

# DISTINGUISHING THE CASTE–RACE DEBATE IN THE UNITED STATES FROM SOUTH ASIA

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*According to the U.S. Census Bureau, there were more than 6.5 million people of South Asian descent in the United States in 2022. Like all immigrants, they do not*

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*journey solely as biological entities but bring their socio-cultural understandings as well. Among those understandings are the ones associated with the caste system. Historically, those most victimized by caste are the Dalits, formerly known as “untouchables” or “outcasts,” who suffer from caste discrimination based on untouchability. As a result of South Asian immigration, American universities, employers, courts, and legislative bodies are increasingly encountering caste discrimination against Dalits in the United States. Caste discrimination on the Indian subcontinent has been used for nearly 200 years in the United States in both legal and political arguments to refer to discrimination against Black people, including during discussions regarding the origins of anti-discrimination law based on race. Abolitionists began to analogize the treatment of Black people to the South Asian caste system as early as the 1830s. The caste–race analogy has remained central to discussions about racial discrimination against Black people since then, including during debates surrounding the enactment of the Civil Rights Act of 1866, the Fourteenth Amendment, and, to a lesser extent, the Civil Rights Act of 1964. This history has raised the legal question of whether caste discrimination based on untouchability is a form of race discrimination currently covered under U.S. federal anti-discrimination laws.*

*This Article will discuss the legal arguments that justify the conclusion that caste discrimination, especially against Dalits, is a form of race discrimination under federal anti-discrimination law. In addressing this issue, U.S. courts may be tempted to look to how caste discrimination is understood in South Asia, or more particularly India, under its anti-discrimination law. While the history and operation of the caste system in South Asia will be of interest, it is the history of the caste–race analogy in the United States, not in South Asia, that is important. In other words, the complex treatment of the caste–race issue in South Asia is not relevant for its interpretation under federal anti-discrimination law; rather, only the understanding of caste developed in this country is. Simply put, the South Asian caste–race debate is a discussion that occurred at very different times, in very different places, and for very different purposes than did its American analogue. While caste is not a form of race under Indian anti-discrimination measure, it most likely is under federal anti-discrimination law. Thus, this Article will also point out why U.S. courts do not need to get too caught up on the conceptual difficulties of understanding caste in South Asia when it comes to adjudicating caste discrimination cases in the United States.*

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## INTRODUCTION

While caste systems exist all over the world, the caste system is primarily associated with South Asia, where it has existed for thousands of years.<sup>1</sup> Though the caste concept may have originated from the religious practices on the Indian subcontinent, caste is separate from religion. It is practiced by many different faiths in South Asia, including Christianity, Hinduism, Islam, and Sikhism.

Over the past 35 years, South Asians have immigrated to the United States in large numbers. According to the U.S. Census Bureau, there were more than 6.5 million people of South Asian descent in the United States in 2022.<sup>2</sup> Like all

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1. M. N. Srinivas, *An Obituary on Caste as a System*, 38 *ECON. & POL. WKLY.* 455, 457 (2003).

2. *Asian Alone or in Any Combination by Selected Groups*, U.S. CENSUS BUREAU (2022), <https://data.census.gov/table?q=B02018&y=2022> [https://perma.cc/96R7-SXLQ]. There were 4,946,306 Asian Indians; 272,338 Bangladeshis; 22,184 Bhutanese; 260,323 Nepalese; 625,570 Pakistanis; 34,023 Sikhs; 75,808 Sri Lankans and 13,389 others. *Id.*

immigrants, when South Asians migrate halfway around the world to reside in the United States, they do not journey solely as “biological entities” but bring their socio-cultural understandings as well.<sup>3</sup> Among those understandings are the ones associated with the caste system. Those historically most victimized by caste are the Dalits, formerly known as “untouchables” or “outcasts.” They suffer from caste discrimination based on untouchability.<sup>4</sup> This stems from a belief that they are infected with a sort of permanent religious pollution that is contagious. To avoid this pollution, it is necessary for a person not only to avoid physical contact but also to maintain a safe distance from them.

As a result of South Asian immigration, American universities, employers, courts, and legislative bodies are increasingly encountering caste discrimination against Dalits. For example, in 2020, Brandeis University became the first university in the United States to ban caste-based discrimination.<sup>5</sup> Brandeis’s actions were followed by Harvard University, the California State University system, the University of California at Davis, and Brown University.<sup>6</sup> An employment discrimination case alleging that high-caste supervisors at Cisco Systems, Inc. (“Cisco”) discriminated against a Dalit subordinate because of caste has been pending in California state court since October of 2020.<sup>7</sup> On October 7, 2023, the Governor of California, Gavin Newsom, returned SB 403 to the California Legislative Assembly without his signature. SB 403 overwhelmingly passed both houses of the Assembly. It would have clarified that under various anti-discrimination provisions in California law, the protected trait of “ancestry” included “caste.”<sup>8</sup> In his message returning SB 403, however, Newsom stated that the Bill was unnecessary because California law already prohibits discrimination based on several protected traits relevant to caste discrimination—including race, ancestry, and national origin—which are to be liberally construed.<sup>9</sup> After Newsom’s action, the trial court in the Cisco case agreed that caste discrimination is covered under California’s anti-discrimination laws.<sup>10</sup>

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3. Vivek Kuman, *Different Shades of Caste Among the Indian Diaspora in the US*, 12 TRANSCIENCE 1, 1 (2021).

4. See *infra* notes 68–92 and accompanying text.

5. Office of Human Resources, *Statement on the Interpretation of Caste Within the Brandeis Nondiscrimination Policy*, BRANDEIS UNIV. (Nov. 26, 2019), <https://www.brandeis.edu/human-resources/policies-forms-procedures/discrimination/caste-statement.html> [<https://perma.cc/FE7L-FW4E>].

6. Ankit Khadgi, *Why California is Taking on Caste-Based Discrimination*, GUARDIAN (Apr. 23, 2023), <https://www.theguardian.com/us-news/2023/apr/16/california-bill-aims-to-ban-caste-based-discrimination> [<https://perma.cc/ANN5-G9EU>].

7. The California Civil Rights Division brought suit against Cisco claiming that it discriminated against a Dalit employee. See *Dep’t of Fair Emp. & Hous. v. Cisco Sys., Inc.*, 297 Cal. Rptr. 3d 827, 829 (Cal. Ct. App. 2022).

8. It would have applied to California’s Fair Employment and Housing Act, the Unruh Act, and the Education Code. Letter from Gavin Newsom, Governor of Cal., to Members of the Cal. State Senate (Oct. 7, 2023), <https://www.gov.ca.gov/wp-content/uploads/2023/10/SB-403-Veto-1.pdf> [<https://perma.cc/YL7Q-PAU5>].

9. See *id.*

10. See Order Re: Defendant CISCO Systems, Inc.’s Demurrer and Motion to Strike Plaintiff’s Complaint, No. 20-CV-372366, at 9 (Nov. 6, 2023) (on file with author).

It may surprise most observers, but scholars in the United States have compared caste discrimination on the Indian subcontinent to discrimination against Black people for both legal and political purposes. Abolitionists began to analogize the treatment of Black people to the South Asian caste system as early as the 1830s. The caste–race analogy remained central to discussions about racial discrimination against Black people throughout the nineteenth century, including in debates surrounding the enactment of the Civil Rights Act of 1866, Congress’s first race-based anti-discrimination measure, and the ratification of the Fourteenth Amendment. This history has raised the legal question of whether caste discrimination is a form of race discrimination currently covered under federal anti-discrimination laws.<sup>11</sup>

For purposes of federal law,<sup>12</sup> the legal schemes that are most relevant to discussing whether caste discrimination is a form of race discrimination are 42 U.S.C. § 1981 (banning discrimination against all persons in public and private contracts)<sup>13</sup> and 42 U.S.C. § 1982 (banning discrimination against all citizens in housing).<sup>14</sup> These two provisions are derived from the Civil Rights Act of 1866. Also, several titles from the Civil Rights Act of 1964 could apply to caste discrimination if it is a form of race discrimination, including Title II (banning discrimination in access and service at various categories of business establishments), Title III (banning discrimination in public facilities, such as park and recreation facilities, libraries, and prisons), Title VI (banning discrimination by recipients of federal funds), and Title VII (banning employment discrimination).<sup>15</sup> The largest number of contract claims filed under § 1981 are for employment discrimination.<sup>16</sup> Thus, it is common for victims of race discrimination in

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11. See, e.g., Guha Krishnamurthi & Charanya Krishnaswami, *Title VII and Caste Discrimination*, 134 HARV. L. REV. F. 456, 456 (2020); Kevin Brown et al., *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*, 46 N.Y.U. REV. L. & SOC. CHANGE 117, 118 (2022); Brett Whitley, *Importing Indian Intolerance: How Title VII Can Prevent Caste Discrimination in the American Workplace*, 75 ARK. L. REV. 163, 166 (2022).

12. For a list of major civil rights legislation addressing race and national origin discrimination, see *Constitutional Amendments and Major Civil Rights Acts of Congress Referenced in Black Americans in Congress*, U.S. HOUSE OF REPRESENTATIVES HIST., ART & ARCHIVES, <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Constitutional-Amendments-and-Legislation/> [https://perma.cc/6N4S-AQJG] (last visited Oct. 3, 2024).

13. Though § 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 the enjoyment of certain rights, without discrimination on account of race, color, or previous condition of servitude.” *United States v. Cruikshank*, 92 U.S. 542, 555 (1875).

14. “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” 42 U.S.C. § 1982.

15. CHRISTINE J. BACK, CONG. RSCH. SERV., IF11705, *THE CIVIL RIGHTS ACT OF 1964: ELEVEN TITLES AT A GLANCE* 1–2 (2020).

16. See, e.g., Theodore Eisenberg & Stewart Schwab, *The Importance of Section 1981*, 73 CORNELL L. REV. 596, 601 (1988).

employment to pursue both § 1981 and Title VII claims. Because of this, courts became accustomed to looking to § 1981 when addressing legal issues under the 1964 Civil Rights Act.

In addition to race, Titles II, III, and VII under the Civil Rights Act of 1964 include religion and national origin as protected traits, and Title VI includes national origin.<sup>17</sup> While discrimination based on religion or national origin are also possible bases for caste discrimination,<sup>18</sup> the reason we limit the scope of this Article to race is due to the historical understanding of race at the time Congress passed the Civil Rights Act of 1866. In 1987, in *Saint Francis College v. Al-Khazraji*,<sup>19</sup> the Supreme Court expounded on the meaning of “race” for § 1981. In an opinion involving whether a person of Arab ancestry could bring a claim of race discrimination under § 1981 against a white person, the Court stated that the definition of race was to be drawn from how it was understood by Americans in the nineteenth century.<sup>20</sup> In recognizing that the concept of race then was much broader than it is today, the Court held:

Based 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 Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory.<sup>21</sup>

As the Court would state in a case dealing with the Fifteenth Amendment, “[i]n interpreting the Reconstruction Era civil rights laws this Court has observed that racial discrimination is that which singles out ‘identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics.’”<sup>22</sup> While the purpose of the Civil Rights Act of 1866 was directed at preventing race discrimination, the concept of “race” included what we would commonly refer to as race, national origin, ethnicity, and/or ancestry. Thus, these concepts may have different meanings in different contexts, but it appears that for purposes of the Reconstruction Era civil rights laws, these concepts are all included within the definition of “race.”

The caste–race analogy is still prominently used today in debates about racial discrimination. Most of those who have employed this analogy in the United States, however, were not aware of the intricacies of how the caste system functioned in South Asia. For those in the United States, it has been enough to see caste as a hierarchical system of social stratification on the basis of inherited status characterized by factors that may include socially enforced restrictions on marriage, social exclusion on the basis of perceived status, public segregation, and

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17. BACK, *supra* note 15, at 1–2.

18. *See supra* note 12 and accompanying text.

19. 481 U.S. 604 (1987).

20. *See id.* at 610.

21. *Id.* at 613 (emphasis added) (footnote omitted).

22. *Rice v. Cayetano*, 528 U.S. 495, 496 (2000) (citation omitted).

discrimination.<sup>23</sup> In this hierarchical system of social stratification, Black people occupied the lowest rung of the American caste system.

The caste–race analogy was first hinted at in South Asia in the late eighteenth century but did not flourish into a substantive debate until the middle of the nineteenth century. In contrast to the experience with the caste–race analogy that was tied to the development of anti-discrimination measures in the United States, the genesis of the discussions of this issue in South Asia was inextricably entwined with British colonialism. Eleanor Zelliott, who has written extensively about India, noted that the Indian languages have no general word for “race” as it is used in the West.<sup>24</sup> Before British colonialism, those who we now think of as practitioners of Hinduism were not thought to have a collective unified religious identity.<sup>25</sup> But the British were not only colonizers, they and other Europeans wrote a great deal about what they perceived or misperceived to be the social and cultural life of the South Asian people, including the caste–race issue.

One of the theories these scholars advanced during the second half of the nineteenth century about the origins of the caste system stems from the “Aryan Invasion Theory.” Indian historian Romila Thapar called the “Aryan question . . . probably [the] most complex, complicated question in the Indian history,”<sup>26</sup> and the theory continues to generate scholarly disputes.<sup>27</sup> It posits that one group of white Aryans, whose original homeland was either in Central Asia or the Arctic Circle, migrated into Europe, and another drifted into northern India. In northern India, these Aryan invaders conquered the indigenous people, eventually spreading their domination south to encompass much of South Asia. The Aryans created the caste system to maintain their control over the native population. Under this theory, high-caste South Asians can trace their roots to a different racial group than the indigenous people who became the low caste and Dalits. Thus, caste was perceived as reflecting racial differences. In addition, the shared Aryan ancestry allowed the high caste to argue for a genuine and real equality with their British

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23. This is the definition of caste that was used in SB 403 passed by the California General Assembly. See S.B. 403 § 1, 2023–2024 Reg. Sess. (Cal. 2023), [https://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=202320240SB403](https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB403) [<https://perma.cc/58PK-37FM>].

24. Eleanor Zelliott, *India’s Dalits: Racism and Contemporary Change*, GLOB. DIALOGUE, July 2010, at 1, 1.

25. RICHARD KING, ORIENTALISM AND RELIGION: POSTCOLONIAL THEORY, INDIA AND ‘THE MYTHIC EAST’ 99 (1999); see also Ben Heath, *The Impact of European Colonialism on the Indian Caste System*, E-INT’L RELS., Nov. 26, 2012, at 1, 1.

26. Romila Thapar, Acad. Staff Coll., Jawaharlal Nehru, Univ., Lecture on the Aryan Question Revisited (Oct. 11, 1999) (transcript available at <https://ascjnu.tripod.com/aryan.html> [<https://perma.cc/CY4L-MWCN>]).

27. See, e.g., THE INDO-ARYAN CONTROVERSY: EVIDENCE AND INFERENCE IN INDIAN HISTORY 468 (Edwin F. Bryant & Laurie L. Patton eds., 2005) (ebook) (“The purpose of this volume has been to bring together different voices and attempt to portray differing views on the origins of the Vedic speakers, that is, on whether the Indo-Aryan side of the family were immigrants into the Indian subcontinent, or indigenous to it.”).

colonizers. As Keshab Chandra Sen put it, high-caste Indians could assert to their British colonizers that they were long-lost “parted cousins.”<sup>28</sup>

Starting in the 1870s, however, some activists for low-caste and Dalit groups embraced the Aryan Invasion Theory but turned it on its head.<sup>29</sup> They argued that the high caste were the descendants of foreign invaders who imposed their hegemony on the indigenous inhabitants. As such, caste and Hinduism were merely religious trickery that allowed Brahmins and other high-caste members to maintain an unlawful domination over the true inhabitants.<sup>30</sup>

The Aryan Invasion Theory came under increasing attacks as the twentieth century unfolded. The framers of India’s Constitution rejected the Aryan Invasion Theory and its assertion that caste is a form of race.<sup>31</sup> They viewed caste and race as distinct concepts and wrote that into the Indian Constitution. After all, to view caste discrimination as race discrimination would equate the treatment of low caste and Dalits by the upper caste to the treatment inflicted by the British during colonialism to all of those on the Indian subcontinent. The Indian government reiterated its rejection of the caste–race analogy during debates about whether caste was a form of race during the United Nations’ (“U.N.”) World Conference Against Racism, Racial Discrimination, and Xenophobia (“WCAR”), held from August 31 to September 7, 2001, in Durban, South Africa.<sup>32</sup>

In addressing the issue of whether caste discrimination based on untouchability is a form of race discrimination under federal law, U.S. courts may question how the history of caste discrimination in South Asia impacts the interpretation of anti-discrimination law in United States and whether caste discrimination is viewed as race discrimination under anti-discrimination law in India. Anyone who does transnational inequality scholarship, however, quickly learns that legal issues are not resolved on a universal or global basis but on a local one. As Professor Prema A. Kurien has put it: “[U]niversalistic’ frames can obscure crucial particularities, making it harder to address the issue at hand.”<sup>33</sup>

When examining the legal treatment of issues such as subordination and oppression, each group in each society is dealing with how legal concepts like equality, liberty, freedom, and discrimination are defined and applied for a particular group at a particular place during a particular time. To demonstrate, take the historical treatment of Black people throughout the world, which has included both

28. Romila Thapar, *The Theory of Aryan Race and India: History and Politics*, 24 SOC. SCIENTIST 3, 8 (1996).

29. See JOTIRAO GOVINDRAO PHULE, *SLAVERY/GULAAMGIRI*, at iii–vi (1873).

30. *Id.* at 24.

31. See B.R. AMBEDKAR, *ANNIHILATION OF CASTE: WITH A REPLY TO MAHATMA GANDHI* 20 (2d ed. 1937) (ebook).

32. See generally CASTE, RACE AND DISCRIMINATION: DISCOURSES IN INTERNATIONAL CONTEXT (Sukhadeo Thorat & Umakant eds., 2004) (containing papers, which address issues related to caste, race, and discrimination, internalization of caste, present status of Dalit and similar groups from Nepal and Japan, alternative remedies against discrimination and inequality and other such issues).

33. Prema A. Kurien, *The Racial Paradigm and Dalit Anti-Caste Activism in the United States*, 70 SOC. PROBS. 717, 717 (2022).



discrimination and remedies for such discrimination. Whether a person should be viewed as a victim of discrimination or a beneficiary of remedies because of discrimination depends on the understanding of who is a “Black person” at a given place and at a given time.<sup>34</sup> For most of the twentieth century, the United States used the one-drop rule to determine Blackness.<sup>35</sup> Under this rule, one drop of Black blood made a person Black.<sup>36</sup> The one-drop rule replaced the older way to determine a person’s race by looking at blood fractions, appearance, and associations.<sup>37</sup> With the unfolding of the twenty-first century, however, Americans are witnessing the demise of the one-drop rule.<sup>38</sup> Since the 2000 census, documents that are used to collect and report racial and/or ethnic data to the federal government have increasingly allowed individuals not only to self-identify their race but also select all their racial and/or ethnic categories.<sup>39</sup> As a result, many individuals who would have been considered Black under the one-drop rule or earlier criteria are now viewed as multiracial or fitting into the “Two or More Races” category. José Cabranes has recounted the confusing attempts to apply conventional notions of race in the United States to the population of Puerto Rico during the early years of the twentieth century when the United States came into possession of the island after the Spanish–American War.<sup>40</sup> Puerto Ricans, mainland census administrators, and interpreters operated with different concepts of how to determine a person’s race. As pointed out above, on the mainland at the time, a drop of “Negro” blood made a person Black, but in Puerto Rico, a drop of white blood made a person white.<sup>41</sup> And, during the Apartheid Era in South Africa, the government recognized three dominant racial groups: Black, white, and colored.<sup>42</sup>

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34. This is a point that has long been accepted. As Ashley Montagu put it, “‘Race,’ it should always be remembered is a human grouping which is culturally defined in a given society.” ASHLEY MONTAGU, *MAN’S MOST DANGEROUS MYTH: THE FALLACY OF RACE* 137 (1964).

35. For a discussion of the history of the one-drop rule, see Kevin Brown, *The Rise and Fall of One-Drop Rule: How the Importance of Color Came to Eclipse Race*, in *COLOR MATTERS: SKIN TONE BIAS AND THE MYTH OF A POST-RACIAL AMERICA* 44, 44–94 (Kimberly Jade Norwood ed., 2013); see also Destiny Peery, *(Re)defining Race: Addressing The Consequences Of The Law’s Failure To Define Race*, 38 *CARDOZO L. REV.* 1817, 1844–64 (2017).

36. Brown, *supra* note 35, at 44.

37. *Id.* at 58.

38. For a discussion of the change in the United States from the one-drop rule to the more current definition of race, see Brown, *supra* note 35, at 44–47.

39. For an extended discussion of the changes in how the federal government has collected racial and ethnic data, see KEVIN BROWN, *BECAUSE OF OUR SUCCESS: THE CHANGING RACIAL AND ETHNIC ANCESTRY OF BLACKS ON AFFIRMATIVE ACTION* 48–64 (2014).

