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## Proving Intra-Racial Discrimination in the U.S. and Canada: The Room for Making the Artificial Distinction Between Genealogical Relatedness and Race

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# Proving Intra-Racial Discrimination in the U.S. and Canada: The Room for Making the Artificial Distinction Between Genealogical Relatedness and Race

Martin Kwan\*

*This article takes the role of the Devil’s advocate in order to question the judicial willingness to distinguish “race” from comparable notions. It suggests that, depending on the exact circumstances, a defendant can make an arguable case that the alleged intra-racial discrimination is motivated by perceived genealogical relatedness, but not because of belonging to the same “race.” Factually, the defendant claims to believe in being remotely genealogically related to the plaintiff. This is not unworthy of credence, because it is academically recognized that modern genealogy and root tracing can be an imaginative, forged exercise. Legally, this argument is supportable because there are cases holding that “race” or “ancestry” is different from genealogy or “line of descent.”*

*By contrast, such an argument would not work in Canada, because Canada has adopted an expansive interpretation of the impermissible grounds. In particular, Canada includes “ancestry”—despite the fact that it is not explicitly included in their statute—on the grounds of “race”, “ethnicity” and “family status.” This covers more situations that resemble intra-racial discrimination, such as discrimination based on*

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*remote or close bloodline (un) relatedness. However, whilst the U.S. courts claim to have adopted a liberal interpretation, they also openly oppose expanding the law and have therefore narrowly interpreted “ancestry” and other impermissible grounds. This makes proof more difficult and leaves open gaps of protection in the U.S.*

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## I. INTRODUCTION

Intra–racial discrimination refers to discrimination between people of the same race based on racial grounds. Whilst such an act may sound counterintuitive, it does occur all over the world. There can be a number of reasons for this to happen and the U.S. Supreme Court has reiterated that “[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group.”<sup>1</sup> For example, in cases of

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<sup>1</sup> *Castaneda v. Partida*, 430 U.S. 482, 499 (1977).

“associational discrimination,” “Whites discriminate against other Whites because of their association and relationship with racial minorities.”<sup>2</sup> The courts have recognized this type of racial discrimination.<sup>3</sup>

Besides, same-race discrimination can also happen amongst ethnic minorities. Justice Marshall of the U.S. Supreme Court explained this from the social perspective: —

Social scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority’s negative attitudes towards the minority. Such behavior occurs with particular frequency among members of minority groups who have achieved some measure of economic or political success and thereby have gained some acceptability among the dominant group.<sup>4</sup>

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<sup>2</sup> Lih Yona, *Whiteness at Work*, 24 MICH. J. RACE & L. 111, 126 (2018).

<sup>3</sup> Jessica Voegelé, *Associational Discrimination: How Far Can It Go?*, 32 TOURO L. REV. 921, 927–29 (2016) (citing *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 891–92 (11th Cir. 1986)); *Tetro v. Elliott Popham Pontiac*, 173 F.3d 988, 994 (6th Cir. 1999); *Holcomb v. Iona College*, 521 F.3d 130, 139 (2d Cir. 2008) (holding that “where an employee is subjected to adverse action because an employer disapproves of inter-racial association, the employee suffers discrimination because of the employee’s own race”). *Cf.* Some courts have refused to accept that this is racial discrimination. *See* Voegelé at 927 (citing cases such as *Ripp v. Dobbs Houses, Inc.*, 366 F. Supp. 205 (N.D. Ala. 1973)). It is worth noting that whilst *Ripp* was followed in other cases such as *Adams v. Governor’s Committee on Postsecondary Education*, 26 F.E.P. Cases 1348 (N.D.Ga. 1981), *Ripp* was also disapproved by other courts such as *Whitney v. Greater New York Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975) (“[the complainant] was discharged because she, a white woman, associated with a black, her complaint falls within the statutory language that she was ‘[d]ischarged . . . because of [her] race’”) and *Gresham v. Waffle House, Inc.*, 586 F. Supp. 1442, 1445 (N.D.Ga. 1984); *see also* Yona, *supra* note 2, at 129 (commenting that the associational discrimination cases have “‘strong’ relationship to intra-White discrimination”).

<sup>4</sup> *Castaneda*, 430 U.S., at 503. Justice Marshall’s observation was subsequently cited with agreement in *Dominguez v. Stone*, 97 N.M. 211, 213 (N.M. Ct. App. 1981)). There is a notion of “internalized racism” which has been defined as “the

Additionally, intra-racial discrimination can occur as a manifestation of socio-economic class differentiation amongst people of the same race. For instance, “White trash” is an intra-White slur used for social class separation between the impoverished and the wealthy.<sup>5</sup> Some have argued that the Indian caste discrimination is another example, but it involves a more controversial intersection between race and class.<sup>6</sup>

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individual inculcation of the racist stereotypes, values, images, and ideologies perpetuated by the White dominant society about one’s racial group, leading to feelings of self-doubt, disgust and disrespect for one’s race and/ or oneself.” See Karen D. Pyke, *What is Internalized Racial Oppression and Why Don’t We Study it? Acknowledging Racism’s Hidden Injuries*, 53(4) SOCIO. PERSPECTIVES 551, 553 (2010).

<sup>5</sup> Yona, *supra* note 2, at 111 (“Intra-White discrimination cases may range from associational discrimination cases to cases involving discrimination against poor rural Whites, often referred to as ‘White trash.’”); Marjo Kolehmainen, *The Material Politics of Stereotyping White Trash: Flexible Class-Making*, 65(2) THE SOCIO. REV. 251 (2017) (the term “White trash” “is used to reproduce class stigma, illustrating how class is made through racialization.”).

<sup>6</sup> Ramya Jawahar Kudekallu, *Race, Caste, and Hunger*, 43(4) FORDHAM INT’L L. J. 1104, 1108 (2020) (noting there are two views, with one thinking that the Caste system is a racial divide; whilst others think that that the “Caste system is a social division of people of the same race”) (emphasis added); K. S. Jacob, *Caste and inequalities in health*, THE HINDU (Aug. 22, 2019), <https://www.thehindu.com/opinion/lead/Caste-and-inequalities-in-health/article16876113.ece> (“Caste is inextricably linked to and is a proxy for socio-economic status in India”); KP Narayana Kumar, *Racial Prejudice in India May Be a Legacy of the Caste System*, ECON. TIMES (Feb. 14, 2016), [https://economictimes.indiatimes.com/news/politics-and-nation/racial-prejudice-in-india-may-be-a-legacy-of-the-caste-system/articleshow/50978345.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/news/politics-and-nation/racial-prejudice-in-india-may-be-a-legacy-of-the-caste-system/articleshow/50978345.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst) (“the Indian government objected to the notion that discrimination by caste is the same as racism” and “categorisation by race is a Western concept, unlike caste.”). Cf. Western perspectives view the Caste system as a racial matter. See, e.g., Equality Act 2010, § 5(a) (UK), <https://www.legislation.gov.uk/ukpga/2010/15/section/9/2013-06-25?view=extent> (“caste to be an aspect of race”); Zia Akhtar, *Scheduled Castes, Dalits and Criminalisation by ‘descent’*, 9(1) STATE CRIME J. 71, 84 (2020), <https://www.sciencenopen.com/hosted-document?doi=10.13169/statecrime.9.1.0071> (“The caste hatred in India is an intra racial problem and it can be reflected in the competition theory that suggests that inter-group conflict is heightened when the traditionally privileged majority group and the minority group start to have overlapping interests.”).

U.S. law prohibits *racial* discrimination,<sup>7</sup> and it was held to include same-race discrimination.<sup>8</sup> Nevertheless, it is notoriously

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<sup>7</sup> The Equal Protection Clause of the Fourteenth Amendment provides protection against governmental racial discrimination, and the derogation of which gives rise to a civil cause of action under 42 U.S.C. § 1983; see *Snider v. Jefferson State Community College*, 344 F.3d 1325, 1328, n.4 (11th Cir. 2003).

In the employment context, Title VII of the *Civil Rights Act* of 1964 provides that it is unlawful “for an employer . . . to fail or refuse to hire . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race.” 42 U.S.C. ¶ 2000e-2. There are many other anti-racial discriminatory provisions, such as 42 U.S.C. §1981 of the Civil Rights Act of 1866 and the state laws. See Iris Hentze & Rebecca Tyus, *Discrimination and Harassment in the Workplace*, NAT’L CONF. OF STATE LEGISLATURES (Dec. 8, 2021) <https://www.ncsl.org/research/labor-and-employment/employment-discrimination.aspx>.

