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A draft of this Article was presented at the Peking University School of Transnational Law Faculty Workshop in May 2022. I thank Dean Philip McConnaughay, the faculty, staff, and students of Peking University School of Transnational Law for their support. Dean Leigh Saufley, Jessica Feinberg, and Jennifer Wriggins all helped shape my thoughts as I planned this work. Christine Desan, Messalina Forbes, Lynn Girton, Randall Kennedy, Todd Rakoff, and Henry Smith have been guides, friends, and mentors these many years, and I offer my thanks to them as well. M. H.P. has been—as ever—wonderfully insightful, kind, and thoughtful; thank you. The 2022-2023 Catholic University Law Review Editorial Board has been a pleasure to work with, and I thank them. All errors are my own

CLIMATE DISCRIMINATION

Duane Rudolph[+]

This Article focuses on the coming legal plight of workers in the United States, who will likely face discrimination as they search for work outside their home states. The Article takes for granted that climate change will have forced those workers across state and international boundaries, a reality dramatically witnessed in the United States during the Dust Bowl of the 1930s. During that environmental emergency (and the devastation it wrought), workers were forced across boundaries only to be violently discriminated against upon arrival in their new domiciles. Such discrimination is likely to recur, and it will threaten the livelihoods of workers across the country, especially the poor and workers from minority communities.

While it may be tempting to believe that the current array of federal employment-discrimination laws is both comprehensive and flexible enough to meet the challenges ahead, the prevailing interpretations of federal employment-discrimination laws show that applicable federal law will not be able to respond. Specifically, the main federal statutes targeting employment discrimination, including the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, Title I of the Americans with Disabilities Act of 1990, and 42 U.S.C. § 1981 (1991) will be of limited utility to judges, workers, lawyers, and employers, among others, if Congress does not amend them.

The Article is novel in at least three ways. First, it is the only article addressing the confluence of climate change and employment discrimination in the United States. Second, the Article is innovative in an additional way—it argues that groundbreaking recent precedent from the Supreme Court of the United States interpreting a federal employment anti-discrimination statute, notably *Bostock v. Clayton County*, does not cover employment discrimination based on climatic displacement. Third, the Article is the first to propose a number of climate-related changes to federal employment-discrimination statutes to facilitate the work of judges, workers, lawyers, and employers, among others. The Article

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argues that in the absence of protection under federal law, claimants will likely turn to state employment-discrimination laws, state common-law causes of action, and constitutional claims under federal law that likely will provide inadequate relief.

"A VAST SIMMERING CAULDRON"

"As their land fails them, hundreds of millions of people from Central America to Sudan to the Mekong Delta will be forced to choose between flight or death. The result will almost certainly be the greatest wave of global migration the world has seen."[1] "If history is any guide, racial animosities may be exacerbated as locals resist the arrival of new populations and the (real or perceived) impact on employment, political influence, social services, and the like."[2] "[A] Green New Deal will require . . . strengthening and enforcing labor, workplace health and safety, antidiscrimination, and wage and hour standards across all employers, industries, and sectors."[3]

a. "Existential Threat"

In November 2020, ProPublica, the nonprofit organization devoted to investigative journalism, published an article titled "Climate Change Will Make Parts of the U.S. Uninhabitable. Americans Are Still Moving There."[4] The article revealed that data previously provided to ProPublica anticipated that climate change would devastate the southern third of the United States, in particular, "erasing more than 8% of its economic output and likely turning migration from a choice to an imperative."[5] A video accompanying the article noted that the poor and minority communities would be especially vulnerable to the effects of climate change in the United States.[6] "Ultimately," the article

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1. Abrahm Lustgarten, *The Great Climate Migration*, N.Y. TIMES MAG. (July 26, 2020), https://www.nytimes.com/interactive/2020/07/23/magazine/climate-migration.html; *see also* Kanta Kumari Rigaud et al., *Groundswell: Preparing for Internal Climate Migration*, WORLD BANK GROUP (2018), https://www.worldbank.org/en/news/infographic/2018/03/19/groundswell---preparing-for-internal-climate-migration ("Internal climate migration is already taking place. As climate impacts increase over the course of this century, the scale of such migration is expected to increase.").

2. Jody Freeman & Andrew Guzman, *Climate Change and U.S. Interests*, 109 COLUM. L. REV. 1531, 1586–87 (2009) (discrediting the argument that the United States will be less affected by climate change and arguing in favor of more robust action by the United States as regards climate change).

3. Recognizing the duty of the Federal Government to create a Green New Deal, H. Res. 109, 116th Cong. § 4(j) (2019).

4. Lucas Waldron & Abrahm Lustgarten, *The Great Climate Migration: Climate Change Will Make Parts of the U.S. Uninhabitable. Americans Are Still Moving There*, PROPUBLICA (Nov. 10, 2020, 12:11 PM), https://www.propublica.org/article/climate-change-will-make-parts-of-the-u-s-uninhabitable-americans-are-still-moving-there; *see also* Lily Katz & Sebastian Sandoval-Olascoaga, *More People Are Moving In Than Out of Areas Facing High Risk from Climate Change*, REDFIN NEWS (Aug. 25, 2021), https://www.redfin.com/news/climate-migration-real-estate-2021/.

5. Waldron & Lustgarten, *supra* note 4.

6. *Id.*; *see also* EPA, *Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts*, U.S. ENV'T PROT. AGENCY (2021), https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf ("[M]inorities are most likely to currently live in areas where analyses project the highest levels of climate change impacts."); *see also* Lukoye Atwoli et al., *Call for Emergency Action to Limit Global Temperature Increases, Restore Biodiversity, and Protect Health*, 398 LANCET 931, 939 (2021), https://www.thelancet.com/

concluded, "millions of people will be displaced by flooding, fires, and scorching heat, a resorting of the map not seen since the Dust Bowl of the 1930s."[7]

Four years before the publication of ProPublica's article, the United Nations Educational, Scientific and Cultural Organization ("UNESCO"), published "The United Nations World Water Development Report 2016."[8] Its focus? "Water and Jobs."[9] UNESCO estimated that "well over one billion jobs, representing more than 40% of the world's total active workforce, are heavily water-dependent. . . . Another billion jobs, representing over one third of the world's total active workforce, are likely to be moderately water-dependent."[10] The report went on to estimate that almost eighty percent of jobs in the global workforce were water-dependent in some manner.[11] Water-dependent jobs encompassed areas as diverse as agriculture, construction, mining, power generation, recreation, and tourism, among others.[12] Water-related jobs encompassed everything from water resources management to water infrastructure to water-related services.[13] By imperiling access to water, climate change would affect livelihoods, and it would also alter the employment landscape.[14] In sum, climate change will have a significant impact on workers

journals/lancet/article/PIIS0140-6736(21)01915-2/fulltext ("Harms [from higher temperatures] disproportionately affect the most vulnerable, including children, older populations, ethnic minorities, poorer communities, and those with underlying health problems."); *see also* Hannah Perls, Note, *U.S. Disaster Displacement in the Era of Climate Change: Discrimination & Consultation Under the Stafford Act*, 44 HARV. ENV'T L. REV. 511, 512, 514–517 (2020) (noting that over a million people have been displaced in the United States as a result of climate-related disasters and focusing on the impact of climate change on minority communities).

7. Waldron & Lustgarten, *supra* note 4; *see also* Abrahm Lustgarten, *How Climate Migration Will Reshape America*, N.Y. TIMES MAG. (Sept. 20, 2020), https://www.nytimes.com/interactive/2020/09/15/magazine/climate-crisis-migration-america.html [hereinafter Lustgarten, *Reshape America*] ("A Dust Bowl event will most likely happen again. The Great Plains states today provide nearly half of the nation's wheat, sorghum and cattle and much of its corn; the farmers and ranchers there export that food to Africa, South America and Asia.").

8. *The United Nations World Water Development Report 2016: Water and Jobs*, UNESCO (2016), https://www.unescap.org/sites/default/files/2016%20UN%20World%20Water%20Development%20Report-%20Water%20and%20Jobs.pdf.

9. *Id.*

10. *Id.* at v; *see also The Employment Impact of Climate Change Adaptation: Input Document for the G20 Climate Sustainability Working Group*, INT'L LABOUR ORG. 26 (Aug. 2018), https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_645572.pdf.

11. UNESCO, *supra* note 8, at v.

12. *Id.* at 2–3.

13. *Id.* at v, 32.

14. *See id.* at 3 ("Water scarcity is likely to limit opportunities for economic growth and the creation of decent jobs in the upcoming years and decades."); *see generally* WORLD BANK GROUP, A WATER-SECURE WORLD FOR ALL: THE WORLD BANK WATER GLOBAL PRACTICE (2016).

and employers worldwide.[15] Indeed, climate change has already had a negative impact on the labor market.[16]

Given the existential threat posed by climate change, the legal issue is whether the current employment-discrimination laws in the United States are flexible enough to accommodate the adaptations that climate change will force upon workers, their employers, and those they both serve.[17] What happens, for example, when workers are compelled to leave one state or country because of the weather, arrive in another, and are discriminated against there?[18] While it might seem like discrimination only matters to workers and their advocates, employers also care about discrimination because many want to ensure that their workers thrive and succeed, and employers also fear reputational damage.[19] An increasingly inhospitable climate has already forced over a million Americans to move, and this is apart from an ostensible business (and employee) exodus from states like California for places like Texas and Florida, which may increase in the years ahead.[20] As some of California's citizens (and businesses) depart

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15. *See* UNESCO, *supra* note 8, at 2-5; U.S. ENV'T PROT. AGENCY, *supra* note 6, at 37 ("Climate-driven changes in the frequency and intensity of extreme temperatures are expected to result in disruptions in labor sectors where people work outdoors or in indoor environments without air conditioning.").

16. *See* INT'L LABOUR ORG., *supra* note 10, at 14 ("The ILO estimates that between 2000 and 2015, 23 million working-life years were lost annually as a result of various environment-related hazards caused or exacerbated by human activity.").

17. *See generally* Remarks by President Biden Before Signing Executive Actions on Tackling Climate Change, Creating Jobs, and Restoring Scientific Integrity, https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/27/remarks-by-president-biden-before-signing-executive-actions-on-tackling-climate-change-creating-jobs-and-restoring-scientific-integrity/ (last visited Oct. 30, 2021) ("It's—that's why I'm signing today an executive order to supercharge our administration ambitious plan to confront the existential threat of climate change. And it is an existential threat."); *Climate change: An 'existential threat' to humanity, UN chief warns global summit*, UNITED NATIONS (May 15, 2018), https://news.un.org/en/story/2018/05/1009782 ("None of the world's challenges loom as large as climate change, the United Nations chief told a major climate action summit on Tuesday, reiterating his belief that global warming poses an 'existential threat' to humanity.").

18. *See generally* Joel Mathis, *The Climate Refugees Are Here. They're Americans.*, THE WEEK (Sept. 14, 2020), https://theweek.com/articles/937357/climate-refugees-are-here-theyre-americans; Carlos Martín, *Who Are America's "Climate Migrants," and Where Will They Go?*, URBAN WIRE (Oct. 22, 2019), https://www.urban.org/urban-wire/who-are-americas-climate-migrants-and-where-will-they-go; Mimi Swartz, *The Year of Living Dangerously: Houston's Katrina Hangover*, TEXAS MONTHLY (Oct. 2006), https://texasmonthly.com/articles/the-year-of-living-dangerously. I am grateful to Joel Mathis's article for bringing the other sources to my attention.

19. *See generally* Lily Zheng, *We're Entering the Age of Corporate Social Justice*, HARV. BUS. REV. (June 15, 2020), https://hbr.org/2020/06/were-entering-the-age-of-corporate-social-justice.

20. *See generally* Martín, *supra* note 18; Perls, *supra* note 6, at 512–23; *see also* Lee Ohanian, *California Businesses Leave the State by the Thousands*, HOOVER INST. (Sep. 8, 2020), https://www.hoover.org/research/california-businesses-leave-state-thousands. *But see* U.C. Off. of the President, *UC Studies: Contrary to Popular Belief, Residents Are Not Fleeing California* (July

for other states, they may contribute to a change in the political landscape there, a potential cause of concern to natives of those states.[21] In this regard, it is noteworthy that Texas Governor Greg Abbott campaigned in 2018 on the slogan "Don't California My Texas."[22] The governor has also "tried to assuage fears that Texas is being invaded [by Californians]."[23] Thus, while Americans can move across state boundaries and establish domicile in another state fairly easily, new arrivals are still at risk of discrimination in their new domiciles.[24]

The climate catastrophe of another age is worth recalling.[25] The result, at least in part, of human attitudes to the environment, the Dust Bowl of the 1930s made the Great Plains in the United States uninhabitable.[26] Heat made the United States "a vast simmering cauldron," drought provoked widespread economic loss, and soaring temperatures alone killed at least 4,500 people in a single year.[27] The arid landscape, devastated by drought and grasshoppers, led to a few million farmers receiving relief assistance.[28] States like California saw large numbers of arrivals from places like Oklahoma, which hemorrhaged 18.4

7, 2021), https://www.universityofcalifornia.edu/press-room/uc-studies-contrary-popular-belief-residents-are-not-fleeing-california.

21. *See* Timothy Egan, Opinion, *California Takes Revenge on Trump*, N.Y. TIMES (Feb. 14, 2020), https://www.nytimes.com/2020/02/14/opinion/california-revenge-trump.html (drawing attention to "the vast diaspora of more than 7.3 million people who have *left* California since 2007. They appear to be changing the political makeup of the states they've moved to, perhaps enough to alter the Electoral College map in favor of Democrats.").

22. Christopher Hooks, *Californians Could Ruin Texas—But Not the Way You Might Think*, TEXAS MONTHLY (Mar. 2021), https://www.texasmonthly.com/news-politics/californians-could-ruin-texas-but-not-the-way-you-might-think/.

23. *Id.*

24. *See generally* FRIEDENTHAL ET AL., CIVIL PROCEDURE § 2.6 (6th ed. 2021) (discussing domicile); HAY ET AL., CONFLICT OF LAWS §§ 4.1–4.46 (6th ed. 2018) (discussing domicile); *see also* Sup. Ct. of Va. v. Friedman, 487 U.S. 59, 70 (1988) (holding that the State of Virginia violated the Privileges and Immunities Clause of the U.S. Constitution (Art. IV § 2 cl. 1) when it imposed a residency requirement for admission to the state bar); *see also* Swartz, *supra* note 18 (noting that African American Louisiana residents who were displaced by Katrina were referred to as "Katrina illegal immigrants" in Texas by "a mostly white, mostly affluent crowd of 1,700 or so bound and determined to drive the mostly poor, mostly black newcomers not just out of their neighborhood but out of their town").

25. *See* Lustgarten, *Reshape America*, *supra* note 7 (briefly discussing the Dust Bowl, its effects, and the likelihood of its recurrence).

26. See DONALD WORSTER, DUST BOWL: THE SOUTHERN PLAINS IN THE 1930S 4 (1979) ("The Dust Bowl . . . was the inevitable outcome of a culture that deliberately, self-consciously, set itself that task of dominating and exploiting the land for all it was worth."); Robin A. Fanslow, *The Migrant Experience*, U.S. LIB. OF CONG.: VOICES FROM THE DUST BOWL (Apr. 6, 1998), https://www.loc.gov/collections/todd-and-sonkin-migrant-workers-from-1940-to-1941/articles-and-essays/the-migrant-experience/# ("[T]he increase in farming activity placed greater strain on the land. As the naturally occurring grasslands of the southern Great Plains were replaced with cultivated fields, the rich soil lost its ability to retain moisture and nutrients and began to erode.").

27. *See* WORSTER, *supra* note 26, at 11–12; Fanslow, *supra* note 26.

28. *See* WORSTER, *supra* note 26, at 11–12; *see also* Fanslow, *supra* note 26.

percent of its population in 1930 alone.[29] Colorado, for example, attempted to bar the entry of new arrivals into the state, as did California.[30] California paid for the migrants' transportation back to Oklahoma, only to have the Oklahomans return bringing someone else to California, a state possessing "a fine climate to be destitute in."[31] Many Oklahomans, pejoratively known as "Okies" and "exodusters," lived in squalid conditions in California, referred to as "little Oklahomas."[32] So contentious was the treatment of Oklahomans in California that one Oklahoman migrant stated, "I imagine if some native [Californian] come up and called me something like [Okie] I would have probably knocked his block off."[33]

Californians discriminated against the new arrivals based purely on their origins. One theater sign in California pointed to multiple ongoing forms of discrimination in the state when it specifically required African Americans and migrants from Oklahoma to sit together in the upstairs section of the theater.[34] A prominent writer at the time believed that the arrivals from the Great Plains were "simply, by God's inscrutable will, inferior men, . . . and inferior they will remain until, by a stupendous miracle, He gives them equality among His angels."[35] Sterilization was considered an option.[36] Many Californians believed Oklahomans were biologically inferior.[37] State origin proved determinative in how Americans treated each other during a devastating environmental emergency.

The new arrivals toiled in jobs considered menial in California. Such difficult jobs were often reserved for Mexicans, to whom immigration restrictions were

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29. *See* WORSTER, *supra* note 26, at 48, 50; *see also* Fanslow, *supra* note 26.

30. Lustgarten, *Reshaping America*, *supra* note 7 ("Colorado tried to seal its border from the climate refugees"); Fanslow, *supra* note 26 ("After struggling to make it to California, many found themselves turned away at its borders."). *But see* Interview by Stacey Jagels with James Lackey, in Bakersfield, Ca. (Mar. 31 & Apr. 2, 1981), https://csub.app.box.com/s/zy65eluwoujerhavv 0pn328t6hifhfu3 [hereinafter, Lackey Interview].

31. Charles L. Todd, *The "Okies" Search For A Lost Frontier*, N.Y. TIMES MAG. 11 (Aug. 27, 1939), https://timesmachine.nytimes.com/timesmachine/1939/08/27/issue.html.

32. *See* WORSTER, *supra* note 26, at 44, 50–53. On the original "exodusters," *see* Taja-Nia Y. Henderson, Article, *"I Shall Talk to My Own People": The Intersectional Life and Times of Lutie A. Lytle*, 102 IOWA L. REV. 1983, 1990 (2017) (noting that black "migrants, known as 'exodusters,' believed that the West (and Kansas, specifically) was a 'promised land' for blacks (with reference to the biblical book of Exodus)").

33. Lackey Interview, *supra* note 30, at 42.

34. WORSTER, *supra* note 26, at 52; *see also* Fanslow, *supra* note 26 (noting that the new arrivals from the Great Plains were "ethnocentric in their attitude toward other ethnic/cultural groups, with whom they had had [sic] little contact prior to their arrival in California. Such attitudes sometimes led to the use of derogatory language and negative stereotyping of cultural outsiders.").

35. *Id.* at 53 (internal quotations omitted) (quoting "H. L. Mencken, the barbed wit of the iconoclastic twenties, [who] had once attracted a large following by ridiculing rural people.").

36. *Id.*

37. *Id.*

applicable.[38] The new arrivals "routed" the Mexicans who had previously worked the land, and the new arrivals replaced the foreign-born laborers (including Americans of Filipino descent).[39] Some labor organizers among the new arrivals were "beaten, shot, and jailed" in California.[40] Of course, all of this in addition to the horrendous suffering visited upon workers—and the world—by the Great Depression.[41] Although our age seems long removed from the Dust Bowl, as one writer has observed, "[a] Dust Bowl event will most likely happen again."[42] It is noteworthy that the average temperature in the United Sates in summer 2021 exceeded the heat record set by the summer of 1936 during the Dust Bowl.[43]

b. Five Claimants from Five Federal Circuits

As other commentators have shown the persuasive force of relying on hypothetical claimants in their analyses of federal employment discrimination laws, in this Article, I focus on five hypothetical claimants—four originating in the United States and one abroad.[44] The hypothetical claimants are instructive in the absence of relevant case law.[45] The five claimants are meant to show the strengths and weaknesses of federal laws governing employment discrimination in an age of climate upheaval and forced adaptation. The five claimants are also meant to engage with the current political moment in the United States, which is a witness to the ongoing suffering of the poor and the targeting of individuals

38. *See id.* at 52–53; Fanslow, *supra* note 26; Todd, *supra* note 31, at 12.

39. *Id.*

40. *See* WORSTER, *supra* note 26, at 53.

41. *See id.* at 4–5; Lackey Interview, *supra* note 30, at 12, 14–15.

42. Lustgarten, *Reshaping America*, *supra* note 7.

43. *Summer 2021 neck and neck with Dust Bowl summer for hottest record*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Sept. 9, 2021), https://www.noaa.gov/news/summer-2021-neck-and-neck-with-dust-bowl-summer-for-hottest-on-record.

44. *See, e.g.*, Henry L. Chambers, Jr., *A Unifying Theory of Sex Discrimination*, 34 GA. L. REV. 1591, 1594-96 (2000) (hypothetical claimant in the context of Title VII); Jeanne M. Hamburg, Note, *When Prior Pay Isn't Equal Pay: A Proposed Standard for the Identification of "Factors Other Than Sex" Under the Equal Pay Act*, 89 COLUM. L. REV. 1085 (1989).

45. I have run the following searches both on LexisNexis and Westlaw: hurricane* or flood* or wildfire* or "natural disaster" or disaster* /100 employ* /15 discriminat*; "green new deal" /p employ* /9 discriminat*; "climate change" or "global warming" /20 employ* /9 discriminat*. I've run the following additional searches on Westlaw: climate /100 discriminat* /10 job* or work* or employ*; Title VII /50 "national origin" /255 "climate change" or "global warming"; discriminat* /20 "out of state" or "outside the state" or "different state" or "another state" /30 employ*. I have also run searches on the Internet.

from minority communities.[46] I also offer my insights notwithstanding denials about the reality of climate change both in the United States and elsewhere.[47]

I now identify the five hypothethetical claimants. The first hypothetical claimant is a thirty-eight-year-old agronomist of Chinese descent.[48] She decides to move to Michigan, which is thriving given its location.[49] The second plaintiff is a sixty-four-year-old Native American engineer.[50] She hears that North

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46. *See generally* David Nakamura, *Hate crimes rise to highest level in 12 years amid increasing attacks on Black and Asian people, FBI says*, WASH. POST (Aug. 30, 2021), https://www.washingtonpost.com/national-security/hate-crimes-fbi-2020-asian-black/2021/08/30/28bede00-09a7-11ec-9781-07796ffb56fe_story.html.

47. *See generally* Freeman & Guzman, *supra* note 2, at 1544–45 (espousing "the predominant scientific consensus—that climate change is indeed occurring . . . as a starting point.").

48. *See generally* Sabrina Tavernise & Richard A. Oppel, Jr., *Spit On, Yelled At, Attacked: Chinese Americans Fear for Their Safety*, N.Y. TIMES (May 5, 2021), https://www.nytimes.com/2020/03/23/us/chinese-coronavirus-racist-attacks.html; Ruro Kuo et al., *How It Feels to Be Asian in Today's America*, N.Y. TIMES (Sept. 25, 2021), https://www.nytimes.com/interactive/2021/09/25/us/asian-americans.html; Cal. Just. Info. Div., *Anti-Asian Hate Crime Events During the Covid-19 Epidemic*, CAL. DEP'T OF JUST. (2020), https://oag.ca.gov/system/files/media/anti-asian-hc-report.pdf.