40. See José A. Cabranes, *Citizenship and the American Empire*, 127 *U. PA. L. REV.* 391, 421–22, 488 n.475 (1978).

41. *Id.* at 489 (quoting *PUERTO RICO RECONSTRUCTION ADMIN. IN COOPERATION WITH THE WRITERS’ PROGRAM OF THE WORKS PROGRESS ADMIN., PUERTO RICO: A GUIDE TO THE ISLAND OF BORIQUÉN* 110 (1940)).

42. See Deborah Posel, *Race as Common Sense: Racial Classification in Twentieth-Century South Africa*, 44 *AFR. STUD. REV.* 87, 98 (2001) (“Every citizen was to be

In this Article, we compare the broad features of the caste–race issue under federal anti-discrimination law in the United States with how the same issue was handled under anti-discrimination law in India, particularly in the Indian Constitution. As we perform this comparative study to highlight the caste–race issue under federal anti-discrimination law, it is best to keep in mind the Supreme Court’s admonition about the uses of scholarly writings to resolve legal issues:

Historians and other scholars who write . . . will have a different purpose and more latitude than do we. They may draw judgments either more laudatory or more harsh than the ones to which we refer. Our more limited role, in the posture of this particular case, is to recount events as understood by the lawmakers, thus ensuring that we accord proper appreciation to their purposes in adopting the policies and laws at issue.<sup>43</sup>

Thus, in our discussions of the caste–race issue under these two countries’ legal systems, we focus on what Professor Justin Desautels-Stein called the functionalist interpretation of race and ask “not what race *is*, but rather, what purpose does the articulation of race serve? What is the interest in using the idea of race as legal category? What is its function?”<sup>44</sup>

No one can deny that the history and cultures of India are vastly different from those of the United States. There is little question that the struggles of Black people in the United States against racial oppression are qualitatively different from the struggles of Dalits in India against caste discrimination based on untouchability. Yet sometimes the concepts addressing the struggle against oppression of one group in a particular place at a particular time are given a local meaning, and they are later applied to a different group at a different time. A prime example of this phenomenon is the caste–race issue in the United States that occurred at different places, times, and for very different reasons than it did in South Asia.

For an American legal mind, approaching the issue of caste in South Asia can be a baffling and bewildering intellectual exercise. The primary purpose of this Article is to simplify that exercise by distinguishing how the caste–race issue is understood under federal anti-discrimination law in the United States from how it is understood under anti-discrimination law in India. For purposes of applying U.S. anti-discrimination law, it is the history of the legal question of whether caste discrimination is a form of race discrimination that is relevant. While the legal treatment of the caste–race issue in South Asia is certainly of great interest to those addressing caste discrimination in the United States, it is, ultimately, a discussion that occurred at very different times and places, and for very different purposes, in South Asia than it did in the United States. The debates surrounding the caste–race issue in South Asia should not interfere with or supersede how the caste–race issue is understood under U.S. federal anti-discrimination law. Indeed, such discussions are largely irrelevant. For federal anti-discrimination law in the United States, there

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issued an identity document recording his or her race, as either ‘a white person, a coloured person or a Native,’ assessed according to the Act’s specific.” (footnote omitted)).

43. Rice v. Cayetano, 528 U.S. 495, 499–500 (2000).

44. Justin Desautels-Stein, *Race as a Legal Concept*, 2 COLUM. J. RACE & L. 1, 62 (2012).

are very cogent arguments that caste discrimination is a form of race discrimination. However, under the Indian Constitution, these are two distinct concepts. Thus, the caste–race issue can and does have a different resolution in India than it does under federal anti-discrimination law in the United States

The central question that U.S. courts need to resolve under federal anti-discrimination law, in order to determine if a person is a victim of race discrimination because of their membership in a particular caste, is whether a victim of caste discrimination is subjected to intentional discrimination because of their ancestry. If the answer is “yes,” then there almost certainly is what would be considered race discrimination under 42 U.S.C. § 1981 and § 1982 (and probably what would be considered race discrimination under the various titles of the Civil Rights Act of 1964). If the answer is “no,” then there is no claim for race discrimination.

Part I of this Article briefly discusses what caste and caste discrimination are in South Asia, with a special focus on discrimination based on untouchability, because it is the most severe form of caste discrimination. Part II discusses how the caste–race issue was resolved for anti-discrimination law in India’s Constitution, its first federal measure establishing India’s anti-discrimination scheme. India rarely needs to confirm that caste discrimination is different from race discrimination; however, such a situation arose during the conversations that surrounded the 2001 WCAR in Durban, South Africa. There, the government of India emphatically reaffirmed its position that caste discrimination is not race discrimination. Part II also covers this discussion. For purposes of the caste–race issue in the United States, the assumption that caste was a form of race is inextricably tied to the first race-based anti-discrimination measure passed by Congress. Part III discusses the origins of the caste–race issue for purposes of the Civil Rights Act of 1866. This history of the caste–race issue strongly points to the conclusion that caste discrimination based on untouchability is a recognized form of discrimination in the United States under the protected trait of race. Part IV discusses the caste–race issue for purposes of the Civil Rights Act of 1964. While this analysis is more complicated than it is for the 1866 Act, it also appears that caste discrimination is a form of race discrimination under the 1964 Act. This Article concludes that in determining the meaning of caste discrimination for federal anti-discrimination law in the United States, simply put, courts do not need to understand the baffling and bewildering uses of caste in India or under Indian law. They only need to address whether the discriminator’s actions toward the victim were motivated by caste considerations due to the victim’s ancestry.

## I. WHAT IS CASTE DISCRIMINATION?

Section I.A discusses the origins of the four-part caste system. Dalits constitute a sort of fifth group that was created at a later date. Section I.B discusses the creation of the Dalits, along with the caste discrimination that they have encountered for over a thousand years. Thinking of the caste system as part of a five-fold division that existed throughout South Asia obscures the complexity of the functioning of the caste system. In operation there are not just five major castes, but thousands of subcastes also known as *jatis*, and obligations attached to these

subcastes dictate how members live their lives. Finally, Section I.C delves into the complexity of the caste system.

#### A. *Origins of the Caste System*

The European credited with leading the first voyage to India during the Age of Discovery was the Portuguese explorer Vasco de Gama, in 1498. He noted that the society in South Asia consisted of endogamous groups fixed in permanent inferior and superior social positions.<sup>45</sup> The Portuguese used the word *casta* to describe the system, which is also a Spanish word meaning race or lineage.<sup>46</sup> The concept was also used within Spain's Latin American colonies during the seventeenth and eighteenth centuries to describe a caste system that categorized people based on racial ancestry.<sup>47</sup>

Despite the Portuguese and Spanish origins and uses of the word *casta*, discussions about caste systems normally relate to its practice in South Asia. For simplification, the caste system of South Asia can be thought of as consisting of four distinct hierarchically ranked social groups called *varnas*, or major occupational groupings, with a fifth group that was added later. We will refer to all of those in the first four groups, collectively, as "Caste Members." The system has existed for thousands of years.<sup>48</sup> For example, the Buddha, who lived about 2,500 years ago, preached against it.<sup>49</sup> This four-part division of society into separate *varnas* is also sanctioned by sacred Hindu scriptures including the Laws of Manu (or *Manusmriti*)<sup>50</sup> and the poems of the Ramayana and the Mahabharata.<sup>51</sup> But Professor Vivekanand Jha (and other scholars) point out that the first definite literary evidence of a four-tier hierarchical *varna* social system is found in the sacred Purusha Sukta hymn within the *Rigveda* (1500–1000 BCE).<sup>52</sup> This hymn recounts the divine origin

45. OLIVER CROMWELL COX, *CASTE, CLASS, & RACE: A STUDY IN SOCIAL DYNAMICS* 298 (1959).

46. Anup Hiwrale, *Caste: Understanding the Nuances from Ambedkar's Expositions*, 6 J. SOC. INCLUSION STUD. 78, 79 (2020).

47. To go further back, the roots of the word caste come from the Latin word *castus*, which means pure. *Id.*

48. See Srinivas, *supra* note 1, at 457.

49. See, e.g., GAIL OMVEDT, *DALITS AND THE DEMOCRATIC REVOLUTION—DR. AMBEDKAR AND THE DALIT MOVEMENT IN COLONIAL INDIA* 31 (1994) ("The caste system exists in the South Asian subcontinent and there only.") [hereinafter OMVEDT, *DALITS*]; see also B.R. AMBEDKAR, *THE BUDDHA & HIS DHAMMA* 66 (Aakash Singh Rathore & Ajay Verma eds., 2011) (footnote omitted); GAIL OMVEDT, *BUDDHISM IN INDIA: CHALLENGING BRAHMANISM AND CASTE* 2, 17 (2003) [hereinafter OMVEDT, *BUDDHISM*].

50. The Laws of Manu is an ancient Hindu text that describes the caste duties and obligations a person has towards himself and others, including moral and legal codes that govern caste order, but it does not mention Dalits either. Babasaheb Ambedkar, *Why Lawlessness is Lawful?*, in 5 DR. BABASAHEB AMBEDKAR WRITINGS AND SPEECHES 62, 64 (Dr. Ambedkar Found. 3d ed. 2020) (ebook).

51. OMVEDT, *DALITS*, *supra* note 49, at 22.

52. VIVEKANAND JHA, *CANDĀLA: UNTOUCHABILITY AND CASTE IN EARLY INDIA* 106 (2022).

of the caste system<sup>53</sup> as coming from the division of the original cosmic being, Purusha. The priestly caste, or Brahmins, came from his head;<sup>54</sup> Purusha's arms became the Kshatriyas, the princely and warrior caste;<sup>55</sup> and his stomach or thighs became the Vaishyas, the business and merchant caste.<sup>56</sup> Members of these three upper castes undergo special initiation religious ceremonies that make them “twice born,”<sup>57</sup> and the three groups are collectively referred to as “high-caste” or “forward-caste,” because of their dominance in the caste system.<sup>58</sup> In contrast to the auspicious spiritual origins of the high-caste Hindus, Purusha's feet became the low caste (“Shudras”).<sup>59</sup> The religiously imposed duty of Shudras is to serve the high castes.<sup>60</sup> At a much later date, around 700 CE, they were allowed to be peasants and farmers.<sup>61</sup> The legal term used for this caste in India is “Other Backwards Classes” (“OBCs”).<sup>62</sup> By population, they are the largest caste.<sup>63</sup>

By the end of the Vedic Period (about 600 BCE), the hereditary aspect of caste had emerged.<sup>64</sup> A clear separation of people into groups or castes with assigned social, religious, and economic rights now existed. Caste also determined occupations without the freedom for change. These distinctions crystalized with the practice of endogamy (or marriage within caste), residential segregation, and restrictions on inter-caste dining and social relations.<sup>65</sup> The theory of karma (or

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53. BABASAHEB AMBEDKAR, *Riddle No. 16: The Four Varnas—Are the Brahmins Sure of Their Origin?*, in 4 DR. BABASAHEB AMBEDKAR WRITINGS AND SPEECHES 189, 189–90 (Dr. Ambedkar Found. 3d ed. 2020) (ebook).

54. See DEVANESAN NESIAH, *DISCRIMINATION WITH REASON? THE POLICY OF RESERVATIONS IN THE UNITED STATES, INDIA AND MALAYSIA* 37 (1997).

55. See JHA, *supra* note 52, at 106.

56. See *id.*

57. See NESIAH, *supra* note 54, at 37.

58. See *id.*

59. See JHA, *supra* note 52, at 106.

60. G. BUHLER, *THE LAWS OF MANU* 428–29 (F. Max Müller ed., 1886).

61. Cf. JHA, *supra* note 52, at 106. See also BABASAHEB AMBEDKAR, *The Riddle of the Shudras*, in 7 DR. BABASAHEB AMBEDKAR WRITINGS AND SPEECHES 21, 23–26 (Dr. Ambedkar Found. 3d ed. 2020) (ebook).

62. MANORANJAN MOHANTY, *CLASS, CASTE, GENDER: READINGS IN INDIAN GOVERNMENT AND POLITICS* 209–10 (2004).

63. See *infra* notes 101–04 and accompanying text. According to Pew Research 35% of those surveyed indicated that they were Shudras. NEHA SAHGAL ET AL., PEW RSCH. CTR., *RELIGION IN INDIA: TOLERANCE AND SEGREGATION* 99 (2021), [https://www.pewresearch.org/wp-content/uploads/sites/20/2021/06/PF\\_06.29.21\\_India\\_full\\_report.pdf](https://www.pewresearch.org/wp-content/uploads/sites/20/2021/06/PF_06.29.21_India_full_report.pdf) [<https://perma.cc/R9P6-JU55>]. The Mandal Commission's report that was submitted to Indian President N.S. Reddy on December 31, 1980, estimated the percentage of OBCs at 52%. See Aparna Alluri & Zoya Mateen, *Caste Census: Clamour to Count India Social Groups Grows*, BBC (Aug. 23, 2021), <https://www.bbc.com/news/world-asia-india-58141993> [<https://perma.cc/HDP5-PMLF>]; B. R. AMBEDKAR, *WHO WERE THE SHUDRAS?: HOW THEY CAME TO BE THE FOURTH VARNA IN THE INDO-ARYAN SOCIETY*, at ii (1946) (“[E]xcluding the Untouchables[,] the Shudras form about 75 to 80 percent of the population of Hindus.”).

64. JHA, *supra* note 52, at 106.

65. BABASAHEB AMBEDKAR, *The Hindu Social Order: Its Essential Principles*, in 3 DR. BABASAHEB AMBEDKAR WRITINGS AND SPEECHES 95, 102–04 (Dr. Ambedkar Found. 3d ed. 2020) (ebook).

deeds) and rebirth developed to justify the status of each caste based on past deeds. One's present birth is determined by past birth, and the future birth by the present, thus leaving no opportunity to change one's present caste assignment by effort or deed in this life.<sup>66</sup> Such a change will have to wait until the next life.

The post-Vedic Period (600–200 BCE) is marked by the emergence of an even more stratified society and the consolidation of the *varna* structure. The texts of the Dharma Sutras are a collection of the earliest source of Hindu laws (600–300 BCE). They placed the hierarchical social position and occupational roles of the four *varnas* in a legal setting and detailed the privileges of the first three twice-born *varnas*, demarcating them clearly from the Shudras, who were saddled with numerous and varied disabilities.<sup>67</sup>

### ***B. Origins of Dalits and Caste Discrimination Based on Untouchability***

Dalits constitute a sort of fifth group separate from the four-fold system. According to the 2011 Indian census, out of India's 1.2 billion people, Dalits made up about 200 million, or around 16.6% of the country's population.<sup>68</sup> Dalits are also known as "untouchables," "pariahs," or "outcasts" because they were not included in the Purusha Sukta and, thus, religiously excluded from the four-fold caste system.<sup>69</sup> What differentiates Dalits from low-caste members is the belief that Dalits are infected with a sort of irredeemable and permanent religious pollution that is passed down from generation to generation. For Caste Members, this religious pollution is also contagious, though not permanent. Dalits are also viewed as untouchables because if their shadow (approximately 6 feet) touches Caste Members, the higher-caste members must do purification rituals to decontaminate themselves.<sup>70</sup> This need for physical distancing is reminiscent of the social distancing requirements the world observed during the COVID-19 pandemic.<sup>71</sup>

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66. BABASAHEB AMBEDKAR, *Philosophy of Hinduism*, in 3 DR. BABASAHEB AMBEDKAR WRITINGS AND SPEECHES, *supra* note 65, at 3, 25.

67. AMBEDKAR, *supra* note 63, at ii, 25–26, 35–36 (mentioning the conversion of caste system, which evolved from a custom and ideal, later into law that was made legally binding by the State and society).

68. See, e.g., Ahmad Adil, *India's 'Black Untouchables' Still Fighting for Social Justice*, ANADOLU AGENCY (Nov. 2, 2022), <https://www.aa.com.tr/en/asia-pacific/indias-black-untouchables-still-fighting-for-social-justice/2499850> [<https://perma.cc/75JS-XN8E>].

69. OLIVER MENDELSON & MARIKA VICZANY, *THE UNTOUCHABLES: SUBORDINATION, POVERTY AND THE STATE IN MODERN INDIA* 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* 97, 115 (2019); see also Sanjoy Chakravorty, *Viewpoint: How the British Reshaped India's Caste System*, BBC (June 18, 2019), <https://www.bbc.com/news/world-asia-india-48619734> [<https://perma.cc/G46E-3HK9>].

70. See BABASAHEB AMBEDKAR, *From Millions to Fractions*, in 5 DR. BABASAHEB AMBEDKAR WRITINGS AND SPEECHES, *supra* note 50, at 229, 242.

71. Cf. GHANSHYAM SHAH ET AL., *UNTOUCHABILITY IN RURAL INDIA* 106 (2006). Ritually unclean occupations include those associated with animal carcasses or human death, as well as objectively dirty and dangerous jobs such as cleaning sewage tanks and manual

Caste members not only refused to allow Dalits into their homes but also into their communities. Dalit living facilities were segregated from those of Caste Members and relegated to the outskirts of villages and towns. Dalits were banned from Hindu temples, formal education, public wells, walking on roads in broad daylight, and wearing clean clothes.<sup>72</sup> Caste practices also excluded Dalits from engaging in business activities and owning property or housing.<sup>73</sup> If Dalits violated caste laws, they were subjected to violent punishments.<sup>74</sup>

Historically, the status of the Dalits was associated with occupations regarded as ritually too filthy or polluting for Caste Members.<sup>75</sup> Dalits were and are typically engaged in manual scavenging,<sup>76</sup> cleaning streets, removing trash and bodies, cleaning toilets, maintaining sewage systems that tend to involve substantial manual labor, collecting cow manure and turning it into cooking fuel, slaughtering animals, digging wells for water, and performing agricultural labor as landless peasants.<sup>77</sup>

Because assignment of occupations is a fundamental tenet of the caste system, caste discrimination is sometimes referred to in U.N. forums as discrimination based on “work and descent.”<sup>78</sup> The former U.N. High Commissioner for Human Rights summarized the treatment of Dalits by stating that the caste system condemns many individuals and communities “to a life of exploitation,

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scavenging (the removal of human excrement by hand from dry latrines, which is unlawful in India yet still widespread). *See id.*

72. 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. BLACK LETTER L.J. 3, 4 (2008).

73. *See generally* SUKHARDEO THORAT & KATHERINE S. NEWMAN, *Introduction*, in *BLOCKED BY CASTE: ECONOMIC DISCRIMINATION IN MODERN INDIA* (Sukhadeo Thorat & Katherine S. Newman eds., 2012).

74. 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).

75. *See generally* B. R. AMBEDKAR, *PERSPECTIVES ON SOCIAL EXCLUSION AND INCLUSIVE POLICIES* (Sukhadeo Thorat & Narendra Kumar eds., 2008) (describing the historic treatment of Dalits); *see also* SHAH ET AL., *supra* note 71, at 106; 1 GOV’T OF INDIA, *REPORT OF THE BACKWARD CLASSES COMMISSION* 30–31 (1955).

76. Manual scavenging is a caste-based occupation often performed by Dalit women. It entails the removal of human excrement from dry latrines and sewers, often without any protective gear. Manual scavengers are often also tasked with handling animal carcasses and excrement, cleaning septic tanks, and cremating unclaimed corpses. *See generally* HUM. RTS. WATCH, *CLEANING HUMAN WASTE: “MANUAL SCAVENGING,” CASTE, AND DISCRIMINATION IN INDIA* (2014). For a discussion of a group of American legal academics visiting a village of manual scavengers see ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* 73 (2020) (ebook).

77. Brown & Sitapati, *supra* note 72, at 4.

78. *See, e.g., Guidance Tool on Descent-Based Discrimination: Key Challenges and Strategic Approaches to Combat Caste-Based and Analogous Forms of Discrimination*, U.N. NETWORK ON RACIAL DISCRIMINATION & PROT. OF MINORITIES 11 n.17 (2017), <https://www.ohchr.org/sites/default/files/Documents/Issues/Minorities/GuidanceToolDiscrimination.pdf> [<https://perma.cc/7NFN-AZQP>].

violence, social exclusion and segregation,” and it “is the very negation of the human rights principles of equality and non-discrimination.”<sup>79</sup>

The untouchable caste is believed to have emerged at a later stage than the other four.<sup>80</sup> For example, the Laws of Manu did not mention untouchability, but under them, discriminations and disabilities that became attached to untouchables were inflicted on Shudras.<sup>81</sup> However, Manu did recognize the existence of Chandalas, who were outside the four castes and later became included among the untouchables.<sup>82</sup>

Opinions differ regarding the origin of the Dalits.<sup>83</sup> During the time of the *Rigveda* (about 1500–1000 BCE), there were no signs of untouchability.<sup>84</sup> Professor Jha argues that untouchability took firm and definite shape around 200 CE.<sup>85</sup> But early signs date back to 600 BCE, when the use of milk provided by Shudras was forbidden at certain religious activities.<sup>86</sup> The first Sanskrit use of the word “untouchable” appears in the *Vishnu Smriti*, a text dating to about 300 CE.<sup>87</sup> The most renowned Dalit intellectual of all time, Dr. Ambedkar,<sup>88</sup> places the date for the emergence of untouchability—as a permanent and hereditary impurity of a community—at around 400 CE.<sup>89</sup> He ties it to the “struggle for supremacy between Buddhism and Brahmanism.”<sup>90</sup> He further argues that untouchability became firmly established sometime between 600 and 1200 CE.<sup>91</sup>

Professor Jha attributed the origins of untouchability to the deep-rooted taboos regulating communal and connubial behavior of different groups. But Ambedkar attributed it to the contempt and hatred of tribal people, whom he called “broken people” and whom were viewed with contempt due to their belief in

79. Off. of the High Comm’r for Hum. Rts., *Opinion Piece: Tearing Down the Wall of Caste*, UNITED NATIONS (Oct. 19, 2009), <https://www.ohchr.org/en/opinion-editorial/2009/10/opinion-piece-tearing-down-wall-caste> [<https://perma.cc/AU8H-TSK4>].