<sup>8</sup> For the employment context under Title VII, see *Ross v. Douglas County, Nebraska*, 234 F.3d 391, 396 (8th Cir. 2000) (holding that “[g]iven the *Oncale* decision, we have no doubt that, as a matter of law, a black male could discriminate against another black male ‘because of such individual’s race.’” On the facts, the supervisor at work used racial epithets against the complainant of the same race, and the court observed that derogatory words like the n-word or “black boy” would not have been used but for the victim’s race. The court therefore held that this exceeded mere incivility and amounted to discrimination.); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (“in the related context of racial discrimination in the workplace this Court has rejected any conclusive presumption that an employer will not discriminate against members of his own race”). See also Abigail L. Perdue & Gregory S. Parks, *The Nth Degree: Examining Intra-racial Use of the N-Word in Employment Discriminal Cases*, 64(1) DEPAUL L. REV. 65, 66 (2014) (citing other employment cases that successfully established same-race discrimination under Title VII and were tried by jury, such as *Weatherly v. Alabama State University*, 728 F.3d 1263 (2013) and *Johnson v. Strive East Harlem Employment Group*, 990 F. Supp. 2d 435, 442 (S.D.N.Y. 2014)). The protection against same-race discrimination is not limited to the employment context. For example, it was reported that professional boxer Zeke Wilson made a successful claim in 2000 tried by jury for same-race discrimination under Equal Protection Clause of the Fourteenth Amendment. See *Wilson v. McClure*, 135 F. Supp. 2d 66 (D. Mass. 2001); Robert J. Romano, *Zeke Wilson’s §1983 Case Shows How Discrimination Comes in Various Forms*, 19(4) SPORTS LITIGATION ALERT 12, 12–13 (Feb. 25, 2022). Besides, the same holds true for 42 U.S.C. §1981 of the Civil Rights Act of 1866. See *Mitchell v. National R.R Passenger Corp.*, 407 F. Supp. 2d 213, 236 (D.D.C. 2005) at 48 (“Intra-racial discrimination is actionable under § 1981.”).

difficult to prove intra-racial discrimination in the U.S.<sup>9</sup> Jones suggested that this is because same-race discrimination is “so rare, so seemingly against the norm and illogical, that jurors may deny it or be skeptical about whether it occur.”<sup>10</sup> Furthermore, Jones explained that:

same-group participation seemingly ameliorates the severity of the harm and the absence of a White perpetrator eliminates White moral obligation as a possible catalyst for action), then plaintiffs will have a tough row to hoe when both the plaintiff and the decision maker are members of the same group. Direct evidence may overcome some of these hurdles. But circumstantial evidence leaves too much room for doubt to flourish.<sup>11</sup>

This article takes the role of Devil’s advocate and suggests that there is another unexplored issue of proving “race”. It argues that the current judicial approach is willing to distinguish notions that is

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<sup>9</sup> See, e.g., *Dungee v. Northeast Foods, Inc.*, 940 F. Supp. 682, 691 n. 3 (D.N.J. 1996) (“The fact that the final decision maker and both interviewers are members of the plaintiff’s protected class (women) weakens any possible inference of discrimination. This reasoning has been applied to weaken the inference of discrimination in sex, race, and age cases.”); *Welch v. Delta Air Lines, Inc.*, 978 F. Supp. 1133, 1153 (N.D. Ga. 1997) (“it is extremely difficult for a plaintiff to establish discrimination where the allegedly discriminatory decision-makers are within the same protected class as the plaintiff.”); *Hansborough v. City of Elkhart Parks & Rec. Dept.*, 802 F. Supp. 199, 206–07 (N.D. Ind. 1992) (“Despite all of this leading to the conclusion that as a purely conceptual matter it is possible for one black person to discriminate against another black person on the basis of race, the *problem of proof* still remains. For the plaintiff, here, it is a *relatively unique and difficult burden of proof*. One has to be very careful to be sure that what in other interpersonal relationships might be described as discrimination is not just plain, ordinary, personal antagonism unrelated to the color of skin . . . This concern causes the court to require a substantial preliminary showing when one black person alleges discrimination by another black person.”) (emphasis added).

<sup>10</sup> Trina Jones, *Intra-Group Preferencing: Proving Skin Color and Identity Performance Discrimination*, 34 N.Y.U. REV. OF L & SOC. CHANGE 657, 682 (2010).

<sup>11</sup> *Id.* at 689. See also *id.* at 683 (noting that “[o]ther courts deciding colorism or identity performance cases have also invoked alternative explanations (like cronism, personality clashes, economic class differences, etc.) in denying plaintiffs their requested relief.”).

conceptually similar to “race.” This leaves room for a defendant to contend that the discrimination was not motivated by race. *Factually*, the defendant claims to believe in being remotely genealogically related to the plaintiff.<sup>12</sup> This is not unworthy of credence, because even modern genealogy and root tracing can be an imaginative, forged exercise.<sup>13</sup> Furthermore, this belief will not be undermined by modern science and genetics.<sup>14</sup> *Legally*, this argument is supportable because there are cases holding that “race” or “ancestry” is different from genealogy or “line of descent.”<sup>15</sup>

This article will then contrast with the Canadian approach, which would reject such an argument. This is because Canada has adopted an expansive interpretation of impermissible grounds. In particular, Canada includes “ancestry”—which is not explicitly included in their statute—in the statutory grounds of “race,” “ethnicity” and “family status.” This covers more situations that resemble intra-racial discrimination, such as discrimination based on remote or close bloodline (un-)relatedness. However, whilst the U.S. courts claim to have adopted a liberal interpretation, they also openly oppose expanding the law and have therefore narrowly interpreted “ancestry” and other impermissible grounds. This makes proof more difficult and leaves open gaps of protection for same-race discrimination in the U.S.

*A. Can the Defendant Contend that it is not About “Race,” but “Genealogical Relatedness”?*

The essential feature of “intra-racial” discrimination is that the defendant and victim are of the *same* race.<sup>16</sup> The same facts can

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<sup>12</sup> See *infra* Section I A-F.

<sup>13</sup> See *infra* Section II B and sources cited *infra* notes 26–27.

<sup>14</sup> See *infra* Section IV D.

<sup>15</sup> See *infra* Section III C and sources cited *infra* note 35.

<sup>16</sup> The term “intra-racial discrimination” is not new and it gained prominence after it was used in *Walker v. Secretary of the Treasury, IRS*, 742 F. Supp. 670, 671 (N.D. Ga. 1990) and was discussed by the literature such as Amy Weinstein, *Must Employers Be Colorblind? Title VII Bars Intra-Racial Employment Discrimination*, *Walker v. Secretary of Treasury, I.R.S.*, 713 F. Supp. 403 (N.D. Ga. 1989) 713 F. Supp. 403 (N.D. Ga. 1989), 68(1) WASH. U. L. REV. 213 (1990); Sandi J. Robson, *Intra-Racial, Color-Based Discrimination and the Need for Theoretical Consistency after Walker v. Internal Revenue Service*, 35 VILLANOVA



equally happen when the discrimination is actually based on the perceived *relatedness*, however remote, in genealogy (or kinship/bloodline)<sup>17</sup> between them—but not on race (hereafter the “Argument”).

This Argument is not “unworthy of credence,”<sup>18</sup> both in terms of its factual and legal bases. Raising this Argument could make the

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L. REV. 983 (1990). In *Walker*, the court confirmed that a claim can be made under Title VII for discrimination between people of the same race based on different shades of skin color. Subsequent cases clarified that intra-racial discrimination, even without involving any color-based element, is an actionable cause of action under Title VII. *See* *Hansborough v. City of Elkhart Parks & Rec. Dept.*, 802 F. Supp. 199, 206 (N.D. Ind. 1992); *Franceschi v. Hyatt Corp.*, 782 F. Supp. 712, 724 (D.P.R. 1992) (“the recognition that physiognomic characteristics are no longer considered the indispensable magic recipient for a cause of action under the statute. Rather, it is the subjection of a person to intentional discrimination because of the belief that he or she belongs to a given race that renders such behavior actionable.”).

<sup>17</sup> These seemingly similar terms are used to illustrate the point that there can be commingling of concepts that are related to the notion of “race,” yet leaving room for judicial distinguishing between them as will be contended below in text. Social scientists would argue the terms are subtly different, but that specific precision and distinctions are not intended for the present article. *See, e.g.*, Catherine Nash, *Genealogical Relatedness: Geographies of Shared Descent and Difference*, 1(2) GENEALOGY 1, 4 (2017) (“Genealogy is framed by the wider cultural significance of ancestry to personal identity and shaped by the significance of particular relationships, in all their different configurations of intimacy and distance, within a living family . . . Relatedness or kinship, unlike genealogy, stands for the ways in which family relationships through birth and parentage are deeply significant in understandings of family but are at the same time not understood to be absolutely determining of the nature, quality, and pattern of family relationships and the configuration of emotionally ‘close’ relationships. This is central to anthropological approaches to kinship. Thinking of relatedness as a practice in which those who count as close family are not simply a function of genealogical closeness but depend on the ongoing practice of kinship, through which a range of family forms are continuously enacted, stands in contrast to a strictly genealogical account of who is related to whom in the past and in the present.”).

<sup>18</sup> When the complainant argues that the proffered explanation is a pretext, they have to prove that the defendant’s asserted reason is “false or unworthy or credence.” *See* *Moss v. BMC Software, Inc.*, 610 F.3d 917, 922 (5th Cir. 2010) (applied in subsequent cases like *Morris v. Derrick Young, Wal-Mart Stores East, L.P.*, Civil Action No. 1:14-CV-136-SA-DAS, 2016 WL 2354642, at \*6–8 (N.D. Miss. 2016); *Knudsen v. City of Tacoma*, Case No. C04-5850FDB, 2005 WL 3418413, at \*3 (W.D. Wash. Dec. 9, 2005); *Nall v. BNSF Ry. Co.*, 912 F.3d 335, 347 (2018).

proof more difficult for the plaintiff.<sup>19</sup> After all, the U.S. Supreme Court has acknowledged the existence of “many facets of human motivations” for committing discrimination.<sup>20</sup> For example, as quoted above, there can be situations when a discriminator would want to “disassociate themselves from the group,” which motivates them to discriminate against those who are perceived to be genealogically related.<sup>21</sup> This genealogical relatedness ground is not necessarily used as a smokescreen for intra-racial discrimination, but it is possible, as the following section will demonstrate, for the defendant to genuinely hold such belief.

