See, e.g., Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1538–44 (2004) (arguing that *Grutter* expands the concept of diversity by embracing antisubordination values despite deploying anticlassification discourse, such that the Court appears to be allowing racial allocation of opportunities when the state is looking to inhibit or break down caste relations, so long as the state acts in a way that will not unduly exacerbate race consciousness or resentment of majority group members).

But if that is what the Court accomplished, the reformulation remains uncomfortable and is hardly a model schools will be able to follow going forward. Indeed, had the admissions policy itself expressed a particular interest in the diversity contributed by Mexican Americans, rather than Hispanics generally, it would likely have been more difficult for the school to defend its diversity claims. The bootstrapping would have been too obvious, and the diversity premise would have been undermined.

One way to understand these tensions is to acknowledge that they demonstrate how the rise of the diversity interest as the justification for affirmative action has led us astray. We have moved away from an honest approach to what should be the animating purposes of a civil rights agenda: combating discrimination and eliminating its effects. We might not feel the imperative to create a broad Hispanic category in the admissions system if we remained clear-eyed about our anti-discrimination goals.⁵⁹

But not only has the Court made it impossible for institutions like the University of Michigan to engage in this sort of broad-based social policy without some kind of cover, the evolution of the diversity justification and the corresponding rise of broad-based racial categories is itself a positive development. Taking the diversity rationale seriously is actually in the long-term interests of Latinos, and it serves the broader social interest of reducing the salience of race in our society. Even if the Court were to return to permitting state actors to remedy subordination generally through race conscious policies, diversity should continue to be pursued and regarded as compelling.

The benefit of this move is apparent for Latinos for several reasons. First and foremost, it is important to have a publicly articulated and even state-sanctioned conception of Latino that is not tied exclusively to the experience of discrimination and disadvantage. Without discounting the history and continuation of under-representation experienced by Latinos of many different types, it is crucial to augment that conception of Latino with affirmative statements of value that stem not only from the unique contributions the population has made to the history and dynamism of the United States, but also from the diversity of the population itself. Indeed, race discourse in general has benefited from a move toward the positive and away from efforts to link

59. A similar point can be made in the voting rights context, in which the race-consciousness of voting rights litigation brings groups, such as Cuban Americans, who have never been subject to the kind of systematic intimidation, violence, and exclusion from voting experienced by southern blacks and Mexican Americans in Texas and other parts of the Southwest, under the protection of the Voting Rights Act. For an articulation of how the voting rights claims of some advocates have become unmoored from these foundations, see Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 872 (1995) (“[T]he current proliferation of group claims in the voting rights arena stems from a profound disorientation from the crucial factors that justify . . . the ‘affirmative’ reliance on racial or ethnic classifications. The rationale of *Carolene Products* . . . suggests that a claim for judicial reform of the political process requires a showing both of group disadvantage and of the group’s historic inability to redress that disadvantage Whatever the merits of the ‘rainbow coalition’ as a matter of political program, not all members of the coalition share these features; not all are entitled to the special solicitude for which they clamor.”) (emphasis in original). For my own assessment of these matters, see Rodríguez, *From Litigation, Legislation*, *supra* note 25.

the majority culture to a history of subordination and the minority culture to the status of victim.⁶⁰

Second, the diversity rationale articulated in *Grutter*—its focus on making the paths to participation and leadership open to socially salient groups—is an advance over the educational benefits version of diversity developed by Justice Powell in *Bakke*, because it is a claim for equal ownership of our social and political life, and not just a claim about the exchange of ideas in the rarified setting of the classroom. Crucially for Latinos, the expansion of the diversity rationale enables equal ownership and representation claims to be made not just by populations whose history of exclusion is deeply entrenched in American history, but also by populations whose presence is socially salient but is largely the result of post-civil rights era immigration—claims I believe Latinos are justified in making but whose complete defense is beyond the scope of this Article.⁶¹ Indeed, the Latino population in the United States today is substantially the product of post-1965 immigration. In 1966, 8.5 million Hispanics lived in the United States, compared to 44.7 million Latinos in 2006—a development in which immigration played a major factor.⁶² The Latino population's claim to representation and solicitude, therefore, must stem from a source other than a claim for redress of past wrongs.

