Flying while Brown: Federal Civil Rights Remedies to Post-9/11 Airline Racial Profiling of South Asians

Charu A. Chandrasekhar
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INTRODUCTION

The terrorist attacks of September 11, 2001 ("9/11") permanently transformed the American civil liberties landscape. After nineteen Arab Muslim men hijacked and crashed commercial aircraft into the World Trade Center towers and the Pentagon, people of South Asian, Arab, and Middle Eastern descent have become targets of hundreds of hate crimes and incidents of racial profiling across the country. Racial profilers and perpetrators of hate crimes have particularly discriminated against South Asians, presumably focusing on perceived racial, ethnic, and religious similarities to the hijackers. This backlash, victimizing citizens and non-

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1. "South Asian" is a well-established cultural and geographical term describing persons of Indian, Pakistani, Bangladeshi, Nepali, Sri Lankan, Tibetan, Bhutanese, and Maldivian ancestry. This article uses the term "South Asians" to refer to people of South Asian national or ethnic origin.

citizens alike, has ranged from the degrading strip search of a young Pakistani American woman by Illinois National Guard troops at Chicago’s O’Hare Airport\(^3\) to the brutal murder of an Arizona Sikh man.\(^4\) South Asians in the United States, particularly South Asian Muslims, have also encountered widespread employment, housing, and educational discrimination post-9/11.\(^5\) Moreover, the U.S. government has detained several hundred South Asian immigrants without due process, steadily encroaching upon their civil rights and civil liberties.\(^6\)

One highly visible and contested manifestation of post-9/11 race-based discrimination has been the widespread increase in airline disparate treatment of South Asians. Because terrorists commandeered commercial

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3. See Press Release, ACLU, ACLU of Illinois Challenges Ethnic and Religious Bias in Strip Search of Muslim Woman at O’Hare International Airport (Jan. 16, 2002), at http://www.aclu.org/RacialEquality/RacialEquality.cfm?ID=9717&c=133&Type=s (alleging that a female Pakistani passenger was subjected to a humiliating search because she was wearing a traditional head covering).


5. See, e.g., Council on American-Islamic Relations, Number of Reported Incidents by Category, at http://www.cair-net.org/html/bycategory.htm (last visited Nov. 8, 2002) (chart breaking down 1,717 incidents of harassment reported by Muslim Americans after 9/11 into the following categories: deaths; physical assault and property damage; employment discrimination; school discrimination; FBI/INS intimidation; hate mail; death threats; bomb threats; and public harassment); Amardeep Singh, Remarks at Meeting of the U.S. Equal Employment Opportunity Commission, at http://www.eeoc.gov/meetings/12-11-01-sikh.html (Dec. 11, 2001) (describing three cases of employment discrimination against Sikh Americans post-9/11) [hereinafter Singh]. See also Press Release, U.S. Commission on Civil Rights, U.S. Commission on Civil Rights Receives Overwhelming Response to Complaint Line (Sept. 18, 2001), at http://www.usccr.gov (describing the establishment of a toll free hotline after September 11 to collect reports of hate crimes and discrimination). Given the overwhelming response to the hotline established in the week after the 9/11 tragedies, the USCCR had to establish a second hotline to accommodate the volume of calls. See Press Release, U.S. Commission on Civil Rights, U.S. Commission on Civil Rights Launches Second Complaint Hotline to Accommodate Great Response (Sept. 19, 2001), at http://www.usccr.gov

6. See ACLU, THE ACLU DEFENDS FREEDOM, A HISTORICAL PERSPECTIVE ON PROTECTING LIBERTY IN TIMES OF CRISIS, available at http://www.aclu.org/Files/Openfile.cfm?id=10837 (last visited Nov. 8, 2002) (complaining that nearly 1,200 detainees, almost all of whom were Arab, Muslim, or South Asian, have been “held for many weeks without charges” and that “all but a few hundred are now believed to have been deported on immigration charges or allowed to leave voluntarily”). In late 2002, the U.S. Department of Justice implemented a program requiring individuals from over twenty South Asian, Middle Eastern, and Arab countries to complete “special registration” with the Immigration and Naturalization Service (“INS”). See Registration and Fingerprinting, 8 C.F.R. § 264.1(f) (2003); Registration of Certain Nonimmigrant Aliens from Designated Countries, 68 Fed. Reg. 2363 (Jan. 16, 2003) (listing the affected countries). As a part of special registration, these individuals must submit to questioning and provide the INS with information and regular updates about their immigration status, residence, and employment. 8 C.F.R. § 264.1(f). Failure to comply can subject an individual to deportation, fines, and imprisonment. Registration of Certain Nonimmigrant Aliens from Designated Countries, 68 Fed. Reg. 8046 (Feb. 19, 2003). Indeed, the INS has arrested and detained hundreds of immigrants during the special registration process. See Owen Bowcott, America Arrests 700 Muslim Immigrants, THE GUARDIAN, Dec. 20, 2002, available at http://www.guardian.co.uk/international/story/0,3604,863274,00.html.
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aircraft to cause the mass destruction of 9/11, private airlines have come to view themselves as the “front line of defense” of American national security. Since 9/11, airlines have racially profiled passengers of South Asian descent in the name of passenger safety. They have subjected such passengers to heightened security screening and denied them passage based solely on the belief that ethnicity or national origin increases passengers’ flight risk. By refusing permission to board aircraft even when these passengers posed no cognizable safety threats, this Comment will argue, the airlines violated these passengers’ civil rights.

Airlines have also forced South Asian passengers to endure humiliating and degrading pre-boarding searches and interrogations. Such airline profiling of South Asians, particularly of South Asian Muslims, has been rampant. Worse, it has continued unabated over a

7. See, e.g., Press Release, Air Transport Association, ATA Passenger Airlines: Cockpit Doors Secure From Intrusion, Call for Law Enforcement Coordination and National Traveler’s ID (Nov. 8, 2001), at http://www.airlines.org/public/news/display2.asp?nid=4710 [hereinafter ATA Press Release] (quoting ATA President and CEO Carol Hallett: “All of the [aviation security] activities I have described ultimately should benefit homeland security and national security, not just aviation security.”); Press Release, Air Transport Association, Federalize Airport Security Screening and Deploy More Sky Marshals, A Call to Action by the Nation’s Airlines (Sept. 26, 2001), at http://www.airlines.org/public/news/display2.asp?nid=1345 (stating the ATA position that “airport security... should be treated as a national security priority and managed no differently than any other national defense program”). The Air Transport Association is the only trade organization for the major U.S. carriers. See Press Release, Air Transport Association, What is the ATA? The ATA is the Air Transport Association of America (Feb. 10, 2003), at http://www.airlines.org/public/about/display1.asp?nid=978. Interestingly, although individual airlines have agreed that aviation security constitutes a primary element of national security in the post-9/11 climate, airlines have also asserted that they cannot bear the cost of increased aviation security measures. See, e.g., Airline Chief Pleads for Security Aid, AIRWISE NEWS, Oct. 8, 2002, at http://news.airwise.com/stories/2002/10/1034098021.html (quoting Delta Airlines CEO Leo F. Mullin’s argument that “[i]ncreased aviation security should be viewed as an appropriate national security response” to 9/11 and additional costs “should be funded through the national security funding mechanisms, not as taxes or costs imposed specifically on airlines”).

8. See Riad Z. Abdelkarim, Profiles in Caution: Focus on Safety Must Not Come at the Cost of Humiliating Certain Citizens, ROCKY MOUNTAIN NEWS, Jan. 19, 2002, at 4B (noting that although over 160 claims of airline profiling against Muslims Americans were reported to the Council on American-Islamic Relations between September 11, 2001 and January 2002, the actual number of such incidents is believed to be much higher); see also ACLU, CIVIL LIBERTIES, supra note 2, at 6-7 (describing the post-9/11 removal of Arab and Arab-appearing airline passengers because aircraft personnel or passengers “felt uncomfortable” in their presence).

