

COLORISM AMONG SOUTH ASIANS: TITLE VII AND SKIN TONE DISCRIMINATION

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INTRODUCTION

In 2013 Nina Davuluri, an Asian Indian from Syracuse, NY, became the first South Asian-American Miss America.¹ Her selection prompted racist messages on Twitter “mixing up Indian, Indian-American, Arab, Muslim, and everything in between.”² The racist tweets are not simply a commentary on racial “progress” in post-civil rights America but, more importantly from a legal perspective, illustrate the popularly held misunderstandings of South Asian identity. This confusion about South Asians is reflected in some employment discrimination cases.

Asian Indians are often subsumed into a category called South Asians.³ The term “South Asian” normally encompasses Dalits, Christians, Muslims, Sikhs, and other Indian minorities who represent a larger portion of the Indian population in the United States than they do in India.⁴ The

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1. Lakshmi Chaudhry, *Miss America Nina Davuluri: Too 'Indian' to ever be Miss India*, FIRST POST (Sept. 16, 2013), <http://www.firstpost.com/living/miss-america-nina-davuluri-too-indian-to-ever-be-miss-india-1111477.html>.

2. Alex Williams, *Beauty Pageants Draw Social Media Critics*, N.Y. TIMES (Sept. 20, 2013), http://www.nytimes.com/2013/09/22/fashion/beauty-pageants-draw-social-media-critics.html?_r=0 (quoting a blog post by Laura Beck).

3. The South Asian Association for Regional Cooperation consists of Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. SOUTH ASIAN ASS'N FOR REGIONAL COOPERATION, CHARTER (Dec. 8, 1985).

4. Prema Kurien, *Who Speaks for Indian Americans? Religion Ethnicity, and Political Formation*, 59 AM. Q. 759, 759 (2007). Hindu Indians do not always self-identify as South Asians reflecting political divisions within and outside the Asian Indian American community. To some “South Asian organizations represent pluralist subcontinental groups that are explicitly against the political Hindu movement.” *Id.* at 759. In contrast, “Hindu organizations represent political Hindu interests.” *Id.* “At the heart of the difference between Hindu and South Asian organizations lie two different conceptions of ‘Indianness’—a Hinducentric one that defines India as a Hindu country under attack from Muslims, Christians, and secularists within and without the country, and a secular, multireligious, multicultural conception that emphasizes the importance of developing harmonious relationships between groups and countries in the Indian subcontinent.” *Id.* at 763. Nevertheless, the division in the Indian American political groups pits pan-Hindu groups (either United States branches of Hindu nationalist groups existing in India or independent Hindu American organizations) against South Asian groups (usually consisting of coalitions of secular Hindus, leftist South Asian academics, Dalits, Indian Muslims, Indian Sikhs, and Indian Christians banding together on an anti-Hindutva platform). *Id.* Although divided, the Indian American community is seeing large gains in political influence due to their donations and India’s development as a key economic player. *Id.* at 759.

term “South Asian” is used throughout this article in the broadest sense, except where it is important to distinguish various subgroups.

The largely congratulatory comments from South Asian commentators about Davuluri’s win were insightful in another troubling way. While reveling in the significance of her win, bloggers also commented on her skin tone, characterizing the new Miss America as dark brown.⁵ One Asian Indian American commentator sarcastically wrote, “That gorgeous chocolate may play as exotic in the West, but in India, we prefer our beauty queens strictly vanilla—preferably accessorised with blue contact lenses.”⁶ Thus it was not simply Davuluri’s win as Miss America that was deemed significant, it was her skin tone as well. A commentator added that Davuluri would have never won the Miss Indian America USA title because she is “too dark.”⁷ Still others added that in India someone with her skin tone would *never* be a contestant in a beauty contest, much less the winner.⁸

These comments about Davuluri’s skin tone within the Asian Indian American community add to our understanding of how different non-white communities process skin tone. To me her skin tone seemed medium brown, but this difference in perspective is unsurprising. As I have written before, skin tone differences are relative.⁹ Further, when Davuluri’s skin tone is compared with the nine other non-white Miss Americas from 1984–2014, with two exceptions, her skin tone looks much the same as the other winners.¹⁰

5. Chaudhry, *supra* note 1.

6. *Id.*

7. *Id.* This point is made in the documentary film *Miss India Georgia* (URBAN LIFE PRODUCTIONS 1997) about the competition for Miss India America in Georgia.

8. Mallika Rao, *Why Miss America, Nina Davuluri, ‘Would Never Win Pageants In South Asia’*, HUFFINGTON POST (Sept. 16, 2013), http://www.huffingtonpost.com/2013/09/16/miss-america-nina-skin-color_n_3935348.html.

9. There may be significant disagreement about what constitutes skin tone difference, even within a racialized group. Skin tone measurement may be egocentric in that a dark-skinned member of a racialized group may judge the skin tone of another [group] member based on her own skin tone. Thus, a dark-skinned black person might rate another as lighter than the rating given by a light-skinned black person. Further, in-group notions of skin tone may differ from the perceptions of people outside this group. Taunya Lovell Banks, *A Darker Shade of Pale Revisited: Disaggregated Blackness and Colorism in the “Post-Racial” Obama Era*, in *COLOR MATTERS: SKIN TONE BIAS AND THE MYTH OF A POST-RACIAL AMERICA* 97 (Kimberly Jade Norwood ed., 2014) (citing Mark E. Hill, *Race of the Interviewer and Perception of Skin Color: Evidence from the Multi-City Study of Urban Inequality*, 67 *AM.SOC. REV.* 99, 100 (2002)).