80. For example, B.R. Ambedkar argued that they were a product of a struggle between Buddhists and Hinduism in the fourth century. See B. R. AMBEDKAR, *THE UNTOUCHABLES: WHO WERE THEY AND WHY THEY BECAME UNTOUCHABLES* 155 (1948).

81. BABASAHEB AMBEDKAR, *The Brahmanic Theory of the Status of the Shudras*, in 7 DR. BABASAHEB AMBEDKAR WRITINGS AND SPEECHES, *supra* note 61, at 42–43.

82. Gen’ichi Yamazaki, *Introduction: Social Discrimination in Ancient India and its Transition to the Medieval Period*, in 1 CASTE SYSTEM, UNTOUCHABILITY AND THE DEPRESSED 3, 13–14 (H. Kotani ed., 1997) (pointing to the emergence of untouchables as a fifth caste with the combining of Ati-Shudra impure Shudra and the out castes, which the Chandala was the main caste).

83. For example, Professor Vivekanand Jha views the roots as going back to 600 BCE, but Ambedkar suggests a beginning of untouchability at around 400 CE. Compare JHA, *supra* note 52, at 106, with AMBEDKAR, *supra* note 80, at 155.

84. JHA, *supra* note 52, at 62–82.

85. *Id.* at 73.

86. Vivekanand Jha, *Caste, Untouchability and Social Justice: Early North Indian Perspective*, 25 SOC. SCIENTIST 19, 23 (1997).

87. *See id.* at 68.

88. *See infra* notes 154–56 and accompanying text.

89. AMBEDKAR, *supra* note 80, at 155.

90. *Id.*

91. *See id.* at 154–55.



Buddhism and their consumption of beef after others had given up the practice. By 600 CE, those Shudra subcastes that continued to be viewed as polluted, known as Ati-Shudras, were pushed into the untouchable community, and the other (“pure” or “non-polluting”) Shudra subcastes became relatively free of disabilities related to untouchability.<sup>92</sup>

### C. Complexity of Subcastes, or Jatis

Conceptualizing the caste system as a five-fold division that presupposes a sort of pan-Indian or pan-South Asia schema for divisions in society obscures how complex and complicated the functioning of the caste system is.<sup>93</sup> Generally speaking, most Americans think of India as a nation with a long history. Modern-day India, however, only came into existence with the end of British colonialism in the 1940s. But civilization has existed on the Indian subcontinent for thousands of years. Several different empires and kingdoms rose and fell in different regions of the subcontinent at different times. The long history of the land of South Asia is that of clusters of neighboring villages that could claim “a large degree of self-sufficiency” regarding “the production of basic needs,” with an “overarching value in the culture [of] contentment with one’s lot.”<sup>94</sup>

In the caste system’s actual operation, there are not five major castes but thousands of subcastes or *jatis*,<sup>95</sup> “ranging from small groups of a few hundred individuals to large groups numbering a few million.”<sup>96</sup> Subcaste membership is what dictates how individuals should live their lives. The fundamental principle of the *jati* system is graded inequality.<sup>97</sup> Anand Teltumbde has described the system as “a continuum of infinite castes strung loosely within the Varna framework with a notion of hierarchy that unleashes a million contentions within but leaves the macro-

92. See JHA, *supra* note 52, at 19.

93. See Ishita Banderjee-Dube, *Caste, Race and Difference: The Limits of Knowledge and Resistance*, 62 CURRENT SOCIO. 451, 512, 515–16, 519 (2014).

94. See Srinivas, *supra* note 1, at 455.

95. See Amit Thorat & Omkar Joshi, *The Continuing Practice of Untouchability in India: Patterns and Mitigating Influences*, 55 ECON. & POL. WKLY. 36, 36 (2020).

96. See NESIAH, *supra* note 54, at 36.

97. Professor Thorat asserts that there are:

[T]hree unique features of the caste system [that] need to be understood. In social sphere the caste system involves (a) division of people in social groups (castes); (b) the social, religious, cultural and economic rights of member of the caste are predetermined in advance by birth into that caste and are hereditary an un-equal distribution of these rights across caste groups; and (c) provision of a mechanism of social and economic ostracism, calculated to ensure rigid adherence to the system and justification of the Hindu social system by philosophy.

In the sphere of economic rights, this concept of social order also lays down a scheme of distribution namely, (a) it fixes the occupations for each caste by birth and its hereditary continuation; (b) unequal distribution of these economic rights related to property, trade, employment, wages, education, etc, among the caste groups; and (c) imposing a hierarchy of occupation.

Sukhadeo Thorat, *Oppression and Denial: Dalit Discrimination in the 1990s*, 37 ECON. & POL. WKLY. 572, 573 (2002).

structure unchallenged.”<sup>98</sup> Thus, *jatis* are placed in a social system that carries with it an ascending scale of reverence and a descending scale of contempt.<sup>99</sup> As Dr. 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.”<sup>100</sup>

Under the pressures of secularism and modernity, the system is breaking down, especially in urban areas.<sup>101</sup> According to a 2021 Pew Research Center report on India, Brahmins are about 4% of the population of India today.<sup>102</sup> However, 25% of Indians saw themselves as members of a “Scheduled Caste,” which is the legal term used to describe the Dalits,<sup>103</sup> and 35% saw themselves as members of OBCs.<sup>104</sup> Only 20% said that there is a lot of caste discrimination in the country,<sup>105</sup> but Indians still conduct their social lives largely based upon their caste duties. For example, just under a majority of Indians say that their close friends are mostly members of their own caste, including roughly one-quarter who said that all their close friends are from their caste.<sup>106</sup> Almost three out of every ten Brahmins said that “they would not be willing to accept” a Scheduled Caste member as a neighbor,<sup>107</sup> and over 60% of respondents, including 64% of Brahmins and 61% of Scheduled Caste/Tribe<sup>108</sup> members, felt that it is crucial to stop inter-caste marriages.<sup>109</sup> This contrasts with a similar report on interracial marriage in the United States conducted at the same time

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98. ANAND TELTUMBDE, *DALITS: PAST, PRESENT, AND FUTURE* 25 (2017); *see also* Kurien, *supra* note 33, at 720 (citation omitted).

99. *Cf.* TELTUMBDE, *supra* note 98, at 84.

100. S. D. Kapoor, *B R Ambedkar, W E B DuBois and the Process of Liberation*, 38 *ECON. & POL. WKLY.* 5344, 5346 (2003) (quoting DHANANJAYA KEER, *DR. AMBEDKAR: LIFE AND MISSION* 41 (3d ed. 1994)).

101. Srinivas, *supra* note 1, at 457.

102. SAHGAL ET AL., *supra* note 63, at 96.

103. “In 1935, the British government developed a list of Dalit sub-castes that it defined as the ‘Schedule Castes.’ After Independence, the Indian Constitution continued to use the term ‘Schedule Castes.’ Thus, all official documentation refers to Dalits as ‘Scheduled Castes.’” Brown & Sitapati, *supra* note 72, at 15 (footnotes omitted). This Article uses the terms Dalits and “Schedule Castes” interchangeably.

104. SAHGAL ET AL., *supra* note 63, at 99.

105. *See id.* at 100.

106. *Id.* at 105.

107. *Id.* at 103.

108. Scheduled Tribes are a legal concept defined in Article 366, clause 25 of the Indian Constitution. Scheduled tribes are “such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution.” India Const. art. 366, cl. 25. Scheduled Tribes are local groups that are not part of the caste system but tend to live in secluded countryside communities. Because Scheduled Tribes have a very low economic status, they are sometimes lumped in with Dalits. However, because they are not part of the caste system, discussion of discrimination against them is beyond the scope of this Article.

109. SAHGAL ET AL., *supra* note 63, at 106.

that found that 4% of non-white and 7% of white adults disapprove of interracial marriage.<sup>110</sup>

## II. THE CASTE–RACE ISSUE IN SOUTH ASIA

South Asia is one of the first places where humanity developed civilizations. While the origins of the caste system are in the distant past, the issue of whether caste discrimination is a form of race discrimination is a relatively recent occurrence. The first time the caste–race issue became a subject of debate for South Asia occurred during the period of British colonialism.

The issue was introduced with the Aryan Invasion Theory, which is addressed in Section II.A. The theory was developed by European scholars in the last half of the nineteenth century in their studies of the history of the Indian subcontinent. It posits that high-caste members are descendants of a group of white Aryans from either Central Asia or the Arctic Circle who conquered the native people and set up the caste system to maintain their control. If the theory is accepted, then there is a racial difference between the high castes, the low caste, and the Dalits. Section II.B discusses caste critic Jyotiba Phule and other low caste and Dalit activists who embraced the Aryan Invasion Theory by repurposing it. They asserted that since high-caste members are descendants of foreign invaders, they are not the rightful heirs of South Asia. The Aryan Invasion Theory has come under heavy criticism for the past 100 years. Section II.C addresses the core criticisms of the theory. Dr. Ambedkar, who is the leading Dalit intellectual of all time, flatly rejected the theory and the notion that caste was a form of race. Section II.D discusses Ambedkar’s view of the caste–race issue. Dr. Ambedkar would become the Chairman of the Indian Constitution Drafting Committee. The Indian Constitution, which was ratified in 1950, clearly embodies the idea that caste is separate and distinct from race. This has been the position of Indian anti-discrimination law since the founding of the nation, and it was emphatically affirmed by the government of India in 2001 at the WCAR. Section II.E discusses how the Indian Constitution recognized caste as separate from race and how that understanding was reiterated at the WCAR.

### A. *Origins of the Caste–Race Issue: Aryan Invasion Theory*

The issue of whether caste discrimination is a form of race discrimination has been a very contentious subject in South Asia. Even though caste has existed for thousands of years, the caste–race debate has been around for less than 250 years. As the former Director General of the Archaeological Survey of India B. B. Lal<sup>111</sup> put it, the Aryan Invasion Theory “was in an embryonic stage in the eighteenth

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110. Justin McCarthy, *U.S. Approval of Interracial Marriage at New High of 94%*, GALLUP (Sept. 10, 2021), <https://news.gallup.com/poll/354638/approval-interracial-marriage-new-high.aspx> [https://perma.cc/4MP6-JHCM].

111. THE INDO-ARYAN CONTROVERSY: EVIDENCE AND INFERENCE IN INDIAN HISTORY, *supra* note 27, at viii.

century, acquired adolescence in the nineteenth and entered its full adulthood in the first part of the twentieth century.”<sup>112</sup>

The first remarks that built towards the theory was the observation made in 1786 by Calcutta High Court Judge Sir William Jones. He asserted that Sanskrit, Greek, and Latin were languages from a common source:

The *Sanscrit* language, whatever be its antiquity, is of a wonderful structure; more perfect than the Greek, more copious than the *Latin* and more exquisitely refined than either; yet bearing to both of them a stronger affinity both in the roots of verbs, and in the forms of grammar, than could possibly have been produced by accident; so strong, indeed, that no philologer [sic] could examine them all three, without believing them to have sprung from some common source, which, perhaps, no longer exists.<sup>113</sup>

Over time, this linguistic observation of the similarities between these languages would form the basis of the evidence for the Aryan Invasion Theory. German comparative philologists in the 1840s and 1850s asserted that “the speakers of Indo-European languages in India, Persia, and Europe were of the same culture and race, descendants of one primitive tribe of proto-Indo-European speakers which had lived north of the Hindu Kush.”<sup>114</sup> British scholar Joan Leopold noted, “From 1850–70 perhaps the majority of comparative philologists accepted the principle that in the classification of contemporary human ‘races,’ linguistic criteria were the most reliable and should supersede as yet scarcely formularized ethnological criteria such as hair, eye and cuticle colour or cranial and skeletal measurement.”<sup>115</sup>

There were different versions of the Aryan Invasion Theory. One was developed primarily between 1849 and 1874 by German-born philologist, Orientalist, and professor of comparative philology at Oxford University, Friedrich Max Müller.<sup>116</sup> Müller was one of the first Western academics to study India and comparative religion.<sup>117</sup> As a young scholar in 1847, Müller arranged to oversee the printing of the *Rigveda* in England.<sup>118</sup>

Though he never visited India, using linguistic analysis, Müller argued for the common descent and legitimate relationship between the Hindu, Greek, and

112. B. B. Lal, *Aryan Invasion of India: Perpetuation of a Myth*, in *THE INDO-ARYAN CONTROVERSY: EVIDENCE AND INFERENCE IN INDIAN HISTORY*, *supra* note 27, at 50, 61.

113. William Jones, *The Third Anniversary Discourse*, in *ASIATIC RESEARCHES; OR TRANSACTIONS OF THE SOCIETY, INSTITUTED IN BENGAL, FOR INQUIRING INTO THE HISTORY AND ANTIQUITIES, THE ARTS, SCIENCES, AND LITERATURE, OF ASIA* 344, 348–49 (1884); *see also* B. B. Lal, *Aryan Invasion of India: Perpetuation of a Myth*, in *THE INDO-ARYAN CONTROVERSY: EVIDENCE AND INFERENCE IN INDIAN HISTORY*, *supra* note 27, at 50.

114. Joan Leopold, *The Aryan Theory of Race*, 7 *INDIAN ECON. & SOC. HIST. REV.* 271, 271 (1974).

115. Joan Leopold, *British Applications of the Aryan Theory of Race to India, 1850–1870*, 89 *ENG. HIST. REV.* 578, 579 (1974).

116. Thapar, *supra* note 28, at 5.

117. *Cf.* Thapar, *supra* note 28, at 5.

118. Leopold, *supra* note 115, at 582.

Teuton, as well as the blood tie of the Englishman and the Bengali.<sup>119</sup> He asserted that a group of people of shared Aryan origin in Central Asia divided into two groups, one that migrated to Europe while the other went to Iran.<sup>120</sup> From Iran, another group traveled into northern India, where they conquered the indigenous people there and brought the language of Sanskrit with them.<sup>121</sup> These Aryans fashioned the caste system to maintain their dominance. The indigenous people were of the Dravidian race and became the Shudras and Dalits.<sup>122</sup> Thus, high-caste Hindus, especially the Brahmins, descended from white foreign invaders who migrated from Central Asia and conquered the northern part of India before spreading southwards. Müller referred to these two different groups using terms including “nation,” “people,” “blood,” and “race.”<sup>123</sup>

Another version of the Aryan Invasion Theory was endorsed by Bal Gangadhar Tilak, an influential Indian freedom fighter who was one of the first popular leaders of the Indian independence movement.<sup>124</sup> Tilak did not base his argument for the theory on archeological or linguistic data but on constellations and their mention in various books of the *Rigveda*.<sup>125</sup> His version differed from Müller’s, but due to Tilak’s influence, his theory should be considered relevant to the caste–race issue in South Asia. Rather than Müller’s Central Asian origins for the Aryans, the theory Tilak endorsed traced their origins back to a Nordic homeland and suggested they had migrated from the Arctic regions in the post-glacial age.<sup>126</sup> One group branched off and went into Europe but lapsed into barbarism, while a different group migrated into India and maintained their superior civilization.<sup>127</sup> 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.<sup>128</sup>

Even though there is no archaeological evidence to support the theory of an invasion or migration of Indo-Aryan peoples, for decades the Aryan Invasion Theory was accepted by many high-caste members of South Asia. They could use

119. *Id.*; see also *id.* at 580 (“Though the historian may shake his head, though the physiologist may doubt, and the poet scorn the idea, all must yield before the facts furnished by language.” (citation omitted)).

120. *Id.* at 580 n.4.

121. See Thapar, *supra* note 28, at 5, 9.

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

123. *Id.* at 34.

124. See Thapar, *supra* note 28, at 8; see also Sukeshi Karma, *Bal Gangadhar Tilak*, OXFORD BIBLIOGRAPHIES, <https://www.oxfordbibliographies.com/display/document/obo-9780195399318/obo-9780195399318-0214.xml> [https://perma.cc/358Q-22T9] (Feb. 27, 2019) (“Bal Gangadhar Tilak (b. 1856–d. 1920) has been one of the Indian freedom movement’s more contentious leaders.”).

125. Laurie L. Patton, *Introduction*, in *THE INDO-ARYAN CONTROVERSY: EVIDENCE AND INFERENCE IN INDIAN HISTORY*, *supra* note 27, at 1, 12.

126. See Thapar, *supra* note 28, at 8; 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).

127. Thapar, *supra* note 28, at 8.

128. TILAK, *supra* note 126, at iii. Tilak discusses the help he received from Müller in the Preface of his book. See *id.* at iii–iv.

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.”<sup>129</sup> The shared ancestry allowed these high-caste members to argue for a genuine and real equality with their British colonizers. Thus, during the second half of the nineteenth century, colonialism provided a powerful incentive for the emerging middle-class intelligentsia in India to assert its racial and cultural equality with the West.<sup>130</sup>

***B. Aryan Invasion Theory Applied by the Lower Caste and Dalits***

One of the foremost critics of the Indian caste system was Jotirao Phule, whom the late renowned Indian scholar Gail Omvedt called the first major social revolutionary and the main founder of the modern anti-caste movement in the nineteenth century.<sup>131</sup> Phule was an Indian activist, thinker, and social reformer from the modern-day western Indian state of Maharashtra, whose capital city is Mumbai. He belonged to a Shudra sub-caste, whose traditional occupation was gardening.<sup>132</sup> Due to the lack of established communication links between lower-caste groups in India, however, Phule’s movement was not well-known outside of his home state.

Though Phule sought to unite Shudras and Dalits, he knew that the Dalits received more of the brunt of caste-based oppression. Phule created schools for the low castes and Dalits and preached rational thinking among them to facilitate their rejection of Brahmanical rituals. He also created a group called “Satyashodhak Samaj” (Society of Seekers of Truth) to pursue equal rights for peasants and those from the lower castes.<sup>133</sup> This organization was open to people of all castes, and its members were committed to the notion that all human beings are children of one God; accordingly, all are brothers and sisters.

Phule’s famous 1873 book, *Gulamgiri* (meaning “slavery”),<sup>134</sup> expounded upon his criticism of the caste system. Interestingly, Phule also connected the struggle against caste oppression in South Asia to the oppression of Black people in the United States—a connection that continues to exist among Dalits in India to this day.<sup>135</sup> Phule dedicated his book to the American people:

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129. Thapar, *supra* note 28, 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).

130. Sankaran Krishna, *A Postcolonial Racial/Spatial Order: Gandhi, Ambedkar, and the Construction of the International*, in *RACE AND RACISM IN INTERNATIONAL RELATIONS: CONFRONTING THE GLOBAL COLOUR LINE* 139, 141 (Alexander Anievas et al. eds., 2014).

131. *See* OMVEDT, *DALITS*, *supra* note 49, at 97; *see also* Daniel Immerwahr, *Caste or Colony? Indianizing Race in the United States*, 4 *MOD. INTELL. HIST.* 275, 277 (2007).

132. Banderjee-Dube, *supra* note 93, at 519.

133. *See* OMVEDT, *DALITS*, *supra* note 49, at 11, 98.

134. *See generally* PHULE, *supra* note 29.

135. The Dalit Panthers were established in the spring of 1972 by a group of Dalit poets and writers. The group’s creation was inspired by the Black Panthers of America; the Dalit Panthers identified strongly with the “militant literature, community service, and political struggle” of the African American. For information about the Dalit Panthers, *see*

Dedicated to the Good People of the United States as a token of admiration for their sublime disinterested and self sacrificing devotion in the cause of Negro Slavery; and with an earnest desire, that my countrymen may take their noble example as their guide in the emancipation of their Sudra Brethren from the trammels of Brahmin thralldom.<sup>136</sup>

Phule built his criticism of the Indian caste system on Müller’s Aryan Invasion Theory, but he flipped the theory on its head.<sup>137</sup> He agreed that the high-caste Hindus, especially the Brahmins, were foreign invaders who conquered the northern part of India.<sup>138</sup> These “aliens” were the ones that developed the caste system to perpetuate their control.<sup>139</sup> Thus, for Phule, the indigenous people were the rightful inheritors of the land. They were victimized by the caste system that was imposed on them by foreign invaders who had sought to keep them permanently subordinated. Phule asserted, “Since the advent of the rule of Brahmin for centuries (in India), the Shudras and the Ati-Shudras [Dalits] are suffering hardships and are leading miserable lives.”<sup>140</sup> For Phule, Dalits and Shudras were blood brothers whose lineage came from the same family stock. He criticized the caste system and the religious, economic, and social oppression that it visited upon the native inhabitants. Phule’s theory gained popularity with a number of lower-caste, non-Brahmin movements.<sup>141</sup>

Another powerful non-Brahmin movement was launched by low-caste leader E. V. Ramaswamy (also known as Periyar) on the other side of India, in the eastern, modern Indian state of Tamil Nadu. Though Periyar was low-caste, Eleanor Zelliott points out that he is one of six or seven leaders whom Dalits hold in high esteem.<sup>142</sup> Periyar originally joined Mohandas K. Gandhi’s Indian National Congress Party in 1919. Even though the Congress Party had members who were

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generally J.V. PAWAR, DALIT PANTHERS: AN AUTHORITATIVE HISTORY (Rakshit Sonawane trans., 2018). Dalit capitalism was inspired by Black capitalism. Chandra Bhan Prasad is widely regarded by many in India as one of the Dalits most significant intellectuals and political commentators. Prasad openly admits that Black capitalism in the United States was his inspiration for Dalit capitalism. See Nissim Mannathukkaren, *The Chimera of Dalit Capitalism*, THE HINDU, <https://www.thehindu.com/opinion/op-ed/The-chimera-of-Dalit-capitalism/article12011003.ece> [https://perma.cc/YC7W-3JRU] (Dec. 4, 2021, 11:21 PM). Black Lives Matter Movement inspired protests by Dalits in India. See *In India, a Revolution of the Untouchables*, PAC. STANDARD (Oct. 10, 2016), <https://psmag.com/news/in-india-a-revolution-of-the-untouchables> [https://perma.cc/W5LL-HZQP].

