THE CONSTITUTIONALITY OF PROHIBITING CASTE DISCRIMINATION

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The problem of caste discrimination has come into sharp focus in the United States. In the last few years, there have been several high-profile allegations and cases of caste discrimination in employment and educational settings. As a result, organizations—including governmental entities—are taking action, including by updating their rules and regulations to explicitly prohibit discrimination based on caste and initiating enforcement actions against alleged caste discrimination. Most prominently, the City of Seattle became the first U.S. city to amend its local antidiscrimination ordinance to add caste as a protected category.

In response to such government action, questions have arisen about the constitutionality of prohibiting caste discrimination. Opponents principally argue that recognizing caste discrimination violates the Establishment and Free Exercise Clauses of the First Amendment because governmental entities demean religions, like Hinduism, in doing so. In this Essay, I explain that governments can recognize and remedy caste discrimination consistent with the First Amendment. Remedying caste discrimination does not require disparaging any religion. Insofar as it is necessary to contextualize and remedy instances of discrimination, governmental entities may reference religion, but as a constitutional matter they should refrain from unnecessarily disparaging religion. As with other forms of discrimination, our Constitution empowers the government to protect individuals from the effects of caste discrimination.

Introduction

Over the last three years, the issue of caste discrimination has come into sharp focus in the United States. In the summer of 2020, there was a high-profile case of alleged caste discrimination arising out of Silicon Valley. An employee of Cisco Systems, Inc., hailing from a Dalit background, alleged that he had been paid less, deprived of opportunities, and denigrated due to his caste status. Dalits were once referred to as "untouchables" under the South Asian caste system; they

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were and are subject to grievous caste-based oppression in India and elsewhere in the subcontinent. The California Civil Rights Department (CRD), formerly the California Department of Fair Education and Housing, brought a case on behalf of the employee and the issue is still being litigated. Subsequently, numerous individuals have shared their stories of being subject to caste discrimination in employment, educational settings, social settings, and beyond. As a result, scholars have written about the ability of current law to address claims of caste discrimination. And we are seeing more cases of alleged caste discrimination coming to the courts.

Several organizations have taken steps to recognize caste discrimination and to pave pathways for remedies. Universities, including Brandeis University, Brown University, the University of California at Davis, and the California State University system, have added caste as a protected category to their antidiscrimination codes. The Santa Clara Human Rights Commission held public hearings to consider adding caste as a protected category. The City of Seattle became the first U.S. city to add caste as a protected category to its local antidiscrimination ordinance. And, most recently, the California State Legislature is considering proposed legislation S.B. 403 that would ban caste discrimination statewide.

By and large, the public response to these systemic changes has been positive. There is overwhelming consensus that caste discrimination is morally wrongful and socially harmful, and that recognizing and remedying instances of caste discrimination is appropriate. And, as noted, many institutions have pursued this through explicit changes to their antidiscrimination policies and rules.

That said, with respect to governmental action, some objectors have expressed concern that explicitly recognizing caste as a protected category may cause constitutional problems.[1] Specifically, objectors argue that recognizing caste discrimination violates the First Amendment's Establishment Clause and Free Exercise Clause.

In this Essay, I address these putative constitutional violations. I begin by observing that caste is a distinct category and so there is good reason to recognize it separately from religion. With that in mind,

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[1] These objectors also raise concerns that calling out caste specifically has the potential to denigrate Hinduism, (East) Indians, and South Asians more broadly, at a time when there is rampant anti-Hindu bigotry and anti-Asian racism. I think these are serious concerns, but they are possible to address. In general, I believe it is possible to recognize and remedy caste discrimination without perpetrating other forms of bigotry and discrimination. Here I focus on the constitutional arguments.

I examine how legislation and other government action prohibiting caste discrimination may be pursued in accord with the First Amendment's Establishment Clause and Free Exercise Clause.

I. Caste Discrimination: Reasons for Special Recognition

Caste is a structure of social stratification that is characterized by hereditary transmission of a set of practices, often including occupation, ritual practice, and social interaction. There are various social systems around the world that have been described as "caste" systems, of which the South Asian caste system is most prominent. Across these systems, including in South Asia, caste is often related to concepts of ritual purity and pollution, and serves as the basis for discrimination, and indeed severe oppression.