10. The nine other non-white winners are: 1984 Vanessa Williams (first black winner) later replaced by runner-up Suzette Charles, also black; 1990 Debbye Turner Bell (black); 1991 Marjorie Vincent (black); 1994 Kimberly Aiken (black); 2001 Angela Perez Baraquio (First Asian winner); 2003 Erika Harold (multi-racial); 2004 Ericka Dunlap (black); 2010 Caressa Cameron (black). One scholar on this subject noted that “Debbye Turner’s, dark, yet Anglo defined features and Marjorie

Early discussions of colorism by legal scholars focus on how the practice impacts black Americans or other persons with some African ancestry.¹¹ Yet the comments from South Asians about Davuluri's skin tone sound surprisingly similar to conventional American notions of colorism practices. But in Miss Davuluri's case, the comments seems counter intuitive. Instead of selecting a light-skinned woman, a cultural preference in the United States as well as India, a brown-skinned Asian Indian woman won. South Asian commentators explain Davuluri's selection as a preference by the dominant American culture for darker more "exotic" South Asians. Thus skin tone preferences impacting South Asians operate within and outside of their communities. What is not clear is whether intra-group or inter-group skin tone preferences involving South Asians carry over to workplace decisions.

This inquiry is important because South Asians comprise a significant portion of this country's growing non-white population. There are more than three million South Asians in the United States.¹² More specifically, ethnic Asian Indians represent the third-largest immigrant group by country of origin in the country today.¹³

Title VII of the Civil Rights Act of 1964¹⁴ and the older civil rights statute 42 U.S.C. § 1981¹⁵ prohibit discrimination based on "color," but neither statute defines the term.¹⁶ A little more than fifteen years ago I

Vincent's classic Black features were the subject of media attention." Elwood Watson, *Miss America's Racial Milestones*, DIVERSE ISSUES: HIGHER EDUC. (Jan. 19, 2009), <https://diverseeducation.wordpress.com/2009/01/14/miss-americas-racial-milestones/>. As of 2009 there had been no Latina winner. *Id.*

11. See Leonard M. Baynes, *If It's Not Black and White Anymore, Why Does Darkness Cast a Longer Discriminatory Shadow than Lightness? An Investigation and Analysis of the Color Hierarchy*, 75 DENVER U. L. REV. 131, 146-53 (1997) (arguing about the existence of skin tone discrimination within the black American community); Leonard M. Baynes, *Blinded by the Light: But Now I See*, 20 W. NEW ENG. L. REV. 491 (1998) (book review discussing the existence of intra-racial colorism among black Americans); Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 U.C.L.A. L. REV. 1705 (2000) (arguing that colorism is a form of race-related discrimination); Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487 (2000) (arguing that colorism is a separate and distinct form of discrimination).

12. See ASIAN AMERICAN FEDERATION & STRENGTHENING SOUTH ASIAN COMMUNITIES IN AMERICA, A DEMOGRAPHIC SNAPSHOT OF SOUTH ASIANS IN THE UNITED STATES (July 2012), available at <http://saalt.org/wp-content/uploads/2012/09/Demographic-Snapshot-Asian-American-Foundation-2012.pdf> (estimating the United States population of South Asians, defined as Bangladeshi, Bhutanese, Indian, Maldivian, Nepali, Pakistani, and Sri Lankan ethnicities at 3,441,773 in 2010).

13. Monica Whatley & Jeanna Batalova, *Indian Immigrants in the United States*, MIGRATION INFO. SOURCE (Aug. 21, 2013), <http://migrationpolicy.org/article/indian-immigrants-united-states>.

14. 42 U.S.C. §§ 2000e-2(a)(1) (1981).

15. Rev. Stat. § 1977, 18 Stat. 337 (1875) (codified as amended at 42 U.S.C. § 1981).

16. Kate Sablosky Elengold, in her examination of the legislative history of Title VII of the 1964 Civil Rights Act, argues that Congress often used the term "colored" interchangeably with "Negro"

argued that skin tone discrimination, whether intra-racial or inter-racial, constitutes a form of race-based discrimination that tends to disadvantage individuals with dark skin tones.¹⁷ With few exceptions, more recent discussions of this topic among legal scholars continue to focus almost exclusively on black Americans.¹⁸ Thus, this Article asks whether colorism among or between racialized groups impacts immigrants from South Asia and their American-born offspring in the same way studies suggest that skin tone discrimination adversely impacts black Americans and Latinos in the workplace.¹⁹

In exploring this question, I examined fifty-one employment discrimination cases involving South Asians decided between 1981 and 2014. This Article also explores the difficulties South Asian plaintiffs face

raising questions about whether the term “color” has a separate meaning. See Kate Sablosky Elengold, *Branding Identity*, 93 DENV. U. L. REV. (forthcoming 2015) (arguing that the term “people of color” should not be considered the same as discrimination based on “color” under Title VII). (copy on file with the author)

17. Banks, *supra* note 11.

18. See Banks, *supra* note 9; Trina Jones, *Intra-Group Preferencing: Proving Skin Color and Identity Performance Discrimination*, 34 N.Y.U. REV. L. & SOC. CHANGE 657 (2010) (explaining many of the practical impediments plaintiffs face when bringing intra-group claims); Taunya Lovell Banks, *Multilayered Racism: Courts’ Continued Resistance to Colorism Claims*, in SHADES OF DIFFERENCE: WHY SKIN COLOR MATTERS 213 (Evelyn Nakano Glenn ed., 2009) (discussing the empirical studies on skin tone bias and the implications and law’s inability to address the harms of colorism); Trina Jones, *The Case for Legal Recognition of Colorism Claims*, in SHADES OF DIFFERENCE, *supra* at 223 (arguing for legal recognition of colorism claims). *But c.f.*, Tanya Kateri Hernandez, *Latino Inter-Ethnic Employment Discrimination and the “Diversity” Defense*, 42 HARV. C.R.-C.L. L. REV. 259 (2007) (looking at the implications of increased diversity, specifically among Latinos and the operation of employment discrimination law); Tanya Kateri Hernandez, *Latinos at Work: When Color Discrimination Involves More Than Color*, in SHADES OF DIFFERENCE, *supra*, at 236 (arguing that judges misunderstand “the permutations of color discrimination” in cases involving Latinos).

