

Outcast(e):  
The Case for Recognizing Caste Under U.S. Anti-Discrimination Law

## INTRODUCTION

By the mid-1950s, Dr. Martin Luther King, Jr. was a man who needed no introduction. He achieved international fame after word of his role leading the Montgomery bus boycott reached world news headlines. Dr. King subsequently traveled abroad himself. In February 1959, Dr. King began his long-awaited and self-described “pilgrim[age]” to India.<sup>1</sup> His month-long visit to the country he reverently called “the land of Gandhi” included a trip to Thiruvananthapuram, the capital of the southern state of Kerala.<sup>2</sup> There, Dr. King visited a high school comprised largely of students whose families were formerly known as “untouchables” due to their caste.<sup>3</sup> When Dr. King was introduced to the crowd, he was given an introduction unlike any he was accustomed to. The school’s principal welcomed the storied activist and minister on stage as “a fellow untouchable from the United States of America.”<sup>4</sup> Dr. King admitted to being “a bit shocked and peeved” at this choice of words when recalling the anecdote during a sermon at Ebenezer Baptist Church.<sup>5</sup> But after a moment reflecting on the shared mistreatment and segregation he witnessed of so-called untouchables in India and Blacks in America, Dr. King remarked that “every Negro in the United States of America [is] an untouchable.”<sup>6</sup> This common struggle left a lasting impression on Dr. King. Shortly after his

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<sup>1</sup> See Lawrence Dunbar Reddick, *Account by Lawrence Dunbar Reddick of Pres Press Conference in New Delhi on 10 February 1959*, (1959), [http://okra.stanford.edu/transcription/document\\_images/Vol05Scans/10Feb1959\\_AccountbyLawrenceDunbarReddickofPressConferenceinN.pdf](http://okra.stanford.edu/transcription/document_images/Vol05Scans/10Feb1959_AccountbyLawrenceDunbarReddickofPressConferenceinN.pdf).

<sup>2</sup> See Martin Luther King, Jr., *My Trip to the Land of Gandhi*, (1959), [http://okra.stanford.edu/transcription/document\\_images/Vol05Scans/July1959\\_MyTriptotheLandofGandhi.pdf](http://okra.stanford.edu/transcription/document_images/Vol05Scans/July1959_MyTriptotheLandofGandhi.pdf).

<sup>3</sup> See Martin Luther King, Jr., *Pilgrimage to Nonviolence*, The Martin Luther King, Jr. Research and Education Institute (1959), <https://kinginstitute.stanford.edu/chapter-13-pilgrimage-nonviolence>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

return to America, Dr. King wrote to Howard University dean William Stuart Nelson that he was “making a study of untouchability,” and asked Nelson to share literature he had on the subject.<sup>7</sup> Dr. King later penned an article in *Ebony* magazine stating the issue of “‘untouchability’ . . . . [is] a problem that is very similar” to racial segregation.<sup>8</sup>

“Untouchable” is another word for members of the Dalit caste, one of the most oppressed groups in the Indian caste system. “Dalit” itself means “oppressed,” and is a self-chosen name for nearly 25 percent of India’s population.<sup>9</sup> Though protections against caste discrimination are enshrined in India’s constitution, rates of poverty, hate crimes, and educational attainment evince its entrenchment in Indian society. Caste oppression is neither a thing of the past nor is it confined to India’s borders. As Dr. Bhimrao Ambedkar, known as the Father of the Indian Constitution, said in 1916, “if Hindus migrate to other regions on earth, Indian caste would become a world problem.”<sup>10</sup> Dr. Ambedkar’s prescience about caste is clear. Other countries have since attempted to formally ban casteism. Nepal, for example, enacted legislation in 2011 banning caste discrimination. And in 2017, the U.K. proposed amending its 2010 Equality Act to list caste discrimination as a form of race discrimination. The amendment was struck down following a public comment period, despite government-commissioned reports revealing the prevalence of caste discrimination.<sup>11</sup> The failure to enact the proposed amendment was criticized

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<sup>7</sup> See Martin Luther King, Jr., *Letter To William Stuart Nelson*, The Martin Luther King, Jr. Research and Education Institute (1959), <https://kinginstitute.stanford.edu/king-papers/documents/william-stuart-nelson-0>.

<sup>8</sup> See *supra* note 2.

<sup>9</sup> See Yashica Dutt, *The Specter of Caste in Silicon Valley*, N.Y. TIMES (July 14, 2020), <https://www.nytimes.com/2020/07/14/opinion/caste-cisco-indian-americans-discrimination.html>.

<sup>10</sup> See Dr. Babasaheb Ambedkar: *Writing and Speeches*, INDIAN ANTIQUARY, 6 (1917), [https://www.mea.gov.in/Images/attach/amb/Volume\\_01.pdf](https://www.mea.gov.in/Images/attach/amb/Volume_01.pdf).

<sup>11</sup> See Kunal Purohit, *Caving to Pressure from Hindu Groups, UK Backs Down on Law Against Caste Discrimination*, THE WIRE (July 27, 2018), <https://thewire.in/caste/caving-to-pressure-from-hindu-groups-uk-backs-down-on-law-against-caste-discrimination>.

by some as the U.K. government caving to pressure from U.K. groups with ties to Indian Prime Minister Narendra Modi and the Hindu nationalist Bharatiya Janata Party.<sup>12</sup>

A case filed last summer in the U.S. District Court for the Northern District of California raised the profile of caste discrimination in the United States. On June 30, 2020, California's Department of Fair Employment and Housing filed a lawsuit against Cisco Systems, Inc. on behalf of John Doe, a Dalit employee alleging caste-based discrimination by his managers who are from dominant castes.<sup>13</sup> *California Department of Fair Employment and Housing v. Cisco Systems, Inc.* is the first federal suit to ask a court to rule on whether caste discrimination amounts to discrimination on the basis of religion, ancestry, national origin, ethnicity, race, and/or color. Notice of the Cisco lawsuit being filed was followed by more than 250 Dalits reporting their experiences of caste-based discrimination at Google, Facebook, Microsoft, Apple, Netflix, and other companies in Silicon Valley.<sup>14</sup> Additionally, 30 oppressed-caste female employees in Big Tech released a statement detailing the abuse they endure at the hands of dominant-caste supervisors, from unequal pay to sexual harassment.<sup>15</sup>

This Article proceeds in four parts. Part I acknowledges the debate on what caste is and adopts a definition of what the term caste encompasses. This includes an overview of the Indian caste system and a brief discussion of recent scholarship contributing to a new understanding of what caste is and its relationship to race. Part II describes the way in which caste operates in the

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<sup>12</sup> *Id.*

<sup>13</sup> See Complaint at 2-3, Cal. Dep't of Fair Emp't & Hous. v. Cisco Sys., Inc., (2020) (20CV372366).

<sup>14</sup> See David Gilbert, *Silicon Valley Has a Caste Discrimination Problem*, VICE (Aug. 5, 2020), <https://www.vice.com/en/article/3azjp5/silicon-valley-has-a-caste-discrimination-problem>.

<sup>15</sup> See *A Statement on Caste Bias in Silicon Valley from 30 Dalit Women Engineers*, WASHINGTON POST (Oct. 27, 2020), [https://www.washingtonpost.com/context/a-statement-on-caste-bias-in-silicon-valley-from-30-dalit-women-engineers/d692b4f8-2710-41c3-9d5f-ea55c13bcc50/?itid=lk\\_interstitial\\_manual\\_16](https://www.washingtonpost.com/context/a-statement-on-caste-bias-in-silicon-valley-from-30-dalit-women-engineers/d692b4f8-2710-41c3-9d5f-ea55c13bcc50/?itid=lk_interstitial_manual_16).

United States and the prevalence with which caste-based discrimination occurs. The conception of identity as a performance is discussed as a reification of caste in the workplace.<sup>16</sup> This part also posits that the harm caused by casteism is analogous to the harm caused by racism using stigma theory and the anti-stereotyping principle to explain the endemic repercussions of marginalization. Part III addresses what a complaint by a plaintiff alleging caste discrimination may look like. This includes anecdotal accounts of caste discrimination, and an acknowledgment that complaints are most likely to occur between two or more parties of Indian descent. This Article concludes in Part IV by explaining why Title VII's prohibition against national origin discrimination and 42 U.S. Code § 1981's prohibition against racial discrimination are the strongest legal protections against caste discrimination, beginning with takeaways from the Supreme Court's *Bostock* decision. It also calls for amendments to anti-discrimination statutes and workplace policies that explicitly include caste, and recommends additional opportunities for legislative intervention to curb workplace caste discrimination.