136. PHULE, *supra* note 29, at *Dedication*.

137. Other low caste and Dalit activist also followed this line of thinking. For example, Gopal Baba Valankgkar, who was a close associate of Phule, used the Aryan invasion to assert that Dalits were almost the only original inhabitants of India. For Valankgkar, Brahmins and upper castes of the south and west were descendants of Australian Semitic-Non-Aryans, Black Africans, Barbary Jews and Turks. Banderjee-Dube, *supra* note 93, at 520.

138. PHULE, *supra* note 29, at 24.

139. OMVEDT, DALITS, *supra* note 49, at 97–98.

140. PHULE, *supra* note 29, at xviii.

141. See Thapar, *supra* note 28, at 8.

142. See Zelliott, *supra* note 24, at 4.

Parsis and Muslims, the majority were high-caste Hindu males who, for the most part, were Brahmins.<sup>143</sup> Periyar resigned from the Congress Party in 1925, condemning it for its high-caste orientation.

He created a self-respect movement that preached atheism and propagated humanism, rationalism, and scientific thinking. His movement was anti-Hindu, anti-Brahmin, and anti-Aryan. Periyar argued that the lower castes in south India are descendants of the original inhabitants of South Asia, the Dravidian people. The Brahmins, who are Aryan descendants, are therefore racially different from the lower castes.<sup>144</sup> Periyar would go so far as to embrace the creation of a separate, independent Dravidian state. He did not drop this demand until 1962.<sup>145</sup>

### C. Criticisms of the Aryan Invasion Theory

The scholarly debate about whether Aryan conquerors came from outside India has continued, with supporters on both sides of the debate.<sup>146</sup> Müller, like many of the Christian scholars of his day, took for granted the Biblical chronology that placed the creation of the world at around 4000 BCE and the Great Flood at around 2500 BCE. Thus, he set the date of the *Rigveda* at around 1200 BCE.<sup>147</sup> Since the Indus Valley culture predated this time, it had to be pre-Aryan and conquered by the Aryans.

Archaeological excavations at the sites of the Indus Valley civilizations of Harappa and Mohenjo-Daro in the 1920s, however, provided proof of the antiquity of Indian civilization, pushing the date of its creation to the third millennium BCE.<sup>148</sup> The initial discovery was followed up by large-scale excavations at both sites. In addition, it was clear that India's civilizations covered more area than the contemporary Egyptian and Mesopotamian civilizations. In fact, India's own high civilization may have even surpassed, in some ways, those of Egypt and Mesopotamia.

Critics of the Aryan Invasion Theory objected to the notion that high culture in India resulted from foreign invaders.<sup>149</sup> They viewed such theories as the product of intrusive Western scholarly influences.<sup>150</sup> Some of these critics pointed

143. GAIL OMVEDT, *REINVENTING REVOLUTION: NEW SOCIAL MOVEMENTS AND THE SOCIALIST TRADITION IN INDIA* 10 (1993).

144. OMVEDT, *DALITS*, *supra* note 49, at 12.

145. *See* Zelliott, *supra* note 24, at 4.

146. *See, e.g.*, THE INDO-ARYAN CONTROVERSY: EVIDENCE AND INFERENCE IN INDIAN HISTORY, *supra* note 27 (“The purpose of this volume is to bring together different voices and attempt to portray differing views on the origins of the Vedic speakers, that is, on whether the Indo-Aryan side of the family were immigrants into the Indian subcontinent, or indigenous to it.”); *see also* T. R. S. Prasanna, *There Is No Scientific Basis for the Aryan Invasion Theory*, 103 *CURRENT SCI.* 216 (2012).

147. B. B. Lal, *Aryan Invasion of India: Perpetuation of a Myth*, in THE INDO-ARYAN CONTROVERSY: EVIDENCE AND INFERENCE IN INDIAN HISTORY, *supra* note 27, at 50.

148. *Id.* at 51.

149. *See generally* RAM SHARAN SHARMA, *SHUDRAS IN ANCIENT INDIA: A SOCIAL HISTORY OF THE LOWER ORDER DOWN TO CIRCA A.D. 600* (1958); SUVIRA JAISWAL, *CASTE: ORIGIN, FUNCTION, AND DIMENSIONS OF CHANGE* (2000).

150. Edwin F. Bryant, *Concluding Remarks*, in THE INDO-ARYAN CONTROVERSY: EVIDENCE AND INFERENCE IN INDIAN HISTORY, *supra* note 27, at 469.



to the continuity of cultural development on the Indian subcontinent stretching back to the seventh millennium BCE. They emphasized that there is no archaeological evidence to support an invasion theory,<sup>151</sup> nor have archaeologists found any vestiges left behind by invaders.<sup>152</sup> The biological evidence from burial sites also shows a basic biological continuity on the subcontinent during the period when there would have been an Aryan invasion.<sup>153</sup>

***D. Dr. Ambedkar Rejects the Caste–Race Analogy***

The most renowned Dalit intellectual of all time is Dr. B. R. Ambedkar. Ambedkar was also a student of the writings of Phule—in fact, Ambedkar dedicated his book, *Who Were the Shudras?*, to Phule.<sup>154</sup> Ambedkar spent three years in the United States, from 1913 to 1916, pursuing a PhD in economics at Columbia University.<sup>155</sup> The campus of Columbia University is very close to the historically important Black neighborhood of Harlem in New York City. In 1910, however, Harlem was not the hub of Black culture it would become later. At that time, less than 10% of its residents were non-white.<sup>156</sup> The Great Migration of Black people out of the South and into northern urban areas started around 1916,<sup>157</sup> and between 1917 and 1918, half a million African Americans left the South,<sup>158</sup> with New York receiving a considerable fraction of this group. Thus, Ambedkar left New York at the start of substantial migration of Black people to northern cities from the South.<sup>159</sup> Nevertheless, Ambedkar was very familiar with the experiences of Black people with racial oppression in the United States.<sup>160</sup> Ambedkar wrote a piece where he

151. *Id.*

152. B. B. Lal, *Aryan Invasion of India: Perpetuation of a Myth*, in *THE INDO-ARYAN CONTROVERSY: EVIDENCE AND INFERENCE IN INDIAN HISTORY*, *supra* note 27, at 50, 53.

153. *Id.* at 59–60.

154. For a copy of the dedication to Ambedkar’s book, see AMBEDKAR, *supra* note 63.

155. See Santosh Dass & William Gould, *Introduction*, in AMBEDKAR IN LONDON 1, 4 (William Gould et al. eds., 2022).

156. HENRY LOUIS GATES, JR., *STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW* 203–04 (2019).

157. Between 1916 and 1930, three million Black people left the South. STANLEY SEABERG, *THE NEGRO IN AMERICAN HISTORY*, VOL. 2: WHICH WAY TO EQUALITY? 45 (1968).

158. GATES, *supra* note 156, at 204.

159. NANCY FONER, *IN A NEW LAND: A COMPARATIVE VIEW OF IMMIGRATION* 44 (2005).

160. Ambedkar wrote a letter to W. E. B. DuBois in 1946 stating, “I have been a student of the Negro problem and have read your writings throughout. There is so much similarity between the position of the Untouchables in India and of the position of the Negroes in America that the study of the latter is not only natural but necessary.” For a copy of Ambedkar’s letter sent to DuBois, see Letter from B. R. Ambedkar to W. E. B. Du Bois (1946) (available at <https://www.saada.org/item/20140415-3544> [<https://perma.cc/BL4N-KD7P>]). For DuBois’s response, see Letter from W. E. B. Du Bois to B. R. Ambedkar (July 31, 1946) (available at <https://credo.library.umass.edu/view/full/mums312-b109-i133> [<https://perma.cc/BVX7-7JMB>]). See also M. Vain Chandola, *Affirmative Action in India and the United States: The Untouchable and Black Experience*, 3 *IND. INT’L & COMPAR. L. REV.* 101, 118 (1992).

compared slavery to untouchability, concluding that untouchability is an indirect form of slavery.<sup>161</sup>

In 1936, after a five-year struggle by Dalits to enter a Hindu temple near Nasik, Ambedkar declared that he might have been born a Hindu, but he would not die as one.<sup>162</sup> Twenty years later, he would make good on this promise. On October 14, 1956, two months before his death, Ambedkar led a mass conversion of over a half million Dalits to Buddhism.<sup>163</sup> Following his lead, millions of Dalits have converted to Buddhism.<sup>164</sup> According to a 2021 survey conducted by Pew Research, 89% of Buddhists in India consider themselves Dalits.<sup>165</sup> Ambedkar founded the first political parties for Dalits.<sup>166</sup> As Dalit activist Anand Teltumbde summed it up, for the Dalit masses, Dr. Ambedkar “is everything together, a first-rate scholar, a Moses who led his people out of bondage, a Bodhisatva in the Buddhism pantheon—he is like a god.”<sup>167</sup>

Ambedkar rejected the colonial theory of racial differences between the upper caste and the lower caste/Dalits, even as he repeatedly referred to the experiences of African Americans during his speeches and in his writings.<sup>168</sup> For Dr. Ambedkar, the caste system did not demarcate racial divisions; rather, it was a social division of people of the same race, a point that he made clear in the first article he wrote on caste while at Columbia in 1916.<sup>169</sup> He argued that the Dalits were Buddhists subjected to discrimination during the time of the Gupta Empire (between the fourth and sixth centuries CE) up to the time before the Muslim invasions of the twelfth century.<sup>170</sup> In his famous essay, *Annihilation of Caste*, he stressed that the caste system was a division of people of the same race:

161. BABASAHEB AMBEDKAR, *Slaves and Untouchables*, in 5 DR. BABASAHEB AMBEDKAR WRITING & SPEECHES 9, 15 (1976).

162. Zelliott, *supra* note 24, at 5.

163. See AMBEDKAR, *supra* note 49, at xvi; ELEANOR ZELLIOTT, 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, BUDDHISM, *supra* note 49, at 2–3. As a strange coincidence or a matter of fate, if you adjust for the time difference between the United States and India, one of the Authors of this Article, Kevin Brown, was born on the very day that Dr. Ambedkar led this mass conversion.

164. 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/9D9R-VXZH>].

165. SAHGAL ET AL., *supra* note 63, at 99.

166. Specifically, the Independent Labor Party (1936) and the Scheduled Caste Federation (1942).

167. ANAND TELTUMBDE, ‘AMBEDKAR’ IN AND FOR THE POST-AMBEDKAR DALIT MOVEMENT (1997) (ebook). 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/2020/4/14/india-arrests-activist-anand-teltumbde-over-2018-caste-violence> [<https://perma.cc/Z2ES-DBFA>].

168. Kurien, *supra* note 33, at 721.

169. Zelliott, *supra* note 24, at 4.

170. *Id.* at 5.

As a matter of fact the caste system came into being long after the different races of India had commingled in blood and culture. To hold that distinctions of castes are really distinctions of race, and to treat different castes as though they were so many different races, is a gross perversion of facts.

. . . The caste system is a social division of people of the same race.<sup>171</sup>

#### *E. The Indian Constitution Views Caste and Race as Different*

“[T]he adoption of the Constitution (of India) in 1950 marks a watershed in the progress towards equality in India.”<sup>172</sup> If the inconsistency between the United States’ commitment to equality and its historical treatment of Black people is the American dilemma, “the reconciliation of traditional hierarchical concepts of [Indian] society with constitutional provisions for equality” is the Indian dilemma.<sup>173</sup> The deliberations of the founding fathers of the Indian Constitution provide a glimpse into this dilemma.

The dominant political party in India at the time of the adoption of the Constitution was the Indian Congress Party of Gandhi and Jawaharlal Nehru.<sup>174</sup> India created a Drafting Committee to write the Constitution for the new nation, and Dr. Ambedkar was made the Chairman of the Committee. Even though Dr. Ambedkar was the Chairman, a consensual and deliberative process involving all the members of the Constituent Assembly framed the Indian Constitution.

As part of the constitutional drafting process, on March 15, 1947, Dr. Ambedkar submitted a memorandum to the Fundamental Rights Committee of the Constituent Assembly, of which he was a member, on behalf of the All-India Schedule Caste Federation. The title of the document was *States and Minorities: What Are Their Rights and How to Secure Them in the Constitution of Free India*.<sup>175</sup> It sought to provide safeguards in the new Constitution for the Scheduled Castes. In laying out protections for the Dalits, the memorandum borrows provisions from the U.S. Civil Rights Act of 1866 and the Civil Rights Act of 1875.<sup>176</sup>

171. B.R. AMBEDKAR, ANNIHILATION OF CASTE: THE ANNOTATED CRITICAL EDITION 186 (S. Anand ed., 2016) (ebook).

172. B. Sivaramayya, *Equality and Inequality: The Legal Framework*, in EQUALITY AND INEQUALITY: THEORY AND PRACTICE 28, 32 (André Béteille ed., 1983).

173. SUNITA PARIKH, THE POLITICS OF PREFERENCE: DEMOCRATIC INSTITUTIONS AND AFFIRMATIVE ACTION IN THE UNITED STATES AND INDIA 47 (1997); *see also* ANDRÉ BÉTEILLE, THE BACKWARD CLASSES AND THE NEW SOCIAL ORDER 8 (1981).

174. *See generally* STANLEY A. KOCHANER, THE CONGRESS PARTY OF INDIA: THE DYNAMICS OF ONE-PARTY DEMOCRACY (1968).

175. B. R. AMBEDKAR, STATES AND MINORITIES: WHAT ARE THEIR RIGHTS AND HOW TO SECURE THEM IN THE CONSTITUTION OF FREE INDIA, MEMORANDUM ON THE SAFEGUARDS FOR THE SCHEDULED CASTES SUBMITTED TO THE CONSTITUENT ASSEMBLY ON BEHALF OF THE ALL INDIA SCHEDULED CASTES FEDERATION (1947), <http://www.drambedkar.co.in/wp-content/uploads/books/category2/11states-and-minorities.pdf> [<https://perma.cc/Y2Z7-9RU9>].

176. *Id.* at 21–23.

With the ratification of the Indian Constitution, it is clear that for legal purposes in India, caste has always been viewed as different from race. While abolishing untouchability,<sup>177</sup> the Indian Constitution recognized the dilemma between group and individual rights. It sought to resolve this fundamental conflict by accepting the importance of group life and seeking to enhance India's rich plural diversity, but within a framework of social reform and protection for individual rights. Thus, the Constitution provides that group life would yield to the reasonable demands of public order, health, and morality, and coexist with India's general commitment to social welfare and reform.<sup>178</sup>

Article 15, clause 1 of the Indian Constitution bars the state from discriminating against any citizen based upon religion, race, caste, sex, or place of birth. Like interpretations of the meaning of the Equal Protection Clause, this provision is limited to state actors and therefore does not apply to private parties.<sup>179</sup> Article 15, clause 2 proscribes discrimination in public accommodations and in the use of wells, tanks, and bathing ghats on the same grounds as did the previous clause.<sup>180</sup> Article 16 provides for equality of opportunity in matters of public employment. Thus, "[n]o citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State."<sup>181</sup> Furthermore, Article 29, clause 2 specifically prevents any discrimination on grounds of religion, race, caste, or language in admission into any educational institution that is maintained by the state or that receives aid from state funds.<sup>182</sup>

While the Indian Constitution includes caste and race as protected traits for purposes of non-discrimination provisions, the Constitution also authorizes a very robust system of reservations (which in the United States would be labeled "quotas") for elected bodies, governmental jobs, and government-aided universities. The provisions for the latter two also include OBCs, who are generally the low caste. Thus, Article 15, clause 4 provides that nothing in Article 15 shall prevent the State from "making any special provision[s] for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."<sup>183</sup> Article 16, clauses 4A and 4B allow the state to make provisions for reservations of government employment for any members of OBCs, Scheduled Castes, or Scheduled Tribes that are not adequately represented in the

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177. India Const. art. 17 ("‘Untouchability’ is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of ‘Untouchability’ shall be an offence punishable in accordance with law.”).

178. *Id.* art. 25, cl. 2.

179. *Id.* art. 15, cl. 2(a).

180. *Id.* art. 15, cl. 2(b).

181. *Id.* art. 16, cl. 2.

182. *Id.* art. 29, cl. 2.

183. *Id.* art. 15, cl. 4. Article 366, clause 25 of the Indian Constitution defines Scheduled Tribes as "such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution." *Id.* art. 366, cl. 25. Scheduled Tribes are local groups that are not part of the caste system but tend to live in secluded countryside communities. Discussion of discrimination against them is beyond the scope of this Article.

services of the state.<sup>184</sup> There are no provisions allowing for reservations or special provisions based on race.

In India, legally, it is necessary to determine the various subcastes that qualify as beneficiaries for these reservation programs. The governments in India handle this complexity of the *jatis* by compiling official lists of subcastes, including those that are OBCs or Scheduled Castes—there are about 400 *jatis* that make up the Scheduled Castes.<sup>185</sup> Being added to the list opens reservation opportunities for members of these subcastes.

The Indian Constitution therefore includes race and caste as protected traits for purposes of anti-discrimination provisions. However, with respect to reservations, those only apply to certain subcastes. What these provisions in the Indian Constitution make clear, is that the Constitution treats race as something separate from caste.

***F. India Reaffirms Its View at the WCAR that Caste Is Not Race***

“The great battle to identify casteism and untouchability as a form of racism came later, at the famous Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa” from August 31 to September 7, 2001.<sup>186</sup> The goals of the WCAR were to examine effective mechanisms for combating racial discrimination, move beyond a formal definition of racism, and include discrimination based on “descent” and “occupation.”

In December 1997, the U.N. General Assembly decided to organize an international conference on racism. Prior to the conference, activists for Dalit causes wanted to include on the agenda a discussion of whether caste discrimination was equivalent to race discrimination.<sup>187</sup> One of the problems with bringing international attention to caste discrimination that Dalits have faced since independence is that the problem is mystified, in part, as something uniquely Indian.<sup>188</sup> As such it would not have an international dimension. Like Phule 130 years before them, these activists for Dalits sought to leverage international opprobrium against racism to accelerate the pace of change within India regarding caste discrimination.<sup>189</sup> In February 2001, the U.N. organizers agreed to include a discussion about issues of caste discrimination. The decision to include caste on the conference agenda and the question of Dalit oppression were met with a very strong negative reaction from the Indian government.<sup>190</sup>

At the WCAR, the caste–race issue was subject to intense discussions.<sup>191</sup> The Dalits were represented by the National Campaign on Dalit Human Rights

184. *Id.* art. 16, cl. 4A–4B.

185. Z Elliot, *supra* note 24, at 7.

186. *Id.*

187. Krishna, *supra* note 130, at 141.

188. *Id.* at 140–41.

189. *Id.* at 140.

190. *See infra* notes 193 to 201 and accompanying text.

191. CASTE, RACE AND DISCRIMINATION, *supra* note 32, at xiii. (containing papers, which address issues related to caste, and race, and the position of the Indian government on caste and race).

(“NCDHR”), which included a delegation of almost 200 participants. NCDHR provided a long and still-growing list of atrocities committed against Dalits and presented evidence to show the impact of discrimination upon them.<sup>192</sup>

The Indian government was successful in preventing India’s Dalits from having casteism equated with racism and having untouchability addressed as part of the proceedings.<sup>193</sup> In doing so, it joined forces with Israel and the United States, countries that didn’t want their internal policies debated in a U.N. forum either.<sup>194</sup> The Indian government asserted that caste was a domestic matter, and any attempts by the conference to address it was tantamount to infringement on India’s state sovereignty.<sup>195</sup> Further, as discussed, India’s Constitution had outlawed untouchability and caste-based discrimination.<sup>196</sup> It also had enacted reservation policies for Dalits and OBCs. Thus, according to the Indian government, there was nothing to discuss anyway.<sup>197</sup> India’s Ministry of Foreign Affairs issued the official Indian position. The statement of the Indian representative to the conference made it clear that India viewed racism as a result of slavery, imperialism, and colonialism.<sup>198</sup> In other words, racism is something that owes its origins to white supremacy embodied by the practices of Europeans and North Americans. India as a nation of people of color, therefore, could not be a practitioner of racism; rather its people were a victim of it.

