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Brian Elzweig

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CASTE DISCRIMINATION AND FEDERAL EMPLOYMENT LAW IN THE UNITED STATES

*Brian Elzweig**

I. INTRODUCTION

In 2020, the California Department of Fair Employment and Housing (CDFEH) brought a case against Cisco Systems, Inc. (Cisco) and two of its employees on behalf of a John Doe plaintiff for discrimination and harassment based on “religion, ancestry, national origin/ethnicity, and race/color.”¹ It was claimed that the discrimination and harassment violated federal law under Title VII of the Civil Rights Act of 1964 (Title VII)² and state law under the California Fair Employment and Housing Act.³ The basis of the claims arose from workers of Indian descent who were in a high caste, discriminating against the plaintiff who was a Dalit, “also . . . known as being from the Untouchable or Scheduled Caste.”⁴ Dalit Indian was alleged to be the plaintiff’s “ancestry, national origin/ethnicity, and race/color.”⁵ The allegations include the plaintiff being paid less, being passed up for advancement opportunities, and suffering poor working conditions based on his caste.⁶ The complaint states that although the plaintiff made “repeated attempts to bring the caste-based and related discrimination, harassment, and retaliation to Defendant Cisco’s attention, . . . Cisco failed to recognize casteism as a form of unlawful religion-, ancestry-, national origin/ethnicity-, and race/color-based discrimination or harassment under state or federal law and failed to conduct a thorough investigation.”⁷ The *Cisco* case was seen by many as exposing the issue of caste discrimination in the United States, as it was the first time that caste was the basis of a discrimination case.⁸ CDFEH eventually voluntarily

*Assistant Professor of Business Law and Research Fellow of the Reubin O’Donovan Askew Institute of Multidisciplinary Studies at the University of West Florida.

1. Complaint at 11–21, California Dep’t of Fair Emp’t & Hous. v. Cisco Sys., Inc., No. 5:20-cv-04374-EJD (N.D. Cal., June 6, 2020).

2. *Id.* at 1; 42 U.S.C. § 2000e (1977).

3. Complaint at 11–14, *Cisco*, No. 5:20-cv-04374-EJD; Cal. Gov’t Code § 12940, *et seq.* (West 2021).

4. Complaint at 8, *Cisco*, No. 5:20-cv-04374-EJD.

5. *Id.*

6. *Id.* at 8–11.

7. *Id.* at 10.

8. See, e.g., Thenmozhi Soundararajan, *Opinion: A New Lawsuit Shines a Light on Caste Discrimination in the U.S. and Around the World*, WASH. POST (July 13, 2020), <https://www.washingtonpost.com/opinions/2020/07/13/new-lawsuit-shines-light-caste-discrimination-us-around-world/>. There was at least one case, *Mazumder v. University of Michigan*, where caste discrimination was alleged to be the basis of a Title VII claim, but it was dismissed on other grounds. 195 F. App’x 320 (6th Cir. 2006).

dismissed the case without prejudice from the federal court prior to any significant action in the case.⁹ The case was then refiled in a California state court with the same allegations except for the violations of federal law.¹⁰

This article examines whether discrimination based on caste can be grounds to claim employment discrimination under the two principal federal employment discrimination laws, Title VII and § 1981. The article first explains the Indian caste system. The article then examines the India diaspora and how it allowed the caste system to migrate to new areas of the world, including the United States. Next, the article focuses on federal employment laws and their creation of protected classes. Then, it examines caste discrimination and its relationship to the protected classes of race, color, religion, and national origin. Separately, it examines ancestry, which is part of the definition of some of these protected classes. This article also explores caste discrimination in international law as it can be influential on interpretations of United States law. Finally, the article recommends enacting specific legislation to quickly address caste discrimination in the United States.

II. THE CASTE SYSTEM

A. The History of the Caste System

The caste system, built on Hindu hierarchal class structure, has roots in India dating back thousands of years.¹¹ Although the origins of the caste system are in dispute, most seem to believe that it arises from the Veda, which are ancient Hindu scriptures.¹² This practice goes back to the Rig Veda, which was written around the fifteenth century B.C.¹³ The Veda organizes the universe into a classification system which creates hierarchical relationships in society.¹⁴ This structure creates a deep religious justification for dividing society into castes.¹⁵

9. Plaintiff's Notice of Voluntary Dismissal Without Prejudice at 2, California Dep't of Fair Emp't & Hous. v. Cisco Sys. Inc., No. 5:20-cv-04374-EJD (N.D. Cal. Oct. 16, 2020).

10. Complaint at 2, California Dep't of Fair Emp't & Hous. v. Cisco Sys. Inc., No. 20-cv-372366 (Super. Ct. Santa Clara 2020).

11. Bina B. Hanchinamani, *Human Rights Abuses of Dalits in India*, 8 HUM. RTS. BR. 15, 15 (2001).

12. Scott Grinsell, *Caste and the Problem of Social Reform in Indian Equality Law*, 35 YALE J. INT'L L. 199, 203 (2010).

13. Sarah Kathryn French, *Homely, Cultured Brahmin Woman Seeks Particular Social Group: Must Be Immutable, Particular and Socially Visible*, 83 U. COLO. L. REV. 1065, 1077 (2012).

14. BRIAN K. SMITH, CLASSIFYING THE UNIVERSE: THE ANCIENT INDIAN VARNA SYSTEM AND THE ORIGINS OF CASTE 46–47 (1994).

15. Grinsell, *supra* note 12, at 203.

The caste system in India consists of four major classes, known as varnas.¹⁶ These four principle castes are then further divided into approximately 3,000 castes and 25,000 sub-castes, which are often tied to a specific occupation.¹⁷ Many Hindus believe caste was created by Brahma, the Hindu god of creation.¹⁸ Brahmins represent the highest varna and were traditionally priests and scholars.¹⁹ Hindus believe Brahmins derived from Brahma's head.²⁰ The next highest varna is the Kshatriyas, which were traditionally warriors and rulers.²¹ Hindus believe that Kshatriyas came from Brahma's arms.²² Farmers occupied a caste known as Vaishyas and were the next in importance.²³ Hindus claim that Vaishyas came from Brahma's thighs.²⁴ Shudras are the lowest varna, traditionally working as servants and in menial jobs.²⁵ Hindus believe Shudras originated from Brahma's feet.²⁶

Outside of these four groups were the Dalits, who are commonly referred to as "untouchables."²⁷ Dalit translates from Hindi to mean "broken people" or "oppressed."²⁸ People in the four principal castes are often referred to as "caste Hindus."²⁹ The Dalits were traditionally below the caste Hindus, falling outside of the varna system, and were instead considered varna-sankara and outcasts.³⁰ They were considered so inferior to other Hindus that they were seen as polluting to caste Hindus (making them untouchable).³¹ Dalits, therefore, were relegated to occupations that the rest of Indian society thought were ritually polluting, such as removal of human waste, handling animal carcasses, tanning leather, washing clothes, sweeping streets, and making and fixing shoes.³² There are differing schools of thought as to whether the low-

16. Priya Sridharan, *Representations of Disadvantage: Evolving Definitions of Disadvantage in India's Reservation Policy and United States' Affirmative Action Policy*, 6 ASIAN L.J. 99, 102 (1999).

17. *What is India's Caste System?*, BBC NEWS (June 19, 2009), <https://www.bbc.com/news/world-asia-india-35650616> (focusing on the four main castes).

18. *Id.*

19. Sridharan, *supra* note 16, at 102.

20. *What is India's Caste System?*, *supra* note 17.

21. Sridharan, *supra* note 16, at 102.

22. *What is India's Caste System?*, *supra* note 17.

23. Sridharan, *supra* note 16, at 102.

24. *What is India's Caste System?*, *supra* note 17.

25. Sridharan, *supra* note 16, at 102.

26. *What is India's Caste System?*, *supra* note 17.

27. Ramya Jawahar Kudekallu, *Race, Caste and Hunger*, 43 FORDHAM INT'L L.J. 1103, 1107 (2020).

28. Hanchinamani, *supra* note 11, at 15.

29. Smita Narula, *Equal by Law, Unequal by Caste: The "Untouchable" Condition in Critical Race Perspective*, 26 WIS. INT'L L.J. 255, 272 (2008).

30. *Id.*

31. *Id.*

32. Kudekallu, *supra* note 27, at 1112. Cobbling was considered polluting because it encompassed working with feet and leather. Hanchinamani, *supra* note 11, at 15.

level occupations in which Dalits were allowed to obtain caused them to be considered untouchable, or whether they were so polluted that they were actually untouchable, and therefore, could only fill these occupations.³³ Regardless of the history, Brahmins and other high-caste Hindus believed that they “would be polluted if the shadow of Dalit fell upon [them].”³⁴ Traditionally, Brahmins had to bathe to purify after a Dalit’s shadow was cast on him or her.³⁵ To prevent this pollution, Dalits were generally kept distanced from higher castes.³⁶ If a Dalit defied the caste system, they would be punished.³⁷ These punishments included being paraded nakedly in public or being tortured, raped, or killed.³⁸

A person born into a caste would generally be associated with that caste for their entire life.³⁹ Traditionally, moving from one caste to another is nearly impossible.⁴⁰ One scholar noted:

To be born into a specific caste is to inherit all the privileges or detriments, to hold all the social currency or suffer imposed poverty, to be able to access education or excluded from it, to have very limited choices (in general) in association, be it in marriage, friendship, or even occupying the same physical space with others.⁴¹

Because caste was seen as a Hindu convention in India, many lower-caste Hindus converted to other religions such as Islam and Christianity to escape its constructs.⁴² However, while these religions did not officially recognize the caste structure, the hierarchy was often still applied to religious converts.⁴³ Caste-based discrimination against Dalits is still openly practiced by Sikhs, Christians, and Muslims against converted Dalits and low-caste Hindus.⁴⁴

33. William J. Eisenman, *Eliminating Discriminatory Traditions Against Dalits: The Local Need for International Capacity-Building of the Indian Criminal Justice System*, 17 EMORY INT’L L. REV. 133, 134 (2003).

34. *Id.* at 135.

35. Hanchinamani, *supra* note 11, at 15.

36. Grinsell, *supra* note 12, at 204.

37. Hanchinamani, *supra* note 11, at 15.

38. *Id.*

39. Grinsell, *supra* note 12, at 204.

40. *Id.*

41. Kudekallu, *supra* note 27, at 1108–09.

42. Sridharan, *supra* note 16, at 103.

43. *Id.*

44. Narula, *supra* note 29, at 271.

B. The Impact of Colonialization on the Caste System

Some historians contend that until the eighteenth century, caste was less restrictive.⁴⁵ During both the pre-colonial and colonial periods of British rule, the British exploited the caste system for political purposes.⁴⁶ After the Battle of Plassey in 1757, the British East India Company (Company) began acquiescing control in India.⁴⁷ The Company effectively ruled large portions of India until the British Parliament enacted the Government of India Act.⁴⁸ This Act put the monarchy in control of the territories governed by the Company.⁴⁹ By this time, India had no power left to fend off British rule.⁵⁰ The British discovered that the caste system was integral to Indian society.⁵¹ Those in the upper-castes, such as the Brahmins, allied themselves to the new British rule to gain power for themselves.⁵² With this influence, the British created different rules for different castes.⁵³ The differing rules created a divide-and-conquer approach to reinforce and expand caste division.⁵⁴ Under British rule, the caste system became the “colonial form of civil society,” justifying the denial of political rights to Indians.⁵⁵ Colonizers used caste to create Indian social identities so they could create a single society with common law.⁵⁶ These categories became rigid and were associated with the rights allowed to a specific caste.⁵⁷ This creation of legal hierarchies allowed for the British to easily govern India.⁵⁸ During the latter part of British rule, the Indian government made efforts, with little success, to limit Brahmin domination in Indian society.⁵⁹

In 1947, India achieved independence from British rule.⁶⁰ Jawaharlal Nehru, India’s first Prime Minister, and B.R. Ambedkar, a principal writer of

45. *What is India’s Caste System?*, *supra* note 17.

46. Karthik Nagarajan, *Compensatory Discrimination in India Sixty Years After Independence: A Vehicle of Progress or a Tool of Partisan Politics?*, 15 WASH. & LEE J. CIV. RTS. & SOC. JUST. 483, 487–88 (2009).

47. Note, *Interpreting Oriental Cases: The Law of Alterity in the Colonial Courtroom*, 107 HARV. L. REV. 1711, 1714 (1994).

48. M. Ramaswamy, *Constitutional Developments in India 1600-1955*, 8 STAN. L. REV. 326, 328 (1956).

49. *Id.*

50. *Id.*

51. Nagarajan, *supra* note 46, at 487.

52. Kudekallu, *supra* note 27, at 1107–08.

53. Nagarajan, *supra* note 46, at 487.

54. See NICHOLAS B. DIRKS, *CASTES OF MIND: COLONIALISM AND THE MAKING OF MODERN INDIA* 73 (2001).

55. *Id.* at 56.

56. Sanjoy Chakravorty, *Viewpoint: How the British Reshaped India’s Caste System*, BBC NEWS (June 19, 2019), <https://www.bbc.com/news/world-asia-india-48619734>.

