
COMMENT

THE DIVIDED STATES OF AMERICA: REINTERPRETING
TITLE VII'S NATIONAL ORIGIN PROVISION TO ACCOUNT
FOR SUBNATIONAL DISCRIMINATION *WITHIN* THE
UNITED STATES

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INTRODUCTION

From the marginalization of Native Americans to the bitter rivalry between the North and the South, discrimination *within* the United States is not a new phenomenon. For centuries, Americans have discriminated against one another because they come from different parts of the country. Northerners have been derogatorily referred to as "Yankees,"¹ Southerners² as "rednecks,"³ Appalachians as "hillbillies,"⁴ Californians as "hippies" and "Valley girls,"⁵ and Native Americans as "redskins."⁶ Such discrimination has had particularly adverse consequences in the employment context due to the assumptions employers draw from these regional identities. For example,

¹ See, e.g., Lindsay E. Leonard, *Damned Yankees: Restrictive Covenants That Discriminate Against Geographic Origin*, 2 CHARLESTON L. REV. 671, 672-73 (2008) (describing a restrictive covenant that prohibited property from being leased or sold to anyone considered part of the "Yankee race").

² See Stephen J. McNamee & Robert K. Miller, Jr., *The Meritocracy Myth*, SOCIATION TODAY, Spring 2004, available at <http://www.ncsociology.org/sociationtoday/v21/merit.htm> (describing "discrimination against Southerners and preference for Yankees" as a form of discrimination that neutralizes the effects of merit).

³ See PHILIP MARTIN, *THE ARTIFICIAL SOUTHERNER: EQUIVOCATIONS AND LOVE SONGS* 34-35 (2001) (citing Reverend Will Campbell, who argues that "rednecks," defined as poor rural white Southerners, "are the most discriminated-against folks in America").

⁴ See Everett Sizemore, *Appalachian Americans: The Invisible Minority*, YAHOO! VOICES (Aug. 16, 2005), <http://voices.yahoo.com/article/8611/appalachian-americans-invisible-minority-6422.html> ("Appalachians are statistically one of the most exploited and marginalised groups in America").

⁵ See Mary Bucholtz et al., *Hella Nor Cal or Totally So Cal?: The Perceptual Dialectology of California*, 35 J. ENG. LINGUISTICS 325, 326-27 (2007) (explaining that people typically associate the "Valley girl" stereotype with "vacuous, silly, airheaded, [and] California" (internal quotation marks omitted)).

⁶ See Rob Capriccioso, *'Redskins' May Have Psychological Impact Beyond Native Americans*, INDIAN COUNTRY TODAY MEDIA NETWORK (May 19, 2010), <http://indiancountrytodaymedianetwork.com/article/%25e2%2580%2598redskins%25e2%2580%2599-may-have-psychological-impact-beyond-native-americans-22498> (explaining that "[s]ocial science research shows that the use of ethnic slurs like 'redskin' perpetuates harmful stereotypes and leads to discrimination" against Native Americans).

Southerners are frequently seen as less competent, intelligent, and educated,⁷ which in turn impacts hiring and firing and contributes to a hostile work environment.

Despite the prevalence of regional animus in the United States, employment discrimination based on regional origin is not currently actionable under Title VII's national origin provision.⁸ Rather, most courts have interpreted Title VII's national origin provision narrowly, requiring employees to point to a sovereign country of origin in order to make out a national origin discrimination claim. The problem with this country-focused conception of national origin is that it presupposes that nations are homogeneous when, in reality, nations—especially large ones like the United States—are composed of divergent subgroups.

Given this problem, the Equal Employment Opportunity Commission (EEOC) and some courts have begun to broaden the definition of national origin to include “place of origin.” They have done so in order to move away from the misguided assumption that sovereignty is required to constitute a “national origin.” As a result, courts have upheld discrimination claims where employees traced their national origin to subnational groups in foreign countries, such as Acadians, Creoles, and Gypsies, as well as Serbians as part of the former Yugoslavia. However, courts have refused to allow employees to prove discrimination under Title VII by tracing their national origin to regions or subnational groups *within* the United States. Instead, courts have continued to treat “American” as though it were a homogeneous national origin.

To better protect employees from employment discrimination, Title VII's national origin provision should be taken one step further to include

⁷ Kayla Elizabeth Anders, *The Effects of Dialect, Gender, and Group Identity on Person Perception* (Apr. 24, 2009) (unpublished B.A. thesis, The College of William and Mary), available at <https://digitalarchive.wm.edu/bitstream/handle/10288/1161/Kayla%20Anders%2c%20Honors%20Thesis%20%282009%29.pdf?sequence=1>; see also Jason K. Clark, Cassie A. Eno & Rosanna E. Guadagno, *Southern Discomfort: The Effects of Stereotype Threat on the Intellectual Performance of US Southerners*, 10 SELF & IDENTITY 248, 249, 257-59 (2011), available at <http://osil.psy.ua.edu/pubs/Clark%20et%20al%202011%20-%20Southern%20Discomfort.pdf> (studying how negative stereotypes of “southerners as being uneducated and unintelligent” can impact southern students' academic performance); Paul Jankowski, *Six Ignorant Stereotypes About Middle America*, FORBES (Oct. 5, 2011), <http://www.forbes.com/sites/pauljankowski/2011/10/05/six-ignorant-stereotypes-about-middle-america> (explaining that the six most ignorant stereotypes about citizens in “the New Heartland” is that they are dumb, fat, poor, backward, and conservative, and only like country music); *American Regions & Stereotypes*, ENGLISH REPUBLIC, <http://englishrepublic.ru/Topics/AmericanRegions.pdf> (last visited Jan. 24, 2014) (“Americans from other parts of the United States characterize residents of the Deep South as unintelligent, simple, uncultured, and intolerant . . .”).

⁸ See 42 U.S.C. § 2000e-2(a) (2006).

regional discrimination within the United States. The burden of proof should be on the plaintiff to show that she comes from a region of the United States with a distinct culture, history, and background. This interpretation would permit Title VII to protect against discrimination occurring among individuals sharing the same American origin, while keeping national origin within geographically circumscribed limits.

Part I of this Comment defines national origin under Title VII and describes how an employee may bring a national origin discrimination claim. Part II critiques the assumption underlying Title VII's national origin definition—that nations are homogeneous—by describing the various forms of employment discrimination that occur within the United States. Part III summarizes the relevant case law to show that courts have gradually expanded the scope of national origin discrimination protection to encompass some forms of subnational discrimination, but notes that courts have failed to do so uniformly. Finally, Part IV critiques recent proposals to amend Title VII and recommends that Title VII's national origin provision be reinterpreted to include regional discrimination.

I. NATIONAL ORIGIN DISCRIMINATION UNDER TITLE VII

A. *Definition of "National Origin"*

The key federal law prohibiting discrimination in employment is Title VII of the Civil Rights Act of 1964.⁹ Title VII applies to all public and private employers with fifteen or more employees¹⁰ and prohibits employers from discriminating on the basis of an employee's race, color, religion, sex, or national origin.¹¹

Although national origin is among the types of discrimination prohibited by Title VII, national origin discrimination was not the primary evil the authors of Title VII intended to combat. Rather, Congress's main goal was to prohibit the rampant racial discrimination that had been plaguing African Americans in the United States for over a century.¹² The only reason

⁹ *Id.*

¹⁰ *Id.* § 2000e(b).

¹¹ *Id.* § 2000e-2(a) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin . . .").

¹² *See, e.g.,* *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) ("The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and

national origin was ultimately included as a protected class was “because it was part of the ‘boilerplate’ statutory language of fair employment in executive orders and legislation preceding the Civil Rights Act of 1964.”¹³

The fact that Title VII fails to define national origin underscores the relative unimportance of national origin discrimination in the minds of the statute’s authors.¹⁴ The only semblance of a definition discernible from the limited legislative history is a statement by Congressman James Roosevelt of California, in which he explained, “[N]ational origin’ means national. It means the country from which you or your forebears came from. You may come from Poland, Czechoslovakia, England, France, or any other country.”¹⁵

Further, in the fifty years since Title VII’s enactment, the Supreme Court has only once interpreted the “national origin” provision directly.¹⁶ In *Espinoza v. Farah Manufacturing Co.*, the Court held that “[t]he term ‘national origin’ on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came.”¹⁷ As is evident from both the legislative history behind Title VII’s national origin provision and the sole Supreme Court case interpreting it, “national origin”—at least at the beginning—was interpreted literally to refer to a specific country.

B. *Proving a National Origin Discrimination Claim*

An employee seeking to bring a national origin discrimination claim under Title VII may do so in one of two ways: as a disparate treatment claim or as a disparate impact claim.

1. Disparate Treatment

A claim of disparate treatment based on national origin arises when an employer treats an employee differently from the employee’s coworkers

to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.”).

¹³ Juan F. Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 807 (1994).

¹⁴ Joanna Carey Smith, *Emerging Issues: National Origin Discrimination in Employment*, POPULAR GOV’T, Fall 2002, at 17, 18, available at <http://sogpubs.unc.edu/electronicversions/pg/pgfal02/article2.pdf>.

¹⁵ 110 CONG. REC. 2549 (1964); see also Eugenio Abellera Cruz, Note, *Unprotected Identities: Recognizing Cultural Ethnic Divergence in Interpreting Title VII’s ‘National Origin’ Classification*, 9 HASTINGS WOMEN’S L.J. 161, 177-78 (1998).

¹⁶ Perea, *supra* note 13, at 822.