## I. THE INDIAN CASTE SYSTEM

The Indian caste system is considered the world's longest surviving social hierarchy.<sup>17</sup> The *Manusmriti*, a Hindu text dated at roughly 1,000 B.C., is considered the first to have defined four main castes in the following descending order of status and privilege: Brahmins, the priests; Kshatriyas, the warriors; Vaishyas, the merchants; and Shudras, those who performed menial labor.<sup>18</sup> The Hindu deity Brahma is said to have created the four groups, with the Brahmins

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<sup>16</sup> See generally Devon W. Carbado & Mitu Gulati, *Conversations at Work*, 79. OR. L. REV. 103 (2001) (discussing the relationship between identity performance and the norms and structures of institutions).

<sup>17</sup> See Human Rights Watch, *Background* (2001), <https://www.hrw.org/reports/2001/globalcaste/caste0801-03.htm>.

<sup>18</sup> See Archana Chaudhary, *India's Caste System*, BLOOMBERG (Oct. 25, 2019), <https://www.bloomberg.com/quicktake/india-s-caste-system>.

coming from Brahma’s head, the Kshatriyas from his arms, Vaishyas from his thighs, and Shudras from his feet.<sup>19</sup> The *Manusmriti* also detailed the duties and obligations of each caste.<sup>20</sup> Privileges were bestowed to the Brahmins, Kshatriyas, and Vaishyas, such as the ability to learn and recite sacred texts. In contrast, Shudras were forbidden from these educational activities and from accumulating wealth.<sup>21</sup>

Over time, two additional groups—that, as the title of this Article suggests, are technically outside of the caste system—came to be recognized: Dalits and Indigenous tribes. These groups are traditionally considered spiritually impure partly because they are not derived from any part of Brahma’s body.<sup>22</sup> Jobs considered “unclean”<sup>23</sup> are reserved for Dalits, including collecting garbage and clearing excrement.<sup>24</sup> Referred to as the “Depressed Classes” during the British Raj, Dalits and Indigenous tribes later became known as the Scheduled Castes and Scheduled Tribes respectively after India gained independence.<sup>25</sup> Scheduled Castes and

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<sup>19</sup> *What is India’s caste system?*, BBC NEWS (June 19, 2019), <https://www.bbc.com/news/world-asia-india-35650616>.

<sup>20</sup> See P.B. Sawant, *The Manusmriti and a Divided Nation*, THE WIRE (Nov. 16, 2020), <https://thewire.in/caste/manusmriti-history-discrimination-constitution>.

<sup>21</sup> See Manusmriti, Chapter X, <https://www.sacred-texts.com/hin/manu/manu10.htm> (“No collection of wealth must be made by a Sudra, even though he be able (to do it); for a Sudra who has acquired wealth, gives pain to Brahmanas.”).

<sup>22</sup> See Donald Johnson & Jean Johnson, *Social Stratification in India*, ASIA SOCIETY, <https://asiasociety.org/education/social-stratification-india> (“The ranking of castes is based on purity and pollution, often associated with functions of the human body.”).

<sup>23</sup> See Hillary Maywell, *India’s “Untouchables” Face Violence, Discrimination*, NATIONAL GEOGRAPHIC (June 2, 2003), <https://www.nationalgeographic.com/pages/article/indias-untouchables-face-violence-discrimination>.

<sup>24</sup> See Donald Johnson & Jean Johnson, *Social Stratification in India*, ASIA SOCIETY, <https://asiasociety.org/education/social-stratification-india> (“Untouchables . . . cleared away human waste, collected garbage, cut hair, skinned animals, and washed clothes . . . their occupations mainly dealt with human, animal, and societal waste.”).

<sup>25</sup> See Charles A. Selden, *Prince and Outcaste at Dinner in London End Age-Old Barrier*, N.Y. TIMES (Nov. 30, 1930), <http://www.columbia.edu/itc/mealac/pritchett/00ambedkar/timeline/graphics/nyt1930.html>. (referring to Dalits and Indigenous groups as the Depressed Classes).

Scheduled Tribes also received formal legal protections during the adoption of the Indian Constitution.<sup>26</sup>

Several subcastes, known as *jatis*, further divide each caste. Where *jatis* rank in relation to one another varies regionally in India, and is informed by numerous local criteria.<sup>27</sup> For purposes of this Article, Shudras, Scheduled Castes, and Scheduled Tribes will be referred to as oppressed castes.<sup>28</sup> Brahmins, Kshatriyas, and Vaishyas will be referred to as dominant castes.

Caste is inherited at birth and immutable, meaning one is born into and dies a part of the same caste. Historically, the caste system was enforced legally through endogamy. In parts of India and abroad, the practice is still enforced socially.<sup>29</sup> For children of inter-caste marriages, Indian law generally favors recognizing the father's caste, after a series of Supreme Court decisions pushing such uniformity.

The caste system divides over one billion Hindus worldwide, but it is not limited to one religion. Millions of Hindus have converted to other religions, including Sikhism, Buddhism,

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<sup>26</sup> See generally India Const., [https://legislative.gov.in/sites/default/files/COI\\_1.pdf](https://legislative.gov.in/sites/default/files/COI_1.pdf) (enshrining protections for Scheduled Caste a Scheduled Tribe groups including reservations in India's parliament to guarantee political representation).

<sup>27</sup> See 16 Shareen Joshi, Nishtha Kochhar & Vijayendra Rao, *Are Caste Categories Misleading? The Relationship Between Gender and Jati in Three Indian States* (2019) ("Each region of India has several hundred jatis and there is no pan-Indian system of ranking them. Anthropologists have documented numerous local criteria for ranking jatis.").

<sup>28</sup> Specific castes are generally referred to as upper and lower castes or forwards and backwards castes. To avoid this hierarchy, I will use the terms oppressed and dominant caste in this Article.

<sup>29</sup> See Henry Chu, *India tackles barriers to inter-caste marriage*, THE BALTIMORE SUN (Nov. 4, 2007), <https://www.baltimoresun.com/news/bs-xpm-2007-11-04-0711040072-story.html> ("In a [2006] survey . . . by the New Delhi-based Center for the Study of Developing Societies, 74 percent of Indians called inter-caste marriages unacceptable, despite a law passed [in 1955] that expressly affirmed an individual's right to wed whomever he or she chooses."). See also Yashica Dutt, *Indian Matchmaking Exposes the Easy Acceptance of Caste*, THE ATLANTIC (Aug. 1, 2020), <https://www.theatlantic.com/culture/archive/2020/08/netflix-indian-matchmaking-and-the-shadow-of-caste/614863/> (describing the coded phrases for caste used in the recently popularized Netflix show *Indian Matchmaking* to arrange marriages in both India and the U.S. Such phrases include a desire for "similar backgrounds," and "shared communities.").

Catholicism, and Islam—many to escape the caste system. An estimated 65 percent of India’s twenty-million Catholics, for example, are estimated to be descendants of Dalits.<sup>30</sup> Conversion has not proven to be a shield against casteism. Individuals typically continue to be regarded by their community as members of the caste they were born into, resulting in converts enduring many of the same barriers and violence as before.<sup>31</sup>

Legal texts from the ancient *Manusmriti* to the modern Indian Constitution acknowledge the significance of caste. Yet despite the documented reach of the caste system, there is little consensus on what caste is. Can it be summarized as class? A race? A religion? The origin of the word “caste” provides some insight into how outsiders to the Indian caste system understood it. “Caste” is a term ascribed to Portuguese travelers in the 16th century spice trade, who used the Portuguese word *casta*, a Renaissance-era term meaning “race,” “breed,” or “lineage,” to describe the divisions they witnessed among Indians.<sup>32</sup>

The present-day academic definition of caste is in flux. Isabel Wilkerson’s recently published and widely lauded book, *Caste: The Origins of Our Discontents*, reflects an ever growing recognition of the similarities between the systems of caste in India and race in America. Wilkerson draws several parallels between the two, including that they have been

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<sup>30</sup> See *Even as India urbanises, caste discrimination remains rife*, THE ECONOMIST (July 25, 2020), <https://www-economist-com.ezp-prod1.hul.harvard.edu/asia/2020/07/23/even-as-india-urbanises-caste-discrimination-remains-rife>.