After independence, India was a leader in the Non-Aligned Movement and of the Global South. Thus, it was at the forefront of attacking colonialism, and that provided it with a legitimacy and source of pride to counter the notion that it engaged in racism. For the Indian government, international law, human rights, and racism had nothing to do with a domestic problem of caste discrimination based on untouchability.

Several prominent Indian sociologists agreed with the assertion that caste is not race. The most notable was the aforementioned André Béteille.<sup>199</sup> He rejected the notion that there was any biological basis for race and asserted that race was an illusory concept. Because, to him, race is a dubious concept, “treating caste as a form of race is politically mischievous; what is worse, it is scientifically nonsensical.”<sup>200</sup>

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192. Krishna, *supra* note 130, at 140. According to Elanor Zelliott, however, only 60 Dalit representatives sought to bring caste-based oppression to the world stage at WCAR. Zelliott, *supra* note 24, at 6–7.

193. Krishna, *supra* note 130, at 140.

194. *Id.*

195. *Id.*

196. *See supra* notes 172 to 182 and accompanying text.

197. *Id.*

198. H.E. Mr. Omar Abdullah, Minister of State for External Affs., Statement at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Sept. 2, 2001), <http://www.un.org/WCAR/statements/indiaE.htm> [<https://perma.cc/5BK8-YBJC>].

199. André Béteille, *Race and Caste*, THE HINDU (Mar. 10, 2001) <https://www.hvk.org/2001/0301/89.html> [<https://perma.cc/46DW-AA7A>]; *see also* Dag-Erik Berg, *Race as a Political Frontier Against Caste: WCAR, Dalits and India’s Foreign Policy*, 21 J. INT’L RELS. & DEV. 990, 993 (2018).

200. Béteille, *supra* note 199; *see also* Berg, *supra* note 199, at 993.

Yet, despite the failure to have caste discrimination viewed as an aspect of race discrimination, the effort by the Dalit delegation in Durban did bring a great deal of attention to caste discrimination based on untouchability.<sup>201</sup>

### III. THE CASTE–RACE ISSUE UNDER 42 U.S.C. §§ 1981 AND 1982

Having addressed the caste–race issue under Indian federal law, we will now address it under US federal law by starting with its use under 42 U.S.C. §§ 1981 and 1982 originally adopted as part of the Civil Rights Act of 1866. The Civil Rights Act of 1866 doesn't use the word "race." Within a decade of the passage of the Act, however, the U.S. 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."<sup>202</sup> The Court, in its 1987 opinion in *Saint Francis College v. Al-Khazraji*,<sup>203</sup> for the first time expounded upon the meaning of "race" for § 1981. In concluding that a person of Arab ancestry could bring a claim of race discrimination against a white person, the Court noted that the definition of race was to be drawn from how it was understood in the nineteenth century.<sup>204</sup> Section III.A discusses the Supreme Court's opinion in *Saint Francis*. To comprehend whether caste was understood to be a form of race in the United States in the nineteenth century, it is necessary to go back to the origins of the caste–race analogy. Abolitionists in the North began to compare the condition of Black people to the caste system of South Asia as early as the 1830s. This caste–race analogy would remain important throughout the nineteenth century and is even used today. Section III.B discusses the uses of the caste–race analogy in the nineteenth century, including its discussion in congressional debates that led to the passage of the Civil Rights Act of 1866 and the Fourteenth Amendment.

#### A. *The Meaning of Race in § 1981 from the Supreme Court Opinion in Saint Francis College v. Al-Khazraji*

During the Antebellum Period, enslaved people suffered from more than physical bondage; they were not recognized as legal persons.<sup>205</sup> This meant that they did not have any of the following legal rights: ability to enter into contracts; buy, sell, lease, or rent property; testify in court; or file legal claims with the courts. Nor did they have any political rights. The Supreme Court infamously affirmed the lack of legal status for Black people under federal law in *Dred Scott v. Sandford*,<sup>206</sup> decided four years before the start of the Civil War. In this opinion, the Court concluded that Black people, enslaved or free, could not be citizens of the United States and, thus, did not have a right to file a claim in federal court. In justifying this decision, Chief Justice Taney pointed out how the Framers of the Constitution regarded Black people: "They had for more than a century before been regarded as

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201. CASTE, RACE AND DISCRIMINATION, *supra* note 32, at xiv.

202. *United States v. Cruikshank*, 92 U.S. 542, 555 (1875). The terms "race, color, or previous condition of servitude" are the same ones used in the Fifteenth Amendment.

203. 481 U.S. 604 (1987).

204. *Id.* at 610.

205. *Dred Scott v. Sandford*, 60 U.S. 393, 450 (1857) (holding that Scott, an enslaved Black man, was property), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

206. *Id.* at 407.

beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect . . . .”<sup>207</sup>

With the conclusion of the Civil War, southern governments that participated in the rebellion were reconstituted in the summer and fall of 1865. These reconstituted governments had to address the legal status of the newly freed people. Led by the November 1865 legislation adopted by Mississippi, these governments enacted measures collectively known as the “Black Codes.” The goal of the Black Codes was to create a revised legal system to ensure that white people could continue to extract the labor of Black people while providing them with as few rights as possible. The “evil of the Black Codes was that they abridged, shortened, or lessened the fundamental rights of a class of people . . . , creating a racial caste system of the South.”<sup>208</sup>

The ratification process of the Thirteenth Amendment, banning slavery, concluded on December 6, 1865. Section 2 of the Thirteenth Amendment provided, “Congress shall have power to enforce this article by appropriate legislation.”<sup>209</sup> This was the first Amendment to give Congress such power. Once back in session in December 1865, from its recess that began in March, Congress took up work on what would become the Civil Rights Act of 1866. This Act provided and protected the legal rights of the newly freed people.<sup>210</sup> Needless to say, Congress had never passed a measure to protect the rights of Black people in its history.

In discussing the legislative history of 42 U.S.C. §§ 1981 and 1982, 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 its legislative authority under the Thirteenth Amendment.<sup>211</sup> Scholars agree that one of the driving purposes for enacting Section 1 of the Fourteenth Amendment, adopted by the same Congress two months after overriding President Andrew Johnson’s veto of the Civil Rights Act of 1866, was to

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207. *Id.*

208. Stephen G. Calabresi, *Does the Fourteenth Amendment Guarantee Equal Justice for All?*, 34 HARV. J. L. & PUB. POL’Y 149, 150 (2011).

209. U.S. CONST. amend. XIII, § 2.

210. ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877 243 (2d ed. 2014).

211. One of the criticisms that President Johnson leveled against the Act in his veto message was that it exceeded Congress’s powers under the Thirteenth Amendment. *See* Andrew Johnson, President of the U.S., Veto Message on Civil Rights Legislation (Mar. 27, 1866) (transcript available at <https://millercenter.org/the-presidency/presidential-speeches/march-27-1866-veto-message-civil-rights-legislation> [https://perma.cc/LCQ4-HADG]) (stating 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”). John Bingham, a principal drafter of Section 1 of the Fourteenth Amendment, also believed that prior to the passage of the Amendment, Congress lacked power for the 1866 Act. MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 80 (1986). Bingham was one of a small group of Republicans who subscribed to this argument. *Id.*



constitutionalize the provisions of the Act.<sup>212</sup> After the Fourteenth and Fifteenth Amendments were 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.<sup>213</sup> As the Supreme Court would say, “The history of the 1870 Act reflects similar understanding of what groups Congress intended to protect from intentional discrimination.”<sup>214</sup> In 1970, Congress would also split parts of § 1 of the Act into the modern-day 42 U.S.C. §§ 1981 and 1982.<sup>215</sup> However, both sections used nearly identical language, and the Supreme Court has construed them similarly.<sup>216</sup> The former section deals primarily with most of the rights to contract covered by the Civil Rights Act of 1866 for all persons. The latter section deals with property rights for citizens of the United States. Thus, when thinking about the legislative history

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212. 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* 51 (9th ed. 2013) (“The Fourteenth Amendment was obviously designed to constitutionalize the Civil Rights Act of 1866.”); *Hurd v. Hodge*, 334 U.S. 24, 32 (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.”).

213. Enforcement Act of 1870, ch. 114, 16 Stat. 140 (codified as amended at 42 U.S.C. §§ 1981–82 (2000)). Congress also enacted its first codification of federal law in 1874. *Runyon v. McCrary*, 427 U.S. 160, 168 n.8 (1976) (“The commissioners who prepared the 1874 draft revision were . . . given authority to ‘revise, simplify, arrange, and consolidate all statutes of the United States’ . . . .”).

214. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 612–13 (1987).

215. During the Supreme Court’s 1988 Term, it rendered opinions on several civil rights cases that eroded the protection of § 1981 and Title VII. *Patterson v. McLean Credit Union*, 491 U.S. 164, 171–75 (1989) (limiting the scope of § 1981); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239–52 (1989) (establishing standards for evaluating mixed-motive employment discrimination claims); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650–55 (1989) (substantially undercutting the disparate impact theory of discrimination the Court enunciated in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)); *Martin v. Wilks*, 490 U.S. 755, 766–68 (1989) (broadening the right of white employees and applicants to challenge affirmative action plans in consent decrees); *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 904–13 (1989) (requiring discriminatory intent for allegations of sex discrimination in seniority systems). Congress responded to these decisions by enacting the 1991 Civil Rights Act. For a summary of the changes, see *Summary: S.1745 — 102<sup>nd</sup> Congress (1991-1992)*, CONGRESS.GOV, <https://www.congress.gov/bill/102nd-congress/senate-bill/1745> (last visited Nov. 29, 2024). The changes did not impact the definition of “race” under either the Section 1981 or any of the provisions of the 1964 Civil Rights Act.

216. *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”).

of § 1981, not only is the Civil Rights Act of 1866 relevant, but so are the congressional discussions regarding the enactment of the Fourteenth Amendment.

In *Saint Francis College v. Al-Khazraji*,<sup>217</sup> the Court faced the question of whether an American citizen of Arab ancestry was protected from racial discrimination by his white employer.<sup>218</sup> Before this decision, lower courts had struggled with whether § 1981 applied to “national origin” discrimination.<sup>219</sup> As one leading court opinion in this area described it at the time, “[a] review of the cases in which plaintiffs have sought to state claims pursuant to section 1981 founded upon national origin reveals that the law in this area is in a state of profound disarray.”<sup>220</sup>

The district court in *Saint Francis College* held that the Arab plaintiff’s claim was one of national origin and, thus, outside the scope of § 1981.<sup>221</sup> The court of appeals rejected the district court’s conclusion, holding the plaintiff had alleged a discrimination claim based on race, even though under current racial classifications Arabs were viewed as Caucasians.<sup>222</sup> It also stated that Congress had not limited § 1981 claims to those filed by members of a different race than the defendant.<sup>223</sup> The Supreme Court agreed with the court of appeals that § 1981 was not limited to claims of racial discrimination by those of different races.<sup>224</sup> The Court went on to note that the defendant’s argument that the plaintiff’s discrimination claim was not recognized under § 1981 rested on an incorrect assumption. The

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217. 481 U.S. 604 (1987).

218. *Id.* at 607.

219. For an extended discussion of this issue in a case decided before *Saint Francis College*, see *Ortiz v. Bank of Am.*, 547 F. Supp. 550, 559–65 (E.D. Cal. 1982) (discussing how courts approached whether § 1981 covered discrimination based on national origin: (1) it did not; (2) it did not, but a victim alleging national origin under § 1981 had the burden of establishing a racial element; or (3) an assumption that national origin claims were encompassed in race discrimination claims under § 1981). See also *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1 (E.D. Pa. 1975) (rejecting the ability of an employee with a Spanish surname from bringing a claim under § 1981 because it does not cover national origin discrimination).

220. *Ortiz*, 547 F. Supp. at 559.

221. *Saint Francis Coll.*, 481 U.S. at 606. The plaintiff’s Title VII claim was dismissed because it was not timely filed. *Id.*

222. *Id.* at 607. For a more detailed discussion of these racial classifications, see *infra* notes 350–78 and accompanying text. On March 28, 2024, the Office of Management and Budget updated the federal regulations and added a category for “Middle Eastern or North African” as a requirement to collecting detailed race/ethnicity responses. See OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, REVISIONS TO OMB’S STATISTICAL POLICY DIRECTIVE NO. 15: STANDARDS FOR MAINTAINING, COLLECTING, AND PRESENTING FEDERAL DATA ON RACE AND ETHNICITY (2024), <https://www.federalregister.gov/documents/2024/03/29/2024-06469/revisions-to-ombs-statistical-policy-directive-no-15-standards-for-maintaining-collecting-and> [<https://perma.cc/R79N-XP4G>].

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

224. *Id.* at 609–10. See also *Ross v. Douglas Cnty.*, 234 F.3d 391, 397 (8th Cir. 2000) (finding that a Black prison guard discriminated against a younger Black guard because of his race).

defendant assumed that all those who might be deemed Caucasians today<sup>225</sup> were thought to be of the same race when § 1981 became law in the nineteenth century. It may be today that a variety of ethnic groups, including Arabs, are now considered to be within the Caucasian race. The understanding of “race” in the nineteenth 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.<sup>226</sup>

The Court reviewed several nineteenth century sources on the definition of “race,” which include the following:

- From *Webster American Dictionary* of 1828: “RACE . . . . The lineage of a family, or continued series of descendants from a parent who is called the stock. A race is the series of descendants indefinitely.”<sup>227</sup>
- From *Webster Dictionary* of 1841: “RACE . . . . The lineage of a family, or continued series of descendants from a parent who is called the stock.”<sup>228</sup>
- From *Chambers’s Etymological Dictionary of the English Language* of 1872: “Race . . . the descendants of a common ancestor; family; a breed, or variety . . . .”<sup>229</sup>
- From *Webster Dictionary* of 1887: “Race . . . . The descendants of a common ancestor; a family, tribe, people, or nation, of the same stock . . . .”<sup>230</sup>

To bolster its conclusion, the Court noted remarks by several congressmen to the effect that their concept of race was broad.<sup>231</sup> The Court went on to hold that the discrimination was racial discrimination:

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225. By “today,” the Court was referring to 1987. The federal government had adopted race explanations. This led to a discussion of the federal definitions of race in ethnicity. *See infra* notes 342–56 and accompanying text.

226. *Saint Francis Coll.*, 481 U.S. at 610.

227. *Race*, WEBSTERS DICTIONARY 1828, <https://webstersdictionary1828.com/Dictionary/race> [<https://perma.cc/Q6RY-JRLN>] (last visited Oct. 1, 2024); *see also Saint Francis Coll.*, 481 U.S. at 611.

228. NOAH WEBSTER, A DICTIONARY OF THE ENGLISH LANGUAGE 666 (New York: White & Sheffield, 1841) [hereinafter WEBSTER’S 1841], [https://www.google.com/books/edition/An\\_American\\_Dictionary\\_of\\_the\\_English\\_La/EohAAAAAYAAJ?hl=en&gbpv=1](https://www.google.com/books/edition/An_American_Dictionary_of_the_English_La/EohAAAAAYAAJ?hl=en&gbpv=1) [<https://perma.cc/E6ZK-6475>]; *see also Saint Francis Coll.*, 481 U.S. at 610.

229. CHAMBERS’S ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE 415 (James Donald ed., London: W. & R. Chambers 1872) [hereinafter CHAMBERS’S ETYMOLOGICAL DICTIONARY], <https://archive.org/details/chamberssetymolo00donarich/page/414/mode/2up> [<https://perma.cc/7VFT-VCEG>]; *see also Saint Francis Coll.*, 481 U.S. at 611.

230. NOAH WEBSTER, WEBSTER’S CONDENSED DICTIONARY 466 (Noah Porter & Dorsey Gardner eds., George Routledge & Sons, 1887) [hereinafter WEBSTER’S 1887], [https://www.google.com/books/edition/Webster\\_s\\_Condensed\\_Dictionary/aU0yAQAAAMAJ?hl=en&gbpv=1&kptab=getbook](https://www.google.com/books/edition/Webster_s_Condensed_Dictionary/aU0yAQAAAMAJ?hl=en&gbpv=1&kptab=getbook) [<https://perma.cc/SUU3-76RF>]; *see also Saint Francis Coll.*, 481 U.S. at 611.

231. *Saint Francis Coll.*, 481 U.S. at 612.

Based 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 Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory.<sup>232</sup>

Given the Court's opinion, the question of whether caste fits within the definition of race for § 1981 would depend upon whether "caste" would be viewed as a form of "race" within the understandings of Americans in the nineteenth century. Americans understood class and caste as nearly interchangeable terms<sup>233</sup> during these times, which preceded the publication of Karl Marx's *Das Kapital* and the popularization of the term "class conflict."<sup>234</sup> The definitions of "caste" and "class" in the same dictionary sources cited by the Supreme Court in *Saint Francis College* make the similarity of the two terms apparent. While *Webster American Dictionary* of 1828 did not include a definition of "caste," its definitions from the other three sources are as follows:

- From *Webster Dictionary* of 1841: "CASTE . . . . a tribe or class of the same rank or profession . . . ."<sup>235</sup>
- From *Chambers's Etymological Dictionary of the English Language* of 1872: "Caste . . . a breed or race; one of the classes into which society in India is divided; a tribe or class of society."<sup>236</sup>
- From *Webster Dictionary* of 1887: "Caste . . . . One of the hereditary social classes in India; a separate and fixed order or class of society."<sup>237</sup>

The definition of "class" from the four sources is as follows:

- From *Webster American Dictionary* of 1828: "Class—An order or rank of persons; a number of persons in society, supposed to

232. *Id.* at 613 (emphasis added) (footnote omitted).

233. Steven G. Calabresi & Julia T. Ricker, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 17, 19 (2011); *see also* Slaughter-House Cases, 83 U.S. 36, 81 (1872) (discussing the Equal Protection Clause, and stating, "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)).

234. DAS KAPITAL was published in 1867. KARL MARX, DAS KAPITAL, KRITIK DER POLITISCHEN OEKONOMIE [CAPITAL: A CRITIQUE OF POLITICAL ECONOMY] (Frederick Engels, ed., Samuel Moore & Edward Aveling, trans., Progress Publishers 2015) (1867) (ebook).

235. WEBSTER'S 1841, *supra* note 228, at 949.

236. CHAMBERS'S ETYMOLOGICAL DICTIONARY, *supra* note 229, at 60 (emphasis omitted).

237. WEBSTER'S 1887, *supra* note 230, at 78.

have some resemblance or equality, in rank, education, property, talents, and the like.”<sup>238</sup>

- From *Webster Dictionary* of 1841: “CLASS . . . . An order or rank of persons; a number of persons in society, supposed to have some resemblance or equality, in rank, education, property, talents, and the like.”<sup>239</sup>
- From *Chambers’s Etymological Dictionary of the English Language* of 1872: “Class . . . a rank or order of persons or things . . . .”<sup>240</sup>
- From *Webster Dictionary* of 1887: “Class . . . . A group of individuals possessing common characteristics . . . .”<sup>241</sup>

The *Chambers’s Etymological Dictionary of the English Language* specifically states in its definitions of “caste” and “class” that each is a “breed or race.” The other definitions of caste and class track the Supreme Court’s conclusion that for race discrimination to occur, it has to be directed at “identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.”<sup>242</sup> Thus, the definitions of race, caste, and class all seem to point to similar concepts, strengthening the conclusion that nineteenth-century Americans would see caste or class as a form of race.

The Court went on in *Saint Francis College* to note, “[I]t is clear that [these nineteenth-century sources defining race] do not support the claim that for the purposes of § 1981, Arabs, Englishmen, Germans, and certain other ethnic groups are to be considered a single race.”<sup>243</sup> The Court also listed several “races” from its cited encyclopedia sources—including Finns, Romani,<sup>244</sup> Basques, Hebrews, Swedes, Norwegians, Germans, Greeks, Italians, Spaniards, Mongolians, Russians, and Jews.<sup>245</sup> 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 600 CE.<sup>246</sup> Thus, perhaps the Supreme Court has already endorsed the notion that Dalits are a distinct race under § 1981.

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238. *Class*, WEBSTERS DICTIONARY 1828, <https://webstersdictionary1828.com/Dictionary/class> [<https://perma.cc/S7TZ-VV8U>] (last visited Oct. 1, 2024).

239. WEBSTER’S 1841, *supra* note 228, at 150.

240. CHAMBERS’S ETYMOLOGICAL DICTIONARY, *supra* note 229, at 72.

241. WEBSTER’S 1887, *supra* note 230, at 93.

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

243. *Id.* at 612.

244. The Court used the term “[G]ypsies.” *Id.* at 611 (citation omitted).

245. *Id.* (citations omitted).