For discussions of colorism among South Asians, see Cynthia E. Nance, *Colorable Claims: The Continuing Significance of Color Under Title VII Forty Years After Its Passage*, 26 BERKELEY J. EMP. & LAB. L. 435 (2005) (arguing that colorism cases will account for an increasing number of Title VII cases); Shilpi Bhattacharya, *The Desire for Whiteness: Can Law and Economics Explain It?*, 2 COLUM. J. RACE & L. 117 (2012) (arguing for a new theoretical perspective on colorism that focuses on economics rather than race); Trina Jones, *The Significance of Skin Color in Asian and Asian-American Communities: Initial Reflections*, 3 U.C. IRVINE L. REV. 1105 (2013) (discussing colorism among Asian Americans in general with reference to South Asians).

19. See Taunya Lovell Banks, *A Darker Shade of Pale Revisited: Disaggregated Blackness and Colorism in the “Post-Racial” Obama Era*, in COLOR MATTERS: SKIN TONE BIAS AND THE MYTH OF A POSTRACIAL AMERICA 95 (Kimberly Jade Norwood ed., 2013) (arguing that skin tone, rather than racial classification or racial self-identification, will, in the near future, determine who gets better access to quality education, jobs and real power in America); Banks, *Multilayered Racism*, *supra* note 18, at 213 (arguing that the preference for lighter skin tones for all racialized groups may reflect unconscious or implicit biases); Hernandez, *Latinos at Work*, *supra* note 18, at 236; Hernandez, *Latino Inter-Ethnic Employment Discrimination*, *supra* note 18.

when raising a Title VII color employment discrimination claim.²⁰ South Asian plaintiffs are more likely to use Title VII rather than the older Section 1981 law because the latter does not cover discrimination based on national origin and claims filed by South Asians sometimes conflate race and national origin claims.

The remaining article is divided into three sections. The first section briefly examines the influx of South Asians, specifically Asian Indians, in the United States since the mid-1960s. It also examines the colorism phenomena in India and the South Asian diaspora including the United States. The second section examines employment discrimination cases brought by South Asians, especially Asian Indians, and their invocation of skin tone in many of these cases. This section starts with a reexamination of *Ali v. Bank of Pakistan*, perhaps the earliest colorism case involving a South Asian.²¹ The 1981 federal district court opinion in *Ali* suggests that intra-group colorism claims involving South Asians are not cognizable under Title VII because they fall outside the “American experience.”²² Thus, I examine the cases that follow *Ali* to determine whether and how South Asian plaintiffs invoke “color” in Title VII employment discrimination cases. The final section of this article contains some suggestions for both litigators and judges involved in workplace discrimination cases brought by South Asians.

20. The United States Supreme Court ruled in *Saint Francis College v. Al-Khazraji*, that 42 U.S.C. §1981 covers intentional discrimination based on ancestry or ethnicity, but not national origin. *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987). The lack of a clear distinction between ethnicity and national origin has resulted in a series of confusing lower court decisions. As noted in an ALR commentary summarizing cases on this issue: “The courts have found no adequate standard to distinguish racial from national origin discrimination, and have generally adopted a common-sense approach based upon the factual practicalities indicating a racial bias against certain groups of distinct national origin.” Jean F. Rydstrom, Annotation, *Applicability of 42 U.S.C.A. § 1981 to National Origin Employment Discrimination Cases*, 43 A.L.R. Fed. 103 (originally published in 1979). Nevertheless, subsequent circuit courts of appeals that considered this issue generally conclude that Section 1981 does not cover discrimination based solely on national origin. See *Torgerson v. City of Rochester*, 643 F.3d 1031, 1053 (8th Cir. 2011); *Pourghoraishi v. Flying J, Inc.*, 449 F.3d 751, 756 (7th Cir. 2006), *as amended on denial of reh’g* (May 25, 2006); *El-Zabet v. Nissan N. Am., Inc.*, 211 F. App’x 460, 462–63 (6th Cir. 2006); *Ingram v. Papa John’s Int’l, Inc.*, 171 F. App’x 439, 441 (5th Cir. 2006); *Fonseca v. Sysco Food Servs. of Arizona, Inc.*, 374 F.3d 840, 850 (9th Cir. 2004); *Anderson v. Conboy*, 156 F.3d 167, 170 (2nd Cir. 1998); *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1411 n.10 (10th Cir. 1997).

21. *Ali v. Nat’l Bank of Pakistan*, 508 F. Supp. 611 (S.D.N.Y. 1981).

22. *Id.* at 613.

II. ASIAN INDIANS IN AMERICA

A. Growth in the Asian Indian Community

Asian Indians comprise the largest group of South Asians in the United States. There are more than a million immigrants from India in the United States.²³ Most Asian Indians entered the country after 1965 when immigration and naturalization restrictions on non-white immigrants eased with passage of the Immigration and Nationality Act Amendments of 1965.²⁴ Between 2000 and 2005 the ethnic Asian Indian population in the United States, immigrant and native born, rose to 2.3 million.²⁵

By 2011 there were nearly 1.9 million Asian Indian immigrants living in the United States, representing the third-largest immigrant group by country of origin.²⁶ Asian Indian immigrants in 2011 were better educated, more likely to have strong English language skills and arrive on employment-based visas, and were less likely to live below the federal poverty line than the overall foreign-born population.²⁷ The vast majority

