

Please cite the Published Version

Brown, Kevin D, Khandare, Lalit, Waughray, Annapurna, Dau-Schmidt, Kenneth Glenn and Shaw, Theodore (2022) Does U.S. Federal Employment Law Now Cover Caste Discrimination Based On Untouchability?: If All Else Fails There is the Possible Application of Bostock v. Clayton County. N.Y.U. Review of Law and Social Change, 46 (2). pp. 117-174. ISSN 0048-7481

DOI: <https://doi.org/10.2139/ssrn.3816265>

Publisher: New York University

Version: Published Version

Downloaded from: <https://e-space.mmu.ac.uk/627522/>

Enquiries:

If you have questions about this document, contact openresearch@mmu.ac.uk. Please include the URL of the record in e-space. If you believe that your, or a third party's rights have been compromised through this document please see our Take Down policy (available from <https://www.mmu.ac.uk/library/using-the-library/policies-and-guidelines>)

DOES U.S. FEDERAL EMPLOYMENT LAW NOW COVER CASTE DISCRIMINATION BASED ON UNTOUCHABILITY?: IF ALL ELSE FAILS THERE IS THE POSSIBLE APPLICATION OF *BOSTOCK V. CLAYTON COUNTY*

KEVIN BROWN, LALIT KHANDARE, ANNAPURNA WAUGHRAI, KENNETH DAU-
SCHMIDT, & THEODORE M. SHAW[∞]

ABSTRACT

This article discusses the issue of whether a victim of caste discrimination based on untouchability can assert a claim of intentional employment

[∞] Kevin Brown, Richard S. Melvin Professor, Indiana University Maurer School of Law, B.S. 1978, Indiana University, J.D. 1982, Yale Law School; Lalit Khandare, Assistant Professor, School of Social Work, Pacific University Oregon, B.S. 1999, Amravati University in India, M.S., Commerce, 2001, Amravati University in India, M.A., Social Work, 2003, Tata Institute of Social Sciences-Mumbai, PG Diploma, Human Rights and Law, 2005, The National Law School of India University-Bangalore, M. Phil., Planning and Development, 2006, Indian Institute of Technology-Bombay, Ph.D., Social Work, 2017, Indiana University; Annapurna Waughray, Professor of Human Rights Law, Manchester Law School, Manchester Metropolitan University, Manchester, U.K., B.A. (Hons.) 1983, Cambridge University, M.A. 1986, Cambridge University, Solicitor 1994, Law Society of England and Wales, LL.M., International and European Law, 2000, Liverpool University, Ph.D. 2013, Liverpool University; Kenneth Dau-Schmidt, Willard and Margaret Carr Professor of Labor and Employment Law, Indiana University Maurer School of Law, B.A. 1978, University of Wisconsin, M.A., Economics, and J.D. 1981, University of Michigan-Ann Arbor, Ph.D., Economics, 1984, University of Michigan-Ann Arbor; Theodore M. Shaw, Julius L. Chambers Distinguished Professor of Law and Director of the Center for Civil Rights at the University of North Carolina School of Law, B.A. 1976, Wesleyan University, J.D. 1979, Columbia University School of Law. We would like to acknowledge and express our appreciation to colleagues and other friends whose support and suggestions have been so valuable to this Article. Special thanks to Michael Dodson, Melvin Felton, Steve Fulmer, Guha Krishnamurthi, Timothy Lovelace, Purvi Mehta, Anthony Prather, Garav Pathania, Sukhadeo Thoratt, and Deborah Widiss. The substance of this article was discussed at the following: Zoom Conference entitled the Practice of Caste in USA organized by the Ambedkar King Study Circle of California in August 2020; Zoom Conference entitled Caste in the Valley: Experiencing Discrimination on Foreign Land organized by the International Dalit Solidarity Network in August 2020; Confronting Racism: Zoom Conference Global Solidarities Sponsored by the Center for Race and Ethnic Studies at Indiana University, Bloomington in August 2020; Zoom Conference Strategic Approaches to Collaborate and Combat Racial Injustice and Caste Discrimination sponsored by International Commission for Dalit Rights in September 2020; and Zoom Conference Sustaining Solidarities: Dalit, Black & Muslim Lives in an Era of Uncertainty organized by the Dhar India Studies Department of Indiana University, Bloomington, Indiana October 2020. Caste Discrimination Under US Federal Employment Discrimination Law Keynote Address at the Conference entitled International Connections and Solidarity, sponsored by Discrimination Law Association of United Kingdom, Zoom Webinar Feb 17, 2021; World Bank Series on Race and Caste sponsored by Social Inclusion Global Solutions Group and the SAR Sustainable Development Working Group on Racism of the World Bank, Zoom Conference April 27, 2021; Decolonising the Law Discussion Group at the Faculty of Law delivered at Oxford University, Oxford, United Kingdom Zoom Conference May 13, 2021; Presentation to the faculty of the University of South Carolina Law School on March 28, 2022; and Presentation to the faculty

discrimination under Title VII or Section 1981. This article contends that there are legitimate arguments that this form of discrimination is a form of religious discrimination under Title VII. The question of whether caste discrimination is a form of race or national origin discrimination under Title VII or Section 1981 depends upon how the courts apply these definitions to caste discrimination based on untouchability. There are legitimate arguments that this form of discrimination is recognized within the concept of race discrimination or national origin discrimination under Title VII or race discrimination under Section 1981. However, if courts reject these conclusions, the approach adopted by the Supreme Court in its June 2020 decision in Bostock v. Clayton County would provide another potent legal argument for recognizing such discrimination.

The Bostock approach avoids the question of whether caste discrimination based on untouchability is a form of national origin or racial discrimination. This approach draws on the Supreme Court's recognition that the "but-for" causation standard applies under both Title VII and Section 1981. The but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause. And multiple but-for causes can exist. Applying this approach to intentional employment discrimination against gays, lesbians, or transgender individuals, the Supreme Court pointed out that such a person's sex is inextricably intertwined with their other status. The Court concluded that discrimination against a person because they are gay, lesbian, or transgender means that you are discriminating against such a person based on that status, which is not protected, and their sex, which is. Thus, under the Bostock approach, because all of those who are victims of caste discrimination based on untouchability are from Asia, their caste is inextricably intertwined with their race. As a result, when Dalits are victims of intentional discrimination based on untouchability, the discriminator is motivated to discriminate against them because of their caste, which is not a protected trait, and their race, which is. Thus, intentional caste discrimination inevitably also involves race discrimination under both Title VII and Section 1981.

I. INTRODUCTION.....	120
II. CASTE SUBORDINATION OF DALITS IN SOUTH ASIA AND THE U.S.	127
A. Brief History of South Asian Immigration to the U.S.	128
B. The Five-Fold Caste System.....	130
C. Discrimination Dalits Experience Under the Caste System.....	134
III. CASTE DISCRIMINATION CAN GENERATE RACE DISCRIMINATION EMPLOYMENT CLAIMS UNDER 42 U.S.C. § 1981.....	137
A. Application of Section 1981 to Employment Discrimination	138
B. Americans of the 19th Century Understood Caste Discrimination as Included Within Race Discrimination	140
1. Supreme Court's Opinion in <i>Saint Francis College v Al Khazraji</i>	140
2. Common Practice of Analogizing Racial Discrimination Against Black Americans to Caste Discrimination During the 19th Century	142
3. Aryan Origin Theory and Race.....	145
4. Congressional Debates During the Passage of the Civil Rights Act of 1866.....	148
5. Conclusion	152
IV. IS CASTE DISCRIMINATION COVERED BY ONE OF THE PROTECTED TRAITS OF TITLE VII?	152
A. Is Caste Discrimination Based on Untouchability a Form of Religious Discrimination?	154
B. Is Caste Discrimination Based on Untouchability Covered Under the Protected Trait of Race?	156
1. Determining Whether Caste Discrimination is Race Discrimination Using the Federal Government's Definitions of Race.....	157
2. Defining Race for Purposes of Title VII as it Was Defined by Section 1981.....	159
3. Congressional Debates During Passage of the Civil Rights Act of 1964.....	160
4. Contemporary Sources Defining Race	161
C. Is Caste Discrimination Based on Untouchability Covered Under the Protected Trait of National Origin Discrimination?	162
1. Dalits as a National Origin Group Due to Stigmatization by Caste Members	164
2. Dalits as a National Origin Group Based on Ancestry Analogy to U.K. Treatment of Caste Discrimination	164
3. Aryan Origin Theory and National Origin Discrimination.....	165
4. Dalits as a National Origin Group Based on Applying Section 1981's Definition	167
V. CHANGE THE PROTECTED TRAIT APPROACH ARTICULATED IN <i>BOSTOCK</i> ...	167
A. <i>Bostock v. Clayton County</i>	168
B. Application of the <i>Bostock</i> Approach to Caste Discrimination Under Title VII.....	171
1. Does the <i>Bostock</i> Approach Using Religion Work for Dalits?.....	172

2. Does the <i>Bostock</i> Approach Using National Origin Work for Dalits? ..	172
3. Does the <i>Bostock</i> Approach Using Race Work for Dalits?	172
B. Application of the <i>Bostock</i> Approach to Caste Discrimination Under Section 1981	173
VI. CONCLUSION	174

I.

INTRODUCTION

Untouchability stems from the over 3,000-year-old caste system of the Indian subcontinent, a hierarchical system that stratifies individuals into groups based on birth.¹ For simplification, the “caste system” consists of four distinct hierarchically ranked ‘varnas’ or major occupational groupings (we will refer to all of those in these groups, collectively, as “Caste Hindus”). Dalits constitute a sort of fifth caste outside the four-fold system. Dalits were also known as “outcastes” or “untouchables” to illustrate that they, religiously, fell outside the four-fold Hindu caste system.² These five broad caste groups can be broken down into thousands of hierarchically ranked subcastes or “jatis”—the indigenous Indian word.³ In traditional Hindu society, occupations were allocated among different social groups according to Hindu law and custom that reflected the “classic expression of inequality, viz., caste.”⁴ Thus, to a certain extent, employment discrimination based on caste is a way of life. Caste also ensured that there was little concern in Indian society for the rights of individuals. The functioning of the caste system excluded whole segments of society from positions of respect and responsibility without consideration of individual talents, abilities, or interests.⁵ Every individual’s social position in Indian society was (and to a large extent, particularly in rural India where three-fourths of Dalits reside,⁶ still is) defined by the jati into which he or she is born.

Historically, Dalits were forced into the occupations regarded as ritually “impure”, such as leather workers, manual scavenging (manually clearing human feces from public and private latrines using hand-held implements, without mechanization or protective equipment), disposing of dead animal carcasses and

1. See *infra* notes 84–85. For a detailed discussion of the caste system, see LOUIS DUMONT, *HOMO HIERARCHICUS: THE CASTE SYSTEM AND ITS IMPLICATIONS* (1972).

2. See *infra* note 84.

3. Varna is a Hindu concept whereas jati is a cross-religious cultural phenomenon. Thus, not all jatis are subsumed into one of the four varnas.

4. M. N. SRINIVAS, *CASTE IN MODERN INDIA* 88 (1962).

5. See generally DUMONT, *supra* note 1.

6. *India: Official Dalit Population Exceeds 200 Million*, INT’L DALIT SOLIDARITY NETWORK (May 29, 2013), <https://idsn.org/india-official-dalit-population-exceeds-200-million/> [https://perma.cc/NHR4-S97W].

temple prostitution (devadasi).⁷ Hindus believe that engaging in these activities is religiously polluting to the individuals who perform them and that this spiritual pollution is contagious.⁸ Since this spiritual pollution stemmed from birth, even today Dalits cannot escape it by deed, attainment of highly valued educational credentials, or rise in social or economic standing.⁹ Because of this religious pollution, Caste Hindus took elaborate precautions to prevent even incidental contact between themselves and Dalits.¹⁰ Like the concept of social distancing that has developed in response to Covid-19 and its variants, when it came to avoiding contact with Dalits, Caste Hindus engaged in extreme social distancing. They commonly banned and segregated Dalits from full participation in Hindu social life and required them to maintain a discrete distance.¹¹

Caste discrimination based on untouchability in the employment context has generally been a hidden form of discrimination in the U.S., until recently. Even though the caste system has existed for thousands of years, caste discrimination based on untouchability was rarely recognized as an issue on American soil due to the historically low numbers of South Asians in the U.S., of which only the tiniest fraction were Dalits. As late as 1960, there were less than 13,000 people of Indian origin in the country.¹² Over the past thirty years, however, the number of South Asian immigrants in the U.S. has skyrocketed. According to the Census Bureau, there were more than 5.4 million people of South Asian descent in the U.S. in 2018.¹³ But, a 2003 University of Pennsylvania study revealed that only 1.5% of Indian immigrants in the U.S. were Dalits or members of the lower

7. SMITA NARULA, *BROKEN PEOPLE: CASTE VIOLENCE AGAINST INDIA'S "UNTOUCHABLES"* 141 (1999).

8. N. K. BOSE, *THE STRUCTURE OF HINDU SOCIETY* 28 (1975).

9. As a Dalit surgeon emphatically put it:

It is India's most shameful paradox—this country has made almost unimaginable progress in nearly every sphere of human life, but the one thing unchanged is the condition of its dalits and backward communities. I am a microsurgeon specialising in hand and spinal reconstruction, and am [a Member of the Legislative Assembly] from Bihar, but I still remain very much a dalit—a dhobi ("washerman"), to be precise, open to routine humiliation from the upper castes.

Smita Narula, *Equal by Law, Unequal by Caste: The "Untouchable" Condition in Critical Race Perspective*, 26 WIS. INT'L L.J. 255, 266 (2008).

10. See DEVANESAN NESIAH, *DISCRIMINATION WITH REASON? THE POLICY OF RESERVATIONS IN THE UNITED STATES, INDIA AND MALAYSIA* 38 (1997). Despite the doctrinal denunciations of caste and their espousal of equality, Sikhs, Muslims, and Christians also engage in social distancing practices with respect to Dalits. See *infra* note 128 and accompanying text.

11. See *infra* note 122.

12. SANJOY CHAKRAVORTY, DEVESH KAPUR, & NIRKVIKAR SINGH, *THE OTHER ONE PERCENT: INDIANS IN AMERICA* 24 (2017).

13. *American Community Survey, Asian Alone or in Any Combination by Selected Groups*, U.S. CENSUS BUREAU (2018), <https://data.census.gov/cedsci/table?q=B02018&tid=ACSDT1Y2019.B02018&hidePreview=true> [https://perma.cc/8R84-ACL4]. There were 4,605,550 Asian Indians, 208,200 Bangladeshi, 24,143, Bhutanese, 197,880 Nepalese, 554,202 Pakistanis, and 55,812 Sri Lankans. *Id.*

castes.¹⁴ Like all immigrants, South Asians brought their beliefs with them, including those about the caste system.

As a result of more immigration from South Asia, more employment discrimination claims based on caste can be expected. For example, Cisco Systems, Inc. (“Cisco”), is engaged in an employment discrimination litigation initially commenced in June 2020 by the California Department of Fair Employment and Housing (“DFEH”).¹⁵ In the case, DFEH alleges that Cisco engaged in caste discrimination based on untouchability against John Doe, a Dalit, in violation of the California Fair Employment and Housing Act (“FEHA”).¹⁶ Equality Labs, a nonprofit advocacy organization for Dalits,¹⁷ received complaints of caste discrimination from almost 260 U.S. tech workers in a three-week period in the fall of 2020.¹⁸ In addition, in October 2020, the Washington Post published a statement from a group of 30 Dalit female Indian engineers employed by Google, Apple, Microsoft, Cisco, and other tech companies.¹⁹ The statement thanked John Doe for filing his complaint and discussed the caste bias they have encountered both in educational institutions in India and in the U.S. tech sector.²⁰ In May 2021, a labor trafficking case was filed in the U.S. District Court of New Jersey on behalf of 200 Indian nationals recruited from India to work on construction of the largest Hindu temple in the U.S.²¹ They were placed in a state of total dependence on their employers.²² Their employers took their passports away and imprisoned them in a compound.²³ They were subjected to casteist

14. Tinku Ray, *The US Isn't Safe from the Trauma of Caste Bias*, WORLD (Mar. 8, 2019, 9:00 AM), <https://www.pri.org/stories/2019-03-08/us-isn-t-safe-trauma-caste-bias> [https://perma.cc/8W5Y-B8LE].

15. Cal. Dep't of Fair Emp. & Hous. v. Cisco Sys. Inc., No. 20CV372366 (Santa Clara Cnty. Super. Ct. Oct. 16, 2020). The claim was originally filed on June 30, 2020 in the United States District Court of the Northern District of California. DFEH brought suit against Cisco regarding its discriminatory treatment of John Doe, in violation of Title VII of the Civil Rights Act of 1964 and the California Fair Employment and Housing Act (FEHA). DFEH, however, dismissed the filing in the US District Court on October 16, 2020 and refiled in the Superior Court of California, Santa Clara County, the same day, resting its claims solely on FEHA.

16. California Fair Employment and Housing Act (FEHA), CAL. GOV'T CODE § 12900 (West 2022). The complaint filed by DFEH alleges that Cisco engaged in unlawful employment practices based on religion, ancestry, national origin/ethnicity, and race/color against John Doe, a Dalit.

17. EQUALITY LABS, <https://www.equalitylabs.org> [https://perma.cc/7CHN-Z3XQ] (last visited Feb. 3, 2021).

18. Nitasha Tikku, *India's Engineers Have Thrived in Silicon Valley. So Has Its Caste System.*, WASH. POST (Oct. 27, 2020), <https://www.washingtonpost.com/technology/2020/10/27/indian-caste-bias-silicon-valley/> [https://perma.cc/2SVG-HZPL].

19. *Dalit Women Technologists' Statement About Caste in Silicon Valley*, WASH. POST (Oct. 27, 2020), <https://www.washingtonpost.com/context/a-statement-on-caste-bias-in-silicon-valley-from-30-dalit-women-engineers/d692b4f8-2710-41c3-9d5f-ea55c13bcc50/> [https://perma.cc/VF6A-K42V].

20. *Id.*

21. Complaint, *Kumar v. Bocharanwasi Shri Akshar Purushottam Swaminarayan Sanstha*, Inc., No. 3:21-CV-11048 (D. N.J. May 11, 2021).

22. *Id.* at § 104.

23. *Id.* at § 4.

insults and humiliations.²⁴ Their status as Dalits was the reason why they were recruited, exploited, and mistreated in this way.²⁵ In fact, the U.S. State Department has consistently noted caste-based trafficking, sexual, and labor exploitation from India disproportionately impacts Dalits.²⁶

If we propose the normative question in the context of American society, should caste discrimination based on untouchability, if it is practiced, be a form of employment discrimination, the answer must be a resounding yes! The comparison between caste and other forms of discrimination was made in the U.S. by abolitionists in the 1830s, who expressed their disgust at the caste system.²⁷ Before the Civil War, abolitionists analogized the treatment of enslaved Black people in the U.S. to the Indian caste system in order to argue against the horrors of slavery in the south and for better treatment of formerly enslaved persons in the north.²⁸

U.S. courts have rarely addressed the issue of whether anti-discrimination employment measures ban caste discrimination.²⁹ For purposes of discussing caste discrimination in employment, the most appropriate federal laws are 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964. Section 1981, which originated with the Civil Rights Act of 1866, only applies to race discrimination.³⁰ Title VII makes it “unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.”³¹

This article is limited to federal employment claims for intentional caste discrimination based on untouchability under Section 1981 and Title VII. Because Section 1981 provides a basis for claims of discrimination for police misconduct, housing, zoning, and education, the article is also suggesting that federal law provides other important legal remedies for Dalits beyond the employment

24. *Id.* at § 7 (People in the Scheduled Caste in India, for example, were formerly considered “untouchables” and “endure near complete social ostracization.” At the temple in New Jersey, temple leadership did what they could to remind these marginalized workers of their place in the social hierarchy. Defendant Swami Prasanand, for example, called the workers “worms,” thus exacerbating the psychological coercion the workers experienced.)

25. *Id.*

26. *See, e.g.*, OFF. TO MONITOR AND COMBAT TRAFFICKING IN PERS., U.S. DEP’T OF STATE, 2021 TRAFFICKING IN PERSONS REPORT: INDIA, <https://www.state.gov/reports/2021-trafficking-in-persons-report/india/> [<https://perma.cc/P2AC-UQ7K>] (last visited Feb. 26, 2022).