57. *Id.*

58. *Id.*

59. Nagarajan, *supra* note 46, at 488.

60. Ramaswamy, *supra* note 48, at 335–36.

the Indian Constitution, committed to creating an egalitarian society in India.⁶¹ In its new Constitution, the government promised equal protection for all of its citizens, prohibited discrimination on several grounds—including caste—promoted equality in public employment, and abolished the practice of untouchability.⁶² The Constitution also guaranteed seats in the Indian Parliament for members of lower-castes and Dalits.⁶³ In addition to Constitutional reforms, India established a system of laws designed to prohibit caste-based discrimination.⁶⁴ In addition, affirmative action programs and other caste-conscious measures were put in place to give economic aid to Dalits.⁶⁵ These reforms were met with limited success. Even after the inception of the Constitution and other reform measures, caste discrimination is still prevalent in India.⁶⁶ The social structure in modern India is still based on the caste system.⁶⁷ This has created structural inequalities between the high-castes, the lower-castes, and the Dalits.⁶⁸ There is a strong consensus in India that Dalits are marginalized in society.⁶⁹ In 2007, the U.N. Committee on the Elimination of Racial Discrimination noted that “de facto segregation of Dalits persists, in particular in rural areas, in access to places of worship, housing, hospitals, education, water sources, markets, and other public places.”⁷⁰ Dalits are often subject to social isolation and excluded from participation in social, political, and economic processes.⁷¹ In many areas of India, Dalits still must bring their own utensils to restaurants to prevent polluting the members of higher castes.⁷² For the same reason, Dalits often cannot drink out of the same wells nor worship in the same temples as members of higher castes.⁷³

61. Nagarajan, *supra* note 46, at 491.

62. *Id.*

63. *Id.*

64. Narula, *supra* note 29, at 255.

65. *Id.*

66. Jeremy Sarkin & Mark Koenig, *Ending Caste Discrimination in India: Human Rights and the Responsibility to Protect (R2P) Individuals and Groups from Discrimination at the Domestic and International Levels*, 41 GEO. WASH. INT'L L. REV. 541, 541 (2012).

67. *Id.* at 541–42.

68. *Id.* at 542.

69. Nagarajan, *supra* note 46, at 487.

70. U.N. Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties Under Art. 9 of the Convention: Concluding Observations of CERD: India, ¶ 13, U.N. Doc. CERD/C/IND/CO/19 (May 5, 2007), [hereinafter Concluding Observations].

71. Sarkin & Koenig, *supra* note 66, at 542.

72. Hanchinamani, *supra* note 11, at 15.

73. *Id.*

III. THE INDIA DIASPORA

India has the largest diaspora in the world, with approximately 17.5 million Indian-born people living in other countries.⁷⁴ Bangladesh and Pakistan also contribute approximately 7.8 million and 6.3 million people, respectively, to their own diasporas.⁷⁵ The India diaspora occurred in four major interwoven waves.⁷⁶ The first wave, which began in ancient times and continues today, are traders who emigrated from the South Asian subcontinent.⁷⁷ This group left to find business and trade opportunities in areas outside of the subcontinent.⁷⁸ The second wave of emigration from India occurred in the nineteenth century.⁷⁹ This migration was comprised of Indian indentured laborers who replaced freed slaves in plantation economies.⁸⁰ This sometimes forced migration led Indians to countries like South Africa, Mauritius, Trinidad, Jamaica, Guyana, and Fiji.⁸¹ The third wave of the diaspora occurred after World War II.⁸² During this wave, many people moved within the Indian subcontinent and other areas of the world. Feeling that new post-war governments would not protect minority rights, many Muslims moved from India to East and West Pakistan.⁸³ Conversely, many Hindus living in Pakistan moved to India.⁸⁴ This wave of the diaspora saw large amounts of highly educated Indian professionals leaving to become teachers, lawyers, and doctors in Europe, the United States, and Canada.⁸⁵ This immigration is still occurring with many Indians in the field of Internet Technology (IT), leaving for high paying jobs in these and other Western countries.⁸⁶ As many as 100,000 IT and computer specialists per year have moved from India to the United States since

74. See *Monitoring Global Population Trends*, UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, POPULATION DIVISION, <https://www.un.org/en/development/desa/population/migration/data/estimates2/estimatesgraphs.asp?3g3>.

75. See *id.*

76. GILBERT OONK, *GLOBAL INDIAN DIASPORAS: EXPLORING TRAJECTORIES OF MIGRATION AND THEORY* 10 (2007).

77. *Id.* at 11.

78. *Id.*

79. *Id.*

80. *Id.*

81. Jairam Ramesh, *The Indian Diaspora Living in Two Worlds is an Essential Feature of Globalisation*, INDIA TODAY (May 1, 2000), <https://www.indiatoday.in/magazine/guest-column/story/20000501-the-indian-diaspora-living-in-two-worlds-is-an-essential-feature-of-globalisation-777485-2000-05-01>.

82. OONK, *supra* note 76, at 11.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

the mid-1990s.⁸⁷ Overall, this wave led to about four million Indians moving to the West.⁸⁸ There are approximately three million people of Indian descent in the United States.⁸⁹ About two-thirds of people of Indian descent in the United States came during this wave.⁹⁰ Because so many Indians came to the United States for jobs in computer technology and IT, some have labeled this wave as “the IT generation.”⁹¹ The fourth wave of the diaspora includes those who emigrated twice or more.⁹² This group includes indentured servants who moved (or were moved) to countries in the Caribbean and South America and then moved to Europe or North America.⁹³ Most of this group migrated because of political conditions in their host countries.⁹⁴ This group was diverse, consisting of professionals as well as traders and laborers.⁹⁵

The caste system has traveled with the diaspora, impacting Dalits throughout the world.⁹⁶ The Indian diaspora has led to India being the leading country of origin for migrants.⁹⁷ A 2001 Human Rights Watch report to the United Nations World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance found that caste discrimination has “firmly take[n] root in East and South Africa, Mauritius, Fiji, Suriname, the Middle East, Malaysia, the Caribbean, the United Kingdom, North America, and other regions.”⁹⁸

IV. CASTE-BASED EMPLOYMENT DISCRIMINATION IN THE UNITED STATES

With the caste system migrating with the India diaspora as well as others from the Indian subcontinent, it is important to know the impact that caste has on the lives of those emigrants in their new home countries, including those living in the United States. In 2018, Equality Labs, an advocacy group for

87. Chazen Global Insights, *A Singular Population: Indian Immigrants in America*, COLUM. BUS. SCH. (Dec. 10, 2020), <https://www8.gsb.columbia.edu/articles/chazen-global-insights/singular-population-indian-immigrants-america>.

88. Ramesh, *supra* note 81.

89. Chazen Global Insights, *supra* note 87.

90. *Id.*

91. *Id.*

92. OONK, *supra* note 76, at 11.

93. *Id.* at 11–12.

94. *Id.* at 12.

95. *Id.*

96. HUMAN RIGHTS WATCH, *CASTE DISCRIMINATION: A GLOBAL CONCERN: A REPORT BY HUMAN RIGHTS WATCH FOR THE UNITED NATIONS WORLD CONFERENCE AGAINST RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE, DURBAN, SOUTH AFRICA, SEPTEMBER 2001* (Sept. 2001), <https://www.hrw.org/reports/2001/globalcaste/>.

97. *At 18 Million, India Has the World's Largest Diaspora Population*, ECON. TIMES (June 23, 2021), <https://economictimes.indiatimes.com/nri/migrate/at-18-million-india-has-the-worlds-largest-diaspora-population/articleshow/80290768.cms>.

98. HUMAN RIGHTS WATCH, *supra* note 96.

Dalit rights, released a study on caste-based discrimination in the United States.⁹⁹ This report noted that caste status has become embedded in major South Asian American institutions as well as American mainstream institutions with large South Asian immigrant populations.¹⁰⁰ Caste-based discrimination, primarily against Dalits, was found in “schools, workplaces, places of business, and religious institutions.”¹⁰¹ Forty-one percent of American Dalits stated that they were victims of caste-based discrimination in both primary and higher educational institutions.¹⁰² This is opposed to three percent of Brahmins who felt they had been disadvantaged due to caste-based discrimination.¹⁰³ Forty-two percent of American Dalits felt as though they had been discriminated against based on their caste in their places of worship.¹⁰⁴ Fifty-nine percent of Dalits experienced caste-based derogatory jokes and slurs made against them, and twenty-six percent claimed they were victims of physical assault in the United States based on their caste.¹⁰⁵

Caste-based discrimination is widely reported among American Dalits in their workplaces. Sixty-seven percent of Dalits reported that they had been unfairly treated in their workplaces in the United States because of their caste.¹⁰⁶ Much of this discrimination goes unreported and uncorrected because employees feel that other Americans do not understand caste, and therefore, may not be given the weight of other forms of discrimination in the workplace.¹⁰⁷ Partially because of this fear of discrimination in the workplace and concern that reporting such discrimination would not merit consequences, many Dalits (and members of other lower castes) hide their caste identity.¹⁰⁸ Fifty-two percent of American Dalits fear that they will be “outed” as members of a lower caste.¹⁰⁹

The fear of being outed appears to correlate to the perceived discrimination that occurs to Dalits by those of higher castes. Although anecdotal, several Dalit respondents to the Equality Labs survey alleged that they had “significant amounts of psychological turmoil they sustained around the secrecy of their Caste. Being outed meant that they and their families could be rejected from South Asian cultural and religious spaces, lose professional and social

99. Maari Zwick-Maitreyi et al., *Caste in the United States, A Survey of Caste Among South Asian Americans*, EQUALITY LABS (2018), <http://www.equitylabs.org/castesurvey>.

100. *Id.* at 16.

101. *Id.*

102. *Id.* at 18.

103. *Id.*

104. *Id.* at 21.

105. Zwick-Maitreyi et al., *supra* note 99, at 26–27.

106. *Id.* at 20.

107. *Id.*

108. *Id.* at 17.

109. *Id.*

networks, or even face bullying, abuse, and violence.”¹¹⁰ To obviate the fear of being outed, many lower-caste immigrants isolate themselves from other South Asians.¹¹¹

There are, however, several ways in which higher-caste individuals try to determine if a person is of a lower caste. One common method is to stroke the back of another to see if they are wearing a sacred thread.¹¹² A sacred thread is given to children of higher castes upon their official acceptance into their varna through a ceremony called Upanayana.¹¹³ While traditionally only boys participated in the Upanayana, some upper-caste groups now allow girls to participate.¹¹⁴ The sacred thread is usually worn as a cord tied over the left shoulder and under the right arm.¹¹⁵ After the ceremony, higher-caste individuals wear the sacred thread for life, replacing it at intervals or when damaged.¹¹⁶ If a South Asian American is not wearing a sacred thread, the assumption is that individual is not from a high caste and may be a Dalit. Similarly, high-caste individuals may invite other South Asians to go swimming in order to determine if they are wearing a sacred thread when they are disrobing.¹¹⁷

Another way in which a person may try to determine the caste of someone else is by their surname.¹¹⁸ Oftentimes, certain surnames are associated with certain castes.¹¹⁹ Similarly, certain neighborhoods in Indian cities are segregated by caste. Determining the neighborhood in which a person grew up would then reveal the caste of that person.¹²⁰ In order to keep the purity to perform religious tasks, Brahmins traditionally observed numerous taboos, including vegetarianism.¹²¹ This may lead some to question whether a South Asian American is a vegetarian¹²² because Dalits are mainly meat eaters.¹²³

110. *Id.* at 18.

111. Zwick-Maitreyi et al., *supra* note 99, at 18.

112. Narula, *supra* note 29, at 255, at 321; Nitasha Tiku, *India's Engineers Have Thrived in Silicon Valley. So Has Its Caste System*, WASH. POST (Oct. 27, 2020, 8:45 PM), <https://www.washingtonpost.com/technology/2020/10/27/indian-caste-bias-silicon-valley/>.

113. The Pluralism Project, *Upanayana: The Sacred Threads*, HARV. UNIV., (2020), <https://pluralism.org/upanayana-the-sacred-thread>.

114. *Initiation: The Sacred Thread Ceremony*, THE HEART OF HINDUISM, [https://iskcond-educational-services.org/HoH/practice/rites-of-passage/initiation-the-sacred-thread-ceremony/](https://iskcond-educationalservices.org/HoH/practice/rites-of-passage/initiation-the-sacred-thread-ceremony/).

115. The Pluralism Project, *supra* note 113.

116. *Initiation: The Sacred Thread Ceremony*, *supra* note 114.

117. *See Rough Translation: How To Be An Anti-Casteist*, (NPR radio broadcast Sept. 30, 2020) (transcript available at <https://www.npr.org/transcripts/915299467>).

118. *Id.*

119. *Id.*

120. *Id.*

121. French, *supra* note 13, at 1077.

122. Tiku, *supra* note 112.

123. Balmurli Natrajan & Jacob Suraj, ‘Provincialising’ Vegetarianism Putting Indian Food Habits in Their Place, 53 ECON. & POLIT. WKLY 54, 58 (Mar. 2018); Soutik Biswas, *The Myth of the Indian Vegetarian Nation*, BBC NEWS (Apr. 3, 2018), <https://www.bbc.com/news/world-asia-india-43581122>.