¹⁷ 414 U.S. 86, 88 (1973), *superseded by statute*, 8 U.S.C. § 1324b (1996), as recognized in *Cor-tezano v. Salin Bank & Trust Co.*, 680 F.3d 936, 940 (7th Cir. 2012).

because of the employee's national origin.¹⁸ Intentional discrimination is the cornerstone of a disparate treatment claim. Examples of intentional national origin discrimination abound in the United States, particularly in the aftermath of September 11th. For example, in *Hassan v. City of Ithaca*, the plaintiff—who identified himself as being of “Middle Eastern descent”—alleged that after September 11, 2001, his employer began disparaging him because of his national origin, calling him and other individuals of Middle Eastern descent names such as “sand nigger,” “dune coon,” and “towel head.”¹⁹ The plaintiff also claimed that he received far harsher disciplinary penalties than non-Middle Eastern employees, even for conduct that had occurred more than a year before.²⁰ Ultimately, the plaintiff was fired.²¹ This case—and other cases like it²²—constitutes disparate treatment because the adverse employment actions in question were taken “because of” the employee's national origin.²³

A plaintiff may advance a disparate treatment claim under either a single- or a mixed-motive theory. Under a single-motive theory, the plaintiff must show that unlawful discrimination alone was the reason for the adverse employment actions, following the burden-shifting framework set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*.²⁴ Initially, a plaintiff bears the burden of proving, by a preponderance of the evidence, a prima facie case of discrimination.²⁵ In the context of hiring, for example, a plaintiff

¹⁸ See Smith, *supra* note 14, at 20 (describing the various claims that courts recognize under Title VII).

¹⁹ No. 10-06125, 2012 WL 1190649, at *1 (W.D.N.Y. Apr. 9, 2012).

²⁰ *Id.* at *2-3.

²¹ *Id.* at *2.

²² See, e.g., *EEOC v. Spitzer Mgmt., Inc.*, 866 F. Supp. 2d 851, 863-64 (N.D. Ohio 2012) (holding that statements made after September 11th, referring to plaintiff as “Chemical Ali,” “Camel Jockey,” and “Little Terrorist,” were sufficiently severe and pervasive to support a claim of hostile work environment and constructive discharge); *Alawi v. Sprint Nextel Corp.*, 544 F. Supp. 2d 1171, 1178-79 (W.D. Wash. 2008) (upholding plaintiff's national origin discrimination claim where the employer inquired about plaintiff's Middle Eastern origin and opinion of jihad); *Elries v. Denny's, Inc.*, 179 F. Supp. 2d 590, 594, 598 (D. Md. 2002) (holding that the plaintiff established a prima facie case of national origin discrimination based on evidence that the employer assigned the plaintiff irregular hours, prohibited the plaintiff from speaking Arabic, ordered the plaintiff to sit in the back of the room, stated he planned to “get rid of all the Arabs,” and, ultimately, terminated the plaintiff).

²³ See 42 U.S.C. § 2000e-2(a) (2006) (describing that it is an unlawful employment practice for an employer to discriminate against an individual “because of such individual's . . . national origin” (emphasis added)).

²⁴ *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); see also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (establishing the elements of a disparate treatment claim and the burdens of proof required of the parties when litigating such a claim).

²⁵ *McDonnell Douglas*, 411 U.S. at 802.

could meet this burden by showing (1) that she fell within a recognized national origin; (2) that she applied for and was qualified for a job for which the employer was seeking applicants; (3) that despite her qualifications, she was rejected; and (4) that the employer continued to seek equally qualified applicants or filled the position with someone outside of the plaintiff's national origin group.²⁶ Successfully establishing the prima facie case gives rise to an inference of discrimination.

In order to rebut the inference of discrimination, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action.²⁷ The defendant need not persuade the court that she was actually motivated by the proffered reasons. Rather, "[i]t is sufficient if the defendant's evidence raises a genuine issue of fact as to whether [she] discriminated against the plaintiff."²⁸

Finally, should the defendant succeed in articulating a legitimate reason for her actions, the burden then shifts back to the plaintiff to prove by a preponderance of the evidence that the reasons offered by the defendant were not genuine and were merely a pretext for discrimination.²⁹

Despite the clarity of the *McDonnell Douglas* framework, employment decisions are rarely made on the basis of a single factor. Rather, "most employment decisions are the result of the interaction of various factors, legitimate and at times illegitimate, objective and subjective, rational and irrational."³⁰ Recognizing that employment decisions are complex, Congress amended Title VII in 1991 to allow for a mixed-motive theory for a disparate treatment claim, providing that "an unlawful employment practice is established when [a plaintiff] demonstrates that . . . national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice."³¹ The Supreme Court interpreted the amended statute in *Desert Palace, Inc. v. Costa* and found that a plaintiff need not provide direct evidence of discrimination in pursuing a claim under a mixed-motive theory, explaining that "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence."³²

²⁶ *Id.*

²⁷ *Id.* at 802-03.

²⁸ *Burdine*, 450 U.S. at 254-55.

²⁹ *McDonnell Douglas*, 411 U.S. at 804.

³⁰ *Dare v. Wal-Mart Stores, Inc.*, 267 F. Supp. 2d 987, 991 (D. Minn. 2003).

³¹ Act of Nov. 21, 1991, Pub. L. No. 102-166, sec. 107(a), § 703, 105 Stat. 1071, 1075 (emphasis added) (codified as amended at 42 U.S.C. § 2000e-2(m) (2006)).

³² 539 U.S. 90, 100 (2003) (quoting *Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 508 n. 17 (1957)).

Although the mixed-motive analysis gives plaintiffs more flexibility in developing a claim against a discriminatory employer who may have been motivated by factors other than national origin, this flexibility comes at a cost: in mixed-motive cases, Title VII affords employers a limited affirmative defense. If an employer can “demonstrat[e] that [she] would have taken the same action in the absence of the impermissible motivating factor,” the jury may limit a plaintiff’s remedies to certain types of injunctive relief and attorney’s fees.³³

2. Disparate Impact

Unlike disparate treatment claims, disparate impact claims do not require proof of a discriminatory motive.³⁴ Rather, disparate impact claims arise from employment practices that are “facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another.”³⁵ A plaintiff bringing a disparate impact claim grounded in national origin discrimination need only show that a particular employment practice, though ostensibly neutral on its face, had a discriminatory effect on employees of a particular national origin.³⁶ The burden of proof then shifts to the employer to demonstrate that the employment practice did not have a disparate impact or, if it did, that the practice was “job related for the position in question and consistent with business necessity.”³⁷ Should the defendant meet this burden, a plaintiff could then prevail only “by showing there is a less discriminatory alternative.”³⁸

A familiar example of disparate impact discrimination involves the use of standardized tests.³⁹ For instance, in *Rivera v. NIBCO, Inc.*, the employer instituted an English-only proficiency test for his employees, even though many employees had limited English language skills.⁴⁰ Although the employer did not intend to discriminate, the proficiency tests were still

³³ 42 U.S.C. § 2000e-5(g)(2)(B).

³⁴ *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n. 15 (1977).

³⁵ *Id.*

³⁶ 42 U.S.C. § 2000e-2(k).

³⁷ *Id.*

³⁸ *EEOC v. Dial Corp.*, 469 F.3d 735, 742 (8th Cir. 2006) (citing *Firefighters’ Inst. for Racial Equal. v. City of St. Louis*, 220 F.3d 898, 904 (8th Cir. 2000)).

³⁹ *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (invalidating the employer’s use of cognitive tests on the grounds that Title VII “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. . . . If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited . . .”).

⁴⁰ 701 F. Supp. 2d 1135, 1142 (E.D. Cal. 2010).

actionable under Title VII because the tests had a discriminatory effect on employees of Hispanic national origins.⁴¹

II. TITLE VII'S FAILURE TO ACCOUNT FOR SUBNATIONAL DISCRIMINATION

Under *Espinoza's* definition of "national origin" as country of ancestry,⁴² plaintiffs must trace their ethnicity to a sovereign country in order to prevail on a national origin discrimination claim. This definition is not sufficient today, as the American workforce has grown more and more ethnically diverse.⁴³ First, the traditional definition of national origin erroneously assumes that nations are homogeneous when, in reality, "even the most seemingly homogeneous ethnic grouping contains cultural subgroups."⁴⁴ Second, and related to the first point, the traditional definition fails to account for the incidence of subnational discrimination that continues to occur within the United States. As a result, the courts and the EEOC have interpreted national origin more and more broadly, stopping just short of a full recognition of subnational discrimination.

A. *Title VII's Flawed Assumption of Intracountry Homogeneity*

Nations are not homogeneous. Rather, most nations are comprised of a variety of subgroups, each with differing ethnicities. These ethnicities are characterized by "shared mutable and immutable qualities given at birth such as race, national origin, ancestry, mother language, religion, shared history, traditions, values, and symbols, all of which contribute to a sense of

⁴¹ See *id.* at 1142-43 (explaining that although the national origin claims raised in this case were ultimately unsuccessful, the use of the discriminatory tests by the employer had the potential to result in the termination of foreign-language speaking employees).

⁴² See *supra* note 17 and accompanying text.

⁴³ See, e.g., Press Release, United States Census Bureau, An Older and More Diverse Nation by Midcentury, CB 08-123 (Aug. 14, 2008), available at <http://www.census.gov/newsroom/releases/archives/population/cb08-123.html> ("Minorities, now roughly one-third of the U.S. population, are expected to become the majority in 2042, with the nation projected to be 54 percent minority in 2050."); see also Troy D. Thompson, *Meltdown in the Melting Pot: The Growth of National Origin Claims*, WIS. EMP. L. LETTER, Mar. 2004 (explaining that in 2002, the EEOC "received 9,042 charges involving national origin discrimination—a 27 percent increase since 1999" and that "those claims have remained on the rise"); D.D. Bennett-Alexander & L.P. Hartman, *National Origin Discrimination*, MCGRAW-HILL ANSWERS, <http://answers.mheducation.com/management/employment-law/national-origin-discrimination> (last visited Jan. 24, 2014) (explaining that "complaints to the EEOC based on alleged national origin discrimination . . . represent the fastest-growing source of complaints submitted to the EEOC").

⁴⁴ Cruz, *supra* note 15, at 164.

distinctiveness both for members of the group and for outsiders.”⁴⁵ Often, these groups are united by a shared interpretation of their subgroup’s particular history within the country in which they reside.⁴⁶

Despite the differences that exist within nations, as originally defined, national origin represents a singular, uniform identity—an identity that each individual country possesses and that is shared by all of the country’s citizens. The problem with the traditional definition of “national origin” is that it “fails to recognize the cultural differences [that exist] among people who share the same geographic origin and/or ancestry.”⁴⁷ Yet, it is these intracountry differences that have historically resulted in invidious forms of discrimination.