27. *See infra* notes 172–73.

28. *Id.*

29. *See, e.g.*, *Mazumder v. Univ. of Mich.*, 195 F. App’x 320, 323 (6th Cir. 2005). The caste discrimination issue was raised, but not fully litigated, and the Court expressed an unfamiliarity with the concept through their use of quotation marks around the term.

30. *See* 42 U.S.C. § 1981(a) (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings . . . as is enjoyed by white citizens.”) (emphasis added).

31. 42 U.S.C.A. § 2000e–2(a)(1).

context.³² In this article, we will contend that there is a legitimate argument that caste discrimination is a form of religious discrimination under Title VII. However, the strongest arguments involve the assertions that caste discrimination based on untouchability are included within race and/or national origin discrimination.

The question of whether caste discrimination is a form of race or national origin discrimination under Title VII or race discrimination under Section 1981 comes down to whether caste fits within the definition of those protected traits under the respective statutory frameworks. Title VII does not include a definition for “race,” and the Supreme Court has not yet elaborated on the term for purposes of Title VII. Though Section 1981 doesn’t use the word “race,” within a decade of the passage of the Civil Rights Act of 1866, the Supreme Court confirmed that it “is intended for the protection of citizens of the United States in their enjoyment of certain rights without discrimination on account of race, color, or previous condition of servitude.”³³

In addressing what groups constitute a race under Section 1981, the Supreme Court stated in *Saint Francis College v. Al Khazraji* that the definition of race was to be drawn from how it was understood in the 19th century.³⁴ The number of groups recognized as different races was far more expansive in the 19th century than is commonly thought today. The prevailing conceptions of race in the U.S. have been strongly influenced by the federal government’s definitions of different races that first went into effect in 1977.³⁵ In *Saint Francis College*, the Court reviewed several 19th-century sources defining race, specifically listing several races from those sources; these included Finns, Romani, Basques, Hebrews, Swedes, Norwegians, Germans, Greeks, Italians, Spanish, Mongolians, Russians, and Jews.³⁶ As one can see, the concept of race also includes what today we might think of as ethnic or national origin groups. What is also of particular importance is that the Romani are one of the listed “racial” groups.³⁷ The Roma, however, are believed to be Dalits who migrated from India into Persia, the near East and, finally, into Eastern and Central Europe beginning around A.D. 600.³⁸ There are other compelling reasons to assert that Americans of the 19th century viewed

32. While the largest percentage of actions filed under 42 U.S.C.A. § 1981 are employment discrimination claims, § 1981 causes of action include race discrimination for police misconduct, housing, zoning, and schools. *See, e.g.,* Theodore Eisenberg & Stewart Schwab, *The Importance of Section 1981*, 73 CORNELL L. REV. 596, 601 (1988).

33. *United States v. Cruikshank*, 92 U.S. 542, 555 (1875).

34. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610 (1987).

35. *See infra* note 293 and accompanying text.

36. *Saint Francis Coll.*, 481 U.S. at 611.

37. *Id.*

38. Palash Ghosh, *Centuries of Discrimination: European Roma Linked to India’s ‘Untouchables’*, INT’L BUS. TIMES (Dec. 4, 2012), <https://www.ibtimes.com/centuries-discrimination-european-roma-linked-indias-untouchables-917965> [https://perma.cc/2UR8-QCG2].

different Indian castes as separate races.³⁹ Further, while Section 1981 and Title VII are from two different Civil Rights Acts, whose initial passages were almost 100 years apart, courts often analyze intentional employment discrimination claims involving race and national origin under the two statutes in a very similar, if not identical, way. “[T]he facts necessary to support a claim for relief under Title VII are nearly identical to the facts which support a claim under Section 1981.”⁴⁰

There are, therefore, several arguments that caste discrimination fits within the concept of race discrimination under Section 1981 and the protected traits of religion, race, and national origin under Title VII. However, the greatest strength of the argument that caste discrimination is covered by federal employment discrimination law is the fact that if courts reject the argument that caste discrimination fits within any of the protected categories of those two provisions, the analysis used by the Supreme Court in *Bostock v. Clayton County*,⁴¹ a major Title VII case decided in 2020, would come into play.

The approach taken by the Supreme Court in *Bostock* would, if applied to a claim of caste discrimination, avoid the difficult question of whether caste fits in the definition of race or national origin. In *Bostock*, the Court addressed whether discrimination against gay, lesbian, and transgendered individuals constitutes sex discrimination under Title VII. In addressing the question, Justice Neil Gorsuch explained that, in Title VII claims, “a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.”⁴² There can be multiple but-for causes. Gorsuch noted that although a person’s sexual orientation and gender identity are separate and distinct from a person’s sex, their sex is nevertheless inextricably linked to their other status.⁴³ Even if an

39. See remarks made in particular by Senator Charles Sumner. In his discussion during the passage of the Civil Rights Act of 1866, Sumner compares the Indian caste system with Brahmans and Shudras to the U.S. race situation with blacks and whites. See *infra* notes 177–82 and accompanying text; see also CHARLES SUMNER, EQUALITY BEFORE THE LAW PROTECTED BY NATIONAL STATUTE: SPEECHES OF HON. CHAS. SUMNER 15 (1874), <https://tile.loc.gov/storage-services/service/rbc/lcrbmrp/t2415/t2415.pdf> [<https://perma.cc/MV2K-ZXK7>] (“Religion and reason condemn Caste as impious and unchristian, making republican institutions and equal laws impossible; but here is Caste not unlike that which separates the Sudra from the Brahmin.”). This analogy was meant to demonstrate that racism in the United States is similar to the caste system of the South Asian continent. Thus, the framers of the Civil Rights Act of 1866 would have viewed discrimination against Dalits as interracial discrimination as opposed to intra-racial discrimination.

40. *Caldwell v. Martin Marietta Corp.*, 632 F.2d 1184, 1186 (5th Cir. 1980). See also *Village of Freeport v. Barrella*, 814 F.3d 594, 607 (2d Cir. 2016) (“[W]e analyze claims of racial discrimination identically under Title VII and § 1981 in other respects, and we see no reason why we should not do the same with respect to how we define race with for purposes of those statutes.”).

41. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

42. *Id.* at 1739. He also noted that Congress amended Title VII in 1991 to allow a plaintiff to prevail merely by showing that a protected trait was a “motivating factor” in an adverse employment action. *Id.* Thus, “under this more forgiving standard, liability can sometimes follow even if sex wasn’t a but-for cause of the employer’s challenged decision.” *Id.* However, the motivating factor test is not the issue in *Bostock*.

43. *Id.* at 1746–47.

employer's goal is only to discriminate against a person because they are gay, lesbian, or a transgender individual, it is not possible without also discriminating against the person because of their sex. To demonstrate this, Gorsuch noted that if you changed the gay, lesbian, or transgender individual's sex, say a gay man to a woman, would that change lead to a different outcome by the employer? If the answer is yes, then the discrimination is also based on sex.⁴⁴ Clearly the answer is yes, because the change would eliminate the gay, lesbian, or transgender status that was the motivation for the adverse employment treatment. Although an individual's status as gay, lesbian, or transgender is not a listed protected trait, *Bostock* holds, it is equivalent to discrimination based on the protected trait of sex.⁴⁵

The *Bostock* approach should apply to claims of caste discrimination based on untouchability. Since all Dalits in the U.S. originated in South Asia,⁴⁶ caste is inextricably linked to being a member of the Asian race. When a person discriminates against a Dalit based on untouchability, they are discriminating against that person based both on caste, which is not a protected category, and race, which is. But it is important to note that this *Bostock* argument is only legally necessary if courts first conclude that caste discrimination based on untouchability is not a form of race or national origin discrimination under Title VII or race discrimination under Section 1981.

Dalits have legal protection under the 1989 Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act against discriminatory and abusive behavior by high-caste communities.⁴⁷ In addition, the Protection of Civil Rights Act 1955 specifically prohibits discrimination and offences related to business, trade, employment, healthcare, religion, and various other civil spheres.⁴⁸ However, these provisions are under criminal law and do not provide civil remedies to meet the holistic needs of caste-related employment discrimination in private companies. Until the mid-1990s, caste discrimination was neither recognized in international human rights law nor included in human rights discourse.⁴⁹ This changed due to Dalit activists and their supporters throughout the world advocating for global recognition of the discrimination they face not just in India, but throughout the South Asian diaspora.⁵⁰ They have succeeded in getting caste

44. *Id.* at 1741.

45. *Id.*

46. See, e.g., GAIL OMVEDT, DALITS AND THE DEMOCRATIC REVOLUTION 31 (1994) ("The caste system exists in the South Asian subcontinent and there only.").

47. The Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (Act. No. 33/1989) (India), <https://tribal.nic.in/actRules/preventionofAtrocities.pdf> [<https://perma.cc/LZ7Z-D4BR>] (last visited July 10, 2022).

48. See generally The Protection of Civil Rights Act, 1955 (Act. 22/1955) (India), <https://www.indiacode.nic.in/handle/123456789/1544?locale=en> [<https://perma.cc/9WDF-NEYF>].

49. Annapurna Waughray, *Caste Discrimination: A Twenty-First Century Challenge for UK Discrimination Law*, 72 MODERN L. REV. 182, 191 (2009).

50. *Id.*

discrimination declared a violation of international human rights law.⁵¹ However, because of the prodigious international weight of U.S. law, for the 200 million Dalits in India alone and the Dalit diaspora,⁵² a determination that U.S. federal employment discrimination law banned caste discrimination based on untouchability by private employers would have incalculable global ramifications.

This article is written in four parts. The first part discusses the immigration of South Asians to the U.S., including their dramatic increase in numbers over the past thirty years. It also provides an explanation of the caste system and the discrimination that Dalits have endured and continue to experience.⁵³ The second part will focus on employment discrimination claims for caste discrimination based on untouchability under Section 1981.⁵⁴ The third part will discuss Title VII claims of caste discrimination based on untouchability.⁵⁵ The fourth part will provide the argument that is derived from *Bostock v. Clayton County* that caste discrimination is intertwined with race discrimination.⁵⁶ It will discuss the *Bostock* case, and how this approach applies under Title VII, as well as *Comcast Corporation v. National Association of African American Owned Media*,⁵⁷ another Supreme Court case in 2020 in which the Court applied the same approach to a Section 1981 claim.

II.

CASTE SUBORDINATION OF DALITS IN SOUTH ASIA AND THE U.S.

Over the past thirty years, the number of South Asian immigrants in the U.S. has skyrocketed. The first section of this part will discuss the history of immigration to the U.S. from South Asia, including its recent dramatic rise. As the number of South Asians in the U.S. increased, the number of incidents of caste

51. Specifically, caste discrimination is viewed as a violation of the International Convention on the Elimination of all Forms of Racial Discrimination as a sub-category of racial discrimination based on descent, and separately as a category of discrimination based on work and descent, a broader form of discrimination condemned by the U.N. *Id.* One of the Dalit activists' and supporters' most highly publicized efforts, however, occurred when they unsuccessfully lobbied to have caste discrimination officially recognized as a form of racial discrimination at the 2001 U.N. World Conference against Racism, Racial Discrimination, Xenophobia and other related forms of Intolerance held in Durban, South Africa. They were unsuccessful, but as a result caste acquired global visibility as a ground of discrimination. *Id.* at 193.

52. Gautham Subramanyam, *In India, Dalits Still Feel Bottom of the Caste Ladder*, NBC NEWS (Sept. 13, 2020), <https://www.nbcnews.com/news/world/india-dalits-still-feel-bottom-caste-ladder-n1239846> [<https://perma.cc/3T3Y-M7FS>]; *see also* Larry Simon & Sukhdeo Thorat, *Editorial*, 2 CASTE: A GLOBAL JOURNAL ON SOCIAL EXCLUSION vi, viii (2021); *India: Official Dalit population exceeds 200 million*, INT'L DALIT SOLIDARITY NETWORK (May 29, 2013), <https://idsn.org/india-official-dalit-population-exceeds-200-million/> [<https://perma.cc/73DL-X2ZH>].

53. *See infra* notes 58–142 and accompanying text.

54. *See infra* notes 143–253 and accompanying text.

55. *See infra* notes 254–350 and accompanying text.

56. *See infra* notes 351–94 and accompanying text.

57. *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009 (2020).

discrimination based on untouchability increased as well. The second section of this part will discuss the 3,500-year-old five-fold caste system. The third section will discuss the discrimination Dalits experience due to the concept of untouchability that exists within South Asian and American societies today.

A. Brief History of South Asian Immigration to the U.S.

South Asians did not start to migrate in large numbers until the British Empire outlawed slavery in the 1833 and created a new demand for replacement labor.⁵⁸ Subjects of the British Empire, South Asians coming to the west coast of the Americas in the latter half of the 19th century also tended to head to British Columbia, especially Vancouver.⁵⁹ A few South Asians immigrated to the U.S. in the 19th century. In 1870, there were only 586 reported India-born individuals in the U.S. and 2031 in 1900.⁶⁰

Congress enacted several measures aimed at stemming immigration from Asia, beginning with the Page Act in 1875.⁶¹ For South Asians, this culminated in 1917. Congress adopted legislation that banned anyone born within a geographical area that included most of Asia and all of South Asia.⁶² The area was known as the Asiatic Barred Zone.⁶³

According to the 1920 census, fewer than 5,000 Indians resided in the U.S. at the time.⁶⁴ Some lived in the Northeast and Midwest and became parts of working-class neighborhoods from New York to Baltimore to Detroit, but most resided in California.⁶⁵ With restrictions on immigration in place, the numbers of South Asians declined. As late as 1940, there were only 2,405 South Asians in the US.⁶⁶ The U.S. gradually lifted restrictions on immigration from South Asia after World War II.⁶⁷ According to the Census Bureau figures in 1960, fewer than 13,000 people of Indian origin lived in the U.S.⁶⁸ In 1965, Congress enacted the

58. CHAKRAVORTY, KAPUR, & SINGH, *supra* note 12, at 5.

59. Maia Ramnath, *Two Resolutions: The Ghadar Movement and India's Radical Diaspora, 1913–1918*, 92 RADICAL HIST. REV. 7, 10–11 (2005).

60. CHAKRAVORTY, KAPUR, & SINGH, *supra* note 12, at 6.

61. Page Act, Pub. L. No. 41-141, 18 Stat. 477 (1875); Geary Act, Pub. L. 52-60, 27 Stat. 25 (1892) (repealed 1943); Chinese Exclusion Act, Pub. L. No. 47-126, 22 Stat. 58 (1882) (repealed 1943).

62. Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874, 875. The 1917 Act also included a requirement that barred aliens over the age of 16 who could not read English or some other dialect or language and who were incapable of reading.

63. See CHAKRAVORTY, KAPUR, & SINGH, *supra* note 12, at 11.

64. CHAKRAVORTY, KAPUR, & SINGH, *supra* note 12, at 6.

65. Ramnath, *supra* note 59, at 11. (“Even through the 1920s there were never more than a few thousand Indians in the United States, the vast majority of whom lived on the West Coast, over three-fourths of them in California.”). See also VIVEK BALD, *BENGALI HARLEM AND THE LOST HISTORIES OF SOUTH ASIAN AMERICA* 7 (2013) (describing the roots South Asian immigrants put down in New York, Baltimore, and Detroit, noting that the “greatest number appear to have settled in Harlem”).

66. CHAKRAVORTY, KAPUR, & SINGH, *supra* note 12, at 14.

67. *Id.* at 22–23.

68. *Id.* at 24.

Family Reunification and Refugee Law, also known as the Hart-Cellar Act,⁶⁹ which fundamentally changed U.S. immigration law. The Act and subsequent immigration reforms reshaped American immigration policies. Among the changes were provisions that led to significant increases in immigration from South Asia.⁷⁰ According to a report by the Migration Policy Institute, in 2019 there were almost 2.7 million Indian immigrants in the country, up from 450,000 in 1990.⁷¹ South Asian Americans Leading Together, a national movement strategy and advocacy organization, estimates that in 2017 there were nearly 4.1 million people of Indian ancestry residing in the U.S., up 40% since 2010.⁷² Many Indian students also seek American higher education. During the academic year that began in 2015, nearly 166,000 Indian immigrants were enrolled in U.S. higher education institutions, making up about one-sixth of the international students in the country.⁷³ About 20% of Indian immigrants live in California; Texas and New Jersey are home to about 10% each, with the next three most populous states being New York, Illinois, and Georgia, collectively accounting for another 17%.⁷⁴ The Indian population in the U.S. is both well-educated and prosperous. In 2019, almost 80% of Indian immigrants ages 25 and older had at least a bachelor's degree, in contrast to about 33% of the adult U.S. population overall.⁷⁵ In addition, Indian households' 2019 median income of \$132,000 was double that of U.S. born households.⁷⁶

Commentators have generally credited the Y2K problem, also known as the "millennium bug," as the catalyst for the upsurge in immigration from India.⁷⁷ When the Y2K problem became apparent, India had a sizable and appropriate labor force to address the issue. While attacking the Y2K problem, tech companies in the West, including in the U.S., recognized that Indian firms offered not just cheap labor, but highly skilled services at a low cost.⁷⁸ As a result, multi-national information technology companies became aware of this vast pool of skilled

69. Immigration and Nationality Act of 1965, 8 U.S.C. § 1151.

70. See, e.g., *id.*; Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978.

71. Mary Hanna & Jean Batalova, *Indian Immigrants in the United States*, MIGRATION POL'Y INST. (Oct. 16, 2020), <https://www.migrationpolicy.org/article/indian-immigrants-united-states-2019> [<https://perma.cc/J727-QDHA>].

72. *Demographic Snapshot of South Asians in the United States*, S. ASIAN AMS. LEADING TOGETHER (Apr. 2019), <https://saalt.org/wp-content/uploads/2019/04/SAALT-Demographic-Snapshot-2019.pdf> [<https://perma.cc/2B6Y-9QY8>].

73. Jie Zong & Jeanne Batalova, *Indian Immigrants in the United States in 2015*, MIGRATION POL'Y INST. (Aug. 31, 2017), <https://www.migrationpolicy.org/article/indian-immigrants-united-states-2015> [<https://perma.cc/S2QL-QWPA>].

74. Hanna & Batalova, *supra* note 71.

75. *Id.*

76. *Id.*

77. CHAKRAVORTY, KAPUR, & SINGH, *supra* note 12, at 53.

78. ANNALEE SAXENIAN, THE NEW ARGONAUTS: REGIONAL ADVANTAGE IN A GLOBAL ECONOMY 276 (2006).

workers. This created a huge demand for their services.⁷⁹ Around 1995, the Indian Y2K cohort started entering the US in large numbers to help fill the growing demands for information technology workers.⁸⁰

Even though there have been South Asians in the U.S. for over 170 years, very few of them have been Dalits.⁸¹ Thus, while Dalits make up about 16.5% of the population in India,⁸² in 2003, a University of Pennsylvania study noted that only 1.5% of Indian immigrants in the United States were Dalits or members of lower castes.⁸³ Due to discrimination in South Asia, few Dalits have had the money or requisite skills to participate in immigration to North America in either the past or recent immigration waves.

B. The Five-Fold Caste System

There is some debate, but scholars typically agree that the caste system is thousands of years old.⁸⁴ For example, Prakash Louis asserts that the caste system is at least 3,000 years old.⁸⁵ The Buddha, who lived about 2,500 years ago, preached against it.⁸⁶ For simplification, the caste system can be broken down into four distinct ‘varnas,’ or major occupational groupings, plus the Dalits as a sort of fifth caste.⁸⁷ The Bhagavad Gita, which is one of the most revered Hindu texts, mentions the four-fold division.⁸⁸ More importantly, one of the most sacred Hindu creation myths contained in the Rigveda sanctions the caste system.⁸⁹ According

79. CHAKRAVORTY, KAPUR, & SINGH, *supra* note 12, at 52–56.

80. *Id.* at 30. A tangible result of this increased demand was a substantial increase in annual remittance flows into India from just around 6 billion dollars in 1995 to over 70 billion by 2012. *See id.* at 54; *see also* Hanna & Batalova, *supra* note 71.

81. *See supra* note 14 and accompanying text.