Finally, Hispanic or Latino *is* descriptive of an associational dynamic in the contemporary United States.⁶³ Latino is a socially material category, constructed by our civil rights history, the nature of post-1965 immigration, the academy, and the media, both English and Spanish-language. Our political and social discourses constantly cycle back to the terms Latino and Hispanic, with good reason. Not only is a more specific definition of Latino difficult to administer and likely to result in exclusions that create grievances and hence competition across Latino subgroups, but life in the United States tends to have an amalgamating effect for Latinos, particularly as the immigrant generation gives way to second and third generations, such that the wider society comes to recognize Latinos as Latinos.⁶⁴

60. For those who eschew race consciousness altogether, the inability to pinpoint past discrimination against a particular group by a particular institution should mean an end to race consciousness. But this conception of race in American life ignores that racial and ethnic differences will continue to be salient, and that racial groupings simply will not disappear, because human societies are constituted in part by subgroups. The nature and perhaps salience of race will change over time and across generations, particularly when it comes to the racial or ethnic identity of the descendants of immigrants, but the notion that racial and related differences will disappear seems blinkered.

61. I have developed this point more fully elsewhere. See Cristina M. Rodriguez, *Language Diversity in the Workplace*, 100 Nw. U. L. REV. 1689, 1747–50 (2006).

62. See Pew Hispanic Center, Fact Sheet, *From 200 Million to 300 Million: The Numbers Behind Population Growth*, available at <http://www.pewhispanic.org/files/factsheets/25/pdf>.

63. As I note above, I explore the reasons why in more detail elsewhere. See *supra* note 25 and accompanying text.

64. Cf. ROGER WALDINGER, BETWEEN HERE AND THERE: HOW ATTACHED ARE LATINO IMMIGRANTS TO THEIR NATIVE COUNTRY? i (2007), available at <http://pewhispanic.org/files/reports/80.pdf> (noting that attachment to home country is less for Latinos who have spent more time in the United States or who arrived as children, and that most Latinos in the United States see their future as inside the United States, rather than their countries of origin). After the third generation, when connection to the culture of origin and the

In the end, because the Latino category exists largely as a function of the race-based way in which American legal and political culture frame debates over disadvantage and difference, it is important to define the category broadly, in order to prevent the meaning of the category from becoming fixed. This broad definition will help to destabilize the concept of race over the long-haul—not so that it disappears, but so that we can approach the condition of a pluralistic equality where race matters but does not map onto status. Nothing about having broadly defined racial categories precludes addressing socioeconomic or class-oriented concerns within the Latino community; the diversity interest and a broad conceptualization of race's contribution to that interest does not require discounting other forms of difference that challenge the coherence of racial categories along the economic dimension.

But as I hope my discussion of individualized versus mechanical decision making has made clear, when the state invokes broad-based racial categories like Latino, it is vital that it refrain from giving them content, permitting the definition of the groups to be fluid and driven by those who seek to identify and include themselves within the groups' parameters. In the context of affirmative action, this imperative requires the use of mechanical, broad-based methods of ensuring inclusion in political and social institutions. Such approaches may seem too race-conscious, over-inclusive, and increasingly divorced from the original, specific aims of the civil rights agenda. But they are, in fact, the best means of keeping the government's role in defining and using race limited, even as we give the government the tools to promote inclusion and integration. And, in both the affirmative action context and in general, mechanical and broad-based rules for who counts as Latino are the best hope for respecting the fluid and evolving nature of the Latino population while simultaneously ensuring that this increasingly important segment of the population is part of the governing structure of society.

Spanish language is likely to be non-existent, or attenuated at best, Latino identity arguably becomes less complex and more traditionally American, in that non-white Latinos may persist in being defined as such, whereas white Latinos may have assimilated entirely into a white American majority. For a discussion of the linguistic assimilation of Latinos across three generations that results in the loss of Spanish-speaking ability by the third generation, see RICHARD ALBA & VICTOR NEE, *REMAKING THE AMERICAN MAINSTREAM: ASSIMILATION AND CONTEMPORARY IMMIGRATION* 219 (2003).