MEMORANDUM

To:

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Cofounder, Hindu American Foundation

RE: Proposed Legislation Adding "Caste" as a new protected class category

Date: February 08 , 2022

Question Presented

Is the addition of "caste" as a new protected class to non-discrimination law constitutional?

Short Answer

No. "Caste" is a facially discriminatory category as it is uniquely and exclusively associated with people of Indian origin or descent and to a lesser extent, people of South Asian origin or descent and therefore unconstitutional. The addition of "caste" to existing protected classes under state law, as such, is a striking and unlawful departure from well established legal principles of equal protection and due process, and requirements for laws to be facially neutral and generally applicable.

The addition of "caste" presumes and suggests that there exists a prevalent form of prejudice and malice amongst only people of Indian origin or descent (or those from the subcontinent) that is so entirely different, abhorrent, and widespread that this group should be marked a suspect class, and specifically monitored and policed in a perverse form of ethno-religious profiling. No similar state or federal laws exist that are only meant to police one ethnic and/or religious group. This raises questions of discriminatory intent as well as discriminatory implementation.

Lastly, because existing protected classes, such as national origin, ethnicity, or ancestry already address factors associated with caste, such as descent, birthplace, culture, or linguistic differences, instituting policies for "caste" -- a category that would apply only to Indians and South Asians -- fails on the requirement of being narrowly tailored or the least restrictive means.

Statement of Facts

Throughout the State of California, from the Democratic Party to Santa Clara County to the California State University system and various trade unions, "caste" as a protected class is making its way into non-discrimination policies and collective bargaining agreements.

Santa Clara County is the only policymaking body, which after exercising due diligence and legal review of the implications and consequences of the proposed policy of adding "caste" to county non-discrimination policy, refused to proceed. The other entities, however, have, without due diligence nor notice to their respective constituencies who will be specifically implicated by the addition, have added "caste," endangering the rights of all Californians of Indian and South Asian origin or descent.

All of these measures can be traced back to allegations being made by a for-profit, activist entity called Equality Labs which stands to profit from its caste competency training services. Equality Labs claims that caste-based discrimination is widespread based on findings of a survey it conducted in 2018. However, the study has been criticized for not having been conducted in a reliably scientific manner and in fact manipulating data. Issues that have been raised include sample bias, confirmation bias, and a number other issues, including discarding responses in which respondents did not identify with or disclose a caste identity to ostensibly inflate a showing of prevalence of caste being a relevant identity as well as discrimination on its basis. Reliance on this data, therefore is irresponsible as a matter of public policy.

A comprehensive and scientific study on Indian Americans conducted recently by researchers the Carnegie Endowment, Johns Hopkins University, and University of Pennsyvania, *Social Realities of Indian Americans: Results From the 2020 Indian American Attitudes Survey*, indicates that while people of Indian origin or descent, comprising of 1.3% of the entire US population, commonly report facing discrimination on the basis of color, religion, and national origin, discrimination on the basis of caste is exceedingly rare. This will be discussed in greater detail in the discussion.

Discussion

There is no precedent or case law directly on caste discrimination claims in the U.S. The *CDFEH v. Cisco Systems* is the first major case that examines whether and how caste-based discrimination fits under federal and state non-discrimination statutes.

In *CDFEH v. Cisco Systems*, the State of California's Department of Fair Employment and Housing (DFEH) filed four causes of action against Cisco Systems under Title VII in federal

court in June 2020 over a claim by an Indian-origin employee that two managers, also of Indian origin, allegedly discriminated against him on the basis of his presumed caste.[1] The State subsequently withdrew the case and re-filed in California state court in October 2020,[2] accusing the company of engaging in unlawful employment practices "on the bases of religion, ancestry, national origin/ethnicity, and race/color."[3]

Although the specific claims in this case were brought under the *California Fair Employment and Housing Act, Cal. Gov't Code, 12940, subd. (a) (FEHA),*[4] they would also have implications on the applicability of *Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII)*[5] to caste-based discrimination cases, which "prohibits employment discrimination based on race, color, religion, sex and national origin."[6]

California alleged that Cisco Systems Inc. failed to adequately address a claim of discrimination based on an Indian origin employee's ostensible caste. That employee said that two of his managers, also of Indian origin, discriminated against him by divulging to other employees that he had been admitted to a prestigious Indian university under India's expansive affirmative action quotas reserved for India's Scheduled or "depressed castes."[7]

Thus far, the case has almost entirely been analyzed and covered by the media in the context of two specific areas: (1) the alleged prevalence of caste-based discrimination in American technology companies and broader society;[8] and (2) the applicability of current civil rights laws to caste-based discrimination.[9] The former has been briefly addressed in the previous section above, while the latter will be discussed below.