82. DR. C. CHANDRAMOULI, OFF. OF THE REGISTRAR GEN. & CENSUS COMM’R, INDIA, MINISTRY OF HOME AFFS., *Census of India 2011: Release of Primary Census Abstract Data Highlights* (2013), https://idsn.org/wp-content/uploads/user_folder/pdf/New_files/India/2013/INDIA_CENSUS_ABSTRACT-2011-Data_on_SC-STs.pdf [<https://perma.cc/8MSZ-5DGD>].

83. Ray, *supra* note 14.

84. OLIVER MENDELSON & MARIKA VICZANY, *THE UNTOUCHABLES* 5–7 (1998). There has also been criticism that the four-fold caste system was created by British colonial thinkers and was never recognized in South Asia in the way the four-fold division suggests. *See* SANJOY CHAKRAVORTY, *THE TRUTH ABOUT US: THE POLITICS OF INFORMATION FROM MANU TO MODI* (2019). *See also*, 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> [<https://perma.cc/U9UC-ZGAF>].

85. PRAKASH LOUIS, *CASTEISM IS HORRENDOUS THAN RACISM: DURBAN AND DALIT DISCOURSE* 21–22 (2001).

86. *See, e.g.*, OMVEDT, *supra* note 46; *see also* DR. B. R. AMBEDKAR, *THE BUDDHA & HIS DHAMMA* 172 (2010); OMVEDT, *BUDDHISM IN INDIA: CHALLENGING BRAHMANISM AND CASTE* (2003).

87. B. R. AMBEDKAR, *THE ESSENTIAL WRITINGS OF B. R. AMBEDKAR* (Valerian Rodrigues ed., 2002). For an explanation of the Shudra caste and its relationship to the Dalit caste, *see infra* notes 108–13 and accompanying text.

88. *Id.* at 198.

89. B. R. Ambedkar, *Riddles in Hinduism*, in 4 *BABASAHEB AMBEDKAR WRITING & SPEECHES* 190 (1974).

to this revered text, all existence derived from the division of an original primal man known as Purusha.⁹⁰ Three-quarters of Purusha transcended the world we perceive and one-quarter came to Earth.⁹¹ From the part that came to Earth, his head became the Brahmins, the priestly caste.⁹² His arms became the Kshatriyas, the princely and warrior caste.⁹³ The stomach or the thighs of Purusha became the Vaishyas, the business and merchant caste.⁹⁴ Because of their dominance in the caste system, these three groups are collectively referred to as “high-caste” or “forward-caste” Hindus.⁹⁵ Members of these three upper castes undergo special initiation religious ceremonies that make them “twice born.”⁹⁶

The caste system embodies the message that the advantage accorded to high-caste Hindus is the result of divine privilege attributable to the good karma these individuals accumulated over many prior lives. In other words, the spiritual advantage of high-caste Hindus in this current life is a form of self-executing justice accumulated through their various prior rounds of existence.

Though the caste system reaches far back in history, various studies conducted in the past decade have illuminated the effects the caste system continues to have today. High-caste Hindus still dominate India’s political, judicial, economic, financial, educational, and religious institutions. Even though an Economist article estimated that only 3.6% of India’s 1.4 billion population are Brahmins,⁹⁷ experts estimate that they hold more than 70% of government posts.⁹⁸ In addition, Brahmins hold 78% of the judicial positions and approximately half of parliamentary seats in India.⁹⁹ A 2010 study found that about 93% of board members of India’s top 1000 businesses were members of the upper castes.¹⁰⁰ A 2019 U.S. study of 4,005 leading Indian firms revealed that only three out of 35,000 directorships belonged to Dalits and other marginalized

90. See also 1 J. MUIR, ORIGINAL SANSKRIT ON THE ORIGIN AND HISTORY OF THE PEOPLE OF INDIA TEXTS 7–11 (1868), https://www.forgottenbooks.com/en/readbook/OriginalSanskritTexts_10020220 [<https://perma.cc/L9PQ-WZWL>].

91. *Id.* at 10.

92. See NESIAH, *supra* note 10, at 37.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Why Brahmins Lead Western Firms but Rarely Indian Ones*, ECONOMIST (Jan. 1, 2022), <https://www.economist.com/asia/2022/01/01/why-brahmins-lead-western-firms-but-rarely-indian-ones> [<https://perma.cc/Y7WP-C8CP>]. There are 50 million Brahmins. *Id.*

98. See Henry Chu, *A Gift for India’s Inter-Caste Couples*, L.A. TIMES (Nov. 4, 2007), at A6.

99. 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 n.78 (2008).

100. D Ajit, Han Donker, & Ravi Saxena, *Corporate Boards in India: Blocked by Caste?*, ECON. & POL. WKLY., Aug. 11, 2012, at 39, 41. Of the board members of the top 1000 businesses, 46% were Vaishyas and 44% were Brahmins. *Id.*

groups.¹⁰¹ In a study conducted by the Savitribai Phule Pune University, Jawaharlal Nehru University, and Indian Institute of Dalit Studies from 2015 to 2017, high-caste Hindus “boast[ed] four times more wealth than those classified as Scheduled Castes.”¹⁰² The study also noted that high-caste Hindus held roughly 41% of the total wealth in the country, almost double their population size.¹⁰³ Another study found that a large percentage of mergers and acquisitions in India “occur between businesses where the directors belong to the same caste group.”¹⁰⁴ The study looked at 1200 merger and acquisition deals in India that took place between the years 2000 and 2017.¹⁰⁵ When Brahmins had a maximum representation on the Board of the acquiring company, nearly half of the targeted firms had majority Brahmin boards.¹⁰⁶ For Vaishyas, the percentage was even higher. Where the acquiring firm had a Board controlled by Vaishyas, the targeted firm had a board dominated by Vaishyas 55% of the time.¹⁰⁷

In contrast to the auspicious spiritual origins of the high-caste Hindus, Purusha’s feet became the peasants and farmers.¹⁰⁸ This group, known as the Shudras, are commonly referred to as low-caste Hindus.¹⁰⁹ The legal term used for them is “Other Backwards Classes” (OBCs).¹¹⁰ The religiously imposed duty of Shudras is to serve the high castes. They are also the largest population caste,

101. Ammu Kannampilly, *Caste Discrimination Taints Corporate India*, YAHOO MONEY (Nov. 5, 2020), https://money.yahoo.com/caste-discrimination-taints-corporate-india-035606381.html?soc_src=social-sh&soc_trk=ma [https://perma.cc/8JV9-HVR5].

102. *Upper Caste Hindus Own 41 Per Cent of India’s Total Wealth: Study*, BUSINESS TODAY.IN (Feb. 14, 2019), <https://www.businesstoday.in/current/economy-politics/upper-caste-hindus-own-41-per-cent-india-total-wealth-study/story/318727.html> [https://perma.cc/4U6Q-6JD3].

103. *Id.* High-caste Hindus, or HHCs, make up about 22.28% of the total population in India. The next big chunk of the country’s wealth is held by Hindu Other Backward Classes at 31%, Muslims own 8% of the country’s wealth, and the two lowest castes own 11.3% combined of the total wealth, even though their population size is over 27% of the country. *Id.*

104. Manaswini Bhalla & Manisha Goel, *The Caste Is Alive and Kicking in Corporate India*, FORBES INDIA (Apr. 18, 2019), <https://www.forbesindia.com/article/iim-bangalore/the-caste-is-alive-and-kicking-in-corporate-india/53059/1> [https://perma.cc/5A2T-Q2YN]. The results of the study were published in a paper entitled *Firms of a Feather Merge Together: Cultural Proximity and Firms Outcome*. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* The study found the same for Kshatriya- and Shudra-dominated firms. *Id.*

108. B. R. AMBEDKAR, *Who Were the Shudras?*, in 7 BABASAHEB AMBEDKAR WRITING & SPEECHES 21, 22–24 (1979).

109. MANORANJAN MOHANTY, CLASS, CASTE, GENDER 20 (2004).

110. *Id.* at 209.

making up around 52% of India's population according to the Mandal Commission¹¹¹ and around 41% by National Sample Survey 2004-5.¹¹²

Beneath the four main castes are the Dalits. The origins of untouchability are lost in the long-ago past. Dalits are not mentioned in the Purusha Sukta, noted above.¹¹³ The *Laws of Manu* is an ancient Hindu text that describes the caste duties and obligations a person has towards himself and to others, including moral and legal codes that govern caste order, but it does not mention Dalits either.¹¹⁴ The legendary Dalit leader, Dr. B. R. Ambedkar, argues that untouchability was the consequence of a struggle between Buddhists and the Brahmins, which the latter won.¹¹⁵ He places the origin of untouchability at around A.D. 400.¹¹⁶

These five broad castes can be broken down into thousands of subcastes or "jatis."¹¹⁷ Every individual's social position in Indian society was, and, to a large extent—particularly in rural India—still is, defined by the jati into which he or she is born. Caste rankings and rules vary depending on the context and the region of India.¹¹⁸ The hierarchy of the caste system places each of the thousands of subcastes into its appropriate relative position. As Ambedkar puts it, "Hindu society was just like a tower which had several storeys [sic] without a ladder or an entrance. One was to die in the storey [sic] in which one was born."¹¹⁹ And, as pointed out by Clark Cunningham and Dr. Madhava Menon:

The historic caste system in India was truly systemic: everyone had a place within it. As a result, the caste system not only drastically exploited and disadvantaged certain groups, such as the erstwhile untouchables; it also concentrated advantage in

111. See Aparna Alluri & Zoya Mateen, *Caste Census: Clamour to Count India Social Groups Grows*, BBC NEWS (Aug. 24, 2021), <https://www.bbc.com/news/world-asia-india-58141993> [<https://perma.cc/E7P3-UAQC>]. This is an estimate, independent India's decadal census only counts the castes of Dalits and Adivasis. *Id.* For caste percentage population estimates, see also Roshan Kishore, *Decoding the Purpose and Politics of Caste Census*, HINDUSTAN TIMES (Aug. 24, 2021, 5:47 AM), <https://www.hindustantimes.com/india-news/decoding-the-purpose-and-politics-of-caste-census-101629741365130.html> [<https://perma.cc/9WRR-D8TY>]. For percentages of school children by caste, see Rema Nagarajan, *School Enrolment Data Indicates 45% OBCs, 19% Dalits in India*, TIMES INDIA (July 30, 2021, 12:03 PM), <https://timesofindia.indiatimes.com/india/school-enrolment-data-indicates-45-obcs-19-dalits-in-india/articleshow/84877162.cms> [<https://perma.cc/RF3U-Z3K6>].

112. Sonalde Desai, *Caste and Census: A Forward-Looking Strategy*, ECON. & POL. WKLY., July 17, 2010, at 10.

113. See *supra* note 89 and accompanying text.

114. B. R. AMBEDKAR, *Why Lawlessness Is Lawful*, in 5 BABASAHEB AMBEDKAR WRITING & SPEECHES 62, 64 (1989).

115. B. R. AMBEDKAR, *Who Were They and Why They Became Untouchables*, in 7 BABASAHEB AMBEDKAR WRITING & SPEECHES 379 (1979).

116. *Id.*

117. See NESIAH, *supra* note 10, at 36–37.

118. *Id.* at 38.

119. S. D. Kapoor, *B. R. Ambedkar, W. E. B. DuBois and the Process of Liberation*, ECON. & POL. WKLY., Dec. 27, 2003, at 5344, 5346 (quoting DHANANJAYA KEER, DR. B. R. AMBEDKAR: LIFE AND MISSION 41 (3d ed. 1994)).

other groups, such as the Brahmins. *Both* suffering and success were largely attributable to where one was born into the social hierarchy rather than individual effort and virtue.¹²⁰

Caste ensured its continued viability through the practice of endogamy and social separation. In any hierarchical society, the social order is structured in terms of privileges and disabilities of groups rather than the rights of individuals. The common history and experience of being a member of a jati experiencing oppression by the subcastes higher in the hierarchy and oppressing the subcastes lower in the hierarchy generated a strong sense of group identity. Caste also ensured that there was little concern in Indian society for the rights of individuals. Thus, the functioning of the caste system excluded whole segments of society from positions of respect and responsibility, without consideration of individual talents, abilities, or interests.¹²¹

C. Discrimination Dalits Experience Under the Caste System

While low-caste Hindus suffered due to their position in the caste system, they did not suffer from oppression resulting from religious impurity, as Dalits did. Thus, Dalits experienced far worse forms of subordination than low-caste members. Caste Hindus maintained enough distance between themselves and Dalits to prevent the shadows of Dalits (six feet) from touching them.¹²² Historically, Dalits were banned from Hindu temples, formal education, public wells (often ones the Dalits themselves had dug), walking on roads in broad daylight, and wearing clean clothes.¹²³ Caste Hindus not only refused to allow Dalits in their homes, but their communities too; Dalit housing was segregated, and they were relegated to the outskirts of towns.¹²⁴ Historically, the status of the Dalits was associated with occupations regarded as ritually impure. Dalits took care of trash and body disposal, maintained the sewage system, cleaned toilets, worked with dead animals, collected cow manure and turned it into cooking fuel,

120. Clark D. Cunningham & N.R. Madhava Menon, *Race, Class, Caste? Rethinking Affirmative Action*, 97 MICH. L. REV. 1296, 1302 (1999).

121. SUKHADEO THORAT & KATHERINE NEUMAN, *BLOCKED BY CASTE: ECONOMIC DISCRIMINATION IN MODERN INDIA* 5 (2012).

122. B. R. AMBEDKAR, *From Millions to Fractions*, in 5 AMBEDKAR WRITING & SPEECHES 242 (1979).

123. Brown & Sitapati, *supra* note 99, at 4; *see also* B. R. AMBEDKAR, *Untouchables or The Children of India's Ghetto*, in 5 AMBEDKAR WRITING & SPEECHES 22, 59, 108 (1979); AMBEDKAR, *supra* note 122, at 242.

124. Brown & Sitapati, *supra* note 99, at 4. *See generally* Sukhadeo Thorat, Anuradha Banerjee, Vinod K Mishra, & Firdaus Rizvi, *Urban Rental Housing Market: Caste and Religion Matters in Access*, ECON. & POL. WKLY, June 27, 2015, at 47 (providing an empirical study of anti-Dalit bias in private home sales and rentals).

labored in the fields, worked on leather, and dug the wells for water.¹²⁵ Hindu religious caste practices also excluded Dalits from engaging in business activities, owning property and housing, attending educational institutions, and accessing healthcare.¹²⁶ If Dalits violated caste laws, they were subjected to violent punishments.¹²⁷

While untouchability is a product of the Hindu religion, it is not strictly a problem for just Hindus. As Human Rights Watch notes, untouchability “is a characteristic determined by one’s birth into a particular caste, irrespective of the faith practiced by the individual.”¹²⁸ On the Indian sub-continent, distinctions and discrimination on the basis of caste have penetrated other religions, including Buddhism, Christianity, Islam and Sikhism, despite the fact that the doctrinal bases for these religions reject caste.¹²⁹ Thus, while Hindu religion may be the original source of Dalit oppression, conversion to other religions is not a solution.¹³⁰

Perhaps the best example of demonstrating that changing religions does not eliminate discrimination based on untouchability is the mass conversion of Dalits to Buddhism led by Dr. Ambedkar. No one has done more to liberate Dalits and the Dalit mind from the oppressive mentality presented to it by the Hindu religion than Dr. Ambedkar. It may be impossible to convey to the average American how significant of a figure Dr. Ambedkar is in the Dalit struggle. As Dalit activist Anand Teltumbde put it, for the Dalit masses, Dr. Ambedkar is everything

125. See generally B. R. AMBEDKAR, PERSPECTIVES ON SOCIAL EXCLUSION AND INCLUSIVE POLICIES (Sukhadeo Thorat & Narendra Kumar eds., 2008) (describing the historic treatment of Dalits); GHANSHYAM SHAH, HARSH MANDER, SUKHADEO THORAT, SATISH DESHPANDE, & AMITA BAVISKAR, UNTOUCHABILITY IN RURAL INDIA (2006); GOV’T OF INDIA, 1 REPORT OF THE INDIA BACKWARD CLASSES COMMISSION (1955).

126. Sukhadeo Thorat & Katherine Neuman, *Introduction* to BLOCKED BY CASTE: ECONOMIC DISCRIMINATION IN MODERN INDIA (2012).

127. A. Ramaiah, *Growing Crimes Against Dalits in India Despite Special Laws: Relevance of Ambedkar’s Demand for ‘Separate Settlement,’* 3 J. L. & CONFLICT RESOL. 151, 164 (2011), <https://academicjournals.org/journal/JLCR/article-full-text-pdf/2F95A1F7733> [https://perma.cc/QKY2-VQG3].

128. HUMAN RIGHTS WATCH, HIDDEN APARTHEID: CASTE DISCRIMINATION AGAINST INDIA’S “UNTOUCHABLES” 2 (2007), https://www.hrw.org/sites/default/files/reports/india0207webwcover_0.pdf [https://perma.cc/6KBF-QCJE].

129. See J. Tharamangalam, *Caste Among Christians in India*, in CASTE: ITS TWENTIETH CENTURY AVATAR, 263 (M. N. Srinivas ed., 1996) (Christianity); DAVID G. MANDELBAUM, 2 SOCIETY IN INDIA: CHANGE & CONTINUITY 569, 571 (1970) (same); Roger Ballard, *Differentiation and Disjunction Among the Sikhs*, in DESK PARDESH: THE SOUTH ASIAN PRESENCE IN BRITAIN 88, 91 (Roger Ballard ed., 1994) (discussing the role of caste distinctions among some Sikhs); Marcus Banks, *Jain Ways of Being*, in PARDESH, *supra*, at 231, 250 (Jainism); John R. Hinnells, *Parsi Zoroastrians in London*, in PARDESH, *supra*, at 250–51, 271 (Parsis (Indian Zoroastrians) as a caste-like group). See generally CASTE AND SOCIAL STRATIFICATION AMONG MUSLIMS IN INDIA (Imtiaz Ahmad ed., 1978) (collecting studies about social stratification in some Islamic communities and how it is influenced by the Hindu concept of caste); Zarina Bhatti, *Social Stratification Among Muslims in India*, in CASTE: ITS TWENTIETH CENTURY AVATAR, *supra* (Islam).

130. D. Shyam Babu & Chandra Bhan Prasad, *Six Dalit Paradoxes*, ECON. & POL. WKLY., June 6, 2009, at 22, 23.

together: a first-rate scholar, a Moses who led his people out of bondage, a Bodhisattva in the Buddhist pantheon—he is like a god.¹³¹ One important Dalit slogan epitomizes Ambedkar’s significance: “We Are, Because He Was.”¹³² In 1935, Dr. Ambedkar famously declared, “Even though I was born in the Hindu religion, I will not die in the Hindu religion.”¹³³ On October 14, 1956,¹³⁴ near the end of his life, Dr. Ambedkar led a mass conversion of over 500,000 Dalits to Buddhism.¹³⁵ Following this lead, millions of Dalits have converted to Buddhism.¹³⁶ While Buddhists make up only a small proportion of the overall population of India, only about 8.4 million in a population of 1.2 billion, 87% of them are Ambedkarites or new converts.¹³⁷ However, Caste Hindus continue to treat Dalits who convert to Buddhism the same way. Thus, this religious conversion did not allow them to escape caste discrimination, even if it allowed them to shift their personal mindset.

131. ANAND TELTUMBDE, ‘AMBEDKAR’ IN AND FOR THE POST-AMBEDKAR DALIT MOVEMENT (1997). Teltumbde is the grandson-in-law of Dr. Ambedkar. See Parth MN, *India Arrests Activist Anand Teltumbde over 2018 Caste Violence*, AL JAZEERA (Apr. 14, 2020), <https://www.aljazeera.com/news/2020/04/india-arrests-activist-anand-teltumbde-2018-dalit-event-200414112452191.html> [<https://perma.cc/7EVW-T3GA>].

132. See Sanghapali Aruna Lohitakshi, *New Series: Dalit History Month—We Are Because He Was*, CRUNK FEMINIST COLLECTIVE, <https://www.crunkfeministcollective.com/2015/04/21/new-series-dalit-history-month-we-are-because-he-was/> [<https://perma.cc/JMX5-H83D>]. One can purchase such a bumper sticker today from Amazon. See *PEACOCKRIDE Vinyl Dr. Ambedkar We Are Because He was Car Bumper Decal (Blue)*, AMAZON, <https://www.amazon.in/Ambedkar-because-Bumper-Decal-Blue/dp/B06XBVJ2PK> [<https://perma.cc/2N4R-PT8X>] (last visited Oct. 4, 2021).