<sup>31</sup> See Yaroslav Trofimov, *In India, ‘Untouchables’ Convert to Christianity—and Face Extra Bias*, THE WALL STREET JOURNAL (Sept. 19, 2007), <https://www.wsj.com/articles/SB119014428899931394>. See also Human Rights Watch, *Hidden Apartheid: Caste Discrimination against India’s “Untouchables,”* Art. V(D)(5)(a): Eliminate caste-based discrimination in the enjoyment of Fundamental Rights (2001), <https://www.hrw.org/reports/2007/india0207/9.htm> (describing how Dalit Muslims and Christians face discrimination from their new communities as well, including being forced to pray in separate houses of worship and bury their dead in separate cemeteries).

<sup>32</sup> Isabel Wilkerson, *Caste: The Origins of Our Discontents* 67 (1st ed. 2020).



justified as divinely ordered, perpetuated through heritability of status, and enforced with endogamy.<sup>33</sup> But beyond equating Indian caste and American race, Wilkerson posits that caste is a framework that transcends any one culture and envelopes race. Where “[c]aste focuses in on the infrastructure of our divisions and the rankings . . . race is the metric that's used to determine one's place in that.”<sup>34</sup> Race and caste are therefore inextricable in this view.

The U.S. government has remained largely silent on the topic of caste discrimination. It did, however, ratify the International Convention of the Elimination of All Forms of Racial Discrimination (CERD) in 1994.<sup>35</sup> This treaty defines racial discrimination to include “any distinction, exclusion, restriction, or preference . . . based on descent.”<sup>36</sup> In 2002, the CERD Enforcement Committee issued a General Recommendation “*strongly reaffirming* that discrimination based on ‘descent’ includes discrimination against members of communities based on forms of social stratification such as caste and analogous systems of inherited status.”<sup>37</sup>

For the purpose of this Article, the author adopts the following definition of caste: caste is a system of rigid social stratification characterized by hereditary status, endogamy, and social barriers sanctioned by custom, law, or religion.<sup>38</sup> The author uses the Indian caste system as a

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<sup>33</sup> *Id.*

<sup>34</sup> See Terry Gross, *It's More Than Racism: Isabel Wilkerson Explains America's 'Caste' System*, NPR (Aug. 4, 2020), <https://www.npr.org/2020/08/04/898574852/its-more-than-racism-isabel-wilkerson-explains-america-s-caste-system>.

<sup>35</sup> See United Nations Human Rights Treaty Bodies, UN Treaty Body Database, Sept. 28, 1966, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=187&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=187&Lang=EN).

<sup>36</sup> See International Convention on the Elimination of All Forms of Racial Discrimination, <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>.

<sup>37</sup> See UN Committee on the Elimination of Racial Discrimination (CERD), CERD General Recommendation XXIX on Article 1, Paragraph 1, of the Convention (Descent), 1 November 2002, available at: <https://www.refworld.org/docid/4538830511.html> [accessed 23 April 2021].

<sup>38</sup> This is the definition of caste Brandeis University uses in their campus nondiscrimination policy. See Brandeis University, *Statement on the Interpretation of Caste Within the Brandeis*

paradigmatic case of caste hierarchy and acknowledges that other countries have cognizable caste systems.<sup>39</sup>

## II. CASTE OPERATES IN THE UNITED STATES

One less opaque aspect of caste is how it surfaced in Silicon Valley. In short, Indian immigrants who end up working together in Big Tech may have known of or have gone to school with one another in India. Consequently, the very hierarchy that defined their relationship in India may be reproduced in America. This Part will (1) give an overview of immigration to the U.S. from India; and (2) describe the harm resulting from caste discrimination.

### A. *The History of Caste in America*

The history of caste in the United States is intertwined with the history of Indian immigration to the United States. In 1923, the Supreme Court ruled on a case brought by a dominant-caste Hindu plaintiff who argued that his caste qualified him as a White person eligible for naturalization under the Immigration Act of 1917.<sup>40</sup> He lost. Civil rights activism during the 1950s and 1960s later led to the enactment of the Immigration and Nationality Act of 1965. The 1965 Act replaced overtly racist “National Origins Formula” immigration quotas with a selection system based on family relationships and employment preferences. From the mid-1990s, Indian

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*Nondiscrimination Policy*, Office of Human Resources (No. 26, 2019), <https://www.brandeis.edu/human-resources/policies/discrimination/caste-statement.html>.

<sup>39</sup> See generally Bruce LaBrack, *The Concept Of Caste: Cross-Cultural Applications*, TRANSACTIONS OF THE NEBRASKA ACADEMY OF SCIENCES (1973) (describing caste systems in Japan, Africa, Tibet, Korea, and North America).

<sup>40</sup> See *United States v. Bhagat Singh Thind*, 261 U.S. 204, 210 (1923) (“The eligibility of this applicant for citizenship is based on the sole fact that he is of high-caste Hindu stock, born in Punjab, one of the extreme northwestern districts of India, and classified by certain scientific authorities as of the Caucasian or Aryan race.”) Thind’s lawyers stated that Thind had a revulsion to marrying an Indian woman of the “lower races” asserting, “[t]he high-caste Hindu regards the aboriginal Indian Mongoloid in the same manner as the American regards the Negro, speaking from a matrimonial standpoint.” See *Whose Struggles Are Ours?*, SOUTH ASIAN AMERICAN DIGITAL ARCHIVE, <https://www.saada.org/theproblem/part-iii>.

technology workers began benefitting from the 1965 Act's employment preference provision in scores as American companies hired nearly 100,000 Indian immigrants a year in preparation for the Y2K millennial bug scare.<sup>41</sup>

Y2K came and went, but Indians continue to dominate the tech sector. In 2019, more than 278,000 workers from India received H-1B visas, temporary work visas for foreign nationals employed in specialty occupations.<sup>42</sup> That figure is close to 72 percent of all H-1B recipients in 2019.<sup>43</sup> And, nearly 70 percent of all H-1B visa holders since 2009 work in the tech industry.<sup>44</sup> The weight of hiring referrals in the tech sector is one culprit explaining the sustained prominence of Indian workers in the field, as it gives the networks of existing employees—namely former classmates—a marked advantage in the hiring process.<sup>45</sup> Notably, not all Indians

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<sup>41</sup> See *supra* note 9.

<sup>42</sup> See Paige Smith, *Caste Bias Lawsuit Against Cisco Tests Rare Workplace Claim*, BLOOMBERG LAW (July 17, 2020), <https://news.bloomberglaw.com/daily-labor-report/caste-bias-lawsuit-against-cisco-tests-rare-workplace-claim>.

<sup>43</sup> *Id.* See also Nitasha Tiku, *India's Engineers Have Thrived in Silicon Valley. So Has Its Caste System.*, WASHINGTON POST (Oct. 27, 2020), <https://www.washingtonpost.com/technology/2020/10/27/indian-caste-bias-silicon-valley/>. (of the 1.7 million H-1B visas granted since 2009, 65 percent have gone to people of Indian nationality).

<sup>44</sup> *Id.*

<sup>45</sup> See Henry Farrell, *Silicon Valley paints itself as a hotbed of free enterprise. Here's how the government helped built it*, WASHINGTON POST (July 17, 2019), <https://www.washingtonpost.com/politics/2019/07/17/silicon-valley-portrays-itself-hotbed-free-market-enterprise-new-book-explains-how-government-helped-build-it/>. (“[T]o this day[,] Employee referrals are an important source for hiring at places like Google and Salesforce.”) See also Katie Canales, *Tech employees are selling referrals online to job candidates for \$50 to help them get hired at Google, Facebook, and other industry giants*, BUSINESS INSIDER (June 29, 2020), <https://www.businessinsider.com/rooftop-slushie-tech-workers-buying-job-referrals-2020-6> (describing websites that have been created to commoditize technology industry referrals in an online marketplace).

benefit equally. An estimated 90 percent of Indian immigrants to the U.S. are dominant caste.<sup>46</sup> As the following discussion reveals, the dearth of Dalit immigration is not a coincidence.