### *B. The Possible Factual Basis for the Argument*

This article is *not* suggesting the following ideas will lead to discrimination (and in fact, some of them stand as anti-racist pronouncements).<sup>22</sup> The aim of this section is merely to highlight the variety of thoughts and beliefs as to how people can be perceived as somehow related in genealogy to different extents.

For example, there is the idea of “global genealogy” (or the “out of Africa” theory) and that people subsequently develop into

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<sup>19</sup> Timothy Patton, *The Discriminatory Use of Peremptory Challenges in Civil Litigation: Practice, Procedure and Review*, 19 TEXAS TECH L. REV. 921, 969 (1988) (despite commenting on discrimination in other context, Patton noted that “discerning the genuineness of the proffered explanation will be difficult, and perhaps impossible in some instances. For those reasons, appellate courts will have to rely heavily on trial judge’s instincts, experience, and sense of fairness.”).

<sup>20</sup> *Castaneda v. Partida*, 430 U.S. 482, 499 (1977).

<sup>21</sup> See sources cited *supra* note 4.

<sup>22</sup> See, e.g., SIGRID SCHMALZER, *THE PEOPLE’S PEKING MAN: POPULAR SCIENCE AND HUMAN IDENTITY IN TWENTIETH-CENTURY CHINA* 269 (2008) (“there are important political motivations in the West for supporting the recent out-of-Africa theory; it helps counter racism by insisting on the recency, and thus the negligible importance, of racial differences”); Kenan Malik, *Ancient bones should rewrite history but not the present*, THE GUARDIAN (July 14, 2019), <https://www.theguardian.com/commentisfree/2019/jul/14/ancient-bones-should-rewrite-history-but-not-the-present> (“the ‘out of Africa’ theory – the idea that all contemporary humans stem from a small group of *H sapiens* from east Africa – seemed to provide an objective basis for an anti-racist viewpoint. Our ‘descent from a recent African root,’ the American paleontologist Stephen J Gould wrote, shows that ‘human unity is no idle political slogan’”).

geographical groups.<sup>23</sup> There is ample academic support from evolutionary biology and social anthropology for human relatedness, in the sense that humans “constitute a single species, and have been so since their evolution in Africa and throughout their migration around the world.”<sup>24</sup> In fact, Prof. Catherine Nash has suggested—from the social science perspective—that “genealogy” itself is:

an *imaginative* exercise in considering the place of ancestors within historical contexts, sometimes only known *sketchily*, and sometimes more fully through wider reading and thinking about the past. But it is also, I would argue, often a deeply geographical practice with *geographical imaginative dimensions*.<sup>25</sup>

Furthermore, genealogical beliefs do not necessarily require actual, accurate, or close relatedness, as genealogical relatedness can be “forged” even “with very distant relations or with people of no blood relation but bonded through a shared interest in genealogy”.<sup>26</sup>

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<sup>23</sup> Nash, *supra* note 17, at 6 (“What then of the idea of a global family tree? Imagining humanity as global community of shared origins and shared decent has been an important trope of liberal antiracism for more than half a century. Though scientific debates continue about whether there was a single or multiple ‘out of Africa’ migration of humans, the African origin of all of humanity is now firmly embedded in public understandings of human evolutionary history and is often argued to demonstrate the power of scientific studies of human genetic variation to challenge racism and ideas of race. The idea of a global family is undoubtedly positive in many ways. In extending the most positive associations of the family as an intimate sphere of affection, love, and loyalty, to the world as a whole, it suggests a globally extensive imaginary of care, solidarity, and compassion across distance and across cultural difference. It challenges a racialized conception of humanity as composed of discrete categories of difference.”).

<sup>24</sup> Sandra Soo-Jin Lee, Joanna Mountain & Barbara A. Koenig, *The Meanings of ‘Race’ in the New Genomics: Implications for Health Disparities Research*, 1 YALE J. HEALTH POL’Y L. & ETHICS 33, 39 (2001).

<sup>25</sup> Nash, *supra* note 17, at 3 (“Genealogy . . . requires a geographical imagination that encompasses spatially stretched lineages, migration routes, and a multitude of ancestrally significant places rather than a single ultimate point of ancestral origin.”) (emphasis added).

<sup>26</sup> Catherine Nash, *‘They’re Family!’: Cultural Geographies of Relatedness in Popular Genealogy*, in *Uprootings/Regroundings Questions of Home and Migration*, in UPROOTINGS/REGROUNDINGS: QUESTIONS OF HOME AND MIGRATION

For example, this happens when there is a “shared surname” despite not having a biological connection.<sup>27</sup> Additionally, there have been social attempts to construct “genealogical interconnectedness” as a “natural basis for sense of . . . shared identity, even if between traditionally opposed groups.”<sup>28</sup>

Besides, there are also beliefs from other disciplines that construct relatedness, such as monogenism/monogenesis which assumes “that all present human diversity stemmed from a common source and that all races were historically united in a single ‘brotherhood of man.’”<sup>29</sup>

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179, 195 (Sara Ahmed et. al. eds., 2003); Nash, *supra* note 17, at 5 (“Just as families can include members who are defined as family not through genealogy but because of the quality of their social relations, genealogy can be a process of forging family-like relationships with those who do not share genealogy in terms of actual genealogical connections but share genealogical interests.”) [hereinafter ‘*They’re Family!*’].

<sup>27</sup> Nash, ‘*They’re Family!*’ *supra* note 26, at 195. Interestingly, whilst Nash’s discussion concerns the Western context, comparable ideas existed in Asia. See, e.g., Siu-woo Cheung, *Appropriating Otherness and the Contention of Miao Identity in Southwest China*, 13(2) THE ASIA PACIFIC J. OF ANTHROPOLOGY 142, 142 (2012) (“the notion of ‘yanhuang zisun’, or ‘descendants of Yandi and Huangdi’, was often mentioned to refer to the common genealogical origin of Chinese people.”); Hongni Wei, Yi Yu & Zhenjie Yuan, *Heritage Tourism and Nation-Building: Politics of the Production of Chinese National Identity at the Mausoleum of Yellow Emperor*, 14 SUSTAINABILITY 1, 12 (2022), <https://www.mdpi.com/2071-1050/14/14/8798> (“The concept of Chinese culture is mainly related to traditional values and norms, especially the strong belief in ethnic and cultural homogeneity, which is the principle of the ‘Descendants of the Yellow Emperor [sic] This principle is a mythical concept as old as the Chinese nation. Chineseness, in other words, means being Chinese. This concept perpetuates the Chinese beliefs in national and cultural homogeneity that stem from the mythical founder of the Chinese nation. The belief and pride in building a homogeneous nation plays a fundamental role in unifying Chinese culture and identity, especially in the face of national crises and foreign invasions.”).

<sup>28</sup> Nash, *supra* note 17, at 6 (raising the example of socially emphasizing the genealogical relatedness between Ireland and the U.K as a way to address their contemporary relationship constructively. “People can thus be understood as genealogically interconnected but to different degrees and in different ways.”).

<sup>29</sup> Joshua M. Moritz, *Darwin’s Sacred Cause—The Unity of Humanity*, 13(1) THEOLOGY AND SCIENCE 1, 1–2 (2015) (“Monogenists were typically religiously devout abolitionists and Evangelical Christians who upheld a single origin for all known races of humanity for the sake of ‘preserving the integrity of scripture.’”); see also Kenneth W. Kemp, *Science, Theology, and Monogenesis*, 85(2)

Some of these perspectives may provide the basis for the above Argument as to (1) how remote relatedness can be subjectively perceived as a matter of beliefs and “imaginative exercise”; and (2) how there can be various *non-racial* (i.e. permissible) bases, such as the “geographical imaginative dimension” or mutable<sup>30</sup> traits like hair-style even if they are socioculturally associated with a particular race or nationality,<sup>31</sup> that can detach the discrimination from *racial*

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AMERICAN CATHOLIC PHILOSOPHICAL QUARTERLY 217, 218 (2011) (“There are, of course, passages in both the Old and the New Testaments that suggest a monogenetic origin for the human race. Although *Genesis 1* is silent on the matter, the story of *Genesis 2–4* is presented as the story of the first two human beings. The reference in *Wisdom 10:1* to ‘the first-formed father of the world’ suggests the same.”).

<sup>30</sup> Anti-discrimination law in general will only prohibit discrimination based on immutable characteristics. See Angela Clements, *Sexual Orientation, Gender Nonconformity, and Trait-Based Discrimination: Cautionary Tales from Title VII & An Argument for Inclusion*, 24 BERKELEY J. GENDER, L. & JUST. 166, 172 (2009) (“The general rule that developed under Title VII case law is that traits associated with race, national origin, and sex are generally only protected from discrimination if they are immutable characteristics or tied to a fundamental constitutional right”), *id.* at 173 (“courts do reject discrimination claims where discrimination occurs based on voluntarily chosen physical traits or performed behaviors that communicate racial or ethnic identity”). However, in the context of racial discrimination, there is debate on what is mutable and what is not. See Deepa Das Acevedo, *(Im)mutable race?*, 116 NORTHWESTERN U. L. REV. 88, 109 (2021) (“What scholarship and case law have overwhelmingly failed to consider is the extent to which *racial* identity is immutable”); Clements, *supra* note 30, at 174 (“one of the problems for race and national origin discrimination claims is that, in order to be actionable under Title VII, the litigant has the difficult task of tying the trait to immutability”); *Equal Employment Opportunity Commission v. Catastrophe Management Solutions*, 876 F.3d 1273, 1284 (2017) (in his dissenting opinion, Justice Martin argued that “[t]he supposed distinction between an ‘immutable’ racial trait and a ‘mutable’ one is illusory. Is the color of an employee’s hair an immutable trait? What about the shape of an employee’s nose? . . . [W]ith modern medicine skin color can be changed too.”).