9. See, e.g., ACLU, BACKLASH, supra note 2, at 18 (describing the story of Arshad Chowdhury, a South Asian MBA student prevented from boarding a Northwest Airlines flight because of “his race and ethnicity”).


year after the 9/11 attacks. For example, in November 2002, Booker Prize-shortlisted author Rohinton Mistry (a Canadian resident of South Asian descent) canceled part of a U.S. book tour after being repeatedly subjected to intrusive airport searches.\textsuperscript{13}

In response to similar incidents, less than a month after 9/11 the Department of Transportation ("DOT") issued several strong directives banning airlines from racially profiling their customers.\textsuperscript{14} The DOT instructed airlines:

\begin{quote}
Do not subject persons or their property to inspection, search and/or detention solely because they appear to be Arab, Middle Eastern, Asian, and/or Muslim; or solely because they speak Arabic, Farsi, or another foreign language; or solely because they speak with an accent that may lead you to believe they are Arab, Middle Eastern, Asian, and/or Muslim.\textsuperscript{15}
\end{quote}

Department of Transportation investigation of 142 complaints from airline passengers who claimed to have been denied passage or singled out for heightened security screenings due to their appearance; CNN, \textit{Arabs Removed From Flights; Airlines Investigate}, Sept. 21, 2001, at http://www.cnn.com/2001/US/09/21/gen.airlines.arabs.removed (reporting at least five incidents under investigation where people of Arab descent were removed from flights); Ken Ellingwood & Nicholas Riccardi, \textit{After the Attack Racial Profiling: Arab Americans Enduring Hard Stares of Other Fliers Backlash}, L.A. TIMES, Sept. 20, 2001, at A1; Roy Bragg, \textit{Claims of Bias Follow Terror: Pakistani Man Living in New Braunfels Says He Was Thrown Off Jet}, SAN ANTONIO EXPRESS-NEWS, Sept. 20, 2001, at 1A.

\textsuperscript{13} Colin Freeze, \textit{Mistry Suffers 'Visions of Guantanamo,'} THE GLOBE AND MAIL, Nov. 3, 2002, available at http://www.globeandmail.com/servlet/ArticleNews/front/RTGAM/20021103/wxmist1102/Front/homeBN/breakingnews. Mistry complained that while traveling in the United States, he was "constantly made to feel like a second class citizen." \textit{Id.} For example, Mistry noted, "[t]he first flight [my wife and I] took, we were greeted by a ticket agent who cheerfully told us that we had been selected randomly for a special security check. ... Then it began to happen at every single stop, at every single airport. The random process took on a 100 per cent certitude." \textit{Id.}

\textsuperscript{14} See, e.g., Email from Norman Strickman, Assistant Director of Aviation Consumer Protection, U.S. Department of Transportation (Sept. 21, 2001, 15:02 EST), at http://www.caasf.org/0901/al_usdot.htm (cautioning airlines "not to target or otherwise discriminate against passengers based on their race, color, national or ethnic origin, religion, or based on passengers' names or modes of dress that could be indicative of such classification" and warning that "various Federal statutes prohibit air carriers from subjecting a person in air transportation to discrimination on the basis of race, color, national origin, religion, sex, or ancestry").


\begin{quote}
The terrorist attacks of September 11, 2001, have raised concerns about intimidation and harassment directed at individuals who are, or are perceived to be, of Arab, Middle Eastern, or South Asian descent and/or Muslim. Federal civil rights laws prohibit discrimination on the basis of a person's race, color, national or ethnic origin, religion, sex, ancestry, or disability. DOT applauds the professionalism and dedication of its safety inspectors and law enforcement investigators and recognizes the enormous challenges we face in ensuring the security of our Nation's transportation system. However, it is important to reemphasize that in performing our critical duties, we may not rely on generalized stereotypes or engage in unlawful activity.
\end{quote}

\textit{Id.}
This directive contained detailed instructions for performing passenger security checks on Sikh men wearing turbans and Muslim women wearing headcoverings to avoid violating these passengers' civil liberties and religious beliefs.16

In spite of these efforts, the airlines persisted in discriminating against South Asian passengers who posed no apparent flight risks.17 Some victims of these activities have sought legal redress for the harms they suffered. Notably, in June 2002, the American Civil Liberties Union ("ACLU") and Relman & Associates, a Washington, D.C.-based civil rights law firm, jointly filed five individual lawsuits against American Airlines, Continental Airlines, Northwest Airlines, and United Airlines on behalf of five passengers ejected from their flights.18 Although the airlines contended that these passengers posed security risks that justified denying them passage, the ACLU-Relman lawsuits allege that the removals constituted racial profiling tantamount to illegal discrimination.19 This Comment will not discuss the merits of the individual ACLU-Relman claims in detail, but rather will use the broad factual and legal issues raised by the cases to examine the legal redress available to South Asian airline passengers who were ejected from flights, as well as those who suffered disparate treatment but were ultimately granted passage. It examines the viability of claims alleging violations of 42 U.S.C. § 1981 ("section

16. Id. While providing instructions for performing specific security checks on passengers wearing turbans or headcoverings, this directive banned the use of racial profiling on the basis of such characteristics, noting that:

Individuals may not be selected for additional screening based solely on appearance or mode of dress that is associated with a particular national origin or religion. For example, selecting a woman for additional screening solely because her hair is covered or she is wearing a veil, as some Muslim women do, is unlawful discrimination. Selecting a man for additional screening solely because he is wearing a long beard or hair covering, as some Muslim men do, is unlawful discrimination. Likewise, selecting a man for additional screening solely because he is wearing a turban, as some Sikh men and women do, is unlawful discrimination. Id.

17. Notably, airline actions that constitute the basis of ACLU-Relman plaintiffs’ complaints all occurred after the DOT issued the directives described above. See, e.g., Complaint for Declaratory, Injunctive, and Monetary Relief at 3-4, Dasrath v. Cont’l Airlines, Inc., 228 F. Supp. 2d 531 (D.N.J. 2002) (No. 02-2683) [hereinafter Dasrath complaint] (on file with author).

18. See ACLU/Relman Press Release, supra note 10. The plaintiffs in the lawsuits ("ACLU-Relman plaintiffs") are: Assem Bayaa, 40, a U.S. citizen from Long Beach, CA, ejected from United Airlines Flight 10 (Los Angeles to New York) on December 23, 2001; Edgardo Cureg, 34, a permanent legal resident from Tampa, Florida, ejected from Continental Flight 1218 (New Jersey to Tampa) on Dec. 31, 2001; Michael Dasrath, 32, a U.S. citizen from Brooklyn, ejected from Continental Flight 1218 (New Jersey to Tampa) on December 31, 2001; Hassan Sader, 36, a U.S. citizen from Virginia, ejected from American Airlines Flight 1531 (Baltimore to Seattle) on Oct. 31, 2001; and Arshad Chowdhury, 26, a U.S. citizen from Pittsburgh, refused passage on Northwest Airlines Flight 342 (San Francisco to Pittsburgh) on Oct. 23, 2001. Id. The American-Arab Anti-Discrimination Committee was also a plaintiff in the Bayaa, Cureg, and Sader lawsuits. Id.

and Title VI of the Civil Rights Act of 1964 ("Title VI")\(^{21}\) as an aspect of South Asian American and other community responses to post-9/11 racial and ethnic violence.

As a framework for this analysis, the Comment will discuss the nature of racial profiling in aviation security in Part I. Part II focuses on discrimination claims brought under section 1981, examining first the threshold question of whether South Asians and subsets of the South Asian population belong to a distinct "race." It then weighs the likelihood of success for such claims. Part III examines the ability of plaintiffs in airline profiling cases to plead Title VI claims against the airlines by analogizing to Title VI racial profiling cases brought in other public and private sector contexts. Part IV considers defenses that may be raised by defendant airlines. Since post-9/11 racial profiling and violence had a widespread impact on many non-South Asian groups in the United States, the legal analysis offered by this Comment is applicable to other ethnic minorities seeking to bring similar claims. Part V examines the implications of airline racial profiling on the civil rights of South Asians and other Americans. It recognizes the importance of multiethnic and multiracial coalitions in fighting post-9/11 erosions of civil rights and civil liberties, and analyzes strategies of resistance.

I. THE ROLE OF RACIAL PROFILING IN AVIATION SECURITY

Racial profiling is perhaps most notorious as a law enforcement practice.\(^{22}\) Courts have defined it as "the improper use of race as a basis for taking law enforcement action"\(^{23}\) and as "law enforcement-initiated action based on an individual's race, ethnicity, or national origin rather than on the individual's behavior or on information identifying the individual as having engaged in criminal activity."\(^{24}\) Racial profiling has also been widely documented and discussed in other areas, especially public accommodations and retail.\(^{25}\) Beyond the criminal law enforcement


\(^{23}\) Chavez v. Illinois State Police, 251 F.3d 612, 620 (7th Cir. 2001).