Additionally, professionals are often asked who they married to give a clue to the caste in which they belong.¹²⁴ In *Cisco*, the plaintiff was outed by a Cisco employee who attended the Indian Institute of Technology at the same time as the plaintiff.¹²⁵ The employee noted, and told others, that the plaintiff was not on the “main list” of students, signifying that the plaintiff was part of an affirmative action program aimed at Dalits and others of lower castes.¹²⁶

Within three weeks of the *Cisco* lawsuit being initiated, Equality Labs received about 260 complaints from IT workers who claimed to be victims of caste discrimination.¹²⁷ The caste-based discrimination was in the form of “slurs and jokes, bullying, discriminatory hiring practices, bias in peer reviews, and sexual harassment.”¹²⁸ Further, a group of thirty Dalit women engineers wrote an anonymous letter to the Washington Post claiming that they were victims of caste discrimination in the workplace.¹²⁹ The complaints being made in IT companies are intuitive due to the large number of Indian and South Asian immigrants that arrived in the United States as part of the IT Generation.¹³⁰ It is not surprising that much of the reported caste discrimination employment complaints are against IT companies. Although Indians in the diaspora settled through most major cities within the United States, many settled in areas with large IT presences.¹³¹ After the Second World War, Silicon Valley and the Route 128 Corridor near Boston became major technology hubs in the United States.¹³² Silicon Valley is the area in and around the Santa Clara Valley, south of San Francisco.¹³³ During the 1990s dot-com bubble, other areas such as Seattle, Austin, and New York City became tech hubs as well.¹³⁴ After the Great Recession, major cities such as Los Angeles, Chicago, and Washington, D.C. also became significant tech hubs.¹³⁵ During this time,

124. Tiku, *supra* note 112.

125. Complaint at 9, California Dep’t of Fair Emp’t & Hous. v. Cisco Sys., Inc., No. 5:20-cv-04374-EJD (N.D. Cal., June 6, 2020).

126. *Id.*

127. Tiku, *supra* note 112.

128. *Id.*

129. *A Statement on Caste Bias in Silicon Valley From 30 Dalit Women Engineers*, WASH. POST (Oct. 27, 2020, 3:39 PM), https://www.washingtonpost.com/context/a-statement-on-caste-bias-in-silicon-valley-from-30-dalit-women-engineers/d692b4f8-2710-41c3-9d5f-ea55c13bcc50/?itid=lk_interstitial_manual_16.

130. Chazen Global Insights, *supra* note 87.

131. Mary Hanna & Jeanne Batalova, *Indian Immigrants in the United States*, MIGRATION POL’Y INST. (Oct. 16, 2020), <https://www.migrationpolicy.org/article/indian-immigrants-united-states-2019>.

132. John F. Coyle & Joseph M. Green, *Startup Lawyering 2.0*, 95 N.C. L. REV. 1403, 1407 (2017).

133. Christian Zolniski, *The Informal Economy in an Advanced Industrialized Society: Mexican Immigrant Labor in Silicon Valley*, 103 YALE L.J. 2305, 2306 (1994).

134. Coyle & Green, *supra* note 132, at 1407.

135. *Id.*

many IT firms that started in the Silicon Valley began moving to San Francisco.¹³⁶ The area stretching from Silicon Valley to San Francisco is the largest IT cluster, by far, in the world.¹³⁷ The Indian diaspora has led to large populations of Indian Americans in all of these cities.¹³⁸ The New York, Chicago, San Francisco, and San Jose metropolitan areas are home to thirty percent of the Indians living in the United States.¹³⁹ Foreign-born Indians comprise 6.3% of the population within the San Jose-Sunnyvale-Santa Clara California metro.¹⁴⁰ Additionally, foreign-born Indians make up 2.7% of the San Francisco-Oakland-Hayward metro.¹⁴¹ The percentages of Indians and South Asians in the IT industry will likely continue to rise. Between 2001 and 2015, the United States granted more than half of its H-1B visas to people from India.¹⁴² For example, in 2018, approximately forty percent of foreign-born workers in the Seattle tech industry were born in India.¹⁴³ H-1B visas are the main way in which United States companies hire foreign workers in highly skilled occupations.¹⁴⁴ In 2019, there were 388,403 H-1B visas granted, 71.7% of which went to Indian recipients.¹⁴⁵ United States companies issued 66.1% of these H-1B visas for computer-related occupations.¹⁴⁶ Major technology firms, including Amazon, Google, Tata Consultancy Services, Microsoft, Facebook, IBM, Apple, and Intel were all among the top ten recipients of H-1B visas in 2019.¹⁴⁷

There has been a high level of achievement among the South Asian immigrant community. The United States recently elected Kamala Harris, who is of Indian descent on her mother's side, as its Vice President.¹⁴⁸ Sundar

136. *Id.*

137. *Id.*

138. *See* Hanna & Batalova, *supra* note 131.

139. *Id.*

140. *Id.*

141. *Id.*

142. Neil G. Ruiz, *Key Facts About the U.S. H-1b Visa Program*, PEW RESEARCH CTR. (Apr. 27, 2017), <https://www.pewresearch.org/fact-tank/2017/04/27/key-facts-about-the-u-s-h-1b-visa-program/>.

143. Gene Balk, *More Than Half of Seattle's Software Developers Were Born Outside U.S.*, SEATTLE TIMES (Jan. 19, 2018, 10:34 PM), <https://www.seattletimes.com/seattle-news/data/more-than-half-of-seattles-software-developers-were-born-outside-u-s/>.

144. Ruiz, *supra* note 142.

145. U.S. CITIZENSHIP AND IMMIGRATION SERVS., CHARACTERISTICS OF H-1B SPECIALTY OCCUPATION WORKERS, FISCAL YEAR 2019 ANNUAL REPORT TO CONGRESS OCTOBER 1, 2018–SEPTEMBER 30, 2019, 6–7 (Mar. 5, 2020), https://www.uscis.gov/sites/default/files/document/reports/characteristics_of_specialty_occupation_workers_H-1B_fiscal_year_2019.pdf

146. *Id.* at 12.

147. NAT'L FOUND. FOR AM. POL'Y, H-1B APPROVED PETITIONS AND DENIAL RATES FOR FY 2019, 4 (Feb. 2020), <https://nfap.com/wp-content/uploads/2020/02/H-1B-Denial-Rates-Analysis-of-FY-2019-Numbers.NFAP-Policy-Brief.February-2020-1.pdf>.

148. Sadanand Dhume, *What Kamala Harris Isn't Saying About Her Mother's Background, Tamil Brahmins like Shyamala Gopalan Fled Identity Politics and Socialism for the*

Pichai, the Chief Executive Officer (CEO) of both Alphabet, Inc. (which is the parent company of Google) and Google, Indra Nooyi, the former CEO of PepsiCo, Inc.,¹⁴⁹ and Satya Nadella, the CEO of Microsoft, were all born in India.¹⁵⁰ The Indian community in the United States has produced “too many prominent doctors, engineers, and academics to count.”¹⁵¹ In 2012, approximately sixteen percent of Silicon Valley startups had an Indian co-founder.¹⁵² In the *Cisco* case, it was alleged that “Cisco ha[d] employed a predominately South Asian Indian workforce for decades”¹⁵³ However, most highly successful Indians in the United States, including Harris, Pinchai, Nooyi, and Nadella, are Brahmins.¹⁵⁴

Dalits and other lower-caste members make up less than two percent of the Indian immigrants to the United States.¹⁵⁵ More than ninety percent of Indian immigrants in the United States are from high or dominant castes.¹⁵⁶ Because they are a small minority and have faced discrimination for centuries in India, Dalits and other low-caste Indians in the United States often feel as if they are outsiders.¹⁵⁷ There is a feeling among Dalits and other lower castes “that all of the inequalities associated with caste status, ritual purity, and social exclusion have become embedded within all of the major South Asian American institutions.”¹⁵⁸ Further, these inequalities extend into American mainstream institutions that have significant South Asian immigrant populations. “This includes schools, workplaces, places of business, and religious institutions.”¹⁵⁹ When discriminated against in the workplace, Dalits do not feel that Americans understand the caste system, and therefore, their “concerns will not be given weight.”¹⁶⁰ This has led to many Dalits not reporting

U.S., WALL ST. J. (Aug. 21, 2020, 1:29 PM), <https://www.wsj.com/articles/what-kamala-harris-isnt-saying-about-her-mothers-background-11597944590>.

149. *Id.*

150. Sherman Hollar, *Satya Nadella*, ENCYC. BRITANNICA (Jan. 1, 2021), <https://www.britannica.com/biography/Satya-Nadella>.

151. Dhume, *supra* note 148.

152. Paresh Dave, *Indian Immigrants Are Tech’s New Titans*, L.A. TIMES (Aug. 11, 2015), <https://www.latimes.com/business/la-fi-indians-in-tech-20150812-story.html>.

153. Complaint at 9, California Dep’t of Fair Emp’t & Hous. v. Cisco Sys., Inc., No. 5:20-cv-04374-EJD (N.D. Cal. June 6, 2020).

154. *See* Tiku, *supra* note 112; *see also* Aaker Pattel, *When Diversity is Seen as Discrimination*, MINT (Feb. 15, 2014), <https://www.livemint.com/Leisure/9HDVwSeDKkGw5dw3E916uM/When-diversity-is-seen-as-discrimination.html>.

155. DEVESH KAPUR, DIASPORA, DEVELOPMENT, AND DEMOCRACY: THE DOMESTIC IMPACT OF INTERNATIONAL MIGRATION FROM INDIA 81–82 (2010); *see also* Tinku Ray, *The US Isn’t Safe From the Trauma of Caste Bias*, WGBH NEWS (Mar. 8, 2019, 9:00 AM), <https://www.pri.org/stories/2019-03-08/us-isn-t-safe-trauma-caste-bias>.

156. Ray, *supra* note 155.

157. *See* Zwick-Maitreyi et al., *supra* note 99.

158. *Id.* at 16.

159. *Id.*

160. *Id.* at 20.

caste-based workplace discrimination nor trying to correct the injustice they feel arises from it.¹⁶¹

V. CASTE DISCRIMINATION IN EMPLOYMENT UNDER CURRENT LAW

Sixty-seven percent of Dalits and twelve percent of Shudras feel as though they were discriminated against in the workplace because of their caste.¹⁶² They feel that reporting the discrimination would lead to “being dismissed or suffering other negative consequences to their career.”¹⁶³ However, it is unclear what consequences employers face if they allow caste discrimination in their workplace. While India, in its reformed Constitution, has outlawed the caste system, discrimination based on caste is not specifically illegal in any jurisdiction in the United States.¹⁶⁴ Lower-caste workers believe that most upper-caste Indians think that caste bias is a relic of the past.¹⁶⁵ Those of the lower castes, however, accuse the upper castes of having “caste privilege.”¹⁶⁶

A. An Overview of Relevant Federal Employment Laws

At the federal level, the two principal employment discrimination laws are Title VII and § 1981.¹⁶⁷ In relevant part, Title VII states:

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.¹⁶⁸

161. *Id.*

162. *Id.*

163. Zwick-Maitreyi et al., *supra* note 99, at 20.

164. See Phillip Martin, *Caste Bias Isn’t Illegal in the United States. But This University is Trying to Fight It*, GBH NEWS (Feb. 27, 2019), <https://www.wgbh.org/news/national-news/2019/02/27/caste-bias-isnt-illegal-in-the-united-state-but-this-university-is-trying-to-fight-it>.

165. Tiku, *supra* note 112.

166. *Id.*

167. 42 U.S.C. § 2000e *et seq.*

168. *Id.* at § 2000e-2(a).

In discrimination cases, disputes often arise as to whether the plaintiff's discrimination claims arose because of their membership in one of these protected classes.¹⁶⁹ To make the discrimination case, most cases are proven by satisfying the *McDonnell Douglas* test.¹⁷⁰ To make a prima facie Title VII case under the *McDonnell Douglas* test framework, a plaintiff must show “(1) membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances supporting an inference of discrimination.”¹⁷¹ To prove caste-based discrimination under the first part of the *McDonnell Douglas* test, a court would have to find that caste equated to one of the Title VII protected classes: race, color, religion, sex, or national origin.

Shortly after the Civil War, Congress passed the Civil Rights Act of 1866, which was codified into § 1981. Section 1981 states “[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.”¹⁷² Section 1981 does not contain the terms “race” or “color” but creates a remedy against discrimination based on race and color in both public and private employment.¹⁷³ To establish a § 1981 case, a plaintiff must prove “but for race, [the plaintiff] would not have suffered the loss of a legally protected right.”¹⁷⁴ To meet this standard in a caste discrimination case, caste would have to be a proxy for race or color. Racial and color discrimination claims under Title VII and § 1981 are analogous and are often brought together.¹⁷⁵ However, § 1981 does not cover discrimination claims based on protected classes other than race or color.

C. Caste-Based Discrimination as Race Discrimination

1. *Early Immigration Cases on Race*

The first cases in the courts regarding caste were immigration and citizenship cases.¹⁷⁶ The Naturalization Act of 1790 required that citizenship be granted only to “free white person[s] . . . of good character . . .”¹⁷⁷ Until 1952, “immigrants and settlers petitioning for citizenship were tasked with

169. Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 102 (2017).

170. *Id.*; see also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

171. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002).

172. 42 U.S.C. § 1981 (2020).

173. Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1532 (2000).

174. *Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, 140 S.Ct. 1009, 1019 (2020).