A third, yet equally important issue that this case raises is the constitutional implications of how the State has framed its claims. In this regard, the Hindu American Foundation (HAF) filed a

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[1] *DFEH Sues Cisco Systems, Inc. And Former Managers For Caste-Based Discrimination*, Department of Fair Employment and Housing, State of California Business, Consumer Services and Housing Agency (June 30, 2020) https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/06/Cisco_2020.06.30.pdf.

[2] Sunita Sohrabji, *Does Caste Discrimination Exist in Silicon Valley Firms? Indian Americans Divided Over Issue at Santa Clara County Human Rights Commission Hearing,* India West (May 12, 2021) https://www.indiawest.com/news/global_indian/does-caste-discrimination-exist-in-silicon-valley-firms-indian-ameri cans-divided-over-issue-at-santa/article_b44ce4d6-b2f3-11eb-a363-7380c1c3f4ce.html.

[3] *Cal. Dept. Fair Empl. & Hous. v. Cisco Systems, Inc., et al.*

[4] *Id.*

[5] Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq (1964)

[6] *Id.*

[7] *Cal. Dept. Fair Empl. & Hous. v. Cisco Systems, Inc., et al.*

[8] *See for e.g.*, Shwanika Narayan and Chase DiFeliciantonio, *Activists Push Tech to Address Caste Discrimination After Cisco Lawsuit*, San Francisco Chronicle (August 13, 2020), https://www.sfchronicle.com/business/article/Activists-push-tech-to-address-caste-15479743.php.

[9] Charanya Krishnaswami & Guha Krishnamurthi, *Title VII and Caste Discrimination*, 134 Harv. L. Rev. F. 456 (June 20, 2021), https://harvardlawreview.org/2021/06/title-vii-and-caste-discrimination/.

legal motion in Santa Clara County Superior Court to intervene in the case as a third party to protect the constitutional rights of the broader Hindu American community.[10]

Specifically, California attempted to make its claim by asserting a definition of caste as follows:

> *"[a]s a strict Hindu social and religious hierarchy, India's caste system defines a person's status based on their religion, ancestry, national origin/ethnicity, and race/color—or the caste into which they are born—and will remain until death. At the bottom of the Indian hierarchy is the Dalit, typically the darkest complexion caste, who were traditionally subject to "untouchability" practices which segregated them by social custom and legal mandate."*[11]

California further explained in footnote 2 that the caste to which someone belongs is immutable and social stratification and discrimination based on caste persists in the U.S.[12] Additionally, California maintained that "Cisco failed to take any steps whatsoever to prevent " . . . **inequalities associated with [c]aste status, ritual purity, and social exclusion** [from] **becom[ing] embedded** . . **."** at the company.[13]

California's assertion as a state body to resolve questions of religious doctrine as well as its "failure to provide any definition or workable method to determine anyone's caste" raises serious constitutional problems.[14] The practical implications of the state seeking to legally define caste, which has no universally accepted definition, is not an immutable characteristic, is not outwardly recognizable, nor is it something that can be presumed to be core to an individual's self-identity or their interactions with others, also cannot be ignored. In the absence of legal precedent, the State attempts to equate caste with all of the following categories: religion, race, color, ancestry, national origin, and ethnicity and asks the court to insert into law a concept that lacks a precise objective definition, let alone a commonly understood one.[15]

As a result, Hindus would effectively lose their rights to religious liberty, equal protection, and due process rights by the state government 1) illegally asserting a right prohibited by the First Amendment's Establishment and Free Exercise clauses; 2) creating a de facto suspect class subject to unique and targeted monitoring and policing;[16] and 3) fostering workplaces which would "likely lead employers to actively discriminate against Hindus and South Asian

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[10] Memorandum of Points and Authorities in Support of Hindu American Foundation's Motion for Leave to Intervene, *Cal. Dept. Fair Empl. & Hous. v. Cisco Systems, Inc., et al.*
[11] *Cal. Dept. Fair Empl. & Hous. v. Cisco Systems, Inc., et al.*
[12] *Id.*
[13] *Id.* (Emphasis added.)
[14] Memorandum of Points and Authorities in Support of Hindu American Foundation's Motion for Leave to Intervene, *Cal. Dept. Fair Empl. & Hous. v. Cisco Systems, Inc., et al.*
[15] *Id.*
[16] *Id.*

Americans in order to avoid the undefined maze of legal uncertainty that would be California's caste-discrimination bar."[17]

What is caste?