Charanya Krishnaswami and I, as well as other scholars, have argued that caste discrimination may be cognizable under Title VII under race, national origin, and—in the appropriate factual case—religion. But those arguments are still untested in the courts, and the comparatively unique nature of the category of caste does suggest that there is value in recognizing caste with particularity, since it may otherwise escape recognition under our current legal frameworks.

Notwithstanding arguments that caste may be covered under existing legal frameworks, there are good reasons to recognize caste discrimination with particularity. The nature of caste as a category is distinctive: it does not squarely fit within race, spans various religions, and is not generally considered an ethnicity. Thus, caste discrimination might not be based on the commonly understood categories of race, color, national origin, or ethnicity. Furthermore, caste status may cross religious lines, and instances of caste discrimination might be unrelated to one's religion. However, caste is a complex that does involve, inter alia, ancestral and endogamous relations, historic occupation, religious background, and native language. These facts may obfuscate its fit within recognized categories of antidiscrimination law.

Moreover, recognizing caste with particularity would obviate putative arguments reducing caste to socioeconomic status. The implication of such arguments is that because socioeconomic status generally does not receive protection under antidiscrimination law, neither should caste. Setting aside the question of whether socioeconomic status should be protected, caste is simply not reducible to socioeconomic status. Even if one can change his or her socioeconomic status, that will often not impact his or her caste status—which is notoriously rigid. Caste is an immutable

characteristic, just like those traditionally protected by antidiscrimination law.

II. Recognizing Caste Discrimination Does Not Offend the Establishment Clause

Some of those who object to explicitly recognizing caste discrimination contend that this recognition reaches a constitutional dimension, raising concerns that sound in the First Amendment's Establishment Clause and Free Exercise Clause. In my review, I have not yet found these concerns fully articulated.[2] Thus, I describe these concerns in the most charitable, developed way that I can, noting where there are gaps.

With respect to the Establishment Clause, the objectors' argument appears to be that, in the course of recognizing caste discrimination, the government makes statements—whether in a statute or in the course of enforcement actions—that Hinduism involves caste at some core or innate level. These statements, the objectors claim, are false and denigrating of Hinduism, and consequently are an Establishment Clause violation.

A. The Supreme Court's Establishment Clause Jurisprudence

The Establishment Clause forbids "government speech endorsing religion." This means that "when the government speaks for itself it must carefully avoid expressing favoritism for a particular religious viewpoint." However, "[t]he Establishment Clause does not wholly preclude the government from referencing religion." Indeed, in *Stone v. Graham* (1980), the Supreme Court observed that "the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like" in public schools. A prohibition on all reference to religion by governmental entities would "raise substantial difficulties as to what might be left to talk about . . . [and] it would require that we ignore much of our own history and that of the world in general." Instead, the Establishment Clause requires that the government espouse neutrality between different religions.

We find ourselves at a moment of flux in the Supreme Court's Establishment Clause jurisprudence. Under the longstanding test from *Lemon v. Kurtzman* (1971), "a government act is consistent with the Establishment Clause if it: (1) has a secular purpose; (2) has a principal or primary effect that neither advances nor disapproves of religion; and (3) does not foster excessive governmental entanglement

[2] The most fulsome articulation is in the Hindu American Foundation (HAF) complaint.

with religion." In *Kennedy v. Bremerton School District* (2022), the Supreme Court abandoned the *Lemon* test in favor of a test that looks to "historical practices and understandings." It is not yet clear what that test means, but the opinion may suggest that the Court is generally less inclined to find that government action violates the Establishment Clause.

Relevant here as well is the Court's decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018). That case concerned a baker who refused to provide a wedding cake to a gay couple. The Colorado Civil Rights Commission determined that the baker violated Colorado's antidiscrimination law and gave the baker specific orders on how to comply. On review as to whether this violated the baker's Free Exercise rights, the Supreme Court ruled against the Commission on the basis that the Commission's statements expressed a hostility toward religion. Indeed, the Court noted that it may have ruled for the Commission had it expressed neutrality toward religion. Here too, the full import of the Supreme Court's holding is difficult to discern, but it appears that the Court signaled a sensitivity to and vigilance for government hostility to religion.[3]

One way of resolving the latent tension in the Court's recent cases, where the Court is seemingly both expanding and contracting the capacity for government action to engage with religion, is to understand the Court as willing to give the government more breadth in its conduct touching on religion so long as the government does not engage in hostility toward religion (or particular religions). Admittedly, this is speculation, hoping for consistency.