133. Tarun Vijay, *An Ambedkar Speech No Hindu Should Ever Forget*, TIMES INDIA (Apr. 16, 2019), <https://timesofindia.indiatimes.com/blogs/indus-calling/an-ambedkar-speech-every-hindu-must-not-forget/> [<https://perma.cc/DL5B-3FW2>].

134. As a strange coincidence or a matter of fate, if you adjust for the time difference between the U.S. and India, one of the authors of this article Kevin Brown was born on the very day that Dr. Ambedkar led this mass conversion and another author, Ken Dau-Schmidt, was born the day before.

135. AMBEDKAR, *supra* note 86, at 5; ELEANOR ZELLIOT, FROM UNTOUCHABLE TO DALIT: ESSAYS ON THE AMBEDKAR MOVEMENT 207–08 (3d ed. 2001) (“The following day he converted the half million of his followers who had responded to his call to convert.”). See also OMVEDT, *supra* note 86, at 2–3.

136. Krithika Varagur, *Converting to Buddhism as a Form of Political Protest: Low-Caste Indians are Leaving Hinduism En Masse—Partly to Stick It to Their Prime Minister*, ATLANTIC (Apr. 11, 2018), <https://www.theatlantic.com/international/archive/2018/04/dalit-buddhism-conversion-india-modi/557570/> [<https://perma.cc/54KV-JGH4>].

137. *Id.* See also Manu Moudgil, *Dalits Are Still Converting to Buddhism, but at a Dwindling Rate*, BUS. STANDARD (June 17, 2017), https://www.business-standard.com/article/current-affairs/dalits-are-still-converting-to-buddhism-but-at-a-dwindling-rate-117061700355_1.html#:~:text=After%201956%2C%20the%20number%20of,major%20Dalit%2Dcentric%20political%20party [<https://perma.cc/B3NW-TU4S>].

In 2018, Equality Labs conducted a first-of-its-kind survey of 1500 individuals from South Asia living in the U.S., 24% of whom were Dalits.¹³⁸ The study revealed the existence of significant caste discrimination in the U.S.¹³⁹ The survey exposed that while no Vaishyas, one percent of Brahmins, five percent of Kshatriyas, and 25% of Shudras worry about others finding out their castes, over half of the Dalits have this fear.¹⁴⁰ In addition, 41% of Dalit students surveyed reported facing discrimination in educational institutions.¹⁴¹ The most striking result was that while high-caste Hindus experienced almost no discrimination in employment, over two-thirds of Dalits said they experienced unfair treatment in the workplace.¹⁴²

III.

CASTE DISCRIMINATION CAN GENERATE RACE DISCRIMINATION EMPLOYMENT CLAIMS UNDER 42 U.S.C. § 1981

Title VII applies to five different protected traits.¹⁴³ In contrast, Section 1981, which originated with the Civil Rights Act of 1866, only forbids intentional “racial” discrimination in the making, enforcing, and carrying out of both private and public contracts.¹⁴⁴ However, courts analyze intentional employment discrimination claims under Section 1981 and race and national origin claims under Title VII in much the same way.¹⁴⁵ Thus, aggrieved individuals pursuing disparate treatment employment claims for race or national origin discrimination may¹⁴⁶ invoke both Section 1981 and Title VII.

138. Maari Zwick-Maitreyi, Thenmozhi Soundararajan, Natasha Dar, Ralph F. Bheel, & Prathap Balakrishnan, CASTE IN THE UNITED STATES: A SURVEY OF CASTE AMONG SOUTH ASIAN AMERICANS 16 (2018), https://static1.squarespace.com/static/58347d04bebafbb1e66df84c/t/603ae9f4cfad7f515281e9bf/1614473732034/Caste_report_2018.pdf [https://perma.cc/RT47-AWFF].

139. *Id.* (“The results of our 2016 survey definitively find that all of the inequalities associated with Caste status, ritual purity, and social exclusion have become embedded within . . . American mainstream institutions.”).

140. *Id.* at 17 fig.8.

141. *Id.* at 18.

142. *Id.* at 20 fig.10. For Shudras, 12% of Shudra respondents experienced discrimination in employment. *Id.*

143. 42 U.S.C. § 2000e–2(a)(1).

144. *Runyon v. McCrary*, 427 U.S. 160, 168 (1976). Although Section 1981 does not itself use the word “race,” the Court has construed the section to forbid all “racial” discrimination in the making of private as well as public contracts.

145. *See Caldwell v. Martin Marietta Corp.*, 632 F.2d 1184, 1186 (5th Cir. 1980) (“[T]he facts necessary to support a claim for relief under Title VII are nearly identical to the facts which support a claim under § 1981”); *see also Village of Freeport v. Barrella*, 814 F.3d 594, 607 (2d Cir. 2016) (“[W]e analyze claims of racial discrimination identically under Title VII and § 1981 in [some] . . . respects.”).

146. Eric Bachman, *5 Differences Between Title VII and Section 1981 That Can Help Your Employment Race Discrimination Case*, NAT’L L. REV. (June 12, 2017), <https://www.natlawreview.com/article/5-differences-between-title-vii-and-section-1981-can-help-your-employment-race> [https://perma.cc/MR9W-5X8R].

The first section of this part will discuss the broad application of Section 1981 to race discrimination claims. The second section addresses the question of whether caste discrimination based on untouchability is a form of race discrimination under Section 1981. Neither Section 1981 nor Title VII define race. However, for purposes of Section 1981, the Supreme Court has stated that the definition of race comes from how it was understood in the 19th.¹⁴⁷ Thus, this section will focus on how Americans of the 19th century understood caste discrimination to show that there are several arguments that they viewed it as a form of race discrimination.

A. Application of Section 1981 to Employment Discrimination

Though Section 1981 does not use the word “race,” within a decade of the passage of the Civil Rights Act of 1866, the Supreme Court interpreted it to be “intended for the protection of citizens of the United States in the enjoyment of certain rights, without discrimination on account of race, color, or previous condition of servitude.”¹⁴⁸ The Court’s interpretation of the Act includes the prohibition of all “racial” discrimination in the making of both public and private contracts.¹⁴⁹ The Court has thus limited applications of Section 1981 to cases of racial discrimination. Title VII claims differ from Section 1981 claims in this way, as well as several others. Section 1981 claims can be brought against any employer, whereas Title VII claims must be brought against those who have at least 15 employees.¹⁵⁰ Title VII claims are limited to employers, but an aggrieved party raising a Section 1981 claim can also sue individuals, such as harassing supervisors. Whereas Title VII has damage caps that depend on the size of the employer, there are no damage caps under Section 1981.¹⁵¹ Nor does a litigant have to exhaust administrative procedures, including filing an employment discrimination claim with the Equal Employment Opportunity Commission (EEOC), under Section 1981 in order to file a court claim.¹⁵² And, for many types of suits, Section 1981 will have a longer statute of limitation.¹⁵³

The current provisions of Section 1981 state in relevant part the following:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be

147. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987).

148. *United States v. Cruikshank*, 92 U.S. 542, 555 (1875).

149. *Runyon v. McCrary*, 427 U.S. 160, 168, 174–75 (1976).

150. Title VII of the Civil Rights Act (Title VII) of 1964 § 701, 42 U.S.C.A. § 2000e (b).

151. *Bachman*, *supra* note 146, at 3.

152. *Id.*

153. *Id.*

subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) “Make and enforce contracts” defined

For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.¹⁵⁴

The language of Section 1981 would seem to exclude white plaintiffs from its coverage. However, in *McDonald v. Santa Fe Trial Transp. Corp.*,¹⁵⁵ Justice Thurgood Marshall, writing for the Court, concluded that the section can protect white complainants who suffer racial discrimination as well:

Unlikely as it might have appeared in 1866 that white citizens would encounter substantial racial discrimination of the sort proscribed under the Act, the statutory structure and legislative history persuade us that the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves. And while the statutory language has been somewhat streamlined in re-enactment and codification, there is no indication that Section 1981 is intended to provide any less than the Congress enacted in 1866 regarding racial discrimination against white persons. Thus, we conclude that the District Court erred in dismissing petitioners’ claims

154. 42 U.S.C. § 1981(a)–(b). Note that this is not the precise wording in the original Civil Rights Act. In response to concerns that it was not authorized by the Thirteenth Amendment, Congress reenacted the provision after the Fourteenth Amendment’s ratification in the Enforcement Act of 1870, Ch. 114, §§ 16–18, 16 Stat. 140, 144. The 1870 reenactment differed from the original 1866 act in two important respects: it substituted the words “all persons” for “citizens, of every race and color,” and it omitted the language about equal property rights, which was reenacted separately in what is now 42 U.S.C. § 1982. *See id.*; Doe v. Kamehameha Sch., 416 F.3d 1025, 1031 (9th Cir. 2005).

155. *McDonald v. Santa Fe Trial Transp. Corp.*, 427 U.S. 273, 295–96 (1976).

under Section 1981 on the ground that the protections of that provision are unavailable to white persons.¹⁵⁶

B. Americans of the 19th Century Understood Caste Discrimination as Included Within Race Discrimination

Although Section 1981 does not define race, in *Saint Francis College v. Al Khazraji*, the Supreme Court relied on 19th century dictionaries & encyclopedias in an attempt to understand its meaning.¹⁵⁷ The Court noted that the concept of race was much broader then than it is today.¹⁵⁸ This section will focus on how, at that time, Americans understood caste discrimination as a form of race discrimination. The first subsection will first discuss the Court's decision in the *Saint Francis College* case and its significant inclusion of the Romani as a group considered to be a racial group in the 19th century. In order to fully comprehend how Americans viewed caste discrimination as a form of race discrimination in the 19th century, the second section will discuss the comparison of treatment of Black people in the U.S. to the caste system in India. The third subsection will discuss what is known as the "Aryan Origin Theory," a theory developed by scholars in the latter half of the 19th century which gained wide acceptance at that time. The fourth subsection will point to indications by the framers of the Civil Rights Act of 1866 that they viewed the measure as an anti-caste measure. If the framers of the Civil Rights Act of 1866 believed that outlawing discrimination against Black people was an anti-caste measure, *a fortiori*, they would have also felt their measure should prohibit caste discrimination on American soil practiced by those from the place in which caste originated.

1. Supreme Court's Opinion in Saint Francis College v. Al Khazraji

In the *Saint Francis College* case, the Supreme Court faced the question of whether an American citizen of Arabian ancestry was protected from racial discrimination under Section 1981.¹⁵⁹ The District Court concluded that the plaintiff's claim was one of national origin and, thus, outside the scope of Section

156. *Id.* One constant question about § 1981 is: "Does it cover discrimination based on national origin?" In *Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011), the plaintiff was a Native American, but his complaint stated, "Defendant has discriminated . . . against Plaintiff in the formation of an employment contract on the basis of his *national origin*, in violation of 42 U.S.C. § 1981." *Id.* at 1053 (emphasis added). The Eighth Circuit noted that § 1981 protects "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." *Id.* at 1052 (quoting *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987)). Thus, the Eighth Circuit agreed that a claim of discrimination based on Native American status could be raised as a race claim. See *Torgerson*, at 1053 (citing *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 154 F.3d 1117, 1119 (9th Cir. 1198)). However, *Torgerson* never amended his complaint to include race discrimination and the Eighth Circuit in an *en banc* decision upheld the dismissal. *Id.*

157. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987).

158. *Id.*

159. *Id.* at 607.

1981.¹⁶⁰ The Court of Appeals held that the plaintiff had alleged a discrimination claim based on race even though under current racial classifications Arabs were viewed as Caucasians.¹⁶¹ Congress had not limited Section 1981 claims to those filed by members of a different race from the defendant.¹⁶²

The Supreme Court agreed with the Court of Appeals that Section 1981 was not limited to claims of racial discrimination by those of different races.¹⁶³ The Court went on to note that the defendant's argument rested on the assumption

that all those who might be deemed Caucasians today were thought to be of the same race when Section 1981 became law in the 19th century; and it may be that a variety of ethnic groups, including Arabs, are now considered to be within the Caucasian race. The understanding of "race" in the 19th century, however, was different. Plainly, all those who might be deemed Caucasian today were not thought to be of the same race at the time § 1981 became law.¹⁶⁴

The Court reviewed several 19th-century sources on the definition of race, and specifically listed several "races" from those sources including Finns, Romani, Basques, Hebrews, Swedes, Norwegians, Germans, Greeks, Italians, Spanish, Mongolians, Russians, and Jews.¹⁶⁵ The Court went on to note that "it is clear that [these 19th-century sources defining race] do not support the claim that for the purposes of §1981 that Arabs, Englishmen, Germans, and certain other ethnic groups are to be considered a single race."¹⁶⁶ To bolster its conclusion, the Court noted remarks by several Congressmen to the effect that their concept of race was broad.¹⁶⁷ The Court went on to hold that

[b]ased on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that

160. *Id.* at 606. The plaintiff's Title VII claim was dismissed because it was not timely filed.

161. *Id.* at 607. In a 2015 Census Bureau study, researchers found it may be beneficial to include a dedicated Middle Eastern or North African category in the 2020 census. *See Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity*, 81 Fed. Reg. 67,398 (Sept. 30, 2016). However, in 2018, officials in the Trump Administration decided not to add the category. Yousef H. Alshammari, *Why Is There No MENA Category on the 2020 US Census?*, AL JAZEERA (Apr. 1, 2020), <https://www.aljazeera.com/news/2020/4/1/why-is-there-no-mena-category-on-the-2020-us-census> [https://perma.cc/WF7X-2CA3]. They viewed the category as about ethnicity, not about race. *Id.*

162. *Saint Francis Coll.*, 481 U.S. at 607.

163. *Id.* at 609–10.

164. *Id.* at 610.

165. *Id.* at 611.

166. *Id.* at 612.

167. These remarks will be discussed in detail later in this section. *See infra* notes 225–33 and accompanying text.

Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory.¹⁶⁸

The Court's inclusion of Romani in its list of racial groups drawn from contemporary sources is particularly significant. The Romani are believed to be Dalits who migrated from India into Persia, the near East and, finally, into Eastern and Central Europe beginning around A.D. 600.¹⁶⁹ Thus, perhaps, the Supreme Court has already endorsed the notion that Dalits are a separate race under Section 1981.

2. Common Practice of Analogizing Racial Discrimination Against Black Americans to Caste Discrimination During the 19th Century

In order to fully comprehend the importance of caste discrimination in discussions during the enactment of Section 1981, it is necessary to understand the importance of the use of anti-caste legal arguments in American law and politics during the pre-Civil War period. That discussion will show that by analogizing race discrimination against Black people to the Indian caste system, Americans in the 19th century viewed caste as a form of race.

By the early 1830s, antislavery societies in New England had identified the clear connection between slavery and the denial of civil liberties in the North.¹⁷⁰ Even though only a few South Asians immigrated to the U.S. before 1870,¹⁷¹ to help demonstrate that both slavery and discrimination against free blacks were contrary to core principals of American society, some abolitionist proponents of Black equality, including Frederick Douglass, Thomas Dalton, William Lloyd Garrison, Harriet Beecher Stowe, and Charles Sumner, compared the treatment of Black people to the Hindu caste system.¹⁷²

168. Saint Francis Coll., 481 U.S. at 613.

169. Palash Ghosh, *Centuries of Discrimination: European Roma Linked to India's "Untouchables,"* INT'L BUS. TIMES (Dec. 4, 2012), <https://www.ibtimes.com/centuries-discrimination-european-roma-linked-indias-untouchables-917965> [https://perma.cc/8N6R-6DCN]; Niraj Rai, Gyaneshwer Chaubey, Rakesh Tamang, Ajai Kumar Pathak, Vipin Kumar Singh, Monika Karmin, Manvendra Singh, Deepa Selvi Rani, Sharath Anugula, Brijesh Kumar Yadav, Ashish Singh, Ramkumar Srinivasagan, Anita Yadav, Manjua Kashyap, Sapna Narvariya, Alla G. Reddy, George van Driem, Peter A. Underhill, Richard Villems, Toomas Kivisild, Lalji Singh, & Kumarasamy Thangaraj, *The Phylogeography of Y-Chromosome Haplogroup H1a1a-M82 Reveals the Likely Indian Origin of the European Romani Populations*, 7 PLOS ONE 1 (2012), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0048477> [https://perma.cc/CAL8-HT5C]; Horolma Pamjav, Andrea Zalán, Judit Béres, Melinda Nagy, & Yuet Meng Chang, *Genetic Structure of the Paternal Lineage of the Roma People*, 145 AM. J. PHYSICAL ANTHROPOLOGY 21–29 (2011), <https://onlinelibrary.wiley.com/doi/full/10.1002/ajpa.21454> [https://perma.cc/SQV3-AY4Q].

170. See, e.g., J. Morgan Kousser, *The Supremacy of Equal Rights: The Struggle Against Racial Discrimination in Antebellum Massachusetts and the Foundations of the Fourteenth Amendment*, 82 NW. U. L. REV. 941, 953–55 (1988).

171. See *supra* note 64 and accompanying text.

172. Daniel Immerwahr, *Caste or Colony? Indianizing Race in the United States*, 4 MOD. INTELL. 275, 277 (2007).

The *Anti-Slavery Record*, an abolitionist series published from 1835 to 1837 by the leading abolitionist organization, the American Anti-Slavery Movement, contained frequent references to the prevention of caste. For example, one article discussing the right to end slavery in the District of Columbia argued that

By the most express sanctions of the [C]onstitution, [C]ongress has the power to abolish [slavery] at the seat of the national government, and in [C]ongress a majority of forty are from free states. . . . To bring the North up to this work, it is necessary that the spirit of slavery at the North be met and conquered. The prejudice of *caste* must be killed and buried.¹⁷³

An 1842 article in Garrison's *The Liberator*, another abolitionist publication, described a meeting of the British India Society where a free Black person spoke of race relations in the U.S.¹⁷⁴ The writer noted that even though the speaker was not a slave, the spirit of caste leads the white race to insult all of those of African descent.¹⁷⁵

Perhaps the most thorough and complete discussion of the caste analogy to the condition of enslaved people during the antebellum period occurred as part of the legal arguments in the first major school segregation case in American history. In *Roberts v. Boston*,¹⁷⁶ Sarah Roberts sought to attend the nearest school to her home, which at the time excluded Black students. Sarah was represented by Robert Morris, one of the first Black attorneys in the U.S., and Charles Sumner, who would go on to become one of the most influential leaders of the Radical Republicans in the Senate during the Civil War and Reconstruction.¹⁷⁷ In his arguments before the Court, Sumner fully developed the analogy of the treatment of enslaved persons to the caste system in India, an analogy that he constantly repeated throughout his advocacy of the Civil Rights Act of 1866, as well as the Fourteenth Amendment.¹⁷⁸

For Sumner, “[t]he separation of children in the Schools, on account of race or color, is in the nature of caste, and, on this account, a violation of Equality.”¹⁷⁹ In his brief, Sumner drew a direct analogy of caste in India to the U.S. “This will be apparent from the very definition of Caste. This term is borrowed from the Portuguese word *casta*, which signifies family, breed, race. It has become

173. *The Right of Northern Interference*, ANTI-SLAVERY REC. 6 (1837) (emphasis added).

174. *American Slavery and the Prejudice Against Color*, LIBERATOR 3 (Jan. 7, 1842).

175. *Id.* For more examples, see Scott Grinsell, “*The Prejudice of Caste*”: *The Misreading of Justice Harlan and the Ascendancy of Anticlassification*, 15 MICH. J. RACE & L. 317, 340–42 (2010).

176. *Roberts v. Boston*, 59 Mass. 198 (1849).

177. Charles Sumner, 1849 *Charles Sumner*, “*Equality Before the Law: Unconstitutionality of Separate Colored Schools in Massachusetts*,” BLACKPAST, <https://www.blackpast.org/african-american-history/1849-charles-sumner-equality-law-unconstitutionality-separate-colored-schools-massachusetts-2/> [https://perma.cc/WUF8-ZLGV].