175. See *Lambert v. Tesla, Inc.*, 2018 WL 317793 (N.D. Cal. 2018).

176. See cases cited *infra* notes 179–212.

177. Naturalization Act of 1790, ch. 3, 1 Stat. 103 (1790), *repealed by* Naturalization Act of January 25, 1795, ch. 20, 1 Stat. 414 (1795).

performing whiteness—as if their lives were on the line—in civil courtrooms.”¹⁷⁸ In 1913, *In re Akhay Kumar Mozumdar* was the *first* case to allow a person of Indian descent to become a United States citizen.¹⁷⁹ To prove his whiteness, Mozumdar stated that he was a “high-caste Hindu of pure blood.”¹⁸⁰ Originally, Mozumdar was denied citizenship because of a meager amount of evidence brought forth.¹⁸¹ The testimony only revealed that Mozumdar and his ancestors were natives of India.¹⁸² This testimony did not satisfy the court that Mozumdar was a free white person.¹⁸³ However, Congress had not yet established what constituted a “free white person.”¹⁸⁴ In interpreting the vagueness of the term free white person, the court in *Mozumdar* cited a line of cases that noted that at the time it was “settled, by the great weight of authority, . . . it was the intention of Congress to confer the privilege of naturalization upon members of the Caucasian race only.”¹⁸⁵ The court granted Mozumdar a rehearing to provide further evidence.¹⁸⁶ On rehearing, Mozumdar stated:

“I come from the northern part of India, from the part of India that is customarily spoken of as Upper India, or what is known as Hindustan proper. *I am a high-caste Hindu of pure blood*, belonging to what is known as the warrior caste, or ruling caste. The pure-blooded Hindus are divided into three castes—the priestly caste, the warrior or ruling caste, and the merchant caste. The blood is kept pure by rigid rules of exclusion. Any one who marries outside of his caste is ostracized, and is disinherited by the native law. None of the high-caste Hindus will have anything to do with him. Marriage outside of the caste is not often known. Very few of the high-caste Hindus come to the United States. The great bulk of the Hindus in this country are not high-caste Hindus, but are what are called sihks, and are of mixed blood. The laboring class, those who do the rough manual labor, are not high-caste Hindus at all, but are in an entirely separate class, having quite a different religion and a different ancestry. The high-caste Hindus are of Brahmin faith, and in India are clearly distinguished from all of the other inhabitants, including the aborigines of the country, or the hill tribes, and also the descendants of the invaders, those of the Mohammedan faith. The high-caste Hindus comprise perhaps one-fourth of the natives of India. The high-caste Hindus always consider themselves

178. Khaled A. Beydoun, *Faith in Whiteness: Free Exercise of Religion as Racial Expression*, 105 IOWA L. REV. 1475, 1477 (2020).

179. *In re Akhay Kumar Mozumdar*, 207 F. 115 (E.D. Wash. 1913).

180. *Id.* at 116.

181. *Id.*

182. *Id.*

183. *Id.*

184. J. Allen Douglas, *The “Priceless Possession” of Citizenship: Race, Nation and Naturalization in American Law, 1880-1930*, 43 DUQ. L. REV. 369, 405 n. 94 (2005).

185. *In re Mozumdar*, 207 F. at 117 (original citations omitted).

186. *Id.* at 116.

to be members of the Aryan race, and their native term for Hindustan is Arya-vartha, which means country or land of the Aryans."¹⁸⁷

Claiming to be Aryan in the context of an Indian at the time was a claim to be of high birth Indo-European ancestry.¹⁸⁸ The court stated that the claimant had the primary burden of proving whether their lineage met the provisions of the Naturalization Acts.¹⁸⁹ Mozumdar's statement satisfied the court, and it allowed him citizenship.¹⁹⁰ However, it was noted that "it is . . . true that certain of the natives of India belong to [the Caucasian] race, although the line of demarcation between the different castes and classes may be dim and difficult of ascertainment."¹⁹¹

Mozumdar's victory was short-lived. In 1922, the Supreme Court decided *Ozawa v. United States*.¹⁹² The Court considered whether Takao Ozawa, a Japanese immigrant, could obtain citizenship as a free white person.¹⁹³ In denying Ozawa's request for citizenship, the Court held that regardless of the skin color of the individual, "the words 'white person' were meant to indicate only a person of what is popularly known as the Caucasian race."¹⁹⁴ The Court noted that limiting the term "white person" to only those who were Caucasian left open to debate as to who met that requirement, and Ozawa, as a Japanese person, did not.¹⁹⁵

Shortly after *Ozawa*, the Court heard the case of *United States v. Thind*.¹⁹⁶ The case involved Bhagat Singh Thind, an immigrant from India.¹⁹⁷ Thind had lived in the United States for over seven years.¹⁹⁸ In that time, he had served in the United States military during World War I and had also graduated from the University of California at Berkeley.¹⁹⁹ Thind had been approved for citizenship, but the decision was appealed by a naturalization

187. *Id.* at 116–17.

188. Kudekallu, *supra* note 27, at 1112.

189. *In re Mozumdar*, 207 F. at 118. The Naturalization Act of 1790 had been repealed and replaced several times during the nineteenth century. At the time of *In re Mozumdar*, the Naturalization Act of 1870 was in effect. This revision extended naturalization to "aliens of African nativity and to persons of African descent" while specifically excluding those of Chinese descent. Naturalization Act of 1870, Pub. L. 41-254, 16 Stat. 254, 254–56.

190. *Id.*

191. *Id.* at 117–18.

192. 260 U.S. 178 (1922).

193. *Id.* at 190.

194. *Id.* at 197.

195. *Id.* at 198.

196. 261 U.S. 204 (1923).

197. Andrés Acebo, *Life, Liberty, and the Pursuit of Whiteness: A Revolution of Identity Politics in America*, 2 COLUM. J. RACE & L. 149, 155 (2012).

198. *Id.*

199. *Id.*

agent.²⁰⁰ The Court heard the case to decide whether “a high-caste Hindu of full Indian blood . . . [was] a white person” under the Naturalization Act.²⁰¹ Thind was born in Punjab, which is one of the extreme northwest provinces of India.²⁰² Upper-caste people from this area were “classified by certain scientific authorities [to be] of the Caucasian or Aryan race.”²⁰³ The Court noted that the term Caucasian was ambiguous, discrediting the “Aryan theory as a racial basis” because it was based on linguistic, not physical features.²⁰⁴ The Court noted that while the terms “Caucasian” and “white persons” were synonymous for the purposes of *Ozawa*, they were not identical in meaning.²⁰⁵ The Court found that scientific definitions of the term “Caucasian” were not necessary to resolve the ambiguity in its meaning.²⁰⁶ Instead, the Court held that the term “white person” should be defined by its popular meaning.²⁰⁷ The framers of the naturalization laws understood white people to be “from the British Isles and Northwestern Europe, whence they and their forebears had come.”²⁰⁸ Later immigrants who were considered to be white persons included those from “Eastern, Southern and Middle Europe, among them the Slavs and the dark-eyed, swarthy people of Alpine and Mediterranean stock” because they were “received as unquestionably akin to those already here and readily amalgamated with them.”²⁰⁹ The Court further noted that although the caste system had been designed to preserve racial purity, intermarriages did occur and caused a mixture of “Aryan[s]” (who had invaded parts of India) and “darkskinned Dravidian” blood.²¹⁰ Using the common understanding of who was Caucasian at the time, the Court ruled that people of primarily Asiatic ancestry, including those from India, did not meet the definition of Caucasian and therefore could not obtain citizenship.²¹¹

The denial of Thind’s citizenship application had far-reaching implications for people from the South Asian subcontinent (including Mozumdar) emigrating to the United States. After *Ozawa* and *Thind*, a district attorney filed a petition to cancel Mozumdar’s certificate of naturalization.²¹² The court ruled that *Ozawa* and *Thind* established “that mere ability of an applicant to establish a line of descent from a Caucasian ancestor could not conclude the

200. *Id.*

201. *Thind*, 261 U.S. at 206.

202. *Id.* at 210.

203. *Id.*

204. *Id.*

205. *Id.* at 208.

206. *Id.* at 213.

207. *Thind*, 261 U.S. at 209.

208. *Id.* at 213.

209. *Id.*

210. *Id.* at 212–13.

211. *Id.* at 214–15.

212. *United States v. Mozumdar*, 296 F. 173, 174 (S.D. Cal. 1923).

inquiry, because the word ‘Caucasian’ was a conventional word of much flexibility.”²¹³ Because the Supreme Court held that a person of the Hindu race was not eligible for citizenship, the court reasoned that Mozumdar’s certificate of naturalization was “illegally procured” and was therefore revoked.²¹⁴

Ozawa and *Thind*’s exclusion of Asians led to a standstill in immigration from the continent. The Luce-Celler Act of 1946 allowed for immigration to begin again, but it only allowed for 100 Indians to immigrate per year.²¹⁵ The Immigration and Nationality Act of 1965 initiated the wave of immigration that led to the arrival of the IT Generation.²¹⁶ This Act ended immigration quotas based on the country of origin and allowed up to 170,000 immigrants from the Eastern Hemisphere, which included South Asian countries.²¹⁷ This was coupled with the Immigration and Nationality Act of 1952 that established immigrant classes based on special skills.²¹⁸ The Immigration and Nationality Act of 1952 created the basis for the skilled worker category of H-1B visas, which is still currently in use.²¹⁹ Because the South Asians who immigrated after 1965 comprised a very large percentage of high-caste individuals, compared with a very low percentage of Dalits and other lower-caste individuals, these demographics created an environment for caste discrimination to take place in the American workplace.²²⁰

2. *Recent Employment Race Discrimination Impacting Caste Discrimination*

Neither Title VII nor § 1981 define the term “race.” However, case law defines “race” in different ways. In *Village of Freeport v. Barrella*, the Second Circuit had to determine whether “Hispanic” was considered to be a race.²²¹ The plaintiff, a white Italian American, believed he was discriminated against because he was not appointed as the chief of police of Village of

213. *Id.* at 176–77.

214. *Id.* at 178.

215. Luce–Celler Act of 1946, Pub. L. No. 79-483, 60 Stat. 416.

216. Chazen Global Insights, *supra* note 87; *see also* Immigration and Nationality Act, Pub. L. No. 89-236, 79 Stat. 911 (1965).

217. Ivy C. Lee & Mie Lewis, *Human Trafficking from a Legal Advocate’s Perspective: History, Legal Framework and Current Anti-Trafficking Efforts*, 10 U.C. DAVIS J. INT’L L. & POL’Y 169, 177 (2003).

218. *See* Craig S. Morford, *H to B or Not to Be: What Gives Foreigners the Right to Come Here and Create American Jobs?*, 6 OHIO ST. ENTREPREN. BUS. L.J. 299, 306 (2011).

219. *Id.*; *see also* Tess Douglas, *Disrupting Immigration: How Administrative Rulemaking Could Transform the Landscape for Immigrant Entrepreneurs*, 44 PEPP. L. REV. 199, 208 (2016).

220. *See supra* text accompanying notes 155–61.

221. 814 F.3d 594, 598 (2016).

Freeport, New York.²²² He sued, claiming discrimination based, *inter alia*, upon Title VII and § 1981.²²³ He alleged that the mayor hired a Hispanic person, who was less qualified than the plaintiff, as the chief of police.²²⁴ The Village of Freeport argued that they appointed a person born in Cuba who identified as a member of the white race.²²⁵ The Village asserted that the plaintiff could not make a Title VII case because he and the defendant were the same race, and therefore, promoting one over the other could not be racially discriminatory.²²⁶

The court was asked to consider the more esoteric question of what race is itself but it declined to do so.²²⁷ Instead, it limited its decision to assessing whether “Hispanic” is a “race.”²²⁸ The court noted that although § 1981 did not include the word “race,” it has long been held that § 1981 forbids racial discrimination in public and private employment.²²⁹ The court cited authority under the Supreme Court decision *Saint Francis College v. Al-Khazraji*.²³⁰ In *Saint Francis College*, a professor born in Iraq sued his place of employment, Saint Francis College, arguing that the university denied his tenure due to racial discrimination based on his Arab nationality.²³¹ The college argued that because “under current racial classifications, Arabs [were] Caucasians,” the professor’s § 1981 claim must fail because the statute did not cover claims of one white or Caucasian person being favored over another.²³² The Court found that “Congress intended to protect from discrimination identifiable classes of persons who [were] subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.”²³³ The Court stated that § 1981 “at a minimum, reaches discrimination against an individual ‘because he or she is genetically part of an ethnically and physiognomically distinctive subgrouping of *homo sapiens*.’”²³⁴

“It is clear . . . however, that a distinctive physiognomy is not essential to qualify for § 1981 protection.”²³⁵ The court found that Arabs are of a different ethnic group than other Caucasians, and as such, if a person is subjected to discrimination based on ethnicity rather than religion or their nation of

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 599.

226. *Id.* at 600–01.

227. *Village of Freeport*, 814 F.3d 602.

228. *Id.*

229. *Id.*

230. 481 U.S. 604 (1987).

231. *Id.* at 606.

232. *Id.* at 607.

233. *Id.* at 613.