Government actions, such as legislation or enforcement actions, that prohibit caste discrimination as part of civil rights laws will likely stand under the Court's current jurisprudence. Though the exact contours of the *Kennedy* test remain to be decided, it appears that the Court has expanded governments' abilities to engage with religion, beyond the strictures of the *Lemon* test. Ultimately, it seems likely that when government entities act to prohibit discrimination, including caste discrimination, they may reference religion where

[3] The Supreme Court recently decided *303 Creative LLC v. Elenis* (2023), where it considered the same antidiscrimination law at issue in *Masterpiece Cakeshop*. *303 Creative* concerned whether Colorado, through its public accommodation law, could compel a website designer to design wedding websites for gay couples. While affirming the general constitutionality of public accommodation laws, the Court held that such laws are limited by the First Amendment. Specifically, the government cannot, pursuant to such public accommodation laws, compel individuals to engage in expressive conduct with which the putative speaker would disagree.

necessary, but comments that disparage religion might run afoul of the Establishment Clause. Consequently, the more that government entities make statements about religious beliefs, such as about Hinduism, the more they incur constitutional risks.

B. Caste and Religion

As an initial matter, we should observe that prohibiting and remedying caste discrimination, in employment and places of public accommodation, for example, does not require the government to make denigrating statements about any religion, including Hinduism. (And, though not religions, the government need not make any denigrating claims about Indian culture or South Asian culture, either.) The government need not determine the genesis of the concept of caste in order to recognize that there are, in particular societies and communities, extant social orderings of caste. Indeed, caste discrimination occurs in various religious communities in South Asia, not just Hinduism. Thus, it is not true that recognizing caste discrimination per se denigrates Hinduism in particular.

Now, government entities considering prohibiting caste discrimination have in fact made statements that the caste system has relationships with Hinduism. Most prominently, the California CRD referred to caste as a "strict Hindu social and religious hierarchy" and the City of Seattle recited that caste was a "religiously sanctioned social structure of Hinduism." Objectors contend that these statements convey that caste is an inextricable or foundational part of Hinduism. These statements, they contend, are both false and unconstitutionally derogatory of Hinduism. This appears to be the strongest basis for the Establishment Clause challenge, for the government does violate the Establishment Clause if it disparages any religion, including Hinduism.[4]

As a factual matter, historically the institution of caste has had relationships with Hindu religious tradition and practice. Whether such relationships are fundamental to, or a perversion of, Hinduism are separate questions. As noted, governmental entities need not take a position on them. There are plausible readings of the statements by the California CRD and City of Seattle that suggest they have not done

[4] It is not clear that these statements about the relationships between caste and Hinduism are necessary for legally recognizing caste discrimination. If they are unnecessary, then the Establishment Clause challenge could be obviated by simply removing these statements. That said, these statements—or ones like them—may be necessary to contextualize caste discrimination, either generally or in specific instances. In that case, we still must resolve the legal question.

so—rather their claims may simply convey that, as a historical matter, there have been relationships between the institution of caste and the Hindu religion, the predominant religion of South Asia. But objectors disagree: they maintain that these statements wrongly imply that caste is fundamental to Hinduism, and as a result they unconstitutionally tread on religion.

Thus, the question remains whether the government action of making such statements about Hinduism in the course of legally recognizing caste discrimination is constitutional. In the absence of further guidance from the Court, we can first consider how such government action would have fared under the *Lemon* test. That is, because the Court in *Kennedy* arguably expanded the ability for government action to engage with religion, if this government conduct passes muster under the *Lemon* test, it a fortiori should stand under the *Kennedy* test.

C. Applying the *Lemon* Factors

On the first *Lemon* factor, the government action has a secular purpose—to ensure that individuals are not discriminated against on bases that relate to core features of their identity. It is the same secular purpose that animates government action against discrimination on the basis of race, religion, and sex.

On the second factor, such action does not have a *principal or primary* purpose of disapproving of religion—as said before, it is to eradicate a form of invidious discrimination. To be clear, on certain sets of facts, it might be that some governmental entity is primarily intending to disparage a particular religion, and if so, then that action may fail the *Lemon* test. But the mere fact of prohibiting caste discrimination does not evince such intent.