The professional networks that land immigrants jobs in Silicon Valley mainly stem from India's most prestigious colleges, including the Indian Institutes of Technology (IITs).<sup>47</sup> IITs are notoriously difficult to gain admission to, with an acceptance rate of under 1 percent.<sup>48</sup> Admission to the Ivy League is a breeze in comparison.<sup>49</sup> Twenty-two point five percent of IIT seats are reserved for oppressed-caste applicants as part of the constitutionally mandated reservation system, likened by some to American affirmative action policies.<sup>50</sup> And despite a formal commitment to a national reservation system in the Indian Constitution, it would be an understatement to say such programs remain controversial. The high rate of suicide among Dalit students has drawn international attention to the discrimination these students face at the hands of dominant-caste peers and professors alike.<sup>51</sup> Universities have themselves protested proposals

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<sup>46</sup> See Tinku Ray, *The US isn't safe from the trauma of caste bias*, THE WORLD (March 8, 2019), <https://www.pri.org/stories/2019-03-08/us-isn-t-safe-trauma-caste-bias> (“In 2003, only 1.5 percent of Indian immigrants in the United States were Dalits or members of lower castes, according to the Center for the Advanced Study of India at the University of Pennsylvania. More than 90 percent were from high or dominant castes.”).

<sup>47</sup> See Thenmozhi Soundararajan, *A New LawsUIT Shines a Light on Caste Discrimination in the U.S. and Around the World*, WASHINGTON POST (July 13, 2020), <https://www.washingtonpost.com/opinions/2020/07/13/new-lawsuit-shines-light-caste-discrimination-us-around-world/>.

<sup>48</sup> See Saritha Rai, *How Big Tech Is Importing India's Caste Legacy to Silicon Valley*, BLOOMBERG (March 11, 2021), <https://www.bloomberg.com/news/features/2021-03-11/how-big-tech-is-importing-india-s-caste-legacy-to-silicon-valley> (“[S]ome 2.2 million people have registered to take the 2021 entrance exam, to vie for roughly 16,000 slots.”).

<sup>49</sup> The five percent acceptance rate for Harvard University's class of 2024 is the University's lowest on record. See Harvard University's admission statistics, <https://college.harvard.edu/admissions/admissions-statistics> (last visited May 11, 2021).

<sup>50</sup> See *supra* note 48 (“About 15% of those [reserved seats] are allotted to students from the Scheduled Castes and another 7.5% to applicants from the Scheduled Tribes.”).

<sup>51</sup> See Parth M.N., *Another Dalit suicide on campus raises fears of a crisis of discrimination at Indian universities*, L.A. TIMES (March 14, 2017), <https://www.latimes.com/world/la-fg-india-dalit-suicide-20170314-story.html> (“[D]espite government quotas that ensure them places at

to develop a reservation system for faculty hires, arguing it would “dilute the quality of the applicant pool and undermine their meritocratic image.”<sup>52</sup>

IIT students have reported being subjected to hazing rituals known as *kholna*, which are used to determine first-year students’ castes.<sup>53</sup> During *kholna*, senior students force first-year students to reveal caste-identifying information in front of the student body, including their IIT entrance exam score.<sup>54</sup> It is commonly assumed in India that an IIT student with an unusually low exam ranking—colloquially referred to as not being on the “main list”—was admitted through the reservation system.<sup>55</sup> These students are derisively called “quota students.”<sup>56</sup> A student’s rank on the entrance exam is essentially a proxy for caste. Therefore, a person’s caste may be known to their professional network from day one of university.

Hiring networks are only where the cycle of employment discrimination based on caste begins. Dominant-caste workers are able to use company appraisals, internal referrals, and peer reviews to create teams made up of networks of their choosing.<sup>57</sup> Simultaneously, oppressed-caste workers report facing sabotage and seclusion.<sup>58</sup> Networks of oppressed-caste workers have

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universities, [oppressed-caste students] say professors and higher-caste students discriminate against them because of their perceived ‘backwardness.’”).

<sup>52</sup> See *supra* note 48.

<sup>53</sup> *Id.* (hazing rituals in the prestigious Indian Institutes of Technology designed to determine classmates’ castes include “calling on first-year students to give their name, their hometown, and the rank they achieved on the entrance exam. If a surname isn’t a giveaway, an unusual rank on the entrance exam will be.”).

<sup>54</sup> *Id.*

<sup>55</sup> See Complaint at 9, Cal. Dep’t of Fair Emp’t & Hous. v. Cisco Sys., Inc., (2020) (20CV372366).

<sup>56</sup> See Soutik Biswas, *Why are India’s Dalit students taking their lives?*, BBC NEWS (Jan. 20, 2016), <https://www.bbc.com/news/world-asia-india-35349979>.

<sup>57</sup> See *supra* note 47.

<sup>58</sup> See Maya Kamble, *It is time to end caste discrimination in the tech industry*, AL JAZEERA (July 27, 2020), <https://www.aljazeera.com/opinions/2020/7/27/it-is-time-to-end-caste-discrimination-in-the-tech-industry> (an oppressed-caste worker reports being excluded in meetings by a dominant-caste supervisor and belittled with veiled references to her caste).

begun calling Silicon Valley “Agraharam Valley,” in reference to neighborhoods within Indian villages that are occupied exclusively by Brahmin residents.<sup>59</sup>

*i. Identifying individuals’ caste*

Determining an individual’s caste does not require cultivating a personal relationship such as that between Doe and his managers. Rather, a person’s surname commonly indicates one’s caste.<sup>60</sup> This means that a job applicant’s caste may be deduced with a glance at their cover letter. The phrase “you are what you eat” also takes on special significance in this context, because being vegetarian, non-vegetarian, and a non-vegetarian who eats beef commonly signifies caste.<sup>61</sup> Dietary preferences may be observed or directly asked about during a job applicant’s lunch interview, employee welcome lunch, or client dinner. Questions about the region in India one is from can further pinpoint one’s subcaste, as ranking within each caste varies geographically. Religion may also be an indicator of caste, as many Indians who are not Hindu are thought to have converted from Hinduism to escape the persecution they faced as members of an oppressed caste. A final marker of caste is skin color, with darker skin correlating with being from an oppressed caste.

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<sup>59</sup> See *supra* note 47 (“Silicon Valley . . . is often referred to within these networks as ‘Agraharam Valley,’ invoking the part of an Indian village in which Brahmins . . . reside.”).

<sup>60</sup> See *supra* note 19 (“[L]ast names are almost always indications of what caste a person belongs to.”).

<sup>61</sup> Observant Brahmins are typically vegetarian, while Dalits generally eat beef. See Lauren Frayer, *What Does Caste Privilege Mean For South Asians In The U.S.?*, NPR (Oct. 13, 2020), <https://www.npr.org/2020/10/13/923170360/what-does-caste-privilege-mean-for-south-asians-in-the-u-s>. (“[M]ost Indians eat meat. Brahmins are the ones who traditionally don’t . . . [W]hat you miss is cuisine is the place where caste boundaries are drawn.”). Beef is popular in Dalit cuisine because disposing of beef carcasses was one of the grisly jobs traditionally reserved for Dalits. As a result, cattle became a reliable source of sustenance for Dalit communities. See Jahnvi Uppuleti, *I Like My Beef and I Cannot Lie*, VICE (March 2, 2021), <https://www.vice.com/en/article/y3g9x5/india-marginalised-dalits-beef-food-identity-history-culture> (“People who own cattle . . . call [Dalits] as soon as they have a dead animal in the shed . . . it serves as a source of leather and food for the sustenance of my family.”).

## B. *The Harm Caused by Caste Discrimination*

Dalits in America allege that what follows being outed as Dalit in the workplace is a return to the oppressive practices many faced in India. Harassment takes myriad forms, including caste-based slurs and jokes, bullying, discriminatory hiring practices, bias in peer reviews, and sexual harassment.<sup>62</sup> Recent reports of Dalit abuse have also surfaced outside of Silicon Valley. In New Jersey, employers building a temple are alleged to have extended temporary religious visas to Dalit immigrants, promising them jobs as skilled artisans.<sup>63</sup> Upon arrival, the Dalit employees were made to perform manual labor for nearly thirteen hours a day, for which they were paid roughly one dollar per hour.<sup>64</sup> According to a survey conducted in 2016, two out of three Dalits living in the U.S. face caste discrimination in their workplace.<sup>65</sup>

Oppressed-caste employees may hide or alter aspects of themselves in an attempt to conceal their caste. Stories of Dalits changing their last names, abstaining from eating beef at work, and evading questions about where in India they call home abound.<sup>66</sup> This behavior epitomizes Devon Carbado and Mitu Gulati's scholarship on performing identity in the

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<sup>62</sup> See *supra* note 15.