The contemporary term caste originates from the Portuguese word, *casta*, which is loosely defined as lineage, breed, or race. While Europeans used the term to describe and subjugate the highly complex and localized social groupings they witnessed in their earliest contact with Indian society, their assumptions were deeply informed by the 15th century anti-Semitic, Iberian doctrine of blood purity (limpieza de sangre) and later iterations which classified humans by descent.[18]

There is no exact equivalent concept in any Indian language, and the various definitions of caste used by sociologists, anthropologists, historians, Indologists, and even in common parlance may include but are not limited to concepts such as class, traditional occupation, sect, religion, endogamy, community, kinship, birth, and other indigenous social markers.[19]

Today, the imposed European colonial categorization of "caste" exists as a legal fiction and political category under Indian law, bringing together various and diverse indigenous social groupings under two of three administrative classes, and as adopted by the Indian polity. The Government of India, however, does not actually define caste.

Caste has no Observable Traits for Purposes of Race and Color Under Title VII and State Law

Race and color under existing civil rights law have been defined and interpreted to focus on physical traits and characteristics. It is heavily dependent on specific observable traits and characteristics, and more particularly, the idea of the immutability of those traits and characteristics. According to current legal doctrine, "a trait is immutable if it is beyond the power of an individual to change or if it is fundamental to personal identity."[20]

A recent 11th Circuit Court of Appeals case, *EEOC v. Catastrophe Management Solutions,* interpreting Title VII regulations, defined race as "common physical characteristics shared by a group of people and transmitted by their ancestors over time."[21]

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[17] *Id.*

[18] Sumit Guha, *What Did Europeans Contribute to the Caste System in India?* Journal of History Ideas (May 30 2018). https://jhiblog.org/2018/05/30/what-did-europeans-contribute-to-the-caste-system-in-india/.

[19] Padmanabh Samarendra, *Census in Colonial India and the Birth of Caste*, Economic and Political Weekly, xlvi:33, pp. 51-58 (August 13, 2011).

[20] Nicholas Serafin, *In Defense of Immutability*, 2020 BYU L. Rev. 275 (2020), https://digitalcommons.law.byu.edu/lawreview/vol2020/iss2/8

[21] Jade Shaffer, *Defining Race: Muting All That is Not Immutable*, Louisiana Law Review, (April 4, 2017), https://lawreview.law.lsu.edu/2017/04/04/defining-race-muting-all-that-is-not-immutable/.

Similarly, the Supreme Court decision in *Bostock v. Clayton County, Georgia* affirming that race discrimination includes discriminating against employees based on their interracial relationships, similarly indicates that race discrimination is largely dependent on some type of oberservable and physical traits.[22]

Even the expansion of what constitutes racial discrimination under FEHA to include "traits historically associated with race, such as hair texture and protective hairstyles,"[23] while not necessarily focused on "immutability" is still centered on observable physical traits.

Caste is a conglomeration of a variety of social markers including but not limited to clan, class, language, lineage, region of origin, religion, traditional occupation, or other locally recognized groupings. Traits associated with any of these markers are not ordinarily observable. Moreover, the fact that social groups and legal caste designations in India do change further challenges the argument that caste is immutable like race or color. Similarly, as the Carnegie study indicates, caste identity is not prevalent amongst a majority of people of Indian descent or origin, and becomes even less relevant with subsequent generations in this country.[24]

Legal caste designations in India today are based on "schedules" created through British census exercises. During their implementation from the 1870s to the early 1930s, which were intended to collect information to categorize the Indian people on the basis of four "castes," British officials acknowledged that their theories about Indian society did not comport with the lived and ground realities of the Indian people.[25]

In fact, responses to census questions about caste were wholly inconsistent. Indians who responded, self-identified by a variety of the aforementioned social markers. The boundaries between groups coalescing around these markers were also not well-defined, but intersected and overlapped, and were amorphous, permeable, and mutable. Community associations and affiliations often shifted with migration or changes in wealth, class, or trade.[26]

Relations amongst and between communities were greatly influenced by local historical, social, economic, and political dynamics. Perceptions of inter- and intra-community hierarchies across differences in wealth, political influence, social capital, or cultural practices were highly

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[22] *Bostock v. Clayton County, Georgia,* 590 U. S. No. 17–1618 (2020), https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf.
[23] *SB 188 Discrimination: Hairstyles*, California Legislative Information (July 4, 2019), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB188.
[24] Badrinath, et al, *supra, note 4.*
[25] Samarendra, supra note 36.
[26] *Id.*

localized and fluid.[27,28] And, as is true in all human societies throughout history, such perceived differences and notions of hierarchy did contribute to prejudicial and cruel treatment within and amongst different groups, but this too varied greatly by locality, and such dynamics could change over time. In short, identifying discrete castes in a uniform pan-Indian caste system as envisioned by colonial administrators proved not only contentious, but a complete failure.[29]