234. *Id.*

235. *Id.* (quoting *Al-Khazraji v. Saint Francis College*, 784 F.2d 505, 517 (3d Cir. 1986)).

origin, then a case can be made under § 1981.²³⁶ In *Village of Freeport*, the Second Circuit, using the reasoning in *Saint Francis College*, allowed for the use of Hispanic ethnicity, noting that “for purposes of Title VII, ‘race’ encompasses ethnicity, just as it does under § 1981.”²³⁷ The EEOC guidance on what constitutes race discrimination is consistent with *Saint Francis College* and *Village of Freeport*.²³⁸ According to the EEOC, “race discrimination includes discrimination on the basis of ancestry or physical or cultural characteristics associated with a certain race, such as skin color, hair texture or styles, or certain facial features.”²³⁹ This definition includes both physiology and ethnic characteristics in determining race discrimination.²⁴⁰

3. *Caste as Ethnicity*

Even though both race and ethnicity may be seen as issues of race under Title VII and § 1981, the differences between these terms may be a determining factor as to whether caste discrimination is a form of racial discrimination.²⁴¹ The term “race” traditionally deals with biology, physiognomic traits, and ancestry.²⁴² Many recent cases have moved away from biological theories of race and instead view race as a social construct.²⁴³ Instead, many view race more in terms of ethnicity.²⁴⁴ With ethnicity, there is less focus on biological features and more focus on cultural aspects.²⁴⁵ Similar to race, there is not a single accepted definition of ethnicity, but ethnic classifications focus on “an amalgamation of culture, language, religion, nationality, and physical features in determining how groups of people are different from each other.”²⁴⁶

236. *Al-Khazrai*, 481 U.S. at 613.

237. *Village of Freeport*, 814 F.3d at 607.

238. See *Questions and Answers About Race and Color Discrimination in Employment*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Apr. 19, 2006), <https://www.eeoc.gov/laws/guidance/questions-and-answers-about-race-and-color-discrimination-employment>.

239. *Id.*

240. See *id.*; see also *supra* text accompanying notes 234–38.

241. Kudekallu, *supra* note 27, at 1114.

242. See William Q. Lowe, *American Law and the Impact of DNA Technology on Its Meaning in the Future*, 72 ALB. L. REV. 1113, 1115–16 (2009) (establishing that the term “race” traditionally denoted one’s “ancestry or ethnic background.”).

243. *Id.* at 1115.

244. See Pratheep Sevanthinathan, *Shifting From Race to Ethnicity in Higher Education*, 9 SCHOLAR 1, 29 (2006). (“[p]articipants in an international conference on ethnic or racial classifications revealed that some countries view ‘race as a dimension of ethnicity[,] while others mentioned ethnicity within the context of race.’ Thus, the line between ethnicity and race is probably very fine in the eyes of most Americans.”).

245. *Id.*

246. *Id.* at 28.

Caste, like race, is also seen as a social construct.²⁴⁷ Both of these social constructs have led to discriminatory actions against people on their bases.²⁴⁸ It is unlikely that caste discrimination would equate to race discrimination based on ethnic characteristics because members of different castes share the same language, culture, and geographic origins.²⁴⁹ It is likely that the commonality associated with different castes is what allowed the caste system to thrive.²⁵⁰ The government of India has long held that caste discrimination was not race discrimination.²⁵¹ Instead, it views the different castes as a stratification of the same ethnic class.²⁵² Traditionally, sociologists have taken the view that race is separate from caste.²⁵³ It is likely that federal courts in the United States would also take the view that race and caste are separate from each other. Therefore, caste will likely be unable to form the basis of a racial discrimination claim in federal courts.

D. Caste-Based Discrimination as Color Discrimination

The Title VII category of “color” is closely related to race.²⁵⁴ Color may be an indicator of caste, as Dalits tend to, but do not always, have darker skin than those of the higher-castes.²⁵⁵ There is no legislative history defining color.²⁵⁶ This lack of a legislative definition leaves courts free to determine whether color and race are synonymous or if color is a distinct category from race.²⁵⁷ As such, few cases are brought on the basis of color alone.²⁵⁸ Courts that conflate color and race are likely to dismiss intra-racial discrimination claims because the claims for color are not pled correctly as a separate cause

247. Christopher Williams, *Gatekeeping the Profession*, 26 CARDOZO J. EQUAL RTS. & SOC. JUST. 171, 196 (2020).

248. See Kudekallu, *supra* note 27, at 1114.

249. Sarkin & Koenig, *supra* note 66, at 565.

250. *Id.*

251. Kudekallu, *supra* note 27, at 1113.

252. *Id.*

253. *Id.* at 1103.

254. See 42 U.S.C. § 2000e-2(a).

255. See Kevin D. Brown & Vinay Sitapati, *Lessons Learned from Comparing the Application of Constitutional Law and Federal Anti-Discrimination Law to African-Americans in the U.S. and Dalits in India in the Context of Higher Education*, 24 HARV. BLACKLETTER L.J. 3, 16 (2008).

256. See Kate Sablosky Elengold, *Branding Identity*, 93 DENV. L. REV. 1, 5 (2015) (establishing that the legislators of the Civil Rights Act of 1964 “refused to define the color protected class in the statute,” and this refusal continues to impact civil rights protections analyses today).

257. Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705, 1724 (2000).

258. Shilpi Bhattacharya, *The Desire for Whiteness: Can Law and Economics Explain It?*, 2 COLUM. J. RACE & L. 117, n. 33 (2012).

of action.²⁵⁹ However, there are cases in which courts examined color itself as a protected class.²⁶⁰ In 1981, the Southern District of New York decided *Ali v. National Bank of Pakistan*, which examined the issue of intra-racial discrimination based on color.²⁶¹ *Ali* may be particularly instructive because it involves litigants of South Asian descent.²⁶² The plaintiff, Ali, was described as a light-skinned individual from the Punjab province of Pakistan.²⁶³ Ali claimed that the National Bank of Pakistan discriminated against him by giving darker-skinned Pakistani employees from the Sind province preference in pay, promotion, and training opportunities.²⁶⁴ Ali argued that the basis of this discrimination was color, actionable under Title VII.²⁶⁵ The court held Ali had not established a *prima facie* discrimination case, reasoning that color alone was not enough to establish the provincial origin of people from Pakistan.²⁶⁶ The court recognized that differences in complexion existed between Ali and other employees and that the literal language of Title VII protects against discrimination based on color.²⁶⁷ However, the court found that Ali's testimony did not merit dividing Pakistanis into distinct protected classes based on color.²⁶⁸ Further, the court ruled that "the presumption of a protected class status on the basis of color is bound up with an entire national racial history. It may well be that there are indigenous discriminatory practices around the world having nothing to do with the American experience."²⁶⁹ It is unclear what the court meant by the "American experience."²⁷⁰ Presumably, the court intended that in order to have a case of color discrimination, that the discrimination must be common in America. The court hinted that a South Asian making a color discrimination case, in order to be successful, would have to "establish a pattern of discrimination by ancestral national origin, or by color or provincial residence as actual indicators thereof even assuming such evidence would constitute a cause of action."²⁷¹ It appears that *Ali* takes a similar approach as the Supreme Court in *Thind* to the racial homogeneity of South

259. Sonika R. Data, *Coloring in the Gaps of Title VI: Clarifying the Protections Against the Skin-Color Caste System*, 107 GEO. L. J. 1393, 1413–15 (2019).

260. *See, e.g.*, *Ali v. National Bank of Pakistan*, 508 F. Supp. 611 (S.D.N.Y. 1981).

261. *Id.*

262. *See generally id.* at 611.

263. *Id.* at 611–12.

264. *Id.* at 612.

265. *Id.* at 611.

266. *Id.* at 613.

267. *Id.*

268. *Ali*, 508 F. Supp. at 613.

269. *Id.*

270. Taunya Lovell Banks, *Colorism Among South Asians: Title VII and Skin Tone Discrimination*, 14 WASH. U. GLOBAL. STUD. L. REV. 665, 675 (2015).

271. *Ali*, 508 F. Supp. at 614.

Asians.²⁷² It is interesting that the *Ali* decision did not incorporate *Thind* when considering color discrimination of South Asians as part of the American experience. The claimant in *Thind* was trying to prove that he was denied the ability to become a citizen because as a South Asian, he was not white.²⁷³ Likely, this is because the Court in *Thind* seemed to treat the term “white” as being based on ethnicity more than skin color.²⁷⁴ After *Ali*, there have been no intra-racial color discrimination decisions involving South Asians.²⁷⁵

With the recent influx of South Asian immigrants, color discrimination may be more in line with the American experience contemplated in *Ali*.²⁷⁶ Color discrimination in South Asia, however, is different from color discrimination among South Asians in America.²⁷⁷ Color discrimination in South Asia is not limited to one particular faith, tradition, or ethnicity.²⁷⁸ India’s caste system favors light skin to dark skin, as light skin connotes status and privilege.²⁷⁹ However, prior to colonialism, light skin was not always favored.²⁸⁰ Many Hindu gods were dark-skinned, and dark skin did not seem to have negative connotations.²⁸¹ The idea that light skin was desirable appeared after invaders from Europe came to South Asia.²⁸² The Europeans were light-skinned, and thus skin color became a stratification tool.²⁸³ While colonized, the British granted better job opportunities to Indians with light skin.²⁸⁴ The British thought themselves smarter than Indians and segregated themselves from them.²⁸⁵ This stratification led to Indians accepting the ideology that lighter skin was superior, so they started using color as a marker of privilege within their own society.²⁸⁶ However, color discrimination in India did not negate or disenfranchise those who were dark.²⁸⁷ Indian law has never contained racial discrimination or segregation laws like those in the United States.²⁸⁸ Upon the outlawing of untouchability, India had no equivalent to the

272. Compare *id.*, with *United States v. Thind*, 261 U.S. 204 (1923).

273. *Thind*, 261 U.S. at 684–85.

274. See *id.* at 686; see also *Data*, *supra* note 259, at 1399.

275. *Data*, *supra* note 259, at 1399.

276. See *supra* Section III; see also *Ali*, 508 F. Supp. at 613.

277. Compare *supra* Section IV (establishing the impact of color discrimination in America), with *Data*, *supra* note 259, at 1399 (establishing the impact of color discrimination in South Asia).

278. *Banks*, *supra* note 270, at 671.

279. *Data*, *supra* note 259, at 1399.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Data*, *supra* note 259, at 1399.

286. *Id.*

287. *Banks*, *supra* note 270, at 673.

288. *Kudekallu*, *supra* note 27, at 1115.

Jim Crow laws enacted in the United States.²⁸⁹ The Indian government sees the disparities that Dalits and other lower-caste Indians face as those of class disparity based on the caste system, not on race.²⁹⁰

After *Ali* was decided, courts have allowed for cases of intra-racial discrimination based on both race²⁹¹ and color.²⁹² While color discrimination, even intra-racial discrimination among South Asians, may be actionable, color does not necessarily relate to caste.²⁹³ Because color discrimination among South Asians is primarily fueled by a colonialist desire to be whiter, courts would likely separate caste from color.²⁹⁴ Because darker-colored skin is often associated with Dalits and other low-caste South Asians, it is often used as a tool to identify a person's caste.²⁹⁵ In *Cisco*, it was pled that Dalits are "typically the darkest complexion caste."²⁹⁶ A colonial view, that lighter-skinned South Asians are superior to darker-skinned South Asians, would likely lead to an actionable discrimination case. For example, in *Windsor v. Board of Education of Prince George's County*, a *prima facie* Title VII case was made for color discrimination by a light-skinned multiracial woman against her assistant superintendent, a dark-skinned black woman.²⁹⁷ Suzanne Windsor was a teacher who claimed her employer excluded her from an email that announced the opening of some administrative positions.²⁹⁸ Windsor brought forth two allegations to support her claim. First, she pled that her supervisor "left only her and another light-skinned woman off . . . the announcement of the hearing officer positions, from which she concludes . . . was motivated by color discrimination."²⁹⁹ Secondly, she asserted "that when she complained about the incident to her union representative, she was told by the representative that she was generally disliked because she was light-skinned and pretty."³⁰⁰

Color discrimination is often used as a proxy for race discrimination.³⁰¹ However, there are cases brought only as color discrimination claims.³⁰²

289. *Id.*

290. *Id.*

291. *See, e.g.*, *Ross v. Douglas Cnty., Neb.*, 234 F.3d 391, 397 (8th Cir. 2000).

292. *See, e.g.*, *Walker v. Sec'y of the Treasury*, 713 F. Supp. 403, 406 (N.D. Ga. 1989).

293. Kudekallu, *supra* note 27, at 1115.

294. *See generally supra* notes accompanying text at 276–89.

295. Kudekallu, *supra* note 27, at 1108.

296. Tiku, *supra* note 112.

297. Complaint at 3–4, *Windsor v. Bd. of Educ. of Prince George's Cnty.*, No. TDC-14-2287, 2016 WL 4939294 (D. Md. Sept. 13, 2016).

298. *Id.*

299. *Windsor v. Bd. of Educ. of Prince George's Cnty.*, No. TDC-14-2287, 2016 WL 4939294 at *8 (D. Md. Sept. 13, 2016).

300. *Id.*

301. Data, *supra* note 259, at 1412.

302. *See, e.g.*, *Ali v. National Bank of Pakistan*, 508 F. Supp. 611 (S.D.N.Y. 1981).