246. Palash R. Ghosh, *Centuries of Discrimination: European Roma Linked to India’s “Untouchables,”* INT’L BUS. TIMES (Dec. 4, 2012, 10:50 AM), <https://www.ibtimes.com/centuries-discrimination-european-roma-linked-indias-untouchables-917965> [<https://perma.cc/BS5X-YK8R>]; see also Niraj Rai et al., *The Phylogeography of Y-Chromosome Haplogroup H1a1a-M82 Reveals the Likely Indian Origin of the European Romani Populations*, PLOS ONE, Nov. 28, 2012, at 1; Horolma Pamjav et al., *Genetic Structure of*

***B. Caste–Race Understanding in the United States During the Antebellum Period and Reconstruction***

Ashley Montague in his famous book, *Man’s Most Dangerous Myth: The Fallacy of Race*, pointed out how recently the concept of race has been recognized:

A study of both ancient and recent cultures and literatures show us that the conception that there are natural or biological races of humankind that differ from one another mentally as well as physically is an idea that was not developed until the latter part of the eighteenth century.<sup>247</sup>

To better understand why Americans of the nineteenth century would have viewed caste discrimination as a form of race discrimination, it is necessary to go to the beginnings of the caste–race analogy in the United States. Subsection III.B.1 discusses the origins of the caste–race analogy within the 1830s and 1840s abolition movement. Perhaps the most complete and thorough legal discussion of the caste–race analogy before the Civil War was that of Charles Sumner during his unsuccessful arguments against school segregation before the Supreme Judicial Court of Massachusetts, in the 1849 case *Roberts v. Boston*.<sup>248</sup> The court is the oldest continuously functioning appellate court in the Americas and at the time one of the most influential state courts.<sup>249</sup> In that case, Sumner represented a Black school child challenging segregation in Boston public schools. Subsection III.B.2 discusses Sumner’s use of the caste–race analogy in *Roberts v. Boston*. Subsection III.B.3 points to the use of the caste–race analogy during Reconstruction, including its use by the framers of the Civil Rights Act of 1866 and the Fourteenth Amendment. 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 that their measure should prohibit caste discrimination practiced by immigrants from South Asia on American soil. The press is often the principal means to understand the public meaning of governmental actions. Subsection III.B.4 will briefly discuss press references to the caste–race analogy.

*1. Initial Use of the Caste–Race Analogy by Abolitionists in the North*

Before the Civil War, Northerners generally rejected enslavement, but that didn’t mean they believed in racial equality. As DuBois wrote about the sentiment regarding Black people in the North at the time of the War:

To the Northern masses the Negro was a curiosity, a sub-human minstrel, willingly and naturally a slave, and treated as well as he deserved to be. He had not sense enough to revolt and help Northern

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*the Paternal Lineage of the Roma People*, 145 AM. J. PHYSICAL ANTHROPOLOGY 21, 21–29 (2011). The Supreme Court also noted in *Saint Francis* that Senator Cowan specifically mentioned “Gypsies” as a group that the Civil Rights Act of 1866 would cover in the congressional debates. *Saint Francis Coll.*, 481 U.S. at 612.

247. ASHLEY MONTAGU, *MAN’S MOST DANGEROUS MYTH: THE FALLACY OF RACE* 57 (6th ed. 1997).

248. 59 Mass. (5 Cush.) 198 (1850),

249. See *About the Supreme Judicial Court*, MASS.GOV, <https://www.mass.gov/info-details/about-the-supreme-judicial-court> (last visited Nov. 29, 2024).

armies, even if Northern armies were trying to emancipate him, which they were not. . . . Negroes on the whole were considered cowards and inferior beings whose very presence in America was unfortunate.<sup>250</sup>

The extent of discrimination Black people endured in the North varied from state to state; however, they were customarily locked into the bottom of a racial social system by custom, if not by explicit law. Black people were systematically separated from whites or excluded from railway cars, stagecoaches, and steamboats. They were segregated into secluded and remote corners of theaters, lecture halls, and, if they existed, separate schools. Black people could not enter most hotels, restaurants, or resorts—except as servants. They prayed in separate pews and partook of the Christian sacrament of the Eucharist after whites.<sup>251</sup> Free Black people were also generally denied political equality in the North and border states through the end of the Civil War.<sup>252</sup>

To help demonstrate that enslavement, segregation, and discrimination against free Black people were contrary to core principals of American society, some abolitionist proponents of Black equality—including Thomas Dalton, Frederick Douglass, William Lloyd Garrison, and Harriet Beecher Stowe—compared the treatment of Black people to the caste system of South Asia.<sup>253</sup> Even though Garrison would declare that his work as an abolitionist concluded with the end of enslavement,<sup>254</sup> in the very first issue of *The Liberator*, he asserted that the goal of abolitionism in the North was equal rights for Black people.<sup>255</sup> Articles in Garrison's *The Liberator* often analogized the treatment of Black people to the Indian caste system. *The Liberator* was not the only publication to do so. For example, in discussing the trial of a free Black woman in Massachusetts, the author of an 1833 article in *The Abolitionist* noted that those of “[t]he African race are essentially a degraded caste, of inferior rank and condition in society.”<sup>256</sup> The author went on to point out that one of the consequences of caste is that interracial marriages are forbidden, which is a necessary feature of an entrenched hierarchal system. The *Anti-Slavery Record* was an abolitionist series published from 1835 to 1837 by the leading abolitionist organization, the American Anti-Slavery Society.<sup>257</sup> It also contained constant references to the prevention of caste when discussing the

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250. W. E. B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880*, at 56 (1935).

251. C. VAN WOODWARD, *THE STRANGE CAREER OF JIM CROW 18–19* (3d rev. ed. 1974).

252. *Id.* at 20; *see also* BERNARD GROFMAN ET AL., *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 4 n.1 (1992).

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

254. GATES, *supra* note 156, at 24.

255. *See* William Lloyd Garrison, *THE LIBERATOR*, Jan. 1, 1831, at 1.

256. WILLIAM LLOYD GARRISON, *Miss Crandall's Second Trial, in THE ABOLITIONIST: OR RECORD OF THE NEW ENGLAND ANTI-SLAVERY SOCIETY* 161, 163 (1833).

257. *American Anti-Slavery Society*, AMERICAN HISTORY CENTRAL, <https://www.americanhistorycentral.com/entries/american-anti-slavery-society/> (last visited Nov. 29, 2024).

treatment of Black people. For example, an article discussing the right to end slavery in the District of Columbia pointed out that Congress should ban enslavement in the U.S. capital to combat the prejudice of caste:

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 in the North be met and conquered. The prejudice of caste must be killed and buried.<sup>258</sup>

An 1842 article in *The Liberator* described a meeting of the British India Society where a free Black person spoke of race relations in the United States.<sup>259</sup> 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.<sup>260</sup> The notion of the “spirit of caste” referred to the formal categories imposed by a caste system, as well as the ideology that underlines it and the forms of prejudice that it imposes on the lower castes. These forms of prejudice and discrimination against the lower castes create the ground for the legal institutions and the perpetuation of the caste system over generations.<sup>261</sup>

Frederick Douglass also equated the treatment of Black people in the United States to caste. In 1855, Black people in New York City formed a group called the Legal Rights Association to press for equal treatment on public transportation. By 1858, most streetcar companies had complied, but not the Sixth Avenue Railroad. In a May 1858 speech called *Citizenship and the Spirit of Caste*, Douglass pointed out that he saw the refusal to allow Black people to ride on the Sixth Avenue railcars as one feature of the “cruel and malignant spirit of caste.”<sup>262</sup> The spirit of caste was not only the complete and perpetual degradation of the Black race in America but also a denial of citizenship. Douglass went on to spell out that the denial of citizenship embodied in the spirit of caste is manifested in “the refusal of passports, the with-holding of pre-emption rights, the exclusion of the colored man from the jury box, from the militia, from the ballot box, from the Southern States, and from some of the Western States.”<sup>263</sup>

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258. *The Right of Northern Interference*, THE ANTI-SLAVERY RECORD, Apr. 1837, at 6.

259. *See American Slavery and the Prejudice Against Color*, THE LIBERATOR, Jan. 7, 1842, at 3.

260. *Id.*

261. Scott Grinsell, “*The Prejudice of Caste*”: *The Misreading of Justice Harlan and the Ascendency of Anticlassification*, 15 MICH. J. RACE & L. 317, 341 (2010) (citations omitted).

262. Frederick Douglass, *Citizenship and the Spirit of Caste: An Address Delivered in New York, New York (May 11, 1858)* (transcript available at <https://frederickdouglasspapersproject.com/s/digitaledition/item/8876> [https://perma.cc/TS9B-E6KV]).

263. *Id.*



2. *Use of the Caste Analogy During the Desegregation of Boston Public Schools in the 1840s and 1850s*

Perhaps the most significant legal effort to employ the caste analogy during the Antebellum Period occurred in *Roberts v. City of Boston*,<sup>264</sup> a case challenging school segregation in Boston. Throughout the 1830s and early 1840s, the Massachusetts school code did not contain any references to race. Thus, the state statute neither provided for, nor objected to, school segregation. In 1845, the Massachusetts legislature avoided the issue and instead adopted a law, while silent on the issue of race, that stated that “any child unlawfully excluded from any public school” could pursue damages against the offending school board in court.<sup>265</sup>

Sarah Roberts was a little Black girl at the time who was forced to attend a school some distance from her home.<sup>266</sup> She sought to enroll in the nearest school to her home, which at the time excluded Black students.<sup>267</sup> Sarah was represented by Robert Morris, one of the first Black attorneys in the United States, and Charles Sumner.<sup>268</sup> Using the 1845 statute, Sarah and her attorneys sued the school board, claiming that the school’s refusal to admit Sarah was unlawful.<sup>269</sup> In Sumner’s arguments before the Massachusetts Supreme Judicial Court, he fully developed the analogy of the treatment of Black people in America to the caste system in India, an analogy that he repeated often throughout his advocacy for the Civil Rights Act of 1866, as well as for the Fourteenth Amendment.<sup>270</sup> Professor Bryan Fair points out, “As the most articulate champion for ending [B]lack caste in America, Sumner’s words are indispensable to understanding what ardent proponents sought to accomplish by the new equality guarantee.”<sup>271</sup> Thus, given Sumner’s central role in the application of the caste–race analogy for both political and legal arguments, we will quote extensively from the arguments he advanced in *Roberts v. Boston*.<sup>272</sup>

For Sumner, while the issue of school segregation was a legal one, principles of morality and natural justice were at the foundation of all jurisprudence. Sumner contrasted the principles of U.S. society, which are based on equality, to those of Europe, where distinctions are commonly based on heredity. Sumner also

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264. *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849).

265. 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, 966 n.126 (1988).

266. *Roberts*, 59 Mass. at 204–05.

267. *Id.* at 205.

268. (1849) Charles Sumner, “*Equality Before the Law: Unconstitutionality of Separate Colored Schools in Massachusetts*”, BLACKPAST (Aug. 16, 2010), <https://www.blackpast.org/african-american-history/1849-charles-sumner-equality-law-unconstitutionality-separate-colored-schools-massachusetts-2/> [https://perma.cc/SZE2-9JQA].

269. Kousser, *supra* note 265, at 969.

270. Grinsell, *supra* note 261, at 349.

271. Bryan K. Fair, *The Anatomy of American Caste*, 18 ST. LOUIS U. PUB. L. REV. 381, 389 (1999).

272. See Charles Sumner, Esq., Argument Before the Supreme Court of Massachusetts in the Case of *Roberts v. City of Boston* (Dec. 4, 1849) (transcript available at <https://www.loc.gov/resource/rbaapc.28400/?st=pdf> [https://perma.cc/V2X9-V2BP]).

noted that the idea that all men are born as equals was disowned by English institutions.<sup>273</sup> However, the U.S. Constitution and the Constitution of Massachusetts are based upon this belief. Thus, they reject the concept of ranks of superiority and inferiority that were embedded in the feudal systems of England and Europe.

While European societies clearly have elements of caste embedded in them, Sumner pointed to India as the place where the term “caste” is most often applied in full force<sup>274</sup>:

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*.<sup>275</sup>

Sumner also noted that because caste makes distinctions among people where God has made none, it is also opposed to the main scope, principles, and doctrines of Christianity.<sup>276</sup>

In closing his arguments about caste, Sumner made the direct analogy to the evils of caste in India and the evils of race discrimination in the United States. Sumner concluded that caste is inconsistent with the Constitution declaring that all men are equal:

We abjure nobility of all kinds; but here is a nobility of the skin. We abjure all hereditary distinctions; but here is an hereditary distinction, founded not on the merit of the ancestor, but on his color. We abjure all privileges from birth; but here is a privilege which depends solely on the accident whether an ancestor is black or white. We abjure all inequality before the 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*.<sup>277</sup>

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.”<sup>278</sup> Therefore, he emphasized that the operation of segregated schools inflicts upon Black students the stigma of caste, even though all matters in the white and colored schools were

273. *Id.* at 5.

274. *Id.* at 14.

275. *Id.* at 15.

276. To drive home this point, he quotes criticisms of the Hindu caste system contained in a book by Reverend Joseph Roberts. *See generally* JOSEPH ROBERTS, CASTE, IN ITS RELIGIOUS AND CIVIL CHARACTER, OPPOSED TO CHRISTIANITY (1847).

277. *See* Sumner, *supra* note 272, at 19.

278. *Id.* at 14 (emphasis omitted); *see also* Charles Sumner, *Argument of Charles Sumner, Esq. Against the Constitutionality of Separate Colored Schools, in The Case of Sarah C. Roberts vs. The City of Boston, December 4, 1849*, in SLAVERY, RACE, AND THE AMERICAN LEGAL SYSTEM 1700–1872, at 493, 508 (Paul Finkelman ed., 2007).

equal, because “a school exclusively devoted to one class must differ essentially, in its spirit and character.”<sup>279</sup> Sumner went on to highlight that the words “caste” and “equality” are contradictory; hence, where there is caste, there cannot be equality. The “same words, which are potent to destroy slavery, must be equally potent against any institution founded on caste.”<sup>280</sup> Thus, compelling colored children to attend separate schools violates the “Constitution, legislation, and judicial decisions—first, by subjecting colored children to inconvenience, inconsistent with the requirements of Equality, and, secondly, by establishing a system of Caste odious as that of the Hindoos.”<sup>281</sup>

In an opinion written by Chief Justice Lemuel Shaw (who was perhaps the most prestigious Antebellum state judge of the time),<sup>282</sup> the Massachusetts Supreme Judicial Court complimented Sumner on his advocacy.<sup>283</sup> However, the Court rejected the plaintiff’s legal argument 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.”<sup>284</sup>

### 3. *Use of the Caste Analogy by Congress During Reconstruction*<sup>285</sup>

Gunnar Myrdal explains in his epic book on race relations, *An American Dilemma*, that the Emancipation Proclamation stopped the common practice of referring to Black Americans as “slaves.”<sup>286</sup> Instead, the terms “freedmen” and “ex-slaves” came into popular use.<sup>287</sup> Americans also sought a term to describe Black people whom, as a group, white Americans continued to view as inferior.<sup>288</sup> As a result, the use of the term “caste” increased significantly.<sup>289</sup>

As 1866 unfolded, Congress took up work on what would become the Civil Rights Act of 1866 to provide and protect the legal rights of the newly freed

279. *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 203 (1849).

280. *Id.* at 204.

281. Sumner, *supra* note 272, at 3 (emphasis omitted).

282. See Kousser, *supra* note 259, at 1008.

283. *Roberts*, 59 Mass. at 206.

284. *Id.* at 209.

285. In pointing to these statements to demonstrate that the Civil Rights Act of 1866 and the Fourteenth Amendment should be viewed as anti-caste measures, we do not intend to become part of the scholarly debate regarding the interpretation of the Equal Protection Clause. For a discussion of this issue, see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470 (2004). Our goal is more limited—we simply intend to establish the political and legal importance of the analogy of the caste system in South Asia to race discrimination in the United States, for it suggests that nineteenth-century Americans viewed caste as a form of race. For us, it is not relevant whether one interprets the Equal Protection Clause as an anti-caste measure that would allow race-based programs to ameliorate the continuing impact of America’s history of racial discrimination or an anti-classification measure aimed at preventing consideration of race at all. If caste is viewed as an aspect of race, then caste discrimination would be banned under either interpretation.

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

287. *Id.*

288. *Id.*

289. *Id.*

people.<sup>290</sup> During these debates, several congressmen used the caste–race analogy to help explain the purposes of the Act. Responding to an argument that the government was organized in the interest of the white race, Senator Justin Morrill asserted that the Declaration of Independence’s language precluded the idea of a country based on any such distinction between races, colors, or castes.<sup>291</sup> A few days later, Sumner argued that white domination creates “nothing less than a Caste, which is at once irreligious and unrepblican. As such, Caste is contrary to the first principles of Christianity and the Republic.”<sup>292</sup> Sumner went on to point out that Brahmins and Sudras had been generally separated in India in the same way Blacks and whites were separated in the United States.<sup>293</sup> Senator William Fessenden agreed with Sumner that a “caste exclusion is entirely contrary to the spirit of our Government.”<sup>294</sup> Nevertheless, he felt that a measure eliminating all distinctions based on color would not pass Congress.<sup>295</sup> In March 1866, Representative John Martin Bloom argued that the federal government must guarantee the rights of all regardless of caste:

“[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 be,” and “that no system of reconstruction ought to be considered unless it shall effectually guaranty [sic] the rights of Union men of the South.”<sup>296</sup>

Even those who opposed the adoption of such an amendment would also use the caste metaphor. One opponent expressed his concern that Congress would do more than merely abolish slavery—it would “repeal God’s law of *caste*.”<sup>297</sup>

Indeed, the principal goal of Congress in passing the Civil Rights Act of 1866 was to prevent a race-based caste system.<sup>298</sup> However, during the debates on the Civil Rights Act of 1866, opponents alleged that the Act exceeded the authority granted to Congress under the Thirteenth Amendment.<sup>299</sup> As these policymakers put it, the power of Congress to legislate against slavery did not include the power to provide equal civil rights or to prohibit private acts of discrimination.<sup>300</sup> Adding the Fourteenth Amendment to the Constitution would allow the 1866 Act’s proponents to defend against the possibility that courts might agree with the Act’s opponents. A constitutional amendment would also prevent a subsequent Congress from repealing

290. FONER, *supra* note 210, at 243.

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

292. *Id.* at 683.

293. *Id.*

294. *Id.* at 704.

295. *Id.*

296. *Id.* at 1262.

297. *See, e.g.*, DAILY NAT’L INTELLIGENCER, Jan. 5, 1866, at col. 1 (expressing concern that Congress would go beyond the abolition of slavery and “repeal God’s law of caste”).

298. *See* Calabresi & Ricker, *supra* note 233, at 13.

299. *See* EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 75 (3d ed. 1880).

300. *See id.*

the Act.<sup>301</sup> Thus, on June 13, 1866, two months after overriding President Andrew Johnson’s veto of the Act, the same Congress seeking to ensure the validity and permanency of the rights granted in the Act sent the Fourteenth Amendment to the states for ratification.<sup>302</sup>

As recognized by several constitutional scholars, the history of the construction of Section 1 of the Fourteenth Amendment shows that it was understood by many “to ban class legislation and systems of caste, terms that were understood to be nearly identical.”<sup>303</sup> For example, on May 23, 1866, Senator Jacob Howard explained why the words “race” and “color” were dropped from the Amendment:

The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another.<sup>304</sup>

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

302. FONER, *supra* note 210, at 247, 254; see also *Hurd v. Hodge*, 334 U.S. 24, 32 (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.” (footnote omitted)).

303. Calabresi & Ricker, *supra* note 233, at 19; see also, Calabresi, *supra* note 208, at 149 (“I agree with John Harrison that the Amendment bans all forms of caste-like discrimination.” (footnote omitted)). Professor Melissa L. Saunders has argued that the Amendment goes beyond just banning systems of caste based on hereditary and social stigmatization. See 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). Harrison recognizes that the purpose of the Fourteenth Amendment was to put an end to such laws, to “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.” *Id.* (alterations in original) (citing CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866)); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 299–300 (2007) (“As I shall describe later on, equal rights for women are fully consistent with the original meaning of the Fourteenth Amendment and its underlying principles of equal citizenship and opposition to caste and class legislation.” (footnote omitted)); Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 601 (2006); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2435 (1994) (arguing that “the purpose of the Fourteenth Amendment was to . . . [do] away with the injustice of subjecting one caste of persons to a code not applicable to another” (alteration in original) (footnote omitted)). Sunstein employed a broader concept of caste. For him “[t]he motivating idea behind an anticaste principle is that *without good reason, social and legal structures should not turn differences that are both highly visible and irrelevant from the moral point of view into systematic social disadvantages.*” *Id.* at 2429. For Sunstein, the broader concept would also apply to sex discrimination as well as race discrimination.

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

Howard went on to note that a caste-like system existed between Black and white people in the United States, and he discussed how the Fourteenth Amendment would address it.<sup>305</sup> Additionally, while discussing Section 1 of the Amendment, Representative Thomas Eliot stated:

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.<sup>306</sup>

In August 1866, the Republican Party went so far as to post bulletins explaining that the Fourteenth Amendment was meant to bar caste- and class-based discrimination. “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. How much did the Democrats do toward that object?”<sup>307</sup>

The Fourteenth Amendment was ratified in July 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.<sup>308</sup> As the most influential leader of the Radical Republicans in the Senate, Sumner continued to be a major advocate for equal civil and political rights for the freedmen. For example, as the Fifteenth Amendment was going through the ratification process at the state level, in 1869, Sumner published an essay entitled *The Question of Caste*. This essay included much of the substance of speeches he delivered in a dozen cities in the Northeast.<sup>309</sup> Specifically, Sumner once again fully discussed the caste analogy, making several of the same points that he first made in his arguments twenty years earlier in *Roberts v. Boston*.<sup>310</sup>

305. *Id.*

306. *Id.* at 2511.