178. *Id.*

179. Brief of Plaintiff, *Roberts v. Boston*, 59 Mass. 198 (1849), in ABOLITIONISTS IN THE NORTHERN COURTS: THE PAMPHLET LITERATURE 493, 508 (Paul Finkelman ed. 2007).

generally used to designate any hereditary distinction, particularly of race. It is in India that it is most often applied.”¹⁸⁰ Sumner went on:

In India, Brahmins and Sudras, from generation to generation, were kept apart. If a Sudra presumed to sit upon a Brahmin’s carpet his punishment was banishment. With similar inhumanity here, the black child, who goes to sit on the same benches with the white child, is banished, not from the country, but from the school. In both cases it is the triumph of Caste. But the offense is greater with us, because, unlike the Hindoos, we acknowledge that *men are born equal*.¹⁸¹

Sumner concludes, “We abjure all inequality before law; but here is an inequality which touches not an individual, but a race. We revolt at the relation of caste; but here is a caste which is established under a Constitution, declaring that *all men are born equal*.”¹⁸²

The Massachusetts Supreme Judicial Court complimented Sumner on his advocacy.¹⁸³ However, the Court rejected the legal argument of the plaintiffs that the “maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion.”¹⁸⁴

As Gunnar Myrdal points out in his epic book about American race relations, the Emancipation Proclamation stopped the common practice of referring to Black Americans as “slaves.”¹⁸⁵ Instead, the terms “freedmen” and “ex-slaves” came into popular use.¹⁸⁶ Americans sought a term to describe Black people whom, as a society, they continued to view as inferior.¹⁸⁷ As a result, the use of the term “caste” increased significantly.¹⁸⁸

The caste analogy remained central to legal arguments regarding the treatment of Black people until the end of the century. Perhaps the best example of the legal importance of the caste analogy is in the arguments advanced by the plaintiff in the Supreme Court’s 1896 decision in *Plessy v. Ferguson*.¹⁸⁹ The brief, filed on behalf of Homer Plessy by James Walker and Albion Tourgee, argued that slavery was a caste system because it tended “to reduce the colored people of the country to the condition of a subject race” and imposed upon them the inequality of rights.¹⁹⁰ Segregation has the same effect. The effect of the law that

180. *Id.*

181. *Id.* at 509.

182. *Id.* at 512.

183. *Roberts v. Boston*, 59 Mass 198, 206 (1849).

184. *Id.* at 209.

185. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 667 (1944).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

190. Brief for Plaintiff in Error at 23, *Plessy v. Ferguson*, 163 U.S. 537 (1896).

distinguishes citizens based on race is to legalize caste; as such, it is inconsistent with the concept of one equal citizenship for all of the United States and each state.¹⁹¹ Their caste argument was endorsed by Justice John Marshall Harlan in his dissent. As virtually every American law student learns in Constitutional Law, Justice Harlan wrote a separate dissenting opinion in *Plessy*.¹⁹² In what may very well be the most renowned passage from any opinion ever written by a justice of the US Supreme Court, Harlan wrote:

[I]n view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. *There is no caste here.* Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.¹⁹³

3. Aryan Origin Theory and Race

The view of caste as a form of race derived in part from the “Aryan Origin Theory.” Indian historian and Professor Emerita of Jawaharlal Nehru University, Romila Thapar, called the “Aryan question . . . probably the most complex, complicated question in the Indian history.”¹⁹⁴ By the late 19th century, the Aryan Origin Theory had gained wide acceptance in India and become a foundational lens for interpreting Indian history.¹⁹⁵ The Aryan Origin Theory remains controversial today and has been refuted by a number of scholars.¹⁹⁶ However, for the purposes of determining whether caste was understood as a form of race in 19th-century America, the relevant question is not whether the Aryan Origin Theory is accepted today, but whether Americans then considered differences in caste to correspond with their broad definition of race.

There were different versions of the theory. One was developed primarily between 1849 and 1874 by German-born philologist and Orientalist Friedrich Max Müller.¹⁹⁷ According to Müller, a group of people of shared “Aryan” origin in Central Asia divided into two groups, one of which migrated to Europe while the other went to Iran.¹⁹⁸ From Iran, another group travelled into northern India, where they conquered the indigenous people there and brought the language of Sanskrit with them.¹⁹⁹ These Aryans fashioned the caste system to maintain their

191. *Id.*

192. *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting).

193. *Id.* at 559 (Harlan, J., dissenting) (emphasis added).

194. Romila Thapar, *The Aryan Question Revisited*, ACAD. STAFF C., JAWAHARLAL NEHRU U. (Oct. 11 1999), <http://members.tripod.com/ascjnu/aryan.html> [<https://perma.cc/9TWW-R6ZY>].

195. See Romila Thapar, *The Theory of Aryan Race and India: History and Politics*, 24 SOC. SCIENTIST 3, 7 (1996).

196. See T. R. S. Prasanna, *There Is No Scientific Basis for the Aryan Invasion Theory*, 103 CURRENT SCI. 216, 221 (2012).

197. See Thapar, *supra* note 195.

198. *Id.*

199. *Id.* at 5, 9.

dominance. As Müller developed the theory, the indigenous people were the Dravidian race and became the Shudras and Dalits.²⁰⁰ Thus, high-caste Hindus, especially the Brahmins, descended from white foreign invaders who migrated from Central Asia and conquered the northern part of India. Müller referred to these two different groups using terms that included nation, people, blood, and race.²⁰¹

Another version of the theory was endorsed by Bal Gangadhar Tilak, an influential Indian Freedom Fighter.²⁰² His version differed from Müller's, but due to Tilak's influence, his theory should be considered to have the same relevance to the question of whether Americans of the 19th century would have considered differences in caste to be differences in race. Rather than Müller's Central Asian origins, the theory Tilak endorsed traced the Aryans back to a Nordic homeland and suggested they had migrated from the Arctic regions in the post-glacial age.²⁰³ One group branched off and went into Europe, but lapsed into barbarism, while a different group migrated into India and maintained their superior civilization.²⁰⁴ Müller disagreed with this version of the theory, but he was supportive enough of Tilak to help in getting him released from jail when he was incarcerated by the British government for his nationalist activities.²⁰⁵

For decades, the Aryan Origin Theory was accepted by many upper-caste members of South Asia who used the theory "to argue the superiority of the upper castes and promote their self-esteem by maintaining that not only were the upper-castes the lineal descendants of the Aryans but that they were also racially related to the European Aryan."²⁰⁶ The theory also allowed the upper-caste Hindus to argue not only that they were the creators of the Indian civilization, but as Keshab Chandra Sen noted, high-caste Indians could assert to their British colonizers that they were actually "parted cousins."²⁰⁷

The Aryan Origin Theory is no stranger to U.S. courts. Not long after the ratification of the U.S. Constitution, the First Congress passed a restrictive

200. ROMILA THAPAR, *THE ARYAN: RECASTING CONSTRUCTS* 33–34 (2008).

201. *Id.* at 34.

202. *See* Thapar, *supra* note 195. *See also* Sukeshi Karma, *Bal Gangadhar Tilak* in OXFORD BIBLIOGRAPHIES, <https://www.oxfordbibliographies.com/view/document/obo-9780195399318/obo-9780195399318-0214.xml> [<https://perma.cc/MZ2E-X433>]. Bal Gangadhar Tilak (b. 1856–d. 1920) has been one of the Indian freedom movement's more contentious leaders.

203. *See* Thapar, *supra* note 195, at 4; *see also* LOKAMANYA BÂL GANGÂDHAR TILAK, *THE ARCTIC HOME IN THE VEDAS: BEING ALSO A NEW KEY TO THE INTERPRETATION OF MANY VEDIC TEXTS AND LEGENDS* vi–vii (1903).

204. Thapar, *supra* note 195, at 4.

205. *Id.*

206. *Id.* at 8. *See also* Varsha Ayyar & Lalit Khandare, *Mapping Color and Caste Discrimination in Indian Society*, in *THE MELANIN MILLENNIUM: SKIN COLOR AS 21ST CENTURY INTERNATIONAL DISCOURSE* 71, 79 (Ronald E. Hall ed., 2013).

207. THAPAR, *supra* note 200, at 7.

citizenship measure, the Naturalization Act of 1790.²⁰⁸ This measure limited naturalized citizenship to “free white persons.”²⁰⁹ From 1909 to 1923, South Asian plaintiffs brought a series of naturalization cases asserting that they were Caucasian and, accordingly, eligible for naturalized U.S. citizenship.²¹⁰ Courts initially granted their petitions but were confused about how to handle the racial status of South Asians.²¹¹

For U.S. legal purposes, though, the Supreme Court delivered the final word to the Aryan Origin Theory in its unanimous 1923 decision in *U.S. v. Bhagat Singh Thind*.²¹² Thind argued that, as a high-caste Hindu of full Indian blood, born at Amritsar, Punjab, India, he was an Aryan descendant and was therefore Caucasian and entitled to naturalized citizenship.²¹³ The Supreme Court rejected Thind’s argument.²¹⁴ In doing so, the Court noted that to determine the meaning of the words “white persons,” its meaning must be taken from what the original framers of the 1790 statute thought the words meant in common ordinary speech and not scientific origin.²¹⁵ Thus, the Court held, “[i]t may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them to-day.”²¹⁶ The Court went on to reject the notion that Indian people at the time had preserved their racial integrity, but had instead clearly intermarried with the local people.²¹⁷ The Court concluded its opinion by stating, “It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white.”²¹⁸

208. See IAN F. HANEY-LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 42–46 (1996) (citing Naturalization Act, Ch. 3, 1 Stat. 103 (1790)). After the Civil War, Congress amended this Act to expand coverage to those of African nativity or African descent. *Id.*

209. *Id.*

210. For a discussion of these cases, see Taunya L. Banks, *Both Edges of the Margin: Blacks and Asians in Mississippi Masala, Barriers to Coalition Building*, 5 *ASIAN L. REV.* 7, 19–20 (1998).

211. *Id.*

212. *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923).

213. *Id.* at 210. Interestingly, Dr. Bhagat Singh Thind was actually a Sikh. Doug Coulson, *British Imperialism, the Indian Independence Movement, and the Racial Eligibility Provisions of the Naturalization Act: United States v. Thind Revisited*, 7 *GEO. J. L. MOD. CRIT. RACE PERSP.* 1, 3 n.6 (2015).

214. *Thind*, 261 U.S. at 213.

215. *Id.*

216. *Id.* at 209.

217. *Id.* at 212–13.

218. *Id.* at 215.

4. *Congressional Debates During the Passage of the Civil Rights Act of 1866*

In discussing the legislative history of Section 1981, it is important to note that the Congress that adopted the Civil Rights Act of 1866 had to respond to claims that the Act exceeded legislative authority under the Thirteenth Amendment.²¹⁹ Scholars agree that one of the purposes of enacting the Fourteenth Amendment, adopted by the same Congress two months after overriding President Johnson's veto of the Civil Rights Act of 1866, was to constitutionalize the provisions of the Act.²²⁰ After the Fourteenth Amendment was ratified, Congress re-enacted the Civil Rights Act of 1866 in the Enforcement Act of 1870, also known as the Voting Rights Act of 1870.²²¹ Thus, when thinking about the legislative history of Section 1981, not only is the Civil Rights Act of 1866 relevant, but so are the Congressional discussions regarding the enactment of the Fourteenth Amendment.

The ratification process of the Thirteenth Amendment banning slavery concluded on December 6, 1865. This was about the time that Congress was beginning its session. Section 2 of that Amendment provided, "Congress shall have power to enforce this article by appropriate legislation."²²²

Slavery was more than physical bondage. The U.S. legal system did not consider enslaved people to have legal personhood.²²³ Thus, they did not have legal rights that would allow them to enter into contracts, own or lease property, be a witness in legal proceedings, sue or be sued in Court, or perform other legal functions.²²⁴ The Supreme Court famously affirmed this lack of legal status in *Dred Scott v. Sandford*,²²⁵ decided four years before the start of the Civil War, which held that no Black person, enslaved or free, could be a citizen of the United States.²²⁶

219. See *infra* notes 234–39 and accompanying text.

220. RAOUL BERGER, *SELECTED WRITINGS ON THE CONSTITUTION* 185 (1987) ("[T]he uncontroverted evidence, confirmed in these pages, is that the framers [of the Fourteenth Amendment] repeatedly stated that the amendment and the Civil Rights Act of 1866 were 'identical'"); see also ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 75 (1992) ("It was the demonstrable consensus of the Thirty-ninth Congress that section 1 of the Fourteenth Amendment 'constitutionalized' the Civil Rights Act of 1866."); MICHAEL J. PERRY, *WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT* 72 (1999) ("Recall that whatever else it did, the second sentence of section one constitutionalized the 1866 Civil Rights Act."); RALPH A. ROSSUM & G. ALAN TARR, *AMERICAN CONSTITUTIONAL LAW: THE BILL OF RIGHTS AND SUBSEQUENT AMENDMENTS* 53 (8th ed. 2010) ("The Fourteenth Amendment was obviously designed to constitutionalize the Civil Rights Act of 1866.").

221. Enforcement Act of 1870, Ch. 114, 16 Stat. 140 (codified as amended at 42 U.S.C. §§ 1981–82 (2000)).

222. U.S. CONST. amend. XIII, § 2.

223. *Dred Scott v. Sandford*, 60 U.S. 393, 450 (1857) (holding that Scott, an enslaved Black man, was property).

224. *Id.* at 427 (holding that Scott, as a noncitizen, could not bring a suit in federal court).

225. *Id.*

226. *Id.*

As evidenced by the passage of the Civil Rights Act of 1866, most members of Congress believed that Section Two of the Thirteenth Amendment gave it the authority to legislate to eliminate not just physical bondage, but the badges and incidents of slavery as well. After Congress came back into session, Republicans began to work on measures that would protect the basic civil rights of all citizens, especially those who were Black.²²⁷ Needless to say, Congress had never passed a measure to protect the rights of Black Americans in its history. Thus, the Act proved to be Congress' first anti-discrimination measure.

During one Senate debate, in response to the argument that the government was organized in the interest of the white race, Senator Justin Morrill argued that the Declaration of Independence's language precluded the idea of a country being based on any such distinction between races, colors, or castes.²²⁸ Five days later, Sumner spoke during the Senate debate on the topic of the perpetual dominance of the white race.²²⁹ He noted that this idea creates "nothing less than a Caste, which is at once irreligious and unrepugnant. A Caste cannot exist except in defiance of the first principles of Christianity and the first principles of a Republic."²³⁰ Sumner went on to note that Brahmins and Sudras had been separated generationally in India in the same way black and white people were separated in the U.S.²³¹ Agreeing with Sumner that a "caste exclusion is entirely contrary to the spirit of our Government," Senator William Fessenden nonetheless expressed the view that he felt such a measure eliminating all distinctions of color between people would not pass.²³² In March, Representative John Martin Broomall argued,

[T]he government of the United States above all other duties owes it to itself and to humanity to guard the rights of those who in the midst of rebellion periled their lives and fortunes for its honor, of whatever caste or lineage they may be . . . and . . . no system of reconstruction ought to be considered unless it shall effectually guaranty [sic] the rights of Union men of the South.²³³

Framers of the Civil Rights Act of 1866 had to contend with detractors who claimed it was an unconstitutional intrusion on state sovereignty that went beyond the scope of the authority granted by the Thirteenth Amendment. Indeed, one of the criticisms that President Johnson leveled against the Act in his veto message

227. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877*, at 243 (2014).

228. CONG. GLOBE, 39th Cong., 1st Sess. 570–71 (1866).

229. *Id.* at 683.

230. *Id.*

231. *Id.*

232. *Id.* at 704.

233. *Id.* at 1262.

was that it exceeded Congress's powers under the Thirteenth Amendment.²³⁴ John Bingham, a principal drafter of Section One of the Fourteenth Amendment, also believed that prior to the passage of the Amendment, Congress lacked power for the 1866 Act.²³⁵ As the opponents put it, the power of Congress to legislate against slavery did not contain the power to provide equal civil rights or prohibit private acts of discrimination.²³⁶ Passing the Fourteenth Amendment allowed the Act's proponents to defend against the possibility that the courts might agree with Johnson's conclusion and the risk that, even if the Act survived judicial scrutiny, a subsequent Congress could decide to repeal it.²³⁷ Thus, Congress sought to ensure the validity and permanency of the rights granted in the Act by enacting the Fourteenth Amendment.²³⁸ Congress passed the Fourteenth Amendment and sent it to the states for ratification on June 13, 1866, just two months after overriding Johnson's veto of the 1866 Act.²³⁹

Some Constitutional scholars have argued that the Fourteenth Amendment was intended to ban all systems of caste or class legislation.²⁴⁰ Americans understood class and caste as nearly interchangeable terms²⁴¹ during these times, which were before the publication of *Das Kapital* that popularized the use of "class" conflicts in the writings of Karl Marx.²⁴² For example, in the debate on the Fourteenth Amendment on May 23, 1866, Senator Jacob Howard stated that

234. President Andrew Johnson, *March 27, 1866: Veto Message on Civil Rights Legislation* (1866), <https://millercenter.org/the-presidency/presidential-speeches/march-27-1866-veto-message-civil-rights-legislation> [<https://perma.cc/XC7U-R4W6>] (last visited Sept. 10, 2021) (writing that "the bill undoubtedly comprehends cases and authorizes the exercise of powers that are not, by the Constitution, within the jurisdiction of the courts of the United States").

235. MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 80 (Duke Univ. Press, 1986). Bingham was one of a small group of Republicans who subscribed to this argument. *Id.*

236. See EDWARD MCPHERSON, *THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION* 75 (Washington, James J. Chapman, 3d ed. 1880).

237. See George Rutherglen, *The Improbable History of Section 1981: CLIO Still Bemused and Confused*, 9 SUP. CT. REV. 303, 312 (2003).

238. See *supra* note 220 and accompanying text. See also *Hurd v. Hodge*, 334 U.S. 24, 847, 852 (1948) ("Indeed, as the legislative debates reveal, one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land.").

239. FONER, *supra* note 227, at 247, 254.

240. Steven Calabresi & Julia T. Ricker, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 4. Professor Melissa L. Saunders has argued that the Amendment goes beyond just banning systems of caste based on hereditary and social stigmatization. Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 247-48 (1997). See also John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1413 (1992) (arguing that the Fourteenth Amendment was specifically geared toward ending the injustice inherent in caste systems).

241. Calabresi & Ricker, *supra* note 240, at 17, 19. See also *Slaughter-House Cases* 83 U.S. 36, 410 (1872) (discussing the Equal Protection Clause) ("We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.") (emphasis added).

242. *Das Kapital* was published in 1867. 1 KARL MARX, *DAS KAPITAL, DER PRODUKTIONSPROCESS DES KAPITALS* (Hamburg, Meissner, 1867).

the Fourteenth Amendment would “abolish[] all class legislation in the States and do[] away with the injustice of subjecting one caste of persons to a code not applicable to another.”²⁴³ He acknowledged the caste-like system that existed between Black and white people in the U.S. and went on to note the different ways this amendment would end the legally sanctioned system as it existed then.²⁴⁴ In explaining the meaning of Section One, Representative Thomas Eliot said:

I support the first section because the doctrine it declares is right, and if, under the Constitution as it now stands, Congress has not the power to prohibit State legislation discriminating against classes of citizens or depriving any persons of life, liberty, or property without due process of law, or denying to any persons within the State the equal protection of the laws, then, in my judgment, such power should be distinctly conferred.²⁴⁵

After Congress passed the Fourteenth Amendment, the Republican National Party published a bulletin championing it as an anti-caste measure. Published in August of 1866, the bulletin read, “The Republicans in Congress tried to the extent of their powers to abolish throughout the bounds of the republic the evils of caste, as second only to those of slavery.”²⁴⁶

The Fourteenth Amendment was ratified in July of 1868, followed 18 months later by the Fifteenth Amendment, which prohibited any state or the United States from denying or abridging the right of citizens to vote on account of race, color, or previous condition of servitude.²⁴⁷ Two months before the ratification of the Fifteenth Amendment, Sumner published an essay entitled *The Question of Caste*, which was the substance of remarks he made at speeches he delivered in a dozen cities in the Northeast.²⁴⁸ In his essay, Sumner once again fully discussed the caste analogy, making several of the same points that he first made in his arguments in *Roberts v. Boston*.²⁴⁹ After the ratification by the states of the Fourteenth and Fifteenth Amendments, the Republican-controlled Congress reenacted the Civil

243. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

244. *Id.*

245. CONG. GLOBE, 39th Cong., 1st Sess. 2511 (1866).

246. Calabresi & Ricker, *supra* note 240, at 35 (quoting *Who Did It?*, PHILA. N. AM. & U.S. GAZETTE, Aug. 18, 1866, at 1).