These cases require that the differential treatment be based solely on one's skin color.³⁰³ If a South Asian person were to be discriminated against because of skin color, the person would likely have a valid discrimination claim under both Title VII and § 1981. This would be true for either inter-racial or intra-racial discrimination (assuming the pleading requirements hinted at in *Ali* were met), as color is a protected class.³⁰⁴ However, if color were an indicator of caste, and a person was discriminated against because of their caste, the case would likely fail because caste itself is not a protected class, failing to meet the first step in the *McDonnell Douglas* test or § 1981's but-for test.³⁰⁵ *Ali* established that color discrimination claims by South Asians must establish "a pattern of discrimination by ancestral national origin, or by color or provincial residence as actual indicators."³⁰⁶ However, discrimination based on caste itself is not accepted as an issue of race, color, or national origin.³⁰⁷

E. Caste-Based Discrimination as National Origin Discrimination

Caste, having roots in India, is often thought of as a South Asian or Indian issue.³⁰⁸ As such, caste discrimination needs to be examined in terms of national origin discrimination. Like with race and color, Title VII fails to define "national origin."³⁰⁹ The only legislative history on the definition of "national origin" in Title VII comes from a debate in the House of Representatives.³¹⁰ Congressman Roosevelt stated that "'national origin' means the country from which you or your forebears came from, . . . [like] Poland, Czechoslovakia, England, France, or any other country."³¹¹ The Supreme Court has only once interpreted the meaning of the term "national origin."³¹² In *Espinoza v. Farah Manufacturing Co.*, the Court was asked to determine whether the prohibition against discrimination based on national origin protected discrimination based on citizenship status.³¹³ In denying that alienage was part of national origin, the court used a plain meaning interpretation of the language of

303. Data, *supra* note 259, at 1411.

304. See 42 U.S.C. § 2000e *et seq.*

305. See generally Clarke, *supra* note 169, at 102–03.

306. *Ali v. Nat'l Bank of Pak.*, 508 F. Supp. at 614.

307. Sarkin & Koenig, *supra* note 66, at 565.

308. See Sapna Khatri, *Hijras: The 21st Century Untouchables*, 16 WASH. U. GLOBAL STUD. L. REV. 387, 392 (2017).

309. Jacqueline Grace Diaz, *The Divided States of America: Reinterpreting Title VII's National Origin Provision to Account for Subnational Discrimination Within the United States*, 162 U. PA. L. REV. 649, 653 (2014).

310. Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 817–18 (1994).

311. *Id.* at 818.

312. Diaz, *supra* note 309, at 653; see *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 87 (1973).

313. 414 U.S. at 87–88.

Title VII.³¹⁴ Noting that the legislative history on the subject was “quite meager,” the Court stated that “the term ‘national origin’ on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came.”³¹⁵ *Espinoza*, therefore, took a narrow view of national origin, interpreting it to refer only to the specific country in which a person was born.³¹⁶

Since *Espinoza*, however, some courts have taken a broader approach to define national origin, including ancestry claims that are different than just that of one’s birth country.³¹⁷ This expansion is consistent with EEOC policies.³¹⁸ In 1980, the EEOC amended its regulations to replace the term “national origin” with the term “place of origin.”³¹⁹ Further, the term “particular national origin” was changed to “national origin group.”³²⁰ These changes were designed to dissociate national origin discrimination from being limited to claims only involving sovereign nations.³²¹ Later EEOC guidance includes an expansive definition of what constitutes “national origin discrimination.”³²² This guidance states that:

Generally, national origin discrimination means discrimination because an individual (or his or her ancestors) is from a certain place or has the physical, cultural, or linguistic characteristics of a particular national origin group. Title VII prohibits employer actions that have the purpose or effect of discriminating against persons because of their real or perceived national origin. National origin discrimination includes discrimination by a member of one national origin group against a member of the same group.³²³

The expanded EEOC definitions of “national origin,” and case law, have allowed for national origin claims that would not have been viable under *Espinoza*’s narrow definition.³²⁴ *Roach v. Dresser Industrial Valve & Instrument Division* allowed for a national origin discrimination claim because of the plaintiff’s Acadian (or Cajun) roots.³²⁵ The court noted that even though

314. *Id.* at 88.

315. *Id.*

316. Diaz, *supra* note 309, at 653.

317. Perea, *supra* note 310, at 825.

318. Diaz, *supra* note 309, at 652.

319. See 29 C.F.R. § 1606.1 (2021).

320. See *id.*

321. Diaz, *supra* note 309, at 667.

322. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, NOTICE NO. 915.005, ENFORCEMENT GUIDANCE ON NATIONAL ORIGIN DISCRIMINATION (Nov. 18, 2016), <https://www.eeoc.gov/laws/guidance/eeoc-enforcement-guidance-national-origin-discrimination>.

323. *Id.*

324. See generally *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973).

325. 494 F. Supp 215, 218 (W.D. La. 1980).

Acadia was never an independent nation, Acadians historically came from Acadia, a French-speaking colony in what is now Nova Scotia.³²⁶ After allowing national origin discrimination to be based on a place of origin that never had political sovereignty, the court held that “[d]istinctions between citizens solely because of their ancestors are odious to a free people whose institutions are founded upon the doctrine of equality, and we decline to accept the argument that litigation of this sort should be governed by the principles of sovereignty.”³²⁷ However, *Vitalis v. Sun Constructors, Inc.* limited these claims to those based upon the “unique historical, political and/or social circumstances of a given region.”³²⁸

Pejic v. Hughes Helicopters, Inc. allowed a Serbian to bring a national origin claim.³²⁹ The Plaintiff claimed that a supervisor, whose niece was married to a Croatian, discriminated against the plaintiff because he was Serbian.³³⁰ The employer averred that a Serbian could not bring a national origin claim because, at the time, both Serbians and Croatians were ethnic groups that resided in the nation of Yugoslavia.³³¹ Even though Serbia at the time was not a separate country, the court held that one’s national origin could be based on “the country of one’s ancestors.”³³² Citing the historical animus between Serbians and Croatians, the court established Serbians as a protected class for a national origin discrimination claim, stating “Title VII cannot be read to limit ‘countries’ to those with modern boundaries, or to require their existence for a certain time length before it will prohibit discrimination.”³³³

The reasoning in *Pejic* allowed for claims of national origin discrimination against people based on the national origin group to which that person belonged. The EEOC defines a “national origin group” (or “ethnic group”) as “a group of people sharing a common language, culture, ancestry, and/or other social characteristics.”³³⁴ This definition allows for Hispanics,³³⁵ Arabs,³³⁶ or Roma (Gypsies)³³⁷ to be protected classes and form the basis of a national

326. *Id.* at 217.

327. *Id.* at 218.

328. 481 F. App’x 718, 721 (3d Cir. 2012); U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *supra* note 322, at n.21.

329. 840 F.2d 667, 670 (9th Cir. 1988).

330. *Id.*

331. *Id.* at 673.

332. *Id.*

333. *Id.*

334. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *supra* note 322.

335. *See, e.g.,* Salas v. Wis. Dep’t of Corr., 493 F.3d 913, 923 (7th Cir. 2007).

336. *See, e.g.,* U.S. Equal Emp’t Opportunity Comm’n v. WC&M Enters., 496 F.3d 393, 401–02 (5th Cir. 2007).

337. *See, e.g.,* Janko v. Ill. State Toll Highway Auth., 704 F. Supp. 1531, 1532 (N.D. Ill. 1989).

origin discrimination claim.³³⁸ All of these groups do not belong to a particular country but share a common language, culture, and ancestry. Further, some cases and the EEOC allow claims for discrimination based on the perception that a person is from a particular country or a national origin group.³³⁹ These cases recognize that perception of national origin can lead to discrimination even if the harmed individual is not actually from that country or national origin group.³⁴⁰

In a recent case, *Arsham v. Mayor & City Council of Baltimore*,³⁴¹ the court allowed for an employment discrimination claim based on perceived nationality.³⁴² Elie Arsham was an engineer with the Baltimore Department of public works.³⁴³ During her employment, Arsham worked with Prakash Mistry.³⁴⁴ Mistry began as Arsham's colleague, and eventually, he became her supervisor.³⁴⁵ Prior to becoming the supervisor, Mistry and Arsham had a conversation in which Mistry speculated that Arsham was "a member of the 'Parsee' ethnic group, and he expressed his disdain for the Parsee ethnic group at that time."³⁴⁶ Mistry was of Indian descent.³⁴⁷ Arsham researched Parsee ethnicity and believed it to be a lower caste of Indian ethnic groups.³⁴⁸ Parsees are actually of Iranian descent, and the court noted that Arsham's ethnic heritage was Persian.³⁴⁹ Parsees are an immigrant group who fled Iran seeking religious freedom, ending up mostly in India between the eighth and tenth centuries.³⁵⁰ The focus of *Arsham* was whether Mistry's perception that Arsham was Parsee allowed for an actionable national origin discrimination claim.³⁵¹ Though finding that it was actionable, the court did not mention whether Mistry thought of Parsees as a caste in India or an ethnic group. Because of their long tenure in India, Parsees are often referred to by commentators as an Indian caste.³⁵² However, it is likely that these commentaries are using a nineteenth-century definition of caste, which included a "well defined

338. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 322.

339. *Id.*; see e.g., *WC&M Enters.*, 496 F.3d at 201–02.

340. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 322; *But see, e.g.,* *Butler v. Potter*, 345 F. Supp.2d 844, 850 (E.D. Tenn. 2004) (granting summary judgment on the grounds that there could be no claim under Title VII due to perceived race or national origin).

341. 85 F. Supp. 3d 841 (D. Md. 2015).

342. *Id.* at 850.

343. *Id.* at 843.

344. *Id.*

345. *Id.* at 844.

346. *Id.*

347. *Arsham*, 85 F.Supp.3d at 844.

348. *Id.*

349. *Id.*

350. The Editors of Encyclopedia Britannica, *Parsi*, ENCYC. BRITANNICA, (Aug. 8, 2019), <https://www.britannica.com/topic/Parsi>.

351. *Arsham*, 85 F.Supp.3d at 844–45.

352. Rashna Writer, *Parsi Identity*, 27 IRAN 129 (1989).

native community governed for certain internal purposes by its own rules and regulations.”³⁵³ However, Parsees kept a separate identity in India as an ethnic-religious minority, despite residing in India for a millennium.³⁵⁴ By this characterization, the court in *Arsham* was correct in treating Parsee as a national origin group. However, if Mistry perceived Parsee as a caste and not an ethnic group, and the discrimination was based on Arsham being of a lower caste than he, the court may have examined whether caste-based discrimination amounted to discrimination based on national origin group. Since it did not, no court has determined whether castes are national origin groups.

It is unlikely that caste-based discrimination would be actionable based on national origin discrimination. To determine that a caste is a national origin group, the courts would have to hold that each caste is a separate ethnic group. Caste is not divided by region in India, as all major castes are represented in every region of the country.³⁵⁵ Caste has followed people during the Indian diaspora and has now taken root in many countries outside of India.³⁵⁶ There is not an ethnic distinction between castes because “members of different castes share language, culture, and geographical origins.”³⁵⁷ In other words, castes are not likely to be seen as national origin groups. The caste system, instead, would likely be seen as a system of social stratification within an ethnic group.³⁵⁸ It has been argued that “ethnic” should be distinguished from “race” or “caste” in that the former implies real, important, and often valued social and cultural differences (language, values, social organization), while the latter are artificial and invidious distinctions reflecting irrelevant (and sometimes non-existent) differences in physiognomy or artificial differences in social role.”³⁵⁹ Thus, under current interpretations of the law, castes would likely be considered different parts of the same national origin group.

F. Caste-Based Discrimination as Religious Discrimination

Because caste has historical ties to Hinduism, it is important to determine whether caste discrimination is religious discrimination under Title VII. Some see caste as an intrinsic part of Hinduism.³⁶⁰ India is a majority-Hindu nation,

353. *Id.* at 130 (quoting D. F. MULLA, JURISDICTION OF COURTS IN MATTERS RELATING TO THE RIGHTS AND POWERS OF CASTES (Bombay, 1901)).

354. *Id.* at 131.

355. Akila Muthukumar, *Casteism Camouflaged as Culture*, HARV. POL. REV. (Sept. 30, 2020), <https://harvardpolitics.com/casteism-camouflaged-as-culture/>.

356. HUMAN RIGHTS WATCH, *supra* note 96, at 263.

357. Sarkin & Koenig, *supra* note 66, at 565.

358. Kudekallu, *supra* note 27, at 1114.

359. *Id.* (quoting Gerald D. Berreman, *Race, Caste, and Other Invidious Distinctions in Social Stratification*, 13 RACE 385, 388 (1972)).