<sup>63</sup> See Annie Correal, *Hindu Sect Is Accused of Using Forced Labor to Build N.J. Temple*, N.Y. TIMES (May 11, 2021), <https://www.nytimes.com/2021/05/11/nyregion/nj-hindu-temple-india-baps.html?referringSource=articleShare>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> See Gregory Warner, *How To Be An Anti-Casteist*, NPR (Sept. 30, 2020), <https://www.npr.org/transcripts/915299467> (a Dalit employee whose surname doesn't give away his caste describes how he "learned to stay silent and dodge . . . questions" about what region of India his parents are from. The employee also reports being asked by Indian colleagues if he is vegetarian "because Brahmins are vegetarians. Even if you say, well, yes, I am a vegetarian" a follow-up question is "are you vegetarian by birth or by choice?") See also Harmeet Kaur, *Even in the US, South Asians say caste has proved hard to escape*, CNN (Sept. 8, 2020), <https://www.cnn.com/2020/09/04/us/caste-discrimination-us-trnd/index.html> ("[A] primary indicator [of caste] is often last names, leading some people from oppressed castes to change them.").

workplace.<sup>67</sup> Carbado and Gulati note that when a minority person’s employment is preconditioned on such self-negating and self-repudiating strategic behavior, the employee suffers a psychic harm.<sup>68</sup>

In *Coming Out as Dalit*, writer Yashica Dutt describes her experience performing Brahmin identity as a child at the behest of her mother, after they immigrated to the United States. Dutt was instructed to follow the “traditional rituals” of Brahminism.<sup>69</sup> For Dutt, this “meant that one wrong word or gesture while playing with friends or buying sweets from a shopkeeper could expose the lie.”<sup>70</sup> The resulting damage to Dutt’s psyche is clear. Mimicking Brahmins by assuming certain habits, tastes, language, and mannerisms left Dutt “feeling like an imposter” and riddled with self-doubt.<sup>71</sup> Brahmin identity performance made Dutt continually question if “upper caste people with happier childhoods [would] have said [something] better or done [something] differently.”<sup>72</sup> It was after coming out as Dalit in her adulthood that she sought therapy to “[h]elp [her] to live.”<sup>73</sup>

The harm caused by caste discrimination is also the same harm opposed by the anti-stereotyping principle. Scholars argue that this principle animates judicial opinions striking down demands that employees perform their identity to match sex stereotypes. One such example is

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<sup>67</sup> See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1277-97 (2000).

<sup>68</sup> *Id.* at 1277. “The law ignores the extra costs to people of color imposed by implicit workplace expectations that require people of color . . . [to] disidentify themselves from other people of color in order to ‘blend in.’” *Id.* at 1294.

<sup>69</sup> See Amrit Dhillon, *Coming out as Dalit: how one Indian author finally embraced her identity*, THE GUARDIAN (Feb. 19, 2020), <https://www.theguardian.com/global-development/2020/feb/19/coming-out-as-dalit-how-one-indian-author-finally-embraced-her-identity>.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*



the Supreme Court's landmark decision in *Price Waterhouse v. Hopkins*. In *Price*, the Court held that an employer's refusal to promote a female employee because her dress, behavior, and mannerisms were deemed overly masculine was a form of sex discrimination actionable under Title VII.<sup>74</sup> The Court proclaimed that "we are beyond the day when an employer [can] evaluate employees by assuming or insisting that they matched the stereotype associated with their group."<sup>75</sup>

The Court has condemned the evils of stereotyping in a variety of contexts.<sup>76</sup> Employer demands that a Dalit employee accept a caste hierarchy in their workplace and stereotypically defer to dominant-caste employees should be similarly denounced.<sup>77</sup>

In contrast with challenges to gendered workplace demands, challenges against workplace demands that are raced, such as a ban on cornrows, remain largely unsuccessful.<sup>78</sup> This is in spite of the fact that the concept of "passing" was first identified as a phenomenon in the context of race. What has swayed the Supreme Court in the context of racial discrimination is the concept of stigmatization. In *Brown v. Board of Education*, for example, the Court relied on an abstract notion of dignitary harm to proclaim that school segregation violates the Equal Protection Clause of the Fourteenth Amendment.<sup>79</sup> Chief Justice Earl Warren wrote in the

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<sup>74</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>75</sup> *Id.* at 251.

<sup>76</sup> See, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986) (preemptive juror strikes); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (affirmative action); *Obergefell v. Hodges* 576 U.S. 644 (2015) (marriage equality).

<sup>77</sup> See Complaint at 3, *Cal. Dep't of Fair Emp't & Hous. v. Cisco Sys., Inc.*, (2020) (20CV372366) (a Dalit employee alleges his dominant-caste colleagues "had certain expectations for him . . . to accept a caste hierarchy within the workplace where [he] held the lowest status within the team" because of his caste).

<sup>78</sup> See *Rogers v. Am. Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981).

<sup>79</sup> See Laurence H. Tribe, *American Constitutional Law* 1477 (2d ed. 1988) (arguing that stigma rationale provides the "most obvious" and "most persuasive" grounds for the *Brown v. Board* decision).

majority opinion of *Brown* that segregation gave Black people “a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone.”<sup>80</sup> The Court cited the results of many psychological studies to support that assertion.<sup>81</sup> The most famous of these is Kenneth Clark and Mamie Clark’s doll test. The Clarks concluded from their study that segregation caused feelings of inferiority among all Black children, whether northern or southern, middle class or poor, light-skinned or dark-skinned.<sup>82</sup> The experiment showed that southern Black children in particular accepted their inferior social status as normal.<sup>83</sup> This resignation, Kenneth Clark stated, “is not symptomatic of a healthy personality.”<sup>84</sup>

Post-*Brown*, the notion of stigmatization continues to be talismanically employed by the Court in a range of anti-discrimination cases.<sup>85</sup> Stigma resulting from caste discrimination is of the same ilk. As summarized by Dr. Suraj Yengde, a Senior Fellow at Harvard Kennedy School, the caste system inflicts a psychological harm and fear on Dalits.<sup>86</sup> Studies have confirmed the

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<sup>80</sup> See *Brown v. Board of Ed.*, 347 U.S. 483, 494 (1954).

<sup>81</sup> See *id.* at n.1 (listing psychological studies relied on.)

<sup>82</sup> See Lani Guinier, *From Racial Liberalism to Racial Literacy: Brown v. Board of Education and the Interest-Divergence Dilemma*, THE JOURNAL OF AMERICAN HISTORY Vol. 91, Issue 1, 6 (2006).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See, e.g., *Freeman v. Pitts*, 503 U.S. 467, 485 (1992) (school desegregation); *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (preemptory challenges); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (affirmative action); *United Jewish Org. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 165 (1977) (voting).

<sup>86</sup> See Decl. in Supp. of Pl.’s Mot. to Proceed Using a Fictitious Name at 4, *Cal. Dep’t of Fair Emp’t & Hous. v. Cisco Sys., Inc.*, (2020) (20CV372366) (“The caste system inflicts this psychological harm and fear on Dalits. For many Dalits, it is necessary for survival to remain anonymous until there is better recognition of the continued impact the caste system has on Dalits and adequate protective measures are put in place.”).

negative self-image and adverse mental health impacts faced by oppressed-caste people due to negative social representation and social exclusion.<sup>87</sup>

### III. CASTE DISCRIMINATION AS A LEGAL CLAIM

The background of the *Cisco* case typifies the situation described above, *supra* Part II, in which the relationship between parties began as college classmates in India and developed into colleagues in Silicon Valley. In fact, *Cisco* Plaintiff John Doe and two individual *Cisco* Defendants met as classmates at the prestigious IIT Bombay.<sup>88</sup> Doe was eventually recruited to work at Cisco by one of the Defendants, who later became Doe's manager.<sup>89</sup>

Doe attests that this manager effectively outed him at Cisco as Dalit by telling their colleagues that Doe's IIT entrance exam ranking didn't merit him being on the "main list."<sup>90</sup> At the time, Doe was working on a team of entirely Indian employees who grew up in India and immigrated to the U.S. as adults.<sup>91</sup> Doe was the only oppressed-caste team member.<sup>92</sup> Equipped with the knowledge that Doe is Dalit, Doe claims his colleagues ensured he "held the lowest status within the team . . . received less pay, fewer opportunities . . . [and was] expected to endure a hostile work environment."<sup>93</sup> This included being physically isolated from his

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<sup>87</sup> See Rusi Jaspal, *Caste, Social Stigma and Identity Processes*, PSYCHOLOGY AND DEVELOPING SOCIETIES (March 8, 2011). See also G. C. Pal, *Social Exclusion and Mental Health: The Unexplored Aftermath of Caste-based Discrimination and Violence*, PSYCHOLOGY AND DEVELOPING SOCIETIES (Oct. 26, 2015).