49. *See* Al Shaw et al., *New Climate Maps Show a Transformed United States*, PROPUBLICA (Sept. 15, 2020), https://projects.propublica.org/climate-migration/. Further, to avoid possible stereotypes regarding names, I have chosen not to give the hypothetical claimants names. In doing so, I realize that I run the risk of only identifying claimants by their race, the states from which they came or are going, and/or their jobs, which may appear to depersonalize them; in other words, reinforcing or creating a stereotype of a different sort.

50. *See generally* Graham Lee Brewer, *As Native Americans Face Job Discrimination, A Tribe Works to Employ Its Own*, NPR (Nov. 18, 2017, 8:20 AM), https://www.npr.org/2017/11/18/564807229/as-native-americans-face-job-discrimination-a-tribe-works-to-employ-its-own. I realize that the use of terms like "Native American" requires sensitivity. Indeed, implying as much, the Smithsonian's National Museum of the American Indian indicates that the following terms "are acceptable": "American Indian, Indian, Native American, Indigenous, and Native." *Teaching and Learning About Native Americans*, NAT'L MUSEUM AM. INDIAN, https://americanindian.si.edu/nk360/faq/did-you-know (last visited Dec. 11, 2022). The website further indicates that "[i]n the United States, Native American has been widely used but is falling out of favor with some groups, and the terms American Indian or Indigenous American are preferred by many Native people." *Id.* The implication is that for some groups "Native American" is still the preferred term, but it is not for others. The implication, too, is that "American Indian or Indigenous American" is preferred by some, but not by others. The website suggests asking what each group prefers. *Id.* Given the sensitivity and complexity of the issue, this Article uses "Native American," knowledgeable that the term is fraught, but uncertain of which term might most respectfully represent the preferred term for indigenous people that have historically faced—and that continue to face—discrimination. Indeed, reflecting the same concerns as mine, Professor Kristine A. Huskey has, in a recent law-review article, said the following:

> As a non-Native American woman of color, I have trepidation about the terminology I use in referring to the peoples who are the subject of this Article. Based on extensive written materials and oral presentations by Native and non-Native individuals and entities, as well as conversations with Native American Veterans and non-Veterans, this Article uses interchangeably the numerous terms I have come across: Native American, American Indian, Indian, Alaska Native, Native People(s), and Indigenous Americans/People. I use the term "Indian" when sources I cite use the term. I use the

Dakota is thriving given its location, and she decides to move there.[51] The third claimant is a fifty-two-year-old African American accountant. She moves to Florida, where she takes a job at a resort.[52]

The fourth is a forty-six year old transgender Latina woman who immigrated to the United States and works as a museum curator.[53] Her native country is at extreme risk because of climate-related events.[54] She moves to San Francisco, California, where she is employed at a museum.[55] The final claimant is a twenty-year-old White woman from New Orleans, Louisiana, who works as a janitor at

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> term "American Indian/Alaska Native" (AIAN), in part, because the U.S. Department of Veterans Affairs uses the category (and acronym) for much of its reporting. According to the National Museum of the American Indian, both American Indian and Native American are acceptable; however, "[t]he consensus . . . is that whenever possible, Native people prefer to be called by their specific tribal name." Further, some Native people prefer American Indian or Indigenous American over Native American.

Kristine A. Huskey, *The Case for Tribal Veterans Healing to Wellness Courts*, 90 UMKC L. REV. 577, 577, n.1 (2022) (citing *Frequently Asked Questions*, NAT'L MUSEUM AM. INDIAN, https://americanindian.si.edu/nk360/faq/did-you-know (last visited July 19, 2021)).

51. *See* Shaw et al., *supra* note 49 ("By midcentury, North Dakota [], which already harvests millions of acres of both crops, will warm enough to allow for more growing days and higher yields.").

52. *See*, James Gregory, *Moving South: Reversing the Great Migration 1970-2017*, UNIV. OF WASH., https://depts.washington.edu/moving1/black_reverse_migration.shtml.

53. *See generally* Molly Hennessy-Fiske, *"She was really a warrior": Transgender migrant reaches U.S. only to die*, L.A. TIMES (Oct. 5, 2020), https://www.latimes.com/world-nation/story/2020-10-05/trans-asylum-seeker-made-it-to-america-only-to-die; Aurora Almendral & Danielle Villasasna, *What's next for these transgender asylum seekers stranded in Mexico?*, NAT'L GEOGRAPHIC (Feb. 4, 2021), https://www.nationalgeographic.com/history/article/what-next-for-transgender-asylum-seekers-stranded-mexico.

54. *See generally* Freeman & Guzman, *supra* note 2, at 1585 (illustrating "that at least some migrants will reach U.S. borders" by calling on the reader to "consider the most likely spillover into the United States: migration from Latin America."); Lustgarten, *supra* note 1 (discussing the impact of climate change on migration to the United States from Latin America); *See generally* Carmen G. Gonzalez, *Migration as Reparation: Climate Change and the Disruption of Borders*, 66 LOY. L. REV. 401 (2020) (discussing the obligations of the Global North to Latin American countries, among others, given the effects of climate change). I have declined to point to any one country in Latin America as the country of origin of the hypothetical Latina immigrant, again, to avoid stereotypes. I realize that I may be criticized for implicitly identifying all of Latin America as sending immigrants to the United States.

55. *See generally* Robinson v. Dignity Health, No. 16-CV-3035 YGR, 2016 WL 7102832, at *2–3 (N.D. Cal. Dec. 6, 2016) (involving a transgender employee from San Francisco who sues their employer, alleging violations of federal law).

a salt mine.[56] She is a single parent to a toddler.[57] Given the impact of climate-related events, such as hurricanes, in Louisiana, she decides to move to New York State.

Assume, for the sake of argument, the truth of the following additional facts. First, all workers, once legally in the United States, are entitled to the protection of federal employment laws.[58] Second, all five claimants qualify as "employees" under relevant law, and all defendants qualify as "employers" under relevant law. Third, all current prevailing federal, state, and local laws are in force when each of the lawsuits are brought in a timely manner, at roughly the same time, in the appropriate forum.[59] Fourth, the current political landscape in the United States, with all of its complexities, is in force when the lawsuits are brought. Fifth, all five claimants are excellent workers who learn that their supervisor has paid them less than their state-native counterparts since the outset of their employment, and consistently passed them over for promotion. Finally, the supervisor asks each of the five women one day, "[w]hy don't you just go back [to] where you came from? This is [our state]. That's the way things work over here. This is not the [place] where you came from."[60]

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56. While some might object to the identification of low income and poverty among White Americans, one of my goals in the creation of the hypothetical claimants is to show both that members of minority communities can be highly qualified and face discrimination, and that members of majority communities can also face discrimination, albeit on other grounds. More importantly, the goal of this Article is to talk of discrimination in general in the American workplace. The hypothetical professions are also meant to loosely track the water-dependent industries identified by the UNESCO report—agriculture (agronomist), construction (engineer), mining (janitor at a salt mine), power generation, recreation (museum curator), and tourism (accountant at a resort). *See* UNESCO, *supra* note 8, at 1–3.

57. *See generally* Joseph Chamie, *America's Single-Parent Families*, THE HILL (Mar. 19, 2021), https://thehill.com/opinion/finance/543941-americas-single-parent-families.

58. *See generally* Christine Bacon, Annotation, *Employee as Entitled to Title VII Protections Despite Being Citizen of Foreign Country*, 37 A.L.R. FED. 3D ART. 8 (2022) ("[Courts] are in agreement that Title VII applies to non-United States citizens who are legally working in the United States. There is less consensus on the issue of whether Title VII protects noncitizens who lack legal documentation authorizing them to work in the United States."); SANDRA F. SPERINO, THE LAW OF EMPLOYMENT DISCRIMINATION 24 (2019).

59. On statutes of limitation in employment-discrimination actions, *see generally* Duane Rudolph, *Workers, Dignity, and Equitable Tolling*, 15 NW. J. HUM. RTS. 126 (2017). New York is under the jurisdiction of the United States Court of Appeals for the Second Circuit ("Second Circuit"), Michigan falls under the jurisdiction of the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit"), North Dakota is part of the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit"), California is part of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit"), and Florida is part of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit"). *See generally* Admin. Office of the U.S. Courts, Geographic Boundaries of United States Courts of Appeals and United States District Courts, https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf (last visited Feb. 27, 2023).

60. *See generally* EEOC v. WC&M Enter., 496 F.3d 393, 397 (5th Cir. 2007) (involving an Indian Muslim immigrant whose colleagues state, "Why don't you just go back where you came from since you believe what you believe? . . . This is America. That's the way things work over

While this Article is the first to focus on climate change and employment-discrimination law in the United States, others have made this work possible. They have shown that climate change has implications for international labor standards.[61] They have gathered the existing literature on how climate change will affect employment within their borders.[62] They have indicated that climate change already has had an impact on migration and employment around the world, and it will continue to do so.[63] They have mentioned employment in the context of a national policy regarding climate change.[64] They have, similarly, argued that simultaneous attention to employment and environmental laws yields new insights.[65] They have examined constitutional arguments in the United States that might be raised in climate-change cases sounding in environmental law.[66] They have examined the impact of American federal labor and employment laws in the United States on minority groups.[67] Finally, they have attempted to harmonize a federal disaster-relief statute's anti-discrimination provisions with international principles.[68]

This Article unfolds in two parts. Part I shows that none of the most salient federal employment-discrimination statutes (notably, the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act of 1967, Title I of the Americans with Disabilities Act of

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here. This is not the Islamic country where you come from."); Uddin v. N.Y. City / Admin. for Child's Serv., 2001 U.S. Dist. LEXIS 19373, at *6–7, *13 (S.D.N.Y. Nov. 21, 2001) (involving a Bangladeshi immigrant's African American supervisors calling him "little Indian," telling him to "go back to where you came from", and "concoct[ing] various charges against [him] because he was Bangladeshi," resulting in adverse employment actions against him); James v. Terra S. Corp., 1999 U.S. Dist. LEXIS 5453, at *2 (M.D. Fla. Mar. 17, 1999) (involving white co-workers saying, "let's pass a jar around and make a collection to buy a boat so he can paddle himself back to where he came from," in reference to their black colleague, and telling him to "go back to where you came from, we don't need you over here," and to "get back on the boat,' 'n*****'").

61. *See* INT'L LABOUR ORG., *supra* note 10, at 7–8.

62. *See* POLICY DEP'T A: ECON. & SCI. POL'Y, EUR. PARLIAMENT, *The Impact of Climate Change Policies on the Employment Situation: Summary of Evidence Note*, 2 (2010), https://www.europarl.europa.eu/RegData/etudes/note/join/2010/433456/IPOL-JOIN_NT(2010)433456_EN.pdf.

63. *See* INT'L LABOUR ORG., *supra* note 10, at 11–12.

64. *See generally* U.N. ENV'T PROGRAMME, *Green Economy Policy Review of South Africa's Industrial Policy Framework* (2020), https://www.dffe.gov.za/sites/default/files/reports/greeneconomy_policyreview.pdf.

65. *See* David J. Doorey, *A Law of Just Transitions?: Putting Labor Law to Work on Climate Change*, 12 OSGOODE HALL L. SCH. LEGAL STUD. RSCH. PAPER SERIES, Issue 7, Rsch. Paper no. 35, at 3 (2016), https://digitalcommons.osgoode.yorku.ca/olsrps/164/.

66. *See* Mina Juhn, Note, *Taking a Stand: Climate Change Litigants and the Viability of Constitutional Claims*, 89 FORDHAM L. REV. 2731, 2741–46. (2021).

67. *See* Vicki J. Limas, *Application of Federal Labor and Employment Statutes to Native American Tribes: Respecting Sovereignty and Achieving Consistency*, 26 ARIZ. ST. L.J. 681, 682 (1995) (arguing against the application of federal labor and employment laws to Native American tribes given tribal sovereignty concerns).

68. *See* Perls, *supra* note 6, at 538–52 (examining the Stafford Act).

1990, and 42 U.S.C. § 1981 (1991)) will apply to cases brought as a result of climate change.[69] This Article shows that both the history of each statute and its prevailing interpretation do not lend themselves to expansive notions of workplace discrimination that would cover discrimination resulting from climate-related migration. This Article argues that seminal recent precedent from the Supreme Court of the United States interpreting Title VII, notably *Bostock v. Clayton County*, does not extend to employment discrimination based on climatic displacement. Part II argues that in the absence of necessary protection under federal law, the claimants will likely turn to state employment-discrimination laws, state common-law causes of action, and constitutional claims under federal law that likely will provide inadequate relief. I, therefore, make recommendations for congressional action in Part II. My conclusion follows.

A brief prefatory note on the number of statutes I have chosen to discuss. Some might wonder why I focus on five massive and complex federal statutes when a single one of them has generated a voluminous case law and commentary. Take Title VII, for example. Just one of Title VII's five protected classes, say, prohibiting discrimination on the basis of "sex," has a significant amount of materials referring to it. Over 25,000 cases mention "sex" and Title VII.[70] Over 11,000 secondary materials (including academic articles) mention "sex" and Title VII.[71] Almost 10,500 administrative materials mention "sex" and Title VII.[72] "Title VII" itself, in total, returns almost 200,000 cases in the database.[73] Almost 140,000 administrative codes and regulations refer to "Title VII," and almost 55,000 secondary materials—including academic articles—refer to that groundbreaking federal anti-discrimination statute alone.[74] Why focus, then, on five federal statutes when part of just one alone would be enough for a Law Review article?

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69. Thus, I do not deal with cases arising under The Rehabilitation Act of 1973, which prohibits discrimination against those with disabilities and is applicable only against the federal government. 29 U.S.C. § 701(a)–(c) (2018). I also do not deal with cases sounding in the Pregnancy Discrimination Act of 1978, which forbids discrimination on the basis of "pregnancy, childbirth, or related medical conditions . . . ." 42 U.S.C. § 2000e (k) (2018). I similarly do not deal with the Family Medical Leave Act of 1993, which forbids retaliation against an employee who exercises the statutory right to take leave for child and health-related reasons. 29 U.S.C. § 2615 (2018). In addition, I do not discuss the Uniformed Services Employment and Reemployment Rights Act, which deals with the civilian employment of members of the armed forces. 38 U.S.C. § 4301 (2018). Finally, I do not deal with the Genetic Information Nondiscrimination Act of 2008, which makes illegal discrimination based on genetic information. 42 U.S.C. § 2000ff-1(a) (2018).

70. A search in LexisNexis for "Title VII" /10 sex on February 3, 2022, returned 25,176 cases.

71. The same search returned 11,357 cases.

72. The same search returned 10,332 cases.

73. A search in LexisNexis for "Title VII" returned 191,531 cases.

74. The same search returned 137,881 administrative materials and 53,174 secondary materials.

The answer is that the scope of this Article requires an expansive focus. If its focus were restricted to only one of Title VII's provisions, then a legitimate question would arise about protection for those displaced by climate change under Title VII's other provisions. That question would, rightly, ripple its away across other federal anti-discrimination statutes touching on the treatment of workers in the American workplace. This Article implicitly concedes that, given the word limits imposed on a law-review Article, its analysis can by no means aspire to be exhaustive. Nevertheless, this Article does intend to be more representative than it otherwise might be as it answers a question that will be of increasing importance to employers and workers, and, as well, to the lawyers, judges, and legislators to whom those workers and employers will turn for legal relief in the time ahead.

I. FIVE FEDERAL STATUTES

This section evaluates the strength of the statutory causes of action that each of the five claimants might bring. The goal is twofold—first, to show the array of current federal laws in the United States targeting employment discrimination that will likely apply to each claimant, and second, to expose the limitations of such laws when dealing with discrimination arising because of a changing climate.

Specifically, beginning with the Equal Pay Act of 1963, the section discusses and applies some of the most prominent American statutes governing employment discrimination, notably Title VII, the Age Discrimination in Employment Act of 1967, Title I of the Americans with Disabilities Act of 1990, and 42 U.S.C. § 1981 (1991). The section shows that none of these statutes will apply to cases brought as a result of climate change. With the non-expert in mind, the section first provides a succinct history of each act, which also serves two purposes—first, to orient the non-expert regarding the reasons the statute was passed and signed into law, and second, to permit both the expert and non-expert to see why even a reading that relies on the statute's history will exclude cases arising from a changing climate.

A. The Equal Pay Act of 1963

Both the history and application of the Equal Pay Act show that it will not apply to cases arising as a result of climate change. To show this, this subsection provides an overview of the statute's history, which shows that the Equal Pay Act solely targets discrimination on account of sex. The subsection then shows that prevailing interpretations of the statute in the Second, Sixth, Eighth, Ninth, and Eleventh circuits (where each of the hypothetical claimants would likely bring suit) provide that the Equal Pay Act will not grant relief to any of the five claimants, whose claims originate as a result of climate change. Indicative of the fact that the history of the Equal Pay Act may be relevant, the Supreme Court of the United States has stated that the statute "is broadly remedial, and it should

be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve."[75]

i. "On the Basis of Sex"

The history of the Equal Pay Act reflects congressional concern about discrimination against women in the American workplace. Congresswoman Winifred Claire Stanley, a Republican from New York, introduced a predecessor to the Equal Pay Act in 1944.[76] Congresswoman Stanley was concerned that the return of male soldiers from the Second World War would result in discrimination against women already conscripted into the wartime workforce.[77] Congresswoman Stanley thus sought an amendment to the National Labor Relations Act of 1935 that would prohibit discrimination "on account of sex" because discrimination against women was "contrary to the public interest, and it [was] the policy of the United States, so far as practicable, to eliminate such discrimination."[78] The bill did not pass, and perhaps in an expression of why it did not receive the support it should have, a male congressman stated that "[a] woman's place [was] in the home."[79] When the veterans returned from the war, the federal government allowed them to replace those who held their former jobs, and the federal government stopped paying for child care.[80]

It would take almost twenty years of additional compensation discrimination against women in the American workplace before Congresswoman Stanley's vision for equality in workplace pay would be taken seriously enough for Congress to act.[81] "[S]urprising but overwhelming evidence," observed a congressman when the Equal Pay Act was under discussion in the 1960s, showed that discrimination against women persisted even in the "space age."[82] There persisted "the false concept that a woman, because of her very nature, somehow or other should not be given as much money as a man for similar

75. Corning Glass Works v. Brennan, 417 U.S. 188, 208 (1974).

76. *See Equal Pay for Equal Work Bill*, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Records-and-Research/Listing/lfp_031/; *Stanley, Winifred Claire*, U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/People/Listing/S/STANLEY,-Winifred-Claire-(S000798)/; *see also* Torie Abbott Watkins, Note, *The Ghost of Salary Past: Why Salary History Inquiries Perpetuate the Gender Pay Gap and Should Be Ousted as a Factor Other Than Sex*, 103 MINN. L. REV. 1041, 1046–47 (2018).

77. *See Equal Pay for Equal Work Bill*, *supra* note 76.

78. H.R. 5056, 78th Cong. (1944).

79. Jeff Z. Klein, *Heritage Moments: The Buffalo congresswoman and the fight for equal pay*, WFBO NPR (Feb. 26, 2018, 7:00 AM), https://www.wbfo.org/heritage-moments/2018-02-26/heritage-moments-the-buffalo-congresswoman-and-the-fight-for-equal-pay.

80. Diane L. Bridge, *The Glass Ceiling and Sexual Stereotyping: Historical and Legal Perspectives of Women in the Workplace*, 4 VA. J. SOC. POL'Y & L. 581, 589–90 (1997).

81. *See* Watkins, *supra* note 76, at 1047 ("Though her bill was unsuccessful, year after year, equal pay bills were proposed. But year after year, those bills failed to pass.").

82. Shultz v. First Victoria Nat. Bank, 420 F.2d 648, 656 n.17 (5th Cir. 1969).

work."[83] Women, therefore, were widely discriminated against and paid less than their male colleagues.

The numbers supported the concern. Adjusted for inflation, the median American income in 1964 was $58,123.22.[84] In some cases (also adjusted for inflation), women were paid between $70.45 and $176.13 less per week than a man in a similarly situated position.[85] The Equal Pay Act was a response to such an injustice.[86] Indeed, relying on the Commerce Clause to enact the statute, Congress reasoned that discrimination against women "depresses wages and living standards for employees necessary for their health and efficiency[,]" leads to waste of labor resources, causes labor disputes that can be disruptive to commerce, and is an example of unfair competition.[87] The Equal Pay Act, thus, prohibits discrimination in compensation "on the basis of sex."[88]

ii. "Ordinary, Contemporary, Common Meaning"

The Equal Pay Act applies to "equal work" requiring "equal skill, effort, and responsibility . . . performed under similar working conditions . . . ."[89] The act protects both women and men from compensation discrimination based on sex, but since it is part of the Fair Labor Standards Act, some of its provisions may not apply to certain employees in agriculture, computers, primary and secondary education, fishing, recreation, retail, and seafaring, among others.[90]

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83. *Id.*; *see also* Corning Glass Works, 417 U.S. at 195 (citing S. Rep. No. 176, at 1 (1963)) ("[T]he Equal Pay Act . . . [addressed] the fact that the wage structure of 'many segments of American industry [were] based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.").

84. *Income in 1964 of Families and Persons in the United States*, U.S. CENSUS BUREAU 1 (1965), https://www2.census.gov/library/publications/1965/demographics/p60-47.pdf ("The median income of all families in 1964 was about $6,600. . . . [T]he median income of white families was $6,900 in 1964 . . . . For nonwhite families, the median income advanced to $3,800 . . . ."); *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STATS. (Jan. 19, 2018), https://www.bls.gov/data/inflation_calculator.htm (permitting comparisons between the most recent data available at the time this article was written: July 2021 and June 1964).

85. *See* Damon Stetson, *Law in Effect Today Bans Job Discrimination Based on Sex*, N.Y. TIMES (July 10, 1964), https://www.nytimes.com/1964/06/10/archives/law-in-effect-today-bans-job-discrimination-based-on-sex.html (noting that studies by the Labor Department found that some women received between $8 and $20 less than men each week for similar office work); *CPI Inflation Calculator*, U.S. BUREAU OF LAB. STATS. (Jan. 19, 2018), https://www.bls.gov/data/inflation_calculator.htm (permitting comparisons between the most recent data available at the time this article was written: July 2021 and June 1964); *see also* Hamburg, *supra* note 44, at 1094.

86. First Victoria Nat. Bank, 420 F.2d at 656 n.17.

87. Equal Pay Act of 1963, Pub. L. 88–38, § 2(a)(1), 77 Stat. 56 (1963); *see also* First Victoria Nat'l Bank, 420 F.2d, at 657 n.19.

88. 29 U.S.C. § 206(d)(1) (2018); Corning Glass Works, 417 U.S. at 190 (noting that the Equal Pay Act deals with "the principle of equal pay for equal work regardless of sex.").