<sup>31</sup> It is unlawful to discriminate based on immutable traits, such as color and hair texture. However, it is lawful to discriminate based on mutable traits even if it socioculturally reflect the race. See *Rogers v. American Airlines, Inc.*, 527 F. Supp. 229, 232 (S.D.N.Y. 1981) (“An all-braided hair style is an ‘easily changed characteristic,’ and, even if socioculturally associated with a particular race or nationality, is not an impermissible basis for distinctions in the application of employment practices by an employer.”); *Equal Employment Opportunity Commission*, 876 F.3d, at 1274 (Jordan, J., Concurring) (The Court of Appeal refused to “expand the definition of ‘race’—a term undefined in Title VII—to include

grounds—and redirect to *genealogical* relatedness—despite any potential conceptual overlap.

Additionally, the above thoughts and beliefs cater to a *different degree* of relatedness. For example, global genealogy and monogenism would seem to suggest the most *remote* relatedness by tracing back to the foremost origin; whereas the imaginative genealogy exercise based on geography would concern *distant* relatedness that is closer than remote.

### C. *The Legal Basis of the Argument*

In terms of the legal force, this Argument will work—in the sense of making proof more difficult—if the court is willing to distinguish “race” from genealogical relatedness. The academic goal of this Argument is to illustrate the confusing, blurred line between “race” and competing notions. It also demonstrates the problems of legally leaving the notion of “race” indefinite.

In the Superior Court of New Jersey case of *Walsifer v Borough of Belmar*, the complainant was a job applicant for a police position.<sup>32</sup> He alleged that he was not hired because of discrimination based on his “genealogical succession” or “line of descent”—in the sense that his uncles had sued the same defendant years ago and this was retaliation.<sup>33</sup> The claim was made pursuant to the New Jersey Law Against Discrimination, which prohibits discrimination based on “ancestry” (another ground separate from “race”).<sup>34</sup> The court dismissed the claim because the term “ancestry” refers to “racial,

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anything purportedly associated with the culture of a protected group.”). *See also* Ronald Turner, *On locs, race, and Title VII*, 2019 (4) WISCONSIN L. REV. 873, 878 (2019) (“Title VII does not prohibit trait-based discrimination even when a trait has sociocultural significance”). Discrimination based on mutable traits will not trigger the “national origin” ground either. *See Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980) (“National origin must not be confused with ethnic or sociocultural trait”).

<sup>32</sup> *Walsifer v. Borough of Belmar*, NO. A-4340-14T1, 2016 WL 6440637, at \*1 (N.J. Super Ct., App. Div. Nov. 1, 2016).

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

<sup>34</sup> *Id.*

religious, ethnic or national ancestry” and does not cover “genealogical succession” or “mere family connection.”<sup>35</sup>

Whilst this case concerns the ground of “ancestry” which is not necessarily available in other anti-discriminatory provision like Title VII, it is still arguably relevant to the discussion on “race” for two reasons. First, the U.S. Supreme Court has used the notions of “race” and “ancestry” interchangeably in relation to another anti-discriminatory law.<sup>36</sup> In other words, they have an overlapping scope in law. Second, even under the New Jersey Law which lists “ancestry” as a separate ground, the courts in *Walsifer* and *Whateley* defined “ancestry” as “racial ancestry.”<sup>37</sup> The *Whateley* court explained this inter-linked interpretation:

This conclusion is buttressed by application of the doctrine of *noscitur a sociis*, for the coupling of words in a statute denotes an intention that they should be understood in the same general sense . . . The words associated with ‘ancestry’ in both the Constitution and the statute — ‘race, creed, color’, etc. — attribute to it a meaning beyond that derived from the laws of descent and distribution.<sup>38</sup>

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<sup>35</sup> *Id.* at \*2; see also *Bluvias v. Winfield Mut. Housing*, 224 N.J. Super. 515, 526 (N.J. Super. Ct. App. Div. 1988) (“The analysis of the term ‘ancestry’ within the anti-discrimination statutes has been held not to pertain to the mere parent-child relationship within a given family”); see also *Whateley v. Leonia Board of Education*, 141 N.J. Super. 476, 480 (Ch. Div. 1976) (noting that the “ancestry” notion under the New Jersey Law does not seek to prevent “discrimination based upon specific family relationships between individuals such as here, but to prohibit discrimination because of racial, religious, ethnic or national ancestry shared by numerically significant segments of the population.”).

<sup>36</sup> See, e.g., *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610 (1987) (The law in concern was 42 U.S.C. § 1981 of the Civil Rights Act of 1866. The Supreme Court held that “[a]lthough § 1981 does not itself use the word ‘race,’ the Court has construed the section to forbid all ‘racial’ discrimination in the making of private as well as public contracts.”), at 613 (holding that “intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination”).

<sup>37</sup> See sources cited *supra* note 35.

<sup>38</sup> *Whateley*, 141 N.J. Super. at 480.

This line of judgements (*Walsifer*, *Whateley*, etc.) denotes that, legally speaking (irrespective of what social scientists would contend), “race” or “ancestry” is different from genealogy.<sup>39</sup> Moreover, the above quote apparently demonstrates that the court applied the doctrine of *noscitur a sociis* to narrow and limit the scope of “ancestry”—almost as if the other grounds like “race” have a “brooding omnipresence whose meaning cabins that of” ancestry.<sup>40</sup> The court could have ascribed independent meaning to it, and the failure to do so evinces the judicial aversion to expanding the boundaries (This forms a striking contrast with the Canadian approach to be discussed below in Section F, which uses “ancestry” to broaden other impermissible grounds).<sup>41</sup> This arguably leaves room (or legal uncertainty) to contend that genealogy can be viewed in a broader sense, to the extent that a perpetrator sees the victim as (however remotely) related in *genealogy*, and therefore discriminates on the basis of *perceived relatedness* (but not *race*).

The point is not on the semantic terminology—be it “descent” or “genealogy” as used in *Walsifer* etc., or other notions like bloodline or kinship—but rather the courts have (whether artificially or not) distinguished “race” from other highly similar notions, which gives rise to the room for further contention.<sup>42</sup>

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<sup>39</sup> *Walsifer v. Borough of Belmar*, NO. A-4340-14T1, 2016 WL 6440637, at \*1 (“the ancestry language in the [New Jersey Law Against Discrimination] does not apply to ‘genealogical succession’”). See also sources cited *supra* note 35.

<sup>40</sup> Despite concerning another context, Justice Thomas’ dissenting observation on the reliance of the doctrine of *noscitur a sociis* in the case of *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 586 (1995) (Thomas, C., dissenting) illustrated perfectly this argument:

‘*Noscitur a sociis* is a well established and useful rule of construction where words are of obscure or doubtful meaning; and then, but only then, its aid may be sought to remove the obscurity or doubt by reference to the associated words.’ . . . There is obvious breadth in ‘notice, circular, advertisement, letter, or communication, written or by radio or television.’ To read one word in a long list as controlling the meaning of all the other words would defy common sense; doing so would prevent Congress from giving effect to expansive words in a list whenever they are combined with one word with a more restricted meaning.

Justice Thomas’ dissent was supported by other panel judges including Justice Scalia, Justice Ginsburg and Justice Breyer.

<sup>41</sup> See also sources cited *infra* note 35.

<sup>42</sup> It is interesting to note that some dictionaries actually define “race” in terms of “descendants” and “lineage of a family”. See *St. Francis Coll.*, 481 U.S., at 611;



To those who think the above conceptual distinction is artificial and would be one-off, they should note that there are other contexts reinforcing the judicial willingness to distinguish the notion of race from seemingly related ones. Such a careful approach is justified by the understanding that “Title VII is not a general ‘bad acts’ statute; it only addresses discrimination on the basis of race, sex, religion, and national origin.”<sup>43</sup> The courts have held that nepotism—i.e. acts that favor family and relatives of the same race—does not automatically constitute racial discrimination under Title VII.<sup>44</sup> Despite acknowledging their conceptual overlap, the court in *Holder v. City of Raleigh* leaves open room for arguing their subtle differences:

Certainly there are similarities between nepotism and racial discrimination. Both select on a basis unrelated to merit. Both practices disqualify some applicants, *ab initio*, based on accidents of birth . . . A racially discriminatory motive *cannot, as a matter of law, be invariably inferred* from favoritism shown on the basis of some family relationship . . . The former *may* value family relationships for reasons unrelated to

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*Whateley*, 141 N.J. Super., at 479. Despite such, the court in *Whateley* nevertheless ruled that “dictionary definitions are not necessary a reliable guide to the meaning of words of a Constitution or statutes of this breadth and significance.” *Id.* at 479

<sup>43</sup> *Jamil v. Secretary, Dept. of Defense*, 910 F.2d 1203, 1207 (4th Cir. 1990) (this statement has been *quoted with approval in numerous cases*, such as *Logan v. City of Chicago*, 4 F.4th 529 (7th Cir. 2021) which refused to take a “broader view of conduct prohibited” and *Wimmer v. Suffolk County Police Department*, 176 F.3d 125, 135 (2d Cir. 1999)).