\(^{25}\) See, e.g., Brandveen, supra note 22; Amanda Main, Racial Profiling in Places of Public
context, any improperly race-based adverse action taken by a public or private entity can be described as racial profiling. This Comment scrutinizes its widespread post-9/11 use by airlines against passengers.

Airline racial profiling first gained popularity in the aftermath of the 1996 crash of TWA Flight 800. In response, the Clinton Administration formed the White House Commission on Aviation Safety and Security ("Gore Commission"), which issued recommendations "to enhance and ensure the continued safety and security of [the] air transportation system." In its report, the Gore Commission advised the Federal Aviation Administration ("FAA") to proceed with the implementation of passenger profiling as an aviation security mechanism. Under the auspices of an FAA grant, Northwest Airlines developed the Computer-Assisted Passenger Screening System ("CAPS"). The technology was then offered by the FAA in December 1997 to major airlines for voluntary adoption. Using roughly forty pieces of passenger data, the CAPS system identifies passengers who fit a predetermined profile. These passengers are subjected to heightened security measures. Most of the profile criteria are kept secret; however, some indication of what these criteria are can be deduced from public information. Profiles are likely to take into account: passenger’s address; method of ticket purchase; when the ticket was purchased; travel companions; rental car status; departure date; flight destination and origin; passenger destination; and the round trip or one-way nature of the ticket. Relative combinations of data determine whether an
individual poses a heightened security risk, and a passenger who fits the profile is deemed a "selectee." In addition, a limited number of randomly chosen other passengers also receive heightened security screening to "ensure that the 'selectees' are not stigmatized or subjected to unreasonable searches."

Although the Gore Commission report recommended that "[n]o profile should contain or be based on material of a constitutionally suspect nature—e.g., race, religion, national origin of U.S. citizens"—several ethnic and minority groups have alleged that passenger profiling discriminated against them by unfairly targeting them for increased security scrutiny. Scholars have also criticized the lack of transparency in the CAPS system. In 1997, the Department of Justice ("DOJ") concluded that the CAPS program could have a problematic disparate impact on passengers and suggested oversight and reporting requirements; however, these recommendations were never implemented. Ultimately, CAPS was never widely institutionalized among airlines in the United States.

Racial profiling as an airline security device gained increased prominence in the aftermath of the 9/11 terrorist attacks. Popular support for its use has grown. For example, immediately after the 9/11 attacks, a national poll found that most Americans (58%) supported requiring people (including American citizens) of Arab descent to undergo intensive security checks before boarding airplanes in the United States. Support from airlines has grown, evident from the several airline profiling proposals that have been advanced after 9/11. The Air Transport Association ("ATA") called for the adoption of a voluntary "National Traveler's ID" card and

34. Id.
35. Id.
36. GORE REPORT, supra note 27.
37. AuBuchon, supra note 26, at 904-05; see also Jamie L. Rhee, Comment, Rational And Constitutional Approaches To Airline Safety In The Face Of Terrorist Threats, 49 DEPAUL L. REV. 847, 871 (2000) (noting that complaints of unconstitutional security searches made by Muslim Americans increased by 1000% in one year). The Council on American Islamic Relations ("CAIR") reported a 1000% increase in complaints in one year by Islamic Americans who were detained, searched, and questioned in American airports.
38. See, e.g., Rhee, supra note 37, at 865 ("It is impossible to determine whether the profiles now in use involve illegal criteria because the FAA has declined to publicize the nature of the criteria.").
40. See Countering Airline Terrorism, CALTECH 336, Nov. 15, 2001, available at http://pr.caltech.edu/periodicals/336/articles/Volume%201/11-15-01/terrorism.html (reporting that guidelines for implementing the CAPS regulations were still under development at the time of the 9/11 attacks); see also Hearings, supra note 26 (pointing out that before 9/11, only passengers who checked luggage were subject to CAPS profiling).
42. Vikram David Amar, When Racial Profiling is Appropriate, L.A. TIMES, Sept. 30, 2001, at M2 (49% of those polled favored requiring "Special ID cards" for Arabs in the United States, and 33% favored increased surveillance).
mandatory traveler identification for non-resident aliens. The federal government has also acted to affirm its confidence in profiling. The Transportation Security Administration ("TSA") has been developing the Computer Assisted Passenger Prescreening System ("CAPPS II"), a computer system that will examine facts such as travel reservations, housing information, family ties, and credit reports to determine if passengers possess links to terrorist communities or have "unusual" histories that show potential threats. The TSA's ultimate goal is to create an "automated system capable of integrating and simultaneously analyzing numerous databases from Government, industry and the private sector which establishes a threat risk assessment on every air carrier passenger, airport and flight." This new system will likely become "the foundation" on which other public security measures will be built. In addition, the DOT has been funding private research to explore sophisticated computerized racial profiling methodologies.

Proponents of racial profiling generally justify its use as rational, effective, and necessary. Assuming that racial profiling is a rational law enforcement tool presupposes a correlation between an individual's race or ethnicity and his/her likelihood of being a criminal or a terrorist. Commentators point to the fact that the 9/11 hijackers shared ethnic and religious characteristics as support for implementing profiling of specific national origin, religious, or ethnic groups as a central principle of an aviation security strategy. Supporters believe that the practice effectively facilitates the optimal allocation of scarce law enforcement resources to those areas or populations in which crime is likely to occur. Legal

43. These cards would contain "appropriate biometric and anti-counterfeiting technologies" assessing each passenger's flight risk. ATA Press Release, supra note 7. See also Implementation of the Aviation and Transportation Security Act with a Focus on the 60-day Deadline for Screening and Checked Baggage: Hearing Before the House Transp. & Infrastructure Comm. Aviation Subcomm. 107th Cong. (2002) (statement of Carol B. Hallett, President and CEO of the Air Transport Association of America, Inc.) (explaining a plan "to develop a 'trusted traveler,' biometrically encoded, voluntary, access card").


46. Id. (quoting the prediction of U.S. Transportation Secretary Norman Y. Mineta).

47. Id.

48. See, e.g., Nurith C. Aizenman, Middle Eastern Travelers Face Scrutiny; Arab American Activist Attacks Lengthy Interrogations as Profiling, Doubts Usefulness, WASH. POST, Sept. 23, 2001, at A11 (quoting a former security head of the FAA as saying "[i]f the people that are flying your airplanes into buildings are from the Middle East, you don’t look for New Zealanders"); Ellingwood & Riccardi, supra note 12 (quoting an author of several books on terrorism: "We’re going to have to look at people from that part of the world [the Middle East] with a much more intense magnifying glass than anyone else").

49. See, e.g., John Derbyshire, In Defense of Racial Profiling: Where is Our Common Sense?, NAT’L REV., Feb. 19, 2001, at 38, 39 (arguing that police should utilize racial stereotypes for the sake
scholars, government officials, and political commentators have suggested that aviation racial profiling could have averted the 9/11 hijackings and have also argued that racial profiling is a necessary aviation security and law enforcement mechanism. Under this view, its efficacy outweighs its social cost. Some advocates of post-9/11 racial profiling even dismiss as inconsequential the civil liberties deprivations endured by South Asians, Arabs, and Muslims as a result of increased post-9/11 racial profiling undertaken with the aim of improving security.

Although racial profiling has won newfound supporters in the aftermath of 9/11, it remains both a deeply offensive and grossly ineffective law enforcement strategy. Airline racial profiling treats passengers as "criminals in the absence of specific evidence of individual criminality, and [treats] passengers unequally" on the basis of an immutable characteristic that has "no causal relationship to terrorist activity." It does not merely inconvenience passengers by subjecting them to additional security screenings; rather, airline profiling can be an utterly degrading and humiliating experience. Consider the following account:

of "simple efficiency" and contending that "[a] policeman who concentrates a disproportionate amount of his limited time and resources on young black men is going to uncover far more crimes — and therefore be far more successful in his career — than one who biases his attention toward, say, middle-aged Asian women"; David Rudovsky, Breaking the Pattern of Racial Profiling, 38 TRIAL 29, 30 (2002) (describing police rationale of racial profiling as justified "because the location and social impact of the same types of crimes justifies a more aggressive response in minority communities" and because such practices simply "work").