23. There were two phases of Indian immigration—1899–1914 when 6,800 arrived in California (consisting of mostly peasants who took up farming). Prema Kurien, *Religion, Ethnicity, and Politics: Hindu and Muslim Indian Immigrants in the United States*, 24 *ETHNIC & RACIAL STUD.* 263, 266 (2001). But in 1917 the Asiatic Barred Zone Act banned immigration from most Asian countries including colonial India. Asiatic Barred Zone Act (Act of Feb. 5, 1917) ch. 29, Pub. L. No. 64-301, sec. 3, 39 Stat. 874, 876 (repealed 1952). Further, immigrants from these countries already in the United States could not naturalize. *In re Thind*, 268 F. 683 (D. Or. 1920). By the beginning of the twentieth century Hindus were underrepresented in the United States in relation to their proportion in India while Sikhs and Christians were particularly overrepresented. Kurien, *supra*, at 267; Sucheta Mazumdar, *Racist Responses to Racism: The Aryan Myth and South Asians in the United States*, 9 *S. ASIA BULL.* 47, 49 (1989). Interestingly, while upper-caste immigrants formed only twenty-five percent of the Indian population, in the United States most Indian Americans are from the upper caste (or claim to be). See VIJAY PRASHAD, *UNCLE SWAMI: SOUTH ASIANS IN AMERICA TODAY* 95 (2012). Although the ban on naturalization was lifted by the 1946 Luce–Celler Act, immigration quotas severely limited immigration from India. Mazumdar, *supra*, at 50.

24. The first wave of late twentieth century Indian immigrants were the highly educated, fluent English speakers who came under the special skills provision of the 1965 Immigration and Naturalization Act. These immigrants were welcomed due in part to a demand for English-speaking scientists, technicians, engineers, doctors, and other professionals. Kurien, *Religion, Ethnicity, and Politics*, *supra* note 23, at 266. Thus, the first wave of Asian Indian immigrants was quite prosperous, especially compared to the population of India, where only forty-eight percent are literate. *Id.* Many second wave of post-1965 immigrants were relatives of the first wave who entered under the family reunification provisions of the Act. *Id.*

25. Kurien, *Who Speaks for Indian Americans?*, *supra* note 4, at 762.

26. Monica Whatley & Jeanna Batalova, *Indian Immigrants in the United States*, *MIGRATION INFO. SOURCE* (Aug. 21, 2013), <http://migrationpolicy.org/article/indian-immigrants-united-states>.

27. *Id.* As a result of their numbers and relative affluence, Asian Indian Americans also have been able to develop the largest ethnic caucus on the Hill, the Congressional Caucus on India and Indian Americans. Kurien, *supra* note 4, at 762.

of children in Asian Indian immigrant families are born in the United States.²⁸

Given the growing number of ethnic Indians and other South Asians in the United States and the persistence of race-based workplace discrimination, it is likely that courts will see more claims brought by members of these communities. One issue is whether the courts fully understand the nuances of some claims by South Asians that have cultural roots and what litigants need to do to better inform the courts of their claims. Specifically, given the presence of skin tone bias within South Asian communities, one question is how courts will respond to these claims. The next section provides some background on colorism practices in India and within the larger South Asian diaspora.

B. Colorism in India

The origin of colorism practices in India and other parts of South Asia is contested.²⁹ Colorism practices within the Asian Indian community are “not limited to one particularly [*sic*] faith, tradition or ethnicity.”³⁰ Like other societies, there seems to be a gender component that disproportionately impacts Asian Indian women’s perceived marriageability.³¹ The popularity of skin lightening products for women in contemporary India (and elsewhere) reflects the connection between concepts of beauty and marriageability for women.³² On the surface this preference for marriageable Asian Indian women with light skin tones seems to mirror historical marriage patterns of women in the black American community.³³ But it is unclear whether there is a racial component to Asian Indians’ preference for light-skinned women.

Some studies of the light-skinned phenomena among Asian Indians suggest that there is no racial connection. These scholars argue that Asian women are not trying to become white racially rather they are trying to

28. Whatley & Batalova, *supra* note 26.

29. Colorism practices predate British colonization of India but were undoubtedly influenced by British colorphobia. Earlier theories, now largely discredited, link colorism practices to India’s caste system. See Shilpi Bhattacharya, *The Desire for Whiteness: Can Law and Economics Explain It?*, 2 COLUM. J. RACE & L. 117, 124–25 (2012).

30. Murali Balaji, *Not Caste in Color: Dispelling Myths in Our Classrooms*, HUFFINGTON POST (Nov. 11, 2013), http://www.huffingtonpost.com/murali-balaji/not-caste-in-color-dispel_b_4243013.html.

31. *Id.*

32. See MARGARET L. HUNTER, RACE, GENDER, AND THE POLITICS OF SKIN TONE 249 (2005); Evelyn Nakano Glenn, *Consuming Lightness*, in SHADES OF DIFFERENCE, *supra* note 18, at 179.