<sup>44</sup> Charanya Krishnaswami & Guha Krishnamurthi, *Title VII and Caste Discrimination*, 134 HARV. L. REV. F. 456, 475 n.107 (2021) (“One potential exception to the claim that ancestry discrimination is unlawful racial discrimination under Title VII is nepotism. Some courts have held that nepotism is, though perhaps regrettable, not per se unlawful under Title VII.”). *See, e.g.*, *Platner v. Cash & Thomas Contractors, Inc.*, 908 F.2d 902, 905 (11th Cir. 1990) (“nepotism as such does not constitute discrimination under Title VII”). The reverse also holds true, meaning that anti-nepotism—e.g. acts which discriminate the family and relatives of employees—does not constitute unlawful ancestry discrimination. *See Bluvias v. Winfield Mutual Housing Corp.*, 224 N.J. Super. 515, 526 (1988) (noting there were a number of cases “holding that anti-nepotism rules may be enforced in employment notwithstanding the prospective employee’s exclusion solely on the basis of his ‘ancestry.’”).

race; the latter disadvantages job applicants precisely because of their race.<sup>45</sup>

The above quote notably uses nepotism in the sense of family relationship, which makes *Holder* particularly relevant to the present Argument on genealogical relatedness. The *Holder* court further emphasizes that “[t]o hold that favoritism toward friends and relatives is *per se* violative of Title VII would be, in effect, to rewrite federal law.”<sup>46</sup> From another perspective, the cases on “genealogical succession” and nepotism evince the judicial aversion to expanding the notion of race to cover comparable notions.<sup>47</sup> Thus, it is not fatal to rest the Argument on subtle differences.

Even more importantly, the above cases show that there are two types of subtle differences that the courts are willing to consider.<sup>48</sup> First, it can be raised as a *factually specific* matter—i.e. arguing that the discrimination is not *factually* based on race, despite the potential conceptual overlap.<sup>49</sup> This was evident from the cases on nepotism, where the *Holder* court emphasized it “may” be unrelated to race and is not “per se” or “invariably” racial discrimination.<sup>50</sup>

Second, the arguable difference can be framed as a *purely conceptual* issue—i.e. arguing that discrimination based on perceived genealogical relatedness is *by nature* not the same as racial discrimination.<sup>51</sup> This was discernible from the *Walsifer* case where the court limited “ancestry” to “racial ancestry,” but not the distinguishable “genealogical” ancestry.<sup>52</sup> Therefore, there is ample room for raising the legal Argument in courts.

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<sup>45</sup> *Holder v. City of Raleigh*, 867 F.2d 823, 826–27 (4<sup>th</sup> Cir. 1989) (emphasis added).

<sup>46</sup> *Id.* at 824.

<sup>47</sup> *Id.* See also cases on nepotism cited *supra* note 44; *Walsifer v. Borough of Belmar*, NO. A-4340-14T1, 2016 WL 6440637 (N.J. Super Ct., App. Div. Nov. 1, 2016).

<sup>48</sup> *Holder v. City of Raleigh*, 867 F.2d 823 (4<sup>th</sup> Cir. 1989); *Walsifer v. Borough of Belmar*, NO. A-4340-14T1, 2016 WL 6440637 (N.J. Super Ct., App. Div. Nov. 1, 2016).

<sup>49</sup> See the text of *supra* notes 44 and 45.

<sup>50</sup> *Id.*

<sup>51</sup> See the text of *supra* notes 35–39.

<sup>52</sup> *Id.*

#### *D. Will Genetics and Science Undermine the Argument?*

For completeness of the discussion, one may wonder how science would impact the Argument. In light of the recent flux of direct-to-consumer genetic testing, one may argue that the modern understanding of genetic science has already become common sense.<sup>53</sup> Would this popular “science”<sup>54</sup> debunk the Argument’s basis on *subjectively* perceived relatedness in terms of genealogy?

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<sup>53</sup> See, e.g., James W. Hazel et. al., *Direct-to-Consumer Genetic Testing: Prospective Users’ Attitudes Toward Information About Ancestry and Biological Relationships*, 16(11) PLOS ONE (2021) (“Tens of millions of people have undergone direct-to-consumer genetic testing (DTC-GT).”); Michelle Fernandes Martins, *Direct-to-Consumer Genetic Testing: An Updated Systematic Review of Healthcare Professionals’ Knowledge and Views, and Ethical and Legal Concerns*, EUR. J. OF HUM. GENETICS 1, 1 (2022). (“A genetic test that is offered and advertised by companies directly to the consumer, without the involvement of a conventional healthcare system, is known as direct-to-consumer genetic testing (DTC-GT).”); *id.* at 2 (“One feature of some DTC genetic testing companies’ output is referred to variously as biogeographical ancestry, genetic ethnicity, genetic heritage, or genetic ancestry”). By contrast, it is important to remember that the U.S. courts have sometimes used the term “ancestry” interchangeably with “race.” See *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610 (1987). This means DTC could lead to the misunderstanding that race can be tested. Yet, academics have pointed out the consensus that “race” and “ancestry” are different. See Mwenza Blell & M. A. Hunter, *Direct-to-Consumer Genetic Testing’s Red Herring: “Genetic Ancestry” and Personalized Medicine*, 6:48 FRONTIERS IN MED. 1, 4 (2019) (“Reinscription of the notion of biological race in medical consultation, even inadvertently, validates the idea that race and ethnicity are natural classification”). See also *infra* notes 58–59.

<sup>54</sup> The use of genetic testing has been severely criticized. See Blell & Hunter, *supra* note 53, at 2 (“Genetic ancestry results, with their percentages by region and often slick presentation, certainly provide an appearance of precision to the consumer but this very appearance is ‘dangerously seductive and equally misleading.’ The validity of the genetic ancestry results of DTC testing have been questioned and challenged on several grounds. Numerous news articles, blog posts, and YouTube videos attest to inconsistencies in results from different companies’ genetic ancestry tests, even for the same test’s results for identical twins, and the same test’s results at different points in time.”). *Id.* at 3 (raising the point that “ancestry” is a complicated notion. It can, for example, be classified into “biogeographical, geographical, geopolitical, and cultural ancestry.”) With such difficulty in conceptual definitions, the results of DTC are therefore questionable in methodological terms.

This counterargument, however, will not work, both legally and scientifically. Legally, the U.S. Supreme Court “may have been eschewing a biological or genetic conception of race, in favor of an understanding predicated on social construction.”<sup>55</sup> In their unanimous judgment, they specifically highlighted the observation that:

Many modern biologists and anthropologists, however, criticize racial classifications as arbitrary and of little use in understanding the variability of human beings. It is said that genetically homogeneous populations do not exist and traits are not discontinuous between populations; therefore, a population can only be described in terms of relative frequencies of various traits. Clear-cut categories do not exist. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. It has been found that differences between individuals of the same race are often greater than the differences between the ‘average’ individuals of different races. These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature.<sup>56</sup>

In terms of scientific evidence, abundant support can be found to justify the reasonableness of forming the belief of perceived relatedness.<sup>57</sup> The U.S. Supreme Court’s observation, despite being raised in 1987, is still valid in light of “the scientific consensus that humanity is more alike than unlike.”<sup>58</sup> Genetic testing concerns

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<sup>55</sup> Krishnaswami & Krishnamurthi, *supra* note 44, at 474.

<sup>56</sup> *St. Francis Coll.*, 481 U.S. at 614.

<sup>57</sup> See, e.g., James Franklin Crow, *Unequal by nature: a geneticist’s perspective on human differences*, 131(1) DÆDALUS 81 (2002); Joseph T. Chang, *Recent Common Ancestors of All Present-Day Individuals*, 31 ADVANCES IN APPLIED PROBABILITY 1002 (1999). See also sources cited *supra* note 23.

<sup>58</sup> Vivian Chou, *How Science and Genetics are Reshaping the Race Debate of the 21st Century*, SCI. IN THE NEWS (SITN) OF THE HARVARD GRADUATE SCH. OF ARTS AND SCIENCES (Apr. 17, 2017), <https://sitn.hms.harvard.edu/flash/2017/science-genetics-reshaping-race-debate-21st-century/> (“In the biological and social sciences, the consensus is clear: race is a social construct, not a biological

ancestry, but not race—which is something commonly misunderstood.<sup>59</sup> Chou has noted how genetic testing could actually be abused for promoting racism:

The advances in human genetics and the evidence of negligible differences between races might be expected to halt racist arguments. But, in fact, genetics has been used to further racist and ethnocentric arguments . . . Members of the alt-right are enthusiastic proponents of ancestry testing as a way to prove their ‘pure’ white heritage . . . genetics is both the weapon and battle standard of this new, supposedly ‘scientific’ racism.<sup>60</sup>

In any event, irrespective of whether there is scientific basis for a defendant forming the belief of perceived relatedness, the freedoms of thought and belief should suggest that such a basis is not required.<sup>61</sup> Rather, the issue is whether the defendant genuinely hold such belief, such that the discrimination is not motivated by race.

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attribute.”); *see also* Joshua Sealy-Harrington & Jonnette Watson Hamilton, *Colour as a Discrete Ground of Discrimination*, 7(1) CAN. J. HUM. RTS. 1, 6 (2018) (“the now discredited view of race as biology or genetics”); Kemp, *supra* note 29, at 225 (“Natural science, then—or, to speak more precisely, genetics—leads to the conclusion that although man probably came into being at “one place,” the size of that place is only probably a relatively small place (say, East Africa), and could be as large as (nearly) the entire Old World.”).