89. 29 U.S.C. § 206(d)(1) (2018).

90. *See* 29 U.S.C. § 213 (2018); Cty. of Wash. v. Gunther, 452 U.S. 161, 168 (1981); 29 C.F.R. § 1620.1 (2021).

Precedent from the federal circuits indicates that the Equal Pay Act only precludes discrimination in compensation based on sex. The Sixth Circuit, for example, where the Chinese American agronomist who moves to Michigan would likely bring her climate-discrimination suit, has stated that the Equal Pay Act prohibits discrimination "on the basis of sex."[91] The Eighth Circuit, where the Native American engineer would assert her claim for climate discrimination, has similarly stipulated that the statute governs "sex-based wage discrimination."[92] The Ninth Circuit, where the Latina museum curator would bring her suit for climate discrimination, has also stated that the Equal Pay Act governs compensation discrimination on the basis of sex.[93] Finally, the Eleventh Circuit, where the African American accountant would bring her claim for climate discrimination, has, in a similar vein, stated that the Equal Pay Act governs "differing wages to employees of opposite sexes."[94]

Most tellingly, the Second Circuit, where the White woman would bring suit for climate discrimination, has rejected an attempt to extend the reach of the Equal Pay Act beyond the statute's plain language. In *Mudholkar v. University of Rochester*, a professor brought suit against his employer, alleging, in relevant part, violation of the Equal Pay Act given reductions in his salary for discriminatory reasons to less than the median salary for similarly situated colleagues who worked with Ph.D. students.[95] While Professor Mudholkar admitted that the Equal Pay Act, on its own terms, applied to sex, he argued "for the expansion of existing law and/or the establishment of new law because racial, ethnic, and age discrimination are no less reprehensible than sex discrimination."[96] In the absence of support for such an expansion, the trial court rejected the argument, holding that "the Equal Pay Act prohibits only gender-based discrimination."[97] On appeal, the Second Circuit, attentive to the "ordinary, contemporary, common meaning" of the statute, upheld the dismissal of the professor's claim, holding that "[t]he Equal Pay Act is unambiguous in limiting its application to discrimination on the basis of sex, and that limitation does not render the broader statutory scheme incoherent."[98] The Equal Pay Act, thus, will likely not apply to climate discrimination.

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91. Briggs v. Univ. of Cincinnati, 11 F.4th 498, 507 (6th Cir. 2021).

92. Dindinger v. Allsteel, Inc., 853 F.3d 414, 421 (8th Cir. 2017).

93. Freyd v. Univ. of Or., 990 F.3d 1211, 1219 (9th Cir. 2021) ("In an Equal Pay Act case, the plaintiff has the burden of establishing a prima facie case of discrimination by showing that employees of the opposite sex were paid different wages for equal work.").

94. Smith v. Fla. A&M Univ. Bd. of Trs., 831 F. App'x 434, 439 (11th Cir. 2020).

95. Mudholkar v. Univ. of Rochester, 261 F. App'x 320, 322 (2d Cir. 2008).

96. *Id.* at 323 (internal quotation marks omitted).

97. Mudholkar v. Univ. of Rochester, No. 06-CV-6010T, 2006 U.S. Dist. LEXIS 69502, at *17 (W.D.N.Y Sept. 27, 2006).

98. Mudholkar, 261 F. App'x, at 323 (2d Cir. 2008) (upholding the dismissal of Title VII claims alleging discrimination on race and other grounds because they were filed late).

Indeed, from its inception, the Equal Pay Act was thought to solely target sex-based discrimination. In an interview in 2019 with another federal judge, the late Justice Ginsberg recounted her experience working as a law professor the year the Equal Pay Act was passed.[99] That year, 1963, Justice Ginsburg asked her dean about the salary of a male faculty member of a similar age, who had graduated from law school at roughly the same time.[100] "The response was swift: 'Ruth,'" the dean told the future Supreme Court justice, "'[your similarly situated male colleague] has a wife and two children to support. You have a husband with a well-paid job at a New York law firm.' That's the way people thought in the early 1960s."[101]

Justice Ginsberg specifically mentioned the Equal Pay Act in her interview.[102] Indeed, the Equal Pay act targeted just the kind of discriminatory thinking the future justice faced.

Tellingly, the five claimants' lawsuits are also unlikely to be successful even under the Equal Pay Act's plain language. Under the act, the plaintiff's prima-facie case is subject to a three-part test, which, to succeed, must overcome four statutory defenses. The plaintiff must establish by a preponderance of the evidence that (1) an employee of a different sex in the same establishment was paid more, (2) for work requiring equal skill, and (3) performed under similar working conditions.[103] The defendant can still defeat the plaintiff's prima-facie case by showing that the pay difference is justified by the existence of a "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . ."[104]

While it is clear from the facts of the hypothetical that the employers pay similarly situated employees who are natives of the states to which the claimants have moved more than they pay the five migrants, it is not clear that the similarly situated state natives meet the requirement of being of the opposite sex.[105] Thus, even before an employer asserts the defenses available to it under the Equal Pay Act, each claimant's prima-facie case for compensation discrimination on account of sex is weak. In any event, each claimant's suit for violation of the Equal Pay Act would not cover a claim brought for discrimination arising from

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99. *See* Elaine Bucklo, *An Interview with Justice Ginsburg*, 45 LITIG. 25, 27 (2019).

100. *Id.*

101. *Id.*

102. *Id.*

103. *See Corning Glass Works*, 417 U.S. at 195; Freyd v. Univ. of Or., 990 F.3d 1211, 1219 (9th Cir. 2021); Dindinger v. Allsteel, Inc., 853 F.3d 414, 421–22 (8th Cir. 2017); *see also* Jerald J. Director, Annotation, *Construction and application of provisions of Equal Pay Act of 1963 (29 U.S.C.A. § 206(d)) prohibiting wage discrimination on basis of sex*, 7 A.L.R. FED. 707 (2021). I am grateful to Jerald Director's treatment of the Equal Pay Act, which has informed my own treatment of the subject.

104. 209 U.S.C. § 206(d)(1) (2018); Cty. of Wash. v. Gunther, 452 U.S. 161, 167 (1981); *Corning Glass Works*, 417 U.S. at 196; Briggs, 11 F.4th at 507.

105. *See Freyd*, 990 F.3d at 1219.

climatic displacement given the governing interpretations of the act in the relevant circuits. The Equal Pay Act provides, therefore, no comfort to claimants asserting compensation discrimination on account of climatic displacement.

B. Title VII of the Civil Rights Act of 1964

As the Supreme Court has indicated, "[i]n our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964."[106] Both the history and prevailing interpretation of the Title VII show that the statute will not apply to cases arising on account of climate change. First, this section briefly discusses the history of Title VII, which shows that Title VII anticipates protection for several specific categories that do not embrace protection for those moving across boundaries because of a changing climate. The section then shows that prevailing interpretations of Title VII in the Second, Sixth, Eighth, Ninth, and Eleventh circuits will not permit the five claimants to prevail in their lawsuits alleging discrimination as a result of climate change.

i. "Because of Such Individual's Race, Color, Religion, Sex, or National Origin"

The history of Title VII shows that the statute is, at its core, a civil-rights statute anticipating protection for several specifically enumerated legal categories, especially those that are race-related. As federal appellate judges recently noted, "Title VII may be this century's most important piece of remedial legislation. Title VII struck a body blow to the race-based caste system that defined this country for centuries, and its promise of fair treatment has now thankfully been extended to the LGBT community."[107]

In 1941, Congressman Vito Anthony Marcantonio of New York State, a member of the American Labor Party, put forth a bill that would forbid discrimination in federal employment or contracts "because of Race, Color, or Creed."[108] A year later, the congressman introduced a bill expanding the categories that would be protected under federal law to include "Religion, National Origin, or Citizenship."[109] Fifteen years later, the first civil-rights act in more than eight decades (a precursor to Title VII) was signed into law.[110] The

106. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

107. Mandala v. NTT Data, Inc., 988 F.3d 664, 672 (2d Cir. 2021)

108. Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 431 (1966). I am grateful to Vaas's article, which has informed my approach to this subsection.

109. *Id.* at 431.

110. *See* 52 U.S.C. § 10101. *See generally* Paulette Brown, *The Civil Rights Act of 1964*, 92 WASH. U. L. REV. 527, 531 (2014) ("Proposed in 1957 by President Eisenhower, the Civil Rights Act of 1957 was the first civil rights legislation since Reconstruction and came on the heels of the Supreme Court's decision in *Brown v. Board of Education*."); *id.* at 531–32 ("Lyndon B. Johnson, who would later push to get the Civil Rights Act of 1964 passed, similarly pushed through the Civil Rights Act of 1957.").

Civil Rights Act of 1957 created the Civil Rights Division of the Department of Justice, the United States Commission on Civil Rights, and it protected the voting rights of racial minorities.[111] The Civil Rights Act of 1960, yet another precursor to Title VII, further protected the voting rights of racial minorities.[112]

The years intervening between the Civil Rights Act of 1960 and the passage of Title VII of the Civil Rights Act of 1964 provide testimony regarding the environment in which racial minorities in the United States were compelled to live and work. In 1961, the United States Commission on Civil Rights published its statutory report, which documented public and private brutality disproportionately targeting African Americans, including brutal police beatings of African American men resulting in brain damage, severe bodily injury, and death (often with impunity).[113] One police officer allegedly "put his foot on the small of the prostrate [African American man's] back [footprints were later seen], and warned him, 'You'd better not say a damn thing about it or I'll stomp your damn brains out.'"[114] The idea, said the federal report, was to "keep the Negro in his place."[115] The violence directed at African Americans in particular, had telling effects in the employment area. The disproportionate impact of a "recent recession" on African Americans, observed another federal report, "underlined the fact that [African Americans] are by and large confined to the least skilled, worst paid, most insecure occupations; that they are most vulnerable to cyclical and structural unemployment and least prepared to share in, or contribute to, the economic progress of the Nation."[116]

Against this background, a congressman from California proposed, in 1963, "[a] Bill to Prohibit Discrimination in Employment in Certain Cases Because of Race, Religion, Color, National Origin, Ancestry or Age."[117] That bill was merged with another, which ultimately became Title VII, and it included an amendment adding "sex" as a protected category.[118] Title VII, thus, prohibits

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111. *See* 52 U.S.C. § 10101 (protecting the voting rights of minorities); Herbert Brownell, *Civil Rights in the 1950s*, 69 TUL. L. REV. 781, 791 (1995) ("The 1957 Act, among other provisions, removed many barriers to voting by black citizens in the South. It also led to the establishment of the Civil Rights Division of the Justice Department. It further provided for the establishment of the Federal Civil Rights Commission.").

112. Civil Rights Act of 1960, Pub. L. No. 86–449, § 601, 74 Stat. 86, 90 (1960); *see generally* Nicole L. Gueron, Note, *An Idea Whose Time Has Come: A Comparative Procedural History of the Civil Rights Acts of 1960, 1964, and 1991*, 104 YALE L.J. 1201, 1215 (1995).

113. *See* U.S. COMM'N ON C.R., JUSTICE: 1961 COMMISSION ON CIVIL RIGHTS REPORT 1–28 (1961) (documenting, in addition, discrimination targeting Native Americans).

114. *Id.* at 9–10.

115. *Id.* at 12.

116. *Id.* at 6.

117. Vaas, *supra* note 108, at 433; *see also* EEOC, COMPLIANCE MANUAL § 15–1 (2006), https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination#II ("The impetus for the Act was the civil rights movement of the 1950s and 1960s, which challenged the denial of the right of Blacks to participate equally in society.").

118. Vaas, *supra* note 108, at 433–41 (observing that the inclusion of "sex" was "offered . . . in a spirit of satire and ironic cajolery."). *But see* Rachel Osterman, Note, *Origins of A Myth: Why*

employer practices that discriminate on account of "race, color, religion, sex, or national origin."[119]

ii. "Ordinary Public Meaning"

"Title VII," as a commentator has noted, "covers all aspects of the employment relationship [from] pre-employment conduct [to] post-employment retaliatory conduct."[120] The statute prohibits adverse employment actions against employees in several protected classes, which the act identifies as discrimination "because of such individual's race, color, religion, sex, or national origin."[121] A plaintiff's most common theories of liability under Title VII are disparate treatment (the employer treated similarly situated employees outside the protected class differently) and disparate impact (the employer had a facially neutral policy that unfairly burdened members of the protected class).[122]

Disparate treatment can be shown through direct evidence of discriminatory animus or through burden shifting in cases involving indirect proof.[123] As for disparate-impact, as stated above, it focuses on an apparently neutral employer policy, which, in practice, unfairly burdens individuals from protected groups.[124] The Supreme Court has held that harassment is also a form of discrimination under Title VII, which can be shown through evidence of a hostile work environment or quid-pro-quo harassment.[125] Retaliation, and negligence (a tort cause of action) are also available theories of liability under Title VII.[126] Courts

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Courts, Scholars, and the Public Think Title VII's Ban on Sex Discrimination Was an Accident, 20 YALE J.L. & FEMINISM 409, 416 (2009) (refuting the view that the addition of sex-based discrimination was a joke).

119. 42 U.S.C. § 2000e-2(a) (2018).

120. Chambers, *supra* note 44, at 1596–97.

121. 42 U.S.C. § 2000e-2(a)(1); 42 U.S.C. § 2000e-3(b). I am grateful to the following resource on which I have relied in drafting this section: Thomson Reuters, *Discrimination Under Title VII: Basics, Practical Law Practice Note 6-518-4067*, Westlaw (2022), https://us.practicallaw.thomsonreuters.com/6-518-4067 [hereinafter *Discrimination Under Title VII*].

122. Other theories of liability under Title VII, which are not relevant for the present purposes, include pattern or practice, teamster's framework, cat's paw, and failure to accommodate religious practices. *See Discrimination Under Title VII*, *supra* note 121.

123. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973); SPERINO, *supra* note 58, at 62–78.

124. *See* 42 U.S.C. § 2000e-2(k).

125. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65, 73 (1986); *see also* CONTE, *supra* note 130, at 2–9; *see also* SPERINO, *supra* note 58, at 126–131 (discussing the availability of hostile work environment claims when the plaintiff belongs to a protected group). "If a plaintiff claims she faced harassment because of personal animosity unrelated to a protected trait, she does not have a viable harassment claim." *Id.* at 127. Here, given the absence of a protected basis on which such claims might be brought, and given space considerations, I do not discuss such claims.

126. *See Discrimination Under Title VII*, *supra* note 121.

make a number of defenses available under the act.[127] Notably, a goal of Title VII is to steer claimants away from the courts by requiring them to work with the Equal Employment Opportunity Commission ("EEOC"), a federal agency whose important charge it is to enforce the statute (among others).[128]

Next, I show that precedent from the Second, Sixth, Eighth, Ninth, and Eleventh circuits likely does not permit the protected categories under Title VII to reach discrimination on account of a changing climate. I begin first with race, followed by color, religion, sex, and, finally, national origin.

Race

Title VII does not define "race."[129] The EEOC's Compliance Manual admits as much, and, significantly, the manual indicates that Title VII's racial categories are "social-political constructs . . . and should not be interpreted as being genetic, biological, or anthropological in nature."[130] For the purposes of federal employment-discrimination law, the manual identifies "five racial categories: *American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander*; and *White*; and one ethnicity category, *Hispanic or Latino*."[131] The manual indicates that race, under Title VII, covers ancestry (distinguished from national origin), physical characteristics, race-linked illness, culture (including accent, speech, dress, and grooming practices), perception (assuming that an individual belongs to a particular racial group), association (through marriage or other relationship), a racial subgroup, and reverse discrimination (against Whites).[132]

Precedent from the Second, Sixth, Eighth, Ninth, and Eleventh circuits shows that these federal circuits take the meaning of "race" for granted. The Second Circuit, where the young White woman would bring suit, holds that stating one's race meets the first requirement of suing for race-based discrimination under

127. Such defenses include the fact that the plaintiff and the defendant are in the same protected class, that the defendant was fully aware of the plaintiff's protected class at hiring, that newly acquired evidence of the plaintiff's wrongdoing would have resulted in dismissal anyway, that the defendant had mixed motives, and that the policy complained of was an affirmative-action policy, among others. *Discrimination Under Title VII*, *supra* note 121.

128. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (emphasis added) ("Even in its amended form, however, Title VII does not provide the Commission with *direct* powers of enforcement. The Commission cannot adjudicate claims or impose administrative sanctions."); 42 U.S.C. § 2000e-4 (mentioning the Commission's enforcement powers).

129. *See* 42 U.S.C.A. § 2000e (West).

130. EEOC COMPLIANCE MANUAL, *supra* note 117, at §15–II. Note that the EEOC's "regulations are nonbinding administrative interpretations of the Civil Rights Act, but constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." 1 ALBA CONTE, SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE, 2-8 (5th ed. 2022) (internal citation and quotation marks omitted).

131. *See* EEOC COMPLIANCE MANUAL, *supra* note 117, at §15–II.

132. *Id.*

Title VII.[133] The Sixth Circuit, where the Chinese American (termed "Asian") agronomist would bring her claim, mentions the individual's race and relevant facts before engaging in the relevant analysis of race-based claims under Title VII.[134] The Eighth Circuit, where the Native American ("American Indian") engineer would bring her claim, and the Eleventh Circuit, where the African American accountant would bring her claim, similarly mention the plaintiff's race before applying the relevant Title VII precedent to those facts.[135] The Ninth Circuit, where the Latina museum curator would likely assert her claim, sometimes only mentions a plaintiff's national origin, presumably because the relevant racial information is already on the record.[136] Thus, the circuits take for granted that "race" plainly means one of the enumerated racial categories in the manual, and they continue their analyses from there. Precedent explains that "one reason for the general lack of controversy [regarding the meaning of 'race' in the case law] is the broad language of Title VII, including not only race but

133. *See* Fu v. Consol. Edison Co. of N.Y., Inc., 855 F. App'x 787, 789 (2d Cir. 2021) (noting that the plaintiff "clearly established the first element of her race discrimination claim under Title VII because she is Asian").

134. *See* Threat v. City of Cleveland, 6 F.4th 672, 675–76 (6th Cir. 2021) (noting that the plaintiffs "are captains in the division, they belong to the same union, and, pertinent to this dispute, they are black"). On those of Chinese descent being referred to broadly as "Asians" for the purposes of Title VII, *see generally* Lee v. Cleveland Clinic Found., 676 F. App'x 488, 490, 497 n.2 (6th Cir. 2017) (involving a retired nurse of Chinese descent born in India); *Chuang v. Univ. of California Davis, Bd. of Trustees*, 225 F.3d 1115, 1119 (9th Cir. 2000):

> Dr. Ronald Y. Chuang and Dr. Linda Chuang contend that officials at the University of California, Davis ("Davis") discriminated against them on the basis of their race (Asian) and national origin (Chinese), in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

135. *See* Gipson v. Dassault Falcon Jet Corp., 983 F.3d 377, 379 (8th Cir. 2020) ("In 2012, [the plaintiff] was made aware of an offensive email sent around by a colleague; the email compared an African-American male to a monkey."). On Native Americans being referred to as "American Indians" for purposes of Title VII, *see generally* McCoy v. Metro. Nat'l Bank, 2 F. App'x 629, 630 (8th Cir. 2001) ("Shanna McCoy, an African-American/American Indian diagnosed with cerebral palsy, brought this employment discrimination action against her former employer"); *Burke v. Brennan*, No. 5:16CV90-RH/CAS, 2017 WL 487021, at *1 (N.D. Fla. Feb. 6, 2017), *aff'd sub nom. Burke v. Postmaster Gen.*, 719 F. App'x 986 (11th Cir. 2018) (stating in a case that ultimately held that racial discrimination was not present that the plaintiff's amended complaint indicated that she had "suffered discrimination because she is 'Native American Indian.' . . . This order uses the shorter phrase 'American Indian.' American Indian is of course a protected characteristic under Title VII. This order refers to the characteristic as a race.").

136. *See* Zhang v. Cnty. of Monterey, 804 F. App'x 454, 457 (9th Cir. 2020) (mentioning the plaintiff's Chinese background); Zhang v. Cnty. of Monterey, No. 17-CV-00007-LHK, 2018 U.S. Dist. LEXIS 69944, at *1 (N.D. Cal. Apr. 24, 2018) ("Plaintiff is an Asian woman 'whose national origin is Chinese. . . . Plaintiff 'is a native of China' and immigrated to the United States from China in 1996.").

also color, national origin, and religion."[137] If one category does not cover the plaintiff's claim, one of the others likely will.[138]

A trial-court case from the Eleventh Circuit, where the African American accountant would likely bring her claim, is instructive regarding how some federal courts approach the definition of "race" under Title VII.[139] In *Bonadona v. Louisiana College*, Joshua Bonadona, whose mother was Jewish and whose father was Catholic, "was raised both culturally and religiously as a member of the Jewish community."[140] Mr. Bonadona then practiced Christianity, and applied for a job as a football coach, which was denied to him after he revealed "his Jewish heritage."[141] Mr. Bonadona argued that the Jewish community was "a protected racial class" under Title VII.[142] In doing so, Mr. Bonadona relied on precedent interpreting other civil-rights statutes that identified the Jewish community as a race going back to 1866.[143]

The trial court, nevertheless, rejected the magistrate judge's recommendation that the Jewish community be considered a race for the purposes of Title VII.[144] The magistrate judge reasoned that members of the Jewish community faced discrimination, and, in the eyes of those who treated the community atrociously, members of the Jewish community were part of a race or ethnic group:

> Jewish citizens have been excluded from certain clubs or neighborhoods, and they have been denied jobs and other opportunities based on the fact that they were Jewish, with no particular concern as to a given individual's religious leanings. Thus, they have been treated like a racial or ethnic group that Title VII was designed to protect from employment discrimination based on membership in that group.[145]

First, reasoned the federal judge reviewing the recommendation of the magistrate judge, care should be exercised when applying one statute's precedent to another, especially when the purposes and content of the statutes were different.[146] For the trial court, the magistrate judge had disobeyed statutory canons of interpretation and language in governing cases "that §§ 1981

137. Bonadona v. La. Coll., No. 18-CV-0224, 2018 U.S. Dist. LEXIS 158121, at *8 (W.D. La. July 13, 2018).

138. *Id.*

139. *Id.*

140. Bonadona v. La. Coll., No. 1:18-CV-00224, 2019 U.S. Dist. LEXIS 149401, at *1 (W.D. La. Aug. 28, 2019).

141. *Id.* at *2–*3.

142. *Id.* at *5.

143. *Id.* at *5–*6.

144. *See* Bonadona, 2018 U.S. Dist. LEXIS 158121, at *14 ("The undersigned [magistrate judge] is of the opinion that Plaintiff's amended complaint alleges facts that state a claim of Title VII employment discrimination based on race.").