<sup>88</sup> See *supra* note 48 ("Last year a Dalit graduate of IIT Bombay filed suit in the U.S. against Cisco Systems Inc. and two of his fellow alums, saying he'd experienced caste-based discrimination at their hands while the three of them were employed at the company.").

<sup>89</sup> See Mark Chandler, *Protecting Our People*, CISCO BLOGS (Nov. 3, 2020), <https://blogs.cisco.com/news/protecting-our-people>.

<sup>90</sup> See Complaint at 9, Cal. Dep't of Fair Emp't & Hous. v. Cisco Sys., Inc., (2020) (20CV372366).

<sup>91</sup> *Id.* at 3.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

colleagues.<sup>94</sup> Doe both confronted his manager about his harmful comments and sought help from Cisco’s human resources department, all to no avail.<sup>95</sup> Doe’s experience, though vigorously contested by Cisco, is an insightful illustration of how the caste system may be reified in American workplaces. It is also intuitively analogous to claims of employment discrimination on account of race and other protected classes.

Doe’s case is typical of accounts of caste discrimination in that it was perpetuated by and against people thought to be of Indian origin.<sup>96</sup> Importantly, the Supreme Court’s decision in *Oncole v. Sundowner Offshore Services* implicitly affirmed that discrimination actionable under Title VII remains actionable when it emanates from persons possessing the same protected characteristic as the aggrieved employee.<sup>97</sup> *Saint Francis College v. Al-Khazraji* similarly confirms this for 42 U.S. Code § 1981.<sup>98</sup>

South Asian immigrants may be the original purveyors of caste to America, but it is a system of oppression that anyone may gain fluency in and replicate. Unclear and inadequate anti-discrimination laws and company policies thus expand the opportunity for individuals—whether of Indian origin or otherwise—to perpetuate caste discrimination.

#### IV. CASTE AS A PROTECTED CLASS UNDER U.S. ANTI-DISCRIMINATION LAW

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<sup>94</sup> *Id.* at 9.

<sup>95</sup> *Id.*

<sup>96</sup> See Harmeet Kaur, *Even in the US, South Asians say caste has proved hard to escape*, CNN (Sept. 8, 2020), <https://www.cnn.com/2020/09/04/us/caste-discrimination-us-trnd/index.html> (describing the experiences of two Dalit employees at different tech companies who endured hostile work environments and discriminatory comments based on their caste at the hands of South Asian supervisors. One of these employees felt the need to leave her job in search of one where she wouldn’t have a South Asian manager).

<sup>97</sup> See *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (holding that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII).

<sup>98</sup> See *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 607 (1987) (“Congress, when it passed what is now §1981, had not limited its protections to those who today would be considered members of a race different from the race of the defendant.”).

Congressional actions and judicial decisions have made clear that Title VII protection extends beyond the classes explicitly listed in the statute.<sup>99</sup> As Justice Gorsuch explained in the Court’s recent *Bostock v. Clayton County* decision, there is “[no] such thing as a ‘cannon of donut holes,’ in which Congress’ failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception.”<sup>100</sup> This Part will show that (1) the test *Bostock* provides clarifies the expansive scope of Title VII; (2) *Bostock* supports a finding that caste discrimination is a form of national origin discrimination under Title VII; (3) caste discrimination amounts to race discrimination under 42 U.S. Code § 1981; and (4) U.S. anti-discrimination laws and company policies should be amended to name caste as a protected class.

*A. Takeaways from Bostock v. Clayton County*

*Bostock* holds that Title VII’s prohibition against sex discrimination applies to discrimination based on sexual orientation and gender identity. Equally important as this outcome is the rationale the Court used to reach it. Justice Gorsuch, writing for the majority, employed a textualist approach. He noted that the parties’ disagreement regarding the meaning of “sex” was not germane to resolving the dispute. Instead of a cultural debate about the term, it is “what Title VII says about [sex]” that counts.<sup>101</sup> Title VII states:

“It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin[.]”<sup>102</sup>

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<sup>99</sup> Congress enacted The Pregnancy Discrimination Act of 1978, amending Title VII to prohibit sex discrimination on the basis of pregnancy, childbirth, and related medical conditions. The Supreme Court’s holding in *Bostock v. Clayton County* indicates that sex discrimination encompasses discrimination on the basis of sexual orientation or gender identity.

<sup>100</sup> See *Bostock v. Clayton Cty.*, Georgia, 140 S. Ct. 1731, 1747 (2020).

<sup>101</sup> *Id.* at 1739.

<sup>102</sup> 42 U.S.C. § 2999e-2(a)(1).

Next, Justice Gorsuch zeroed in on the phrase “because of.”<sup>103</sup> Giving the term its ordinary meaning, which is “by reason of” or “on account of,” the Court then employed Title VII’s “‘because of’ test.”<sup>104</sup> As explained by the Court, this requires asking “simply whether sex is a but-for cause” of the discrimination.<sup>105</sup> The Court demonstrated that “sex is necessarily a but-for cause when an employer discriminates against homosexual or transgender employees” with the following example:

“Consider...an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge.”<sup>106</sup>

Justice Gorsuch further affirmed the wide reach of the but-for causation standard, noting that “the limits of the [Title VII] drafters' imagination supply no reason to ignore the law's demands.”<sup>107</sup> Moreover, “when Congress chooses not to include any exceptions to a broad rule, th[e] Court applies the broad rule.”<sup>108</sup> As Justice Gorsuch explained, there is “[no] such thing as a ‘cannon of donut holes,’ in which Congress’ failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception.”<sup>109</sup>

The Court’s approach makes clear that, where the but-for causation standard is met, Title VII’s reach must not be stymied on account of novel application.

*B. Caste Discrimination is a Form of National Origin Discrimination*

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<sup>103</sup> See *Bostock*, 140 S. Ct. at 1739.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 1739-1745.

<sup>106</sup> *Id.* at 1741.

<sup>107</sup> *Id.* at 1737.

<sup>108</sup> *Id.* at 1747.

<sup>109</sup> *Id.*

The appropriate question, given *Bostock's* holding, is whether national origin is a but-for cause of caste discrimination. The text of Title VII does not define national origin. The statute's legislative history is meager in this respect as well. Guidance on the meaning of national origin instead comes from subsequent judicial decisions and Equal Employment Opportunity Commission (EEOC) regulation. Each is discussed below.

*i. Judicial precedent*

The Supreme Court clarified that “national origin” is synonymous with “ancestry” in *Espinoza v. Farah Mfg. Co., Inc.*<sup>110</sup> As this Article shows, *supra* Part I, the caste system is an ancestral institution. Ancestry is so integral to caste, that Dr. Ambedkar hypothesized Hinduism ceased to be a missionary religion when the caste system formed because without lineage there would be no basis from which to assign converts to a caste.<sup>111</sup>

The Court in *Espinoza* also stated that national origin refers “broadly [to] the country from which [a person's] ancestors came.”<sup>112</sup> Subsequent lower court decisions dispel any notion that *Espinoza* was meant to cabin national origin protection to “countries” in the sense of politically independent and separate nations.<sup>113</sup> *Janko v. Illinois Slate Toll Highway Authority*, which held that Romani people are a national origin group within the meaning of Title VII, is a

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<sup>110</sup> See *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 86-89 (1973) (“The deletion of the word ‘ancestry’ from the final version [of Title VII] was not intended as a material change, suggesting that the terms ‘national origin’ and ‘ancestry’ were considered synonymous.”) (citation omitted).