360. Narula, *supra* note 29, at 271.

with eighty percent of its populace following the religion.³⁶¹ People who see caste as an integral part of Hinduism note that attempts to reform Hinduism to exclude caste have largely failed.³⁶² On the other hand, some argue that caste, as it is today, is a social construct outside of religion.³⁶³ Proof of a social construct, versus a religious one, relies on many factors.³⁶⁴ It is noted that individuals practicing other religions in South Asia, such as Christians, Muslims, and Buddhists, also adhere to the caste system.³⁶⁵ Examples are given that show mobility in occupations, noting that if a person could not make a living doing the job of their varna, they may take another job. One might find a Brahmin who did not take to the priesthood doing manual labor in service of a lower-caste person.³⁶⁶ Vice-versa, there are examples of lower-caste individuals becoming ministers and public officials.³⁶⁷ The origins of caste may also be outside of Hinduism as a religion. Rather, the caste system may have served as a division of labor, creating specializations within occupations that existed with indigenous Indians in pre-Hindu society.³⁶⁸ Also, some see the caste system as a system of checks and balances, with each group having a role in society that keeps a concentration of power from any one caste.³⁶⁹ The premise of the checks and balances argument is that all of the castes do important work for society, and prior to colonialization, no caste was more important than another.³⁷⁰ This led to competitiveness between the castes because individuals in one caste often thought of themselves as superior to others in a different caste.³⁷¹

The debate about whether the caste system originated due to religious or secular motivations is ongoing. Mahatma Gandhi noted that “[c]aste has nothing to do with religion. It is a custom whose origin I do not know and do not need to know for the satisfaction of my spiritual hunger. But I do know that it is harmful both to the spiritual and national good.”³⁷² What seems to be agreed upon was that the national harm that Gandhi spoke of was exacerbated during the British colonization in India.³⁷³ At the beginning of the colonial

361. Kudekallu, *supra* note 27, at 1121.

362. *Id.*

363. See, e.g., M. V. Nadkarni, *Is Caste System Intrinsic to Hinduism? Demolishing a Myth*, 38 *ECON. & POL. WKLY.* 4783 (2003).

364. *Id.*

365. *Id.* at 4784.

366. *Id.* at 4785.

367. *Id.*

368. *Id.* at 4790.

369. Nadkarni, *supra* note 363, at 4789.

370. *Id.*

371. *Id.*

372. See D.N., *Gandhi, Ambedkar and Separate Electorates Issue*, 26 *ECON. & POL. WKLY.* 1328, 1328 (May 25, 1991).

373. See Nagarajan, *supra* note 46, at 487.

period, the British employed Indians to take the census and also advise on the hierarchy of the caste system.³⁷⁴ The Brahmins, who were the most literate, aligned with the ruling British and were placed in positions of power.³⁷⁵ The caste system was easy for the British to understand because, in many ways, it was similar to the feudal system in place in Britain at the time.³⁷⁶ The British used the census data to arrange the caste hierarchy that endures in modern India.³⁷⁷ This system, along with concepts of racial purity and other concepts of British society, was used to subjugate the Indian population.³⁷⁸ Some argue the system perpetuated by the Brahmins because, as the priestly class, they were the interpreters of the varnas.³⁷⁹ The Hindu belief in karma often justified differences in status.³⁸⁰ Karma is the belief that a person's lot in life is determined by actions taken in previous lifetimes.³⁸¹

Whether Hinduism is the basis for the caste system or not, it definitely had a long influence in the operation of caste hierarchy, and many Hindu leaders continue to teach the discriminatory caste system.³⁸² Scholars question whether caste is a religious or a societal issue.³⁸³ Courts, however, are unlikely to find that the basis of caste discrimination is religion. Unlike the other protected classes, First Amendment protection would be given to the rights of Hindus' religious beliefs and practices.³⁸⁴ According to Kevin Brown, a professor of law at Indiana University, "[w]hat (a judge) would effectively have to do is determine whether Hinduism as a religion is itself discriminatory."³⁸⁵ This is something that courts would be loath to do.

G. The Relationship of Ancestry to Caste Discrimination

Ancestry itself is not a protected class under Title VII.³⁸⁶ However, the term "ancestry" is commonly used in definitions of race, ethnicity, color, and

374. Kudekallu, *supra* note 27, at 1108.

375. *Id.*

376. *Id.* at 1107.

377. DIRKS, *supra* note 54, at 16.

378. Sarkin & Koenig, *supra* note 66, at 548.

379. *Id.*

380. Narula, *supra* note 29, at 272.

381. *Id.*

382. Sarkin & Koenig *supra* note 66, at 548.

383. *Id.*

384. *Case to Watch: Cisco Lawsuit Tests Anti-Bias Laws' Application to Indian Caste System*, REUTERS LEG.: WESTLAW TODAY (July 30, 2020), [https://today.westlaw.com/Document/Ia28d9d10d25e11ea85dce8228c52478f/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://today.westlaw.com/Document/Ia28d9d10d25e11ea85dce8228c52478f/View/FullText.html?transitionType=Default&contextData=(sc.Default)&firstPage=true).

385. *Id.* (quoting Kevin Brown, Professor of Law at Indiana University).

386. *See* 42 U.S.C. § 2000e (1977).

national origin.³⁸⁷ Because the term “ancestry” is part of these definitions, courts could find Title VII discrimination based on ancestry. A year prior to the passage of the Civil Rights Act of 1964, a bill was introduced that would have made an employment practice unlawful if it discriminated against a person “because of [such individual’s] race, religion, color, national origin, or ancestry.”³⁸⁸ However, when Title VII was passed, the protected category of “ancestry” was deleted.³⁸⁹ Though the deletion was not explained, the Court in *Espinoza* opined that it was likely because the drafters thought “national origin” and “ancestry” were equivalents.³⁹⁰ However, because “ancestry” is incorporated in the definitions of several of the protected classes, inherited caste should be scrutinized on the basis of ancestry.

While Title VII does not explicitly prohibit employment discrimination because of ancestry, several state laws do.³⁹¹ Interpretations of these state laws could be influential on the interpretation of Title VII or § 1981. For example, California’s Fair Employment and Housing Act (FEHA) includes the protected classes of “race, religious creed, color, national origin, *ancestry*, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or veteran or military status of any person”³⁹² In *Cisco*, CDFEH refiled the case in state court and included a claim based on ancestry discrimination.³⁹³ However, like the protected classes under Title VII, interpretations for eligibility are made by case law. Similar to California’s FEHA, the West Virginia Human Rights Act includes “ancestry” as a protected class in employment discrimination cases.³⁹⁴ This provision was recently interpreted by a federal district court in *Billiter v. Jones*.³⁹⁵ Lauren Billiter was a registered Democrat and a Deputy Circuit Clerk of Mason County.³⁹⁶ While Billiter was employed as a Deputy Circuit Clerk, her mother became the Circuit Clerk for the county.³⁹⁷ The following year, Elizabeth Jones, a Republican, defeated

387. See, e.g., *Questions and Answers About Race and Color Discrimination in Employment*, *supra* note 238.

388. 1963 Senate Hearings on Equal Employment Opportunity, *Hearings on H.R. 405 and Similar Bills Relating to Equal Employment Opportunity Before the General Subcommittee on Labor of the House Committee on Education and Labor*, 88th Cong., 1st Sess. 3-11 (1963).

389. Perea, *supra* note 310, at 817 (establishing that the final language of Title VII deleted “ancestry” and added “sex” to its list of protected classes).

390. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 89 (1973).

391. See, e.g., Cal. Gov’t Code § 12940(a) (2021).

392. *Id.* (emphasis added).

393. Complaint at 11–13, *Cal. Dept. Fair Empl. & Hous. v. Cisco Systems, Inc., et al.*, No. 5:20-cv-04374 (N.D. Cal. June 30, 2020).

394. W. VA. CODE § 5-11-2 (2016).

395. No. 3:19-0288, 2020 WL 5646901 (S.D. W. Va. 2020).

396. *Id.* at *1.

397. *Id.*

Billiter's mother for the position of Circuit Clerk.³⁹⁸ The plaintiff alleged that shortly after being sworn in, Jones gave Billiter a termination letter and stated, "this is for your mother."³⁹⁹ After the termination, three deputy clerks, all of whom were Republicans, were hired.⁴⁰⁰ Billiter sued, claiming ancestry discrimination and alleged her employer discriminated against her because of who her mother was.⁴⁰¹ Billiter argued that the court should use broad dictionary definitions to define ancestry as a line of descent.⁴⁰² She cited the definitions in Black's Law Dictionary and Merriam-Webster Unabridged Dictionary's Dictionary.⁴⁰³ Black's Law Dictionary's definition of ancestry is "[a] line of descent; collectively, a person's forebears; lineage."⁴⁰⁴ The Merriam-Webster definition included "persons initiating or comprising a line of descent."⁴⁰⁵ Jones, however, averred that ancestry discrimination is based upon "claims of discrimination on the basis of race, ethnicity, and national origin; not the identity of a parent."⁴⁰⁶ To counter this argument, Billiter cited *Davis v. Guam*, which noted that "ancestry and race are not identical legal concepts."⁴⁰⁷ *Davis* also noted that there are areas of the law where people are targeted because of biological descent without respect to race.⁴⁰⁸ The court in *Davis* limited these areas of the law to include intestate succession, citizenship, and custody laws.⁴⁰⁹ The court then noted that ancestry and race often overlap, and the relationship between the two is hard to define, stating that "biological descent or ancestry is often a feature of a race classification, but an ancestral classification is not always a racial one."⁴¹⁰ The court in *Billiter* sided with Jones's interpretation of ancestry. Using the canon of statutory construction of *noscutur a sociis* ("it is known by its associates"), the court found that the meaning of a word can be found in other associated words.⁴¹¹ Using this canon, the court held that because the list of protected classes, including "race, religion, color, national origin, sex, age, blindness or disability," included "ancestry,"⁴¹² that ancestry was akin to these other protected

398. *Id.*

399. *Id.*

400. *Id.*

401. *Billiter*, 2020 WL 5646901, at *5.

402. *Id.*

403. *Id.* at *6 n.3.

404. *Id.* (quoting *Ancestry*, BLACK'S LAW DICTIONARY (11th ed. 2019)).

405. *Id.* (quoting *Ancestry*, MERRIAM-WEBSTER UNABRIDGED (2021), <https://www.merriam-webster.com/dictionary/ancestry>).

406. *Id.*

407. 932 F.3d 822, 836 (9th Cir. 2019).

408. *Id.*

409. *Id.*

410. *Id.* at 837.

411. *Billiter*, 2020 WL 5646901, at *7.

412. W. VA. CODE § 5-11-2 (2016).

classes. Ruling against *Billiter*, the court noted that ancestry claims under the West Virginia Human Rights Act must be based on innate characteristics similar to those of the other protected classes.⁴¹³

However, in jurisdictions that have categorized ancestry as a protected class, courts should come to the opposite conclusion regarding caste. Descent is part of the dictionary definitions of “ancestry” cited in *Billiter*. The court in *Billiter*, when denying that ancestry discrimination existed, determined the ancestral link to be because of *Billiter*’s mother’s political affiliation.⁴¹⁴ The political affiliation of an ancestor is different than the caste of an ancestor. Caste discrimination is based solely on the circumstances of one’s birth.⁴¹⁵ Caste is determined by the family into which a person was born, and association with that caste is life-long.⁴¹⁶ The transmission of social hierarchy at birth and having a lack of ability to change castes, some argue, makes caste immutable.⁴¹⁷ Even if not considered immutable, courts should interpret caste as an innate characteristic of ancestry based on descent, allowing caste discrimination to be the basis of a claim. This reasoning could be used in both state and federal claims.

VI. CASTE DISCRIMINATION IN INTERNATIONAL LAW

International law could guide courts on considering ancestry discrimination based on descent. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was a United Nations convention adopted by the General Assembly in 1965.⁴¹⁸ ICERD’s purpose is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language, or religion.⁴¹⁹ The American Civil Liberties Union’s (ACLU) position is that because the United States ratified ICERD, it is legally “bound by its requirements and is obligated to protect and promote equality and non-discrimination in the enjoyment of human rights, including in the areas of education, housing, criminal justice, health, voting, *labor*, access to justice, and more.”⁴²⁰ Article 1 of ICERD states that:

413. *Id.*

414. *Billiter*, 2020 WL 5646901, at *7.

415. Sarkin & Koenig, *supra* note 66, at 565.

416. *Id.*

417. *See, e.g.*, French, *supra* note 13, at 1083; Ali Khan, *The Dignity of Labor*, 32 COLUM. HUM. RTS. L. REV. 289, 305 (2001).

418. G.A. Res. 2106 (XX), U.N. Doc. A/RES/2106 (XX) (Dec. 21, 1965) [hereinafter ICERD].

419. *Id.*

420. *Frequently Asked Questions: Convention on the Elimination of All Forms of Racial Discrimination*, AMERICAN CIVIL LIBERTIES UNION (emphasis added) https://www.aclu.org/sites/default/files/field_document/cerd_faqs.pdf.

In this Convention, the term “racial discrimination” shall mean any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.⁴²¹

One comment stated that by “logic, it would seem that caste discrimination must be incorporated into the definition of the term ‘descent-based’ discrimination.”⁴²² Despite, or maybe because of, India’s denial that caste discrimination met the ICERD definition of racial discrimination, in 2002, the U.N. Committee on the Elimination of Racial Discrimination (CERD), which is the supervisory body implementing ICERD, proffered a General Recommendation that “[s]trongly reaffirm[ed] that discrimination based on ‘descent’ includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights”⁴²³ CERD’s opinion was reaffirmed in 2007 when it found that:

[D]iscrimination based on ‘descent’ includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status which nullify or impair their equal enjoyment of human rights. Therefore, the Committee reaffirms that discrimination based on the U.N. Comm. On Elimination ground of caste is fully covered by [A]rticle 1 of the Convention.⁴²⁴

This opinion was squarely aimed at eradicating caste discrimination in India.⁴²⁵ CERD’s recommendations and interpretations of ICERD have no binding powers on the ICERD’s signatory countries, but it can be influential in interpreting what descent means in relation to caste.⁴²⁶ Countries can adopt the CERD’s definition of “descent discrimination” through legislation that

421. ICERD, *supra* note 418, at art. I, ¶ 1.

422. Sarkin & Koenig, *supra* note 66, at 565.

423. U.N. Comm. on the Elimination of Racial Discrimination, General Recommendation XXIX on Descent-Based Discrimination, at ¶ 7, U.N. Doc. CERD/C/61/Misc.29/rev.1 (Aug. 22, 2002).