Examples of intracountry conflict abound in history. One of the most prominent examples of such subnational tension was the tragic genocide in Rwanda. In 1994, an estimated 800,000 Rwandans were killed within the short span of 100 days.⁴⁸ The violence was a result of historical tension between the country’s ethnic majority Hutus and minority Tutsis.⁴⁹ Although the two groups “speak the same language, inhabit the same areas and follow the same traditions,” Tutsis are often distinguishable by height and build from Hutus.⁵⁰ Further, when Belgian colonists occupied Rwanda in the early twentieth century, they classified Rwandans by ethnicity and considered Tutsis to be the superior group.⁵¹ As a result, for almost twenty years, Tutsis “enjoyed better jobs and educational opportunities.”⁵²

Imagine now that there are two American citizens of Rwandan ancestry working for the same employer. One employee is Tutsi and the other employee is Hutu. Their employer consistently harasses and verbally abuses the Hutu employee simply because of her Hutu ancestry, and the Hutu employee is passed up for a promotion that a less qualified Tutsi employee receives. Regardless of the invidiousness of the discrimination against the

⁴⁵ *Id.* at 168.

⁴⁶ See Charles F. Keyes, *The Dialectics of Ethnic Change*, in *ETHNIC CHANGE* 4, 8 (Charles F. Keyes ed., 1981) (“What cultural characteristics are marked as emblematic of ethnic identity depends upon the interpretations of the experiences and actions of mythical ancestors and/or historical forebears. These interpretations are often presented in the form of myths or legends in which historical events have been accorded symbolic significance.”).

⁴⁷ Cruz, *supra* note 15, at 178.

⁴⁸ See *Rwanda: How the Genocide Happened*, BBC NEWS, <http://news.bbc.co.uk/2/hi/1288230.stm> (last updated Dec. 18, 2008) (detailing the origins and aftermath of the Rwandan genocide).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

Hutu employee, she likely could not prevail on a claim of national origin discrimination. Rather, under *Espinoza's* narrow definition of national origin, the promoted Tutsi employee and the passed-over Hutu employee would be deemed to share the same Rwandan national origin. Because Title VII only considers "Rwandan," and not "Hutu," as a national origin, the Hutu employee would likely struggle to prove that the employer discriminated against her as a Hutu Rwandan where the employer consistently promoted Tutsi Rwandans. Even where an employer showed a clear discriminatory animus against Hutus, the distinction between Hutus and Tutsis disappears for Title VII analysis, and both would be considered "Rwandans."

Similar subnational discrimination based primarily on regional origin also occurred in Sudan. Since Sudan gained its independence in 1956, "[m]ore than 2 million people have been killed . . . in the long-running war between successive governments of the north and peoples of the south."⁵³ In 2003, regional tension flared in Darfur, a region in western Sudan, leading to government-sanctioned attacks on Muslim nomads and farmers.⁵⁴ Darfur, while predominantly Muslim, includes "more than 30 ethnic groups."⁵⁵ Tension in Darfur quickly "assumed an increasingly ethnic and racist dimension, with population groups defining themselves as Arab or *Zurq*."⁵⁶ As a result of these intracountry differences, over 400,000 citizens living in Darfur died and over 2,500,000 were displaced.⁵⁷ Thus, even though the citizens shared the same Sudanese national origin, discrimination persisted within the country's regional subgroups, culminating in the death of hundreds of thousands of innocent civilians.

Rwanda and Darfur are only two particularly egregious cases of subnational discrimination; other examples abound in history.⁵⁸ According to one

⁵³ See Salih Booker & Ann-Louise Colgan, *Genocide in Darfur*, NATION, July 12, 2004, at 8, 8 (describing the historical tension between ethnic groups in Sudan and Western inaction to prevent genocide there).

⁵⁴ See *Genocide in Darfur*, UNITED HUMAN RIGHTS COUNCIL, <http://www.unitedhumanrights.org/genocide/genocide-in-sudan.htm> (last visited Jan. 24, 2014) (providing context for the religious and ethnic strife in Darfur).

⁵⁵ Tim Youngs, House of Commons Library, *Research Paper 04/51: Sudan: Conflict in Darfur* 7 (June 23, 2004), available at <http://www.parliament.uk/documents/commons/lib/research/rp2004/rp04-051.pdf>.

⁵⁶ *Id.* at 8.

⁵⁷ *Genocide in Darfur*, *supra* note 54.

⁵⁸ See, e.g., Al Burke, *Genocide Victims Accused of Genocide*, NORDIC NEWS NETWORK (Jan. 16, 2004), <http://www.nnn.se/n-model/foreign/hmong.htm> (describing a debate surrounding the Laotian government's genocide of the country's Hmong ethnic minority); Dave Johns, *The Crimes of Saddam Hussein: 1988 The Anfal Campaign*, PBS, http://www.pbs.org/frontlineworld/stories/iraq501/events_anfal.html (last visited Jan. 24, 2014) (describing Saddam Hussein's campaign to eradicate the Kurdish population of northern Iraq); *Myanmar/Burma*, GENOCIDE

study, there have been “no less than 58 ethnic civil wars between 1945 and 1999, constituting 51% of the total number of civil wars.”⁵⁹ These examples demonstrate that an interpretation of national origin that is based solely on country of origin “ignore[s] the reality of ethnicity—which can encompass race, religion, language, culture and other characteristics in formation of personal and group identity.”⁶⁰ These subnational “[d]ifferences in dress, language, accent, and custom” are often “more likely to elicit prejudicial attitudes than the fact of the [national] origin itself.”⁶¹ Yet, because of the definition of national origin set forth in *Espinoza*, an employee would probably fail in relying on such subnational differences to support a national origin discrimination claim.

B. *Prevalence of Subnational Discrimination
Within the United States*

The prevalence of subnational discrimination is not unique to employees who trace their national origins to subgroups within countries other than the United States—it is also a problem *within* the United States. According to one scholar, America is inherently divided because “the United States is a federation comprised of the whole or part of eleven regional nations, some of which truly do not see eye to eye with one another . . . and [f]ew [of which] have shown any indication that they are melting into some sort of unified American culture.”⁶² These eleven American subnations can be divided along geographic lines, each with its own history, common culture, and set of assumptions about politics and life.⁶³ As a result, “[i]t is fruitless

WATCH, <http://www.genocidewatch.org/myanmar.html> (last visited Jan. 24, 2014) (collecting various news articles detailing ethnic discrimination against the Rohingya, an ethnic minority living in western Myanmar); Brett Stone, *Genocide in Australia: Report Details Crimes Against Aborigines*, WORLD SOCIALIST WEB SITE (Sept. 7, 1999), <http://www.wsws.org/articles/1999/sep1999/geno-s07.shtml> (describing the genocidal practices perpetrated for centuries against Australian Aborigines).

⁵⁹ Francesco Caselli & Wilbur John Coleman II, *On the Theory of Ethnic Conflict*, 11 J. EUR. ECON. ASS'N 161, 162 (Supp. 2013).

⁶⁰ Cruz, *supra* note 15, at 164.

⁶¹ Stephen M. Cutler, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 YALE L.J. 1164, 1165 (1985).

⁶² COLIN WOODARD, AMERICAN NATIONS: A HISTORY OF THE ELEVEN RIVAL REGIONAL CULTURES OF NORTH AMERICA 3 (2011); see also *American Regions & Stereotypes*, *supra* note 7 (explaining that the United States can be broken up into six unofficial regions—New England, the Mid-Atlantic, the South, the Midwest, the Southwest, and the West—and describing the stereotypes of Americans who live in these regions).

⁶³ WOODARD, *supra* note 62, at 3. In Colin Woodard's theory, North America has long been divided into eleven rival, regional subnations. *Id.* Some of the divisions that Woodard cites are based on the very stereotypes that serve as sources of subnational discrimination within the

to search for the characteristics of an ‘American’ identity, because each nation [within the United States] has its own notion of what being American should mean.”⁶⁴ Regardless of whether one divides the United States into eleven subnations or otherwise, regional differences exist and many cases of employment discrimination stem from these differences.

The most obvious example of subnational discrimination within the United States is the historic rivalry between the North and the South. From clashes over slavery to a brutal civil war, the southern region of the United States has long had a distinct identity.⁶⁵ The differences between the North

United States. The first regional nation, “Yankeedom,” stretches from Puritan New England to upstate New York and parts of the upper Midwest. *Id.* at 5. This nation has been “locked in nearly perpetual combat with the Deep South for control of the federal government since the moment such a thing existed.” *Id.* The second regional nation, “New Netherland,” encompasses what is now Greater New York City and is notable for being multi-ethnic and for caring more about money than Yankee moralizing. *Id.* at 6. The third regional nation, “the Midlands”—the “most ‘American’ of the nations”—was founded by Quakers and stretches from Philadelphia across the heart of the Midwest. *Id.* at 6-7. The fourth regional nation, “Tidewater,” is a fundamentally conservative region that spans the lowlands of Virginia, Maryland, southern Delaware, and northeastern North Carolina. *Id.* at 7. The fifth regional nation, “Greater Appalachia,” includes the southern Midwest and upper South. *Id.* at 8. Appalachia is known for its “combative culture” and deep aversion towards “Yankee teachers, Tidewater lords, and Deep Southern aristocrats.” *Id.* The sixth regional nation, the “Deep South,” spans the southern lowlands and has long “been the bastion of white supremacy, aristocratic privilege, and a version of classical Republicanism modeled on the slave states of the ancient world.” *Id.* at 9. The seventh regional nation, “New France,” covers Quebec and the Acadian enclaves of southern Louisiana. *Id.* at 9-10. The eighth regional nation, “El Norte,” spans the U.S.–Mexico border and is dominated by Hispanic language, culture, and social norms. *Id.* at 10. The ninth regional nation, “the Left Coast,” located “between the Pacific and the Cascade and Coast mountain ranges, . . . combines the Yankee faith in good government and social reform with a commitment to individual self-exploration and discovery.” *Id.* at 11. The tenth regional nation, “the Far West,” includes the entire interior west of the one-hundredth meridian and, due to oppressive environmental conditions, has remained in a state of semi-dependency. *Id.* at 12. Finally, the last regional nation, “First Nation,” is occupied by indigenous inhabitants, including Native Americans, most of whom have never given up their land by treaty and who “still retain cultural practices and knowledge that allow them to survive in the region on its own terms.” *Id.* at 13.