145. *Id.*

146. Bonadona, 2019 U.S. Dist. LEXIS 149401, at *5.

and 1982 [other federal anti-discrimination statutes] should be interpreted according to the intent at the time they were passed. The same holds true for Title VII. At the time it was passed, the Jews were not thought of as a separate race."[147] Thus, Mr. Bonadona's race-based claim under Title VII should fail.[148] By implication, then, a claim for climate discrimination would be even weaker than Mr. Bonadona's claim because Mr. Bonadona's position had precedent supporting it, which the trial court rejected.

Further support for the plain meaning of "race" under Title VII can be found in commentators' important work on the statute. Commentators have argued, for example, that in discussing "race," courts impose a "biological" reading of "race" that focuses on the plaintiff's involuntary or immutable features as part of the court's own "assimilationist" approach to Title VII.[149] Scholars have argued that Title VII permits a "voluntary, conscious use of race" in the workplace to minimize workplace discrimination, encourage workplace integration, and uphold Title VII's goals.[150] Scholars have questioned the strength of the arguments raised in reverse-discrimination cases involving employment testing.[151] They have rejected an approach that sacrifices Title VII's focus on particularist race-based claims for a focus on universalist post-racial claims by relying on other liability theories under federal law.[152] Commentators have also rejected a "zero-sum" approach to Title VII which, instead of fostering solidarity among racial groups, encourages them to "compete against one another for workplace spoils."[153]

Finally, the five claimants' lawsuits are unlikely to succeed even under Title VII's race-discrimination theory. The five claimants will likely argue that the supervisor's remark telling them to return to their home states provides direct evidence of discrimination.[154] Case law indicates, however, that "stray remarks"

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147. *Id.* at 7; *see generally* Kenneth L. Marcus, *Jurisprudence of the New Anti-Semitism*, 44 WAKE FOREST L. REV. 371, 397 (2009) ("The nineteenth century saw a shift from religious to racialist anti-Semitism, attributed largely to German journalist Wilhelm Marr and his colleagues. Racialist anti-Semitism constructed Jews as members of a distinct Semitic racial group with biological characteristics that were the basis for perceived moral and intellectual traits and deficiencies.").

148. Bonadona, 2019 U.S. Dist. LEXIS 149401, at *7.

149. *See* Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1139–42, 1170-71 (2004).

150. *See* Tristin K. Green, *Race and Sex in Organizing Work: "Diversity," Discrimination, and Integration*, 59 EMORY L.J. 585, 591 (2010).

151. *See* Kimberly West-Faulcon, *Fairness Feuds: Competing Conceptions of Title VII Discriminatory Testing*, 46 WAKE FOREST L. REV. 1035, 1038–39 (2011).

152. *See* Charlotte S. Alexander et al., *Post-Racial Hydraulics: The Hidden Dangers of the Universal Turn*, 91 N.Y.U. L. REV. 1, 9 (2016).

153. Noah D. Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63, 70 (2002).

154. *See generally* SPERINO, *supra* note 58, at 64 ("Other direct evidence cases rely on comments or conduct that tie a negative employment decision to a protected trait.").

of this sort are not evidence of direct discrimination.[155] Even where a supervisor allegedly referred to employees as the "n word," one federal trial court held that although "shameful[,] . . . an isolated offensive utterance" did not give rise to a hostile-work-environment claim under Title VII.[156] Indeed, the five plaintiffs likely will be unsuccessful in their attempts to point to their lower salaries as direct evidence of discrimination because there is no evidence supporting the proposition that the lower salaries in their adopted domiciles are the result of racial discrimination. As a source says regarding a different case, "[w]hile [lower compensation] is direct evidence of different compensation, it is circumstantial evidence about the reasons for that difference."[157] Thus, the five claimants' attempts to establish a direct-evidence claim of employment discrimination will likely fail.

As a result, the plaintiffs will likely rely on burden-shifting to the make their circumstantial-evidence case. Typically, to bring such a claim, a plaintiff must show (1) membership in a protected class, (2) qualification for the position, (3) experience of an adverse employment action, and (4) more favorable treatment of similarly situated individuals not within the plaintiff's protected class, or that an inference of discrimination may be drawn from other evidence.[158] The burden then shifts to the defendant to provide a non-discriminatory reason for the adverse employment action.[159] The plaintiff can then show that the defendant's reason is a pretext for discrimination.[160] While all five complainants will satisfy the first three prongs (protected class, qualification, and adverse employment action), they will not satisfy the fourth prong. That is, they will not be able to show that similarly situated employees of a different *race* were treated more favorably. The fact that natives of the state to which they have moved are

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155. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) ("[S]tray remarks in the workplace . . . cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden . . . .").

156. *See* Jones v. Cont'l Cuisine, Inc., 353 F. Supp. 2d 716, 720–21 (E.D. La. 2004). *But see* Williams v. Mercy Health Sys., 866 F. Supp. 2d 490, 499 (E.D. Pa. 2012) (reaching the opposite conclusion). On the distinction between using and mentioning racial slurs, *see generally* Randall Kennedy et al., *The New Taboo: Quoting Epithets in the Classroom and Beyond*, 49 CAP. UNIV. L. REV. 1, 42 (2021).

157. Cotton M. Lindsay & Charles A. Shanor, *County of Washington v. Gunther: Economic and Legal Considerations for Resolving Sex-Based Wage Discrimination Cases*, 1 S. CT. ECON. REV. 185, 188 (1982).

158. Here, I have combined, for the sake of summary, the approaches of the five appellate circuits. I have relied on the following cases: Hengjun Chao v. Mount Sinai Hosp., 476 F. App'x 892, 896 (2d Cir. 2012); Wingo v. Mich. Bell Tel. Co., 815 F. App'x 43, 45 (6th Cir. 2020); Watson v. McDonough, 996 F.3d 850, 855 (8th Cir. 2021); Sheets v. City of Winslow, 859 F. App'x 161, 162 (9th Cir. 2021); Herron-Williams v. Ala. State Univ., 805 F. App'x 622, 628 (11th Cir. 2020); *see also* SPERINO, *supra* note 58, at 74–79.

159. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

160. *See id.* at 804.

paid more does not make those individuals' state citizenship a racial category under Title VII. Thus, the five claimants are likely to fail on a claim under Title VII both for racial and climate discrimination.

Color

Title VII does not define "color."[161] Again, the EEOC Compliance Manual provides a definition.[162] The manual indicates that the "commonly understood meaning" of "color" means "pigmentation, complexion, or skin shade or tone."[163] Color discrimination, the manual continues, can occur both within the same race or ethnicity and across races and ethnicities.[164] The manual indicates that it uses "race" to refer to "color" both for "stylistic" reasons and for the reason that more race claims are asserted each year than are claims regarding color.[165]

None of the five claimants are likely to bring a successful color-based claim for climate discrimination (or discrimination based on color) for two reasons. First, precedent from the Eleventh Circuit, where the African American accountant would likely litigate her claims, indicates that federal courts may reject such claims.[166] In *Walker v. Secretary of Treasury, I.R.S.*, Ms. Walker, a light-skinned African American employee, asserted a color-based claim against the federal government, her employer.[167] Ms. Walker alleged that solely on the basis of her light skin, her darker-skinned supervisor at the IRS "singled her out for close scrutiny and reprimanded her for many things that were false or insubstantial."[168] After Ms. Walker complained, her supervisor recommended that her employment be terminated, and subsequently, that occurred.[169]

The government argued that "race" under Title VII subsumed "color."[170] In addition, the government argued that "there [was] no cause of action pursuant to Title VII available to a light-skinned black person against a dark-skinned black person."[171] In response, the trial court considered the history of Title VII, and it rejected the federal government's position when it held that the "plain meaning" of Title VII showed that race and color were not the same thing.[172] "To hold otherwise would mean that Congress and the Supreme Court have either

161. *See* 42 U.S.C. § 2000e.
162. EEOC, *supra* note 117, at §15–3.
163. *Id.*
164. *Id.*
165. *Id.*
166. Walker v. Sec'y of Treasury, I.R.S., 713 F. Supp. 403, 409 (N.D. Ga. 1989).
167. *Id.* at 404.
168. *Id.*
169. *Id.*
170. *Id.* at 405.
171. *Id.*
172. *Id.* at 406.

mistakenly or purposefully overlooked an obvious redundancy."[173] Ms. Walker also succeeded on her other claim.[174] On that claim, the court reasoned that only an "ethnocentric and naive world view [would] suggest that we can divide caucasians into many sub-groups but some how [sic] 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."[175]

Thus, "race" under Title VII does not mean "color." We can also understand that the term "color" can be defined to mean "skin tone within the same racial group" or "skin tone across racial groups," but "color" very likely does not mean "climate discrimination."[176] Moreover, none of the facts of the hypothetical claimants indicates that any of the claimants' skin color is of concern. Therefore, yet another Title VII category likely provides no relief for climate-discrimination cases.

Religion

Title VII's plain language defines "religion" as including "all aspects of religious observance and practice, as well as belief."[177] The statute prohibits discrimination on the basis of religion (as it does for all protected classes) in the hiring, compensation, firing, "terms, conditions, or privileges of employment."[178] The statute also prohibits employer attempts "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . religion."[179] The Supreme Court has held that for a religion-based claim to prevail under Title VII's disparate-treatment theory, the claimant need only show that the need for an accommodation on religious grounds was a motivating factor in the adverse employment decision, not that the employer had actual knowledge of the need for an accommodation.[180]

Courts have construed "religion" fairly broadly. Citing to some of that precedent, the EEOC Compliance Manual indicates that it is irrelevant whether

173. *Id.*

174. *Id.* at 408.

175. *Id.* at 407-08.

176. *See generally* Recent Case, *Title VII – Discrimination on Basis of "Race" or "Color"– Federal Court Recognizes Cause of Action For Intraracial Bias–Walker v. IRS, 713 F. Supp. 403 (N.D. Ga. 1989)*, 103 HARV. L. REV. 1403, 1407 (1990) (showing just how expansive the approach in *Walker* is, by noting that "[b]y broadening title VII, however, *Walker* represents the most recent dilution of the legislative intent of the Civil Rights Act of 1866 and its progeny").

177. 42 U.S.C. § 2000e(j) (2018).

178. 42 U.S.C. § 2000e-2(a)(1) (2018).

179. § 2000e-2(a)(2).

180. *See* EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 773–74 (2015).

the claimant's religious beliefs are espoused by organized religion.[181] What matters is "whether the beliefs are, in the individual's own scheme of things, religious."[182] Theism is not required as "nontheistic beliefs can also be religious for purposes of the Title VII exemption as long as they occupy in the life of that individual a place parallel to that filled by . . . God in traditionally religious persons."[183]

Case law supports the EEOC's position. In *Peterson v. Wilmur Communications, Inc.*, the plaintiff, Mr. Peterson, was a "reverend" in the World Church of the Creator, a white-supremacist organization whose central tenet was "what is good for the White Race is the highest virtue, and what is bad for the White Race is the ultimate sin."[184] The "religion's" pamphlet indicated that "[a]fter six thousand years of recorded history, our people finally have a religion of, for, and by them."[185] The pamphlet further stated that "history has shown the United States that the White Race is responsible for all that which we call progress on this earth; and that it is therefore logical and sensible to place supreme importance upon Race and to reject all ideas which fail to do so."[186]

Mr. Peterson's "religious" beliefs sanctified the most contemptible, benighted, and injurious beliefs about racial and religious minorities.

> Creativity [the white-supremacist church's beliefs] teaches that people of color are savage and their desire is to mongrelize the White Race, that African–Americans are subhuman and should be ship[ped] back to Africa; that Jews control the nation and have instigated all wars in this century and should be driven from power, and that the Holocaust never occurred, but if it had occurred, Nazi Germany would have done the world a tremendous favor.[187]

Mr. Peterson and his church envisioned "a white supremacist utopian world of beautiful, healthy [white] people, free of disease, pollution, fear and hunger. . . . This world can only be established through the degradation of all non-whites."[188] Mr. Peterson gave an interview to the local press in which he was seen "holding a tee shirt bearing a picture of Benjamin Smith, who, carrying a copy of *The White Man's Bible*, had targeted African American, Jewish and Asian people in a two-day shooting spree in Indiana and Illinois before shooting himself in the

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181. *See EEOC Compliance Manual* §12, U.S. Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#_ftn8.

182. *Id*. (internal quotation marks omitted).

183. *Id*. (internal quotation marks omitted).

184. Peterson v. Wilmur Commc'ns, Inc., 205 F. Supp. 2d 1014, 1015–16 (E.D. Wis. 2002).

185. *Id.* at 1015.

186. *Id.*

187. *Id.* (internal quotation marks omitted).

188. *Id.* at 1016 (alteration in original) (internal quotation marks omitted).

summer of 1999."[189] As a result, Mr. Peterson was demoted in his job, where he was a supervisor of three non-Whites.[190]

The federal trial court noted the difficulty and sensitivity involved in deciding religious discrimination cases arising under Title VII.[191] Such a task, said the court, required prudence because "religion" under Title VII was "a source of great controversy [both] for courts and commentators."[192] The trial court had to keep in mind the fact that "the Supreme Court ha[d] noted the care that courts must exercise in this area to avoid making theological pronouncements that exceed the judicial ken."[193] The trial court held that it was required to accord "great weight" to Mr. Peterson's own characterization of whether his beliefs were "sincerely held" and "religious in [his or her] own scheme of things."[194] Mr. Peterson met those requirements even though the court and others may reject Mr. Peterson's views on moral or other grounds.[195] In other words, "religion" can cover beliefs of a profoundly disturbing nature, but nothing in *Peterson* (or in the hypothetical facts that are the focus of this Article) suggest that "religion" under Title VII extends to climatic displacement. Another Title VII category, thus, provides no respite for the five claimants.

Sex

Title VII's plain text indicates that the phrases "because of sex" and "on the basis of sex include, but are not limited to . . . pregnancy, childbirth, or related medical conditions."[196] Sexual harassment, the Supreme Court has held, is a form of sex discrimination.[197] Explicit discrimination on the basis of sex gives rise to a quid-pro-quo claim, and constructive discrimination on the basis of sex gives rise to a hostile work environment claim, which must show that the harassment was severe or pervasive.[198] While the Equal Pay Act and Title VII both cover discrimination in compensation on the basis of sex, Title VII makes the plaintiff's prima-facie case easier to establish since a claimant under Title

189. *Id.* at 1016.

190. *Id.* at 1016.

191. *Id.* at 1018 ("The determination of what is a religion or religious belief is more often than not a difficult and delicate task.") (internal quotation marks omitted).

192. *Id.*

193. *Id.*

194. *Id.* at 1018.

195. *Id.* at 1024.

196. 42 U.S.C. § 2000e(k) (2018) (internal quotation marks omitted).

197. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986). Harassment on other protected grounds is similarly prohibited under federal law. *See* SPERINO, *supra* note 58, at 123–32.

198. Burlington Indus. v. Ellerth, 524 U.S. 742, 752 (1998); Meritor, 477 U.S. at 65.

VII need not show that the jobs being compared are equal.[199] However, unlike the Equal Pay Act, Title VII requires a showing of discriminatory intent.[200]

At first glance, the case law regarding the definition of "sex" under Title VII enhances the five claimants' likelihood of success for discrimination on the basis of climatic displacement. The reason is a recent case from the Supreme Court which holds that "sex" under Title VII encompasses a prohibition against discrimination on the basis of sexual orientation and gender identity.[201] *Bostock v. Clayton County*, "one of the most significant civil rights law decisions of modern times," consolidated and decided three cases arising under Title VII's "sex" category.[202]

The eponymous claimant, Gerald Bostock, was dismissed from his county job for "unbecoming" conduct because he played recreational baseball with other members of the gay community.[203] The second plaintiff, Donald Zarda, was a sky diving instructor who, just days after mentioning he was gay, was fired.[204] Aimee Stephens, the third plaintiff, informed her employer that she was transitioning from her assigned sex (male) to her actual gender (female), and her employment was terminated.[205] The Supreme Court held for the plaintiffs.[206] Unfortunately, however, only Mr. Bostock lived to see the outcome in the case as Ms. Stephens and Mr. Zarda both passed away before their appeals were decided.[207]

Before finding for the claimants, Justice Gorsuch, writing for the Court, first looked at the "ordinary public meaning" of certain key terms in 1964 when Title VII was passed.[208] Justice Gorsuch agreed with the defendants that the "ordinary public meaning" of the word "sex" in 1964 implied a biological category having to do with reproduction.[209] The statutory phrase "because of," said the Justice,

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199. *See* Lenzi v. Systemax, Inc., 944 F.3d 97, 110 (2d Cir. 2019) ("In short, Title VII does not require a plaintiff alleging pay discrimination to first establish an EPA violation—that is, that she received less pay for equal work."); DIRECTOR, *supra* note 103, at § 2[b].

200. *See* DIRECTOR, *supra* note 103, at § 4.5.

201. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

202. Rodney A. Smolla, *§ 9:121 Forms of discrimination prohibited—Sex Discrimination—Sexual orientation*, 1 FEDERAL CIVIL RIGHTS ACTS (3d ed. 2022); *Bostock*, 140 S. Ct. at 1737.

203. *Bostock*, 140 S. Ct. at 1737–38.

204. *Id.* at 1738.

205. *Id.*

206. *Id.* at 1754.

207. *Id.* at 1738. Discrimination often has far-reaching consequences. The conditions under which Mr. Zarda lost the job he loved, for example, apparently diminished his chances of employment, which meant that he "never found steady employment again." *Nico Lang, Donald Zarda Was Fired for Being Gay. He Died Before the Supreme Court Could Hear His Case*, LOGO TV (July 26, 2019, 11:43 AM), http://www.newnownext.com/donald-zarda-supreme-court-fired-gay/07/2019/. Mr. Zarda "spiraled into a deep depression," and he later died in a tragic accident far away from home at the age of forty-four. *Id.*

208. *Bostock*, 140 S. Ct. at 1738.

209. *See id.* at 1738–39.

implied but-for causation.[210] "In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause."[211] The word "discriminate," Justice Gorsuch also stated, had its current denotation in 1964—differential treatment.[212] In addition, Title VII's plain terms focused on the differential treatment of individuals, not groups.[213] The word "individual" had the same meaning both in 1964 and when the Court decided *Bostock*—"a particular being."[214] Thus, the ordinary public meaning and the plain terms of "sex" under Title VII required attention to individuals who, but-for their sex, would not have been victims of sex-based differential treatment by their employer.

For the *Bostock* court, Title VII's focus on the differential treatment of individuals based on their sex was noteworthy. A "broad" reading of Title VII compelled the conclusion that "an employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in both cases the employer fires an individual in part because of sex."[215] It followed that "it [was] impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[216]

Why? Because "sex-based rules" were being used to penalize gay men for being men attracted to men, and "sex-based rules" rules were also being used to penalize transgender individuals for being "persons with one sex identified at birth and another today."[217] That is, but for the employee's sex, the employer would not intentionally discriminate against that employee for being gay or transgender.[218] In the process, Justice Gorsuch rejected the ordinary conversational understanding of "sex" as excluding gender identity and sexual orientation.[219] Justice Gorsuch also privileged the "plain terms" of Title VII over historical sources that might recommend a different conclusion in the case.[220] Just because "few in 1964 expected today's *result*," Justice Gorsuch explained, such an "unexpected and important" result did not portend the result's

210. *See id.* at 1739.

211. *Id.*

212. *See id.* at 1740.

213. *See id.* at 1740–41.

214. *Id.* at 1740.

215. *Id.* at 1741. *See also generally* Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339, 351–52 (7th Cir. 2017) ("We hold only that a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes.").

216. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020).

217. *Id.* at 1745–46.

218. *See id.* at 1739.

219. *See id.* at 1745.

220. *See id.* at 1748.

failure.[221] Moreover, it did not matter that Congress itself had considered—but failed to enact—legislation expanding "sex" under Title VII to include sexual orientation, for example.[222]

Equally relevant for the five hypothetical claimants is the *Bostock* Court's evaluation of its holding's entailments.[223] The employers—and dissenting justices—argued that because of the majority's expanded interpretation of "sex" under Title VII, "any number of undesirable policy consequences would follow."[224] Justice Alito, one of three dissenters in *Bostock*, decried what he considered the majority's "considerable audacity," which he found "radical," "arrogant," and "wrong" because "Title VII prohibits discrimination because of *sex itself*, not everything that is related to, based on, or defined with reference to, 'sex.'"[225]

The majority's opinion, Justice Alito predicted, had consequences for future cases for which the Court had not quite accounted. Those future cases might involve, say, the use of locker rooms and bathrooms by transgender individuals; sports cases involving transgender individuals; housing cases involving biological sex; employment cases involving allegations of discrimination by religious organizations; cases involving healthcare access by transgender individuals; cases of free speech in the workplace concerning the failure to use preferred pronouns; and cases regarding the appropriate standard of constitutional scrutiny in such cases.[226] What the majority did, according to dissenters Alito, Thomas, and Kavanaugh, was nothing short of legislation from the bench.[227]

Regarding the future possible applications of *Bostock*, Justice Gorsuch responded by stating that to the extent that Title VII itself did not plainly answer those questions, the answers would be left for "future cases, not these [consolidated cases]."[228] Temptingly, the *Bostock* majority provided language that may open the door ever so slightly for the five claimants alleging discrimination on the basis of climatic displacement, if they can ground their claim in the express language of a protected category under Title VII.

> Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual

221. *Id.* at 1750.
222. *See id.* at 1747.
223. *See id.* at 1753.
224. *Id.*
225. *Id.* at 1758, 1761, 1774, 1778 (Alito, J., dissenting).
226. *See id.* at 1778–83 (Alito, J., dissenting).
227. *See id.* at 1754, 1822 (Alito & Thomas, JJ., dissenting) (Kavanaugh, J., dissenting).
228. *Id.* at 1753.

> harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.[229]

In other words, the successful claimant under Title VII (or, by extension, any federal anti-discrimination statute) must focus on the broad plain language of the federal statute, not on the unforeseen applications of its language. The successful claimant must also be attentive to the "ordinary public meaning" of the statutory language and to its meanings at the time of the statute's passage. Even if the broad plain language of a federal anti-discrimination statute compels an unforeseen application of the statute, the resulting application, however surprising, is the law.

What does *Bostock* mean, then, for the Equal Pay Act and for "race" and "color" under Title VII, whose application to the five claimants I have discussed above? Does *Bostock* mean that "sex" under the Equal Pay Act is synonymous with "climate discrimination"? Does *Bostock* imply that "race" and "color" under Title VII mean "climate discrimination"? A federal trial court in the Ninth Circuit, where the Latina museum curator would bring suit, implicitly answers the first question (regarding the Equal Pay Act) in the negative. That court extended the application of *Bostock* from Title VII to the Equal Pay Act when it allowed a transgender plaintiff's unequal-pay claim to proceed as a "sex" claim under the Equal Pay Act.[230] But nothing in that opinion suggests that "sex" reaches "climate discrimination" or anything else.[231]

Similarly, other federal precedent citing to *Bostock* holds that a claimant alleging "race" discrimination under Title VII, for example, must clearly show that the plaintiff falls within the language of a protected category under Title VII.[232] "Title VII," a federal trial court held in the case after citing to *Bostock*, "prohibits discrimination based on race. It cannot be read expansively enough to extend its protections to employees who have been disciplined for wearing clothes that violate a company dress code, even if that clothing is associated with individuals of a particular race."[233] In other words, *Bostock* changed the law, but only so much.