247. U.S. CONST. amend. XIV; U.S. CONST. amend. XV. The Fifteenth Amendment was ratified on February 3, 1870.

248. HON. CHARLES SUMNER, QUESTION OF CASTE 3, 9 (1869), https://ia800901.us.archive.org/29/items/questionofcaste00sumn/questionofcaste00sumn_bw.pdf [<https://perma.cc/7NQK-EZV3>].

249. Sumner connects the caste system to the feudal system in Europe where the son was to engage in the same occupation as his father. He describes the four major Hindu castes, which he notes have their origins in the Laws of Manu and are called “varnas” in Sanskrit, which translates to “colors.” Sumner says the Brahmins proceed from the mouth of the Creator, the Kshatriya from the arm, the Vaishya from the thigh, and the Shudra from the foot. Sumner points out that below the Shudra is the Pariah (Dalit). *See id.*

Rights Act of 1866 in 1870.²⁵⁰ Congress would also split parts of Section One of the Act into Sections 1981 and 1982. However, both Sections used nearly identical language, and the Supreme Court has construed them similarly.²⁵¹ The former section dealt primarily with most of the rights covered under the original act, while the latter section dealt with property rights.²⁵²

The purpose of discussing the history of the Civil Rights Act of 1866 and the Fourteenth Amendment is not to resolve the jurisprudential dispute regarding the proper interpretation of these measures. Rather, it is to demonstrate that as Congress considered enacting Section 1981, it also had in mind that the measure could combat the maintenance of a caste system on American soil. Thus, the caste system on the Indian subcontinent was in the background of the anti-caste thinking in pursuit of eliminating discrimination suffered by Black people in the U.S.

5. Conclusion

The Supreme Court has interpreted the meaning of race within the context of Section 1981 based upon its understanding in the 19th century.²⁵³ Since, in the 19th century, caste differences were viewed as race differences, it could very well be that courts will view caste discrimination based on untouchability as a form of racial discrimination under Section 1981.

IV.

IS CASTE DISCRIMINATION COVERED BY ONE OF THE PROTECTED TRAITS OF TITLE VII?

Title VII applies to employers with 15 or more employees, and it operates during hiring, termination, promotion, compensation, job training, or any other term, condition, or privilege of employment.²⁵⁴ As the Supreme Court has interpreted the law, “[w]hat is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications.”²⁵⁵

Employers may be held liable under Title VII based on several theories including disparate treatment, which is likely to be the most applicable to an

250. Enforcement Act of 1870, Ch. 114, 16 Stat. 140 (codified as amended at 42 U.S.C. §§ 1981–82 (2000)). Congress revised and codified the United States Code in 1874.

251. *Id.*; *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 447 (2008) (noting that the Court’s precedents have long “construe[d] §§ 1981 and 1982 similarly”).

252. Congress also enacted its first codification of federal law in 1874. *Runyon v. McCrary*, 427 U.S. 160, 168 n.8 (1975) (“The commissioners who prepared the 1874 draft revision were . . . given authority to ‘revise, simplify, arrange, and consolidate all statutes of the United States.’”).

253. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610 (1987). *See supra* note 147 and accompanying text.

254. 42 U.S.C.A. § 2000e-2(a)(1) (Westlaw through P.L. 116-259).

255. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971)).

individual Dalit employee. Disparate treatment discrimination includes harassment claims and occurs when an employer is motivated to treat one employee differently because of a protected trait. Title VII also provides for retaliation claims that apply when the employer discriminates against an employee for engaging in protected activities. Thus, if caste discrimination based on untouchability is covered by Title VII, employees who suffer adverse employment actions because they complain, either internally or externally, would have retaliation claims to pursue distinct from their underlying employment discrimination claim. Protection from retaliation is also critical for Dalits and could encourage more of them to come forward and reveal the discrimination they suffer on the job.

Dalits are vulnerable to discrimination by employers on several bases: their Asian ethnicity, their color, the religion they practice, their sex, or their country of origin. However, if the discrimination is based on these characteristics, their caste is irrelevant to their claim. Thus, instead of focusing on any of those claims, this part will address the question of whether caste discrimination based on untouchability fits within any of the protected traits.

It is clear that caste discrimination does not fit into the protected trait of sex. Many South Asians feel that there is a correlation between color and caste.²⁵⁶ In addition, the Sanskrit term of “varna” translates to color. But this refers to spiritual color as opposed to physical color.²⁵⁷ Like people of all races and ethnicities, Dalits come in a large array of skin colors. The experiences of Asian, Black, and Latinx individuals in the U.S. demonstrate that discrimination based on color is separate from discrimination based on race or national origin. For caste discrimination based on untouchability, the source is not color, it is caste.²⁵⁸

There is the possibility that a Dalit claimant could assert a “religious non-adherence discrimination claim,” also referred to as a “reverse religious discrimination claim,” that would fit within the protected trait of religion. The first section will address whether caste discrimination fits as a form of religious discrimination. The second section will discuss whether caste discrimination fits within the concept of race discrimination. In doing so, the second section will present four different legal analyses. The third subsection will address whether courts could recognize caste discrimination based on untouchability as a form of national origin discrimination. In doing so it discusses four different legal arguments that caste discrimination fits within national origin discrimination.

256. For a discussion of colorism among South Asians, see Taunya Lovell Banks, *Colorism Among South Asians: Title VII and Skin Tone Discrimination*, 14 WASH. U. GLOB. STUD. L. REV. 665 (2014); Varsha Ayyar & Lalit Khandare, *Mapping Color and Caste Discrimination in Indian Society*, in *THE MELANIN MILLENNIUM: SKIN COLOR AS 21ST CENTURY INTERNATIONAL DISCOURSE* 71–95 (Ronald E. Hall ed. 2013).

257. Ayyar & Khandare, *supra* note 256, at 74; *See also* MOHANTY, *supra* note 109, at 151.

258. *See* Smita Narula, *supra* note 9, at 259 (“To begin, the visual cues that accompanied apartheid in South Africa, or racial discrimination in other parts of the world, are lacking in India. Caste is like oxygen—it is both invisible and indispensable.”).

A. Is Caste Discrimination Based on Untouchability a Form of Religious Discrimination?

Title VII provides a definition of religion that includes “all aspects of religious observance and practice, as well as belief.”²⁵⁹ The EEOC “define[s] religious practices to include moral or ethical beliefs about what is right and wrong which are sincerely held with the strength of traditional religious views.”²⁶⁰ Employers are required to accommodate their employees’ religious beliefs, unless the employer demonstrates that they are unable to reasonably do so without undue hardship on the conduct of their business.²⁶¹ The problem with arguing that caste fits within this definition of religious discrimination is that being a Dalit is determined at birth.²⁶² Thus, the discrimination that Dalits face is not the result of what they believe or the practices of their beliefs. On the contrary, the discrimination tends to stem from the discriminators’ own religious beliefs which include negative views about Dalits. Discriminating against someone due to their caste does not appear to fit neatly within this aspect of discriminating against a Dalit because of the Dalit’s religion.²⁶³

Several courts, however, have recognized the validity of religious non-adherence discrimination claims.²⁶⁴ In a religious non-adherence claim, an employee argues that their employer discriminated against them because the employee did not share the employer’s religious beliefs.²⁶⁵ Thus, the employee’s specific religious beliefs do not matter as much as the employer’s religious beliefs in motivating the taking of adverse employment action beyond the simple fact that they diverge.²⁶⁶ In the case of *Noyes v. Kelley Services, Inc.*, the plaintiff’s supervisor and recently promoted co-worker belonged to a small religious sect known as the Fellowship that had around 2000 members.²⁶⁷ A third of the Fellowship members lived together in a compound in Apollo, California.²⁶⁸ The

259. 42 U.S.C. § 2000e(j).

260. 29 C.F.R. § 1605.1.

261. 42 U.S.C. § 2000e.

262. *See supra* notes 128–130 and accompanying text.

263. As was discussed earlier (*see supra* notes 135–37, and accompanying text), many Dalits have become Ambedkarite Buddhists. While there may be a plausible argument that religion is a motivating factor, generally speaking, it is not that they practice Buddhism, but that they are Dalits that motivates the discriminator. A discriminator against an Ambedkarite Buddhist is not likely to manifest the same discriminating motives regarding a Buddhist who was born into a high caste or a Japanese Buddhist, for example. *See* Waughray, *supra* note 49, at 214 (2009).

264. Alex Reed, *Religious Nonadherence Claims as a Means of Contesting LGB-Related Employment Bias*, 40 BERKLEY J. EMP. & LAB. L. 340 (2020). *See, e.g.*, *Shapolia v. Los Alamos Nat’l Lab’y*, 992 F.2d 1033, 1038 (10th Cir. 1993); *Venters v. City of Delphi*, 123 F.3d 956 (7th Cir. 1997); *Noyes v. Kelly Servs.*, 488 F.3d 1163 (9th Cir. 2007); *Magden v. Easterday Farms*, No. 2:16-CV-00068-JLQ, 2017 WL 1731705, at *6–7 (E.D. Wash. May 3, 2017).

265. Harold M. Brody & Catherine Brito, *Reversing Claims of Reverse Religious Discrimination*, 34 EMP. REL. TODAY 77, 77 (2007).

266. *Venters*, 123 F.3d at 972.

267. *Noyes*, 488 F.3d at 1166.

268. *Id.*

sect members abided by strict rules that governed their way of life.²⁶⁹ The plaintiff believed her supervisor passed her over for a promotion in order to give it to a co-Fellowship member and perceived a general pattern at work of Fellowship members receiving favorable treatment.²⁷⁰ The Ninth Circuit found that the plaintiff established triable issues of fact.²⁷¹ Interpreting an earlier decision by the Tenth Circuit in *Shapolia v. Los Alamos National Laboratories*,²⁷² the Ninth Circuit in *Noyes* stated,

The court reasoned that the “protected class” showing required in a traditional race or sex discrimination claim does not apply to this type of non-adherence or reverse religious discrimination claim because “it is the religious beliefs of the employer, and the fact that [the employee] does not share them, that constitute the basis of the [religious discrimination] claim.”²⁷³

The Seventh Circuit also addressed a religious non-adherence claim decision in *Venters v. City of Delphi*.²⁷⁴ The plaintiff, Jennifer Venters, was appointed the head dispatcher for the City of Delphi police department by an outgoing Chief of Police.²⁷⁵ The new Chief of Police, Larry Ives, made it clear from the beginning that “he was a born-again Christian who believed that his decisions as police chief should be guided by the principles of his faith, and that he had been sent by God to Delphi to save as many people from damnation as possible.”²⁷⁶ Venters did not share the Chief’s religious beliefs, but took a while to tell him so because she was afraid.²⁷⁷ After suffering through a number of efforts by the Chief to “save her soul” over the next three years, Venters was fired by Ives, who claimed that Venters had demonstrated poor work performance.²⁷⁸ Venters believed she was terminated for failing to “measure up to [Ives’] religious expectations.”²⁷⁹ In concluding that Venters had successfully raised a Title VII claim, the Court noted that Venters “need only show that her perceived religious shortcomings (her unwillingness to strive for salvation as Ives understood it, for example) played a motivating role in her discharge.”²⁸⁰ In response to Ives’s claim that he had provided non-discriminatory reasons for the decision to fire Venters, the Court

269. *Id.*

270. *Id.* at 1171.

271. *Id.* at 1172.

272. *Shapolia v. Los Alamos Nat’l Lab’y*, 992 F.2d 1033, 1038 (10th Cir. 1993).

273. *Noyes*, 488 F.3d at 1168–69 (citing *Shapolia*, 992 F.2d at 1038).

274. *Venters v. City of Delphi*, 123 F.3d 956 (7th Cir. 1997).

275. *Id.* at 962.

276. *Id.*

277. *Id.* at 963.

278. *Id.* at 963–64.

279. *Id.* at 970.

280. *Id.* at 972; *see also* *Blalock v. Metals Trades, Inc.*, 775 F.2d 703, 708–09 (6th Cir. 1985) (explaining that employer’s willingness to give special consideration to those who shared his religious views and his withholding of same consideration from those who did not constitutes direct evidence that religion played role in plaintiff’s discharge).

held that, when there is direct evidence of discrimination, the “pertinent question is whether the city’s evidence as to the legitimate reasons for terminating Venters eliminates any doubt as to whether religion played at least a motivation role in her discharge.”²⁸¹

The focus of religious non-adherence claims is the discriminator’s beliefs. Thus, a Dalit victim of caste discrimination based on untouchability may be able to establish a question of triable fact. Effectively, what the Dalit victim would assert is that, by not following the discriminator’s religious beliefs that Dalits should act and behave in certain ways, they are refusing to share the perpetrator’s religious beliefs.

B. Is Caste Discrimination Based on Untouchability Covered Under the Protected Trait of Race?

Is caste discrimination race discrimination? This is a perplexing question that has received significant attention in the international legal context.²⁸² Title VII does not define the term “race” and the EEOC has not done so either.²⁸³ Courts, too, are uncertain about its definition for the purposes of Title VII claims.²⁸⁴ The claims based on race and national origin “may substantially overlap or even be indistinguishable depending on the specific facts of a case.”²⁸⁵

There seem to be four available legal analyses to consider in determining if the definition of “race” includes caste. One is to look to the definitions of the various racial groups adopted by the federal government to determine if caste fits in the definition of a racial category. The second starts with the recognition that the federal courts have generally treated race discrimination under Section 1981 the same as under Title VII, meaning they have applied a definition of race as understood in the 19th century.²⁸⁶ The third route is based on the legislative history of the Civil Rights Act of 1964. The fourth is looking at contemporary sources of the 1960s to see how race was defined.

281. *Venters*, 123 F.3d at 972.

282. *See supra* notes 49–51 and accompanying text.

283. *Equal Emp. Opportunity Comm’n v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018, 1026 (11th Cir. 2016). *See also* 42 U.S.C.A. § 2000e (West 2021).

284. *Salas v. Wis. Dep’t of Corrs.*, 493 F.3d 913, 923 (7th Cir. 2007) (“In the federal courts, there is uncertainty about what constitutes race versus national origin discrimination under Title VII.”)

285. *Deravin v. Kerik*, 335 F.3d 195, 201 (2d Cir. 2003). *See also Garcia v. Hatch City Pub. Schs.*, 458 P.3d 378, 385 (N.M. 2018) (“[T]he takeaway from these cases is that terms like race and national origin, as well as related terms like ancestry and ethnicity, often overlap, even to the point of being factually indistinguishable.”)

286. *See, e.g., Walker v. Sec. of the Treasury, Internal Revenue Serv.*, 713 F. Supp. 403, 405 (N.D. Ga. 1989); *Village of Freeport v. Barrella*, 814 F.3d 594, 607 (2d Cir. 2016). *See also supra* notes 145–47 and accompanying text.

*1. Determining Whether Caste Discrimination is Race Discrimination
Using the Federal Government's Definitions of Race*

Each year, certain employers subject to Title VII are required to submit an EEO-1 Report to the Joint Reporting Committee, which consists of the EEOC and Office of Federal Contract Compliance Programs.²⁸⁷ Data requested on the EEO-1 Report tracks employees by race, ethnicity, sex, and job classification.²⁸⁸ The EEO-1 Reports provide useful data on the race and ethnicity of employees, using the definitions mandated by the federal government, which first became required for employers in 1980.²⁸⁹

Even though the federal government has collected racial data for over 200 years as part of the census process, no federal standards for the collection of data on race and ethnicity applied across all federal agencies until the 1970s.²⁹⁰ Federal agencies were increasingly collecting racial and ethnic data at the time because of civil rights laws enacted in the 1960s.²⁹¹ In 1976, Congress passed Public Law 94-311, which required federal agencies to provide a separate count of the Latinx population.²⁹²

On May 12, 1977, the Race and Ethnic Standards for Federal Statistics and Administrative Reporting (“Directive 15”) became effective for all federal government agencies, including the EEOC.²⁹³ The federal government undertook a review of Directive 15 from 1993 to 1997.²⁹⁴ The 1997 Revisions also provided that other federal programs adopt its standards.²⁹⁵ The 1997 Revisions were first

287. See U.S. Equal Emp. Opportunity Comm’n, *EEO-1 Data Collection*, <https://www.eeoc.gov/employers/eo-1-data-collection> [<https://perma.cc/6PFK-KET5>] (last visited Mar. 27, 2022). Employers who must file include those with at least one hundred employees and federal government contractors with at least fifty employees and meeting certain criteria. *Id.*

288. See U.S. Equal Emp. Opportunity Comm’n, *EEO-1 Component 1 Fact Sheet: Report Types*, https://www.eeocdata.org/pdfs/EEO-1_Fact_Sheet.pdf [<https://perma.cc/Q468-3S6N>] (last visited Mar. 27, 2022).

289. For a discussion of the history of the creation of the federal government’s definitions for race and ethnicity, see KEVIN BROWN, *BECAUSE OF OUR SUCCESS: THE CHANGING RACIAL AND ETHNIC ANCESTRY OF BLACKS ON AFFIRMATIVE ACTION* 43–60 (2014).

290. See Katherine K. Wallman, Suzann Evinger, & Susan Schechter, *Measuring Our Nation’s Diversity: Developing a Common Language for Data on Race/Ethnicity*, 90 AM. J. PUB. HEALTH 1704, 1704 (2000).

291. *Id.*

292. *Id.*

293. OFFICE OF MGMT. & BUDGET, DIRECTIVE NO. 15, RACE AND ETHNIC STANDARDS FOR FEDERAL STATISTICS AND ADMINISTRATIVE REPORTING (as adopted on May 12, 1977). In 1978, the standards were renamed “Statistical Policy Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting,” or Directive 15. For a more complete retelling of the change of the name of Directive No. 15, see RAINER SPENCER, *SPURIOUS ISSUES: RACE AND MULTIRACIAL IDENTITY POLITICS IN THE UNITED STATES* 70–71 (1999).

294. For a list of the steps taken, see Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. No. 210 58,782–83 (Oct. 30, 1997), <https://www.govinfo.gov/content/pkg/FR-1997-10-30/pdf/97-28653.pdf> [<https://perma.cc/SE5B-4SGD>].

295. *Id.* at 58,789.

utilized for the 2000 census and were incorporated into the EEOC's regulations in time for the 2007 EEO-1 Reports.²⁹⁶

The 1997 Revisions, as well as the EEOC regulations, which are still currently in use, classified Hispanic or Latinx status as an ethnicity, not a race.²⁹⁷ The term Hispanic or Latinx "refers to persons who trace their origin or descent to Mexico, Puerto Rico, Cuba, Central or South American or some other Spanish culture."²⁹⁸ The definitions for the five racial categories contained in the 1997 Revisions are as follows:

- a. American Indian or Alaska Native—A person having origins in any of the original peoples of North and South America (including Central America), and who maintains tribal affiliation or community attachment.
- b. Asian—A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.
- c. Black or African American—A person having origins in any of the black racial groups of Africa.
- d. Native Hawaiian or Other Pacific Islander—A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands.
- e. White—A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.²⁹⁹

While South Asians have started to spread throughout the world, adherents of the caste system originally hail from Bangladesh, Bhutan, India, Maldives, Nepal,

296. For a discussion of this process, see BROWN, *supra* note 289, at 43–60.

297. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. No. 210 58,789 (Oct. 30, 1997), <https://www.govinfo.gov/content/pkg/FR-1997-10-30/pdf/97-28653.pdf> [<https://perma.cc/V9GA-VVJB>]. For the EEO-1 reports, the ethnicity issue is limited to whether a person is Hispanic or not. Thus, they are of no help in determining a person's ethnic origin for purposes of a Title VII claim.

298. Agency Information Collection Activities, Notice of Submission for OMB Review; Final Comment Request to the Equal Employment Opportunity Commission, 70 Fed. Reg. 71,295, 71,301 (Nov. 28, 2005). The definition of Asian from Directive 15 was "Asian or Pacific Islander—A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands, and Samoa." The 1997 Revisions removed Pacific Islanders from this category and combined them with Native Hawaiians into a new racial category of "Native Hawaiian or Other Pacific Islander." *Id.* at 58,786; OFFICE OF MGMT. & BUDGET, DIRECTIVE NO. 15, RACE AND ETHNIC STANDARDS FOR FEDERAL STATISTICS AND ADMINISTRATIVE REPORTING (as adopted on May 12, 1977). For a discussion of the EEOC guidelines, see BROWN, *supra* note 296.