<sup>111</sup> See B.R. Ambedkar, *Annihilation of Caste* 60 (Mulk Raj Anand, 1990) (“[T]he Hindu religion ceased to be a missionary religion when the Caste System grew up among the Hindus. Caste is inconsistent with conversion . . . Th[e] problem is where to place the convert, in what caste?”)

<sup>112</sup> See *Espinoza*, 414 U.S. at 88.

<sup>113</sup> See *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 673 (9th Cir. 1988) (“Given world history, Title VII cannot be read to limit ‘countries’ to those with modern boundaries, or to require their existence for a certain time length before it will prohibit discrimination. Animus based on national origin can persist long after new political structures and boundaries are established.”).

telling example.<sup>114</sup> The court in *Janko* accepted a dictionary definition of “Gypsy” as “various ethnic groups not originally from this land” with ties to “earlier nomadic minority tribal peoples in the Caucasias.”<sup>115</sup> The court accepted that the Caucasias region “stretch[es] from India to the Northeastern, eastern, and southeastern boundaries of the Mediterranean.”<sup>116</sup> The court’s ruling was based on the fact that the dictionary description of Romani people aligns with the purpose of Title VII, or “prevent[ing] the majority people from discriminating against other people based upon ethnic distinctions.”<sup>117</sup> That Romani people are nomadic and not “related to some particular country” was no bar to declaring Romani identity a national origin for purposes of the statute.<sup>118</sup>

Oppressed-caste people are similar to the Romani in that they are ethnic minorities who can trace their ancestry to the region of South Asia. In fact, linguistic and genetic studies show that the tribal people in the Caucasias from whom the Romani are thought to descend are Scheduled Caste and Scheduled Tribe Indians.<sup>119</sup> The exodus of the modern-day Romani people out of India was spurred, it is hypothesized, by the persecution they faced on account of their oppressed-caste status.<sup>120</sup> It is particularly fitting, then, to recognize caste under Title VII’s national origin provision.

*ii. EEOC guidance*

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<sup>114</sup> See *Janko v. Ill. State Toll Highway Authority*, 704 F.Supp. 1531 (N.D. Ill. 1989).

<sup>115</sup> *Id.* at 1532. See also Walter O. Wayrauch & Maureen A. Bell, *Autonomous Lawmaking: The Case Of The “Gypsies,”* 103 YALE L.J. 323, 335 (1993) (“Gypsy” is a word that covers many groups of Romani people who are “bound together by notions of purity and pollution, and by Gypsy law.”).

<sup>116</sup> See *Janko*, 704 F.Supp. at 1531.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> See Niraj Rai et al., *The Phylogeography of Y-Chromosome Haplotype H1a1a-M82 Reveals the Likely Indian Origin of the European Romani Populations*, (Nov. 28, 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3509117/>.

<sup>120</sup> *Id.* (“Arguably, the humble social position of the [present-day Romani] could frequently have led to circumstances, which could have promoted their geographical mobility” out of India).



The EEOC has interpreted national origin even more broadly. The EEOC’s enforcement guidance on national origin discrimination provides:

“The Commission 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. The Commission will examine with particular concern charges alleging that individuals within the jurisdiction of the Commission have been denied equal employment opportunity for reasons which are grounded in national origin considerations, such as (a) marriage to or association with persons of a national origin group; (b) membership in, or association with an organization identified with or seeking to promote the interests of national origin groups; (c) attendance or participation in schools, churches, temples or mosques, generally used by persons of a national origin group; and (d) because an individual's name or spouse's name is associated with a national origin group.”<sup>121</sup>

This understanding of national origin almost perfectly encapsulates the markers of caste listed above, *supra* Part II. First, “ancestral place of origin” recalls the geographic marker of caste, because where regionally in India one’s ancestors are from may reveal caste. Second, “physical” and “cultural characteristics” respectively correlate with the skin color and dietary markers of caste. Third, association with “churches, temples or mosques,” recalls that Christian, Buddhist, and Muslim South Asians are sometimes thought to have converted from Hinduism to escape its caste system. Fourth, “individual’s name or spouse’s name” aligns with the understanding that surname signifies caste. Each provision in the Agency’s guidelines is entwined with ancestry, supporting the Court’s understanding of national origin as synonymous with ancestry.

In light of judicial precedent and the Court’s acknowledgement that the EEOC’s Title VII regulations are “entitled to great deference,” there is compelling reason to believe that national origin is a but-for cause of caste discrimination.<sup>122</sup>

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<sup>121</sup> 29 C.F.R. § 1606.1.

<sup>122</sup> See *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971) (“The administrative interpretation of the Act by the enforcing agency is entitled to great deference.”).

### C. Caste Discrimination is a Form of Racial Discrimination

Caste discrimination is a form of racial discrimination that should be actionable under Section 1981 of the Civil Rights Act of 1866. In America today, racial groups are generally divided into five categories of Black, White, Native American, Asian, and Latino.<sup>123</sup> But, for purposes of Section 1981, the Court understands race capaciously. This is because when the 1866 Act was passed, differences no longer considered as significant were considered racial. Subsequently, the Court granted people of Arab descent protection under Section 1981 in *Saint Francis College v. Al-Khazraji*.<sup>124</sup> The Court also ruled that Jewish people can state a claim under Section 1981 in *Shaare Tefila Congregation v. Cobb*.<sup>125</sup> Both decisions came from a unanimous Court.

To make a Section 1981 claim, it is necessary to allege 1) that the defendant was motivated by racial animus; and 2) that the defendant's animus was directed towards the kind of group that Congress intended to protect.<sup>126</sup> The Court has determined such groups include "an[y] identifiable class of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics."<sup>127</sup> As shown in this Article, *supra* Parts I-II, ancestry is integral to caste. Further, Section 1981's legislative history, upon which the Court heavily relied on in its *Saint Francis College* opinion, reveals Congress intended the statute to protect various groups including the Romani.<sup>128</sup> Caste should be considered a race for purposes of Section 1981 for these reasons.

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<sup>123</sup> See Ralph Richard Banks et al., *Racial Justice and the Law: Cases and Materials* 443 (2016).

<sup>124</sup> See *Saint Francis College*, 481 U.S. 604.

<sup>125</sup> See *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987).

<sup>126</sup> *Id.* at 617.

<sup>127</sup> See *Saint Francis College*, 481 U.S. at 605.

<sup>128</sup> *Id.* at 611 ("The debates are replete with references to the Scandinavian races as well as the Chinese, Latin, Spanish, [and] Anglo-Saxon races. Jews, Mexicans, [B]lacks, and Mongolians

*D. Anti-discrimination Laws Must be Amended to List Caste*

A judicial opinion analyzing claims of caste discrimination under Title VII and Section 1981 would be both appropriate and promising. There is an additional step institutions and organizations must take, however, to more effectively root out caste discrimination: amending existing anti-discrimination laws and policies to name caste. Such amendments would help combat the unfamiliarity, ignorance, and illiteracy surrounding caste in the U.S. The benefits of enacting amendments to list caste are discussed further below, as are examples of explicitly anti-casteist policies in the U.S. today.

*i. Amending anti-discrimination laws combats caste-blindness and emboldens victims to seek redress*

The United States is a multiracial and multicultural country, increasingly so every year. Laws that clearly reflect all oppressive hierarchies that may accompany ethnic diversity better ensure anti-discrimination laws and policies serve the purpose for which they were enacted. Amendments also give clear notice to employers about what discriminatory behaviors they are on the hook for. This encourages employers to proactively combat caste discrimination. The nuances of the caste system may evade employers, but stating in plain terms that caste is a protected class would help prevent employers from evading their legal obligation.

Updating company policies is crucial for people in situations like John Doe’s. Notes taken during an internal investigation by Cisco’s HR staff reveal that Doe’s supervisor admitted to telling colleagues that Doe was not on the “main list” at university.<sup>129</sup> This comment, as

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were similarly categorized. Gypsies were referred to as a race. Likewise, the Germans.”) (citation omitted).