Since *Bostock* is not being read to reach expansions associated with race, can *Bostock*, a case dealing with "sex" under Title VII, be read to hold that Title VII's "sex" category covers "climate discrimination"? *Bostock*, recall, holds

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229. *Id.* at 1737.

230. *See* Scutt v. Carbonaro CPAs N Mgmt. Grp., 2020 U.S. Dist. LEXIS 182849, at *29 (D. Haw. Oct. 2, 2020); *see also* Salley v. Target, No. 3:20-314-SAL-PJG, 2021 U.S. Dist. LEXIS 163838, at *6 n.6 (D. S.C. July 27, 2021), *report and recommendation adopted*, No. 3:20-CV-314-SAL, 2021 U.S. Dist. LEXIS 162600 (D. S.C. Aug. 27, 2021).

231. *See generally Scutt*, 2020 U.S. Dist. LEXIS 182849, at *29.

232. *See* Frith v. Whole Foods Mkt., Inc., 517 F. Supp. 3d 60, 71 (D. Mass. 2021).

233. *Id.* at 72.

that if the discrimination complained of is even *in part* the result of the claimant's appurtenance to a protected federal category (as defined by the statute's broad plain language), then remediable discrimination has occurred under federal law.[234] Let us assume, therefore, that all five claimants allege that climate discrimination is covered by "sex" under Title VII. How might they fare in *Bostock*'s wake?

Two federal appellate opinions, one from the Tenth Circuit (none of the hypothetical claimants falls under its jurisdiction, however), and one from the Ninth Circuit (the Latina museum curator would likely bring suit in the Ninth Circuit) are instructive. The Tenth Circuit opinion holds that after *Bostock*, a Title VII discrimination case can proceed so long as its initial basis is grounded in the clear statutory language of Title VII.[235] Thus, although Title VII does not have an "age" category, a federal appellate court can still "hold that sex-plus-age claims are cognizable under Title VII."[236]

On the other hand, the Ninth Circuit recently rejected a plaintiff's reliance on *Bostock* to extend "sex" under Title VII to include "sexual activity" as part of "the paramour preference."[237] Such a preference means that a supervisor shows favoritism toward a lover of the opposite sex in the workplace, which allegedly leads to discrimination against the plaintiff, who is of a different sex from the paramour.[238] The court in that case reasoned that "[o]rdinary speakers of English would say an individual possesses 'sex' as a characteristic and that multiple 'individuals' can 'have sex.' But no one would use 'such individual's . . . sex' to refer to sexual activity between persons . . . ."[239] Applied to a discussion of climate discrimination, while "sex" under Title VII includes "sex plus (some other protected category)," since "sex" does not extend to something as closely related to "sex" as "sexual activity," "sex" under Title VII likely cannot be read to solely encompass climate discrimination given the narrowness of the court's approach in the case involving the paramour preference.

Commentators' pioneering work implies that they, similarly, may not read Title VII's prohibition of discrimination on the basis of sex to include discrimination on the basis of climate-related displacement. Commentators' work made it possible for the Supreme Court to hold that Title VII's ban on "sex" discrimination extended to sexual harassment.[240] Their work showed that

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234. *Bostock*, 140 S. Ct. at 1742 ("If an employer would not have discharged an employee but for that individual's sex, the statute's causation standard is met, and liability may attach.").

235. *See* Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1048 (10th Cir. 2020).

236. *Id.*

237. Maner v. Dignity Health, 9 F.4th 1114, 1116, 1119 (9th Cir. 2021).

238. *Id.* at 1118–19.

239. *Id.* at 1123.

240. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986) (Catharine A. MacKinnon contributed to the brief on behalf of respondent); *see generally* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

sexual harassment falls short of the standard of the respectful person.[241] Their work demonstrated that sexual harassment involves the regulation of the "identities of both harasser and victim according to a system of gender norms that envisions women as feminine, (hetero)sexual objects, and men as masculine, (hetero)sexual subjects."[242] Their work revealed that sexual harassment "polices the boundaries of the work and protects its idealized masculine image—as well as the identity of those who do it."[243]

In addition, commentators' groundbreaking work on "sex" under Title VII showed how concerns about "sex" discrimination have led to overreaching in the workplace.[244] As a result, the fear of "sex" discrimination has fomented a "sanitized" workplace.[245] A "sanitized" workplace extrudes from its orbit "personal intimacy, sexual energy, and 'humanness' more broadly. The same impulse that would banish sexuality from the workplace also seeks to suppress other 'irrational' life experiences such as birth and death, sickness and disability, aging and emotion of every kind."[246] Further, commentators have argued that the approach of both the *Bostock* majority and its dissenting opinions can be applied to the Clean Air Act, a federal environmental law, so that greenhouse gases are recognized as "pollutants" so as to protect the public "welfare," which includes climate effects.[247] In sum, therefore, for commentators, "sex" includes "sexual harassment," and while *Bostock* might apply to a federal statute regulating environmental pollutants, its "sex" provision likely does not reach climate discrimination.[248]

Finally, the five claimants' lawsuits are unlikely to succeed even under Title VII's sex-based theory. As with their "race" claims under Title VII, the five plaintiffs will likely argue that the supervisor's remark telling them to return to their home states is direct evidence of sex discrimination. Case law indicates, however, that certain "stray remarks," no matter how objectionable, are not evidence of direct discrimination. While some federal courts have held that referring to a woman as a "broad," "chick," "dame," "gal," or "girl" *is* evidence

241. *See* Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 446 (1997).

242. Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 693 (1997).

243. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1691 (1998).

244. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2088 (2003).

245. *Id.* at 2069.

246. *Id.* at 2069; *see generally* Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J. F. 22 (2018).

247. *See generally* Richard L. Revesz, *Bostock and the End of the Climate Change Double Standard*, 46 COLUM. J. ENV'T. L. 1 (2020).

248. Interestingly enough, if *Bostock* were to "travel" to a federal environmental statute because of global warming, *Bostock* might subsequently return to the federal anti-discrimination statutes where it was created and bring about changes there.

of discrimination, others have held otherwise.[249] What is more, some federal courts have found that even referring to a woman as "our little Black nanny," and repeatedly referring to another woman as a "b***h," a "c**t," a "sl*t," a "tart," or a "wh**e" did not show discrimination.[250] Other federal courts, on the other hand, have concluded otherwise.[251] By comparison, the comment made by the employer in this Article asks the claimants, "[w]hy don't you go just back to where you came from? This is our state. This is the way things work over here. This is not the place where you came from." The comment, however objectionable, is not sex based, and will likely be treated as a stray remark.

Relatedly, the five hypothetical plaintiffs will likely also not succeed in their arguments that their lower salaries are evidence of indirect discrimination. As with "race," a sex-based claimant under Title VII must show, in the five federal appellate circuits discussed here, that: (1) the claimant belongs to a protected category, (2) the claimant qualifies for the job or satisfactory performance of the job, (3) the claimant faced an adverse employment action, and (4) the claimant faced differential treatment from a similarly situated employee of a different sex, or that "the adverse action occurred under circumstances giving rise to an inference of discrimination."[252] Burden shifting then occurs.[253] The plaintiff, subsequently, can respond that the defendant's proffered reason is merely a pretext for discrimination.[254] Although the five plaintiffs will satisfy the first three prongs (protected category, qualification, and adverse employment action), they will likely not show that their lower salaries are the result of their sex. Therefore, Title VII's "sex" category provides little hope of relief from workplace discrimination for the five claimants.

National Origin

Title VII does not define "national origin."[255] The Supreme Court has stated that the plain meaning of "national origin" is "[1] the country where a person was born, or, more broadly, [2] the country from which his or her ancestors came."[256] The Court has stated that Title VII's legislative history similarly

249. *See* Daniel L. Kresh, Annotation, *Stray Remark or Comment Involving General References Toward Female Plaintiffs in Title VII Action for Sex Discrimination*, §§7-16, 7 A.L.R. FED. 3D Art. 2 (2022).

250. *Id.*

251. *Id.*

252. Here, I have combined, for the sake of summary, the approaches of the five appellate circuits, and I have relied on the following cases: Menaker v. Hofstra Univ., 935 F.3d 20, 30 (2d Cir. 2019); Brune v. BASF Corp., No. 99-3194, 2000 U.S. App. LEXIS 26772, at *7 (6th Cir. Oct. 17, 2000) (per curiam); Holmes v. Trinity Health, 729 F.3d 817, 822–23 (8th Cir. 2013); Fried v. Wynn Las Vegas, LLC, No. 20-15710, 2021 U.S. App. LEXIS 342692021, at *2 (9th Cir. Nov. 18, 2021); Johnson v. Airbus Def. & Space Inc., 858 F. App'x 304, 308 (11th Cir. 2021).

253. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)

254. *See id.* at 804.

255. *See* 42 U.S.C. § 2000e.

256. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 88 (1973).

indicates that "national origin" "[1] means the country from which you or [2] your forebears came. . . . You may come from Poland, Czechoslovakia, England, France, or any other country."[257]

The EEOC regulations adopt a similar view, providing that "national origin" includes the plaintiff's [1] "place of origin," [2] the plaintiff's ancestor's "place of origin," and the plaintiff's possession of the "[3] physical, cultural or linguistic characteristics of a national origin group."[258] EEOC guidance, for its part, cites to case law for the proposition that "place of origin" can be [1] a country that no longer exists ("Yugoslavia"), a country that is presently in existence ("Mexico, China, Syria"), [2, 3] or it can be a geographic region that is closely identified with a given group ("Kurdistan, Acadia").[259] Significantly, the United States is also [1] a "place of origin."[260] We might keep these three meanings ([1], [2], and [3]) in mind going forward.

That the United States is [1] a "place of origin" would appear to decisively resolve the question this Article poses. Under this reading, discrimination on account of climatic displacement would be discrimination on account of "national origin" under Title VII. Indeed, the support for this view appears particularly strong. First, four of the five hypothetical claimants—the Chinese American agronomist, the Native American engineer, the African American accountant, and the White janitor—all are from the United States. Thus, their "place of origin" is [1] the United States.

Just as importantly, the Supreme Court has held that actionable discrimination occurs under Title VII when one member of a protected class discriminates against another member of the same class.[261] In language that foreshadows *Bostock* (and on which *Bostock* itself relies), Justice Scalia reasoned for the Court in Oncale v. Sundowner Offshore Servs., Inc., that even though Congress may not have anticipated that one man sexually harassing another is "sex" discrimination under Title VII, such harassment is indeed prohibited by Title VII.[262] By implication, then, an American who discriminates against another American solely on the basis of the other American's place of origin (the United States) is discriminating [1] on the basis of national origin.

We might even say that, like the sex-based rules in *Bostock*, nationality-based rules, in the broadest sense of the phrase, are being used to penalize the four

257. *Id.* at 89.

258. 29 C.F.R. § 1606.1 (2021).

259. *Enforcement Guidance on National Origin Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Nov. 18, 2016), https://www.eeoc.gov/laws/guidance/eeoc-enforcement-guidance-national-origin-discrimination#_ftn16 [hereinafter EEOC Guidance]. For its characteristic thoroughness and thoughtfulness, I am grateful to the EEOC's enforcement guidance (and its website in general), which has brought many of the cases I cite in this section to my attention.

260. *Id.*

261. *See* Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 82 (1998).

262. *Id.* at 79.

hypothetical claimants in their new domiciles.[263] That is, the employers in the five states necessarily discriminate against people whose origins are in the United States in their mistreatment of the new arrivals. Since the four migrants cannot help being American, then, but for their American national origin, they would not be discriminated against in their new domiciles by other Americans. The employer, thus, cannot escape discriminating against the four arrivals *in part* because they are American. To paraphrase and adapt the language of *Bostock*: "[w]e agree that [state origin is] a distinct concept from [national origin]. But, as we've seen, discrimination based on [state origin] necessarily entails discrimination based on [national origin]; the first cannot happen without the second."[264]

We might further add language from both *Bostock* and *Oncale* about the unexpected legal result. Justice Scalia explained in *Oncale* that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[265] Justice Gorsuch in *Bostock* states "[t]hose who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. . . . But the limits of the drafters' imagination supply no reason to ignore the law's demands."[266] Thus, the unforeseen textual reading, which includes state origins, is the law.

And yet, if we more closely follow *Bostock*, we arrive at a different result. *Bostock* directs us to look first at the "ordinary public meaning" of "national origin" at the time Title VII was passed.[267] To do this, we might look at a dictionary from 1964, preferably *Webster*'s.[268] "National origin" being two words—an adjective and a noun—we look at each word's meaning separately, beginning with the adjective.

"National" (adjective) in 1964, had three meanings—"of or relating to the nation"; "compromising or characteristic of a nationality"; and "*Federal*."[269] "Nation" meant "*Nationality* . . . : *also* : a politically organized nationality [] ; a community of people composed of one or more nationalities with its own territory and government"; "a territorial division containing a body of people of one or more nationalities"; "a federation of tribes (as of American Indians)".[270] "Nationality" meant "national character"; "national status: *esp* : a legal

263. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1747 (2020). ("When Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule.").

264. *See id.* at 1746–47 ("We agree that homosexuality and transgender status are distinct concepts from sex. But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.").

265. *Oncale*, 523 U.S. at 79; *see also Bostock*, 140 S. Ct. at 1744.

266. *Bostock*, 140 S. Ct. at 1737.

267. *See id.* at 1738.

268. *See Bostock*, 140 S. Ct. at 1740.

269. THE NEW MERRIAM-WEBSTER POCKET DICTIONARY, 331 (1964).

270. *Id.* at 331.

relationship involving allegiance of an individual and his protection by the state"; "membership in a particular nation"; "political independence or existence as a separate nation"; "a people having a common origin, tradition, and language capable of forming a state"; "an ethnic group within a larger unit (as a nation)."[271] "Origin" (a noun) meant "*Ancestry*"; "rise, beginning, or derivation from a source; *Cause*."[272] "Ancestry" meant "a line of descent: *Lineage*"; "*Ancestors*."[273] Relatedly, "state" meant "one of the constituent units of a nation having a federal government—statehood."[274] "American" meant "a native or inhabitant of No. or So. America."; "a citizen of the U.S."[275]

Given these meanings, we might say that in 1964, "national origin" likely did not refer to an individual's origins in a particular state of the United States. "National origin," instead, likely implied [1] something remarkably expansive in its political and territorial reach, inviting a concomitant sense of belonging and allegiance. "National origin" likely also implied [2] either one's or one's ancestor's rootedness in a particular place. Relatedly, "national origin" denoted that [2] one or one's ancestor, issued from a source (a community) that was much larger than one or one's ancestor, and such ancestral source identified one's derivation, especially to others.

Case law in the years leading up to the passage of Title VII supports this view. A federal trial court held in 1951 that the segregation of individuals of "Mexican or Latin extraction, citizens of the United States," in public elementary schools in Arizona "because of racial or national origin" violated the Federal Constitution.[276] In 1954, Chief Justice Warren held that the exclusion of jurors of Mexican descent in a criminal trial violated the Federal Constitution because such exclusion was "solely" on the basis of "ancestry or national origin" or "national origin or descent."[277] Then, a federal appellate case from 1964 mentioned President Roosevelt's executive orders from 1941 and 1943 prohibiting discrimination in wartime government contracts on the basis of "race, creed, color, or national origin."[278]

Read together, the three cases suggest that "national origin" is aligned with [2, 3] race, color, creed, and ancestry. The use of the phrase "national origin" in the *Gonzales* opinion on segregation suggests that the gross mistreatment of Latin Americans in Arizona's public schools amounted to unconstitutional discrimination on the basis of national origin, not because those students were

271. *Id.*
272. *Id.* at 351.
273. *Id.* at 17.
274. *Id.* at 479.
275. *Id.* at 16.
276. Gonzales v. Sheely, 96 F. Supp. 1004, 1007–1008 (D. Ariz. 1951).
277. Hernandez v. Texas, 347 U.S. 475, 479, 482 (1954).
278. Farmer v. Phila. Elec. Co., 329 F.2d 3, 5 (3d Cir. 1964).

Americans from the state of Arizona.[279] Rather, the use of "national origin" in the opinion implies that segregation amounted to unconstitutional discrimination because [2] the students' ancestral source pointed to a location outside the United States on which basis those fond of discrimination were wont to dwell and act unconstitutionally; their view of ancestry/nationality/national origin is puzzling indeed in a country which, in 1958, future president John F. Kennedy called *A Nation of Immigrants*.[280]

The other two cases recommend a similar conclusion. Chief Justice Warren's association of "national origin" with "descent" and "ancestry" [2] points in the same direction for similar reasons.[281] President Roosevelt's executive orders also group together words that suggest that some ancestral origins [2, 3] might not be shared by the majority of (White) Americans ("race, creed, color, or national origin").[282] In other words, the case law just cited suggests that "national origin" does not mean "having one's beginnings, source, or lineage in a particular state of the United States in the age of global warming." "National origin," rather, means something more expansive in its political and territorial reach than an individual state in the United States.

Even more recent Title VII case law upholds this view. Take, for example, Judge Posner's statement in a 1991 opinion that "just as Title VII protects whites from discrimination in favor of blacks as well as blacks from discrimination in favor of whites . . . so it protects Americans of non-Japanese origin from discrimination in favor of persons of Japanese origin."[283] Judge Posner's dictum here regards discrimination against [1] Americans (nationality) in favor of Japanese workers (nationality), and he concludes that discrimination based on citizenship (as distinguished from nationality) is not actionable under a governing treaty.[284] In a similar vein, a 2012 case holds that a claim for national-origin discrimination was stated when Mexican migrant laborers were apparently treated more favorably by an American employer (race not provided) than were African American laborers.[285] Again, here, African Americans from the [1] United States (nationality) are allegedly being treated differently from

279. *See Gonzales*, 96 F. Supp. at 1008–09 ("Segregation of school children in separate school buildings because of racial or national origin, as accomplished by regulations, customs and usages of respondent, constitutes a denial of the equal protection of the laws guaranteed to petitioners as citizens of the United States.").

280. *See generally* JOHN F. KENNEDY, A NATION OF IMMIGRANTS (1964).

281. *See supra* text accompanying note 279.

282. *See supra* text accompanying note 280.

283. Fortino v. Quasar Co., 950 F.2d 389, 392 (7th Cir. 1991). For bringing this and other national-origin cases on which I rely to my attention, I am grateful to the EEOC's enforcement guidance. *See Enforcement Guidance on National Origin Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/guidance/eeoc-enforcement-guidance-national-origin-discrimination#_ftn16.

284. *See Fortino*, 950 F.2d at 393–94.

285. Fulford v. Alligator River Farms, LLC, 858 F. Supp. 2d 550, 553–54, 560 (E.D.N.C. 2012).

Mexican migrants (nationality).[286] Similarly, a 2021 case in which a [1] Chinese American who alleged discriminatory preference for an Indian in India was arguing that [1] an Indian (nationality) was favored over an American (nationality) and that [2] since "[p]laintiff was born in China in 1958, and he speaks English as a second language, 'with [sic] rather strong accent,'" someone who did not have a similar accent was being favored.[287] "National origin," thus, does not mean "a state in the United States."

Additional precedent cited in the EEOC guidance on "national origin" strengthens this view. In *Thomas v. Rohner-Gehrig & Co.*, the plaintiffs brought a class-action lawsuit alleging, in relevant part, that "they were discharged because they were born in the United States rather than in Switzerland or Germany."[288] The plaintiffs argued that under Title VII, their national origin was [1] "native born American."[289] "Defendants, on the other hand, assert[ed] that national origin discrimination would only encompass claims based on [2] a person's ancestry, heritage, background or possession of characteristics which are typically identified with ancestral groups."[290] The defendants thus claimed "that [2] national origin discrimination [did] not include discrimination based solely on [1] the mere fact of place of birth."[291]

In response, the federal trial court held that the plaintiffs had stated a cause of action under Title VII's "national origin" category given the Supreme Court's definition of "national origin" as including [1] the plaintiff's birth country, [2] the plaintiff's ancestor's origins, and [1] the legislative history's reference to a "country."[292] Thus, even where "national origin" covers those who are "native born American" that phrase is in contrast to someone who is not born within the national boundaries of the United States; nothing here suggests that "national origin" covers discrimination between state citizens in the United States.

Indeed, even when [1] Americans allege that they have been discriminated against while working abroad, this understanding of "national origin" remains undisturbed. Take, for example, *Green-Ajufo v. Azar*, a case from a federal district court in the Eleventh Circuit (where the African American hypothetical

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286. *See generally* Curls v. Clark Cnty. Sch. Dist., No. 2:16-cv-00979-JAD-PALL, 2017 U.S. Dist. LEXIS 50546, at *2–3 (D. Nev. Mar. 31, 2017) (allowing a *pro se* complaint by an employee of "African-American national origin" to proceed against an employer whose race was not provided, but who allegedly treated Mexican workers more favorably and stated '"Mexicans will get the jobs first because I can work them til [sic] they drop' and '[w]hy get U.S. citizens when you can get Hispanics cheap.'").

287. Liu v. Eaton Corp., No. 5:20-CV-255-FL, 2021 U.S. Dist. LEXIS 84103, at *2, *6 (E.D.N.C. May 3, 2021).

288. Thomas v. Rohner-Gehrig & Co., 582 F. Supp. 669, 671 (N.D. Ill. 1984).

289. *Id.* at 674.

290. *Id.* (internal quotation marks omitted).

291. *Id.* (internal quotation marks omitted).

292. *Id.* at 674–75.

plaintiff would bring suit).[293] In *Green-Ajufo*, Dr. Green-Ajufo was an epidemiologist who brought a Title VII lawsuit ("race, color, and national origin") against the federal government, her employer.[294] Dr. Green-Ajufo alleged that while she was working for the federal government in Malawi, in Southern Africa, [1] an Indian-American supervisor discriminated against her, resulting in the termination of her employment.[295] Dr. Green-Ajufo indicated that her national origin was [1] "U.S. citizen," and the magistrate judge accepted this argument.[296] While the magistrate judge was correct to refer to national origin as encompassing the doctor's [1] origins in a particular nation (the United States), the magistrate judge was incorrect to conflate citizenship with national origin. Though the two may coincide; it is not required that they do.[297] *Green-Ajufo* does, nevertheless, show that "national origin" does not mean "state origin."

Precedent from the Supreme Court is helpful in understanding the difference between citizenship and national origin under Title VII. In *Espinoza v. Farah Manufacturing Co.*, Ms. Espinoza, a Mexican citizen living and working in Texas, lawfully admitted to the United States, was denied employment because the employer had "a longstanding company policy against the employment of aliens."[298] Ms. Espinoza argued that under Title VII, a refusal to hire her because she was not an American citizen amounted to discrimination on the basis of national origin.[299] Justice Marshall, writing for the Court, found that "national origin" under Title VII did not include "citizenship."[300] Justice Marshall reasoned, in part, that [1, 2] "[t]here [was] no indication in the record that [the employer's] policy against employment of aliens had the purpose or effect of discriminating against persons of Mexican national origin. It [was] conceded that [the employer] accepts employees of [1] Mexican origin, provided the individual concerned has become an American citizen."[301] While *Espinoza* could be read to suggest that "national origin" is not "national" since it does not involve allegiance to a nation (i.e., citizenship), *Espinoza* implies that "national

293. Green-Ajufo v. Azar, No. 1:18CV00844LMMWEJ, 2018 U.S. Dist. LEXIS 226624 (N.D. Ga. July 13, 2018).

294. *Id.* at *1.