33. Bhattacharya, *supra* note 29, at 119–21.

conform to their society's notion of feminine beauty.³⁴ Significantly, researchers also found that the preference for Asian women with light skin tones may be influenced by American Eurocentric notions of beauty when these Asians immigrate to the United States.³⁵

South Asians were not included in these studies of Asian women, but a few studies of South Asians made similar findings. For example, Roksana Badruddoja Rahman examined the role of skin tone in the New Jersey Hindu Indian immigrant community.³⁶ She focused on Hindu Indian women's concept of beauty and the significance of skin tone as a status marker in the marriage market.³⁷

Rahman argues that the politics and implications of skin color in Indian community and among black Americans are extraordinarily similar, and the strict juxtaposition of black and white works well in understanding the implications of skin color and the definition of beauty among black Americans, Indians in India, and Indians living in the U.S.³⁸

One commentator speculated that although Rahman's subjects were "Hindu Indian women" one can imagine that her findings are applicable to all women of Indian or South Asian origin.³⁹ This speculation seems confirmed by Sarita Sahay's and Nivan Prian's 1997 study of South Asian Canadian female university students.⁴⁰ These authors found that, among this group, dark-skinned women and women who most differed from "the cultural White ideal", most desired light skin.⁴¹

34. See Joanne L. Rondilla, *Filipinos and the Color Complex*, in *SHADES OF DIFFERENCE*, *supra* note 18, at 63.

35. Jones, *The Significance of Skin Color*, *supra* note 18, at 1118–19 (citing Rondilla, *supra* note 18, at 67.).

36. Francis C. Assisi, *Color Complex in the South Asian Diaspora*, <http://www.indolink.com/displayArticleS.php?id=062204065913> ("Her hypothesis: that a larger proportion of lighter skinned women than darker skinned women feel beautiful and attractive."). *Id.* Rahman found that "feelings related to beauty and attractiveness and marriage marketability are partially determined by the lightness of their skin." *Id.*

37. *Id.*

38. *Id.* In her study Rahman found "three major commonalities between [Asian] Indians and black Americans in general. First, both race and caste are systems of social closure. Second, black women in America and Indian women's bodies are sexualized and racialized in a similar manner. And third, skin color and other facial features play a significant role." *Id.*

39. *Id.*

40. Sarita Sahay & Nivan Prian, *Skin-Color Preferences and Body Satisfaction Among South Asian-Canadian and European-Canadian Female University Students*, 132 *J. SOC. PSYCH.* 161, 167 (1997).

41. *Id.*

More than a decade later, Zareena Grewal at the University of Michigan examined the “perspectives on interracial marriage and intra-racial colour preferences” between first and second generation South Asian Muslims in Michigan to determine “the complex ways that constructions of identity are transformed in culturally fragmentary contexts such as the US.”⁴² She argues that “contemporary ideologies of colour in the post-colonial Muslim world are racial, although . . . categorically different from western racism.”⁴³ She continues that “intra-racism . . . corresponds to the rhetoric of white supremacy in suggestive ways. . . . [Thus] dismissing the fetishization of fair skin as . . . random or benign . . . neglects the power and continuing vitality of the rhetoric of white supremacy throughout the world.”⁴⁴

Some Asian Indian Americans caution that colorism among Asian Indians and the Indian diaspora is different from colorism as it has developed in the Americas. According to one commentator, “although colorism is a heavy thread in the Indian social fabric, it didn’t negate or automatically disenfranchise those who are dark. Nor does it automatically correlate to caste.”⁴⁵ Others add that light skin tone preference may reflect sexism rather than racism within the South Asian community.⁴⁶ But even these scholars concede that the increased popularity of skin lighteners among South Asian men reflects “racist biases from colonial times” and “persists among overseas Indians, especially those who have not integrated into the local culture or society.”⁴⁷ Understandably, the lack of consensus about the nature and origin of colorism practices in South Asian communities may confound the courts trying to apply anti-discrimination law.

Given the increased presence of South Asians in the United States, and the persistence of colorism practices within these communities, one question is whether intra-racial colorism claims are actionable under United States workplace anti-discrimination laws. This question was

42. Zareena Grewal, *Marriage in Colour: Race, Religion and Spouse Selection in Four American Mosques*, 32 *ETHNIC & RACIAL STUD.* 323, 325 (2009).

43. *Id.* at 330.

44. *Id.*

45. Rachel Perls, *Caste v. Colorism*, HUE COLOR CONSULTING (Mar. 29, 2010), <http://hueconsulting.blogspot.com/2010/03/caste-vs-colorism.html>. Many add that caste among Indians is not the same as race. *Id.*

46. Lavina Melwani, *The White Complex*, LITTLE INDIA (Aug. 17, 2007), <http://www.littleindia.com/nri/1828-the-white-complex.html> (citing University of Michigan School of Business Associate Professor Aneel Karnani).

47. *Id.*

addressed by a federal district court in *Ali v. National Bank of Pakistan*,⁴⁸ one of the earliest colorism cases involving South Asians. This case, and subsequent employment discrimination cases brought by South Asians, will be discussed in the next section.

III. THE EMPLOYMENT DISCRIMINATION CASES

A. *Ali v. National Bank of Pakistan*

In the late 1970s and early 1980s, Muhammad Ashraf Ali, self-described as a “light-skinned Pakistan citizen[] from the Punjab province,”⁴⁹ was employed by the National Bank of Pakistan in New York. In his employment discrimination suit against the bank, Ali claimed that his employer preferred, and treated more favorably, “dark-skinned Pakistan citizens from the province of Sind” in terms of promotion and pay.⁵⁰ On its face, Ali’s claim seems to confirm the existence of intra-racial colorism employment discrimination claims among South Asians who live and work in the United States.

Unlike many colorism employment discrimination claims, which fail to survive motions to dismiss,⁵¹ the *Ali* case was tried before being dismissed by the judge in an oral opinion, but the appellate court remanded the case.⁵² At the second trial, Ali proceeded *pro se*, “submit[ing] his own proposed findings and conclusions.”⁵³ There was testimony by supervisory officers from the bank, two of whom the court characterized as “darker than Ali” and three others characterized as “the same color as Ali or only marginally darker.”⁵⁴

Other than Ali’s testimony about skin tone differences between residents of Sind and Punjab, no other testimony or evidence was submitted to support his colorism claim.⁵⁵ Unsurprisingly, the court, in

48. *Ali*, *supra* note 21, at 611.

49. *Id.*

50. *Id.*

51. Trina Jones, *Intra-Group Preferencing: Proving Skin Color and Identity Performance Discrimination*, 34 N.Y.U. REV. L. & SOC. CHANGE 657, 661–62 (2010).