At the end of Britain's experiment, thousands of castes or communities were enumerated, not four.[30] A few census officials also sought ranking by status, some with the help of native informants who themselves may have, in the context of the real asymmetries of power, been offering their colonizers what they knew or felt the colonizers sought, or were seeking to secure or improve their own social standing.[31] The absence of any objective or meaningful way of assigning status became obvious when Indians across the subcontinent filed petitions and complaints disputing the ranks assigned to them.[32]

As a result, if caste identities keep changing or being abandoned in the US over time, and caste designations also change under Indian law, how can it be considered a fixed immutable characteristic for the purposes of the law?

Furthermore, the State's equating caste with color under FEHA is predicated on the entirely unsupported contention that "Dalit[s] [are] typically the darkest complexion caste."[33] And it goes even further to claim that "Doe has a darker complexion relative to other persons of non-Dalit Indian descent"[34] without any semblance of evidence or understanding of the wide range of skin color amongst the estimated 4.2 million people of Indian origin in the US, nor the over 1 billion in India. Notably, the State does not even mention the color or complexion of the two individual defendants to show that it is significantly different from John Doe. And as the EEOC guidance shows, "color discrimination occurs when a person is discriminated against based on the lightness, darkness, or other color characteristic of the person."[35]

The State's allegations rest not on legal precedent or science. Rather they rest on racial theories that emerged in the 1700 and 1800s -- theories which sought to prove European superiority and

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[27] Charsley, *supra* note 44.

[28] Roover, *supra* note 43.

[29] Samarendra, supra note 36.

[30] CJ Fuller, *Ethnographic inquiry in colonial India: Herbert Risley, William Crooke, and the study of tribes and castes*, Journal of the Royal Anthropological Institute, 23(3), pp. 603-621 (2017) http://eprints.lse.ac.uk/84172/1/Fuller_Ethnographic%20inquiry_2017.pdf.

[31] *Id.*

[32] *Id.*

[33] *Supra,* note 13.

[34] *Id.*

[35] Cari M. Dominguez, *Section 15 Race and Color Discrimination*, EEOC (April 19, 2006), https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination#II.

justify the colonial projects in India, Africa, Australia, and the Americas that relied on beliefs about the inferiority of non-European peoples.

The assertion that status is somehow linked to skin complexion is contrary to ground realities in both the Indian subcontinent and the diaspora. As with humans more generally, skin pigmentation and color in India are closely linked to the various geographic regions and climates of the country. As the Smithsonian notes, "[v]ariations in human skin color are adaptive traits that correlate closely with geography and the sun's ultraviolet (UV) radiation."[36]

As a result, various caste groups from the same geographic region will share similar skin color, compared to a single caste group having the same pigmentation across all regions and climates in India. In fact, it is common to find darker-skinned Indians amongst "Caste Hindus" or social groups while many lighter-skinned Indians may be from "depressed castes." That caste is not related to either category can also be observed in the various skin tones or hues that present within even a single family of subcontinental origin.

The purpose of this lengthy explanation is to provide context for many of the false equivalencies, not only the State of California, but the average American public, frequently make that could further subject people of Indian and South Asian origin to false and negative stereotypes in the implementation of caste as a protected class.

Caste As National Origin or Ancestry: The Best Yet Imperfect Avenue

While the categories of religion, race, and color are problematic in drawing a parallel with caste, the best avenue to bring caste discrimination claims under FEHA (or an equivalent state law) and Title VII (as well as Title VI in the context of educational institutions) would be national origin (ethnicity or ancestry).

Case law on the category of national origin has encompassed attributes such as birthplace, ethnicity, language, descent, ancestry, even tribe.[37,38] In fact, national origin has been interpreted broadly to include, "certain traits or characteristics that can be linked to one's place of origin, as opposed to a specific country or nation."[39]

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[36] *Modern Human Diversity - Skin Color*, Smithsonian National Museum of Natural History, (June 17, 2020) https://humanorigins.si.edu/evidence/genetics/human-skin-color-variation/modern-human-diversity-skin-color.
[37] *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 614 (1987) (Brennan, J., concurring) (stating "that the line between discrimination based on 'ancestry or ethnic characteristics,' . . . and discrimination based on 'place or nation of . . . origin,' . . . is not a bright one" because "[o]ften . . . the two are identical as a factual matter"; thus, "national origin claims have been treated as ancestry or ethnicity claims in some circumstances")(citing 29 C.F.R. § 1606.1); *Cortezano v. Salin Bank & Trust Co.*, 680 F.3d 936, 940 (7th Cir. 2012) (stating that "national origin discrimination as defined in Title VII encompasses discrimination based on one's ancestry")
[38] See *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist. (Dawavendewa I), 154 F.3d 1117 (9th Cir. 1998).*
[39] *Kanaji v. Children's Hosp. of Phila.*, 276 F. Supp. 2d 399, 401-02 (E.D. Pa. 2003).