⁶⁴ *Id.* at 261. The fact that subnational differences exist within the United States is also apparent by the disagreement among courts as to whether “American” constitutes a valid national origin in the first place. Compare *Vicedomini v. Alitalia Airlines*, 37 Fair Empl. Prac. Cas. (BNA) 1381, 1384 (S.D.N.Y. 1983) (rejecting the notion that “American” constitutes a national origin under Title VII and stating that “perhaps” the only group that may claim an “American” national origin is Native Americans), with *Thomas v. Rohner-Gehrig & Co.*, 582 F. Supp. 669, 675 (N.D. Ill. 1984) (“[E]mployment discrimination against American citizens based merely on country of birth, whether that birthplace is the United States or elsewhere . . . is sufficient to state a Title VII cause of action based on national origin discrimination.”).

⁶⁵ See JESSE T. CARPENTER, *THE SOUTH AS A CONSCIOUS MINORITY 1789–1861*, at 4 (1930) (“[T]he inhabitants of those states below the Mason and Dixon line always considered themselves a separate and distinct people . . . [a]nd it was this consciousness of unity—however

and the South are numerous. First, many Southerners⁶⁶ share a unique history in the United States because their ancestors fought the North in the Civil War, seceded from the country, and operated their own government as the Confederate States of America. Further, on a cultural level, Southerners often place much greater emphasis on a “slow pace of life”⁶⁷ and hold a dominant cultural position of “[o]pposition to modernism [and] liberal theology.”⁶⁸ More so than citizens in any other region, Southerners “have been the stronghold of biblical inerrancy; the elimination of barriers between church and state; teaching children religious rather than scientific explanations for the origins and nature of the universe; maintaining legal, political, and social restraints against homosexuality, civil rights, and interracial dating; and of preventing the secularization of society.”⁶⁹

Based on these regional differences, in the twentieth century, many Southerners were discriminated against when seeking jobs in northern cities and forced to take jobs as semiskilled or unskilled laborers.⁷⁰ Much of the employment discrimination that Southerners have faced stems from the fact that they are frequently associated with negative assessments of competence, intelligence, and education.⁷¹ For example, according to one study,

justified—that obliterated state boundaries and consolidated a geographic section of the Union into a single people.”).

⁶⁶ Due to the complicated history of race relations in the South, I use the term “many Southerners” to refer specifically to *white* Southerners who trace their heritage, at least in part, to the Civil War era. However, it is important to note that many aspects of the southern regional identity are shared among black Southerners and white Southerners. See Ashley Blaise Thompson, Southern Identity: The Meaning, Practice, and Importance of a Regional Identity 212 (Aug. 2007) (unpublished Ph.D. dissertation, Vanderbilt University), available at <http://etd.library.vanderbilt.edu/available/etd-07242007-162825/unrestricted/final3.pdf> (finding that “[S]outherners, both black and white, appear to base their regional identity claims largely on birth in the region, family ancestry in the South, and life-long residence in the South,” but that this regional identity is “more relevant and familiar to whites in the region than blacks,” who emphasize their racial identity before their regional identity).

⁶⁷ *Id.* at 214.

⁶⁸ WOODARD, *supra* note 62, at 271.

⁶⁹ *Id.*

⁷⁰ See LEWIS M. KILLIAN, WHITE SOUTHERNERS 102-09 (Univ. of Mass. Press, rev. ed. 1985) (using a case study of a “hillbilly” colony in mid-twentieth century Chicago to show that the phenomenon of the working class–white southern minority being stereotyped and discriminated against in the northern city is not new, and describing how these stereotypes have negatively impacted southerners’ job prospects).

⁷¹ See Saumya Vaishampayan, *When an Accent Gets in the Way of a Job*, WALL ST. J. (Sept. 6, 2012), <http://blogs.wsj.com/atwork/2012/09/06/when-an-accent-gets-in-the-way-of-a-job> (outlining the role that accent plays in employment discrimination and explaining that southern accents consistently received lower ratings in the category of perceived intelligence); Anders, *supra* note 7; see also Thompson, *supra* note 66, at 29-30 (explaining that white Southerners in particular are seen by both northern whites and blacks as “poorer, lazier, less intelligent, more likely to live off welfare, and less patriotic” and that although “white southerners are not stereotyped to the same

employers in seven out of fourteen northern industrial plants “stated openly that they would hire white southern workers only when they could not get anybody else,” explaining that “laziness, lack of education and skills, and an overdeveloped spirit of independence made them undesirable as employees.”⁷² Another more recent study found that Southerners displaced by Hurricane Katrina had a hard time finding employment outside the South.⁷³ As one job applicant who sought employment in Colorado explained, employers “treated her like she was ‘stupid’ and ‘uneducated’ because of her Southern accent.”⁷⁴

Despite the employment discrimination that Southern-Americans face in the United States, a Southern-American employee would likely not have a cognizable claim solely on the basis of the discrimination she faced as a *Southern-American*. For example, imagine a Southern-American individual is not hired and a less qualified Northern-American is hired. Because both the hired Northern-American and the not-hired Southern-American share the same “American” national origin, the Southern-American’s Title VII disparate treatment national origin claim would likely fail. In other words, employers are free to act upon their regional animus and refuse to hire similarly qualified individuals without running afoul of Title VII.

In addition to Southerners, Americans living in the Appalachian region of the United States have also struggled with subnational employment discrimination.⁷⁵ Although “Appalachian-Americans are not generally

degree as many . . . other racial/ethnic groups . . . such as Jews, blacks, and Hispanics . . . they are nonetheless consistently stereotyped in a more negative manner than whites more generally”).

⁷² KILLIAN, *supra* note 70, at 108-09.

⁷³ See Lori Peek, *They Call It “Katrina Fatigue”: Displaced Families and Discrimination in Colorado*, in *DISPLACED: LIFE IN THE KATRINA DIASPORA* 31, 39-40 (Lynn Weber & Lori Peek eds., 2012).

⁷⁴ *Id.* at 40. Accents are “often derivative of race and national origin” and evoke “a plethora of both conscious and unconscious prejudices.” Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 *YALE L.J.* 1329, 1348, 1351 (1991); see also *id.* at 1351 (“When Jimmy Carter was president, many Northerners admitted that they had a hard time believing that someone with a Georgia accent could be intelligent or well educated.”); Rachel Rodriguez, *Regional Accents Thrive in U.S.—But Is That a Good Thing?*, CNN (Sept. 29, 2011), <http://www.cnn.com/2011/09/29/living/american-accents-ireport> (explaining that southern or western accents “are among the most stigmatized in the United States”).

⁷⁵ See generally Elizabeth E. Heilman, *Hoosiers, Hicks, and Hayseeds: The Controversial Place of Marginalized Ethnic Whites in Multicultural Education*, 37 *EQUITY & EXCELLENCE EDUC.* 67 (2004) (providing a detailed account of discrimination, including employment discrimination, against Appalachians); Matthew H. Walker, Comment, *Discrimination Based on National Origin and Ancestry: How the Goals of Equality Have Failed to Address the Pervasive Stereotyping of the Appalachian Tradition*, 38 *U. DAYTON L. REV.* 335, 337 (2013) (detailing the employment discrimination that Appalachians have faced throughout history and arguing that “Appalachians are a distinct cultural group that have experienced a history of oppression and marginalization similar to that endured by racial and ethnic minorities such as the African, Native, and Mexican Americans”).

discussed in multicultural textbooks or thought of as a distinct cultural group . . . they exhibit major cultural differences when compared to the common social construct of 'white America.'⁷⁶ Appalachians "have their own music, history, art, tradition, literature, dialect, religious beliefs, and ideas of ecology, justice, education and health."⁷⁷ More so than in other regions, "[t]he family, or 'kin', as a working unit, is an important part of Appalachian-America," and "Appalachians have a strong sense of community, even when in urban settings."⁷⁸ Unlike Northeastern-Americans, Appalachians frown upon competitiveness and boasting—"people are expected to play down their achievements and not act as if they are 'above' everyone else."⁷⁹ Additionally, "Appalachians have distinct speech patterns, usually regarded as 'slow drawls'" and use "colloquial words such as: ain't (is not), y'all (you all), y'uns (you ones or you guys), warsher (washing machine, note the 'r'), [and] tater (potato)."⁸⁰

Stereotypes of Appalachians pervade American society, particularly in the media. Americans frequently refer to Appalachians as "white trash" and "trailer trash" and associate Appalachians with "ignorance, incest, inferior genetics, [and] poor hygiene."⁸¹ According to one nineteenth-century commentator, Appalachians are "the laziest two legged animals that walk erect on the face of the Earth. Even their motions are slow, and their speech a sickening drawl . . . [They show] a natural stupidity or dullness of intellect that almost surpasses belief."⁸²

These odious stereotypes of Appalachians as unintelligent hillbillies have had particularly adverse effects on Appalachians in the employment context. For example, "[a] twang in the voice, a quirky expression like 'I reckon,' [and] a taste for banjo music . . . can lead to many other assumptions: This person is not smart, this person won't show up on time, this person's temper is likely to be quick."⁸³ As a result, many Appalachians that moved to big cities in search of jobs⁸⁴ were discriminated against by

⁷⁶ Sizemore, *supra* note 4.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See Heilman, *supra* note 75, at 68-69 (quoting an 1860 ethnography of the South and explaining that such negative social opinions about Appalachians have "carried on consistently from colonial days to the present") (alteration in original).

⁸³ Judy Pasternak, *Column One: Bias Blights Life Outside Appalachia*, L.A. TIMES, Mar. 29, 1994, at A1.