50. See, e.g., Kathy Barrett Carter, Some See New Need for Racial Profiling, NEWARK STAR-LEDGER, Sept. 20, 2001, at 21 (quoting constitutional law scholar Floyd Abrams: "It would be a dereliction of duty to the American public to forget the fact that the people who committed these terrible crimes all spoke Arabic to each other."); John Farmer, Jr., Rethinking Racial Profiling, NEWARK STAR-LEDGER, Sept. 23, 2001, § 10, at 1 ("How can law enforcement not consider ethnicity in investigating these crimes when that identifier is an essential characteristic of the hijackers?"); Stuart Taylor, Jr., The Skies Won't Be Safe Until We Use Commonsense Profiling, NAT'L J., Mar. 16, 2002 (arguing that it is "crazy to ignore [the] odds" that, according to his calculations, "a randomly chosen Middle Eastern male passenger is roughly 2,000 times as likely to be an Al Qaeda terrorist as a randomly-chosen native-born American").

51. See, e.g., Maxine Bernstein, Sept. 11 Alters Profiling Debate, PORTLAND OREGONIAN, Oct. 29, 2001, at C01 (reporting the view of a crime expert that "until Americans can feel secure getting on a plane, Middle Easterners will have to put up with some inconvenience").

52. See, e.g., Stephen J. Singer, Racial Profiling Also Has a Good Side, NEWSDAY (New York), Sept. 25, 2001, at A38 ("Would anyone think it unfair for airport security personnel to target a group of male, Arabic passengers, traveling with little luggage, who were seeking one-way tickets? Clearly not, especially as this was the singular profile of the hijackers in all four of the recent tragedies. And if the leader of the Arab Anti-Defamation League appears on the evening news condemning these practices, any of us now care?").

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On February 1, 1991, during the Gulf War, an American of Middle Eastern origin boarded a plane in Miami bound for New York. Just before the plane took off, agents of the airline escorted Mr. Ghonoudian from the plane in the full view of other passengers; detained and questioned him for three hours (often in a rude and hostile tone); and demanded to know the name of his mother, where he was born, where he had stayed on the earlier portion of his trip, his employer, and how long he had lived in the United States. They forced him to miss his plane, ordered him to remove his jacket and shoes, and conducted a hand search of his entire body, including his crotch and buttocks. One airline agent admitted that Mr. Ghonoudian was forced to leave the plane because he fit the profile of a terrorist. He had done nothing wrong.\(^{54}\)

Not only does the practice of targeting passengers for heightened security screening on the basis of race or ethnic origin instead of on the basis of specific evidence of criminality grossly violate the civil liberties of profiled passengers, it is an unsuccessful security strategy. Airline racial profiling is unreliable because it rests on tenuous data about the potential likelihood of a given population's predilection for terrorist activity.\(^{55}\) Scholars note that airline profiling techniques are “under-inclusive” and “always one step behind” potential terrorists.\(^{56}\) Since airlines craft profiles in response to terrorist attacks, profiling is a reactive effort that cannot anticipate new forms of terrorist threats.\(^{57}\) Furthermore, disproportionately targeting certain groups of people or forms of transport for heightened safety scrutiny leaves other potentially dangerous population segments or travel modes unexamined.\(^{58}\) Given the range of vulnerabilities faced by airlines, too many possible threats exist for any profiling system to operate successfully.\(^{59}\) Proposed computerized airline profiling systems would erode passenger privacy by giving airlines access to personal data such as credit card numbers, address, and travel destination solely for the purpose of monitoring and subjecting specific airline passengers to heightened scrutiny.\(^{60}\) In contrast, several scholars and organizations have proposed numerous specific alternatives to enhance airline safety without resorting to racial profiling.\(^{61}\) Such techniques include: limiting the number of carry-on

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\(^{54}\) Nojeim, supra note 53, at 8.

\(^{55}\) See id. at 6 (explaining that “[p]rofiling does not fill security gaps, it creates them”).

\(^{56}\) Id. at 5, 6.

\(^{57}\) Id. at 6 (“Professional terrorists will employ measures to defeat whatever profile is in use, by, for example, appearing one day as a seminary student, and the next as who knows what.”).

\(^{58}\) See id. (worrying that “the use of profiles may make people feel safer temporarily” but “may decrease safety”).

\(^{59}\) Id.

\(^{60}\) Id. at 7.

\(^{61}\) See, e.g., Liam Braber, Comment, Korematsu’s Ghost: A Post-September 11th Analysis Of Race And National Security, 47 VILL. L. REV. 451, 486 (2002) (mentioning alternatives such as federalizing airport security, utilizing armed federal officers on flights, intensifying random searches, and “develop[ing] good relations with the Islamic community to help identify the true threats”); Nojeim, supra note 53, at 9 (suggesting various security measures such as training security personnel...
Airline racial profiling fits into a broader pattern of post-9/11 discrimination against South Asians and other ethnic minority communities that carries grave societal consequences. Racial profiling marginalizes and stigmatizes Arabs, Muslims, and South Asians, depriving these people of their civil liberties. It enables law enforcement officials to harass and stigmatize particular ethnic and minority groups. It also reinforces negative stereotypes about particular groups and may ultimately encourage hate crimes and racial violence, as well as facilitate the adoption of anti-immigrant laws and policies. Indeed, the post-9/11 rollback of the civil rights and civil liberties of South Asian Americans, Arabs, and Muslims evokes frightening memories of prior waves of anti-Asian sentiment. The post-9/11 backlash recalls the civil rights deprivations visited upon Asian Americans by the Chinese Exclusion Act of 1882, which suspended Chinese labor immigration for a decade, and the mass disenfranchisement and internment of Japanese Americans during the Second World War. As a piece of a familiar pattern, airline racial profiling represents not a mere logistical inconvenience to a few air passengers, but rather a broad erosion of civil liberties and civil rights for ethnic and minority communities in contemporary America.

Racial profiling is both a morally objectionable civil liberties deprivation as well as a grossly ineffectual law enforcement mechanism.

62. See Hearings, supra note 26 (listing alternative aviation security measures to profiling).
64. See Sameer M. Ashar, Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11, 34 CONN. L. REV. 1185, 1196 (2002) (“The government has used the imperatives of the ‘War on Terror’ to justify unchecked law enforcement practices” and the invasion of the constitutional rights of a disfavored group.).
65. See Akram & Johnson, supra note 63, at 313-16 (discussing the connection between post-9/11 racial profiling and increased ethnic violence).
Unfortunately, instead of abandoning this troubling practice for equitable and effective safety mechanisms, airlines have subjected South Asian passengers to rampant racial profiling since 9/11. For victims of airline racial profiling, litigation offers a means of obtaining necessary redress while signaling its unacceptability and deterring its continued use.

II. RACIAL DISCRIMINATION CLAIMS AGAINST AIRLINES UNDER SECTION 1981

Asian American plaintiffs have brought claims of racial discrimination under section 1981,68 and minority plaintiffs have brought racial profiling claims against law enforcement officials under section 1981.69 However, few cases exist in which South Asian plaintiffs have brought racial profiling claims against private entities under section 1981.70 Such plaintiffs must base their claim on purposeful discrimination71 that occurred while “mak[ing] and enforc[ing] contracts”72 with either a public or private party.73 In establishing a prima facie case of racial discrimination, the plaintiff must demonstrate that:

(1) the plaintiff belongs to a racial minority; (2) the defendant discriminated against the plaintiff; (3) the defendant possessed an intent to discriminate on the basis of race; and (4) the discrimination concerned one or more of the activities enumerated in the statute.74

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70. Despite exhaustive efforts, the author was unable to find any such precedent.


72. 42 U.S.C. section 1981(a) provides in relevant part: “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.” Section 1981(b) states that “[f]or purposes of [section 1981], the term ‘make and enforce contracts’ includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” Section 1981(c) states that “[t]he rights protected by [section 1981] are protected against impairment by nongovernmental discrimination and impairment under color of State law.” 42 U.S.C.A. § 1981 (2002).


74. White, 179 F. Supp. 2d at 420 (citations omitted); see McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
Part II.A. first explores the willingness of courts to consider South Asians and subsets of the South Asian population, such as “Indians” or “Bangladeshis,” who are racially distinct for the purposes of pleading section 1981 claims. Since section 1981 protects against discrimination on the basis of race, not national origin, people of South Asian descent cannot bring national origin claims under section 1981. In order to assert racial discrimination under section 1981, they must persuade a court that they belong to a distinct “race.” Part II.B. then assesses the ability of plaintiffs to bring racial profiling claims under section 1981 against private entities. It contends that cases in which plaintiffs have marshaled section 1981 to bring racial profiling cases against places of public accommodation and retail establishments can serve as useful factual and legal analogies for plaintiffs who wish to bring racial profiling cases against airlines.