52. *Ali*, 508 F. Supp. at 611. The appellate court remanded the case to the district court for reconsideration because the initial oral opinion “contained no citation of cases and failed to distinguish between fact and conclusions of law.” Thus, the appellate court was unable to determine whether the district court correctly applied the law. *Id.*

53. *Id.* at n.1.

54. *Id.* at 612.

55. *Id.* There was conflicting evidence of pay differentials based on skin tone and no evidence to support Ali’s claimed denial of promotion and no evidence to support that his demotion was based on skin tone bias. *Id.*

light of the evidence presented at the second trial, concluded that Ali had failed to establish a prima facie case of disparate treatment based on color under Title VII.⁵⁶ More significantly for the purposes of this article, the court explained that even if Ali's claim of intra-racial color-based discrimination were valid, the colorism practices complained of fell outside the realm of the "American experience."⁵⁷ Thus "there is no basis on [the] record for recognition."⁵⁸ The court added that even if Ali could establish skin tone discrimination, these claims are "usually mixed with or subordinated to claims of race discrimination."⁵⁹ Thus the court dismissed Ali's claim for a second time.

The court's terminology in *Ali*, replete with nativism, is an extremely restrictive and static notion of race and race-related discrimination. The decision suggests two things: that color discrimination under Title VII, if recognized, is limited to the "American experience" and that color-based discrimination is the same as or subordinate to race discrimination claims. Both explanations are problematic.

First, the meaning of the court's "American experience" limitation is unclear. The American racial experience is grounded not so much in a black-white paradigm as in a white vs. non-white paradigm. In various places and times, race and race-related practices included others, notably Asian Indians immigrants, who were long-denied the ability to become naturalized citizens because the United States Supreme Court decided they were not "white" within the meaning of the naturalization law.⁶⁰

Second, the *Ali* court reads race discrimination very narrowly, equating skin tone discrimination with race discrimination and questioning whether a discrimination claim can lie between persons of the same "race"—intra-racial colorism. In so doing, the court uncritically lumps all Pakistanis together when Ali was clearly claiming a difference—he was from the Punjab province where residents are light-skinned and his dark-skinned employers were from the Sind province where residents are dark-skinned. As one commentator points out, conflating color with race ignores the fact that discrimination based on color involves treating a person differently because of an immutable characteristic, in this case skin tone.⁶¹

56. *Id.* at 613.

57. *Id.*

58. *Id.* Cythnia Nance mentions this point to suggest that the court misunderstood or misapplied the proper standard. Nance, *supra* note 18, at 459.

59. *Ali*, 508 F. Supp. at 614 (citing *Felix v. Marguez*, 24 Empl. Prac. Dec. (CCH) P 31,279 (D.D.C. 1980)).

60. *In re Bhagat Singh Thind*, 268 F. 683 (D. Or. 1920).

61. Nance, *supra* note 18, at 460–62.

Colorism is a race-like phenomenon based on a person's immutable characteristic—skin tone—coupled with a belief that certain skin tones, usually light-skin, are preferable to dark-skin. South Asians have been present in this country in growing numbers for almost fifty years and there is evidence that colorism practices continue among many long-term residents and native-born South Asians.⁶² Thus it seems absurd to allow skin tone discrimination among South Asians to avoid the purview of anti-discrimination laws when it seeps into the workplace.

As notions of racial identity, whether imposed or adopted, become more fluid, courts must discard their parochial or outdated notions of what constitutes race or race-related discrimination. Even though the origins of colorism practices among South Asians remain contested, South Asian light-skinned preference, like the preference for light skin in the Americas, is grounded in the belief that light or “white” skin is better than non-white skin. Thus this belief, when it forms the basis for an adverse employment decision, should be actionable under Title VII.

Only one scholar has examined the assumptions underlying the court's exclusion in *Ali* of intra-racial colorism claims among South Asians, but she did not explore the subsequent impact of the *Ali* case on employment discrimination claims by South Asians.⁶³ The next section looks at the post-*Ali* cases to see if they provide any answers or insights.

B. Post-Ali Employment Discrimination Cases

As mentioned previously, the vast majority of post-*Ali* Title VII cases with South Asian parties involve Asian Indians suing non-South Asians for workplace discrimination. A quick review of the pleadings is insightful. Most lawsuits are conventional race discrimination claims sometimes combined with national origin allegations and occasionally a religion claim—Hindu, Muslim or Sikh—suggesting that all of these factors may figure into a claimant's perception of his identity or how he believes others see him. An alternative reading is that the claimants and their lawyers may not fully comprehend how to frame the discrimination claims in terms that American courts will understand. A closer

62. Jones, 3 U.C. IRVINE L. REV., *supra* note 18, at 1118 (noting that skin tone preference lessen in second and later generations).

63. Although Cynthia Nance discusses the *Ali* case in the context of her larger argument for legal recognition of intra-racial Title VII colorism claims, she does not discuss the impact of the *Ali* case. Nance, *supra* note 18, at 458–59.

examination of pleadings where a color claim is asserted illustrates this point.

Only two of the approximately fifty cases can be characterized as intra-racial and neither raises a color claim, but two of the inter-racial cases do. Both of the cases involve South Asians and black Americans and neither survived a motion to dismiss. In *Nair v. Columbus State Community College*, the plaintiff, an Asian Indian woman, sued alleging that her supervisor, a light skinned black woman, unlawfully discriminated against plaintiff on basis of race, color, and national origin, in violation of Title VII and state law.⁶⁴ In the second case, *Delon v. News & Observer Pub. Co.*, a light-skinned black American alleged employment discrimination on basis of race and national origin against her Asian Indian supervisor's harassment, but the district court dismissed the case as untimely and insufficient.⁶⁵ One wonders whether these cases were dismissed because the race and color claims were under-developed or whether, as their dismissal suggests, the claims were meritless.