⁸⁴ See KATHRYN M. BORMAN, ETHNIC DIVERSITY IN COMMUNITIES AND SCHOOLS: RECOGNIZING AND BUILDING ON STRENGTHS 71 (1998) ("[T]he influx of Appalachian people

employers who either consciously or subconsciously connoted the employee's regional origin with ignorance.⁸⁵ Employment discrimination against Appalachians still persists in many cities.⁸⁶ A study in 1998 found that the "promise of good employment remains elusive for urban Appalachian youth whose repertoire of skills and behaviors places them at odds with employers' biases toward those who display a more 'appropriate' demeanor."⁸⁷

To combat this pervasive employment discrimination, Cincinnati "adopt[ed] the nation's only human rights ordinance banning discrimination against Appalachians."⁸⁸ Outside of Ohio, however, protection of Appalachians from subnational employment discrimination is virtually nonexistent. As with Southerners, an Appalachian discriminated against because of her regional origin cannot make out a *prima facie* case of national origin discrimination under Title VII where the employer hired a different American, but non-Appalachian, employee.⁸⁹ Thus, even though "Appalachians are statistically one of the most exploited and marginalised groups in America,"⁹⁰ they are frequently left without recourse under Title VII simply based upon a narrow interpretation of the term "national origin."

Whether the discrimination is North versus South, East Coast versus West Coast,⁹¹ Northern California versus Southern California,⁹² Alaskans

from rural areas to Midwestern cities following World War II was nearly as great as Irish and Italian migration in the late 19th century and [was] in sheer numbers much greater than the current migration of Asians to U.S. shores . . .").

⁸⁵ See *id.* at 73-74 ("[N]either cultural differences nor migrant status alone or together account for this outcome. Rather, Appalachians are excluded in order to reduce competition for jobs 'reserved' for native, non-Appalachian whites.").

⁸⁶ See *id.* at 73 (noting that discrimination "persists in the current job market for urban Appalachians" in cities such as "Detroit, Chicago, Cleveland, Columbus, and Cincinnati" which have large urban Appalachian populations).

⁸⁷ See *id.* at 74 (observing that "[e]mployers desire docile, 'responsible' workers who do not have strong obligations to kin, the problems associated with young families of their own, and whose approach to life is less spontaneous and engaged than that of many urban Appalachian . . . youths").

⁸⁸ Pasternak, *supra* note 83.

⁸⁹ See *De Vold v. Bailar*, 568 F.2d 1162, 1165 (5th Cir. 1978) (explaining that whatever motives an employer "may have had in choosing between two people of the same ethnic origin, discrimination cannot have been among them").

⁹⁰ Sizemore, *supra* note 4.

⁹¹ See, e.g., Linton Weeks, *After Quake, A New Round of Coastal Rivalry Erupts*, NPR (Aug. 25, 2011), <http://www.npr.org/2011/08/25/139942033/after-quake-a-new-round-of-coastal-rivalry-erupts> (describing the rivalry between the East Coast and the West Coast, which may be rooted in cultural differences between the coasts).

⁹² See *THE WAR BETWEEN THE STATE: NORTHERN CALIFORNIA VS. SOUTHERN CALIFORNIA*, at xi (Jon Winokur ed., 2004) (illustrating the cultural clash between northern California and southern California, with "San Franciscans" looking down on "Angelenos" as inferior).

versus Native-Alaskans,⁹³ or the rest of the nation versus Appalachians, various regional differences in the United States have culminated in employment discrimination. By incorrectly assuming that all Americans share a homogeneous national origin, *Espinoza's* narrow definition of national origin fails to account for "intraethnic cultural distinctions [that] often result in prejudice, discrimination, ethnic segregation and even attempts at ethnocide."⁹⁴

C. Title VII's Inconsistent Treatment of Protected Classes

In addition to erroneously assuming that nations are homogeneous, the current definition of national origin does not explicitly affirm the Supreme Court's recognition in *Oncale v. Sundowner Offshore Services, Inc.* that unlawful discrimination under Title VII can occur within a protected class.⁹⁵ In *Oncale*, the Supreme Court upheld a claim for same-sex sexual harassment, explaining that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant . . . are of the same sex."⁹⁶ As the Supreme Court explained, "it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group."⁹⁷ Similarly, "in the related context of racial discrimination in the workplace [the Court has] rejected any conclusive presumption that an employer will not discriminate against members of his own race."⁹⁸

The Supreme Court's reasoning in *Oncale* applies equally to national origin as to sex and race. Just like sex and race discrimination can occur among individuals that share the same gender and skin color, respectively, national origin discrimination can—and does—occur among individuals that share the same country of origin. Where both employer and employee trace

⁹³ See ALASKA ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, RACISM'S FRONTIER: THE UNTOLD STORY OF DISCRIMINATION AND DIVISION IN ALASKA 32 (2002), available at <http://www.usccr.gov/pubs/sac/ako402/ako2.pdf> (quoting an Alaskan economist who stated, "The share of Alaska Natives employed in virtually every industry in [Alaska] is less than their share of the population. . . . [A] 50 percent increase in Native workers would be necessary to create parity in job holdings. In some occupations requiring higher education, a 200 percent increase would be necessary for parity." (alterations in original)).

⁹⁴ Cruz, *supra* note 15, at 164.

⁹⁵ See 523 U.S. 75, 78 (1998) ("Title VII's prohibition of discrimination 'because of . . . sex' protects men as well as women, and in the related context of racial discrimination in the workplace we have rejected any conclusive presumption that an employer will not discriminate against members of his own race." (alteration in original) (citation omitted)).

⁹⁶ *Id.* at 79 (first alteration in original).

⁹⁷ *Id.* at 78 (quoting *Castaneda v. Partida*, 430 U.S. 482, 499 (1977)).

⁹⁸ *Id.*

their origins to the United States, such subnational discrimination typically occurs due to the deep-rooted regional differences that have long existed within the nation. If this issue comes before the Supreme Court, the Court should extend its recognition that discrimination can occur within a protected class to national origin as well. Doing so would not only render Title VII internally consistent, but also ensure that Title VII covers the many instances of national origin discrimination that arise due to regional differences within the United States.

III. BROADENING THE DEFINITION OF NATIONAL ORIGIN TO ENCOMPASS SUBNATIONAL DISCRIMINATION

To account for discrimination within national origin groups, both the EEOC and courts have, over time, expanded the definition of national origin to focus on place—rather than country—of origin. As a result, they have permitted employees to trace their origins to subnational groups in foreign countries. However, they have refused to recognize claims where employees have traced their origins to subnational groups within the United States.

A. *The EEOC's Expanded Definition of National Origin*

Recognizing the problem with the presumption that nations are homogeneous, the EEOC formally expanded its interpretation of national origin in 1980 by amending its regulations “to replace ‘country of origin’ with ‘place of origin.’”⁹⁹ The EEOC did so “in order to discourage ‘reference to a sovereign nation.’”¹⁰⁰ Under this expanded definition, place of origin includes not just countries and former countries, but also places that have “never been a country, but [are] closely associated with a group of people who share a common language, culture, ancestry, and/or other similar social characteristics.”¹⁰¹ As a result, the EEOC has deemed national origin to include “smaller ethnic groups, such as Kurds or Roma (Gypsies),” as well as “larger ethnic groups.”¹⁰²

Implicit in the EEOC’s expanded definition is a recognition that the term “national” in national origin should not be read literally as “of a

⁹⁹ *Kanaji v. Child. Hosp. of Phila.*, 276 F. Supp. 2d 399, 402 (E.D. Pa. 2003) (citing Guidelines on Discrimination Because of National Origin, 45 Fed. Reg. 85,632, 85,633 (Dec. 29, 1980) (codified at 29 C.F.R. pt. 1606)).

¹⁰⁰ *Id.* (citing Guidelines on Discrimination Because of National Origin, 45 Fed. Reg. at 85,633).

¹⁰¹ 2 EEOC Compl. Man. (BNA) § 622:0002 (2002).

¹⁰² *Id.* § 622:0003.

nation.” Rather, the EEOC has read “national” more broadly to include other ethnic and geographic groups. For example, the EEOC deems national origin to include Hispanics and Arabs, even though neither can be traced to a single nation.

Although the EEOC has embraced multinational discrimination within its definition of national origin, it has failed to account for subnational discrimination, even though subnational discrimination is equally consistent with the EEOC’s definition. According to the EEOC, a national origin group “is a group of people sharing a common language, culture, ancestry, and/or other similar social characteristics.”¹⁰³ This definition is compatible with the notion of subnational discrimination because subnational or regional groups are even more likely to share common language, culture, ancestry, and/or other similar characteristics than a nation as a whole.¹⁰⁴

B. Courts’ Expanded Definition of National Origin Over Time

Like the EEOC, courts have also gradually expanded their definition of national origin in order to clarify that national origin is not governed by principles of sovereignty. However, courts have been forced to play upon nuances in language and subtle technicalities to account for subnational discrimination without contradicting *Espinoza*. They have achieved this by interpreting “country of origin” to subsume “place of origin” as defined by the EEOC.

The first decision to raise the issue of subnational discrimination following *Espinoza* was *Roach v. Dresser Industrial Valve & Instrument Division*.¹⁰⁵ In *Roach*, an American-born, Louisiana resident brought a national origin discrimination claim against his American employer, claiming that he was fired because of his “Acadian” or “Cajun” descent.¹⁰⁶ Although Acadia is not—nor ever was—a sovereign country, the court upheld the plaintiff’s claim for national origin discrimination, concluding that “since Acadians historically came from the former French colony of ‘Acadia,’ today’s Nova Scotia, this geographic link [was] enough regardless of whether such

¹⁰³ *Id.* § 622:0002.

¹⁰⁴ See Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55, 73 (2009) (“[N]ational origin discrimination is less likely to consist of discrimination motivated by the fact that a person or her ancestors came from a particular country, and it is much more likely to consist of discrimination based on ethnic characteristics with regional associations.”); see also *supra* text accompanying note 61.

¹⁰⁵ 494 F. Supp. 215, 218 (W.D. La. 1980).

¹⁰⁶ See *id.* at 216 (discussing the definition and history of the Acadian people).

territory ever possessed political sovereignty.”¹⁰⁷ Rooting its decision in Title VII’s underlying purpose, the court explained that “[d]istinctions between citizens solely because of their ancestors are odious to a free people whose institutions are founded upon the doctrine of equality, and we decline to accept the argument that litigation of this sort should be governed by the principles of sovereignty.”¹⁰⁸ Thus, the court began paving the way toward recognizing regional discrimination within the United States.