A. South Asian as a Racial Category: The Threshold Hurdle to Establishing Section 1981 Liability

Federal courts have grappled with the task of defining “South Asian” and its subset populations since the start of the twentieth century, often producing confusing and contradictory results. Although relevant twentieth-century case law is inconsistent, I conclude that these groups should ultimately constitute distinguishable “races” for the purpose of bringing section 1981 claims.

1. Historical Overview of South Asian Racial Classification: From 1790 to 1946.

The definition of “South Asian” has been most closely scrutinized in the immigration context. At the dawn of the twentieth century, several federal courts faced the question of whether certain South Asians were “white” and therefore eligible for U.S. citizenship. Congress adopted the first naturalization statute in 1790; by the turn of the twentieth century, the modified statute limited naturalization to “white persons,” “aliens of African nativity,” and “persons of African descent.” At least one federal court held that people of South Asian descent were “white” for the purpose of bringing the statute. In United States v. Balsara, the Second Circuit

75. *McDonnell Douglas Corp.*, 411 U.S. at 802 (requiring that a plaintiff in a section 1981 action belong to a “racial minority”).

76. See, e.g., *United States v. Thind*, 261 U.S. 204 (1923) (considering the racial classification of a Hindu man applying for U.S. citizenship); *In re Sadar Bhagwab Singh*, 246 F. 496 (E.D. Pa. 1917) (discussing the meaning of the phrase “white person” and holding a Hindu ineligible for citizenship); *United States v. Balsara*, 180 F. 694, 696 (2d Cir. 1910) (affirming grant of naturalization to an Indian Parsi man).

held that a man of Indian Parsi origin could be admitted for citizenship, reasoning that "the Parsees do belong to the white race." Not long after this decision, however, Asian immigration was restricted by the passage of the Immigration Act of 1917. A federal court held in 1917 that a "member of the Hindu" race could not be classified as a "white person" under this statute even if he was a member of the Caucasian race.

The U.S. Supreme Court directly confronted this issue in 1923. In United States v. Thind, an Indian immigrant applied for American citizenship, claiming that he was "white" within the meaning of the immigration laws. In denying Bhagat Singh Thind citizenship, the Court held that although Thind might be Aryan or Caucasian, "Caucasian" was not synonymous with the term "white person." The Court held that "free white persons" are "words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word ‘Caucasian’ only as that word is popularly understood." Although "the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity," the "average well informed white American would learn with some degree of astonishment that the race to which he belongs” included such elements as Hindus.

Subsequent federal immigration decisions reinforced the distinction between various classes of South Asians and white people in order to deny South Asians citizenship. Congress did not repeal anti-South Asian immigration provisions until after World War II.


Although the classification of South Asian populations as "nonwhite" populations adversely impacted South Asians who sought U.S. citizenship, in more recent years federal courts have used historical distinctions among the races to protect South Asian populations from racial discrimination. In

78. 180 F. 694, 696 (2d Cir. 1910). Cf. United States v. Dolla, 177 F. 101, 102, 105 (5th Cir. 1910) (dismissing challenge to the naturalization of an Indian native on justiciability grounds).
79. See Immigration Act of 1917, ch. 29, 9 Stat. 874 (1917) (repealed 1952); see also Chopra, supra note 77, at 1284 n.78.
80. In re Singh, 246 F. at 496.
81. 261 U.S. 204, 206-07 (1923).
82. Id. at 207-10.
83. Id. at 214-15.
84. Id. at 209, 211.
85. See, e.g., Samras v. United States, 125 F.2d 879 (9th Cir. 1942) (holding Hindu Indian not to be a “free white person” within the meaning of the immigration statute and thus ineligible for citizenship); Wadia v. United States, 101 F.2d 7 (2d Cir. 1939) (holding that a Parsi man was not a “free white person” within the meaning of the immigration statute and thus ineligible for citizenship); Mozumdar v. United States, 299 F. 240 (9th Cir. 1924) (holding that a “high-caste Hindu of pure blood, . . . who] considered himself a member of the Aryan race” was not a “free white person” within the meaning of the immigration statute and thus was ineligible for citizenship).
86. See Act of July 2, 1946, ch. 534, § 4, 60 Stat. 417 (1946); see also Chopra, supra note 77, at 1290.
this Part, I contend that courts have outlined definitions of race suggesting that those individual populations encompassed by the term “South Asian” constitute distinct “categories,” if not races, that merit section 1981 protection.

In Saint Francis College v. Al-Khazraji, a U.S. citizen of Iraqi descent filed suit against his university employer, alleging that it denied him tenure because of his Arab origin.\(^87\) The Supreme Court dismissed the university’s assertion that Al-Khazraji’s racial status as “Caucasian” precluded him from filing a section 1981 racial discrimination claim.\(^88\) The Court held that racial classification “in terms of modern scientific theory,” which grouped all humans into the three “Caucasoid, Mongoloid, and Negroid” races, need not determine whether a plaintiff suffered racial discrimination.\(^89\) Rather, the Court looked to the historical understanding of race and the legislative history of section 1981 to determine whether a plaintiff could bring a racial discrimination claim under section 1981.\(^90\)

Historical understandings of the differences among races often aimed to separate non-white populations from white populations, occasionally with the aim of disadvantaging non-white populations.\(^91\) In deeming strict categorizations of race irrelevant to determining the scope of section 1981 protections, the Court held that the history of section 1981 demonstrated that Congress intended to protect “identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended section 1981 to forbid....”\(^92\) The Court further noted that

\(^{88}\) Id. at 609-10.
\(^{89}\) Id. at 610 n.4, 613.
\(^{90}\) Id. at 612-13. The Court undertook an extensive analysis of the legislative history of section 1981. The Court noted that although several ethnic groups (including Arabs) were considered in twentieth-century terms to be within the Caucasian race, the understanding of “race” at the time section 1981 was drafted was substantially different. All those who might be deemed Caucasian by contemporary standards were not viewed as Caucasian at the time section 1981 was drafted. Id.
\(^{91}\) See id. at 611. The Al-Khazraji court noted that: Encyclopedias of the 19th century also described race in terms of ethnic groups... Encyclopedia Americana in 1858, for example, referred to various races such as Finns, gypsies, Basques, and Hebrews. The 1863 version of the New American Cyclopaedia divided the Arabs into a number of subsidiary races, represented the Hebrews as of the Semitic race, and identified the numerous other groups as constituting races, including Swedes, Norwegians, Germans, Greeks, Finns, Italians, Spanish, Mongolians, Russians, and the like. The Ninth Edition of the Encyclopedia Britannica also referred to Arabs, Jews, and other ethnic groups such as Germans, Hungarians, and Greeks, as separate races.
\(^{92}\) Id. at 611-12 (citations omitted).

\(^{92}\) Id. at 613. Justice Brennan’s concurrence also supported the absence of a stark difference between race and national origin discrimination:

The line between discrimination based on “ancestry or ethnic characteristics”... and discrimination based on “place or nation of... origin”... is not a bright one. It is true that one’s ancestry—the ethnic group from which an individual and his or her ancestors are descended—is not necessarily the same as one’s national origin—the country “where a person was born, or, more broadly, the country from which his or her ancestors came.”
section 1981 reached discrimination based on genetic membership in an "ethnically or physiognomically distinctive sub-grouping of *homo sapiens,*" holding that section 1981 protected a person of Arabian ancestry against racial discrimination. In order to establish a case under section 1981, Al-Khazraji would have to prove that the defendant intentionally discriminated against him because he was born Arab. Proof that the defendant discriminated solely on the basis of the place or nation of his origin would be inadequate.

Although Al-Khazraji was Iraqi, not South Asian, federal and state courts have applied the Al-Khazraji test to permit South Asians to bring section 1981 racial discrimination claims. For example, in *Jatoi v. Hurst-Euless-Bedford Hosp. Authority,* a physician brought a section 1981 claim against his employer, alleging that the hospital’s failure to reappoint him to the hospital’s medical staff constituted discrimination on account of the plaintiff’s East Indian background. The Fifth Circuit noted that the plaintiff asserted that the discrimination was based on his East Indian ethnic and physiognomic status, not on the grounds of his national origin. The court found Jatoi’s claim cognizable under section 1981.