295. *Id.* at *5–*6.

296. *Id., report and recommendation adopted*, No. 118-CV-00844-LMM-WEJ, 2018 U.S. Dist. LEXIS 226624, at 7 (N.D. Ga. July 13, 2018) ("Plaintiff, who was represented by counsel at this time, alleged that she was terminated based on her race (black) and national origin (U.S. citizen).").

297. *See generally* Fortino v. Quasar Co., 950 F.2d 389, 392 (7th Cir. 1991) ("Of course, especially in the case of a homogeneous country like Japan, citizenship and national origin are highly correlated; almost all citizens of Japan were born there.").

298. Espinoza v. Farah Mfg. Co., 414 U.S. 86, 87 (1973).

299. *Id.* at 88.

300. *See id.* at 95–96.

301. *Id.* at 92–93.

origin" points to a [1] country, not a state in a country.[302] In Ms. Espinoza's case, her citizenship and [1] national origin were the same (Mexican), but the Court concluded that her national origin [1, 2] was not the basis of the differential treatment; her citizenship was, which was an acceptable employer practice.[303]

Espinoza has been criticized for its limited understanding of "national origin." Professor Ontiveros, for example, would like to see *Espinoza* overruled.[304] In Professor Ontiveros's view, "national origin" discrimination under Title VII should be read more expansively to include immigration status because some workers are discriminated against solely on the basis that they are immigrants.[305] Professor Ontiveros agrees, thus, with Justice Douglas's dissent in *Espinoza* that Title VII's "national origin" category contemplates protections for immigrants.[306] Professor Ontiveros rightly laments the fact that "the Court in 1972 was not ready to confront the issue of how to treat Latino identity, *especially the role of migrant status*, and other markers of culture or ethnicity under 'race' and 'national origin.'"[307] Indeed, as much as Professor Ontiveros's position is made even more attractive by its dignitarian approach—that migrants and non-citizens are as deserving of legal protection under Title VII as are those the Court might consider protected by the "national origin" category—the *Espinoza* court appears to have reified an understanding of "national origin" that had been in place for decades.[308] That view is indeed narrow in its approach, and significantly for purposes of this Article, suggests that "national origin" does not refer to origins within a state of the United States.[309]

Returning, then, to the hypothetical complainants, recall that an employer in each of the five states (California, Florida, Michigan, New York, and North Dakota) discriminates against a worker whose origins are in another state by paying the new arrivals less than natives of the state in which the employer operates. In addition, the hypothetical employer with whom I began the Article tells the new arrivals, [1, 2] "Why don't you go just back to where you came from? This is our state. This is the way things work over here. [1, 2] This is not the place where you came from."[310] Note that the employer is *not* saying,

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302. *Id.* at 92–94 (referring to "Mexican national origin").

303. *Id.* at 95 (holding that "[a]liens are protected from illegal discrimination under the Act, but nothing in the Act makes it illegal to discriminate on the basis of citizenship or alienage").

304. Maria L. Ontiveros, *Immigrant Workers and Workplace Discrimination: Overturning the Missed Opportunity of Title VII Under Espinoza v. Farah*, 39 BERKELEY J. EMP. & LAB. L. 117, 118 (2018).

305. *Id.*

306. *Id.* at 134.

307. *Id.* (emphasis added).

308. *See supra National Origin* (discussing how "national origin" refers to those originating outside the United States).

309. *Id.*

310. *See supra* text accompanying note 60.

"Why don't you just go back to the United States? You're in our country now. This is the way things work over here. This is not the United States."

Applying an analogy Justice Gorsuch uses in *Bostock*, we might ask if but-for their national origin, the employer would treat similar plaintiffs differently. Specifically, Justice Gorsuch asks us to think of an employer who has two employees, a man and a woman, both of whom are attracted to men.[311] If the employer fires the man for being attracted to men, but not the woman, "the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge."[312]

Applied to the five hypothetical claimants, we might ask if their employers, when presented with two employees, an American and a non-American, would treat the American differently from the non-American based on [1] the American's national origin. The answer is "no." The employers in the hypothetical do not care who is [1] American and who is not. They care who is from their state and who is not. That their state happens to be in the United States only makes the discrimination "national" insofar as it affects everyone from outside the state, and significantly, from outside the United States (inter-national). Thus, for the five employers' discriminatory purposes, the museum curator from Latin America and the other four claimants are all alike in the only way that matters—they are all migrants, and they are not natives of the state in which the employer operates.

We might also think of it this way. If climate discrimination were national-origin discrimination, then the employers must also be held liable for "national origin" discrimination if they dismissed workers from within their own states in the age of global warming. Why? Because those workers would also be [1] American by origin. Thus, firing them would also give rise to a claim of discrimination based on [1] nationality. For the sake of argument, let's take two claimants, one state native whose hometown has been devastated by climate change, and one non-state employee, whom the employer has specially courted and showered with perks, and who now works for the employer. If the employer fires the worker from inside the state because the employer believes that too many of those workers are "flooding the area" in which the employer operates, but the employer retains the services of the out-of-state employee because this particular out-of-state employee is precious to the employer, then the in-state employee should be able to successfully bring a claim alleging discrimination on the basis of "national origin" under Title VII if "national origin" means "from a state of the United States."

Justice Gorsuch's other analogies are helpful. Justice Gorsuch invites us to think of two hypothetical claimants—Hannah and Bob.[313] If Hannah is fired

311. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020).

312. *Id.*

313. *Id.*

because she is not feminine enough and Bob is similarly fired because he is not masculine enough, Hannah and Bob, Justice Gorsuch concludes, have colorable claims under Title VII's "sex" category because "in *both* cases the employer fires an individual in part because of sex."[314] Can we say that the five claimants are being fired because their national origins are not [1] American enough or because there is an alleged defect in their presentation of what it means to be an American? If we did, we might be assuming that those who discriminate against the new arrivals either have an incredibly high threshold regarding what constitutes being an American, or that they assume that those who leave their home states in the age of climate change cease being American (while those who discriminate against them remain very much—or increasingly—so). Of course, the facts of the hypothetical expose egregious parochialism, which, of course, exists. But parochialism on its own, no matter how egregious, is still likely not discrimination on the basis of "national origin" under Title VII.

The only claimant who might successfully bring a "national origin" claim is the museum curator from Latin America.[315] First, we should note that she is, unfortunately, unlikely to succeed in her claim for direct discrimination based on "national origin" under Title VII. Case law from the Ninth Circuit, where the Latina museum curator would likely bring suit, holds that an employer's statement, allegedly made in the presence of the plaintiff, constitutes a stray remark that does not prove direct discrimination: "I can't hire any of these. They have bad records. Their records are not good enough. . . . Where are all the white people? Doesn't any, isn't there [sic] any white people looking for a job?"[316]

As the Ninth Circuit held in that case, the supervisor's "white people comment and joke about shooting black people, while racist and insensitive, are stray remarks not tied directly to [the plaintiff's] termination and are insufficient to create a triable issue of fact."[317] The same reasoning likely applies to the comment made by a supervisor to the Latina museum curator: "Why don't you go just back to where you came from? This is our state. [3] This is the way things work over here. [1, 2] This is not the place where you came from." Therefore, the Latina woman is unlikely to be able to show that she was the victim of direct discrimination under Title VII.

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314. *Id.*

315. Indeed, the Native American engineer also has a strong claim since "national origin" under Title VII includes Native American status. *See generally* Onyiah v. St. Cloud State Univ., 684 F.3d 711, 718 (8th Cir. 2012) (citing Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 154 F.3d 1117, 1120 (9th Cir. 1998)). However, the Native American engineer is unlikely to show that those outside her protected class were treated differently because the hypothetical provides no indication that they were. Indeed, as the section below on state law shows, Native Americans are employed in North Dakota, meaning that the engineer would have to show that but-for her Native American origins, she would have been treated similarly to other workers at her job.

316. Magsanoc v. Coast Hotels & Casinos, No. 2:04-CV-01122-KJD-PAL, 2006 U.S. Dist. LEXIS 107370, at *1 (D. Nev. Sept. 28, 2006), *aff'd*, 293 F. App'x 454 (9th Cir. 2008).

317. *Magsanoc*, 293 F. App'x, at 455 (internal quotation marks omitted).

Fortunately, the Latina museum curator's use of burden-shifting under Title VII will likely render her claim successful. In the Ninth Circuit, the museum curator must show that (1) she belongs to a protected class, (2) she is qualified for the position, (3) she experienced an adverse employment action, and (4) there was more favorable treatment of similarly situated individuals not within her protected class.[318] Burden shifting then occurs. The museum curator will establish that (1) [1] her national origin outside the United States is a protected class, (2) that she was qualified for the job, (3) she was paid less, and (4) that those outside her national origin were paid more. She will likely succeed because the employees who are paid more are of different national origin from she since she is an immigrant. The employer will find it hard to articulate a non-discriminatory reason for paying those of [1] American origin more than an immigrant since there is no indication in the hypothetical that the employer has a reason to do so apart from discriminatory animus against those who are from outside the state, and, by extension, from outside the United States.

Revealingly, therefore, the Latina's claim is likely stronger than that of the four "native born Americans." Given her origins outside the United States, the museum curator meets the country-based definition of "national origin," which, as a result, casts the Californians who discriminate against her as being [1] of a different national origin. In the museum curator's case, the employer is necessarily asking her "Why don't you go just back to where you came from? This is our state. [3] This is the way things work over here. [1, 2] This is not the place where you came from."[319] This noteworthy result—a foreigner wins where four Americans would not—may persuade a court to hold that even though "national origin" refers to, and has long referred to, a country, the reality of climate change means that it also applies under *Oncale* and *Bostock* to discrimination against those from [1] both other states and other countries.

In conclusion, then, this section shows that Title VII's prohibitions against discrimination on the basis of color, national origin, race, religion, and sex likely will not allow the five claimants to succeed in their claims on the basis of climatic displacement. If anyone succeeds, it will likely be the Latina claimant, who will show that Americans are discriminating against her on the basis of national origin under Title VII given [1] her origins outside the United States even if the employer likely intends its discrimination to apply equally to Americans and foreigners alike who move to California in the age of climate change. Nevertheless, we should still note that the museum curator's win is not guaranteed because a court could also hold that it would be incongruous to allow her to win when [1] Americans in similar positions have been denied relief. In other words, allowing her to win would be implicitly sanctioning discrimination against those similarly situated [1] whose origins are in the United States.

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318. *See* Khera v. Cheney, No. C-92-2050-DLJ, 1993 U.S. Dist. LEXIS 3136, at *9–10 (N.D. Cal. Feb. 26, 1993).

319. *See supra* note 60.

C. The Age Discrimination in Employment Act of 1967

Similar to the Equal Pay Act and Title VII, the history and the prevailing interpretations of the Age Discrimination in Employment Act of 1976 ("ADEA") show that the statute will not apply to cases dealing with displacement as a result of climate change. First, this section shows that the history of the ADEA shows that the statute only prohibits discrimination on account of age. The section then shows that governing precedent from the Supreme Court suggests that the ADEA will likely not be read to incorporate discrimination on account of climatic displacement.

i. "Because of Such Individual's Age"

In 1965, as part of his statutory charge, Secretary of Labor W. Willard Wirtz submitted a report to Congress titled, *The Older American Worker—Age Discrimination in Employment*.[320] Secretary Wirtz warned that the United States, "a Nation which already worships the whole idea of youth" (even in its hiring practices), would have to contend with the fact that its youthful majority owed a duty to the nation's older citizens, who represented a "minority group" in the country.[321] Such was the case because, in 1965, half of all Americans were under the age of twenty-nine, and within ten years of that, half of all Americans would be below the age of twenty-six.[322] Correctly, the Secretary noted that older Americans were "to be sure, one minority group in which we all seek, sometimes desperately, eventual membership."[323]

The Secretary's report noted a number of problematic practices. Employers, for example, placed arbitrary upper limits, ranging from forty-five to fifty-five, on the age of employees they were willing to hire, and such limits were indifferent to worker's qualifications and experience.[324] Such age limits tended to apply to clerical and sales positions, as well as to unskilled and semi-skilled work, with employers only willing to waive such restrictions when the employer was unable to hire under its "rigid specifications."[325] Troublingly, twenty percent of employers "surveyed hired no older workers at all."[326] While the federal government prohibited age discrimination at the federal level and in

320. EEOC, THE OLDER AMERICAN WORKER—AGE DISCRIMINATION IN EMPLOYMENT, (1965), https://www.eeoc.gov/reports/older-american-worker-age-discrimination-employment.

321. *See id.* § I ("It is true that hiring officials are not immune to the brightness, vigor, and attraction of youth, nor always above exploiting these attributes for commercial advantage.").

322. *See id.*

323. *Id.*

324. *See id.* §§ II(B)(1), III ("There is persistent and widespread use of age limits on hiring that in a great many cases can be attributed only to arbitrary discrimination against older workers on the basis of age and regardless of ability.").

325. *Id.* at § II(B)(2).

326. *Id.*

federal contracts, only twenty states banned age discrimination in employment, with Colorado's ban being the oldest; enacted in 1903.[327]

The economic effects of discrimination against older workers were striking. The Secretary noted that discrimination against older workers meant "that a million man-years of productive time are unused each year because of unemployment of workers over 45," and, also, that one billion dollars in 1965 (worth almost nine times that amount in early 2022) was paid in unemployment insurance to older workers unable to find employment.[328] In addition, "[t]he vast majority of older persons have virtually no financial assets to supplement their pensions," and "[m]any are barely outside the poverty border."[329] Many older workers were struggling, which affected commerce.[330]

Congress responded two years later. Among Congress's findings were that older workers, even in a country facing "rising productivity and affluence," encountered difficulties remaining employed or finding employment.[331] Congress also found that older workers were disproportionately affected by "arbitrary age limits regardless of potential for job performance," which had an impact on commerce in the nation.[332] Congress's statutory response to the problem, the ADEA, prohibits discrimination "because of [an] individual's age," "with respect to his compensation, terms, conditions, or privileges of employment."[333] The statute protects workers forty years of age and older from discrimination in the workplace.[334]

ii. "Ordinary Meaning"

Precedent from the Supreme Court and commentators' work on the ADEA both show that the ADEA likely does not apply to climate discrimination. First, this subsection considers precedent from the Supreme Court before looking at commentators' engagement with the ADEA.

Supreme Court precedent shows that the ADEA focuses on age. Specifically, in *Gross v. FBL Financial Services, Inc.*, Mr. Gross brought suit against his private employer after Mr. Gross, aged fifty-four at the time of the alleged adverse employment action, was replaced by an employee in her forties, which Mr. Gross considered a demotion.[335] The trial court gave a jury instruction that the employer could be held liable under the ADEA if, by a preponderance of the evidence, Mr. Gross established that his age was "a motivating factor" in his

327. *Id.* § II(B)(5).
328. *Id.* § II(A).
329. *Id.* § II(B).
330. *Id.* § II(A).
331. 29 U.S.C. § 621(a)(1) (2018).
332. *Id.* § 621(a)(2), (4), (b).
333. *Id.* § 623(a)(1).
334. *Id.* § 631(a); 29 C.F.R. § 1625.2 (2021).
335. *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 170 (2009).

demotion.[336] Justice Thomas, writing for the Court, rejected the instruction, holding in relevant part, that the ordinary meaning of "because of" under the ADEA meant that age was the "reason" the employer had acted, requiring the application of a but-for causation standard under the statute.[337] Therefore, Mr. Gross could not rely on the theory that his employer had "mixed-motives" in demoting him.[338] "It follow[ed], then, that under § 623(a)(1) [of the ADEA], the plaintiff retains the burden of persuasion to establish that age was the 'but-for' cause of the employer's adverse action."[339] A claim, then, of disparate treatment under the ADEA focuses on *age* and on discrimination but-for the complainant's *age*, not on a theory like internal displacement because of climate change.

Commentators have similarly taken the plain language of the ADEA to mean what it says. They have argued that the Supreme Court's application of a but-for causation standard in employment-discrimination cases, even under the ADEA, is a departure from previous precedent, creating confusion as part of a pro-employer stance.[340] Commentators have observed that the Supreme Court has made it more difficult for age-related claims under the ADEA to succeed, and they have argued that, given the correlation between age and disability, claimants should rely instead on the Americans with Disabilities Act.[341] Commentators have also focused on alleged discrimination against "relatively younger protected class members" under the ADEA.[342]

In sum, even for commentators, "age" means "age." Applied to the facts of the hypothetical, the Native American engineer (aged sixty-four), the African American accountant (aged fifty-two), and the Latina museum curator (aged forty-six) are indeed all over forty. In addition, while at least one federal circuit has held after *Bostock* that "sex-plus-age claims are cognizable under Title VII," nothing in the facts of the hypothetical, however, suggests that age is an issue, or that any of the five claimants are discriminated against because of their age.[343] Thus, the ADEA is unlikely to be of any help to the five claimants, whose lawsuits will allege discrimination because of climatic displacement.

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336. *Id.* at 170–71.

337. *Id.* at 176.

338. *Id.* at 177–78.

339. *Id.* at 177.

340. *See generally* Leora F. Eisenstadt, *Causation in Context*, 36 BERKELEY J. EMP. & LAB. L. 1 (2015); *see also* SPERINO, *supra* note 58, at 94.

341. *See* Kevin M. Cremin, *Regarding Age As A Disability: Conceptualizing Age Discrimination at Work As (Mis)perception of Disability Discrimination*, 39 CARDOZO L. REV. 439, 455-68 (2017).

342. *See* Aaron J. Rogers, Note, *Discrimination Against Younger Members of the ADEA's Protected Class*, 89 IOWA L. REV. 313, 352–53 (2003).

343. *See* Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1048 (10th Cir. 2020).

D. Title I of the Americans with Disabilities Act of 1990

Just like with the ADEA, Title VII, and the Equal Pay Act, both the history and governing interpretations of the Americans with Disabilities Act of 1990 ("ADA") indicate that the statute likely does not apply to discrimination on account of climatic displacement. This section briefly shows that the history of the ADA indicates that the statute only applies to mental and physical disabilities. The section cites to governing case law, which also shows that the ADA likely will not be read to include discrimination based on climate-related migration.

i. "Physical or Mental Impairment"

In 1988, Sandra Swift Parrino, Chairperson of the National Council on Disability, a federal agency, submitted to Congress a document entitled *On the Threshold of Independence*.[344] As part of her statutory submission, Chairperson Parrino also submitted a draft law—the Americans with Disabilities Act of 1988—which would prohibit discrimination against those with disabilities in employment, housing, transportation, and public accommodations, among others.[345] Among the findings of the proposed law were that "some thirty-six million" Americans suffered from a mental or physical disability in 1988, and that number was growing.[346] Significantly, "census data, national polls, and other studies [had] documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally."[347]

Congress accepted those and other findings submitted by Chairperson Parrino, making them its own.[348] To those, Congress added the finding that "unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination."[349] The ADA, thus, prohibits discrimination against those who have a disability. It defines "disability" as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment (as described in paragraph (3))."[350] More recently,

344. *See On the Threshold of Independence*, NAT'L COUNCIL ON DISABILITY (Jan. 29, 1988), https://ncd.gov/publications/1988/Jan1988.

345. *See id.*

346. *Id.*

347. *Id.*

348. *See* 42 U.S.C. § 12101(a).

349. *Id.*

350. *Id.* § 12102(1); *see also Disability Discrimination and Employment Decisions*, EEOC, https://www.eeoc.gov/disability-discrimination-and-employment-decisions.

in 2008, Congress amended the ADA, rejecting Supreme Court opinions that had narrowed the meaning of "disability" under the statute.[351]

ii. Plain Meaning

Precedent shows that the ADA will likely not be read to reach climate discrimination. As the Eighth Circuit, where the Native American engineer will likely bring suit, has indicated, where direct evidence of discrimination is lacking, burden-shifting applies.[352] The claimant's prima-facie case must show that she "(1) had a disability within the meaning of the ADA; (2) was qualified, with or without a reasonable accommodation, to perform the essential job functions of the position in question; and (3) suffered an adverse employment action because of [her] disability."[353] As a treatise also indicates, to determine whether an individual is actually disabled under the ADA, courts ask three questions: "(1) whether the plaintiff has a mental or physical impairment; (2) whether that impairment impacts on [sic] or more major life activities; and (3) whether the impairment, in fact, substantially limits that major life activity."[354] In other words, the plain meaning of the ADA applies.

Thus, given the absence of any indication in the hypothetical facts that any of the complainants suffers from a mental or physical disability, it is unlikely that the ADA will provide them with any relief. Indeed, even under recent scholarship that encourages us to think of "disability" under a "social model" that facilitates the lives of those who are disabled, it is unlikely that the ADA would reach discrimination based on climate change.[355]

E. 42 U.S.C. § 1981 (1991)[356]

Both the history and application of 42 U.S.C. § 1981 ("Section 1981") show that it, too, will not apply to cases arising as a result of climate change. First,

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351. *See Notice Concerning the Americans with Disabilities Act (ADA) Amendments Act of 2008*, EEOC, https://www.eeoc.gov/statutes/notice-concerning-americans-disabilities-act-ada-amendments-act-2008.

352. *See* Lors v. Dean, 595 F.3d 831, 834 (8th Cir. 2010).

353. *Id.* (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973)).

354. 2 AMERICANS WITH DISABILITIES: PRACT. & COMPLIANCE MANUAL § 7:72, (2022).

355. *See* Katherine A. Macfarlane, *Disability Without Documentation*, 90 FORDHAM L. REV. 59, 69 (2021); *see generally* Leslie P. Francis, *Employees with Intellectual Disabilities During the COVID-19 Pandemic: New Directions for Disability Anti-Discrimination Law*, 74 OKLA. L. REV. 1 (2021); *see generally* Jasmine E. Harris, *Reckoning with Race and Disability*, 130 YALE L.J. F. 916 (2021); *see generally* Michelle A. Travis, *Gendering Disability to Enable Disability Rights Law*, 105 CALIF. L. REV. 837, 839 (2017); *see generally* Michelle A. Travis, *Disqualifying Universality Under the Americans with Disabilities Amendments Act*, 2015 MICH. ST. L. REV. 1689 (2015).