299. *Id.*

Pakistan, Sri Lanka, Tibet, and other countries in Asia.³⁰⁰ Although the racial categories listed in the 1997 Revisions would consider all of those with a caste to be Asian, since caste alone would not be considered a race, caste discrimination would not equate to race discrimination.

2. Defining Race for Purposes of Title VII as it Was Defined by Section 1981

Although employers must use the above racial categories when reporting their employees to the EEOC, this definition of race should not necessarily be used to determine what is “race discrimination” under Title VII. Section 1981 is the historical predecessor of Title VII with regard to recognizing claims of race discrimination in employment.³⁰¹ Courts have also treated race discrimination under Section 1981 the same as under Title VII.³⁰²

The Second Circuit’s decision in *Village of Freeport v Barrella*,³⁰³ which recently addressed the issue of whether Hispanics are a race or a national origin group under Title VII, is particularly instructive.³⁰⁴ The Second Circuit noted that the District Court had struggled to determine whether the term “Hispanic” fell within the legal definition of race, partly due to the federal government’s “less-than-straightforward use of those terms.”³⁰⁵ The Court noted that, considering merely those federal definitions discussed above, Hispanic/Latinx is considered an ethnicity, not a race.³⁰⁶

From the standpoint of Title VII, the issue of whether Hispanic status is considered a race has long been controversial.³⁰⁷ But, in Section 1981 claims, courts have a history of finding that it fits within the definition of race discrimination.³⁰⁸ Many courts assumed that people who were Hispanic formed a

300. See, e.g., OMVEDT, *supra* note 46, at 31 (“Caste system exists in South Asian subcontinent and there only.”)

301. See, e.g., Walker v. Fulton Cnty. Sch. Dist., 713 F. Supp. 403, 405 (N.D. Ga. 1989).

302. See, e.g., *id.* (“[T]he legal elements and facts necessary to support a claim for relief under Title VII are identical to the facts which support a claim under § 1981.”); *Village of Freeport v. Barrella*, 814 F.3d 594 (2d Cir. 2016) (“[W]e analyze claims of racial discrimination identically under Title VII and § 1981 in other respects, and we see no reason why we should not do the same with respect to how we define race for purposes of those statutes.”).

303. *Barrella*, 814 F.3d 594

304. The case may be particularly instructive given the Court’s characterization of the correct definition of “Hispanic” as a “vexed question.” *Id.* at 602. This may provide a helpful parallel to the difficulty in characterizing “caste” within anti-discrimination laws.

305. *Id.*

306. *Id.* See also *supra* note 297 and accompanying text.

307. *Barrella*, 814 F.3d at 606.

308. *Id.* at 607. See also *Albert v. Carovano*, 851 F.2d 561, 572 (2d Cir. 1988) (en banc); *Rivera v. United States*, 928 F.2d 592, 607 (2d Cir. 1991) (noting that § 1981 “protect[s] against discrimination on the basis not only of race, but also of ‘ancestry or ethnic characteristics’” (quoting *Memphis v. Greene*, 451 U.S. 100, 128 (1981))); *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir. 1987) (“There can be no question that [§ 1981’s ban on racial discrimination] includes persons . . . who are of Puerto Rican descent.”).

protected class under Title VII without clarifying whether it was race or national origin, while others have found the underlying intent to be irrelevant.³⁰⁹ Repeatedly, though, courts have “assumed that claims of ethnicity-based discrimination, including discrimination based on Hispanicity, are cognizable as claims of racial discrimination under Title VII, albeit without holding so explicitly.”³¹⁰

Before the *Village of Freeport* case, the Second Circuit had determined that Hispanic or Latino status was a national origin group under Title VII.³¹¹ In *Freeport*, though, the Second Circuit considered that if it excluded Hispanic status from Title VII’s definition of race, plaintiffs pursuing both Section 1981 and Title VII claims might in some circumstances need to present two different factual arguments in order to invoke the distinct remedies of these two statutes that apply to employment discrimination.³¹² The Second Circuit concluded “race” in Title VII claims encompassed ethnicity to avoid this result.³¹³

Courts’ pattern of equating the definitions of race under Section 1981 and Title VII suggests that the discussion earlier in the Article of Section 1981’s applicability to caste discrimination based on untouchability as race discrimination will also apply to the application of Title VII.³¹⁴ However, the Supreme Court has concluded that the definition of “race” for purposes of Section 1981 is to be drawn from its understanding in the 19th century. One could argue that this definition is not appropriate for Title VII, which was enacted almost 100 years later. But the Second Circuit’s decision points to how a considered decision to do so would create a huge legal problem.

3. Congressional Debates During Passage of the Civil Rights Act of 1964

During deliberations that led to the passage of the Civil Rights Act of 1964, several members of Congress discussed their desire not to recognize a caste system

309. *Barrella*, 814 F.3d at 606.

310. *Id.* at 607 (“In *Malave v. Potter*, for instance, we implicitly acknowledged the viability of a Title VII race-discrimination claim based on Hispanic ethnicity.”) (citing 320 F.3d 321, 324 (2d Cir. 2003)).

311. *See Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 19 (2d Cir.1995) (describing requirements for showing “an inference of ethnic discrimination” under Title VII).

312. 814 F.3d at 606.

313. *Id.*

314. *See supra* note 301 and accompanying text.

in the U.S.³¹⁵ The most significant discussion of the South Asian caste system during the debates of the Act came from Paul Douglas, a Democratic senator from Illinois, when he addressed the issue of school segregation. He argued that

[t]he caste system still endures in India and is a great disgrace upon India; but at least the Government of India has had the courage and the foresight to make it illegal; at least it is not sanctified by law; and, at least in theory and law, the temples are open to members of all castes-both the high castes and the low castes.³¹⁶

The references to caste were not as numerous during the Congressional debates that led to the passage of Civil Rights Act of 1964 as they were during the passage of the Civil Rights Act of 1866. Nevertheless, these Congressional references to caste suggest that Congress continued with the view that caste differences were equivalent to race differences into the 1960s.

4. *Contemporary Sources Defining Race*

Looking to contemporary sources of encyclopedias and dictionary definitions of race may not, alone, be helpful in determining whether caste discrimination fits within these definitions. The edition of Black's Law Dictionary published in 1951 did not include a definition of race.³¹⁷ The 1964 Concise Oxford Dictionary defined race as the following:

Group of Persons . . . connected by common descent posterity of (person); house, family, tribe or nation regarded as of common stock; distinct ethnical stock (the Caucasian, Mongolian, etc.) . . .;

Descent, kindred, (of noble, oriental, etc.)

Class of persons with some common feature³¹⁸

The 1964 Webster's New World Dictionary defined race as follows:

315. During the House debates, a Republican Representative from Minnesota argued that "this country did not develop a caste system whereby we would have first- and second-class citizens." 110 CONG. REC. 1582, 1646 (1964). On February 10, 1964, Representative William St. Onge (D-Connecticut) noted, "We must not recognize any caste system in the United States, or the supremacy of one race over another. Such practices can never be justified in the light of our moral and democratic principles, because there is no moral justification for racial or religious discrimination." 110 CONG. REC. 2705, 2783 (1964). In discussing Title VI during the Senate debate on April 7, 1964, Senator John Pastore of Rhode Island acknowledged that segregation was "a caste system that imposed an inferior status on the Negro citizen from cradle to grave." 110 CONG. REC. 7051, 7055 (1964).

316. 110 CONG. REC. 6812, 6823 (1964). There were a few other mentions of caste during the debates of the Civil Rights Act of 1964. For example, Representative Abernathy, who opposed the Act because, in his words, the bill ignored the discrimination by African Americans against each other, referred to caste. See 110 CONG. REC. 2548, 2555 (1964).

317. BLACK'S LAW DICTIONARY (4th ed. 1951).

318. *Race*, THE CONCISE OXFORD DICTIONARY (5th ed. 1964).

Any of the major biological divisions of mankind, distinguished by color and texture of hair, color of skin and eyes, stature, bodily proportions, etc.: many ethnologists now consider that there are only three primary divisions, the Caucasian (loosely, *white race*), Negroid (loosely, *black race*), and Mongoloid (loosely, *yellow race*), each with various subdivisions: the term has acquired so many unscientific connotations that in this sense it is often replaced in scientific usage by *ethnic stock* or *group*. . .

A population that differs from others in the relative frequency of some gene or genes: a modern scientific usage

Any geographical, national, or tribal ethnic grouping

a) the state of belonging to a certain ethnic stock, group, etc. b) the qualities, traits, etc. belonging, or supposedly belonging, to such a division

Any group of people having the same ancestry; family; clan; lineage

Any group of people having the same activities, habits, ideas, etc.: as, the *race* of dramatists.³¹⁹

These definitions may not lead to conclusive results. Arguably, some of the above definitions would include Dalits as a race. For example, the definition of “any group of people having the same ancestry; family; clan; lineage.” Others would not include Dalits as a race.³²⁰

C. Is Caste Discrimination Based on Untouchability Covered Under the Protected Trait of National Origin Discrimination?

Title VII³²¹ does not define national origin. In *Espinoza v. Farah Manufacturing Company*,³²² the Supreme Court discussed whether failing to hire a permanent resident because they were not a U.S. citizen constituted national origin discrimination. The Court understood the term “national origin” to “refer[] to the country where a person was born, or, more broadly, the country from which his or her ancestors came.”³²³ The Court went on to note that, while “an earlier version of § 703 had referred to discrimination because of ‘race, color, religion, national origin, or *ancestry*,’” the removal of the word *ancestry* was not supposed to be a material change, but was rather considered to be synonymous with

319. *Race*, WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE: COLLEGE EDITION (1964).

320. See, e.g., *supra* note 319, noting that many ethnologists now consider that there are only three primary divisions.

321. 42 U.S.C. § 2000e. *et seq.*

322. *Espinoza v. Farah Mfg. Co. Inc.*, 414 U.S. 86 (1973).

323. *Id.* at 88.

“national origin.”³²⁴ Further, in considering a situation in which an employer required prospective employees to have an Anglo-Saxon background, the Court affirmed that such a condition would be clearly illegal.³²⁵

Following the same reasoning, the Ninth Circuit has held that a Serbian complainant could bring a national origin employment discrimination claim even though, at the time, Serbia no longer existed as a nation.³²⁶ The EEOC’s guidance on discrimination based on national origin also defines it as the “denial of equal employment opportunity because of an individual’s, or his or her ancestor’s, *place of origin*; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.”³²⁷

While physical and linguistic characteristics may not differentiate Dalits from other South Asians, the membership of a group presumed by discriminators to be religiously polluted could constitute a cultural group.³²⁸ One Third Circuit opinion addressing a national origin claim provides language that may be particularly applicable to the type of caste discrimination that Dalits encounter:

Discrimination stems from a reliance on immaterial outward appearances that stereotype an individual with imagined, usually undesirable, characteristics thought to be common to members of the group that shares these superficial traits. It results in a stubborn refusal to judge a person on his merits as a human being. Our various statutes against discrimination express the policy that this refusal to judge people who belong to various, particularly disadvantaged, groups is too costly to be tolerated in a society committed to equal individual liberty and opportunity.³²⁹

Given the above discussions about the definition of national origin, the Dalits could assert at least four different legal theories that they constitute a national origin group.

324. *Id.* at 89.

325. *Id.* at 95. *See also* Kanaji v. Children’s Hosp. of Phila., 276 F. Supp. 2d 399, 401–02 (E.D. Pa. 2003) (finding it “clear that the Supreme Court would not require that one’s national origin be linked directly to a specific country or nation” but rather embraces “a broader class of people” and refers to “certain traits or characteristics that can be linked to one’s place of origin”).

326. Pejic v. Hughes Helicopters, Inc., 840 F.2d 667, 673 (9th Cir. 1988). *See also* Roach v. Dressler Industrial Valve & Instrument Division, 494 F. Supp. 215, 218 (W.D. La. 1980) (recognizing discrimination against Cajun employees as national origin discrimination under Title VII even though the colony of Acadia no longer existed). National origin also encompasses discrimination based on foreign accents. *See* Fragante v. City & Cnty. of Honolulu, 888 F.2d 591, 595 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990) (addressing appellant’s argument that “national origin” under Title VII also encompasses discrimination based on foreign accents).

327. 29 C.F.R. § 1606.1 (emphasis added).

328. *See supra* notes 108–15 and accompanying text.

329. Bennun v. Rutgers State Univ., 941 F.2d 154, 173 (3d Cir. 1991).

1. Dalits as a National Origin Group Due to Stigmatization by Caste Members

The cultural experience of Dalits that is the basis of a caste discrimination claim based on untouchability is the idea that Dalits possess some sort of religious pollution.³³⁰ Like the Third Circuit acknowledged, this prevents Dalits from being judged based on their individual merit; they are instead stereotyped with imagined undesirable characteristics. Their history in South Asia was one of being set apart from Caste Hindus and non-Dalit members of other religions and compelled to practice endogamy. Remedying this historical injustice is consistent with Title VII's stated purpose of removing "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."³³¹

2. Dalits as a National Origin Group Based on Ancestry Analogy to U.K. Treatment of Caste Discrimination

The Supreme Court has noted that the deletion of the term "ancestry" from an earlier list of protected traits by Congress was not a material change because "national origin" was considered synonymous.³³² A Dalit complainant could argue that discrimination against them is the product of common descent as a form of ancestry, an argument that has had success in the United Kingdom.

The Equality Act, passed in the U.K. in 2010, prohibits discrimination on nine grounds, including race, defined by statute as including color, nationality, and ethnic or national origins.³³³ "Ethnic origins" has been interpreted as a "wide and flexible"³³⁴ phrase which also includes questions of birth, lineage, descent, and ancestry.³³⁵ In *Tirkey v. Chandhok*, the U.K.'s first and to date only successful caste discrimination case, the claimant was a domestic servant trafficked from India to work in a private home in the U.K.³³⁶ She alleged egregious violations of employment rights and unlawful discrimination contrary to the Equality Act.³³⁷ Since she had no access to an explicit statutory prohibition of caste discrimination, she alleged her discrimination had occurred for reasons related to her ethnic origins including her status in the caste system as perceived by the respondents.³³⁸ The Employment Tribunal found that she was mistreated by the respondents

330. See *supra* notes 122–30 and accompanying text.

331. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800–01 (1973) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–31 (1971)).

332. See *supra* note 324 and accompanying text.

333. See Nat'l Archives, *Equality Act 2010, Part II, Chapter I*, LEGISLATION.GOV.UK, <https://www.legislation.gov.uk/ukpga/2010/15/part/2/chapter/1> [<https://perma.cc/4JTV-ZJ83>].

334. *Chandhok & Anor v. Tirkey*, Appeal No. UKEAT/0190/14/KN, ¶ 44 (Emp. Appeal Trib. Dec. 19, 2014).

335. *R (E) v Governing Body of JFS* [2009] UKSC 15, [28].

336. *Tirkey v. Chandhok* [2015] EAT 3400174/2015, [205]–[210].

337. *Id.* at ¶ 1.

338. *Id.* at ¶ 205–10.

because of race, specifically because of her ethnic origins—defined as her birth, her *descent*, her inherited position in society or caste, and her background and upbringing.³³⁹ The concept of descent or ancestry in the U.K. is thus far broader than the concept of the land of one's ancestors. Descent was relied on by the tribunals in the *Tirkey* litigation as the legal source of a prohibition of caste discrimination, albeit with the proviso that this finding was case-specific and not intended to establish a general proposition.³⁴⁰

Dalit complainants in the U.S., too, could make the argument that discrimination based on untouchability is derived from their ancestry in the sense that it is derived from the descent or inherited position due to their caste. Given a broad definition of national origin, it is possible that this form of discrimination would fit within that category.

3. Aryan Origin Theory and National Origin Discrimination

A third argument derives from the Aryan Origin Theory discussed earlier.³⁴¹ As protests increased for Indian independence from Great Britain, many South Asian scholars increasingly criticized the Aryan Origin Theory, noting that it was the product of a biased view of Western thinkers.³⁴² A new explanation asserted that the Aryans were actually the initial inhabitants of India. According to this theory, original Hindus were the Aryans, a distinctive people indigenous to India. Caste Hindus or Hindu Aryans are their descendants. Thus, there was no Aryan invasion, since the Aryans were indigenous to India, and, therefore, no confrontation between them and the original people of India occurred.³⁴³

Despite the criticisms of the Aryan Origin Theory, however, recent research may be bringing it back into societal good graces. A 2018 DNA study provides

339. *Id.* The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) defines racial discrimination as discrimination on grounds of race, color, descent, or national or ethnic origin. The Committee on the Elimination of Racial Discrimination (CERD)—ICERD's monitoring body—has affirmed that the term descent in ICERD includes the concept of caste; see Annapurna Waughray and David Keane, *CERD and caste-based discrimination, in FIFTY YEARS OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: A LIVING INSTRUMENT* (Waughray & Keane eds., 2017).

340. *Chandhok & Anor v. Tirkey*, Appeal No. UKEAT/0190/14/KN, ¶ 55 (Emp. Appeal Trib. Dec. 19, 2014).

341. See *supra* notes 195–218 and accompanying text.

342. For a more recent criticism by a professor at the Indian Institute of Technology Bombay, see Prasanna, *supra* note 196 (discussing the evidence that scientists must consider in order to form an opinion on the Aryan Invasion Theory).

343. *Id.*

genetic evidence for the Aryan Origin Theory.³⁴⁴ The study documents “a southward spread of genetic ancestry from the Eurasian Steppe, correlating with the archaeologically known expansion of pastoralist sites from the Steppe to Turan in the Middle Bronze Age (2300–1500 BCE).”³⁴⁵ It genetically links ancestry from the Steppe to Europe and South Asia in the Bronze Age and identifies the populations that almost certainly were responsible for spreading Indo-European languages across much of Eurasia.³⁴⁶ Another genetic study concluded that:

[T]he upper castes have a higher affinity to Europeans than to Asians, and the upper castes are significantly more similar to Europeans than are the lower castes. Collectively, all five datasets show a trend toward upper castes being more similar to Europeans, whereas lower castes are more similar to Asians.³⁴⁷

If the Aryan Origin Theory continues to regain widespread acceptance, discrimination based on untouchability could be recognized as a form of national origin discrimination under Title VII. If Dalits are descendants of the indigenous people, and the high-caste Hindus are descendants of the Aryans, then they have different national origins.

344. VAGHEESH M. NARASIMHAN, NICK PATTERSON, PRIYA MOORJANI, IOSIF LAZARIDIS, MARK LIPSON, SWAPAN MALLICK, NADIN ROHLAND, REBECCA BERNARDOS, ALEXANDER M. KIM, NATHAN NAKATSUKA, IÑIGO OLALDE, ALFREDO COPPA, JAMES MALLORY, VYACHESLAV MOISEYEV, JANET MONGE, LUCA M. OLIVIERI, NICOLE ADAMSKI, NASREEN BROOMANDKHOSHBAHT, FRANCESCA CANDILIO, OLIVIA CHERONET, BRENDAN J. CULLETON, MATTHEW FERRY, DANIEL FERNANDES, BEATRIZ GAMARRA, DANIEL GAUDIO, MATEJA HAJDINJAK, ÉADAÓIN HARNEY, THOMAS K. HARPER, DENISE KEATING, ANN MARIE LAWSON, MEGAN MICHEL, MARIO NOVAK, JONAS OPPENHEIMER, NIRAJ RAI, KENDRA SIRAK, VIVIANE SLON, KRISTIN STEWARDSON, ZHAO ZHANG, GAZIZ AKHATOV, ANATOLY N. BAGASHEV, BAURYZHAN BAITANAYEV, GIAN LUCA BONORA, TATIANA CHIKISHEVA, ANATOLY DEREVIANKO, ENSHIN DMITRY, KATERINA DOUKA, NADEZHDA DUBOVA, ANDREY EPIMAKHOV, SUZANNE FREILICH, DORIAN FULLER, ALEXANDER GORYACHEV, ANDREY GROMOV, BRYAN HANKS, MARGARET JUDD, ERLAN KAZIZOV, ALEKSANDER KHOKHLOV, EGOR KITOV, ELENA KUPRIANOVA, PAVEL KUZNETSOV, DONATA LUISELLI, FARHOD MAKSUDOV, CHRISTOPHER MEIKLEJOHN, DEBORAH MERRETT, ROBERTO MICHELI, OLEG MOCHALOV, ZAHIR MUHAMMED, SAMARIDDIN MUSTAFOKULOV, AYUSHI NAYAK, RYKUN M. PETROVNA, DAVIDE PETTENER, RICHARD POTTS, DMITRY RAZHEV, STEFANIA SARNO, KULYAN SIKHYMBAEVA, SERGEY M. SLEPCHENKO, NADEZHDA STEPANOVA, SVETLANA SVYATKO, SERGEY VASILYEV, MASSIMO VIDALE, DMITRIY VOYAKIN, ANTONINA YERMOLAYEVA, ALISA ZUBOVA, VASANT S. SHINDE, CARLES LALUEZA-FOX, MATTHIAS MEYER, DAVID ANTHONY, NICOLE BOIVIN, KUMARASAMY THANGARAJ, DOUGLAS J. KENNETT, MICHAEL FRACHETTI, RON PINHASI, & DAVID REICH, *THE GENOMIC FORMATION OF SOUTH AND CENTRAL ASIA*, *Biorxiv* (2018), <https://www.biorxiv.org/content/10.1101/292581v1> [<https://perma.cc/BV4H-WAZ6>].