Occasionally, pleadings by South Asians allege discrimination based on color, usually more specifically described as "dark" or "dark brown."⁶⁶ A few plaintiffs described their color as light-skinned or light brown.⁶⁷ Illustrating how skin tone, caste, religion and national origin are inextricably tied to South Asian identity, one Asian Indian plaintiff

64. *Nair v. Columbus State Cmty. Coll.*, No. 2:02-CV-595, 2008 WL 483333 (S.D. Ohio Feb. 19, 2008) Employer moved for summary judgment but the court denied the motion in part, finding that plaintiff submitted sufficient evidence to allow a reasonable trier of fact to conclude supervisor's proffered reasons were pretextual. Ultimately, the parties stipulated that the case be dismissed with prejudice. *Nair v. Columbus State Comm*, Docket No. 2:02-cv-00595 (S.D. Ohio Jun 14, 2002), Court Docket.

65. *Delon v. News & Observer Pub. Co. of Raleigh, N. Carolina*, No. 1:05CV259, 2007 WL 5433774, at *1 (M.D.N.C. Nov. 5, 2007).

66. See, e.g., *Braganza v. Donahoe*, EEOC Decision No. 0520130133, 2013 WL 2903308 (June 7, 2013) (Indian—dark brown); *Riecker v. Donahoe*, EEOC Decision No. 0120110392, 2012 WL 5426968 (Oct. 24, 2012) (Pakistani—dark); *Iyer v. Paulson*, EEOC Decision, 0120073337, 2007 WL 4209337 (Nov. 9, 2007) (Indian—dark complexion); *Gupta v. Chao*, EEOC Decision No. 0120081351, 2008 WL 1744120 (Apr. 9, 2008) (Indian—dark complexion); *Hans v. Potter*, EEOC Decision No. 0120072547, 2007 WL 2077433 (July 16, 2007) (Indian—brown); *George v. New York City Health & Hosp. Corp.*, No. 02 CIV. 1818 (AGS), 2003 WL 289617 (S.D.N.Y. Feb. 11, 2003) (Indian—brown); *Harichandran v. West*, EEOC Decision No. 01975112, 1999 WL 767696 (Sept. 9, 1999) (Sir Lankan—brown); *Khosa v. Runyon*, EEOC Decision No. 01961015, 1998 WL 37228 (Jan. 14, 1998) (Indian—dark-skinned); *Seetharaman v. Commonwealth Edison*, No. 94 C 4373, 1995 WL 453097 (N.D. Ill. July 28, 1995) aff'd sub nom. *Seetharaman v. Commonwealth Edison Co.*, 79 F.3d 1150 (7th Cir. 1996) (Indian—dark); *Hamid v. Reich*, EEOC Decision No. 01942292, 1995 WL 112059 (Mar. 13, 1995) (Pakistani—dark).

67. *Gulati v. Solis*, EEOC Decision NO. 0120091332, 2009 WL 1173535 (Apr. 23, 2009) (Indian—light-skinned); *Bhuller v. Frank*, EEOC Decision No. 01894040, 1990 WL 1113456 (Mar. 23, 1990) (Indian—light-brown); *Rajpal v. Frank*, EEOC Decision No. 01882181, 1988 WL 919614 (June 29, 1988) (Indian—light brown).

described his “race” as “Aryan-Hindu” and his “color” as “light brown.”⁶⁸ This characterization of identity sounds similar to early twentieth century assertions by South Asian, primarily Asian Indian, petitioners for naturalization as they tried to get around the white-only restriction on naturalization.⁶⁹

In asserting color and religion, some South Asian plaintiffs are using physical and cultural markers to enhance their self-identified race claim. One commentator recently speculated that a Title VII color claim may be (mis)used by Asian Americans as an indicator of national or ancestral origin.⁷⁰ More empirical evidence is needed to determine whether this is what is happening in these cases. The bottom line is that we simply do not know enough about the culture and how the American experience impacts South Asian cultures to draw any conclusions.

As mentioned previously, two of the post-*Ali* Title VII cases involve intra-racial claims. In *Rajbahadoorsingh v. Chase Manhattan Bank, NA.*, a terminated “West Indian” employee consumer loan sales manager whose last name suggests South Asian ancestry, alleged race and age discrimination and wrongful discharge by a man whom the plaintiff identified as the same race as plaintiff.⁷¹ The plaintiff alleged that the defendant called him “a thief and a crook”, someone who “could never be trusted to do anything of benefit to the bank.”⁷² But the court in granting the employer’s motion for summary judgment noted, among other things, that because the parties were the same race “it is hard to fathom how [the defendant’s] statements could be construed to show” the plaintiff’s termination was racially biased.⁷³

Rajbahadoorsingh, however, should not be interpreted to mean that intra-racial Title VII discrimination claims are prohibited. In that case the alleged racial statements were not facially racial. Thus, one should read

68. *Kalia v. Stone*, EEOC Decision No. 05890463, 1989 WL 1007049 (Sept. 8, 1989).

69. See my discussion of this point in Taunya Lovell Banks, *Both Edges of the Margin: Blacks and Asians in Mississippi Masala, Barriers to Coalition Building*, 5 *ASIAN L.J.* 7, 18–22 (1998).

70. Jones, *Significance of Skin Color*, *supra* note 18, at 1119–20.

71. *Rajbahadoorsingh v. Chase Manhattan Bank, NA.*, 168 F. Supp. 2d 496, 502 (D.V.I. 2001).

72. *Id.* at 502–03.