356. The other civil-rights statutes are inapplicable. 42 U.S.C. § 1982 does not apply because it governs discrimination in the rental or sale of real or personal property on account of race. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968). 42 U.S.C. § 1983 is also inapplicable because it does not apply to private actors. *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1934 (2019) (concluding that "[o]perating public access channels on a cable system is

this subsection discusses the history of Section 1981, which shows that the act targets racial discrimination. The subsection then shows that current interpretations of Section 1981 in the federal circuits will not permit the five claimants to prevail in their lawsuits alleging discrimination as a result of climate change.

i. "As Is Enjoyed By White Citizens"

Section 1981 has roots in the Reconstruction era.[357] Reconstruction refers to the "violent, dramatic, and still controversial era [1865–1877] that followed the [American] Civil War."[358] The violence during Reconstruction was directed at racial minorities in the United States.[359] Reconstruction saw the ratification of the Thirteenth (abolishing slavery and involuntary servitude), Fourteenth (guaranteeing citizenship and equal protection), and Fifteenth (prohibiting denial or abridgment of voting rights based on "race, color, or previous condition of servitude") amendments, which are collectively referred to as the "Civil War amendments" or the "Reconstruction amendments."[360] Predecessors of the

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not a traditional, exclusive public function," and a private company operating such a system is not subject to liability under 42 U.S.C. § 1983). Similarly, 42 U.S.C. § 1985(3) is inapplicable as it applies to private conspiracies motivated by racial animus, but not commercial or economic animus. *See* United Bhd. of Carpenters & Joiners of Am., Loc. 610 v. Scott, 463 U.S. 825, 838 (1983).

357. *See* Nancy Leong, *Enjoyed by White Citizens*, 109 GEO. L.J. 1421 (2021).

358. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 xvii (2014); *see also* HENRY LOUIS GATES, JR., STONY THE ROAD: RECONSTRUCTION, WHITE SUPREMACY, AND THE RISE OF JIM CROW xiii (2019).

359. *See* EQUAL JUST. INITIATIVE, *Reconstruction in America: Racial Violence After the Civil War, 1865-1876* 7 (2020) https://eji.org/wp-content/uploads/2020/07/reconstruction-in-america-report.pdf (detailing instances of violence against African Americans); LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION (2008) (detailing instances of violence against African Americans); Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CAL. L. REV. 529 (1984) (detailing instances of violence against Chinese immigrants); *see generally* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1243, 1249 (1993) (identifying and responding to the need for legal scholarship focusing on the Asian-American experience).

360. U.S. Const. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."); U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."). *See also generally* BRUCE ACKERMAN, WE THE PEOPLE 2: TRANSFORMATIONS 22 (1998).

current version of Section 1981 were enacted during this era in response to the violence and deprivation of rights directed at racial minorities—the Civil Rights Act of 1866 and the Civil Rights Act of 1870.[361] These predecessors of Section 1981 were enacted shortly after passage of the Thirteenth Amendment.[362] Section 1981 derives its power from the Thirteenth amendment.[363] Section 1981 applies to all types of actions, including employment-discrimination actions.[364]

Section 1981 establishes that "all persons" subject to United States jurisdiction have the same right "as is enjoyed by white citizens" in making and enforcing contracts; bringing lawsuits, being parties to lawsuits, and giving evidence; as well as "the full and equal benefit of all laws and proceedings for the security of persons and property."[365] The Supreme Court has stated that Section 1981 protects a narrow range of rights, "specifically defined in terms of racial equality."[366] While the section does not define "race," the Supreme Court has held that a successful claim for racial discrimination under Section 1981 encompasses discrimination claims based on "ancestry or ethnic characteristics."[367]

Immigrants from China, for example, are protected under the act.[368] Whites are also protected under the act, as are those of "every race and color."[369] Claims under the act can be brought against private entities.[370]

ii. "Language or History of the Section"

Precedent shows that the five claimants will likely be unsuccessful in their reliance on Section 1981. As the Sixth Circuit, where the Chinese American agronomist would bring suit, has indicated, a claimant under Section 1981 must establish that "(1) [s]he belongs to an identifiable class of persons who are subject to discrimination based on their race; (2) the defendant intended to discriminate against [her] on the basis of race; and (3) the defendant's

361. *See* Runyon v. McCrary, 427 U.S. 160, 168 n.8 (1976) (observing that § 1981 is derived from the Civil Rights Act of 1866); Gen. Bldg. Contractors Ass'n v. Pa., 458 U.S. 375, 384–90 (1982) (noting that § 1981 is derived from both the Civil Rights Act of 1866 and the Civil Rights Act of 1870); McClain, *supra* note 359, at 530; Leong, *supra* note 357, at 1437.

362. *See generally* ACKERMAN, *supra* note 361.

363. *See Gen. Bldg. Contractors Ass'n*, 458 U.S. at 384 (providing the history of § 1981); *Runyon*, 427 U.S. at 179 (noting that § 1981 is based on Thirteenth Amendment).

364. *See* Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 459–60 (1975) (discussing § 1981).

365. St. Francis College v. Al-Khazraji, 481 U.S. 604, 609 (1987) (quoting 42 U.S.C. § 1981).

366. *Gen. Bldg. Contractors Ass'n*, 458 U.S. at 384 (quoting Georgia v. Rachel, 384 U.S. 780, 791 (1966)).

367. *St. Francis College*, 481 U.S. at 613.

368. *Id.*

369. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 295–96 (1976); *St. Francis College*, 481 U.S. at 613.

370. Runyon v. McCrary, 427 U.S. 160, 179 (1976)

discriminatory conduct abridged a right enumerated in section 1981(a)."[371] Thus, the protected class under Section 1981 is "race."[372] By extension, then, for much the same reasons that a race-based claim will likely fail under Title VII, a similar claim will likely fail under Section 1981. The five plaintiffs will not be able to show that their employers intended to discriminate against them based on race, a key requirement applicable to Section 1981 based upon precedent from the Supreme Court.[373]

The question then becomes whether courts have read Section 1981 as protecting categories other than race. Tellingly, federal courts appear to disagree regarding the reach of Section 1981. As one federal circuit explained, "[t]he only reference [in Section 1981 regarding protected classes] is that 'all persons' shall have described rights and benefits of 'white citizens.' Thus the standard against whom [sic] the measure was to be made were the rights and benefits of white citizens."[374] In that particular case, the federal appellate court held that Section 1981 included protection on the basis of alienage and national origin, which extended to [1] "Mexican-American origin."[375] The court specifically excluded protection under Section 1981 based on religion or sex, "as those are wholly outside the basic framework of section 1981[.]"[376] In other words, the plain reading of the statute applied, which allowed "national origin" to point to [1] (non-White) ancestry, which, in turn, pointed to [1, 2] origins outside the United States (not to origins within a particular state of the United States).

Other federal courts agree that the Section 1981 excludes discrimination on the basis of sex or religion, for example, and they accept as persuasive the defendant's reliance on precedent holding that Section 1981 does not apply to national origin (and other classes). That precedent indicates that:

> It is well established that § 1981 applies to private racial discrimination. . . . Thus, § 1981 protects 'identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.' . . . However, § 1981 does not ban every kind of discrimination. For example, **nothing in the language or history of the section addresses discrimination on the basis of either sex** or religion. . . . Additionally, § 1981 **does not**

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371. Crane v. Mary Free Bed Rehab. Hosp., 634 F. App'x 518, 521 (6th Cir. 2015); Bernstein v. United States HUD, No. 20-CV-02983-JSC, 2021 U.S. Dist. LEXIS 191184, at *9 (N.D. Cal. Aug. 16, 2021), *report and recommendation adopted*, No. 20-CV-02983-WHO, 2021 U.S. Dist. LEXIS 190002 (N.D. Cal. Oct. 1, 2021).

372. *See generally* Ann K. Wooster, Annotation, *Actions Brought Under 42 U.S.C.A. §§ 1981-1983 for Racial Discrimination—Supreme Court cases*, 164 A.L.R. FED. 483 (2021).

373. *See* Firefighters Loc. Union No. 1784 v. Stotts, 467 U.S. 561, 583 n.16 (1984) (requiring "proof or admission of intentional discrimination" in failure to promote case under Section 1981).

374. Manzanares v. Safeway Stores, Inc., 593 F.2d 968, 970 (10th Cir. 1979).

375. *Id.*

376. *Id.* at 972; *see also* Anderson v. AstraZeneca LP, No. 4:09-CV-00293, 2011 U.S. Dist. LEXIS 162553, at *22–23 (S.D. Iowa Sep. 30, 2011).

> **provide protection for individuals discriminated against on the basis of national origin**, . . . age, . . . handicap, . . . sexual orientation, . . . or political ideology.'[377]

Other courts agree that "[a]lthough Section 1981 does not protect individuals from discrimination based on national origin, it does protect against discrimination based on ethnicity."[378] As yet another federal court explained when rejecting a national-origin claim under Section 1981 in which the claimant's national origin was apparently [1, 2] "African," although ancestry, ethnicity, and national origin may overlap, "[t]he majority of district court decisions in this Circuit also support the contention that national origin alone is an insufficient basis for a Section 1981 claim."[379]

Given the restrictive reading of protected categories under Section 1981, it is unlikely, therefore, that the five litigants will succeed on their claims alleging that Section 1981 reaches discrimination on account of climate change. As a leading treatise observes, "[i]n a number of cases, the lower federal courts have amplified upon the effect of the general rule, holding that § 1981 is not applicable to discrimination allegedly based upon national origin." [380]

II. CONSIDERATIONS AND CONSEQUENCES

Since the Equal Pay Act, Title VII, the ADEA, the ADA, and Section 1981 likely do not provide relief to claimants alleging discrimination based on climatic displacement, here, I briefly consider the consequences of a congressional failure to act. I show that state employment-discrimination laws, state common-law causes of action, and constitutional claims under federal law likely will similarly provide inadequate relief to the five claimants. Finally, I make recommendations for congressional action. My conclusion follows.

A. "National Origin" under State Law

Recall that the five claimants moved to California, Florida, Michigan, New York, and North Dakota. The five claimants will, thus, likely turn to state law in their quest for relief given the climate-related discrimination they have faced. However, the claimants will likely find that state employment-discrimination laws are just as unhelpful to them as federal law in most of their quests for relief.

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377. Rammal v. Vera, No. 3:11-CV-189-MOC-DCK, 2011 U.S. Dist. LEXIS 112737, at *7 (W.D.N.C. Sept. 1, 2011) (quoting Duane v. Gov't Emps. Ins. Co., 784 F. Supp. 1209, 1216 (D. Md. 1992); *see also* Vogel v. S. Bend Cmty. Sch. Corp., No. 3:11 CV 254, 2013 U.S. Dist. LEXIS 70284, at *3-4 (N.D. Ind. May 17, 2013).

378. Eickhoff v. City of Kan. City, No. 98-2372-KHV, 1999 U.S. Dist. LEXIS 9914, at *4 (D. Kan. Apr. 12, 1999) (citing Saint Francis College v. Al–Khazraji, 481 U.S. 604, 613 (1987)).

379. Bahar v. Nw. Hum. Servs., No. 06-CV-3910, 2007 U.S. Dist. LEXIS 6372, at *16-18 (E.D. Pa. Jan. 30, 2007).

380. Jean F. Rydstrom, Annotation, *Applicability of 42 U.S.C.A. § 1981 to national origin employment discrimination cases*, 43 A.L.R. FED. 103 (2021).

Proceeding alphabetically, we might start with California, where the Latina museum curator will likely bring suit. California has some of the most capacious protections for workers. As the Supreme Court of California has stated, California's employment-discrimination statute, the Fair Employment and Housing Act ("FEHA"), provides "a comprehensive scheme for combating employment discrimination. As a matter of public policy, the FEHA recognizes the need to protect and safeguard the right and opportunity of all persons to seek and hold employment free from discrimination. This court has declared that policy to be fundamental."[381] California's constitution specifically forbids discrimination "because of sex, race, creed, color, or national or ethnic origin."[382]

In total, California prohibits discrimination in employment on some fifteen grounds—age; ancestry; color; creed; disability ("mental and physical"); gender expression and identity; genetic information; marital status; medical condition; military or veteran status; national origin; race; religion; sex and gender "(including pregnancy, childbirth, breastfeeding or related medical conditions)"; and sexual orientation.[383] Thus, just as she will likely be successful under federal law, the Latina museum curator will also likely successfully argue that she qualifies for protection under the FEHA's "national origin" category. This is due to the fact that she is from outside the United States, while those who are treated better than she is are from the United States.[384]

Florida, the state in which the African American accountant will likely bring suit, also appears to lack specific provisions covering discrimination based on climate change. Florida's constitution provides that "[n]o person shall be deprived of any right because of race, religion, national origin, or physical disability."[385] The Florida Civil Rights Act ("FCRA") proscribes discrimination on nine bases—age, color, "handicap," marital status, national origin (including ancestry), pregnancy, race, religion, and sex.[386] By its own terms, the FCRA intends that its provisions be construed "liberally."[387] Precedent from Florida suggests that, like under federal law, "national origin" under state law refers to

381. Brown v. Super. Ct., 37 Cal. 3d 477, 485 (1984) (internal citations and quotation marks omitted).

382. Cal. Const. art. I, § 8.

383. *See Employment Discrimination: What is Protected*, CAL. CIV. RIGHTS DIV., CAL. DEP'T OF JUST., https://www.dfeh.ca.gov/Employment/#whoBody.

384. *See generally* CAL. CIV. PRAC. EMPLOYMENT LITIGATION § 2:60, Westlaw (current through Apr. 2022); Cal. Code Regs. tit. 2, § 11027.1 (defining "national origin").I am grateful to the following source for bringing the California statute to my attention: L. Brent Garrett et al., *Anti-Discrimination Laws: California*, No. 6-504-7947 WESTLAW (2021), https://us.practicallaw.thomsonreuters.com/6-504-7947.

385. Fla. Const. art. 1, § 2 (2016).

386. Fla. Stat. Ann. § 760.10 (2).

387. Fla. Stat. Ann. § 760.01(3).

a country (outside the United States), and to ancestry.[388] Given these narrow readings, which do not include climatic displacement, the African American accountant is unlikely to prevail in Florida in her suit for discrimination on account of climate change.

Michigan, the state to which the Chinese American agronomist will move, similarly lacks anti-discrimination provisions that will reach her climate-related claim. The Constitution of Michigan prohibits discrimination "because of religion, race, color or national origin."[389] Michigan's Elliott-Larsen Civil Rights Act ("Civil Rights Act") bars discrimination on the basis of age, color, height, marital status, race, religion, sex, national origin (including ancestry), and weight.[390] Significantly, the Supreme Court of Michigan has understood "national origin" to mean "the country of origin," which in one employment-discrimination case, was Germany.[391] In another case alleging national-origin discrimination under the state's Civil Rights Act, the court implied that "national origin" covered ancestry when it observed that "[p]laintiff Sharda Garg is of Asian Indian ancestry."[392] Thus, the Chinese American claimant's climate-related claim will likely fail under state law because she is from [1] the United States, and she is not facing workplace discrimination on the grounds of [2] her ancestry.

New York State, to which the White woman moves, likely does not anticipate protection under its laws for discrimination based on climatic displacement either. The New York State Constitution proscribes discrimination "because of race, color, creed or religion."[393] The New York State Human Rights Law ("NYSHRL") has roughly sixteen protected bases applicable to employment—age, arrest or conviction record, color, creed, disability, domestic-violence-victim status, family status, gender expression or identity, genetic characteristics, marital status, military status, national origin, pregnancy, race, sex, sexual orientation, and a prohibition against retaliation.[394] The NYSHRL

388. *See* Palm Beach Cty. Sch. Bd. v. Wright, 217 So. 3d 163, 164 (Fla. Dist. Ct. App. 2017) (noting that the "plaintiff is of Vietnamese origin"); Cimino v. Am. Airlines, Inc., 183 So. 3d 1242, 1243 (Fla. Dist. Ct. App. 2016 ("According to the Charge, Mr. Cimino, a non-Hispanic, was discriminated against by his Hispanic supervisor."); Santos v. Gen. Dynamics Aviation Servs. Corp., 984 So. 2d 658, 659 (Fla. Dist. Ct. App. 2008) (noting that claimant alleged "that he was unjustly terminated . . . because of his national origin (Puerto Rican and Dominican) and because of his complaints of discrimination") (internal quotation marks omitted).

389. Mich. Const. art. I, § 2.

390. *See* Mich. Comp. Laws Ann. § 37.2202; Mich. Comp. Laws Ann. § 37.2103 (f) (stating that "'National origin' includes the national origin of an ancestor").

391. *See* Gilbert v. DaimlerChrysler Corp., 685 N.W.2d 391, 394 n.1 (Mich. 2004) ("For all of the reasons detailed in this majority opinion, we conclude that the repeated, explicit and inappropriate references to the Holocaust, defendant's German national origin, and defendant's status as a corporation cannot be tolerated in Michigan courts any more than in our society at large.").

392. Garg v. Macomb Cnty. Cmty. Mental Health Servs., 696 N.W.2d 646, 649 (Mich. 2005).

393. N.Y. Const. art. I, § 11.

394. N.Y. Exec. Law § 296.

is to be construed liberally.[395] As the caselaw I review in this paragraph makes clear, New York State's courts have read "national origin" under the NYSHRL to cover the country of [1, 2] origin and ancestry. In one case, an Indian employee who brought a national-origin claim under the NYSHRL could proceed with his claim.[396] In another, a state appellate court held that "[s]ince the term 'national origin' applies to [2] 'ancestry' (Executive Law, § 292, subd. 8), it must apply with equal effect to an individual's maternal line of ancestry as well as his paternal line."[397] Therefore, the White woman's claim for climate-related discrimination is also unlikely to be successful given narrow definitions of "national origin" under state law.

Finally, North Dakota, to which the Native American engineer moves, is unlikely to provide her with relief. North Dakota's Human Rights Act ("NDHRA") proscribes discrimination in employment on the basis of age, color, disability (mental or physical), marital status, public assistance, "participation in lawful activity off the employer's premises during nonworking hours," race, religion, and sex.[398] Few cases deal with "national origin" in the employment sphere under the NDHRA.[399] Relevantly, in *Ramey v. Twin Butte School District*, the Supreme Court of North Dakota noted (consistent with federal law) that "[d]iscrimination based on tribal affiliation can give rise to a claim for national origin discrimination . . . [b]ecause the different Indian tribes were at one time considered nations, and indeed still are to a certain extent, discrimination on the basis of tribal affiliation can give rise to a 'national origin' claim."[400] Nevertheless, while the Native American engineer might argue that she belongs to a protected class [2] (national origin), there is no indication in the hypothetical facts that all of the employees who are treated more favorably than she is in North Dakota are *not* Native American (outside her protected class). Thus, her claim is likely to fail.

In short, state anti-discrimination laws will likely be of little help to at least four of the five claimants, because state laws prohibiting discrimination on the basis of "national origin" tend to be read similarly to federal provisions—that is, narrowly.

B. Common-Law Causes of Action

The five claimants will likely consider common-law causes of action. Such causes of action sound in tort, and they include intentional infliction of

395. N.Y. Exec. Law § 300.

396. *See* Singh v. Covenant Aviation Sec., LLC, 16 N.Y.S.3d 611, 616 (N.Y. App. Div. 2015).

397. N.Y. State Div. of State Police v. McCall, 470 N.Y.S.2d 916, 922 (1983).

398. *See* N.D. Cent. Code § 14-02.4-01 (2021).

399. I ran a search in Westlaw for "North Dakota Human Rights Act" or "Human Rights Act" /100 "national origin" /15 employ*, which returned two results, both of which are from the Supreme Court of North Dakota. I ran similar searches for all five states.

400. Ramey v. Twin Butte Sch. Dist., 660 N.W.2d 270, 274 (N.D. 2003) (internal citations omitted).

emotional distress ("IIED"), negligence, and negligent infliction of emotional distress ("NIED").

i. Intentional Infliction of Emotional Distress

For the sake of argument, let us assume that each of the five claimants brings a freestanding claim for IIED. Those claims will likely be unsuccessful. As the hornbook on tort law indicates, "[l]egal professionals differ considerably in their attitude toward recovery for emotional distress. Some see the claim as trivial, as a disruption of the judicial process, or even as presenting risks of outright fakery."[401]

Commentators underscore the fact that IIED is particularly difficult to prove.[402] Courts acknowledge as much.[403] IIED is known as the tort of "outrage," and a claimant's prima-facie case must establish that (1) the defendant acted with intent—the highest level of fault in tort law—which means the defendant acted with purpose or substantial certainty that the consequence would follow.[404] Recklessness can also be shown.[405] (2) The conduct complained of must have "been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[406] (3) The conduct must have caused severe emotional distress. Regarding the third prong, as the Second Restatement observes:

> Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.[407]

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401. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 383 (2d ed.) (2015).

402. *See* Marina Sorkina Amendola, *Intentional Infliction of Emotional Distress: A Workplace Perspective*, 43 VT. L. REV. 93, 94 (2018); *See generally* Russell Fraker, Note, *Reformulating Outrage: A Critical Analysis of the Problematic Tort of IIED*, 61 VAND. L. REV. 983 (2008); *see generally* William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

403. *See* Howell v. N.Y. Post Co., 612 N.E.2d 699, 702 (N.Y. 1993) (stating that the "requirements of the rule [for IIED] are rigorous, and difficult to satisfy . . . .") (internal citations quotation marks omitted).

404. *See Modern status of intentional infliction of mental distress as independent tort; "outrage*," 38 A.L.R. 4TH 998 (2022) (citing Gilmer v. Crestview Memorial Funeral Home, Inc., 35 So. 3d 585 (Ala. 2009) ("To recover on claim for tort of outrage, plaintiff must demonstrate that the defendant's conduct (1) was intentional or reckless; (2) was extreme and outrageous; and (3) caused emotional distress so severe that no reasonable person could be expected to endure it.")).

405. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965); *see also* Kilchermann v. Thompson, No. 320432, 2015 Mich. App. LEXIS 806, at *19 (Mich. Ct. App. Apr. 21, 2015).

406. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d; *Kilchermann*, No. 320432, 2015 Mich. App. LEXIS, at *20; Howell, 612 N.E.2d at 702–03.

407. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j.

Nothing in the facts of the hypothetical indicates that the claimants will succeed on an IIED claim. First, there is no indication that the employers intentionally or recklessly caused severe emotional distress. There is also no indication that the supervisors' remarks that the claimants should return to their places of origin exceeds the bounds of decency in a civilized society. So high is the threshold in an IIED case that a court has held even when it was alleged that the defendants "repeatedly us[ed] the term 'n*****' as part of a series of derogatory statements," while those comments were "racist and offensive," "[t]hey do not, however, meet the high standard necessary to satisfy the 'extreme and outrageous' requirement under Illinois law."[408] Indeed, a New York State court, where the White woman would likely bring suit, has determined that a female employee's "allegations concerning the sexual and inappropriate remarks made by various . . . employees [did not] show conduct sufficiently outrageous to support a claim of intentional infliction of emotional distress."[409] The five claimants are, thus, unlikely to be successful in their IIED claims.

ii. Negligence

Assume, further, that the five claimants bring claims alleging that their employers negligently hired the supervisors who discriminated against them. Those claims are also likely to fail. A claim of negligent hiring typically involves an allegation that the employer breached the duty of care owed to the plaintiff by hiring an individual regarding whom the employer was actually or constructively aware had a predisposition to tortious or criminal conduct, and the employer's breach of such duty to the plaintiff actually and proximately resulted in tortious injury to the plaintiff, warranting a grant of actual and/or punitive damages.[410] Typically, the plaintiff must show that the negligently hired employee was incompetent or unfit for the particular job, resulting in injury to the plaintiff.[411] Injury, then, results from the danger posed to the plaintiff.[412] Given the absence of any supporting facts that would sustain this cause of action, a suit for negligent hiring (or supervision) by any of the five claimants is likely to be unsuccessful.[413]

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408. Moore v. City of Chi., No. 13 C 483, 2014 U.S. Dist. LEXIS 73650, at *36–*39 (N.D. Ill. May 30, 2014).