Eight years later, the Ninth Circuit agreed that country of origin is not limited by principles of national sovereignty. In *Pejic v. Hughes Helicopters, Inc.*, an employee claimed that his employer chose not to promote him because of his Serbian ancestry and instead promoted a less senior employee.¹⁰⁹ In defense, the employer claimed that the plaintiff was not a member of a protected class under the national origin provision because Serbians were “simply [an] ethnic group[] residing in the [then existing] nation of Yugoslavia.”¹¹⁰ The court held that Serbians constitute a protected class within Title VII, explaining that “Title VII cannot be read to limit ‘countries’ to those with modern boundaries, or to require their existence for a certain time length before it will prohibit discrimination.”¹¹¹ Taking into account the legislative history and Supreme Court precedent, “[u]nless historical reality is ignored, the term ‘national origin’ must include countries no longer in existence.”¹¹²

Roach and *Pejic* support recognizing subnational discrimination claims for two reasons. First, the cases recognized that just because a country lacks political sovereignty or no longer exists does not mean it falls outside of the scope of “national origin” within Title VII. This implies that Southerners residing in what was formerly the Confederate States of America should be able to sue on the basis of national origin discrimination, even though the Confederacy no longer exists and was never considered a separate, sovereign nation.¹¹³ Second, the court in *Pejic* recognized, in the context of Yugoslavia,

¹⁰⁷ Cruz, *supra* note 15, at 178.

¹⁰⁸ *Roach*, 494 F. Supp. at 218.

¹⁰⁹ See 840 F.2d 667, 669-70 (9th Cir. 1988) (discussing the employee’s allegations that he was bypassed for a promotion after his employer—whose niece was married to a Croatian—discovered that the employee was of Serbian ancestry).

¹¹⁰ *Id.* at 673.

¹¹¹ *Id.*

¹¹² *Id.* (citing *Roach*, 494 F. Supp. at 218).

¹¹³ Although litigation regarding the standing of the Confederacy is sparse, the Supreme Court has refused to recognize the Confederacy as a sovereign nation in various cases involving the doctrine of state succession. See, e.g., *Williams v. Bruffy*, 96 U.S. 176, 191-92 (1877) (“Whatever *de facto* character may be ascribed to the Confederate government consists solely in the fact, that it maintained a contest with the United States for nearly four years, and dominated for that period

that subnational tension can exist within countries. This subnational and interethnic strife between Serbians and Croatians ultimately resulted in the destruction of Yugoslavia as a unified nation in 1991.¹¹⁴ Since the court recognized a region of Yugoslavia as a valid “national origin,” one would logically assume courts would do the same with respect to regions of the United States that have experienced similar subnational strife.

Consistent with *Pejic*, courts continued to broaden the interpretation of national origin in the 1990s. In *Janko v. Illinois State Toll Highway Authority*, an employee sued, claiming that her employer terminated her “because she is a Gypsy.”¹¹⁵ Although Gypsies do not come from one particular nation, the court held that including Gypsies within the meaning of “national origin” was consistent with Title VII’s purpose: “to prevent the majority people from discriminating against other people based upon ethnic distinctions commonly recognized at the time of the discrimination.”¹¹⁶

Similarly, in *Metoyer v. Kansas*, an employee claimed she was “fired because of her Creole national origin in violation of Title VII.”¹¹⁷ Although the plaintiff ultimately failed to establish a prima facie case, the court recognized that Creole could constitute a protected national origin.¹¹⁸ As the court explained, “[u]nder the flexible *McDonnell Douglas* proof scheme, the ‘membership’ requirement of the prima facie case must not be taken too literally in cases where a plaintiff’s connection to a national group is in dispute.”¹¹⁹ In other words, courts should afford plaintiffs the benefit of the doubt in national origin discrimination cases. So long as plaintiffs can trace their origin to some subnational group that has been subject to discrimination, they fall within a protected class for purposes of national origin discrimination.

over a large extent of territory. When its military forces were overthrown, it utterly perished, and with it all its enactments.”).

¹¹⁴ See Svetozar Stojanovic, *The Destruction of Yugoslavia*, 19 *FORDHAM INT’L L.J.* 337, 339 (1995) (explaining that “Yugoslavia emerged, disappeared, and rose again in two world wars . . . marked by inter-national, inter-religious, civil, fratricidal, and even genocidal conflicts”); see also Chuck Sudetic, *Yugoslav Breakup Gains Momentum*, *N.Y. TIMES*, Dec. 21, 1991, at L3 (describing how Yugoslavia “tumbled further toward complete disintegration” when the ethnically mixed republic of Bosnia and Herzegovina applied for recognition as an independent state, following the lead of Croatia, Slovenia, and Macedonia).

¹¹⁵ 704 F. Supp. 1531, 1531 (N.D. Ill. 1989).

¹¹⁶ *Id.* at 1532 (citing *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987)).

¹¹⁷ 874 F. Supp. 1198, 1200 (D. Kan. 1995).

¹¹⁸ See *id.* at 1202-03 (explaining that the term Creole denotes a person of mixed French or Spanish ancestry, which suffices as a national origin).

¹¹⁹ *Id.* (italics added) (quoting *Gilbert v. Babbitt*, 64 *Empl. Prac. Dec. (CCH)* ¶ 43,165, at 80,520 (D.D.C. 1993)).

Finally, the courts' gradual expansion of the definition of national origin is also evident in their treatment of employment discrimination suits brought by Native Americans. In *Dawavendewa v. Salt River Project Agricultural Improvement & Power District*, the plaintiff alleged that "because he is a Hopi and not a Navajo, he was not considered for a position with a private employer operating a facility on the Navajo reservation."¹²⁰ In upholding the plaintiff's claim, the court held that because "different Indian tribes were at one time considered nations . . . discrimination on the basis of tribal affiliation can give rise to a 'national origin' claim under Title VII."¹²¹ However, the Ninth Circuit also noted that the Supreme Court "has in more recent times recognized the erosion of the Indian tribes' 'nation' status."¹²² As a result, "even if the various tribes never enjoyed formal 'nation' status . . . discrimination based on one's ancestor's 'place of origin' is sufficient to state a cause of action."¹²³

The *Dawavendewa* decision is notable because it addressed both the narrow and broad definitions of national origin that courts have read into *Espinoza*. On the one hand, Native American tribes retain a degree of sovereignty as domestic dependent nations.¹²⁴ To the extent that this limited sovereignty is enough to constitute a "nation," as suggested in *Dawavendewa*, Native Americans would fall within *Espinoza*'s narrow definition of national origin. On the other hand, the Ninth Circuit in *Dawavendewa* was careful not to base its holding solely on Native American's quasi-sovereign status. Rather, the Ninth Circuit explicitly stated that even if Native American tribes were never considered sovereign nations, both "case law and the regulations interpreting Title VII" have made clear that discrimination based on "'place of origin' is sufficient to state a cause of action."¹²⁵ Thus, even with regard to Native Americans, courts have emphasized "place of origin" to clarify that *Espinoza* does not limit national origin to territories with actual sovereignty.¹²⁶

¹²⁰ 154 F.3d 1117, 1118 (9th Cir. 1998); see also Alison Etheredge, *Native Americans* (explaining that the Indian Preferences exemption to Title VII permits employers on or near Native American preservations to give preferential treatment to Native Americans, but does not specify whether such employers may give preferential treatment based on membership in a particular tribe), in *1998–1999 Annual Survey of Title VII Decisions*, 30 CUMB. L. REV. 317, at 344, 346 (2000).

¹²¹ *Dawavendewa*, 154 F.3d at 1120.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) ("[I]t may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations.").

¹²⁵ *Dawavendewa*, 154 F.3d at 1120.

¹²⁶ The Supreme Court has denied certiorari on the issue of whether national origin includes tribal affiliation. See *Onyiah v. St. Cloud State Univ.*, 684 F.3d 711, 718-19 (8th Cir. 2012), *cert.*

C. Courts' Refusal to Recognize Claims of Subnational
Discrimination Within the United States

Although courts' broader reading of national origin as "place of origin" should also cover regional discrimination within the United States, courts have refused to extend the definition thus far. Rather, courts have continued to treat the United States as a homogeneous place of origin. As a result, plaintiffs may bring national origin claims against their employers based on subnational differences only when those differences stem from outside the United States or from Native American tribes.

One of the first strictly "regional" discrimination cases was *Bronson v. Board of Education of the City School District of Cincinnati*.¹²⁷ In this case, the plaintiffs claimed that they were discriminated against on the basis of their Appalachian national origin.¹²⁸ Although plaintiffs sued under Title VI rather than Title VII, the court looked to the Civil Rights Act as a whole to interpret the meaning of national origin and found that Appalachians do not constitute a protected class.¹²⁹

At its core, *Bronson* is indistinguishable from *Pejic*, where the court upheld a claim for national origin discrimination based upon the plaintiff's "Serbian" descent, even though Serbia was not a sovereign nation at the time. In both cases, the employer and employee were from the United States. Further, in both cases, the discrimination at issue was regional—a region of Yugoslavia in *Pejic* versus a region of the United States in *Bronson*. The court, however, treated the cases differently because, unlike the plaintiff in *Pejic*, the plaintiff in *Bronson* could not trace his regional origin to a territory outside of the United States. As the court explained, "[t]here is no indication that 'national origin' was intended to include . . . groups such as Appalachians who do not possess a national origin distinguishable from that of other citizens of the United States."¹³⁰ Thus, the court in *Bronson* made the unrealistic assumption that "America" constitutes a homogeneous national origin.

Courts have followed *Bronson's* lead in rejecting Title VII national origin discrimination claims stemming solely from regional differences in the United States. In *Storey v. Burns International Security Services*, an employee brought a national origin discrimination suit, claiming that he was fired

denied, 133 S. Ct. 1502 (2013) (dismissing as time-barred plaintiff's salary discrimination claims regarding tribal affiliation, in which plaintiff claimed he was discriminated against because he was from the Igbo ethnic tribe in Nigeria, whereas his employer was from the Yoruba tribe).