424. Concluding Observations, *supra* note 70, at ¶ 8.

425. *Id.* at 565–66.

426. U.S. HUMAN RIGHTS NETWORK’S CERD WORKING GROUPS ON LOCAL IMPLEMENTATION AND TREATY OBLIGATIONS, A REPORT TO THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION ON: U.S. CERD OBLIGATIONS AND DOMESTIC IMPLEMENTATION ARTICLE TWO 2 (Feb. 2008) [hereinafter CERD WORKING GROUP], <https://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/cerd2008domesticimplementationarticle2.pdf>. (“[T]he U.S. ratified the CERD with an understanding that the treaty was “non-self-executing.””).

will give the treaty domestic legal effect.⁴²⁷ Article 2 contains a provision that “[e]ach State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization”⁴²⁸

ICERD was instrumental in a United Kingdom Employment Appeal Tribunal finding that caste discrimination in employment was prohibited by statute.⁴²⁹ In *Chandhok v. Tirkey* the Chandhoks, a married couple, hired Tirkey to work as a domestic worker.⁴³⁰ Tirkey originally worked for the Chandhoks in India, who then moved her to the United Kingdom to work for them there.⁴³¹ All of the parties were of Indian nationality.⁴³² Tirkey claimed her employer discriminated against her and filed a claim before the Employment Tribunal, claiming the discrimination happened because she was of a lower caste than the Chandhoks.⁴³³ She pled that the alleged discrimination violated Section 9 of the Equality Act of 2010 (Equality Act).⁴³⁴ Section 9 of the Equality Act’s definition for “race” includes color, nationality, and ethnic or national origins.⁴³⁵ Tirkey averred that “her ethnic and/or national origins include[d] (sic) but is not limited to her status in the caste system as perceived by the [Chandhoks].”⁴³⁶ The Equality Act originally contained a provision that would allow amendments “to provide for caste to be an aspect of race.”⁴³⁷ Then, under The Enterprise and Regulatory Act of 2013, the British Government agreed to make “caste an ‘an aspect of’ the protected characteristic of race” under the Equality Act after studying how to do so.⁴³⁸ However, amendments to the Equality Act were never implemented.⁴³⁹ The Chandhoks claimed that because the Equality Act never directly incorporated caste as a protected characteristic within the definition of race, it must be excluded.⁴⁴⁰

427. *Id.*

428. ICERD, *supra* note 418, at art. 2, ¶ 1(d).

429. *Tirkey v. Chandhok*, No. UKEAT/0190/14/KN, Judgment, U.K. Employ. App. Tribunal [I.C.R. 527] (Dec. 2, 2014), *aff’d*, No. 3400147/2015, Judgment, U.K. Employ. Tribunal [I.C.R. 527] (June 20-22, 2015) <https://employmentcasesupdate.co.uk/content/chandhok-anor-v-tirkey-ukeat-0190-14-kn.eec9821debca41478fa8647a235de42b.htm>.

430. *Id.*

431. *Id.* at ¶ 3.

432. *Id.*

433. *Id.*

434. *Id.* at ¶ 9.

435. *Tirkey*, [I.C.R. 527], at ¶ 5.

436. *Id.* at ¶ 6.

437. *Id.* at ¶ 24.

438. Annapurna Waughray, *Capturing Caste in Law: Caste Discrimination and the Equality Act 2010*, 14 HUM. RTS. L. REV. 359, 359 (2014).

439. Shubranshu Mishra, *Caste, Privilege, and Postcolonialism: Reflections on Decolonising the Curriculum*, E-INT’L. REL. (Sept. 15, 2020), <https://www.e-ir.info/2020/09/15/caste-privilege-and-postcolonialism-reflections-on-decolonising-the-curriculum/>.

440. *Tirkey*, [I.C.R. 527], at ¶ 5.

However, the Employment Appeal Tribunal ruled that even though caste discrimination was not a specific category of race discrimination under the Equality Act, it did not limit tribunals from using caste as a factor to define the term “race.”⁴⁴¹ The Employment Appeal Tribunal found that “ethnic origins” was a broad term that includes descent.⁴⁴² It was then noted that “descent,” which could be an element of “race” under ICERD, was closely linked to the term “caste.”⁴⁴³ Therefore, allowing for caste to be used to define “race” was “consistent with the UK’s international obligations, including that derived from ICERD.”⁴⁴⁴

Because CERD opinions are nonbinding, ICERD does not require the United States to do anything regarding caste discrimination.⁴⁴⁵ Further, legal opinions of the United Kingdom are obviously not binding on courts of the United States. However, with the ACLU including “labor” as an area needing protection against discrimination, ICERD may be influential in courts addressing caste discrimination in employment, including those in the United States. The reasoning used in *Chandhok* could be used to equate descent to ancestry, which is an element of a national origin group. This would make caste discrimination actionable under national origin discrimination and maybe under other protected classes well.

VII. CASTE DISCRIMINATION IN EMPLOYMENT SHOULD BE ADDRESSED LEGISLATIVELY

Under current interpretations of § 1981 and Title VII, caste discrimination is unlikely to be considered discriminatory based on race, color, national origin, or religion.⁴⁴⁶ However, caste discrimination is a growing problem in the United States.⁴⁴⁷ Many scholars have compared the impacts of racial discrimination in the United States to that of caste discrimination in South Asia.⁴⁴⁸ The Indian diaspora has brought many South Asians to the United States. As previously stated, sixty-seven percent of Dalits in the United States workforce claim they were discriminated against in the workplace,⁴⁴⁹ and shortly after the Cisco case was filed, there were 260 complaints about caste bias by Dalits in the IT industry.⁴⁵⁰ It appears that caste discrimination in the

441. *Id.*

442. *Id.*

443. *Id.*

444. *Id.* at ¶ 52.

445. CERD WORKING GROUP, *supra* note 426.

446. *See* Narula, *supra* note 29; *see also* Kudekallu, *supra* note 27.

447. *See generally* Zwick-Maitreyi et al., *supra* note 99.

448. *See, e.g.*, ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENTS, (2020). *See also generally* Narula, *supra* note 29; *see also generally* Kudekallu, *supra* note 27.

449. Zwick-Maitreyi et al., *supra* note 99, at 20.

450. Tiku, *supra* note 112.

workplace is now part of the “American experience” that was contemplated in *Ali*.⁴⁵¹ Institutions have already acted internally. In 2019, Brandeis University (Brandeis) became the first university in the United States to specifically ban caste discrimination.⁴⁵² This was in response to the University’s belief “that since caste identity is so intertwined with many of the legally recognized and protected characteristics, discrimination based on a person’s caste is effectively the same.”⁴⁵³ Because neither federal law nor Massachusetts law recognized caste, Brandeis added it to its list of protected categories.⁴⁵⁴ Brandeis’s non-discrimination policy now prevents discrimination based on “race, color, national origin, ethnicity, *caste*, sex, pregnancy, sexual orientation, gender identity/expression, including transgender identity, religion, disability, age, genetics, active military or veteran status”⁴⁵⁵ Additionally, in response to the *Cisco* lawsuit, many tech companies stated that they have broad non-discrimination policies that include discrimination based on caste.⁴⁵⁶ Twitter CEO Jack Dorsey made news when he was photographed in India holding a poster that read “Smash Brahminical patriarchy.”⁴⁵⁷ In 2006, internal emails at Microsoft evidenced IT companies have known about caste discrimination for a long time.⁴⁵⁸ The email chain, which was stopped by Microsoft management, questioned whether an affirmative action program in India was lowering the bar for Dalit candidates because of their “inherent intelligence and work ethic.”⁴⁵⁹

With the prevalence of caste discrimination increasing in the United States and the lack of judicial remedy, federal legislation should be enacted to prevent caste discrimination. Simply adding caste as a protected class to Title VII would help eliminate the practice. United States legislation could define caste similar to the definition in the Explanatory Notes to the Equality Act of 2010, which stated “[t]he term ‘caste’ denotes a hereditary,

451. *Ali v. National Bank of Pakistan*, 508 F. Supp. 611, 613 (S.D.N.Y. 1981).

452. Marian Bohanon, *Brandeis Becomes First US University to Ban Caste-Based Discrimination*, INSIGHT INTO DIVERSITY (Feb. 12, 2020), <https://www.insightintodiversity.com/brandeis-becomes-first-us-university-to-ban-caste-based-discrimination/>.

453. Letter from Ron Liebowitz, President of Brandeis Univ., to Students, Faculty, and Staff, BRANDEIS UNIV. (Dec. 17, 2019), <https://www.brandeis.edu/president/letters/2019-12-17-adding-caste-to-our-nondiscrimination-harassment-policy.html>.

454. *Id.*

455. Brandeis University, *Policy Against Discrimination, Harassment, & Sexual Violence*, at 1 (effective Aug. 14, 2020), <https://www.brandeis.edu/equal-opportunity/policies/pdfs/discrimination-harassment-sv-policy.pdf> (emphasis added).

456. Tiku, *supra* note 112.

457. Pooja Shali, *Twitter CEO Jack Dorsey Slammed by Users for Posing With an Anti-Brahmin Poster*, INDIA TODAY (Nov. 20, 2018), <https://www.google.com/search?client=firefox-b-1-d&q=Twitter+CEO+Jack+Dorsey+Slammed+by+Users+for+Posing+With+an+Anti-Brahmin+Poster>.

458. Tiku, *supra* note 112.

459. *Id.*

endogamous (marrying within the group) community associated with a traditional occupation and ranked accordingly on a perceived scale of ritual purity. It is generally (but not exclusively) associated with South Asia, particularly India, and its diaspora”⁴⁶⁰ This definition should include bias based on traditional Hindu caste. However, because Title VII historically does not define what constitutes inclusion in a protected class, Congress could leave courts to decide what qualifies as a caste for the statute. If Congress chooses not to add a new protected class, it should enact legislation explicitly stating that castes are national origin groups. Then, members of those castes could bring Title VII claims based on national origin discrimination. Courts have inferred that there is discrimination based on national origin that society thinks is wrong but is not actionable in the law.⁴⁶¹ In 1943, the Supreme Court in *Hirabayashi v. United States* stated that “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.”⁴⁶² This same sentiment was echoed in *Roach* in deciding that Arcadians were an ethnic origin group even though they never comprised a sovereign nation.⁴⁶³ The court in *Billiter* stated that “terminating an employee because the employer does not like her mother or father—or because the employer does not like her mother’s political actions—may be improper or wrong, it is improper because civilized society looks down upon it, not because the law forbids it.”⁴⁶⁴ Congress should give the courts the legislative guidance necessary to correct perceived wrongs in deciding who gets protection against discrimination based on ancestry, including those claims of caste discrimination.

VIII. CONCLUSION

One of the cardinal principles of jurisprudence is that for every wrong there is a remedy.⁴⁶⁵ The Supreme Court addressed the odiousness of discriminating against a person solely because of their ancestry. Caste discrimination in employment seems to conform to the odiousness in which the Court described. With the influx of immigrants from South Asia, discrimination based

460. Matias Rodriguez Burr, note, *Different Routes for Protecting Caste Discrimination: Chandhok v Tirkey*, 46 IND. L.J. 406, 409 (2017) (quoting Governments Equalities Office (UK), *Caste in Great Britain and Equality Law: A Public Consultation*, s 1.1 (2017), www.gov.uk/government/uploads/system/uploads/attachment_data/file/609641/170419_-_Caste_condoc_-_Final.pdf).

461. See, e.g., *Billiter v. Jones*, No. 3:19-0288, 2020 WL 5646901, at *7 (S.D. W. Va. Sept. 22, 2020).

462. 320 U.S 81, 100 (1943).

463. See *Roach v. Dresser Indus. & Instrument Div.*, 494 F. Supp 215, 218 (W.D. La. 1980).

464. *Billiter v. Jones*, No. 3:19-0288, 2020 WL 5646901, at *7.

465. *Leo Feist v. Young*, 138 F. 2d 972, 974 (1943).

on caste is now part of the American experience and is likely to become more so. However, under current interpretations of Title VII & § 1981, there is doubt as to whether caste discrimination in employment does indeed have a remedy under federal law. To remedy this, a court could use the term “ancestry,” which is part of the definition of several protected classes, to craft a remedy. This would require interpretation in a way that has not yet been done, but the door is open to this because caste is a circumstance of birth. Once one is born into a caste, there is little or no opportunity to move up in social status among others in the caste system. Instead of relying on the judiciary to interpret caste discrimination as a violation of federal employment statutes, it would be easier for Congress to amend those laws. In line with international law, Congress should either add a new protected class to Title VII or recognize castes as a national origin group based on ancestry. This would ensure a remedy for victims of the odiousness of caste discrimination in employment.