<sup>129</sup> See Complaint at 9, Cal. Dep’t of Fair Emp’t & Hous. v. Cisco Sys., Inc., (2020) (20CV372366) (“[Cisco’s] internal investigation notes revealed that [Doe’s supervisor] admitted that he told Doe’s colleagues that Doe was not on the ‘main list.’”).

described above, *supra* Part III, effectively outed Doe as Dalit to his South Asian teammates.<sup>130</sup> Yet, Cisco’s HR staff declined to take any further action, including contacting relevant witnesses and Doe himself.<sup>131</sup> According to Doe, Cisco defended its inaction because HR had determined that “caste discrimination [is] not unlawful.”<sup>132</sup> Had Cisco’s anti-harassment policy included the term “caste,” it is possible that HR would have taken Doe’s allegation of caste discrimination more seriously. Amending Cisco’s anti-harassment policy to incorporate casteism could also lead HR to develop greater fluency with caste, and thereby understand the supervisor’s comment as beyond a mere slight.

Clearly listing caste as a protected class in anti-discrimination measures will also encourage a greater number of people facing caste discrimination to come forward, because they may do so with the assurance of having a legally redressable claim. Among the over 250 oppressed-caste workers who reported enduring caste-based discrimination following the filing of the *Cisco* lawsuit, none raised the issue with their company’s human resources department.<sup>133</sup> This is likely because many oppressed-caste workers in the U.S. are H-1B visa holders.<sup>134</sup> Their temporary immigration status makes them entirely dependent on their employer, who must

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<sup>130</sup> *Id.* (alleging that Cisco’s Employee Relations staff, including the manager who found Doe had been outed as Dalit, “indicated that caste discrimination was not unlawful. As a result [Employee Relations staff] did not recommend any correction against [Doe’s alleged harasser.]”).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> See Nick Fountain, *Caste Arrives In Silicon Valley*, NPR (Oct. 14, 2020), <https://www.npr.org/transcripts/923736245> (“After the Cisco case, Equality Labs got close to 300 similar complaints from Facebook, Google, Microsoft, IBM, Cisco, Amazon, Dell, Twitter, Uber . . . Netflix, Salesforce, Lyft, Zoom, Dropbox and Quora” and “none of these people went to HR.”).

<sup>134</sup> See *supra* note 96 (a victim of caste-based discrimination at work “saw no point in taking the incident to her employer’s human resources department. She also feared that reporting it could potentially backfire and jeopardize her temporary visa status.”).

voluntarily undertake a costly and time-consuming Green Card sponsorship process before the H-1B holder may obtain permanent residency in the U.S. This means that workers are not just at risk of losing their job, but also of losing their immigration status. Empowering individuals by updating anti-discrimination policies is one measure to help offset the immense power imbalance that results from their precarity.

Finally, amending statutes helps spotlight the issue to caste-blind employees. This group of people includes non-Indian individuals who may have unknowingly witnessed an incident of caste discrimination. This also includes dominant-caste Indian immigrants, and first or second-generation Indian Americans. These individuals, who have likely faced racist and nativist discrimination themselves, may not actively consider how they systematically benefit from caste privilege, let alone the possibility that they may perpetuate oppression. This includes Indians at the highest level of success in their organizations, including many CEOs in Silicon Valley, who are quick to condemn racial discrimination but have not condemned caste discrimination.<sup>135</sup>

In addition to safeguarding oppressed-caste employees through amended company policies, efforts to combat caste discrimination at earlier stages of the employment relationship are needed. For example, legislation similar to the Pregnancy Discrimination Act of 1978 would discourage employers from asking questions about an applicant's caste during an interview.<sup>136</sup>

*ii. Models of anti-casteist legislation and policies exist in the United States*

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<sup>135</sup> As of 2020, ten Fortune 500 companies boast having CEOs of Indian origin. See Snigdha Sur, *The Rise of the Indian-Origin CEO*, THE JUGGERNAUT (Feb. 7, 2020), <https://www.thejuggernaut.com/what-can-brown-do-for-you?s=ckb11tgtq08100700ay2gq410>.

<sup>136</sup> See, e.g. *Gautam v. Prudential*, 2008 WL 11417411, 06-CV-3614 (JS)(AKT), (E.D.N.Y., Sept. 3, 2008) (defendant—a non-South Asian employer—allegedly asked the plaintiff—a South Asian job applicant—about his age and religion, as well as about the Indian caste system. The court determined that no discrimination occurred).

Anti-discrimination measures in the U.S. that presently list caste include a university anti-discrimination policy, state constitution, state student association, and tech companies' content moderation policies. Each is briefly discussed below.

In 2019, Brandeis University became the first institution of higher education in the U.S. to include caste in the University's non-discrimination policy.<sup>137</sup> Upon announcing this amendment to the Policy Against Discrimination, Harassment, and Sexual Violence, Brandeis's president stated that "discrimination based on a person's caste is effectively the same . . . [as] many . . . legally recognized and protected characteristics."<sup>138</sup> The University is therefore committed to investigating complaints of caste discrimination "just as it does for other types of discrimination."<sup>139</sup>

The California State University (CSU) system may be next to follow suit. The Cal State Student Association, an organization that advocates for students in the CSU system, passed a resolution in 2021 calling for caste to be added to the anti-discrimination policy governing the statewide college system.<sup>140</sup> If successful, this amendment will apply to the nearly half a million students enrolled in all 23 CSU campuses.<sup>141</sup>

The Washington State Constitution also outlaws caste discrimination in the context of education. Article IX, section 1 of the Constitution confers on children in Washington a positive

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<sup>137</sup> See Brandeis University, *Policy Against Discrimination, Harassment, & Sexual Violence*, <https://www.brandeis.edu/equal-opportunity/policies/pdfs/discrimination-harassment-sv-policy.pdf> (last visited Feb. 20, 2021).

<sup>138</sup> See Brandeis University, *Adding Caste to Our Non-Discrimination and Harassment Policy*, (Nov. 26, 2019), <https://www.brandeis.edu/president/letters/2019-12-17-adding-caste-to-our-nondiscrimination-harassment-policy.html>.

<sup>139</sup> *Id.*

<sup>140</sup> See Cal State Student Association, *Resolution Calling For the CSU to Include Caste in Anti-Discrimination Policy*, (April 16, 2021), <https://calstatestudents.org/?s=caste>.

<sup>141</sup> See Cal State Student Association's homepage, <https://calstatestudents.org> (last visited May 2, 2021).

constitutional right to an “ample provision of . . . education . . . within distinction or preference on account of race, color, caste, or sex.”<sup>142</sup> This is the original wording of Article IX from the time it was adopted in 1889.<sup>143</sup>

Finally, caste is included as a protected category in the content moderation policies of Facebook, YouTube, and Twitter.<sup>144</sup> These companies have yet to add caste to their company anti-harassment policies.<sup>145</sup>

## V. CONCLUSION

The *Cisco* lawsuit helped move the topic of caste discrimination in America from the margins to the mainstream. But eradicating a millennia-old prejudice requires more than heightened awareness of its existence. As this Article has shown, anemic interpretations of anti-discrimination laws and policies exacerbate the potential for workplace harassment and discrimination. And, no matter the outcome of *Cisco*, it is imperative that amendments are enacted to ensure anti-discrimination laws and policies have teeth. Doing so will bring America closer to dismantling artificial divisions and achieving the goal of anti-discrimination law: creating just workplaces.

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<sup>142</sup> Washington State Constitution, RCWA Const. Art. 9 § 1.

<sup>143</sup> Use of the word “caste” is not uncommon in early court decisions from this this period. Many Supreme Court decisions from the nineteenth century onward use the term “caste” as a shorthand for all forms of invidious discrimination. *See, e.g.* Plyler v. Doe, 457 U.S. 202, 213 (1982). (“The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.”).

<sup>144</sup> *See* Facebook’s Community Standards on Hate Speech, [https://www.facebook.com/communitystandards/hate\\_speech](https://www.facebook.com/communitystandards/hate_speech) (last visited May 1, 2021); YouTube’s Hate Speech Policy, <https://support.google.com/youtube/answer/2801939?hl=en> (last visited May 1, 2021); The Twitter Rules, <https://help.twitter.com/en/rules-and-policies/twitter-rules> (last visited May 1, 2021).

<sup>145</sup> *See supra* note 47 (“Advocacy from Equality Labs has helped ensure caste is treated more seriously as a protected category for content moderation in Facebook, YouTube and Twitter. Yet most companies, including Google and Facebook, still have not added caste to their human resources guidelines.”).