*Sandhu v. Lockheed Missiles and Space Company* similarly applied the logic of *Al-Khazraji* to hold in a California state court proceeding that an East Indian from Punjab had a cognizable claim of race discrimination against his employer under the California Fair Employment and Housing Act ("FEHA"). Drawing heavily upon *Al-Khazraji,* the *Sandhu* court rejected the employer’s narrow definition of race, which deemed Sandhu “Caucasian” and thus ineligible for relief under section 1981, observing that “any scientific definition of race has little to do with the realities of racial discrimination.” Reversing the trial court’s finding for the employer, the *Sandhu* court reasoned that:

however, the two are identical as a factual matter: one was born in the nation whose primary stock is one’s own ethnic group.

*Id.* at 614 (Brennan, J. concurring) (citations omitted).

93. *Id.* at 613 (noting additionally that “a distinctive physiognomy is not essential to qualify for section 1981 protection”).

94. *Id.*

95. *Id.*

96. 807 F.2d 1214 (5th Cir. 1987).

97. *Id.* at 1219.

98. *Id.*

99. 31 Cal. Rptr. 2d 617 (1994). The court noted that FEHA’s federal counterpart was Title VII of the Federal Civil Rights Act of 1964 (42 U.S.C. §2000e, et seq). The *Sandhu* court relied on federal Title VII decisions to interpret parts of FEHA after finding that the two statutes shared similar policy objectives. Similarly, the court noted that although section 1981 of the Civil Rights Act of 1866 was not coextensive with the federal Civil Rights Act of 1964, section 1981 had been construed as forbidding any racial discrimination in employment. The court applied the reasoning of federal decisions involving race and national origin discrimination under section 1981 to the opinion.

100. *Id.* at 618, 624.
Sandhu alleged both in his administrative charge and in his complaints that he was treated differently from other, “non-Asian” Lockheed employees. Like other plaintiffs whose ancestry, descent, and national origin are all intimately related . . . Sandhu may not and need not be aware of the precise basis of Lockheed’s disparate treatment of him: whether it was his accent, his skin color, his ancestry, or nationality. We conclude that Sandhu’s allegation that he was subject to a discriminatory animus based on his membership in a group which is perceived as distinct when measured against other Lockheed employees, and which is not based on his birthplace alone, is sufficient to make out a cognizable claim for racial discrimination under FEHA.101

Federal courts have also permitted section 1981 claims to proceed in situations where national origin and race discrimination are commingled. In Chandoke v. Anheuser-Busch, an Indian-born job applicant brought a section 1981 claim alleging that the employer rejected his application on the grounds of race and national origin.102 The employer argued that it did not know Chandoke’s race when rejecting his application—Chandoke’s resume did not indicate his race, nor did any company employee ever meet Chandoke personally—and could not have undertaken race discrimination.103 Yet, the applicant communicated with the employer by telephone, stated that he was from India, and spoke with a pronounced Indian accent.104 The court rejected the company’s argument that such evidence could only support a claim of national origin discrimination.105 It held instead that knowledge of a person’s national origin could lead to race discrimination.106 The defendant in Chandoke conceded that Indians constituted an “ethnically homogeneous” group; if the company knew that Chandoke was from India, it might have also assumed that Chandoke was Indian.107 In denying the employer’s motion for summary judgment, the court held that Chandoke’s allegations that the employer “treated [him] differently than certain other applicants because of his race and national origin” were sufficient to state a claim for racial discrimination under

101. Id. at 624.
103. Id. at 19. The Court recognized that “an employer cannot intentionally discriminate against a job applicant based on race unless the employer knows the applicant’s race.” Id. at 19 n.6 (citing Robinson v. Adams, 847 F.2d 1315, 1316 (9th Cir. 1998)).
104. Id. at 19.
105. Id. at 20.
106. Id. at 19-20. The court provided an example to illustrate the blurring of lines between national origin and race discrimination:
Suppose an employer telephoned a job applicant who happens to be Jamaican. The applicant speaks with a thick and distinctive Jamaican patois. He tells his prospective employer that most of his job experience before coming to America was in Jamaica. The employer knows that most Jamaicans are black, and consequently decides not to hire the applicant. In such a case, evidence of an accent would clearly support a racial discrimination claim.
Id. at 20 n.6 (citing Al-Khazraj, 481 U.S. at 614 (Brennan, J. concurring) (citations omitted)).
107. Id. at 20.
section 1981. The court held that Chandoke’s section 1981 claim would be cognizable if he could prove at trial that defendant intentionally discriminated against him because he was born Indian. The Jatoi court had similarly expressed a willingness to read the term “race” broadly in the section 1981 discrimination context.

Although the case law is not extensive, courts appear to be willing to classify segments of the South Asian population (such as “Indians”) as distinct “races” for the purposes of pleading section 1981 racial discrimination claims. Although courts have not permitted South Asians to bring section 1981 claims of national origin or religious discrimination, courts seem to be willing to collapse the categories of “national origin” and “race,” particularly when national origin discrimination could be a proxy for race discrimination. Furthermore, per Al-Khazraji, courts have taken an extremely expansive view of “race,” implicitly recognizing the fluidity of racial categories. Courts also appear willing to consider the meaning of race with respect to actual social conditions and realities, not solely in terms of immutable, predetermined categorizations. South Asian plaintiffs are therefore likely to survive this initial threshold question when bringing specific section 1981 claims of racial discrimination against private airlines.

B. Applying Section 1981 Doctrine to Racial Profiling Against The Airlines

Section 1981 claims must be founded on purposeful discrimination proven through the use of direct or circumstantial evidence. In a case in which there is direct evidence of racial discrimination, a plaintiff who wishes to bring a claim of race-based disparate treatment must first

108. Id. at 19.
109. Id. at 20.
110. Jatoi, 807 F.2d at 1218. The court explained:

We have recognized the difficulty in distinguishing discrimination based on national origin from that based on race. . . . When a plaintiff asserts he has suffered discrimination based on his membership in a group that is commonly perceived as “racial” because it is ethnically and physiognomically distinct, we will treat the case as asserting a claim under section 1981 whether he labels that discrimination as based on “national origin” or on “race.”

Id. (citation omitted).
112. Ferrill v. Parker Group, Inc., 168 F.3d 468, 472 (11th Cir. 1999) (holding that a showing of disparate impact through neutral practice is insufficient to prove a section 1981 violation because proof of discriminatory intent is essential).
establish a prima facie case of intentional discrimination. Once the plaintiff has established a prima facie case, the burden of persuasion then shifts to the defendant, who must rebut the direct evidence of discrimination on the basis of race by affirmatively proving that the same decision would have been made even if race had not been considered.

The test for establishing discrimination using direct evidence differs from the test for establishing discrimination using circumstantial evidence. When a plaintiff intends to prove discrimination through circumstantial evidence, she is required to meet the burden-shifting standard outlined by the Supreme Court in *McDonnell Douglas v. Green*. Under this standard, the plaintiff has the burden of first presenting a prima facie case of discrimination. The burden then shifts to the defendant to present legitimate nondiscriminatory reasons for its actions. If the defendant is able to do this, the burden shifts back to the plaintiff to show that the reasons presented merely constitute a pretext for discrimination.

Few racial profiling cases have been brought under section 1981 against commercial airlines; most lawsuits alleging such claims have named governmental actors as defendants. However, racial profiling claims have also been brought under section 1981 against private defendants, most often in the retail and public accommodations context. Plaintiffs in these cases have most often filed section 1981 racial profiling claims under the statute’s Contract Clause. Some plaintiffs have also

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114. *Ferrill*, 168 F.3d at 472.
115. *Id.*
120. See, e.g., *Watson v. Fraternal Order of Eagles*, 915 F.2d 235, 243 (6th Cir. 1990) (refusal to sell soft drinks at club violated § 1981); *Perry v. Burger King Corp.*, 924 F. Supp. 548, 551-52 (S.D.N.Y. 1996) (finding defendant restaurant’s refusal to let plaintiff use restroom ordinarily available to customers to be in violation of § 1981). The pervasive use of racial profiling by private entities in retail and public accommodations has been well-documented. See *Main*, *supra* note 25, at 290 (noting that “[t]he issue of racial profiling in retail stores has gained national attention with both the broadcast and subsequent re-broadcast of an ABC News 20/20 investigative report and cases involving well-known stores such as Eddie Bauer and Dillards”).
met with success alleging claims under the Equal Benefits Clause.\textsuperscript{122}

Plaintiffs in airline discrimination cases should analogously be able to bring racial profiling claims against private air carriers under section 1981.\textsuperscript{123} This Comment evaluates two categories of such claims. The first type of claim occurs when an airline refuses to transport passengers holding paid tickets on the basis of race. Such an action might violate these passengers' section 1981 Contract Clause rights, much like a retail store would incur liability if it refused to permit customers to shop on the basis of race. The second type of claim occurs when an airline permits certain ticketed passengers to fly but only on the condition that they submit to certain pre-boarding security measures not required of other passengers. Victims of this sort of action might successfully claim that the airline denied them the full benefits of airline travel under section 1981's Equal Benefits Clause. This situation might be comparable to one where a store permits certain customers to complete transactions in the store, but subjects these customers to heightened security screening during the shopping process.