<sup>59</sup> Chou, *supra* note 58 (“‘Ancestry’ reflects the fact that human variations do have a connection to the geographical origins of our ancestors—with enough information about a person’s DNA, scientists can make a reasonable guess about their ancestry.”); Wendy D. Roth, *Genetic Ancestry Tests Don’t Change Your Identity, But You Might*, THE CONVERSATION (Jul. 5, 2018), <https://theconversation.com/genetic-ancestry-tests-dont-change-your-identity-but-you-might-98663>; Nash, *supra* note 17, at 7 (“the genetic tests sold by the Genographic Project and other companies are not sold on the basis that they confirm the consumer as part of an undifferentiated global family, since that is already a given. Instead, they offer the consumer a sense of their particular place on a differentiated human family tree and sense of connection to those who also share that ancestry.”).

<sup>60</sup> Chou, *supra* note 58.

<sup>61</sup> John Gregory Francis & Leslie Francis, *Freedom of Thought in the United States: The First Amendment, Marketplaces of Ideas, and the Internet*, 8(2-3) EUR. J. COMP. L. & GOVERNANCE 192, 193 (2021) (“US constitutional law provides no direct protection for freedom of thought. Instead, it protects a range of

*E. Can the Argument Also Be Applied to Inter-Racial Discrimination?*

This is an interesting side issue worth clarifying. Assuming the Argument works, would it equally apply to *inter-racial* discrimination cases, in the sense that one discriminates not because of difference in race, but genealogical un-relatedness? The answer is no, because “the Supreme Court stated in no uncertain terms that § 1981 ‘at a minimum reaches discrimination against an individual because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of homo sapiens.’”<sup>62</sup>

Asking why there is such a difference allows one to more fully grasp the gist of the Argument and the inherent complicatedness of “race”. Genealogical relatedness, and the established notions of “global genealogy” or the widely-accepted “out of Africa” theory, themselves seek to address racism by emphasizing either the common human origin or human relatedness.<sup>63</sup> In other words, these beliefs deny the existence of race. By contrast, the reverse of the Argument—i.e., un-relatedness—apparently upholds the belief of difference amongst humans, which could extend to the social construct

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associated rights such as freedom of expression or freedom of religion that might be thought to bolster freedom of thought more or less directly.”); Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2379 (2018) (“Freedom of speech secures freedom of thought and belief.”); Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253 (2002) (“First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end. The right to think is the beginning of freedom”); Adam J. Kolber, *Two Views of First Amendment Thought Privacy*, 18(5) U. OF PA. J. CONST. L. 1382, 1386 (2016) (“The Supreme Court has made clear that the First Amendment protects freedom of thought, but the Court has never clearly described the contours of the protection. One important question that courts have never resolved is whether freedom of thought is only protected by the Amendment in cases that implicate expression. If a court adopts the *intertwined* view, it means that freedom of thought is only protected in particular cases that implicate the sorts of expression typically recognized by courts in the free speech domain.”). *See also id.* at 1387 (“Freedom of thought is not explicitly enumerated, and so, to the extent it is protected, it is arguably parasitic on freedom of speech, which is explicitly enumerated.”).

<sup>62</sup> Walker v. Sec’y of Treasury, IRS, 713 F. Supp. 403, 406 (N.D. Ga. 1989) (citing *St. Francis Coll.*, 481 U.S. at 613).

<sup>63</sup> *See* sources cited *supra* note 22.

of having *racial differences*. This is exactly the ground that the law seeks to prohibit discrimination on, and therefore so is un-relatedness.

*F. The Contrast with the Canadian Approach*

Would the Argument work in other jurisdictions? The Argument makes a valid case in the U.S. only due to the fact that the U.S. courts are willing to distinguish notions comparable to “race.”<sup>64</sup> It will not work in other jurisdictions if they adopt a more expansive approach that stretches the concept of “race” to cover other comparable notions. This section studies the Canadian approach as a contrast, which is unlikely to allow the Argument to distinguish genealogical relatedness from race.

The Canadian case of *Tanner v. Gambler First Nation* is comparable to the U.S. case of *Walsifer*, because both cases concerned the differences between “descent,” “race,” and “ancestry.”<sup>65</sup> The complainant Ms. Tanner alleged discrimination based on race, national or ethnic origin, and/or family status, pursuant to s.5 of the Canadian Human Rights Act.<sup>66</sup> Ms. Tanner was born a member of the Sagkeeng First Nation in Manitoba.<sup>67</sup> She was married to Alex Turner, a member of the Gambler First Nation.<sup>68</sup> As a consequence of the marriage, she became a member of the Gambler First Nation.<sup>69</sup> Under the Descent Rule of the Gambler First Nation, only a blood descendant of John (Falcon) Tanner could be a candidate for the position of Chief.<sup>70</sup> Ms. Tanner was ineligible because she was not a blood descendant.<sup>71</sup>

The Descent Rule discriminates on the basis of “blood relations,” “descent line,” or “ancestry” (which the Canadian Court used interchangeably).<sup>72</sup> The legal issue is, whether blood relation is a

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<sup>64</sup> See the text of *supra* notes 39–42.

<sup>65</sup> *Tanner v. Gambler First Nation*, 2015 C.H.R.T. 19 (Can. H.R.T.).

<sup>66</sup> *Id.* ¶ 1.

<sup>67</sup> *Id.* ¶ 4.

<sup>68</sup> *Id.* ¶ 5.

<sup>69</sup> *Id.* ¶ 5.

<sup>70</sup> *Id.* ¶ 11.

<sup>71</sup> *Id.* ¶ 15.

<sup>72</sup> *Tanner*, 2015 C.H.R.T. 19 at ¶ 28.

prohibited ground for discrimination.<sup>73</sup> The Canadian Human Rights Act covers the usual grounds of “race” and “ethnic origin,” but not these notions.<sup>74</sup> In other words, the legal question for the Canadian Court is whether “ancestry” is the same as “race.”<sup>75</sup>

The Court held that they are the same.<sup>76</sup> The interpretation follows the international law approach contained in the International Convention on the Elimination of all Forms of Racial Discrimination, because Canada has ratified it and the Convention includes “descent” as “racial discrimination.”<sup>77</sup> The ground of “ethnic origin” also covers “ancestry.”<sup>78</sup>

At this point, this disposition is not surprising and the U.S. Supreme Court has equally used “race” interchangeably with “ancestry.”<sup>79</sup> However, the Canadian Court also ruled that “ancestry” is further covered by the ground of “family status.”<sup>80</sup> “Family status” unsurprisingly includes “relationship that arises from bonds of marriage, consanguinity, legal adoption.”<sup>81</sup> But the scope of familial “ancestry” is strikingly wide to cover two additional groups in two arguable ways.

First, the scope of “family status” in Canada is wider than “ancestry” in *Walsifer* in the sense that the Canadian notion includes “relationships between spouses, siblings, in-laws, uncles or aunts and nephews or nieces, cousins, etc.”<sup>82</sup> In this sense, the Canadian “family status” ground prohibits discrimination based on relatedness with *close* (e.g. spouse) and *distant* (e.g. uncle) family members. Conversely, *Walsifer* concerned the complainant’s relationship with

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<sup>73</sup> *Id.* ¶¶ 17, 23.

<sup>74</sup> *Id.* ¶¶ 23–4; Canadian Human Rights Act, s 3(1). By contrast, the applicable U.S. statute in *Walsifer* covers ancestral discrimination. See the text of *supra* note 34.

<sup>75</sup> *Tanner*, 2015 C.H.R.T. 19 at ¶ 28.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* ¶¶ 29–30.

<sup>78</sup> *Id.* ¶ 31.

<sup>79</sup> See *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610 (1987). See also sources cited *supra* note 35.

<sup>80</sup> *Tanner*, 2015 C.H.R.T. 19, at ¶ 32.

<sup>81</sup> *Id.* ¶ 33.

<sup>82</sup> *Id.* ¶ 33.



his two uncles, and the U.S. court held that ancestral discrimination does not cover “mere family connection.”<sup>83</sup>

Second, “family status” covers “ancestral relationships.”<sup>84</sup> But a relevant issue not explicitly addressed by the Canadian court is *how distant, or rather, how remote* the relationship extends. On the facts, John (Falcon) Tanner, the person which the Descent Rule’s bloodline requirement is based on, is an ancestor of 170 years ago.<sup>85</sup> The Canadian Court ruled that such is covered.<sup>86</sup> This suggests Canadian law proscribes discrimination based on (un)relatedness with a *remote* family member.

To clarify, this far-reaching scope equally applies to “race” and not just to “family status,” because the Canadian Court was defining “ancestral relationships” when extending the coverage to the nearly two-century-old ancestor, and “race” is held to include “ancestry.”

In relation to the scope of “ancestry”, the U.S. courts in *Walsifer* and *Whateley* ruled that “ancestry” must be restrictively related to *racial* ancestry, but not *familial*/descent ancestry.<sup>87</sup> By contrast, the Canadian approach defines “ancestry” more expansively to cover both aspects, because “ancestry” is a ground—which cannot be explicitly found in the Canadian Human Rights Act—embedded in “family status” and “race.”<sup>88</sup>

In sum, the preceding analysis suggests that Canadian law covers both discrimination based on *close* family relationship (based on the “family status” ground) and *remote* bloodline relationship (based on the “ancestral” ground). The Argument—which is based on perceived genealogical relatedness based on *non-racialized* beliefs such as modern humans come “out of Africa”<sup>89</sup>—would likely be defeated under Canadian law.

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<sup>83</sup> See sources cited *supra* note 35.

<sup>84</sup> *Tanner*, 2015 C.H.R.T. 19, ¶ 33.

<sup>85</sup> *Id.* ¶ 34.

<sup>86</sup> *Id.* ¶ 35.

<sup>87</sup> See sources cited *supra* note 35.