Furthermore, while national origin discrimination primarily entails discrimination based on a person being from or appearing to be from a particular region or having ancestors from that region or country, it, has been interpreted to include linguistic and cultural traits (such as accent, inability to speak English, or dress) and immigration/citizenship status.[40] Courts have also held that employers may discriminate against members of their own race or national origin.[41]

Although the argument can be made to bring caste discrimination claims under national origin, caste itself is a legal fiction and political category under Indian law which conflates various indigenous social group markers. Many of these markers, however, could arguably overlap with attributes such as language, descent, or ancestry.

Under current Indian law, there is no legal definition of caste, but there are administrative designations -- that of Scheduled Caste (SC), Scheduled Tribe (ST), and Other Backward Castes (OBC) -- which include thousands of groups and subgroups.[42] For instance, the classification of SC, referred to as "Untouchables" or "Dalits" in the Complaint by the State of California, includes some 1,200 different groups or communities that have very different histories, traditions, and socio-economic realities from one another. What they share, however, is the fact that their respective communities are designated as SC.[43] The list, which originated in early 20th century British census exercises as detailed above, and British orders from 1936,[44] was adopted by Indian law makers shortly after gaining independence from Britain.[45]

Subsequent to its initial adoption, 15 additional Constitutional orders and amendments have been issued to add groups to the list of Scheduled Castes.[46] In addition to the list of SC and ST groups, the administrative category of OBC is also considered "depressed castes." Similarly, OBC groups may have no connection to one another other than the fact that they have been deemed

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[40] National Origin Discrimination, Office of the Assistant Secretary for Administration & Management, U.S. Department of Labor, https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/National-Origin-Discrimination (last visisted November 12, 2021).

[41] See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998) (". . . in the related context of racial discrimination in the workplace, we have rejected any conclusive presumption that an employer will not discriminate against members of his own race.").

[42] *List of Scheduled Castes*, Department of Social Justice and Empowerment, Ministry of Social Justice and Empowerment, Government of India (October 26, 2017) http://socialjustice.nic.in/UserView/index?mid=76750; *Central List of OBCs*, National Commission for Backward Classes, Government of India, http://ncbc.nic.in/User_Panel/CentralListStateView.aspx (last visited November 12, 2021).

[43] Roover, *supra,* note 43.

[44] *The Government of India (Scheduled Castes) Order, 1936*, The Gazette of India (June 6, 1936) http://socialjustice.nic.in/writereaddata/UploadFile/GOI-SC-ORDER-1936.pdf.

[45] *The Constitution (Scheduled Castes) Order, 1950*, The Gazette of India (August 11, 1950) http://socialjustice.nic.in/writereaddata/UploadFile/CONSTITUTION%20(SC)%20ORDER%201950%20dated%2010081950.pdf.

[46] *List of Scheduled Castes*, Department of Social Justice and Empowerment, Ministry of Social Justice and Empowerment, Government of India (October 26, 2017) http://socialjustice.nic.in/UserView/index?mid=76750.

socially and economically "depressed" or "backwards."[47]

A similarly complex situation arises with tribal affiliation amongst Native Americans. Akin to the use of political and social classifications to designate caste groups under current law in India, various Native American tribes have been recognized as distinct political and social entities, giving rise to conflicting opinions on whether they meet the criteria for national origin claims under Title VII.

In *Dawavendewa v. Salt River*,[48] for example, the ninth circuit found that

> *Because the different Indian tribes were at one time considered nations, and indeed still are to a certain extent, discrimination on the basis of tribal affiliation can give rise to a "national origin" claim under Title VII. The fact that "new political structures and boundaries" now exist has no significance. Further, even if the various tribes never enjoyed formal "nation" status, Section 1606.1 of the regulations makes clear that discrimination based on one's ancestor's "place of origin" is sufficient to state a cause of action. Accordingly, under the case law and the regulations interpreting Title VII, tribal affiliation easily falls within the definition of "national origin."[49]*

On the other hand, in *EEOC v. Peabody Western Coal Company,* the court held that tribal distinctions and hiring preferences for the Navajo tribe was "...a political classification, rather than a classification based on national origin, and therefore did not violate Title VII."[50]