307. Calabresi & Ricker, *supra* note 233, at 35 (quoting *Who Did It?*, PHILA. N. AM. & U.S. GAZETTE, Aug. 18, 1866, at 1 (emphasis added)).

308. U.S. CONST. amends. XIV, XV. The Fifteenth Amendment was ratified on February 3, 1870.

309. See DAVID HERBERT DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 418–19 (1970). For a copy of Sumner’s remarks, see *Hon. Charles Sumner on “Caste.”*, N.Y. TIMES (Nov. 30, 1869), <https://www.nytimes.com/1869/11/30/archives/hon-charles-sumner-on-caste.html> [<https://perma.cc/2L4H-5Q6M>]; see also HON. CHARLES SUMNER, QUESTION OF CASTE 18 (Wright & Potter, 1869).

310. 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 that 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 DONALD, *supra* note 309, at 9.

Sumner and others would come back to the caste arguments during several other congressional debates.<sup>311</sup> For example, in hearings in 1871 on public schools in Washington D.C., Massachusetts Senator and eventual Vice President Henry Wilson noted that the legislature in his state had reversed the decision in *Roberts v. Boston* and allowed Black children to attend the former all-white schools. In doing so, the legislature demonstrated “the mode and manner of educating the people against caste.”<sup>312</sup> In hearings conducted in February 1874 on the Civil Rights Act of 1875, Representative Alonzo Ransier, one of the Black congressmen from South Carolina, praised the integrated education that occurred at Berea College in Kentucky. He noted that such an integrated school can teach mutual respect and forbearance and can take away some of the “superciliousness of caste and race.”<sup>313</sup>

#### 4. Use of the Caste Analogy by the Press During Reconstruction

The press is often the principal organ that reveals the public meaning of actions.<sup>314</sup> Accounts in newspapers throughout the country regularly discussed the anti-caste meaning of Congress’s debates on the Civil Rights Act of 1866 and the Fourteenth Amendment.<sup>315</sup> During debates on the passage of the 1866 Act, the *North American and United States Gazette* included an editorial referencing the ability of the Act to prevent the reimposition of a pernicious caste system:

The Civil Rights bill, to which we alluded on its passage by the Senate, is properly connected with this Freedmen’s Bureau bill, and taken together they will undoubtedly work great changes in the rebellious States. They must render nugatory all efforts of the dominant rebel influence to re-impose a pernicious system of *caste* upon the south and to deprive the freedmen of their civil rights, or of the legal means of defence [sic].<sup>316</sup>

An editorial published by the *Chicago Tribune* in January 1866 called for an amendment to the Constitution prohibiting the enactment of laws that recognize or create any distinction along racial lines in political or civil rights and immunities. The editorial concluded by asserting, “We believe that we might as well level the evil of *caste* at one blow.”<sup>317</sup> The *San Francisco Daily Evening Bulletin* also noted that the Fourteenth Amendment provided the opportunity “for the masses to break down *caste* and aristocracy.”<sup>318</sup> Thus, caste discrimination was analogous to race

311. For a discussion, see Fair, *supra* note 271, at 389–93.

312. *Id.* at 393 (emphasis omitted) (quoting *Hearings on Public Schools in the District of Columbia; National Education Fund*, 41st Cong. 1061 (Feb. 8 & 14, 1871) (statement of Sen. Wilson)).

313. *Id.* at 394 (emphasis omitted) (citing *Hearings on Civil Rights Bill*, 43rd Cong. 1314 (Jan. 27 & Feb. 7, 1874) (statement of Rep. Ransier)) (“[A]rguing in favor of non-proscriptive schools, reading from a notice for Berea College appearing in THE AMERICAN MISSIONARY 243–44 (Nov. 1873).”)

314. Grant Darwin, *Originalism and Same-Sex Marriage*, 16 U. PA. J.L. & SOC. CHANGE 237, 252 (2013).

315. Calabresi & Ricker, *supra* note 233, at 35.

316. *The Practical Work of Reconstruction*, N. AM. & U.S. GAZETTE, Feb. 12, 1866, at 2.

317. Editorial, *Class Legislation*, CHI. TRIB., Jan. 12, 1866, at 2.

318. *Southern Experiment*, S.F. DAILY EVENING BULL., Nov. 9, 1866, at 1.

discrimination because it involved a hierarchical system of social stratification on the basis of an inherited trait due to one's ancestry.

#### 5. Conclusion

While Senator Charles Sumner clearly engaged in an in-depth study of the caste system in South Asia, it is not clear that many others who used the caste–race analogy knew as much about caste as he did. Those who spoke about the caste system in Congress and who wrote about it in popular publications did not typically discuss it in specific details. Rather, they described it in broad terms as a hierarchal system of social division in which membership in an endogamous group was hereditary and permanent.

### IV. WHETHER CASTE DISCRIMINATION IS RACE DISCRIMINATION IN THE LEAD-UP TO AND PASSAGE OF THE CIVIL RIGHTS ACT OF 1964

The caste–race analogy remained central to legal, political, and social arguments after Reconstruction. For example, as virtually every American law professor, lawyer, and law student knows, Justice John Harlan wrote a famous dissenting opinion in the Supreme Court's otherwise infamous *Plessy v. Ferguson* decision.<sup>319</sup> In what may very well be the most renowned passage from any legal opinion ever written by a justice of the U.S. 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.”<sup>320</sup>

Advocates for legal equality for African Americans would continue to employ the caste–race analogy throughout the twentieth century as well. For example, the original 1909 charter for the National Association for the Advancement of Colored People (“NAACP”) expressed its mission to include eradicating caste:

To promote equality of rights and *eradicate caste* or race prejudice among citizens of the United States; to advance the interest of colored citizens; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment according to their ability, and complete equality before the law.<sup>321</sup>

Using the Aryan Invasion Theory, the caste–race analogy was also raised in a number of legal efforts by South Asians who sought U.S. citizenship between 1909 and 1923.<sup>322</sup> In the Naturalization Act of 1790, Congress limited the eligibility

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319. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

320. *Id.* at 559 (emphasis added).

321. NAACP: *A Century in the Fight for Freedom*, LIBR. OF CONG., <https://www.loc.gov/exhibits/naacp/founding-and-early-years.html> [<https://perma.cc/7UXC-S6V5>] (last visited Nov. 2, 2024). For the eight-point program, see Elliott M. Rudwick, *The Niagara Movement*, 42 J. NEGRO HIST. 177, 179 (1957). See also GEORGE PADMORE, PAN-AFRICANISM OR COMMUNISM?: THE COMING STRUGGLE FOR AFRICA 112 (1956).

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



for naturalized citizenship to “free white person[s].”<sup>323</sup> In these cases, South Asian plaintiffs asserted that they were eligible for naturalized citizenship because they were Caucasian.<sup>324</sup> However, the Supreme Court rejected this argument in its unanimous 1923 decision in *United States v. Bhagat Singh Thind*.<sup>325</sup> The Court noted that to determine the meaning of the words “white persons,” it must look to what the original framers of the 1790 statute thought the words meant in common, not scientific, speech.<sup>326</sup> The Court expressed that conclusion by writing, “[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 . . . .”<sup>327</sup>

While it does appear that there are very strong arguments that caste discrimination based on untouchability is a form of race discrimination under 42 U.S.C. §§ 1981 and 1982, the issue is more complicated under the Civil Rights Act of 1964. The 1964 Act includes a prohibition against race discrimination under Titles II,<sup>328</sup> III,<sup>329</sup> VI,<sup>330</sup> and VII.<sup>331</sup> The Supreme Court “has long recognized, too, that when Congress uses the same terms in the same statute, we should presume they ‘have the same meaning.’”<sup>332</sup> However, unlike §§ 1981 and 1982, the relevant titles under the 1964 Act also include discrimination based on “national origin.”<sup>333</sup> For purposes of § 1981, the Supreme Court defined race as broad enough to cover

323. See IAN HANEY LÓPEZ, *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.* at 42–43.

324. Banks, *supra* note 322, at 19.

325. 261 U.S. 204 (1923). Interestingly, Dr. Bhagat Singh Thind was 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. Critical Race Persps.* 1, 3 n.6 (2015).

326. *Bhagat Singh Thind*, 261 U.S. at 208.

327. *Id.* at 209.

328. Civil Rights Act of 1964 § 201(a), 42 U.S.C. § 2000(a).

329. *Id.* § 301.

330. *Id.* § 601.

331. 110 *CONG. REC.* 2556 (1964). During the congressional debates, Congressman Cellar stated, “You must remember that the basic purpose of Title VII is to prohibit discrimination in employment on the basis of race or color.” *Id.* Additionally, Senator Humphrey declared during Senate debate on the Civil Rights Act of 1964, “The goals of this bill are simple ones: To extend to Negro citizens the same rights and the same opportunities that white Americans take for granted.” *Id.* at 6552.

332. *Students for Fair Admissions, Inc. v. Presidents & Fellows of Harvard Coll.*, 600 U.S. 181, 290 (2023) (Gorsuch, J., concurring) (citation omitted).

333. *Id.* at 288 (citation omitted). Scholars have also addressed whether caste discrimination could be a form of color, national origin, or religious discrimination. Those categories are outside of the scope of this Article, but see Guha Krishnamurthi & Charanya Krishnaswami, *Title VII and Caste Discrimination*, 134 *HARV. L. REV. F.* 456 (2020); Kevin Brown et al., *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*, 46 *N.Y.U. REV. L. & SOC. CHANGE* 117 (2022); Brett Whitley, *Importing Indian Intolerance: How Title VII Can Prevent Caste Discrimination in the American Workplace*, 75 *ARK. L. REV.* 163 (2022).

national origin. Thus, the inclusion of “national origin” as a protected trait in the provisions of the 1964 Act raises the question of whether the concept of “race” was understood differently in 1964 than it was in the nineteenth century. Unlike with § 1981, there is no Supreme Court opinion addressing the meaning of “race” under the Civil Rights Act of 1964.<sup>334</sup>

As Justice Gorsuch recently stated when discussing Title VI of the 1964 Civil Rights Act in his concurring opinion in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, “When a party seeks relief under a statute, our task is to apply the law’s terms as a reasonable reader would have understood them at the time Congress enacted them.”<sup>335</sup> Section IV.A discusses why the inclusion of “national origin” as a protected trait does not preclude the conclusion that caste discrimination is a form of race discrimination. American concepts of race and/or ethnicity today have been heavily influenced by the federal government’s 1977 creation of definitions of various racial groups for the purposes of collecting and reporting racial and/or ethnic data. If the federal definitions of race are determined by courts to contain an exhaustive list of racial categories, then caste would not be a form of race under the Civil Rights Act of 1964. Section IV.B discusses these federal definitions of racial and ethnic categories. The federal courts have not used the federal definitions to determine the meaning of race under the Civil Rights Act of 1964. Instead, they have employed the legal analysis for and the definition of race from § 1981 to provisions in the Act. Section IV.C discusses this. Several members of Congress also referred to the caste–race analogy during the debates surrounding passage of the 1964 Act, though these references were not as extensive as those in references in the combined debates for the Civil Rights Act of 1866 and the Fourteenth Amendment. Section IV.D discusses these references. Finally, Section IV.E notes the definitions of race from contemporary sources of the passage of the 1964 Act. Those definitions are similar to the definitions of race from contemporary sources the Court used in determining the meaning of race for § 1981.<sup>336</sup> All of this evidence, taken as a whole, suggests that a reasonable reader at the time Congress enacted the 1964 Act would have understood caste discrimination based on untouchability to be a form of race discrimination.

#### ***A. National Origin Discrimination Does Not Preclude the Conclusion that Caste Discrimination Is a Form of Race Discrimination***

The concept of national origin first appeared in federal law in the Immigration Act of 1924, also known as the National Origins Act. But the term was not defined there.<sup>337</sup> Starting in 1943, there were various executive orders that

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334. According to the Supreme Court’s opinion in *Saint Francis v. Al-Khazraji*, “It was not until the 20th century that dictionaries began referring to the Caucasian, Mongolian, and Negro races, or to race as involving divisions of mankind based upon different physical characteristics.” 481 U.S. 604, 611 (1987) (citing 8 THE CENTURY DICTIONARY AND CYCLOPEDIA 4926 (1911)).

335. *Students for Fair Admissions, Inc.*, 600 U.S. at 288 (Gorsuch, J., concurring).

336. See *infra* notes 367–78 and accompanying text.

337. Congress will also subsequently amend the Act by passing the Johnson–Reed or Second National Origins Act that went into effect in 1929. See Michael R. Curran, *Flickering Lamp Beside the Golden Door: Immigration, the Constitution, & Undocumented Aliens in the 1990s*, 30 CASE W. RES. J. INT’L L. 57, 94 (1998).

prohibited discrimination based on “national origin in federal government employment.”<sup>338</sup> Additionally, “national origin” appears in the Immigration and Nationality Act of 1952, also known as the McCarran–Walter Act, but with no discussion.<sup>339</sup> The Civil Rights Act of 1957 created the Commission on Civil Rights. Section 104 charged the Commission with the obligation to investigate allegations “that certain citizens of the United States are being deprived of their right to vote . . . [because] of their color, race, religion, or national origin.”<sup>340</sup> This is the first use of national origin in a federal anti-discrimination statute.<sup>341</sup>

In 1970, the Equal Employment Opportunity Commission (“EEOC”) released its first guidance under Title VII on national origin discrimination.<sup>342</sup> The policy guidance defines national origin discrimination “broadly as including, but not limited to, 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.”<sup>343</sup>

The Supreme Court’s 1973 decision in the Title VII case *Espinoza v. Farah Manufacturing Co.*<sup>344</sup> addressed the issue of whether discrimination against a non-citizen constituted national origin discrimination under Title VII. *Espinoza* also contains the Court’s most extensive discussion of the definition of national origin under the Civil Rights Act of 1964. The Court noted that the statute’s legislative history regarding discussions of “national origin” is quite meager.<sup>345</sup> The entire debate around national origin was less than three pages and centered on a clerical error that caused the words “national origin” to be deleted from the House version of the bill.<sup>346</sup> The Court also noted the only definition for national origin mentioned during the congressional debates:

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338. *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 89 (1973) (citing Exec. Order No. 9346, 3 C.F.R. 1280 (Cum. Supp. 1938–1943); Exec. Order No. 11478, 3 C.F.R. 446 (1970)).

339. The Act did not define “national origin,” but it did define “national.” “The term ‘national’ means a person owing permanent allegiance to a state.” 8 U.S.C. § 1101(a)(21).

340. Civil Rights Act of 1957, Pub. L. No. 85-315, § 104(a)(1), 71 Stat. 634, 635 (1957).

341. Stephen M. Cutler, Note, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 YALE L.J. 1164, 1170 n.26 (1985) (“Section 104(a)(1) imposed on the newly created Civil Rights Commission the duty to ‘investigate allegations . . . that certain citizens . . . [were] being deprived of their right to vote . . . by reason of their color, race, religion, or national origin . . . .’” (alteration in original) (citation omitted)). For purposes of administrative law, the first use of “national origin” comes from President Roosevelt’s Executive Order No. 6802, 6 Fed. Reg. 3109 (1941), “which established the first Committee on Fair Employment Practice.” *Id.*

342. See Guidelines on Discrimination Because of National Origin, 35 Fed. Reg. 421 (Jan. 13, 1970) (to be codified at 29 C.F.R. § 1606.1).

343. *Id.*

344. 414 U.S. 86 (1973).

345. *Id.* at 88–89.

346. See U.S. EQUAL EMP. OPPORTUNITY COMM’N, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, at 3179–81 (1968) (presenting the entire debate

The only direct definition given the phrase ‘national origin’ is the following remark made on the floor of the House of Representatives by Congressman Roosevelt, Chairman of the House Subcommittee which reported the bill: ‘It means the country from which you or your forebears came. . . . You may come from Poland, Czechoslovakia, England, France, or any other country.’<sup>347</sup>

In concluding that discrimination against a non-citizen is not national origin discrimination, echoing Congressman Roosevelt’s remarks, the Court stated that “[t]he term ‘national origin’ on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came.”<sup>348</sup> 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; rather, it was synonymous with “national origin.”<sup>349</sup>

National origin is a different concept than race because it encompasses a person’s or ancestor’s place of birth. However, individuals can be victims of both national origin and race discrimination. Thus, the concept of national origin discrimination doesn’t appear to eliminate the notion that caste is a form of race. It only suggests that caste discrimination may also be a form of race, as well as national origin, discrimination.

#### ***B. The Federal Government’s Racial Classifications Are Not Applicable***

This Section addresses the federal government’s current regulations that provide definitions for racial and/or ethnic classifications that institutions must use in the collecting and reporting of racial and/or ethnic data to the federal government. This includes educational institutions and certain employers that must file an annual EEO-1 Report with the Joint Reporting Committee (which consists of the EEOC and Office of Federal Contract Compliance Programs).<sup>350</sup> If the federal definitions are used to determine the exhaustive list of races, then caste discrimination would not be considered a form of race discrimination.

The federal government has used racial classifications to generate racial statistics since the first census in 1790. Nevertheless, it was not until 13 years after

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on intention of including national origin discrimination within the ambit of Title VII). This discussion was caused by a clerical error that caused the words “national origin” to be deleted from the House version of the bill.

347. *Espinoza*, 414 US at 89 (quoting 110 CONG. REC. 2549 (1964)).

348. *Id.* at 88 (footnote omitted).

349. *Id.* at 89 (citation omitted). “Ancestry can be a proxy for race. It is that proxy here. Even if the residents of Hawai’i in 1778 had been of more diverse ethnic backgrounds and cultures, it is far from clear that a voting test favoring their descendants would not be a race-based qualification.” *Rice v. Cayetano*, 528 U.S. 495, 514 (2000) (discussing the application of the Fifteenth Amendment to a claim by a non-native Hawai’ian who was prevented from voting on that basis).

350. See *EEO-1 Data Collection*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/employers/eo-1-data-collection> [<https://perma.cc/6PFK-KET5>] (last visited Oct. 3, 2024). Employers who must file include “all private sector employees with at least 100 or more employees, and federal contractors with 50 or more employees meeting certain criteria.” *Id.*

the passage of the Civil Rights Act of 1964 that the federal government first adopted standardized definitions for various racial and ethnic categories. Because of Supreme Court opinions in the 1950s, 1960s, and 1970s; passage of civil rights legislation by Congress in the 1960s; and the institution of President Lyndon Johnson’s Great Society programs, by the early 1970s, several different federal agencies were collecting, reporting, and using racial and ethnic data. This generated the first effort by the federal government to standardize the collection and reporting of such information. In 1974, the Federal Interagency Committee on Education (“FICE”) created the Ad Hoc Committee on Racial and Ethnic Definitions to determine the definitions for the various racial/ethnic groups.<sup>351</sup>

With echoes of the Aryan Invasion Theory, the Ad Hoc Committee’s preliminary draft stated, “A person having origins in any of the original peoples of . . . the Indian subcontinent” were to be placed in the “Caucasian/White” category.<sup>352</sup> The Committee noted that although individuals from the Indian subcontinent were from Asia, and some were victims of discrimination, the discrimination they faced appeared to be concentrated in specific geographical and occupational areas.<sup>353</sup> One of the most significant changes between the preliminary draft and the final, however, was to move South Asians from the “White” category into the “Asian” category.<sup>354</sup>

On May 12, 1977, the “Race and Ethnic Standards for Federal Statistics and Administrative Reporting” became effective for all federal government agencies—it required that all existing data collections comply with its terms and definitions by January 1, 1980.<sup>355</sup> In 1978, the Standards were renamed “Statistical Policy Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting” (“Directive 15”).<sup>356</sup>

After its adoption, Directive 15 was subject to much controversy and criticism. By the late 1980s, multiracial advocates were pushing for the inclusion of a separate “multiracial” category on all governmental forms that asked for racial and ethnic information.<sup>357</sup> From 1993 to 1997, the federal government conducted a

351. For a discussion of the history of the creation of the federal government’s definitions for race and ethnicity, see Brown, *supra* note 35, at 44–60.

352. See FED. INTERAGENCY COMM. ON EDUC., REPORT OF THE AD HOC COMMITTEE ON RACIAL AND ETHNIC DEFINITIONS 4 (1975), <https://files.eric.ed.gov/fulltext/ED121636.pdf> [<https://perma.cc/74KF-VXA2>].

353. *Id.* at 4–5.

354. Brown, *supra* note 35, at 46.

355. OFF. OF MGMT. & BUDGET, DIRECTIVE NO. 15, RACE AND ETHNIC STANDARDS FOR FEDERAL STATISTICS AND ADMINISTRATIVE REPORTING (1977).

356. For a more complete retelling of Directive 15’s change of name, see RAINER SPENCER, SPURIOUS ISSUES: RACE AND MULTIRACIAL IDENTITY POLITICS IN THE UNITED STATES 70–71 (1999).