<sup>88</sup> See the text of *supra* notes 74–80.

<sup>89</sup> See sources cited *supra* note 22.

i. The “Familial Status” Ground in the U.S. is Narrower than “Family Status” in Canada

Under some U.S. state laws, “ancestry” is a *separate* statutory ground to “race”;<sup>90</sup> whereas Canadian law *embeds* the non-statutory ground of “ancestry” *within* the statutory grounds of “race” and “family status”, which has the effect of broadening the scope of “race.”<sup>91</sup> Some state laws in the U.S. equally proscribes discrimination based on the ground of “familial status.”<sup>92</sup> Whilst the fact that “familial status” is a *separate* ground in the U.S. means it cannot be embedded within “race” to directly expand the latter’s scope like Canada, but can it be used as an alternative claim to offer indirect protection against the Argument?

The answer is no, for two reasons. First, even in states which protect the ground of “familial status,” it usually only covers discrimination in the context of real property transactions, but, perhaps rather strangely, not in other contexts such as employment.<sup>93</sup> This is best illustrated by the nepotism case of *Bumbaca v. Township of Edison*.<sup>94</sup> The complainant alleged the hiring practice of favoritism towards relatives and friends constituted discrimination based on “familial status” under the New Jersey anti-discriminatory law.<sup>95</sup> Interestingly, the New Jersey Court noted that “the general sweep of the entire statutory scheme” contains the ground of “familial status”

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<sup>90</sup> See sources cited *supra* note 35. See also Hentze & Tyus, *supra* note 7 (listing many states which do so such as California).

<sup>91</sup> See the text of *supra* notes 74–80; Canadian Human Rights Act, s 3(1).

<sup>92</sup> Title VII does not cover “familial status.” However, it can be found in the state anti-discrimination laws in California, Nebraska, Ohio, Oregon, etc. See CA. GOVT. CODE § 12955 through (2015) Leg. Sess.; 2009 NEB. CODE Chapter 20 Civ. Rts. 20–320 Transaction related to residential real estate; discriminatory practices prohibited (2009); OHIO REV. CODE § 4112.02 (2016); OR. REV. STAT. § 659A.421 (2015).

<sup>93</sup> Kendall D. Isaac, *Familial Status Discrimination: Will Employment Law Build upon What Housing Law Started?*, 36(4) EMP. REL. L.J. 50, 52 (2011). For a comprehensive comparison between the scope of protection in different states, see Hentze & Tyus, *supra* note 7. For example, New York state prohibits “familial status” discrimination in the employment context. See, e.g., NY LAB L § 194 (2022).

<sup>94</sup> *Bumbaca v. Township of Edison*, 373 N.J. Super. 239 (2004).

<sup>95</sup> *Id.* at 246.

for discrimination in employment, public housing and transactions in real property.<sup>96</sup> Nevertheless, when it comes to the specific provision on employment discrimination, the ground “familial status” is not explicitly available.<sup>97</sup> Despite the court agreeing that the law “is remedial legislation which must be liberally construed already,”<sup>98</sup> they reject the claim because the “familial status” ground is only explicitly available for the context of the sale and leasing of real property.<sup>99</sup>

Second, U.S. statutes have defined “familial status” narrowly, so there is no room for the courts to expand its scope like the Canadian approach.<sup>100</sup> For example, the New Jersey law above defines it as:

being the natural parent of a child, the adoptive parent of a child, the foster parent of a child, having a ‘parent and child relationship’ with a child as defined by State law, or having sole or joint legal or physical custody, care, guardianship, or visitation with a

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<sup>96</sup> *Id.* at 247; N.J.S.A. 10:5–4.

<sup>97</sup> *Bumbaca*, 373 N.J. Super. at 248; N.J.S.A. 10:5–12.

<sup>98</sup> *Bumbaca*, 373 N.J. Super. at 246.

<sup>99</sup> *Id.* at 248–49 (“Thus, it is clear that the term familial status, as defined, does not include the concept of nepotism and, further, plays no role in the statutory definition of an unlawful employment practice. The term was, in fact, not a part of the LAD as originally drafted in 1945, nor was it the subject of amendments in 1951, 1962, 1970 and 1991. It was only added in 1992, for the stated purpose of prohibiting ‘discrimination in housing on the basis of familial status.’”); N.J.S.A. 10:5–12(g).

<sup>100</sup> Some states have defined it in a similar way based only on pregnancy and domicile with a minor. *See, e.g.*, 2009 Nebraska Code Chapter 20 Civil Rights 20–311; *Szwast v. Carlton Apartments*, 102 F. Supp. 2d 777 (E.D. Mich. 2000). *See also* Peggie R. Smith, *Parental–Status Employment Discrimination: A Wrong in Need of a Right?*, 35 U. MICH. J. L. REFORM 569, 586 (2002) (noting that the notion of “familial status” in various employment discrimination statutes merely refer to whether one has parental/caregiving responsibilities or is pregnant); Joan C. Williams & Stephanie Bornstein, *The Evolution Of “FReD”: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1347 (2008); Cynthia Thomas Calvert, *The New Sex Discrimination: Family Responsibilities*, 9(1) U. MD. L.J. RACE, RELIGION, GENDER & CLASS 34, 43–44 (2009); Courtney G. Joslin, *Marital Status Discrimination 2.0*, 95 B.U. L. REV. 805, 811 (2015) (noting that even the federal Fair Housing Act defines “familial status” narrowly to cover limited situations such as having a minor child).

child, or any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.<sup>101</sup>

To be clear in light of the complicatedness, there is a potential confusion to be clarified. In Section E, this article argues that the Argument applies only to relatedness. It cannot be applied to un-relatedness (in inter-racial discrimination cases) because the courts will very likely consider un-relatedness as undistinguishable from race. However, the specific facts of the Canadian case of *Tanner* concerned un-relatedness (with the bloodline), yet this article argues that the Canadian approach will also prohibit discrimination based on relatedness.<sup>102</sup> There is no contradiction because the gist of the expansive Canadian approach is that it connects and broadens “race,” “family status,” etc., together with a common thread “ancestry.” The far-reaching scope of “family status” makes it applicable to more situations, which would include facts involving both relatedness and un-relatedness. This is not possible in the U.S. because its “familial status” ground is limited to only pregnancy and child-care, but not even relatedness with distant relatives.

*G. Why Dwell on “Race” When there is the Alternative Ground of “Color”?*

“Race” is not the only ground that can be used to deal with same-race discrimination. There is another comparable ground based on “color” in Canada and the U.S.<sup>103</sup> So why is there a need to dwell on “race” and look up to Canada’s expansive scope of “ancestry”?

It will be explained below that it is unrealistic to think that the alternative color ground can always be used as an easier alternative for protection in the U.S. (so is in Canada). Yet, Canada has an expansive “ancestry” ground as a further alternative, but not in the US.

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<sup>101</sup> *Bumbaca*, 373 N.J. Super. at 249; N.J.S.A. 10:5-5(11).

<sup>102</sup> *Tanner v. Gambler First Nation*, 2015 C.H.R.T. 19 (Can. H.R.T.), at ¶ 23.

<sup>103</sup> “Colour” is a prohibited ground for discrimination in Canada and the U.S. See Canadian Hum. Rts. Act, s.3(1); Title VII of the Civil Rights Act of 1964.

This means a complainant in Canada has more optional grounds—race, color, ancestry (which further includes racial ancestry, ethnic ancestry, familial ancestry) for different contexts of intra-racial discrimination. The lack of feasible options in the U.S. reinforces the relevance of the Argument in terms of the need for the plaintiffs and defendants to focus back on the scope of “race.”

i. The Color Ground as an Alternative: Not Always Useful

As a matter of background, in Canada, “within racial minority groups, intra-group screening and preferencing is on the rise.”<sup>104</sup> Yet, Sealy-Harrington and Hamilton suggested that “race is often seen as unavailable as a ground of discrimination” in intra-group cases.<sup>105</sup> Instead, they suggest that the better cause of action is to rely on the *separate* ground of “color.”<sup>106</sup> This view probably implied the absence of authorities on intra-group discrimination on *racial* ground alone and the corresponding difficulty in proof.<sup>107</sup> In the

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<sup>104</sup> Sealy-Harrington & Hamilton, *supra* note 58, at 2.

<sup>105</sup> *Id.* at 3.

<sup>106</sup> *Id.* (stating that “[a] move toward colour playing a more significant role in our domestic human rights law is evident in Canada’s first reported human rights decision based solely on the prohibited ground of colour: *Brothers v Black Educators Association* . . . Colour must stand alone as the asserted ground.”), *id.* at 28 (noting that “proving racial discrimination was more difficult in that case because race is a complex concept to link seemingly discriminatory conduct to. In contrast, skin color is much simpler to describe because of its objective nature, and much easier to connect to the enumerated ground of color, assumed to be simply skin pigmentation.”). *See also* *Brothers v. Black Educators’ Association*, CHRR Doc. 14-3080 (Nova Scotia Hum. Rts. Comm’n Bd. of Inquiry) (July 29, 2014), [https://humanrights.novascotia.ca/sites/default/files/Rachel%20BrothersvBlack%20Educators%20Association\\_Final%20Decision.pdf](https://humanrights.novascotia.ca/sites/default/files/Rachel%20BrothersvBlack%20Educators%20Association_Final%20Decision.pdf) (a case where the complainant was discriminated in the workplace for her lighter skin tone compared to other employees of the same race).