This brings us to the third factor, whether there is an excessive entanglement with religion. Both the California CRD and the City of Seattle have made putative statements of historical fact about the relationship between the caste system and Hinduism—that caste is a "strict Hindu social and religious hierarchy" and a "religiously sanctioned social structure." We needn't seek to resolve the factual accuracy of the statements—which will inevitably be contentious. Importantly, however, the fact that some individuals disagree with or take offense at the government's statements cannot be enough to render the government speech an Establishment Clause violation. Given that matters of religion are contentious, that would render any government reference to religion unconstitutional. But as the Court held in *Stone v. Graham* (1980) that is not the case—the Court there held that religious matters may be constitutionally referenced in

appropriate settings by government actors. Thus, there is a strong argument that government entities can reference what they understand to be the relationship between discrimination and religion. And since the *Kennedy* test is arguably broader than *Lemon* in permitting government action, there is a strong argument that government action here is a fortiori permitted.

At the same time, the references to Hinduism here are not without constitutional risk. As noted, the Supreme Court held in *Masterpiece Cakeshop* that in enforcing antidiscrimination laws that may conflict with religious beliefs, government enforcement authorities must express neutrality toward religion. Here, it is possible that a court might rule that these statements do express hostility toward religion. Indeed, the fact that these statements do not appear to be necessary to effectuate prohibitions on caste discrimination may bolster such a determination. That said, insofar as government reference to religion is necessary to explain caste discrimination, either in general or in a particular instance, a court is unlikely to hold such government action unconstitutional, because the government does have a compelling interest in preventing invidious discrimination, and thus the government action will meet strict scrutiny.

D. Applying "Historical Practices and Understandings"

Finally, we can ask how the Court's appeal to "historical practices and understandings" in *Kennedy* may bear on these questions. With respect to the argument that prohibiting caste discrimination is per se an excessive entanglement with religion, "historical practices and understandings" suggest that governmental action prohibiting discrimination is appropriate. The Reconstruction Amendments (Thirteenth, Fourteenth, and Fifteenth) allow government regulation prohibiting discrimination under race and lineage. Moreover, in *Bob Jones University v. United States* (1983), the Court rejected the argument that antidiscrimination regulation—there against racial discrimination—violates the Establishment Clause if it disfavors religions with beliefs against "racial intermixing." Thus, government action prohibiting caste discrimination should not run afoul of the Establishment Clause. With respect to government statements about religion in antidiscrimination laws, we simply do not have much data. On my review, no case citing *Kennedy* has addressed this question. Ultimately, the question is likely to be governed by the aforementioned principles—that the government may reference religion, but not with hostility. And on that front, government actors would be wise to avoid any unnecessary references to religion.

To be clear, this may not be without cost. That is, by avoiding references to religion, a government entity may fail to fully

contextualize and historically ground the nature of the discrimination. Consequently, among other things, this may hinder the government's ability to educate and to recognize dignitary harms. That is a trade-off, between avoiding constitutional risk and pursuing educational and dignitary goals, for government actors to weigh.[5]

III. Recognizing Caste Discrimination Does Not Impair Free Exercise

Next, the objectors argue that by legally prohibiting caste discrimination, the government is prohibiting individuals from practicing their religion freely. This claim is not usually made to complain specifically about the prohibition on caste discrimination—there is broad consensus that caste discrimination is wrongful. Rather, complainants are claiming that caste discrimination is rare, that regulating caste discrimination as if it were common is a misrepresentation of Hindu culture, and that such regulation may have unintended effects that bring improper scrutiny of Hindus and potentially infringe on religious practice.

The problem is that it is unclear what legitimate religious practices might be infringed upon. As noted, most objectors are *not* asserting that they have, or should have, a legal right to engage in caste discrimination. But it is not at all apparent how prohibiting caste discrimination infringes on any religious beliefs if the religious adherents are not aiming to discriminate on the basis of caste. The onus is on the objectors to articulate how prohibitions on caste discrimination would specially infringe on their rights to religious practice. Indeed, the consensus view among Hindu adherents is that caste discrimination is not legitimately part of Hindu practice. But then why would banning caste discrimination impose on Hindu practice?

It is worth noting that prohibitions on discrimination are generally limited in their scope—confined to the areas of hiring, employment, housing, and places of public accommodation. Such legislation does not prevent private citizens from associating as they wish in their private lives.