South Asian ticket holders denied passage by airlines even after successfully completing pre-boarding security measures can make a strong showing of racial discrimination. Extensive case law has held that plaintiffs prevented from entering into contracts on the basis of race or

\textsuperscript{122} 42 U.S.C. § 1981 (the "Equal Benefits Clause" states that all persons shall be accorded equal rights "to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens"). Racial profiling cases have been brought under this branch of section 1981. See, e.g., Franceschi v. Hyatt Corp., 782 F. Supp. 712, 717 (D.P.R. 1992) (holding that the Equal Benefits Clause of section 1981 applied to discrimination based on race or ethnic background). The \textit{Franceschi} court acknowledged scarcity of precedent dealing with use of section 1981's Equal Benefits Clause to bring race discrimination claims. Furthermore, the district court acknowledged that although the Supreme Court had narrowly read the scope of section 1981's Contracts Clause provision to cover only the making and enforcing of contracts in \textit{Patterson v. McLean Credit Union}, 491 U.S. 164 (1990), the Supreme Court's narrow interpretation of the Contracts Clause did not prevent plaintiffs from seeking relief under the other provisions of section 1981, such as the Equal Benefits Clause. \textit{Id.} at 716.

denied service on the basis of race have colorable section 1981 claims.\textsuperscript{124} The ACLU-Relman plaintiffs allege that the airlines' denial of passage constituted discrimination in the making and enforcement of their contracts (the purchased airplane tickets) with the airlines.\textsuperscript{125} These deprivations of the plaintiffs' rights to make and enforce contracts likely constitute section 1981 Contract Clause violations.\textsuperscript{126} Plaintiffs pleading this type of claim can allege that the defendant airline failed to honor their tickets for travel, preventing them from consummating the contract to travel aboard the airplane. This would amount to a deprivation of a contractual right specifically protected by section 1981.\textsuperscript{127}

Airline racial profiling cases can be analogized to other instances where plaintiffs suffered denials of the right to contract under section 1981. In \textit{Murrell v. Ocean Mecca Hotel, Inc.}, the Fourth Circuit held that an African American plaintiff established a prima facie case of racial discrimination under section 1981.\textsuperscript{128} By checking into the hotel, the plaintiff had contracted with the hotel for accommodations. Although she met the hotel's standard requirements for occupancy, the hotel evicted her, denying her accommodations that were available to other guests.\textsuperscript{129} Similarly, airline racial profiling plaintiffs can establish a prima facie case of racial discrimination by showing that they held contracts with the airlines (in the form of tickets), yet were denied the service of air travel available to non-profiled passengers.\textsuperscript{130} The refusal of service to the airline racial profiling plaintiffs might also constitute an Equal Benefits Clause violation.\textsuperscript{131}

As long as ejected passengers in airline profiling can show that they posed no security threat, perhaps by pointing to evidence that they passed

\begin{thebibliography}{99}
\bibitem{125} See \textit{Chowdhury Complaint}, \textit{supra} note 19, at 10. An airline ticket expresses the contract between the airline and the passenger and is the most critical evidence of the parties' agreement. \textit{Santleben v. Cont'l Airlines}, 178 F. Supp. 2d 752, 755 (S.D. Tex. 2001).
\bibitem{126} See \textit{Chowdhury Complaint}, \textit{supra} note 19, at 10. Although the Complaint does not expressly plead a Contract Clause violation, the Complaint's use of the "make and enforce contracts" language echoes the \textit{Hampton} court's analysis of the section 1981 Contract Clause violations. \textit{See Hampton}, 18 F. Supp. 2d at 1263.
\bibitem{127} The airline profiling cases can be distinguished from cases where the plaintiff only alleged interference with "prospective future business opportunities." \textit{Phelps v. Wichita Eagle-Beacon}, 886 F.2d 1262, 1268 (10th Cir. 1989).
\bibitem{128} 262 F.3d 253, 258 (4th Cir. 2001).
\bibitem{129} \textit{Id}.
\bibitem{130} \textit{Cf} \textit{Powell v. Super 8 Motels, Inc.}, 181 F. Supp. 2d 561 (E.D.N.C. 2000) (refusing to grant defendant hotel chain's motion to dismiss African American traveler's claim that it violated his right to contract when hotel employee deceptively informed him that there were no vacancies but shortly thereafter told his white traveling companion that there were vacancies).
\end{thebibliography}
security screenings, defendant airlines may have difficulty offering non-discriminatory explanations to rebut plaintiffs' claims under the section 1981 burden-shifting analysis. If ejected passengers also did not engage in altercations with airline staff or other passengers, it is more likely that airlines will lack the factual basis to rebut a prima facie case of discrimination under section 1981 by contending that the passengers posed flight safety risks.

2. § 1981 Claims When Airlines Engage in Passenger Racial Profiling, Yet Permit Passengers to Travel.

This Part considers whether South Asian air travelers who experience racial profiling prior to boarding a plane yet ultimately receive permission to travel have actionable section 1981 Contract Clause claims. A section 1981 Contract Clause claim of racial profiling can be actionable when a minority customer-plaintiff is permitted to enter a contract subject to terms and conditions not required of non-minority customers. The language in section 1981(b) is instructive in these cases. It states that section 1981(a)'s “make and enforce contracts” language includes “the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.” Differential treatment thus constitutes racial profiling because it assesses an individual solely in terms of adverse stereotypes associated with her minority group rather than on the merits of her individual case.

Courts have affirmed this point of view. For example, in Joseph v. New York Yankees Partnership, a minority female was refused entry into the Stadium Club at Yankee Stadium for wearing a tank top, whereas similarly attired non-minority female club patrons were allowed in. Although the plaintiff was granted access to the club once she changed from a tank top into a t-shirt, the Joseph court held that:

Imposing an additional condition upon minority customers that is not imposed upon non-minorities states a section 1981 claim for discrimination concerning the making and enforcing of contracts. Where additional conditions are placed on minorities entering the contractual


133. Cf. Alexis v. McDonald’s Restaurants of Massachusetts, Inc., 67 F.3d 341 (1st Cir. 1995) (ruling against an allegedly disruptive African American customer who was removed from a restaurant).


136. See supra Part I.

relationship, those minorities have been denied the right to contract on the same terms and conditions as is enjoyed by white citizens.138

Other courts have interpreted section 1981 similarly. In Bobbitt v. Rage, a restaurant served both white and African American patrons, but required only the African American patrons to prepay for their food.139 African American customers sued the restaurant under section 1981. The court denied the defendant's motion to dismiss, finding the fact that the African American plaintiffs were ultimately served irrelevant since the restaurant "altered a fundamental characteristic of the service provided by the public accommodation solely on the basis of race."140 In McCaleb v. Pizza Hut of America, the district court similarly held that the fact that the plaintiffs were permitted to dine in the defendant's restaurant did not preclude a section 1981 claim against the restaurant.141 In McCaleb, the defendant failed to provide the plaintiffs with the full benefits of the contract: it did not provide the plaintiffs with utensils, created a disruptive dining atmosphere, hurled racial invectives at the plaintiffs, and drove them out before they could finish their meal.142 Similarly, in Washington v. Duty Free Shoppers, the district court denied summary judgment to the defendants where the plaintiffs, African American customers at the defendant's store, were required to show a passport and airline tickets before shopping at the defendant's store, whereas non-minority customers were not required to produce such documentation.143