¹²⁷ 550 F. Supp. 941 (S.D. Ohio 1982).

¹²⁸ *Id.* at 944.

¹²⁹ *Id.* at 959.

¹³⁰ *Id.*

from his position as a security guard because he was a “Confederate Southern-American.”¹³¹ Even though Confederate Southern-Americans share a common culture, the court ultimately held that Confederate Southern-American is not a legitimate national origin for Title VII purposes.¹³² Elaborating on the majority’s reasoning, the concurring opinion explained that “[w]here one cannot trace ancestry to a nation outside of the United States, a former regional or political group within the United States, such as the Confederacy, does not constitute a basis for a valid national origin classification.”¹³³

In *Fowler v. Visiting Nurse Service of New York*, the employee, a Southern African-American woman, claimed that she was fired because of both her race and her Southern national origin.¹³⁴ The court rejected her national origin claim, explaining that “regional differences among the people of this country do not create protected classes.”¹³⁵ Failing to provide an explanation for why “Southern” does not constitute a valid national origin under Title VII, the court instead simply concluded that “the state or region of the United States where plaintiff was raised is irrelevant to her national origin claim.”¹³⁶ The court also made explicit its assumption that America is a homogeneous national origin, explaining that because the plaintiff is “American,” “she must show that she was mistreated as compared to non-Americans”¹³⁷ to defeat summary judgment on her national origin claim.

One of the most recent cases addressing the specific issue of regional discrimination was *Vitalis v. Sun Constructors, Inc.*¹³⁸ In *Vitalis*, the plaintiff claimed that his employer—a “state-sider[.]” from the United States mainland—fired him because he was a “local resident[.] of St. Croix.”¹³⁹ Before

¹³¹ 390 F.3d 760, 761 (3d Cir. 2004).

¹³² *Id.* at 765.

¹³³ *Id.* at 766 (Scirica, C.J., concurring).

¹³⁴ No. 06-4351, 2007 WL 3256129, at *1 (S.D.N.Y. Oct. 31, 2007).

¹³⁵ *Id.* at *4.

¹³⁶ *Id.*; see also *Langadinos v. Appalachian Sch. of Law*, No. 05-0039, 2005 WL 2333460, at *8 (W.D. Va. Sept. 25, 2005) (deciding without providing further explanation that, in the context of a discrimination complaint against the plaintiff’s school, northeastern background is not a protected trait under Title VII); *Williams v. Frank*, 757 F. Supp. 112, 120 (D. Mass. 1991) (concluding that “Southernness is not a protected trait” under Title VII), *aff’d*, 959 F.2d 230 (1st Cir. 1992).

¹³⁷ *Fowler*, 2007 WL 3256129, at *4.

¹³⁸ 481 F. App’x 718 (3d Cir. 2012); see also *Prevost v. Islands Mech. Contractor, Inc.*, No. 2008-110, 2013 WL 1091187, at *7 (D.V.I. Mar. 15, 2013) (relying on *Vitalis* to disallow an argument suggesting that “locals”—residents of St. Croix—constitute a protected class based on their national origin); *Gottschalk v. City & Cnty. of San Francisco*, No. 12-4531, 2013 WL 557010, at *8 (N.D. Cal. Feb. 12, 2013) (dismissing a national origin discrimination claim based on the plaintiff’s Hawaiian origin because “[n]ational origin discrimination does not encompass discrimination against someone because of their origin in a particular state or region of the United States”).

¹³⁹ *Vitalis*, 481 F. App’x at 720-21.

addressing the merits of the claim, the Third Circuit explained that although *Espinoza* defined national origin as country of origin, “[i]n some cases . . . courts have been willing to expand the concept of ‘national origin’ to include claims from persons such as [C]ajuns or [S]erbs based upon the unique historical, political and/or social circumstances of a given region.”¹⁴⁰ Yet, even under this broad definition, the plaintiff failed to provide evidence that “all of the local residents of St. Croix share a ‘unique historical, political and/or social circumstance.’”¹⁴¹ As a result, the court dismissed the claim, holding that “local residents of St. Croix do not constitute a protected class based on their national origin.”¹⁴²

As evident from the patchwork of case law confronting the issue, the state of the law with respect to subnational discrimination is mixed. On the one hand, courts have interpreted national origin more broadly as “place of origin” on the grounds that *Espinoza*’s use of the phrase “country of origin” might incorrectly imply a reference to a sovereign nation. In doing so, the courts have recognized claims where an employee’s subnational origin—Acadian, Creole, Gypsy, Serbian, Hopi—differs from the employer’s American national origin.

On the other hand, courts have simultaneously failed to extend this analysis to instances where an employer and employee are both “American,” but differ based on their divergent regional origins within the United States. As a result, some of the most potent forms of employment discrimination within the United States stemming from subnational differences have been allowed to persist based solely on the flawed assumption that America constitutes a unified place of origin.

IV. REINTERPRETING NATIONAL ORIGIN UNDER TITLE VII

The American legal system must acknowledge that homogeneous national origins do not exist. Regional identity provides a “sense of family and historical identity that the nation-state often cannot produce.”¹⁴³ While the state can provide common legal and political structures, regional origin often offers “stronger bases for group affinity stemming from a distinctive common religion, historical experience, and, usually, ancestral language.”¹⁴⁴

¹⁴⁰ *Id.* at 721 (quoting *Storey v. Burns Int’l Sec. Servs.*, 390 F.3d 760, 762 n.3 (3d Cir. 2004)).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Cruz, *supra* note 15, at 163 n.11 (citing Brian E. Porter, *Concepts of Nationalism in History, in GLOBAL CONVULSIONS* 93, 108 (Winston A. Van Horne ed., 1997)).

¹⁴⁴ *Id.*

As a result, “national origin discrimination is less likely to consist of discrimination motivated by the fact that a person or her ancestors came from a particular country, and it is much more likely to consist of discrimination based on ethnic characteristics with regional associations.”¹⁴⁵

By failing to account for subnational differences within the United States, Title VII permits employers to discriminate on the basis of regional differences, touting a shared “American” origin as a shield. Permitting such discrimination contradicts the purpose of Title VII, which was intended to protect employees from discrimination on the basis of arbitrary factors unrelated to an employee’s job performance. Just like race and gender, subnational origin is irrelevant to an employee’s job qualifications. Further, subnational employment discrimination inflicts the same harms as race and gender discrimination: “stigmatization, forced assimilation and denial of cultural expression.”¹⁴⁶ To redress these harms, Title VII should be broadened to include protection for the divergent, regional cultures that exist in the United States.

A. “Ethnic Trait” Discrimination

One possible solution to account for subnational differences is for Congress to amend Title VII to include the prohibition of ethnicity discrimination.¹⁴⁷ The term ethnicity consists of “ethnic traits that may include, but are not limited to: race, national origin, ancestry, language, religion, shared history, traditions, values, and symbols.”¹⁴⁸ Under this approach, a plaintiff could bring a Title VII claim based on her ethnicity without having to trace it to either a particular country or geographic subregion. While such an approach would be a step in the right direction, it is problematic for two reasons.

First, amending Title VII to cover discrimination based on “ethnic traits” without any geographic limitation whatsoever would render national origin overly broad and amorphous. As scholars proposing this amendment concede, ethnicity is difficult to define because it incorporates a variety of different traits.¹⁴⁹ “Ethnic identity” can refer to any combination of traits, including origin, solidarity, personal integrity, cultural uniqueness, and

¹⁴⁵ Oliveri, *supra* note 104, at 73.

¹⁴⁶ Cruz, *supra* note 15, at 186.

¹⁴⁷ See Perea, *supra* note 13, at 860 (arguing that “Congress should add terms [to Title VII] protecting against discrimination because of ‘ancestry’ and ‘ethnic traits’”); see also Cruz, *supra* note 15, at 180-81 (criticizing Title VII’s failure to remedy intraethnic discrimination and recognize possible cultural heterogeneity across national origin groups).

¹⁴⁸ Perea, *supra* note 13, at 833.

¹⁴⁹ *Id.*

territorial integrity, among countless others.¹⁵⁰ Further, ethnicity is a constantly evolving concept. “Just as ethnic groups evolve through interaction with other distinct ethnicities, ethnic groups also change because of internal cultural subgroupings. In a sense, ethnicity serves as the forum in which cultural dialectics interact, not merely between the ethnic group and outsiders, but also within the group itself.”¹⁵¹

Given the evolving nature of ethnicity and the fact that it evades clear definition, amending Title VII to include ethnic traits would open the floodgates of litigation and leave the courts struggling to ascertain the statute’s limits. Facing conflicting claims over which traits are essential to a group’s identity, courts would be left to embark on an ethnographic immersion that could not be attained by simply reviewing court filings, exhibits, and expert testimony. Moreover, making such a judgment would run the risk that “recognizing cultural rights would . . . solidify *one* version of the group’s identity over others and bolster the notion that groups *have essences*,”¹⁵² thereby codifying the boundaries of ethnic identities into precedent.

Second, amending Title VII to protect against discrimination based on ethnic traits would lead to inherent overlap within the statute. Ethnicity is comprised of various traits, such as race and religion,¹⁵³ which are already separately actionable under Title VII. Thus, amending Title VII to include “ethnic traits” would serve to conflate national origin with the other protected classes delineated in the statute. This would contradict the legislative history of Title VII, which makes clear that Congress viewed national origin as its own protected class, distinguishable from both race and religion. As Congressman Dent stated during a floor debate on Title VII: “National origin . . . has nothing to do with color, religion, or the race of an individual.”¹⁵⁴

An ethnic traits amendment would also lead to overlap within the statute because Title VII already covers trait discrimination when the trait at issue is used as a proxy for national origin. For example, Title VII case law has established that denying an individual employment because of the individual’s manner of speaking or accent constitutes unlawful discrimination where the

¹⁵⁰ EUGEN E. ROSENS, *CREATING ETHNICITY: THE PROCESS OF ETHNOGENESIS* 19 (1989).

¹⁵¹ Cruz, *supra* note 15, at 171.

¹⁵² Roberto J. Gonzalez, Note, *Cultural Rights and the Immutability Requirement in Disparate Impact Doctrine*, 55 STAN. L. REV. 2195, 2198 (2003).