409. Clayton v. Best Buy Co., 851 N.Y.S.2d 485, 487 (App. Div. 2008).

410. *See* Dobbs, *supra* note 401, at § 423; RESTATEMENT OF EMPLOYMENT LAW § 4.04 cmt. c (2015); Kristine Cordier Karnezis, *"Cause of Action for Injury or Death Resulting from Negligent Hiring, Supervision, or Retention of Employee"*, 25 CAUSES OF ACTION 2D 99 (2004).

411. *See* RESTATEMENT OF EMPLOYMENT LAW § 4.04 cmt. c.

412. *Id.*; *see generally* Stuart M. Speiser et al., Annotation, *Negligent Hiring*, 1 AMERICAN LAW OF TORTS § 4:11 (2013).

413. *See* RESTATEMENT OF EMPLOYMENT LAW § 4.04 cmt. d.

iii. Negligent Infliction of Emotional Distress

Assume too, that the five plaintiffs assert claims for NIED. Those claims also, will likely fail. A claim for NIED generally assumes the existence of an initial act of negligence that inflicts an emotional injury on the employee.[414] Some courts even require that the plaintiff have suffered serious emotional harm.[415] Further, as the Restatement of Employment Law notes, "[a]n employee's ability to recover damages for negligent infliction of emotional harm is unsettled."[416] In other words, both because the hypothetical plaintiffs' facts do not give rise to a claim for NIED and because courts do not uniformly allow employees to recover under the cause of action, the claims are likely to be weak.

In sum, common-law causes of action sounding in tort law are likely to be of little utility to the five claimants.

C. Federal Constitutional Causes of Action

The five claimants may try to assert constitutional claims under federal law, appealing to the Equal Protection Clause of the Fourteenth Amendment, to the Privileges and Immunities Clause of Article IV, Section 2 of the Federal Constitution, and to the Privileges and Immunities Clause of the Fourteenth Amendment. Those claims are also likely to fail.

i. Equal Protection Clause of the Fourteenth Amendment

As an initial matter, the five claimants will find that because they are bringing suit against a private employer, the Federal Constitution provides no protection. They might, for example, assert that the Fourteenth Amendment prohibits the discriminatory treatment of which they have been victims. Relevantly, in *Baker v. American Juice, Inc.*, Ms. Baker, an African American woman, brought an employment-discrimination suit against her privately owned employer, American Juice, Inc.[417] In pertinent part, Ms. Baker alleged a violation of the Fourteenth Amendment.[418] The federal trial court held it "a matter of horn-book law" that Ms. Baker had "no cause of action against a private entity" under the Federal Constitution.[419]

"With regard to Baker's federal constitutional argument," the federal court stated, "the Supreme Court made clear long ago that the U.S. Constitution—and

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414. *See* Dobbs, *supra* note 401, §§ 390–97; *see generally* Gregory C. Keating, *Is Negligent Infliction of Emotional Distress A Freestanding Tort?*, 44 WAKE FOREST L. REV. 1131 (2009).

415. *Id.* § 390 ("Moreover, courts sometimes demand, not merely that a reasonable person would foresee the general type of harm, but also serious emotional harm in particular.").

416. RESTATEMENT OF EMPLOYMENT LAW § 9.05 cmt. g (2015).

417. Baker v. Am. Juice, Inc., 870 F. Supp. 878, 880–81 (N.D. Ind. 1994).

418. *Id.* at 881. Although the case does not state that Ms. Baker's claim is under the Equal Protection Clause, the court does cite to a case for the proposition that "Indiana cases that hold there are no practical differences between the equal protection guaranteed under the state versus the federal constitution." *Id.* at 882.

419. *Id.* at 881–882.

specifically the Fourteenth Amendment—'erects no shield against merely private conduct, however discriminatory or wrongful.'"[420] In language that suggested attorney negligence, the trial court observed that "[t]his is a lawsuit that, from the record before the court, should never have been brought. Jerry Baker's lawyer should have known better. Perhaps he did."[421] As Dean Chemerinsky has pointed out, in the late nineteenth century, "the [Supreme] Court broadly declared that the Fourteenth Amendment only applies to government action and that therefore it cannot be used by Congress to regulate private behavior."[422] Thus, the five claimants are unlikely to be successful on an equal-protection argument under the Federal Constitution.

ii. Privileges and Immunities Clauses (Article IV & Fourteenth Amendment)

The five hypothetical plaintiffs have two additional constitutional arguments they might consider. The claimants might contemplate arguments relying on the Privileges and Immunities Clause of Article IV, Section 2 of the Federal Constitution and on the Privileges and Immunities Clause of the Fourteenth Amendment to the Federal Constitution. Specifically, Article IV, Section 2 provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[423] Thus, the five claimants might advance the argument that by treating them differently because their origins are outside of the state, their employers have violated Article IV, Section 2. Similarly, the five claimants might have in mind the Privileges and Immunities Clause of the Fourteenth Amendment, which indicates that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."[424] Both arguments will likely be unavailing. Both the Privileges and Immunities Clause of Article IV, Section 2 and of the Fourteenth Amendment apply to states, not private employers.[425] In addition, the Privileges and Immunities Clause of Article IV, Section 2 will not apply to the Latina museum curator since she is not an American citizen.[426]

In brief, the five complainants' constitutional claims alleging discrimination against out-of-staters by private employers are likely to be ineffective. Therefore, neither federal employment anti-discrimination statutes, nor state common-law causes of action, nor federal constitutional provisions are likely to

420. *Id.* at 882 (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948)); *see generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 573–75 (2019).

421. Baker, 870 F. Supp. at 880.

422. CHEMERINSKY, *supra* note 420, at 309.

423. U.S. CONST. art. IV, § 2.

424. U.S. CONST. amend. XIV, § 1.

425. See CHEMERINSKY, *supra* note 420, at 511, 513; *see also* U.S. CONST. amend. XIV, § 1 (discussing their relationship to the Dormant Commerce Clause, which applies to the states).

426. U.S. CONST. art. IV, § 2.

help the five claimants. The following section recommends that Congress amend federal law. My conclusion follows.

D. Class, Plus, Origin

This subsection first shows that Congress has, in the past, amended federal employment anti-discrimination statutes to support greater protection for workers. It then shows that commentators have requested that Congress make additional amendments to federal employment law, notably, to Title VII. The subsection then urges Congress to amend federal employment anti-discrimination statutes on three bases—class, plus, origin—given the reality (and threat) of climate change.

i. Employment-Discrimination Amendments

Congress has amended federal anti-discrimination statutes to strengthen worker protections. In 1972, for example, Congress amended the Fair Labor Standards Act to extend the scope of the Equal Pay Act's protections.[427] The same year, Congress empowered the EEOC to sue private entities, through an amendment to Title VII.[428] The same amendment also granted the EEOC authority to oversee administrative exhaustion of remedies, and the amendment placed government employees under the protection of Title VII.[429] Six years later, Congress amended Title VII to encompass pregnancy within the groundbreaking statute's provisions.[430] In 1986, Congress amended the ADEA so as to extend its protections to more people.[431]

In response to restrictive Supreme Court rulings, in 1991, Congress amended Title VII again, allowing jury trials as well as grants of both punitive and compensatory damages where violations of Title VII and the ADA were intentional.[432] The amendment also extended Title VII's protections to more government employees.[433] In 2008, again rejecting restrictive Supreme Court

427. *See* NAT'L EQUAL PAY TASK FORCE, FIFTY YEARS AFTER THE EQUAL PAY ACT, 9 (2013), https://obamawhitehouse.archives.gov/sites/default/files/equalpay/equal_pay_task_force_progress_report_june_2013_new.pdf.

428. *See Timeline of Important EEOC Events*, EEOC, https://www.eeoc.gov/youth/timeline-important-eeoc-events.

429. *See* 42 U.S.C. § 2000e-16 (2018) (dealing with administrative exhaustion); Brown v. Gen. Serv. Admin., 425 U.S. 820, 825 (1976) (noting that "[u]ntil it was amended in 1972 by the Equal Employment Opportunity Act, however, Title VII did not protect federal employees. 42 U.S.C. 2000e(b).").

430. *See* EEOC, *supra* note 410.

431. SPERINO, *supra* note 57, at 5.

432. *See The Rehabilitation Act of 1973*, EEOC, https://www.eeoc.gov/statutes/rehabilitation-act-1973; EEOC, *supra* note 410.

433. *See* EEOC, *supra* note 410.

rulings, Congress amended the ADA, expanding the meaning of "disability."[434] In 2009, Congress amended Title VII, the ADA, and the ADEA "to clarify the time frame in which victims of discrimination may challenge and recover for discriminatory compensation decisions or other discriminatory practices affecting compensation."[435] Thus, Congress can and does expand the protections available to workers under federal law.

ii. Commentators' Recommendations

Commentators have offered a number of suggestions to strengthen worker protections under federal law. Regarding the ADA, recommendations have been made that Congress clarify the meaning of "perceived disability" and that Congress prohibit certain kinds of pleading.[436] As for the ADEA, recommendations have been made that Congress change the ADA's causation standard and that it clarify the scope of the statute's coverage.[437] As for Section 1981, a recommendation has been made that Congress "repeal the statutory recognition of the dichotomy of theories in section 1981a."[438] Regarding Title VII, it has been recommended that Congress "amend Title VII and the ADEA to expressly provide for several theories, causes of action, or unlawful practices, following the model of the ADA."[439] Under Title VII, changes have also been recommended in cases involving joint-and-several liability.[440]

Most compellingly, commentators have argued that Congress should include protection on the basis of socioeconomic status. Professor Peterman, for

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434. *See* EEOC, *Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA* (May 5, 2011), https://www.eeoc.gov/laws/guidance/fact-sheet-eeocs-final-regulations-implementing-adaaa.

435. EEOC, *supra* note 410; EEOC, *The Rehabilitation Act of 1973: Sections 501 and 505*, https://www.eeoc.gov/statutes/rehabilitation-act-1973 (last visited Jan. 14, 2023) ("[T]he Lilly Ledbetter Fair Pay Act of 2009 . . . amended Title VII, the Age Discrimination in Employment Act of 1967, the ADA and the Rehab Act to clarify the time frame in which victims of discrimination may challenge and recover for discriminatory compensation decisions or other discriminatory practices affecting compensation.").

436. *See* Allison Ara, Note, *The ADA Amendments Act of 2008: Do the Amendments Cure the Interpretation Problems of Perceived Disabilities?*, 50 SANTA CLARA L. REV. 255, 279 (2010) (discussing the concept of a "perceived disability"); Kelly Kagan, Note, *To Trigger or Not to Trigger: The Catch-22 of the Americans with Disabilities Act's Interactive Process*, 57 SAN DIEGO L. REV. 501, 518–19 (2020) (pleading standards).

437. *See* Leigh A. Van Ostrand, Note, *A Close Look at ADEA Mixed-Motives Claims and Gross v. FBL Financial Services, Inc.*, 78 FORDHAM L. REV. 399, 442 (2009) (discussing the appropriate causation standard); Samantha Pitsch, Note *Quick, Stop Hiring Old People! How the Eleventh Circuit Opened the Door for Discriminatory Hiring Practices Under the ADEA*, 92 WASH. L. REV. 1605, 1606 (2017) (discussing the scope of coverage).

438. William R. Corbett, *Breaking Dichotomies at the Core of Employment Discrimination Law*, 45 FLA. ST. U. L. REV. 763, 805 (2018).

439. *Id.*

440. *See* Llezlie L. Green, *Outsourcing Discrimination*, 55 HARV. C.R.-C.L. L. REV. 915, 943 (2020).

example, has argued convincingly that as classism has become entrenched in American life, the "poor are subject to demeaning representations and stereotyped as being inferior—no matter how capable and competent they are."[441] "During Reconstruction," Professor Peterman notes, "Republicans designated white trash as a dangerous class that was producing a flood of bastards, prostitutes, vagrants, and criminals, and some Northerners expressed anxiety about granting them voting rights."[442]

Eugenics and Social Darwinism, Professor Peterman notes, further entrenched hostility toward the poor of all races in the United States in the twentieth century, and "animosity" toward America's poor continued after a period of "sympathy" toward them following the Great Depression.[443] Unfortunately, in the United States, poverty is now assumed to be culturally ingrained—a cross-generational pathological legacy to be viewed as a willful moral failure by the poor and a voluntary undertaking, leading to stigmatization and exclusion of the poor from a number of important spheres of American life.[444] Professor Peterman, thus, suggests that Congress rely on its constitutional powers under the Thirteenth and Fourteenth amendments, and on the Spending Power under Article I, Section 8 of the Federal Constitution to enact protective anti-discrimination legislation for the poor.[445]

We might recall, here, the young White woman who works as a janitor and is a mother to a toddler. This Article chose to outline her story because her experience shows the intersection of the challenges facing women in American life, the challenges facing single mothers, and the scourge of poverty. Note that the young White woman is told to go back home by her New York employer, she is paid less, potentially deepening her poverty, and she has no legal relief. We might think similarly of the other four hypothetical claimants. In the example of the Chinese American agronomist, we encounter the outlines of a community whose existence is under sustained attack in American life solely because of the community's Chinese (or Asian) origin. The discrimination against the agronomist is compounded by the (mis)treatment of women in American life, and now, the agronomist has to deal with an employer who pays her less and wants her out of the state if she does not like the abuse; she too has no legal relief as we have seen.

The same applies to the Native American engineer, who comes from the foundational communities of the nation, which have been subject to centuries of violent discrimination. She is an engineer and is informed by her employer that she is not only paid less, but she is also passed over for promotion and is told that she should leave the state. Indeed, the African American accountant faces

441. Danieli Evans Peterman, *Socioeconomic Status Discrimination*, 2018 VA. L. REV. 1283, 1302, 1305 (2018).

442. *Id.* at 1306 (citations and internal quotation marks omitted).

443. *Id.* at 1307-09.

444. *Id.* at 1310, 1313, 1330.

445. *Id.* at 1339.

the same terrible reality, as does the Latina museum curator in an age in which citizens become migrants and migrants becomes victims. As Professor White has memorably shown, the marginalization of certain communities often means that those discriminated against internalize the subordination that is projected upon (and, maybe even, required of them), affecting their speech, demeanor, and self-presentation.[446]

Why, then, we might ask, do the hypothetical employers offer jobs to employees the employers ostensibly dislike? Three possible explanations come to mind. The first is that discrimination rarely abjures an opportunity to remind "an inferior" of a governing hierarchy. By identifying an assumed inferior, superior status is ostensibly conferred and reaffirmed by implication. The second possibility is that from a discriminatory employer's perspective, especially when people are desperate for jobs as they move across boundaries, paying excellent employees less likely not only saves money, but it also shows that those employees are indeed inferior, willing to take any job. Plus, such employees have to experience that reality every day—up to and including each paycheck.

Finally, as Professor Nancy Leong has argued, hiring people from groups that are in the minority—however we define the term—can be a form of "*racial capitalism*—the process of deriving social or economic value from the racial identity of another person. A person of any race might engage in racial capitalism, as might an institution dominated by any racial group."[447] Thus, the employers might hire the five women because the employers believe that the five women will make the employer look good, and their presence will confer an associational benefit on the employer. And yet, unfortunately, in the process, the employers also attack the inherent dignity of those employees—dignity having become a term of greater constitutional currency in the United States.[448]

To be sure, it bears stating that the point of this Article is not to say (or imply) that every employer in the United States (or elsewhere) engages (or will engage) in such discriminatory—and immoral—misconduct. There are indeed examples of employers who care deeply about the lives of their workers, of employers invested in creating a holistically nurturing environment in which their workers might thrive, and of employers who care about the meaning of a dignified life (professional and personal) for those who devote their days and nights to their employers' service and, in many cases, enrichment. As a business article

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446. *See generally* Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFFALO L. REV. 1 (1990). I am grateful to Professor Christine Desan, who assigned Professor White's article in our Civil Procedure class in fall 2008 at Harvard Law School. Professor Desan's class was transformative in many ways, and I offer my thanks to her.

447. Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2153 (2013).

448. This insight draws upon a previous article I have published. *See* Duane Rudolph, *Workers, Dignity, and Equitable Tolling*, 15 NW. J. HUM. RTS. 126, 130–131 (2017).

implies, such employers empower and uphold the inherent dignity (my term) of their employees in a number of thoughtful ways.[449]

This Article, however, has in mind the kind of actor whom Professor Smith, in his groundbreaking work on remedies, has called the opportunist—the actor who identifies a gap in the prevailing law and has no moral qualms about exploiting it.[450] Indeed, this Article has in mind a normative undertaking on a national level of which only Congress is capable so as to empower those whom Professor Desan has called, in another context, the inhabitants of the "marchlands" of our national legal life and discourse.[451] Congress can do so, the next subsection argues, by specifically amending federal law to protect on the bases of "class," "plus," and "origin."

iii. Class, Plus, Origin

My recommendations are brief and straightforward.

Class. Congress should enact anti-discrimination protections in employment for the poor, prohibiting discrimination against them on the basis of (socioeconomic) class.

Plus. To the extent that the law does not already provide for this, Congress should amend the Equal Pay Act, Title VII, the ADEA, the ADA, and Section 1981 to allow "plus" claims. That is, as long as the initial claim is grounded in the original statutory language, the claimant can tack on an additional claim that might not strictly fall under the act's stated protected categories.

Origin. Congress should amend Title VII's "national origin" category to prohibit discrimination on the basis of "origin," which will embrace not only the current tripartite understanding ([1], [2], [3]) of "national origin," but will also include having one's origins in a place subject to the jurisdiction of the United States of America.

The conclusion takes us back to the origins of this Article (the Dust Bowl of the 1930s).

"THE LAND O' MILK AN' HONEY"

In August 1939, an article in a prominent American newspaper informed its readers that "The 'Okies' Search for a Lost Frontier."[452] "The Okie," the article

449. *See* Michael O'Malley, *What the "Best Companies to Work for" Do Differently*, HARV. BUS. REV. (Dec. 12, 2019), https://hbr.org/2019/12/what-the-best-companies-to-work-for-do-differently.

450. *See* Henry E. Smith, *Equity as Meta-Law*, 130 YALE L. J.1050, 1079 (2021). Here, I read Professor Smith expansively as he specifically indicates that opportunism "often violates moral norms, which are incorporated into the ex post principles that deal with opportunism. As we will see, opportunism resists taming by tailored ex ante rules." *Id.* at 1080. This article proposes the taming of opportunism through ex ante rules.

451. *See* Christine A. Desan, *Writing Constitutional History Beyond the Institutional/Ideological Divide*, 16 L. & HIST. REV. 391, 395 (1998).

452. *See* Todd, *supra* note 31.

noted using the prevalent pejorative term for "Oklahomans," "is land-hungry as well as work-hungry."[453] Apparently, so appealing was the thought of a new life in California to migrants from Oklahoma (and other states) that in the first five months of 1939 alone, twenty thousand such migrants had moved to California, bringing the total to three hundred thousand migrants now living in the state.[454] The article talked of the "bitterness" that characterized the lives of the new arrivals, whom the article noted were "former preachers, veterinaries [sic], men with knowledge of the law, [and] young people with credits from their State universities."[455] The article observed that "[f]inally, the nation-wide publicity brought to a head by John Steinbeck's 'Grapes of Wrath' has brought the whole situation in California close to the boiling point."[456]

The new arrivals had several things in common. First, they had fled an environmental calamity that had devastated the lives they had once enjoyed.[457] Second, before the federal government stepped in and created camps for them in California (with duration restrictions regarding their residence), the migrants' lives were so difficult that they used irrigation ditches for "drinking water, bathing and sewerage."[458] Third, even in the camps created by the federal government for them, contagion broke out, resulting in the imposition of quarantine measures.[459] Fourth, the migrants worked in agricultural jobs in which they might "pick peas for 20 cents an hour."[460] Fifth, "[n]ative Californians [were] fearful for their jobs in the face of this work-hungry horde from 'foreign' states."[461]

Although California had once believed that it could easily absorb the labor of all the migrants from states affected by severe drought, native Californians now loathed this "work-hungry horde from 'foreign' states." Even Californians involved in agriculture complained that "This isn't a migration—it's an invasion! They're worse than a plague of locusts!"[462] A journalist at the time asked, perhaps reflecting the concerns of those born in California, "Why don't they go back? Why are they still coming?"[463] The federal government became so concerned about the issue that President Roosevelt identified California's problem as one that "belongs to the nation at large."[464] The article concluded with the sentiment that for these "ordinary Americans," "[s]omehow,

453. *Id.*
454. *See id.*
455. *Id.*
456. *Id.*
457. *See id.*
458. *Id.*
459. *See id.*
460. *Id.*
461. *Id.*
462. *Id.*
463. *Id.*
464. *Id.*

somewhere, on this mighty continent, land must be found for these people to call their own."[465] In other words, the internal migrants could not call their chosen domicile—California—in their own country, home.

It is true that in the 1930s, there were no federal employment-discrimination laws that might have provided legal protections for internal (and other) migrants.[466] The lack of case law regarding any cases migrants might have brought implies both how disenfranchised the migrants and others in similar positions must have felt and how inaccessible the legal system must have seemed to them. Almost one hundred years later, (more recent) federal employment-discrimination statutes have generated a voluminous case law, and federal employment-discrimination statutes have inspired analogs in the states.[467]

This fact notwithstanding, as this Article's five hypothetical claimants have shown, there are still significant lacunae, notably protections in the workplace for those who are forced to move across boundaries as a result of a hostile climate and those who are poor. The lessons of almost a century ago stand today, thus, both as a warning and an opportunity. The warning is implicit in the opening to the article about the migrants from Oklahoma, as is the opportunity to heed and address the entailments of the devastation wrought by a hostile climate in another age. Such devastation made migrants of Americans, and it made enemies of compatriots. The newspaper article's opening, a lamentation and warning, reads as follows: "They told me this was the land o' milk an' honey, but Ah guess the cow's gone dry, and the tumble-bugs has got in the beehive."[468]

Congress can and should act to amend the relevant federal laws so that much of the suffering of another age is not reproduced in our own.

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465. *Id.*

466. *See* Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 354 (2002) ("The American workplace of 1950 was subject to very little government regulation.")

467. Title VII, for example, indicates that it is not meant to preempt state laws that are consistent "with any of the purposes of this Act, or any provision thereof." 42 U.S.C. § 2000h-4 (2018).

468. Todd, *supra* note 40.