345. *Id.* at 4.

346. *Id.* According to the authors, “this work sheds new light on the spread of Indo-European languages and parallels between the genetic history of two sub-continent, Europe and South Asia.” *Id.*

347. Michael Bamshad, Toomas Kivisild, W. Scott Watkins, Mary E. Dixon, Chris E. Ricker, Baskara B. Rao, J. Mastan Naidu, B.V. Ravi Prasad, P. Govinda Reddy, Arani Rasanayagam, Surinder S. Papiha, Richard Villems, Alan J. Redd, Michael F. Hammer, Son V. Nguyen, Marion L. Carroll, Mark A. Batzer, & Lynn B. Jorde, *Genetic Evidence on the Origins of Indian Caste Populations*, 11 *GENOME RES.* 994, 994 (2001).

Whether this would be a strong argument for Dalits, however, can be doubted. In *Roach v. Dressler Industrial Valve & Instrument Division*, a Louisiana District Court addressed a Title VII national origin discrimination claim brought by a Cajun plaintiff, who was a native-born American of Acadian descent.³⁴⁸ Although Acadia was never a country but instead a French colony founded in the early 1600s that the British conquered in 1713, the Court recognized that a national origin claim was available to the plaintiff.³⁴⁹ Following the rationale of the *Roach* court, it would be irrelevant that the Indus Valley Civilization was not a country. What matters is that Dalits comprised a group of people sharing a common culture, ancestry, land, and other social characteristics. However, this argument is fraught with more difficulty and less certainty than the recognition of a national origin claim for an Acadian. A court would have to accept a theory of the origin of the caste system that has been contested for decades.³⁵⁰ In order to find that the plaintiff had stated a claim, a court would need to define national origin based on events that occurred thousands of years ago as opposed to hundreds of years ago. Courts may simply find this ancestry too remote to support the claim that Dalits' ancestors and their descendants constitute a separate national origin group.

4. Dalits as a National Origin Group Based on Applying Section 1981's Definition

As noted in the discussion of courts using the definition of Section 1981 to apply to race discrimination under Title VII, the same argument can be made about national origin discrimination. The definition of race discrimination in Section 1981 has also been interpreted by courts to be broad enough to also cover national origin discrimination. Thus, the recognition of caste discrimination as a form of race discrimination under Section 1981 could also lead to a conclusion that it is national origin discrimination under Title VII.

V.

CHANGE THE PROTECTED TRAIT APPROACH ARTICULATED IN *BOSTOCK*

There are evidently several strong arguments that caste discrimination based on untouchability is included in race discrimination under Section 1981 and within a number of protected traits under Title VII. The arguments about whether caste discrimination is a form of race or national origin discrimination depend upon how those terms are interpreted. However, if the arguments already discussed above do not succeed, then the legal analysis adopted by the Supreme Court in its opinion in *Bostock v. Clayton County* may be of assistance.³⁵¹ The approach the Court

348. *Roach v. Dressler Indus. Valve & Instrument Div.*, 494 F. Supp. 215, 218 (W.D. La. 1980).

349. *Id.* at 217.

350. Prasanna, *supra* note 196, at 216 (noting that the Aryan Invasion Theory “has always been controversial”).

351. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

takes in *Bostock* would avoid the question of whether caste fits in a race or national origin category. Instead, it would recognize that caste is intertwined with being a member of the Asian race and, as such, caste discrimination involves the protected category of race. This part will discuss the application of the *Bostock* approach to the issue of whether caste discrimination is recognized under Title VII or Section 1981. The first section will discuss the Court's decision in *Bostock v. Clayton County*. The second section will apply the *Bostock* approach to caste discrimination based on untouchability under Title VII. The third section will apply it to Section 1981.

A. *Bostock v. Clayton County*

In June 2020, the Supreme Court delivered its 6 to 3 opinion in *Bostock v. Clayton County*.³⁵² Justice Gorsuch, writing for the Court, answered the question of whether termination of an employee for the sole reason of their homosexuality or transgender status violates Title VII's prohibition against sex discrimination.³⁵³ The Court noted that the test to determine whether such discrimination involves sex discrimination is to change the person's sex and see if it would yield a different choice by the employer.³⁵⁴ If so, then the discrimination is also sex discrimination.³⁵⁵

Bostock involved three different employment discrimination claims brought by long-time employees.³⁵⁶ Two of the plaintiffs, Gerald Bostock and Donald Zarda, were terminated by their employers soon after they revealed they were homosexuals. The third, Aimee Stephens, who had lived as a man for the first six years of employment, was fired when she revealed that she would start to live as a woman.³⁵⁷ These three individuals brought employment discrimination claims against their former employers contending that they were victims of sex discrimination under Title VII.³⁵⁸

The Court noted that, over the years, Title VII has been applied to aspects of discrimination that may not have been in the Congressional drafters' imaginations when they enacted the Civil Rights Act of 1964.³⁵⁹ Justice Samuel Alito's dissent, joined by Justice Clarence Thomas, goes to great lengths to point this out.³⁶⁰ Not only does Alito point out that Congress did not intend to provide such protection,

352. *Id.* Justices Roberts, Ginsburg, Breyer, Sotomayor and Kagan joined the opinion written by Justice Gorsuch. Justice Alito filed a dissenting opinion, joined by Thomas and Kavanaugh. *Id.*

353. *Id.* at 1737.

354. *Id.* at 1741.

355. *Id.*

356. *Id.* at 1737–38.

357. *Id.*

358. *Id.*

359. *Id.* For example, Title VII now bans discrimination based on motherhood and sexual harassment of male employees regardless of the lack of Congressional intent behind the application of the law. *Id.*

360. *Bostock*, 140 S. Ct. at 1754 (Alito, J., dissenting).

but also that “ordinary Americans reading the text of Title VII in 1964 would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity.”³⁶¹ Alito goes on to note that “[w]hile Americans in 1964 would have been shocked to learn that Congress had enacted a law prohibiting sexual orientation discrimination, they would have been bewildered to hear that this law also forbids discrimination on the basis of ‘transgender status’ or ‘gender identity.’”³⁶² He points out that the term “gender identity” did not appear in academic circles until 1964, doctors in the U.S. did not perform the first sex change operations until 1966, and the term “transgender” was not coined until the early 1970s.³⁶³

Justice Gorsuch, in the majority opinion, notes that Congress enacted other statutes since the 1964 Civil Rights Act that did address sexual orientation.³⁶⁴ Over the years, it also considered amending Title VII to include protection for sexual orientation, but never did.³⁶⁵ Gorsuch does not find the failure of Congress to include explicit sanctions for discrimination on the basis of sexual orientation or gender identity relevant:

[A]pplying protective laws to groups that were politically unpopular at the time of the law’s passage—whether prisoners in the 1990s or homosexual and transgender employees in the 1960s—often may be seen as unexpected. But to refuse enforcement just because of that, because the parties before us happened to be unpopular at the time of the law’s passage, would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law’s terms.³⁶⁶

Gorsuch also makes the relevant point that, in a disparate treatment case, the employer’s discriminatory actions are determined by focusing on their negative impact on the individual victim and not the group of which the victim is a member.³⁶⁷ In other words, in a disparate treatment case, the issue is not whether the employer treats women differently than men, but whether the employer discriminates against any individual because of that individual’s sex.³⁶⁸ Thus, if the employer would fire a gay man the same as a lesbian woman, it might be said

361. *Id.* at 1767 (Alito, J., dissenting).

362. *Id.* at 1772. (Alito, J., dissenting).

363. *Id.* at 1772–73. (Alito, J., dissenting).

364. *Id.* at 1747.

365. H.R. 5, 116th Cong., 1st Sess. (2019). Some attempts have failed. As recently as 2019, for example, the House of Representatives passed a bill which would have defined sex discrimination to include both sexual orientation and gender identity; however, the measure stalled in the Senate. *Bostock*, 140 S. Ct. at 1750.

366. *Bostock*, 140 S. Ct. at 1751.

367. *Id.* at 1740.

368. *Id.* at 1740–41.

that the employer is treating men and women alike. However, the relevant question relates to the employer discriminating against the individual employee based on sex, not on whether the employer discriminates against men or women.³⁶⁹

Much of Gorsuch's opinion for the Court addresses the issue of what it means for an employer to discriminate against a person "because of" a person's sex.³⁷⁰ In answering the question of the meaning of "because of," the Court applies the "simple and traditional" standard of but-for causation typically used in tort cases and set forth in *University of Texas Southwestern Medical Center v. Nassar*, a Title VII retaliation case.³⁷¹ But-for causation exists whenever a particular outcome would not have happened without the purported cause.³⁷²

The ordinary meaning of the language of Title VII leads to the following conclusion: "If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred."³⁷³ Even if an employer's goal is only to discriminate against a person because they are gay, lesbian, or transgender, that is not possible without also discriminating against the person because of their sex.³⁷⁴ While being gay or lesbian is distinct from a person's sex, an individual's homosexuality or transgender status is tied inextricably to their sex.³⁷⁵ Thus, when an employer fires a gay, lesbian, or transgender person, there are two causal factors involved: both the person's sex and something else (attraction to others of the same sex or identifying with a different gender than the one received at birth).³⁷⁶

To illustrate what he means, Gorsuch works through a couple of examples. First, he discusses an employer who has two employees that are attracted to men, but one is a woman and the other is a man.³⁷⁷ If the employer would fire the man because he is attracted to another man, but not the woman attracted to a man, then the employer's decision to fire the male employee reveals that the employer is firing the male employee for actions that the employer tolerates in a female

369. *Id.* at 1740–41, 1748.

370. *Id.* at 1740. Gorsuch notes that Congress could have used other causation tests such as "solely" or "primarily because of," which would have indicated the prohibited factor was the main cause of the defendant's employment decision. *Id.* at 1739. He also noted that Congress amended Title VII in 1991 to allow a plaintiff to prevail merely by showing that a protected trait was a "motivating factor" in an adverse employment action. *Id.* Thus, "under this more forgiving standard, liability can sometimes follow even if sex wasn't a but-for cause of the employer's challenged decision." *Id.* However, the motivating factor test is not the issue in *Bostock*.

371. *Univ. of Tex. SW Med. Ctr. v. Nassar*, 570 U.S. 338, 339 (2013).

372. *Bostock*, 140 S. Ct. at 1739. Gorsuch notes that "a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Id.* The Court also notes that multiple but-for causes can exist.

373. *Id.*

374. *Id.* at 1745–46.

375. *Id.*

376. *Id.* at 1741–42.

377. *Id.* at 1741.

employee.³⁷⁸ The same logic applies to transgender individuals. Take an employer who would fire a person that was assigned male at birth because the person decides now to identify as a female. If that employer would retain an otherwise identical employee who was assigned female at birth, then the employer is penalizing the person who was assigned male at birth for actions that he tolerates with regard to an employee who was assigned female at birth.³⁷⁹

The Court addresses the counterargument that, if you change the sex of a homosexual or a transgender individual, but not their sexual orientation or gender identification, then you eliminate the characteristic of the individual—being gay, lesbian or transgender—that motivated the employer to take the discriminatory action.³⁸⁰ Gorsuch notes that this argument might work if Title VII only ensured equal treatment of men and women or if the statute applied only when sex was the sole or primary reason for the employer’s actions, but it goes beyond that—even if sex was not the main factor, it was a but-for factor.³⁸¹

B. Application of the Bostock Approach to Caste Discrimination Under Title VII

While Gorsuch applied the change the protected trait approach in *Bostock* to sex discrimination,³⁸² there is no reason to think that such a test would not also apply to the other protected traits mentioned in Title VII where the discrimination victim’s protected trait is inextricably linked to another immutable characteristic from birth they possess. Like sexual orientation and gender identity, a person’s caste is also an immutable characteristic originating with birth that others may use to identify a person.³⁸³ Thus, in discussing whether Title VII applies to caste discrimination based on untouchability, Justice Gorsuch’s opening salvo in *Bostock* appears an appropriate introduction:

Those who adopted the Civil Rights Act [of 1964] might not have anticipated their work would lead to this particular result. Likely, they weren’t thinking about many of the Act’s consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters’ imagination supply no reason to ignore the law’s demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law, and all persons are entitled to its benefit.³⁸⁴

378. *Id.*

379. *Id.*

380. *Id.* at 1747–48.

381. *Id.* at 1748.

382. *See supra* notes 373–79 and accompanying text.

383. *See supra* notes 117–19 and accompanying text.

384. *Bostock*, 140 S. Ct. at 1737.

Applying the *Bostock* approach to discrimination against Dalits, the motivation for the adverse employment decision will not be eliminated by changing the sex or color of the employee. Whether a Dalit is male or female, dark complexion or light complexion, they are still a Dalit.

1. Does the Bostock Approach Using Religion Work for Dalits?

With respect to religion, as discussed in the third part,³⁸⁵ there is the possibility that a victim of intentional caste discrimination based on untouchability who suffered an adverse employment action could succeed on a reverse religious discrimination claim. However, under the *Bostock* approach, a Dalit is not likely to succeed by asserting discrimination based on religion because changing the religion of a Dalit is unlikely to change the discrimination. As noted earlier, caste is a product of Hinduism; however, it has permeated the other religions in South Asia, including Buddhism, Christianity, Islam, and Sikhism.³⁸⁶ Thus, while the Hindu religion may be the original source of caste oppression, conversion to other religions is not a solution.³⁸⁷ Given that South Asians bring their religious beliefs with them when they immigrate to the U.S., it is unlikely that changing the religion of a Dalit would lead the employer to a different choice regarding the adverse employment action.

2. Does the Bostock Approach Using National Origin Work for Dalits?

Earlier, this article discussed a number of different arguments that a Dalit victim of caste discrimination could assert for the conclusion that caste based on untouchability could be considered national origin under Title VII.³⁸⁸ If Dalits are considered a national origin group using any of these approaches, however, then the *Bostock* approach is unnecessary. If Dalits are not a national origin group, then there is no national origin to change. Thus, the *Bostock* approach would not be applicable to national origin.

3. Does the Bostock Approach Using Race Work for Dalits?

The *Bostock* approach may be most effective for a claim within the protected trait of race. Using the federal definitions of race, which were first adopted in 1977, then, as already noted, all of those who have a caste would fit under the definition of who is Asian.³⁸⁹ As with plaintiffs who have been discriminated against on the basis of their gender identity or sexual orientation, which are inextricably entwined with their sex, Dalits' status is inextricably entwined with their race. Applying the *Bostock* approach means that if we change the race of a

385. See *supra* notes 259–81 and accompanying text.

386. See *supra* note 129 and accompanying text.

387. Babu & Prasad, *supra* note 130.

388. See *supra* notes 322–50 and accompanying text.

389. See *supra* notes 287–350 and accompanying text.

particular Dalit victimized by caste discrimination based on untouchability from Asian to, say, Black or white, then the person would no longer be a Dalit. For employers whose adverse employment actions are motivated by a desire to engage in caste discrimination based on untouchability, changing individuals' race would lead to different decisions because such individuals would no longer be Dalits.

B. Application of the Bostock Approach to Caste Discrimination Under Section 1981

If a court rejects the argument that caste discrimination is a form of race discrimination under Section 1981,³⁹⁰ Dalits can also assert the *Bostock* approach in a Section 1981 claim. Even though Section 1981 does not contain the “because of” language found in Title VII,³⁹¹ in order to establish causation, the Supreme Court recently reiterated that a successful Section 1981 plaintiff must demonstrate that “but for race,” the defendant would not have taken the discriminatory action the defendant took.³⁹²

Because we are dealing with the same “but for” test for race discrimination under Section 1981 as discussed in *Bostock* for Title VII,³⁹³ it would follow that the change in the protected trait approach that Gorsuch specifically mentions would also apply for Section 1981 claims. As a result, for a disparate treatment claim under Section 1981, like Title VII, the question to ask, once again, would be, if we changed the race of an aggrieved Dalit who is a victim of caste discrimination from Asian to white, would the employer have made a different choice? Like when we discussed the application of the *Bostock* approach to Title VII,³⁹⁴ the answer is yes, because there are no white Dalits. Thus, caste

390. See *supra* notes 144–253 and accompanying text.

391. See *supra* note 31 and accompanying text.

392. *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009 (2020). Justice Gorsuch delivered the opinion of the Court in this case as well. The Court restated its embrace of the “but-for” test for the application of § 1981 to race discrimination, holding that

[t]he guarantee that each person is entitled to the “same right . . . as is enjoyed by white citizens” directs our attention to the counterfactual—what would have happened if the plaintiff had been white? This focus fits naturally with the ordinary rule that a plaintiff must prove but-for causation. If the defendant would have responded the same way to the plaintiff even if he had been white, an ordinary speaker of English would say that the plaintiff received the ‘same’ legally protected right as a white person. Conversely, if the defendant would have responded differently but for the plaintiff’s race, it follows that the plaintiff has not received the same right as a white person.

Id. at 1015. See also *The Supreme Court 2019 Term*, 134 HARV. L.R. 580, 588 (2020) (arguing that the “but-for” test applied to § 1981 in *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media* adopted a narrow causation standard in contravention of the purpose of § 1981, while going on to note in footnote 78 that “one might argue that in light of *Bostock v. Clayton County*, in which the Court recognized the possibility of multiple but-for causes, it is not precisely true that the Court is requiring something meaningfully more difficult to satisfy in requiring that a plaintiff show a but-for cause”).

393. See *supra* notes 389–392 and accompanying text.

394. See *supra* notes 389–90 and accompanying text.

discrimination based on untouchability would also be actionable as race discrimination under Section 1981.

VI.

CONCLUSION

In this Article, we have discussed the question of whether a victim of caste discrimination based on untouchability can argue that it is a form of employment discrimination under the federal employment discrimination law under Title VII or Section 1981. This Article contends that there are legitimate arguments that caste discrimination based on untouchability is a form of religious discrimination under Title VII. The question of whether caste discrimination is a form of race or national origin discrimination under Title VII or Section 1981 is complex. The argument comes down to whether this form of discrimination fits within the definitions of those protected traits under the respective statutory frameworks. There are legitimate arguments that caste discrimination based on untouchability is a form of national origin or race discrimination recognized by federal employment discrimination law. However, if courts reject the notion that caste discrimination based on untouchability is a form of national origin and/or racial discrimination, the *Bostock* approach would provide another potent legal argument for recognizing such discrimination. The *Bostock* approach avoids the question of whether caste discrimination based on untouchability is a form of national origin or racial discrimination and instead recognizes that the “but-for” causation standard applies under both Section 1981 and Title VII. But-for causation exists whenever a particular outcome would not have happened without the purported cause. Thus, the but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause; further, multiple but-for causes can exist. Under this approach, because all of those who are victims of caste discrimination based on untouchability are from Asia, their caste is inextricably intertwined with their race. Thus, when Dalits are victims of intentional discrimination based on untouchability, the discriminator is motivated to discriminate against them because of their caste, which is not a protected trait, and their race, which is. Thus, caste discrimination inevitably also involves race discrimination.