73. The court ruled that (1) employers’ proffered reason for termination of sales manager because of conflicts of interest, relating to his side-business of selling and buying automobiles, was legitimate, non-race or age based reason for manager’s termination, and was not pretext, and (2) employers’ proffered reasons for termination of manager because of conflicts of interest, and disobedience of employers’ orders to stop buying and selling automobiles, were legitimate, statutorily approved reasons, under Virgin Islands Wrongful Discharge Act (WDA), for manager’s termination, which were not pretextual. *Id.*

Rajbahadoorsingh only for the principle that claims of race-based discrimination must be very clearly alleged and proven.

In *Dhar v. NYC Department of Transportation* a self-identified former Bangladeshi Christian employee alleged that his Hindu Asian Indian supervisor from Gujarat illegally favored other Indian/Gujurati Hindu employees in violation of Title VII and New York state laws on the basis of race, religion and national origin.⁷⁴ The issues, as spelled out in the complaint and supporting documents for the parties' cross motions, are very complex. But the judge looking at the complaint is left wondering about the significance of the distinction between Bangladesh and Gujarat and whether religious differences also impact any skin tone distinctions. There was no mention that the documents filed in opposition to the motion to dismiss contained any documentation or reference to expert testimony explaining cultural practices or beliefs. Thus, the court is forced to decide the case solely relying on conventional American understanding of race. Unsurprisingly the court dismisses the claim. One also wonders whether the fact that the plaintiff proceeded *pro se* meant that his claims were not fully developed and this factor was a major cause of the case's dismissal.

The absence of an expert or cultural translator to explain South Asian attitudes and cultural behavior in intra-racial workplace discrimination claims involving South Asians leaves the courts in cases like *Dhar* and *Ali* in the dark. There is probably more going on in these cases than the pleadings disclose. Some cultural nuances are being missed by the American courts. But without the guidance of experts on the history and demographics of these communities, or without more specific pleading from the plaintiffs, courts cannot be expected to understand or judge the significance of the allegations.

What is interesting about the post-*Ali* cases is that none directly assert a color claim like *Ali*'s. Perhaps the district court's language about intra-racial colorism cases falling outside the "American experience" discouraged plaintiffs from more squarely raising colorism claims. Yet the specific references to color in the employment discrimination complaints by South Asians suggests that, in their minds, their skin tone is a factor contributing to their adverse treatment in the workplace. The next section offers advice to litigators and judges about the treatment of colorism workplace discrimination claims involving South Asians.

74. *Dhar v. NYC Dep't of Transp.*, No. 10-CV-5681 ENV VVP, 2014 WL 4773965 (E.D.N.Y. Sept. 24, 2014). *Dhar* also claimed that his other supervisor, a Bulgarian immigrant favored other Eastern European employees. *Id.* at *1.

IV. ADVICE TO LITIGANTS CONSIDERING TITLE VII COLORISM CLAIMS

The *Ali* case illustrates that even if courts recognize colorism claims, successful claims will be rare and success is difficult to attain, especially for South Asians. The evidentiary deficiencies in the *Ali* case are fairly typical of colorism cases. These difficulties are complicated because courts are uneasy about drawing distinctions based on skin tone⁷⁵ and are unfamiliar with colorism practices outside of the United States. Judging discriminatory practices, especially those grounded in other cultures, makes courts uneasy because they lack any expertise in or knowledge of these practices. Lacking guidance the court in *Ali* applies a notion of race and race-like discrimination grounded in the twentieth century black-white racial paradigm in the United States. This decision leaves litigants and judges wondering what to do when faced with these cases.

The district court in *Ali* provided some clues. It said that assuming colorism claims by South Asians were actionable a plaintiff must establish “a pattern of discrimination by ancestral national origin, or by color or provincial residence as actual indicators” to prevail.⁷⁶ This is exactly what happened in a fairly recent case.

In *Muhammad v. Islamic Society*, a black woman convert to Islam sued the Islamic school at which she taught for race and gender discrimination under Title VII alleging, among other things, that she had been replaced in her job as principal by a “light-skinned woman” at the request of a director of the school, an Asian Indian man.⁷⁷ At trial the plaintiff introduced expert testimony on a variety of “cultural” issues including skin tone bias in South Asian communities.⁷⁸ The plaintiff prevailed at trial, and the Supreme Court of California, in an unpublished opinion, upheld the introduction of this testimony.⁷⁹ Thus, one take-away from the success of the plaintiff in *Muhammad*, and the lack of success in other cases, is the importance of cultural evidence to help explain to the court the full nature of the complaint. In addition to expert testimony, judges also can use magistrates for more intensive fact-finding. These lessons are not limited to South Asian parties, but apply more broadly to a variety of other complaints involving cultural differences.

75. Banks, *supra* note 7, at 97.

76. *Ali*, *supra* note 21, at 614.

77. *Muhammad v. Islamic Soc.*, No. G036534, 2008 Cal. App. Unpub. LEXIS 2693, *29 (Cal. Ct. App. Mar. 28, 2008).

78. *Id.* at *44-52.

79. *Id.* at *44-5

CONCLUSION

American courts are not fully committed to recognizing colorism claims whether intra-racial or inter-racial. Their discomfort with these claims is exaggerated when the colorism practices complained of have their roots in cultures outside the United States. As this country grows more diverse, and as its non-white population becomes even more varied, courts must broaden their understanding of race and race-related discrimination that, though grounded in foreign countries, is alive and well in the United States. Litigants will have to lead the way in educating the courts.

Title VII was intended to prohibit discrimination in the workplace based on race *and* color. Its goals are thwarted when claims of some workers go unaddressed because courts remain stuck in mid-twentieth century notions of what constitutes race discrimination. For fifty years Asian Indians and other South Asians have constituted a noticeable presence in the American workplace. It is important that courts try to better understand their claims of workplace discrimination.