357. As Kim Williams, who extensively studied the movement to alter the federal forms to allow individuals to mark one or more boxes, stated:

Unexpectedly, I found that white, liberal, and suburban-based middle-class women (married to black men) held the leadership roles in most multiracial organizations. These white women helped to set an optimistic

review of Directive 15 that culminated with the Office of Management and Budget (“OMB”) publishing its revisions to Directive 15 on October 30, 1997 (the “1997 Revisions”).<sup>358</sup> The 1997 Revisions required that those filling out forms reporting racial and/or ethnic data to the federal government to respond to the following question: are you Hispanic/Latino? Respondents could then pick from five racial categories—American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; or White—to specify their identity.<sup>359</sup> The 1997 Revisions provided that after the 2000 census, all federal programs adopt standards for reporting racial and ethnic data consistent with the Revisions.<sup>360</sup>

On March 28, 2024, the OMB updated the federal regulations and added a category for “Middle Eastern or North African (MENA).”<sup>361</sup> It specified that these regulations must be complied with within “five years after the [ir] publication.”<sup>362</sup> The MENA category will be added to the existing federal race and ethnicity categories.<sup>363</sup> In addition, the changes eliminated the separate Hispanic/Latino question, which will now be combined with the question about racial identity. Thus, respondents will be allowed to designate any of the now seven racial and/or ethnic categories with which they identify. Given the limited number of racial categories for the purposes of collecting and reporting racial data to the federal government, it is clear that caste is not considered a racial category under the federal definitions.

***C. Federal Courts Have Used the Legal Analysis for and the Definition of Race from § 1981 for the Civil Rights Act of 1964***

Even though institutions that report racial and ethnic data to the federal government must use the federal definitions, federal courts have not applied these definitions to determine the meaning of race under the Civil Rights Act of 1964. Justice Gorsuch recently expounded on the application of Title VI to race discrimination in his concurring opinion in *Students for Fair Admissions*.<sup>364</sup> In doing so, he took to task the federal definitions for race and ethnicity. He noted that these definitions were created “without any input from anthropologists, sociologists, ethnologists, or other experts.”<sup>365</sup> He also pointed out that the classifications rested

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tone for multiracial activism; many believed that American racial polarization could be overcome by their example. Most of these women were looking for community—not for a census designation. Movement spokespeople reversed these priorities somewhat, although they parted ways after the OMB decision in 1997.

KIM WILLIAMS, MARK ONE OR MORE: CIVIL RIGHTS IN MULTIRACIAL AMERICA 112 (2008).

358. OFF. OF MGMT. & BUDGET, REVISIONS TO THE STANDARDS FOR THE CLASSIFICATION OF FEDERAL DATA ON RACE AND ETHNICITY (1997).

359. *Id.*

360. *Id.*

361. *See* OFF. OF MGMT. & BUDGET, REVISIONS TO OMB’S STATISTICAL POLICY DIRECTIVE NO. 15: STANDARDS FOR MAINTAINING, COLLECTING, AND PRESENTING FEDERAL DATA ON RACE AND ETHNICITY 1 (2024).

362. *Id.* at 8.

363. *See* U.S. EQUAL EMP. OPPORTUNITY COMM’N, 2023 EEO-1 COMPONENT 1 DATA COLLECTION INSTRUCTION BOOKLET 7 n.5 (2023).

364. *See* 600 U.S. 181, 291 (2023) (Gorsuch, J., concurring).

365. *Id.* at 291 (citation omitted).

on incoherent stereotypes, noting that 60% of the world’s population are lumped into the “Asian” category.<sup>366</sup> This paves over all of the differences in language, culture, and historical experiences of billions of people.<sup>367</sup> He criticized the lumping together of different groups in the other categories as well, noting, for example, the Black category includes “everyone from a descendant of enslaved persons who grew up poor in the rural South, to a first-generation child of wealthy Nigerian immigrants, to a Black-identifying applicant with multiracial ancestry whose family lives in a typical American suburb.”<sup>368</sup>

Federal courts have typically looked to § 1981 for the appropriate legal analysis for disparate treatment cases under the Civil Rights Act of 1964.<sup>369</sup> In addition, reflecting Justice Gorsuch’s hesitancy about the federal definitions of race and ethnicity, courts have applied the definition of race from § 1981 to the titles of the Civil Rights Act of 1964.<sup>370</sup> For example, in *Village of Freeport v. Barrella*, the Second Circuit Court of Appeals agreed that discrimination against Hispanics was national origin discrimination under Title VII.<sup>371</sup> It then addressed whether such discrimination could also be race discrimination under Title VII.<sup>372</sup> The Second Circuit noted that the lower court had struggled to determine whether the term “Hispanic” fell within the legal definition of race, partly due “to the federal

366. *Id.* at 291–92 (citation omitted).

367. *Id.* at 292 (citation omitted).

368. *Id.* (citation omitted).

369. *See, e.g., Littlejohn v. City of New York*, 795 F.3d 297, 312 (2d Cir. 2015) (“[Plaintiff’s] disparate treatment claim under Title VII, § 1981, and § 1983 is subject to the burden-shifting evidentiary framework set forth in *McDonnell Douglas*.” (citation omitted)); *Patterson v. County of Oneida*, 375 F.3d 206, 225 (2d Cir. 2004) (noting that while there are “several significant differences” among the statutes, “the standards applicable to the conduct alleged to constitute . . . violation of Title VII are also applicable to [plaintiff’s] employment claims under § 1981 and . . . § 1983.”); *Hill v. City of New York*, 136 F. Supp. 3d 304, 331 (E.D.N.Y. 2015) (“Employment discrimination claims under §§ 1981 and 1983 . . . are governed by the same liability standard and analytical framework as Title VII disparate treatment claims.” (citations omitted)); *Whethers v. Nassau Health Care Corp.*, 956 F. Supp. 2d 364, 383 (E.D.N.Y. 2013) (“The *McDonnell Douglas* analysis applies to both Title VII discrimination claims and claims under § 1981.” (citation omitted)); *Whyte v. Nassau Health Care Corp.*, 969 F. Supp. 2d 248, 254 (E.D.N.Y. 2013) (same); *see also Walker v. Sec’y of the Treasury*, 713 F. Supp. 403, 405 (N.D. Ga. 1989) (“[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.” (citations omitted)); *Phillip v. City of New York*, No. 09 Civ. 442, 2012 WL 1356604, at \*8 (E.D.N.Y. Apr. 19, 2012); *Vivenzio v. City of Syracuse*, 611 F.3d 98, 106 (2d Cir. 2010) (noting the basic analytical framework for claims under Title VII and § 1981 are the same).

370. *See, e.g., Walker*, 713 F. Supp. at 405 (“[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.” (citations omitted)); *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 for purposes of those statutes.” (footnote omitted)).

371. 814 F.3d at 616–17.

372. *Id.* at 607 (“In *Malave v. Potter* (2003), 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))).

government's less-than-straightforward use of those terms."<sup>373</sup> However, the court pointed out that if it excluded Hispanic status from Title VII's definition of race, plaintiffs pursuing both § 1981 and Title VII claims in some circumstances might need to present two different factual arguments.<sup>374</sup> In order to avoid this result, the Second Circuit concluded that race in Title VII claims encompassed ethnicity.<sup>375</sup>

Consistent with the Supreme Court's guidance that the same terms in the same statute are presumed to have the same meaning,<sup>376</sup> federal courts have also concluded that the legal analysis for § 1981 claims applies equally to Title II and VI claims.<sup>377</sup> Courts have also noted that a "a plaintiff alleging a violation of Section 2000a (Title II) must allege facts which show [she] was deprived of equal use and enjoyment of a covered facility's services and facts which demonstrate discriminatory intent."<sup>378</sup>

#### *D. Uses of Caste During Congressional Debates*

During the congressional debates regarding the passage of the Civil Rights Act of 1964, several members of Congress referred to the caste–race analogy. For example, in the House debates, a Republican Representative from Minnesota argued that "this great country did not develop a caste system whereby we would have first- and second-class citizens."<sup>379</sup> On February 10, 1964, Representative William St. Onge 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

373. *Id.* at 602 (footnote omitted).

374. *Id.* at 606.

375. *Id.*

376. *Students for Fair Admissions, Inc. v Presidents & Fellows of Harvard Coll.*, 600 U.S. 181, 290 (2023) (Gorsuch, J., concurring).

377. For Title VI, see *Pryor v. National Collegiate Athletic Ass'n*, 288 F.3d 548, 562–64 (3d Cir. 2002).

378. *Thomas v. Tops Friendly Mkts., Inc.*, No. 96-CV-1579, 1997 WL 627553, at \*5 (N.D.N.Y. Oct. 8, 1997); see also *Coward v. Town & Village of Harrison*, 665 F. Supp. 2d 281, 307 (S.D.N.Y. 2009) ("[T]he Second Circuit [has] looked to Title VII and Section 1981 cases for guidance to determine whether racial discrimination actually occurred in a Section 2000a case," and "[d]istrict courts have applied similar standards." *Id.* (alterations in original) (quoting *Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333, 1340–41 (2d Cir. 1974); *Perry v. Burger King Corp.*, 924 F. Supp. 548, 552 (S.D.N.Y. 1996))); see also *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 673 (2d Cir. 1995) ("In order to survive a motion to dismiss under any of the civil rights statutes invoked, 'the plaintiff must specifically allege the events claimed to constitute intentional discrimination as well as circumstances giving rise to a plausible inference of racially discriminatory intent.'" (quoting *Yusuf v. Vassar Coll.*, 35 F.3d 709, 713 (2d Cir. 1994))); *Deide v. Day*, No. 23-cv-3954, 2023 WL 3842694, at \*20 (S.D.N.Y. June 6, 2023); *Radars Sports Mgmt., LLC v. Legacy Lacrosse, LI Inc.*, No. 21-CV-5749, 2023 WL 2632461, at \*9 (E.D.N.Y. Mar. 24, 2023); *Stone v. N.Y. Pub. Libr.*, No. 05 Civ. 10896, 2008 WL 1826485, at \*3 (S.D.N.Y. Apr. 22, 2008), *aff'd*, 348 F. App'x 665 (2d Cir. 2009); *Lizardo v. Denny's, Inc.*, 270 F.3d 94, 106 (2d Cir. 2001) ("For the same reasons that the plaintiffs can not [sic] prevail on their § 1981 claims, they can not [sic] do so under § 2000a." (footnote omitted)).

379. 110 CONG. REC. 1582, 1646 (1964).



racial or religious discrimination.”<sup>380</sup> In discussing Title VI during the Senate debate on April 7, 1964, Rhode Island Senator John Pastore acknowledged that segregation was “a caste system imposing an inferior status on the Negro citizen from cradle to grave.”<sup>381</sup> Likewise, Senator Paul Douglas pointed out that the caste system still exists in India:

The 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.<sup>382</sup>

Douglas would later back this up by quoting from Justice Harlan’s famous statement in *Plessy*: “There is no caste here. Our constitution is color-blind . . . .”<sup>383</sup>

### *E. Contemporary Sources’ Definition of Race*

In the summer of 2023, in *Students for Fair Admissions*, the Supreme Court struck down the affirmative action plans of Harvard College and the University of North Carolina.<sup>384</sup> Justice Gorsuch wrote a concurring opinion to emphasize that Title VI of the Civil Rights Act of 1964 does not allow the consideration of race in the admissions process. In determining the meaning of Title VI’s prohibition on race discrimination, Gorsuch focused on the definitions of two relevant terms, “discriminate” and “because of.”<sup>385</sup> In discussing what these terms meant, Gorsuch pointed to how they were defined in *Webster’s New International Dictionary* (2d ed. 1954), *Webster’s New World Dictionary* (1960) and *Webster’s Third New International Dictionary* (1961).<sup>386</sup>

Following Gorsuch’s approach, to determine the meaning of race in the Civil Rights Act of 1964, we should examine the definitions for race in the sources he cited. From *Webster’s New International Dictionary* (2d ed. 1954):

The descendants of a common ancestor; a family, tribe, people, or nation, believed or presumed to belong to the same stock; a lineage; a breed; also, more broadly, a class or kind of individuals with common characteristics, interests, appearance, habits, or the like, as if derived from a common ancestor . . . .<sup>387</sup>

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380. *Id.* at 2705, 2783.

381. 110 CONG. REC. 7051, 7055 (1964).

382. 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).

383. 110 CONG. REC. 6806, 6813 (1964) (statement of Senator Paul Douglas); *see also* *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“Our constitution is color-blind . . . .”).

384. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023).

385. *Id.* at 288–89 (Gorsuch, J., concurring).

386. *Id.*

387. *Race*, *Webster’s New International Dictionary* (2d ed. 1954).

From *Webster's New World Dictionary* (coll. ed. 1960):

[A]ny 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*. . . . mankind. . . . a population that differs from others in the relative frequency of some gene or genes: a modern scientific use. . . . any geographical, national, or tribal ethnic grouping. . . . the state of belonging to a certain ethnic stock, group, etc. . . . 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.<sup>388</sup>

From *Webster's Third New International Dictionary* (1961):

[T]he descendants of a common ancestor : a family, tribe, people, or nation belonging to the same stock . . . a class or kind of individuals with common characteristics, interests, appearance, or habits as if derived from a common ancestor . . . a division of mankind possessing traits that are transmissible by descent and sufficient to characterize it as a distinct human type ⟨Caucasian ~⟩⟨Mongoloid ~⟩.<sup>389</sup>

This definition goes on to state:

In popular use RACE can apply to any more or less clearly defined group thought of as a unit [usually] because of a common or presumed common past . . . A group of human beings recognizing a common history and a common culture, yearning for a common destiny, assuming common habits and generally attached to a specific piece of the earth's surface[.]<sup>390</sup>

Although Gorsuch did not mention the 1964 *Webster's New World Dictionary*, its definition of race includes the following: “the state of belonging to a certain ethnic stock, group, etc. . . . the qualities, traits, etc. belonging, or supposedly belonging, to such a division,” and, “[a]ny group of people having the same ancestry; family; clan; lineage.”<sup>391</sup>

As is apparent, the definitions of race in *Webster's New International Dictionary* (2d ed. 1954) are similar to the definition of race from the nineteenth century sources discussed earlier in this Article.<sup>392</sup> However, the definitions of “race” from the *Webster's New World Dictionary* (1960) and *Webster's Third New International Dictionary* (1961) are more numerous and varied. Each of these also

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388. *Race*, Webster's New World Dictionary (coll. ed. 1960).

389. *Race*, Webster's Third New International Dictionary (1961).

390. *Id.*

391. *Race*, WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (coll. ed. 1964).

392. See *supra* notes 227–32 and accompanying text.

includes definitions of race that are similar to those from the sources cited by the Supreme Court for interpreting § 1981. However, they also include definitions that would limit the concept of race primarily to the outdated categories of “Caucasian,” “Negroid,” and “Mongoloid.” Given this conflict, it is possible to assert that the definition of race was limited to three groups. However, all the sources that Gorsuch cited include definitions that are clearly broad enough to include caste as a form of race.

### CONCLUSION

Immigration of South Asians to the United States has exploded since 1990. In 2022, more than 6.5 million people of South Asian descent resided in the United States. Like all immigrants, they carried with themselves their socio-cultural understandings of how society operates, including the caste system. Those historically most victimized by caste are the Dalits, formerly known as “untouchables” or “outcasts.” They suffer from caste discrimination based on untouchability.

Because of this immigration, more and more caste discrimination based on untouchability is occurring in the United States. Several universities have already banned caste discrimination on their campuses. Additionally, in California state court, a Dalit employee has alleged a case of caste discrimination against his high-caste supervisors.<sup>393</sup> Motivated by Dalit activists, the California Legislative Assembly overwhelmingly passed SB 403, which would have clarified under California law that the protected trait of “ancestry” included “caste.”<sup>394</sup> However, Governor Newsom returned the Bill to the Legislative Assembly unsigned.<sup>395</sup> In so doing, he called the Bill “unnecessary” because California law already prohibits discrimination based on several protected traits relevant to caste discrimination, including race, religion, ancestry, and national origin.<sup>396</sup> Afterwards, the trial court in the Cisco case concluded that caste discrimination was covered under California’s employment discrimination law.<sup>397</sup> These examples illustrate that due to the significant increase in immigration from South Asia over the past decade, caste discrimination is becoming a larger issue in U.S. legal circles.

Caste discrimination also has a unique history in this country. For nearly 200 years, the treatment of Black people in the United States has been analogized to caste discrimination in South Asia. The caste–race analogy was also instrumental in discussions about the passage of Congress’s first anti-racial discrimination law—the Civil Rights Act of 1866—as well as the Fourteenth Amendment.

Most of those who used the caste–race analogy in the United States were not aware of the intricacies of how the caste system historically functioned in South Asia. For those in this country, it was enough to see a caste system as a hierarchical system of social stratification on the basis of inherited status—characterized by

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393. See Order Re: Defendant CISCO Systems, Inc.’s Demurrer and Motion to Strike Plaintiff’s Complaint, No. 20-CV-372366, at 2–3 (Nov. 6, 2023) (on file with author).

394. See *id.* at 9.

395. See *id.*

396. See *id.* (citation and footnote omitted).

397. *Id.* at 9, 22.

factors that may include socially enforced restrictions on marriage, social exclusion on the basis of perceived status, and private and public discrimination. In this hierarchical system of social stratification, Black people have occupied the lowest rung of the American caste system.

Due to the long connection between the caste system and both discrimination against Black people and the origins of U.S. federal anti-discrimination law, caste discrimination against Dalits has sparked interest in whether caste discrimination is a form of race discrimination under federal anti-discrimination law. The legal schemes most relevant to Dalits attacking caste discrimination as a form of race discrimination are 42 U.S.C. § 1981 and § 1982, which were originally enacted in the Civil Rights Act of 1866. In addition, if caste discrimination is a form of race discrimination, a few titles from the Civil Rights Act of 1964 would also apply—namely, Title II, Title III, Title VI, and Title VII. This Article has pointed out that there is a very strong likelihood that caste discrimination is a form of race discrimination under these federal anti-discrimination provisions.

In addressing the issue of caste discrimination for purposes of federal anti-discrimination law, lawyers and U.S. courts may be tempted to look to how caste discrimination is understood in South Asia, or more particularly under Indian anti-discrimination law. South Asia also addressed the caste–race issue, starting around the same time as it was first discussed in the United States. The origins of discussions on the caste–race issue there, however, were not linked to anti-discrimination law, but to British colonialism. During the second half of the nineteenth century, European scholars began to embrace the Aryan Invasion Theory, which posits that one group of white Aryans, whose original homeland was in either Central Asia or the Arctic Circle, migrated into Europe, while another group migrated into northern India. In northern India, these Aryan invaders conquered the indigenous people, eventually spreading their domination south to encompass much of South Asia. The caste system was a product of the desire of these Aryans to maintain their control over the native population. Under this theory, the members of the high caste are from a different racial group than those who are low caste or Dalits. The Aryan Invasion Theory presumed that there was a familial connection between high-caste individuals and their British colonizers. As a result, colonialism provided the incentive for the high caste to adopt the Aryan Invasion Theory. However, in the latter decades of the nineteenth century, activists for the low caste and Dalits also embraced the theory but argued that as descendants of the native inhabitants of South Asia, they were the rightful heirs of the subcontinent. Over the past 100 years, the theory has come under scholarly and political attack, and it continues to generate scholarly disputes. The theory was rejected by the framers of India’s Constitution, including several anti-discrimination provisions and viewing caste discrimination as distinct from race discrimination. In addition, the Constitution of India provides for reservations, or what U.S. law would call “quotas,” for Dalits, OBCs, and Scheduled Tribes, but not for race. The Indian government reiterated its objection to the notion that caste discrimination based on untouchability is a form of race discrimination in 2001, during the U.N.’s WCAR in Durban, South Africa. Since the founding of the Republic of India, it has been clear that for legal purposes, caste is not viewed as a form of race.

Understanding how caste functions in South Asia can be a daunting task for an American legal mind. For example, at a bare minimum, one will run into a number of unfamiliar terms and concepts including *Rigveda*, Purusha Sukta, Ramayana, Mahabharata, Dharma Shastras, *Manusmriti*, Aryans, Dravidians, Brahmins, Kshatriyas, Vaishyas, Shudras, Ati-Shudras, *jatis*, Chandalas, karma, forward castes, high castes, OBCs, Scheduled Castes, and Scheduled Tribes, just to name a few. The primary purpose of this Article is to simplify that exercise by distinguishing how the caste–race issue is understood under federal anti-discrimination law in the United States from how it is understood under anti-discrimination law in India. For purposes of applying U.S. anti-discrimination law, the history of the legal question of whether caste discrimination is a form of race discrimination in this country is what is relevant. Certainly, the legal treatment of the caste–race issue in South Asia is of great interest to those addressing caste discrimination in the United States. Ultimately, however, that was a discussion that occurred at very different times and places and for very different purposes in South Asia than it did in the United States.

The central question that courts in the United States need to resolve under federal anti-discrimination law to determine if a person was a victim of race discrimination due to their membership in a particular caste is whether that person was subjected to intentional discrimination because of their ancestry. If yes, then a claim for race discrimination almost certainly exists under §§ 1981 and 1982, and probably exists under the various titles of the Civil Rights Act of 1964. If not, then there is no claim for race discrimination.