¹⁵³ See *supra* text accompanying note 148.

¹⁵⁴ 110 Cong. Rec. 2549 (1964); see also Perea, *supra* note 13, at 818. Although Congressman Dent’s statement is an exaggeration—since there will inevitably be some degree of overlap between protected classes—it makes clear that Congress viewed national origin as distinguishable from both race and religion, warranting its own independent protection.

accent marks the employee as being from another country.¹⁵⁵ Similarly, both the EEOC and courts have held that English-only rules in the workplace violate Title VII's prohibition against national origin discrimination where English is not a bona fide occupational qualification (BFOQ).¹⁵⁶ Since traits such as language and accent are already actionable when they are used as proxies for national origin, an ethnic traits amendment would be unhelpful in addressing the shortcomings of Title VII's national origin provision.

In defense of the ethnic traits approach, scholars counter that proxies are insufficient because courts differ widely on which traits can serve as proxies for a protected category and on the required degree of correlation between the trait and the protected class.¹⁵⁷ Therefore, they argue, discrimination based on ethnic traits should be prohibited directly, rather than only indirectly when such traits are used as proxies for national origin.¹⁵⁸

Although proxies require courts to make nuanced determinations based on correlations, they have more potential for uniform application than a direct prohibition on ethnic trait discrimination. Since Title VII was enacted, courts have consistently made difficult decisions based on correlations. For example, in all disparate impact cases, courts must determine whether the correlation between an employment practice and its statistically greater impact on a protected class leads to an inference of discrimination.¹⁵⁹ Similarly, in the context of BFOQs, courts must determine whether a protected trait is sufficiently correlated with job performance to qualify as a valid BFOQ.¹⁶⁰ Thus, although complexities are inherent in using correlations,

¹⁵⁵ See STEVEN C. KAHN ET AL., *LEGAL GUIDE TO HUMAN RESOURCES* § 2.01(9), at 2-5 (1994) (explaining that discrimination on the basis of "accent" could be considered national origin discrimination where the accent is also a proxy for national origin, unless the employer can show that the accent interferes with the employee's ability to perform the job).

¹⁵⁶ See *id.*; Smith, *supra* note 14, at 21.

¹⁵⁷ Perea, *supra* note 13, at 852.

¹⁵⁸ *Id.* at 853.

¹⁵⁹ See, e.g., *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 311 (1977) (explaining that while the disparity between 3.7% (the percentage of black teachers hired by the school) and 5.7% (the percentage of black teachers in the county) would not be enough to give rise to an inference of discrimination, a disparity between 3.7% and 15.4% (the percentage of black teachers in the city) might be); *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 320-21 (7th Cir. 1988) (holding that the statistical disparity between men and women in commission jobs was not enough to lead to an inference of discriminatory intent because Sears offered evidence of nondiscriminatory explanations for the disparity, such as the fact that women were simply not interested in commission jobs).

¹⁶⁰ See, e.g., *Western Airlines v. Criswell*, 472 U.S. 400, 414-17 (1985) (holding that an employer may use a protected trait as a legitimate proxy for job qualification "by proving that it is 'impossible or highly impractical' to deal with the . . . employees on an individualized basis" and noting as an example that an employer could show that "some members of the discriminated-against class possess a trait precluding safe and efficient job performance that cannot be ascertained

courts have dealt with these issues in various areas of employment discrimination law and could do the same with respect to national origin.¹⁶¹

B. Regional Discrimination

In order to both account for discrimination within the United States and provide the courts with manageable limits, national origin discrimination should be reinterpreted to include regional discrimination. Under this proposal, a plaintiff would need to prove by a preponderance of the evidence that the employer discriminated against her because of her "place of origin," which would include regions within the United States. This would permit a plaintiff to file a cause of action even where an employer and employee are both American, so long as the plaintiff asserts that she was discriminated against as a result of her being from a distinct region of the United States.

To make out a *prima facie* case, plaintiffs would have to show that the region of the United States where they are from has a unique history, culture, and political or social circumstance that is distinguishable from others in the United States. This inquiry would entail many of the same factors considered in determining ethnicity, but unlike the ethnic traits approach, the inquiry here would remain geographically circumscribed.

Embracing regional discrimination within the meaning of national origin would have four main benefits. First, a regional discrimination approach would affirm, consistent with the Supreme Court's recognition in *Oncale*, that unlawful discrimination can occur within a protected class.¹⁶² Just as courts have recognized that sex discrimination can occur between individuals of the same sex¹⁶³ and that race discrimination can occur between

by means other than knowledge of the applicant's membership in the class" (citations omitted)); *Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977) (holding that the employer failed to produce sufficient evidence correlating its height and weight requirements with the requisite amount of strength it thought essential to good job performance).

¹⁶¹ Even if the complexities associated with using proxies seem too burdensome for courts to grapple with, the issues posed by a direct prohibition of ethnic trait discrimination would be far more onerous. Under such an approach, courts would have to trace identified traits to a notion of ethnicity that is inherently vague and lacks any identifiable boundaries. Another approach is needed that will account for the existence of subnational discrimination and provide courts with external limits.

¹⁶² See *supra* note 95 and accompanying text (explaining that Title VII also protects against intraracial discrimination in the workplace).

¹⁶³ See *supra* notes 96-97 and accompanying text.

individuals of the same race,¹⁶⁴ the courts must also recognize that national origin discrimination can occur between individuals from the same country of origin.

Second, regional discrimination falls within the literal meaning of “place of origin” as embraced by the EEOC and courts following *Espinoza*.¹⁶⁵ Although courts have refused to extend the definition this far, there is no logical reason to recognize national origin claims based on subnational differences outside the United States (e.g., Serbian, Acadian), but not subnational differences within the United States (e.g., Appalachian). In fact, if place of origin means what courts have said it means—that, after *Espinoza*, national origin is not contingent on sovereignty—then this would favor including regions of the United States within the meaning of national origin.

Third, recognizing regional discrimination comports with the overarching purpose of Title VII, which seeks to remove artificial bars to employment based on immutable characteristics.¹⁶⁶ Like any other national origin, being born in a particular region of the United States has no inherent relation to one’s ability to perform a job and is completely outside an individual’s control. There is no reason why employers should be permitted to discriminate against qualified employees based solely on regional stereotypes, simply because those employees cannot trace their regional origin to territories outside the United States.

Finally, a regional origin approach would provide the courts with the objectively identifiable limits that are lacking in the ethnicity approach. By requiring a plaintiff to point to a particular geographic region of the United States and prove that this region has a distinct culture, a regional approach would help circumscribe what would otherwise be an unguided journey into the evolving and undefined concept of ethnicity. Although it would ultimately be up to the courts to decide how expansively to read the term “region,” the presumption should be in favor of a narrower reading, including at least those regions of the United States in which there is a well-documented history of regional animus (e.g., the South and Appalachia).¹⁶⁷ In this way, regional origin splits the difference between the restrictive

¹⁶⁴ See *Walker v. Sec’y of Treasury, IRS*, 713 F. Supp. 403, 406-08 (N.D. Ga. 1989) (recognizing a Title VII discrimination claim by a light-skinned black employee against her dark-skinned black supervisor); *supra* notes 97-98 and accompanying text.

¹⁶⁵ See *supra* note 99 and accompanying text.

¹⁶⁶ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (“What is required by Congress [through Title VII] is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”).

¹⁶⁷ See *supra* Section II.B.

definition of national origin in *Espinoza* and the virtually limitless definition posed by an ethnic traits approach. On the one hand, it recognizes that, consistent with *Oncala*, discrimination can occur within a national origin group, and it provides redress to the countless Americans that have faced discrimination in employment on the basis of subnational differences. On the other hand, it avoids rendering “national origin” so broad that courts will be flooded with claims of ethnic discrimination and forced to make controversial determinations of what ethnicity means for purposes of Title VII.

While a regional discrimination approach serves as a middle ground between two extreme approaches, it is not a perfect solution. Just as the national origin provision currently fails to account for differences within the United States, regional discrimination would inevitably fail to account for differences within certain regions of the United States. However, as a practical matter, the line must be drawn somewhere. Without some geographically imposed limitation, U.S. courts would be forced to delve into a complex ethnographic immersion.¹⁶⁸ Until scholars develop a clear notion of what ethnicity is and a uniform approach to identify it, the regional discrimination approach will remain the most viable solution to addressing the problem of subnational discrimination within the United States.

CONCLUSION

The problem of discrimination based on regional origin is deeply rooted in our nation’s history and persists today. Though some may believe that America is a singular, homogeneous nation, the reality is that our nation—like many others—is comprised of regional subgroups, each sharing a different history, culture, and dialect. For too long, discrimination among these American subgroups has been permitted based on the flawed assumption that nations are homogeneous. Although the EEOC and the courts have moved in the right direction by rejecting the focus on a sovereign nation and broadening national origin to include “place of origin,” they have not gone far enough.

To fully account for the discrimination that occurs among Americans, Title VII must be interpreted to include regional discrimination. The courts should do so by extending “place of origin” one step further to include regional origin. While this proposal would not cover every distinct, subnational group within the United States, it would cover the most pervasive and documented form of subnational discrimination, which continues to be

¹⁶⁸ See *supra* Section IV.A.

based on region.¹⁶⁹ Further, using “region,” instead of “ethnic traits,” would ensure that national origin remains geographically circumscribed. Without this sort of geographic limitation, the floodgates of litigation would open, and the courts would be left struggling to define Title VII around a notion of ethnicity that is, by definition, amorphous and constantly evolving.

The time has come to extend protection to the countless employees who have been denied employment opportunities simply because they are viewed as “Yankees,” “hillbillies,” “Confederates,” “redskins,” or “rednecks.” Until courts formally recognize that this form of subnational origin discrimination persists within the United States, the overarching goal of Title VII—to prevent arbitrary discrimination in employment—will remain unfulfilled.

¹⁶⁹ See Oliveri, *supra* note 104, at 73 (“[N]ational origin discrimination is less likely to consist of discrimination motivated by the fact that a person or her ancestors came from a particular country, and it is much more likely to consist of discrimination based on ethnic characteristics with regional associations.”).