And in *Kahawaiolaa v. Norton,* the question of which groups constitute Native American tribes, in the context of native Hawaiians, raises additional "questions of considerable moment and difficulty," and is ultimately "a matter of some dispute."[51]

These cases demonstrate the challenges in adjudicated national origin claims with complex classification groups, such as tribal affiliation. As the Ninth Circuit further noted in *Kahawaiolaa v. Norton,* "...the United States has struggled to find an adequate definition of an Indian tribe. There is no universally recognized legal definition of the phrase, and no single federal statute defining it for all purposes."[52] Caste similarly has no universal definition nor legal precedent in American law and doesn't fit neatly into national origin under Title VII or Title VI for that matter.

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[47] *Central List of OBCs*, National Commission for Backward Classes, Government of India, http://ncbc.nic.in/User_Panel/CentralListStateView.aspx (last visited November 12, 2021).
[48] *Dawavendewa v. Salt River, supra,* note 78.
[49] *Id.*
[50] *EEOC v. Peabody Western Coal Co.*, No. 12-17780 (9th Cir. 2014).
[51] *Kahawaiolaa v. Norton,* 386 F.3d 1271 (2004).
[52] *Id.*

Class would be a more accurate category to utilize, but since class is not a protected category under civil rights law, national origin and its adjacent categories of ancestry, language, descent, and culture, would be the most viable, albeit imperfect, option.

Any caste policy or legislation inherits the discriminatory intent of Equality Labs and its survey.

The only scientific and representational study that delves into caste attitudes and caste-based discrimination in the U.S. is a recent study, *Social Realities of Indian Americans: Results from the 2020 Indian Americans Attitudes Survey*, by the Carnegie Endowment for International Peace.[53]

The study revealed three important findings on the issue of caste in America: (1) a majority of Hindu respondents (53 percent) do not identify with any caste group at all;[54] (2) within the group that does identify with a caste, there is a significantly lower number of U.S.-born Hindu Indian Americans who identify with a caste group (34 percent) versus those that are foreign-born (53 percent), which may indicate that caste identification will become increasingly less relevant with every generation; and (3) only 5% of Indian Americans reported encountering discrmination on the basis of caste, with almost half of those respondents reporting facing caste discrimination at the hands of non-Indians, indicating that caste may have been conflated with some other factor.

Importantly, the Carnegie survey discredits a prior non-scientific survey by Equality Labs which is frequently cited to by the media, government bodies, and educational institutions in an effort to demonstrate a widespread prevalence of caste-based discrimination.[55] That highly flawed survey claimed that "67% of Dalits reported being treated unfairly at their American workplaces because of their caste and related characteristics,"[56] and was heavily relied upon by the Department of Fair Employment and Housing (DFEH) in its case against Cisco Systems to define caste as "religion, ancestry, national origin/ethnicity, and race/color" under existing law.[57]

Carnegie, however, noted that the Equality Labs survey "is not based on a representative sample, raising questions about the generalizability of its findings."[58]

It further noted,

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[53] *Id.*

[54] The survey's authors admit to not having asked questions related to caste-identity to those respondents not identifying as Hindu due to time constraints. Caste or community identies are commonplace amongst Buddhists, Christians, Jains, Muslim, and Christians.

[55] Zwick-Maitreyi, et al, *supra,* note 3.

[56] *Id.*

[57] *Cal. Dept. Fair Empl. & Hous. v. Cisco Systems, Inc., et al.*

[58] Badrinath, et al, *supra, note 4.*

This study relied on a nonrepresentative snowball sampling method to recruit respondents. Furthermore, respondents who did not disclose a caste identity were dropped from the data set. Therefore, it is likely that the sample does not fully represent the South Asian American population and could skew in favor of those who have strong views about caste. While the existence of caste discrimination in India is incontrovertible, its precise extent and intensity in the United States can be contested.[59]

Additionally, while dozens of South Asian organizations are listed as partner organizations for having assisted in distributing the survey, the survey authors did not invite any of the major national Hindu or Indian organizations, representing hundreds of thousands of Hindus and people of Indian origin, to participate.[60] Moreover, recent solicitations for petitions seeking reporting of incidents of alleged caste-based discrimination made by Equality Labs and allied organizations encouraged those reporting from outside the country to use the Santa Clara County Zip Code, 95134, ostensibly to artificially inflate numbers or a show of support.[61]

Consequently, the existing data on caste identity and discrimination in the U.S. is still very limited. What is available and conducted scientifically, however, does not seem to support the claim that caste-based discrimination is a rampant problem among the Indian and broader South Asian diaspora.