Moreover, there are generally exceptions in civil rights legislation, like the ministerial exception and the bona fide occupational qualification exception, for religious entities to discriminate on otherwise prohibited bases in religious matters. For example, one concern might be about how prohibiting caste discrimination impacts hiring clergy. That is, certain castes are

[5] I thank Chan Tov McNamarah for pushing me to address this point.

associated with religious ritual practice, and priests and clergy are often hired based on their familiarity with that ritual practice. In hiring clergy, religious institutions may hire, by intention or by practice, only from particular castes. This is true in certain Hindu sects, as well as in other religious sects across the subcontinent. The prototypical example is that a Hindu temple may hire a priest, who traditionally will be from a set of castes. That said, current law expressly contemplates this scenario and immunizes the religious entities from liability. And without such exemptions for religious entities, any such legislation will likely be unconstitutional, at least insofar as it applies to religious entities. Further still, most recently, the Supreme Court, in *303 Creative LLC v. Elenis* (2023), has set forth a First Amendment limitation on public accommodation laws, holding that the government may not compel an individual to engage in expressive conduct with which he or she disagrees. Thus, while public accommodation laws remain generally constitutional, they cannot force individuals to provide services involving expressive conduct they find disagreeable.

Insofar as claimants are arguing that civil rights laws regulating behavior in the scope of hiring, employment, housing, places of public accommodation, and the like infringes on religious freedom, these claims are legally incorrect and will fail. Consider the analogy to, say, race discrimination: a claimant who asserts that civil rights laws prohibiting race discrimination in employment prevent the claimant's free exercise of their religion because that religion requires or endorses race discrimination. This claim would lose, as it has before. Indeed, a contrary result—holding that recognizing caste discrimination in the scope of civic and public behavior infringes free exercise rights—would threaten all civil rights protections, and that is an absurdity.

To this point, the Supreme Court's words in *Bob Jones University* are instructive: the government's "fundamental, overriding interest in eradicating racial discrimination in education" outweighs the interests of religious exercise that perpetuate such discrimination. Thus, with exceptions that allow for religious exercise and free speech, the Supreme Court held in *303 Creative*, that public accommodation and antidiscrimination laws are constitutionally valid and indeed "vital . . . in realizing the civil rights of all [those protected by the Constitution]."

In light of current precedent and barring a sea change in antidiscrimination law, complaints that legislation and other government action to eliminate caste discrimination burden free exercise will fail as a matter of constitutional law. Laws against caste discrimination—like laws against discrimination on the basis of race,

color, sex, religion, and national origin—do not offend free exercise, and the overriding interest in eliminating discrimination outweighs any contrary claim of religious exercise.[6]

Conclusion

After several high profile accounts of caste discrimination in the United States, governmental entities are taking action, including by bringing cases alleging, and passing legislation prohibiting, caste discrimination. This Essay has detailed how governmental entities can act against caste discrimination without violating the First Amendment's Establishment Clause and Free Exercise Clause. Caste discrimination, like all forms of invidious discrimination, is a scourge. And as with other forms of discrimination, our Constitution empowers

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[6] Professor Vikram Amar raises another issue rooted in equal protection. He contends that California's S.B. 403, which would prohibit caste discrimination, arguably singles out South Asians for regulation. He analogizes to a hypothetical statute that says: "It shall be unlawful for Black employers, and all other employers, [to do X]." He contends this would be unconstitutional under the Equal Protection Clause, and, similarly, so might S.B. 403.

The analogy occurs to me as inapt. S.B. 403 does not single out specific *discriminators* based on their traits. *Anyone* who discriminates based on the putative *victim*'s trait—namely caste—is subject to liability. Moreover, as Professor Amar acknowledges, the term "caste" is defined in the statute in a general way, not specific to South Asia. The draft bill did state: "Caste discrimination is present across South Asia and the South Asian diaspora, as well as around the world." Professor Amar suggested that even this amount of focus on a particular people may render the statute unconstitutional. Since that time, the draft bill was amended to delete that language. But because the language did arguably motivate the proposed statute and is present in the legislative history, it may bear on future assessments of the statute's validity and so it is important to address Professor Amar's point.

I think a legislature may constitutionally draft a generic antidiscrimination statute while acknowledging that there are particular real-world examples of that form of discrimination. Indeed, suppose for example a legislature were to refer to the history of antisemitism in the preamble of a bill against religious discrimination or the history of Jim Crow in the preamble of a bill against racial discrimination. In either case, that pellucidly would appear to be constitutional. And that is all that has happened here in S.B. 403. The drafting legislators have banned caste discrimination—defined generically—but noted a particular example of extant caste discrimination that motivates the bill. That alone does not show any kind of unconstitutional singling out of a community or animus against a community.

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