<sup>107</sup> On the facts of *Brothers*, the complainant Ms. Brothers was being told by a colleague of the same race as “too light skinned to ‘officially represent them’ because she ‘wasn’t black enough.’” *Brothers*, CHRR Doc. 14-3080 ¶ 42. The Human Rights Commission held that this constitute colorism discrimination, but not racial discrimination. *Id.* ¶ 83.

intra-racial context, colorism means discrimination against persons of the same race for their different skin tone.<sup>108</sup>

However, although proving colorism might sometimes be an easier alternative than relying solely on the *racial* ground, it is still not a very easy task in practice in both Canada and the U.S.<sup>109</sup> In Canada, there is little guidance as *Brothers* was the first *intra-racial* colorism case; and therefore, Sealy-Harrington and Hamilton's academic analysis finds it necessary to draw reference from U.S. literature.<sup>110</sup>

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<sup>108</sup> See, e.g., *Williams v. Wendler*, 530 F.3d 584, 587 (7th Cir. 2008) (stating that “Light-skinned blacks sometimes discriminate against dark-skinned blacks, and vice versa, and either form of discrimination is literally color discrimination.”); Robson, *supra* note 16, at 998–99 (noting that “It appears to be grounded in the resentment an individual feels when a member of his own race is treated more favorably by others simply because he looks more like a member of the dominant or favored race. In the context of intra-racial discrimination between blacks, the situation in *Walker*, the darker-skinned black feels that he has been ‘sold out’ by his lighter-skinned counterpart. He feels two layers of oppression: the first from prejudice by whites, and the second from members of his own race who are not as oppressed because of their lighter skin color. This type of discrimination can work in reverse as well, with the lighter-skinned black, who is viewed more favorably by the white majority, expressing hostility towards the darker-skinned black in order to disassociate himself from his own minority race and thereby protect his favored status.”).

<sup>109</sup> Sealy-Harrington & Hamilton, *supra* note 58, at 28 (describing that in the *Brothers* case, “proving racial discrimination was more difficult in that case because race is a complex concept to link seemingly discriminatory conduct to. In contrast, skin colour is much simpler to describe because of its objective nature, and much easier to connect to the enumerated ground of colour, assumed to be simply skin pigmentation.”). Nevertheless, proving colorism remains itself difficult. See also *id.* at 16 (“Pursuing colourism claims may be difficult” in Canada. “Racial minorities, especially women, have historically been under represented in Canadian human rights cases. The causes have been varied, but include observations of police mistreatment of racial minorities and complaint systems that fail to respond to the realities of their lives.”); *id.* at 26–27 (noting that in the U.S., there are “barriers to colourism claims”, such as “the common assumption that employers who are people of colour will not discriminate against employees of the same colour” and the “tendency to assume that any employer who has hired a person of colour will not distinguish between people of colour”).

<sup>110</sup> *Id.* at 20 (noting that the “Canada’s much smaller body of jurisprudence” means there is a need to look at the “lessons in the American jurisprudence” which is “more robust than elsewhere”); *id.* at 12 (“Since there are very few Canadian

In the U.S., the court in *Walker* acknowledged the “difficulties” of “measuring skin color and determining whether the skin pigmentation of the parties is sufficiently different.”<sup>111</sup> This is “a question of fact that must be determined by the fact finder.”<sup>112</sup> In other words, the color ground requires some difference in color, but imaginably, there will be situations where there is no provable or observable difference.<sup>113</sup>

Besides, whilst colorism claims help address intra-racial discrimination amongst Whites and Blacks themselves,<sup>114</sup> the protection in the U.S. has been criticized as uncomprehensive *in practice*. Elzweig pointed out in 2021 that “there have been no intra-racial color discrimination decisions involving South Asians” in the U.S. after the discouraging decision of *Ali v. National Bank of Pakistan* in 1981 (despite pre-*Walker*).<sup>115</sup> The complainant alleged that he

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empirical studies on the impact of race and ethnicity in areas such as incarceration and health, little is known about the material impacts of colourism in Canada”).

<sup>111</sup> *Walker v. Secretary of Treasury, IRS*, 713 F. Supp. 403, 408 (N.D. Ga. 1989) (“This court recognizes full well that such difficulties are genuine and substantial.”). See also Robson, *supra* note 16, at 990 (“When the parties are members of the same race, however, and the difference between them is perhaps only a slight difference in skin tone, it is much more difficult for the courts to accept that invidious discrimination may have occurred.”). *Walker* is considered the key authority on colorism. See Sealy-Harrington & Hamilton, *supra* note 58, at 24 (“Subsequent courts have read *Walker* to stand for the proposition that ‘intra-racial color discrimination claims are authorized by both Title VII and existing Supreme Court precedent.’”).

<sup>112</sup> *Walker*, 713 F. Supp. at 408; Tolulope F. Odunsi, *Remedying Trait-based Employment Discrimination: Lessons from the Crown Act*, 14(2) NW. U. L. REV. 317, 334 (2022).

<sup>113</sup> See, e.g., Taunya Lovell Banks, *Colorism Among South Asians: Title VII and Skin Tone Discrimination*, 14(4) WASH. U. GLOBAL STUD. L. REV. 665, 666 (2015) (suggesting that there “may be significant disagreement about what constitutes skin tone difference”. This means the skin tone could look “much the same” upon comparison to an observer, but not to another one.).

<sup>114</sup> *Walker*, 713 F. Supp. at 407–08 (“It would take an ethnocentric and naive world view to suggest that we can divide Caucasians into many sub-groups but somehow all blacks are part of the same sub-group. There are sharp and distinctive contrasts amongst native black African peoples (sub-Saharan) both in color and in physical characteristics.”).

<sup>115</sup> Brian Elzweig, *Caste Discrimination and Federal Employment Law in the United States*, 44(1) U. ARK. LITTLE ROCK L. REV. 57, 80 (2021); *Ali v. National Bank of Pakistan*, 508 F. Supp. 611 (S.D.N.Y. 1981).

was treated less favorably than darker-skinned employees also from Pakistan, but from different provinces.<sup>116</sup> The court rejected his claim because there “was no evidence to establish a pattern of discrimination by ancestral national origin, or by color or provincial residence as actual indicators thereof even assuming such evidence would constitute a cause of action.”<sup>117</sup> Elzweig explained the practical inability of proving a “pattern of discrimination” amongst South Asians on grounds of race, color or origin, because the ground is more accurately based on the complicated notion of “caste” instead which is legally unprotected in the U.S.<sup>118</sup> The court was expecting “evidence by way of expert testimony or treatise . . . with respect to color differences among the various provinces of Pakistan, or discrimination based on color,” which was not presented on the facts.<sup>119</sup> This led the court to conclude that “[c]olor alone does not suffice to establish the provincial origin of a Pakistan citizen.”<sup>120</sup> Whilst the word “caste” was not mentioned in the *Ali* judgment, Elzweig argues that colorism *in the South Asian context* is a form of caste discrimination because color is “an indicator of caste, as Dalits tend to, but do not always, have darker skin than those of the higher-castes.”<sup>121</sup> And in this context, caste is about class status.<sup>122</sup> To put this in another way, discrimination based on caste (class status) is acceptable despite the fact that caste is related to color, so it is difficult to evidentially prove discrimination—in the South Asian context—based on color when it is really about class status.<sup>123</sup>

This is why the legal protection against colorism is not sufficient to address intra-racial discrimination, and having an alternative ground based on “ancestry” would help.

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<sup>116</sup> *Ali*, 508 F. Supp. at 611.

<sup>117</sup> *Id.* at 614.

<sup>118</sup> Elzweig, *supra* note 115, at 82. *See also* Elzweig at 70 (“[D]iscrimination based on caste is not specifically illegal in any jurisdiction in the United States.”).

<sup>119</sup> *Ali*, 508 F. Supp. at 612.

<sup>120</sup> *Id.*

<sup>121</sup> Elzweig, *supra* note 115, at 78.

<sup>122</sup> *Id.* at 58 (“The caste system, built on Hindu hierarchal class structure”). *See also* *Ali*, 508 F. Supp., at 613 (noting that “the presumption of a protected class status on the basis of color is bound up with an entire national racial history. It may well be that there are indigenous discriminatory practices around the world having nothing to do with the American experience.”).

<sup>123</sup> Elzweig, *supra* note 115, at 82.



Had the Canadian expansive “ancestry” been applicable in future cases with facts comparable to *Ali*, a complainant may have an alternative claim by arguing, e.g., that there was discrimination for not having a common ancestry with the favored province of a country. It is certainly true that having an additional ground does not guarantee the success of a complaint on intra-racial discrimination, which still depends on factors like the available evidence. But the more contexts the law can cover, the more likely a victim of same-race discrimination is protected.

## II. CONCLUSION

This article raises the argument that illustrates how the courts’ willingness to distinguish “race” from comparable notions could lead to conceptual confusions and seemingly artificial distinctions. Based on this clear-cut judicial approach, there is an arguable case that alleged intra-racial discrimination can be lawfully explained as discrimination based on perceived genealogical relatedness.

Upon comparison between Canada and the U.S., it is shocking that the non-statutory “family status” ground in Canada has a broader coverage than the statutory ground of “ancestry” in some U.S. laws—in the sense that the former covers both close relatives and distant ancestors of nearly two centuries ago, but the latter does not even cover uncles as in the New Jersey case of *Walsifer*. But for the comparison and looking at the Canadian approach alone, one might have doubted the Canadian approach for its seemingly arbitrary ambit. However, this Argument shows that having such a wide scope is not necessarily detrimental and could bridge gaps in protection against intra-racial discrimination because these separate notions like “ancestry” can still be related to “race” depending on the context.