In contrast to caste as a narrow category that exclusively targets a particular subset of the population, and that too a micro-minority of less than 1.3% of the US population, every protected class under current US civil rights law, namely race, national origin (ancestry/ethnicity), gender, religion, disability, age, and now sexual orientation are facially neutral, universal categories. They seek to address well documented bases of discrimination broadly. The power of existing law to provide protection against disrimination and mete out justice in its wake is that all protected classes are facially neutral and generally applicable, while caste is not.

The category of caste is not only facially discriminatory, it's implentation would be inherently discriminatory.

Caste is a stereotype uniquely associated with Indians and Hindus. Any legislation seeking to add it as a protected class asks employers, administrators, and others in positions of administering the policy to single out members of a micro-minority for ethno-religious profiling, monitoring, and policing based on a presumption that if an individual is of Indian descent or a practicing Hindu, they would necessarily identify by a caste and discriminate in accordance with a purported hierarchical caste system.

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[59] *Id.*

[60] Zwick-Maitreyi, et al, *supra, note 3.*

[61] Equality Labs Newsletter, https://mailchi.mp/equalitylabs/southasiantownhall-4131209?e=bea6c6de99

It also raises significant questions about how caste would actually be regulated in the workplace, on college campuses, or other settings. In order to regulate something, it first requires a definition. And as a prominent British professor and leading proponent of adding caste to federal anti-discrimination legislation in the United Kingdom, David Keane, conceded "[i]t is impossible to have a clear definition of what constitutes caste."[62]

This inability to accurately define caste, amongst other reasons, led to the failure of legislating caste in the UK.[63]

Absent a historical or current basis to regulate caste in the United States and the lack of an agreed upon legal or sociological definition, the obvious resource is India's laws and regulations related to caste. Even in the Indian context, however, caste is a legal fiction and political category that is solely defined by administrative classifications that encompass thousands of caste groups for the purposes of both preventing discrimination and conferring affirmative action benefits.

The Indian Constitution guarantees equal rights to all citizens and prohibits discrimination on the grounds of caste, religion, race, sex, or place of birth. It also provides the state power to make special provisions for positive discrimination.[64] As such, groups listed or designated at the national or state level as SC, ST, or OBC are guaranteed certain legal protections and eligible for special provisions. The special provisions make up a system of affirmative action that is intended to increase access to opportunity and representation in education, employment, and government at both the state and union levels.[65]

In fact, there are many politically dominant communities from specific states who have lobbied to be added to the OBC list in order to avail themselves of such benefits.[66] Currently, there are 5,013 groups designated as OBC in India, whereas the Mandal Commission national list created in 1979-1980 contained 3,743 castes, and the initial Kala Kalelkar Commission in 1955 designated 2,399 groups as OBC.[67]

Consequently, the terms "Scheduled Caste," "Untouchable," "Dalit," or "OBC" do not refer to

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[62] David Keane, *Caste-based discrimination in international human rights law,* Routledge (2016).

[63] Prakash Shah, *Against Caste in British Law: A Critical Perspective on the Caste Discrimination Provision in the Equality Act 2010*, United Kingdom: Palgrave Macmillan, (2015).

[64] Constitution of India, Legislative Department, Ministry of Law and Justice, Government of India, https://legislative.gov.in/sites/default/files/COI_1.pdf.

[65] Department of Social Justice and Empowerment, Ministry of Social Justice and Empowerment, Government of India, http://socialjustice.nic.in/Home/Index.

[66] Rishi Iyengar, *Riots Break Out in India Over a Dominant Caste's Attempt to Gain 'Backward' Status,* Time (August 26, 2015), https://time.com/4011001/hardik-patel-protest-arrest-gujarat-obc/.

[67] *Time to Cast Away Caste Reservation Elevator to Success?* Times of India (October 12, 2015), https://timesofindia.indiatimes.com/city/visakhapatnam/time-to-cast-away-caste-reservation-elevator-to-success/articleshow/49318108.cms.

any one static or stable and unchanging system, but rather an often fluid list of groups or communities that are diverse and subject to change based on a number of factors, including modern political and socioeconomic factors. There are also thousands of additional groups or communities that do not appear on any lists as the initial census exercises required a minimum number of "members" to be counted and listed.[68]

There is also a growing movement amongst communities designated as Scheduled Caste in many parts of India to move away from labels such as "Dalit," which have become political identities that are increasingly viewed as disempowering and offensive.[69] These communities, in states such as Uttar Pradesh, have instead asserted their individual community identities and celebrated their related histories, traditions, and contributions.[70]

Interestingly, while there are numerous media reports of caste-based conflicts or incidents of discrimination in India, a new Pew Research survey there found that most Indians, including those from designated "depressed castes," do not perceive widespread caste-based discrimination. Nineteen percent of the general category of castes or "Caste Hindus" believe that SCs, OBCs, and STs face caste-based discrimination.[71] Strikingly, this rises by seven to eight percent among those who are actually SC or ST.[72] Moreover, OBCs perceive even less discrimination against themselves (13%) than the general castes do (18%).[73]

Would companies or courts adopt and impose Indian administrative classifications in their hiring and firing practices and HR policies, on workers in the United States? Would American courts consult Indian law and jurisprudence to make determinations related to allegations of caste discrimination? What evidentiary standards would be required for plaintiffs and defendants to prove or contest allegations made against them related to caste, including but not limited to awareness and knowledge of their own caste or the perceived status of one caste in relation to another when there are vastly different self-conceptions and external perceptions of that social status?

How would courts determine status if both a plaintiff and defendant originated from different regions in India, where any associations between a last name and caste or caste and perceptions of social status would likely be unfamiliar to one another? What if an employee with SC, ST, or OBC designation from India created a hostile environment for another employee without a similar administrative designation, meaning an employee who would be considered a "Caste Hindu"?

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[68] Fuller, *supra*, note 66.
[69] Narayan, *supra*, note 94.
[70] *Id.*
[71] *Religion in India: Tolerance and Segregation*, Pew Research Center, (June 29, 2021) https://www.pewforum.org/2021/06/29/religion-in-india-tolerance-and-segregation/.
[72] *Id.*
[73] *Id.*

In terms of how to handle caste in corporate America, one scholar-activist who self-identifies as Dalit, has suggested that companies like Cisco be required to submit lists of all of its employees of Indian origin or ancestry and/or Hindus for caste audits, in which a caste identity would be assigned by caste "experts" to every individual based on their last name.[74] Beyond the odious nature of putting private company data targeting only Indian origin employees in the hands of supposed third-party "experts" and forcibly assigning and classifying these employees with a caste, (or compelling employees to identify with a caste), the likelihood of any expert or court being able to verify an individual's caste outside their own assertion or assignment is highly doubtful and would raise significant evidentiary challenges.

It must be noted that last names can be indicators of numerous social group markers. They are not, however, entirely accurate indicators of background. For example, the same last names can often be found in multiple caste or community and across various sects, religions, and regions. In some regions, the father's first name is taken as the last name of the subsequent generation. Marriage can also be a factor in how an individual has chosen a last name, including hyphenating their last name.

By adding caste as a protected category, caste identities risk being crystalized and made rigid. These are the very real implications and questions that are not being considered by the State of California or college administrators on an issue that is still not well understood in the US.

More importantly, discrimination based on national origin is already prohibited under US law as is ancestry and ethnicity under California state law and public and private sector employment policies. As noted above, national origin, ancestry, and ethnicity have been interpreted as protecting against discrimination on the basis of birthplace, ancestry, culture, or linguistic characteristics -- all of which are social markers associated with the various indigenous communities that were conflated into the category of caste. Thus, existing laws can provide the legal avenue to address claims of caste-based discrimination.

Conclusion

Caste is a complex and little understood concept, with no universally agreed upon legal or social definition. The modern understanding of caste is steeped in race science theories about Indians and policies dating back to the colonial era. Moreover, recent data on the extent and prevalence to which caste identities and discrimination exists amongst the Indian (and wider subcontinental) diaspora in the U.S. demonstrates that the former is diminished significantly and the latter is exceedingly rare.

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[74] Gregory Warner, *How to Be an Anti-Casteist*, Rough Translation, National Public Radio, (September 30, 2020) www.npr.org/transcripts/915299467 .

At the same time, it is necessary to provide legal avenues and remedies to anyone that believes they have been discriminated against on the basis of their perceived caste. This need must be balanced against constitutional guarantees, however, in order to not target and discriminate against a micro-minority and deprive them of their rights to equal protection and due process, and unconstitutionally interfere in religion doctrine by inaccurately tying a "caste system" to Hinduism.

Consequently, any proposed legislation that seeks to add caste as a separate category under anti-discrimination law would be unconstitutional on its face, as it would deprive Indian and Hindu Americans of their equal protection and due process rights under the law.

Instead, the most viable solution is to use existing, facially neutral, and more generally applicable state and federal civil rights categories of ancestry, national origin, and ethnicity to provide recourse. Just and viable solutions are only possible if the history and complexity of caste are understood when adjudicating legal claims or evaluating administrative or regulatory proposals to add caste as a specific category.