In some cases, however, courts have ruled against plaintiffs who execute contracts even after experiencing racial profiling in the contracting process. In Morris v. Office Max, minority customers sued a store that suspected them of theft and consequently subjected them to police questioning, but permitted them to complete their shopping transaction.144 The Seventh Circuit noted that the plaintiffs ultimately purchased everything they desired at the store and thus could not state a claim under section 1981.145 Similarly, in Robertson v. Burger King, although white patrons were served food ahead of the black patron-plaintiff, the court held that a delay in service—unlike a denial of service—could not constitute a section 1981 violation.146 Although the outcome of these cases appear to

138. Id. at *4.
140. Id. at 519-20.
142. Id.
144. 89 F.3d 411 (7th Cir. 1996).
145. Id. See also Flowers v. TJX Cos., No. 91-CV 1339, 1994 WL 382515, at *6 (N.D.N.Y. Jul. 15, 1994) (memorandum decision) (holding that because plaintiffs completed retail transaction in spite of possible discrimination by defendants, no interference with contract formation occurred such that plaintiffs could recover damages under section 1981).
detract from the strength of section 1981 claims alleging airline discrimination short of denial of passage, they should not be dispositive. The airline profiling plaintiffs, unlike the Morris plaintiffs, had already executed a significant part of the contract by paying for their tickets. Unwarranted heightened screening in their cases therefore interfered with much more than mere “prospective contractual relations.” The facts of Robertson can be distinguished as simply alleging too trivial a grievance.

Delay in service, the airline profiling plaintiffs could argue, does not subject one to the same embarrassment and humiliation as being set aside and scanned, frisked, and otherwise treated as a dangerous security risk.

South Asian airline passengers who experience heightened security screening, hostility, or other adverse treatment may be able to bring successful section 1981 claims if the non-South Asian passengers did not endure similar treatment and even if the South Asian passengers ultimately received permission to fly. Such potential plaintiffs must allege egregious improprieties in the procedures or actions undertaken by the airline prior to, during, or after the flight. Extreme and overt racial hostility by airline personnel towards passengers, airline refusal to permit the passenger to bring baggage on the flight, and airline insistence on strip-searching only South Asian passengers prior to permitting them to board are some examples of actions that a court might view as an impingement upon the “benefits, privileges, terms, and conditions” of an airline ticket.

Unfortunately, defendant airlines may undertake racially discriminatory behavior with impunity in all but the most glaring and unreasonable cases. The drastically increased fear of terrorism after 9/11 has tilted public sympathy in favor of airlines, which will undoubtedly defend claims of racial profiling by portraying themselves as guardians of national security. Case law discussion of “security” issues in the public accommodations context can also bolster the airlines’ defense. For example, a circuit court favorably viewed a related analysis in Garrett v. Tandy Corp., where an African American plaintiff alleged that defendant’s white employee discriminatorily kept surveillance on him during his presence in an electronics store in violation of section 1981. In finding that the store’s surveillance did not interfere with the customer’s ability to make purchases, the First Circuit remarked:

In a society in which shoplifting and vandalism are rife, merchants have a legitimate interest in observing customers’ movements. So long as

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147. Morris, 89 F.3d at 414.
148. See Robertson, 848 F. Supp. at 81 (“While inconvenient, frustrating, and all too common, the mere fact of slow service does not . . . rise to the level of violating one’s civil rights.”).
149. See, e.g., Roberts v. Wal-Mart Stores, 769 F. Supp. 1086, 1089-90 (E.D. Mo. 1991) (holding that the store’s practice of recording each check-writing customer’s race on the check did not constitute a violation of section 1981 because the store recorded the race of all customers).
150. 295 F.3d 94 (1st Cir. 2002).
watchfulness neither crosses the line into harassment nor impairs a shopper's ability to make and complete purchases, it is not actionable under section 1981.151

Similarly, airlines may argue that increased security measures that include heightened screening of passengers who belong to the same ethnic/racial background as the 9/11 hijackers are vital to ensuring aircraft safety. Furthermore, the *Garrett* court ominously stated that:

Congress did not intend to convert section 1981 into a general prohibition against race discrimination... in order to satisfy the foundational pleading requirements for a suit under section 1981, a retail customer must allege that he was actually denied the ability to make, perform, enforce, modify, or terminate a contract, or to enjoy the fruits of a contractual relationship, by reason of a race-based animus.152

Although racial discrimination has been much-litigated in the public accommodation and retail context, the section 1981 cases involving public accommodations and retail establishments provide only imperfect analogies. Because airlines are a largely uncontested area of section 1981 litigation, a degree of uncertainty must accompany any predictions about likely legal results. However, the foregoing analysis indicates that section 1981 racial discrimination claims brought against the airlines, particularly where the plaintiffs were ultimately permitted to travel, will likely only succeed when the plaintiffs explicitly plead that the airlines violated their passenger contractual rights by engaging in glaring and unreasonable race-based violations of their passenger civil rights and civil liberties.

III. TITLE VI RACIAL PROFILING CLAIMS AGAINST THE AIRLINES

South Asian victims of airline racial profiling should also consider the remedies created by Title VI of the Civil Rights Act of 1964.153 Title VI states that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."154 Individual victims of intentional

151. *Id.* at 101.
152. *Id.* at 100-01.
154. *Id.* The Department of Justice enforces this provision to prohibit any program that receives federal assistance from "utiliz[ing] criteria or methods of administration" that are discriminatory in nature or that "have the effect of defeating or substantially impairing" the goals of that program for certain persons because of their race, color, or national origin. 28 C.F.R. 42.104(b)(2) (2002). Federal financial assistance includes federal money distributed via grant, loan, or contract. 42 U.S.C. § 2000d-1 (2003). "Recipient" includes "[a]ny State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under any such program." 45 C.F.R. § 80.13(i) (1989). Title VI defines "program or activity" broadly to prohibit discrimination throughout an entire institution if
discrimination may sue under Title VI for injunctive relief and damages. Since Title VI applies to “person[s]” rather than “citizens,” resident aliens or other non-citizens are entitled to its protections. Congress intended Title VI to accomplish two goals: it wished first to “avoid the use of federal resources to support discriminatory practices” and second, “to provide individual citizens effective protection against those practices.” Protection of the interests of individuals discriminated against by federally funded programs was therefore a paramount concern of the legislation.

To state a claim for damages under Title VI, a plaintiff must allege that the defendant (1) engaged in racial discrimination and (2) received federal financial assistance. Although the plaintiff must prove discriminatory intent at trial, it need not be pled in the complaint. Title VI does not provide for a private right of action for disparate impact claims.

A. Racial Classification Under Title VI

Racial categorization of South Asian plaintiffs does not appear to be as contested under Title VI as it is under section 1981. This may be partially due to the applicability of Title VI only to actions by entities receiving federal financial assistance. Since the scope and number of possible Title VI defendants is relatively limited, the opportunity for cases debating the definition of “race” may have only rarely arisen.

Another reason for this difference may be due to the ability of South Asian plaintiffs to bring suit under Title VI on the basis of national origin. This provision may obviate the debates that occur in the section 1981 context over whether South Asian plaintiffs have pled cognizable claims of racial discrimination or national origin discrimination, which is technically

any part of the institution receives federal financial assistance. For a more detailed analysis of the scope of entities subject to Title VI liability, see Sidney D. Watson, Reinvigorating Title VI: Defending Health Care Discrimination—It Shouldn’t Be So Easy, 58 FORDHAM L. REV. 939, 943-48 (1990).


158. See id. at 704 n.36 (quoting Representative Lindsay’s explanation in Congress that “[t]his bill is designed for the protection of individuals”); see also Bryant v. New Jersey Dep’t of Transp., 998 F. Supp. 438, 445 (D.N.J. 1998) (“The interests arguable to be protected by Title VI, then, are those of persons against whom federally funded programs discriminate.”).


160. Id.


impermissible under section 1981 but sometimes permitted by courts in a "back-door" fashion. The "fighting issue" in Title VI cases is most often the question of whether a defending entity engaged in racial discrimination. Also often litigated is the federally funded nature of defendants in a Title VI suit.

B. Title VI Claims Against Private Defendants

Most Title VI defendants are governmental agencies or public educational institutions receiving federal financial assistance. However, in some cases plaintiffs have brought Title VI racial discrimination suits against private sector institutions receiving federal funds. The most visible Title VI claims of racial discrimination brought against private sector entities are those lawsuits brought against hospitals. Private airlines that receive federal funding are comparable to private hospitals that receive federal funding, and therefore are equivalently subject to Title VI liability. The plaintiffs in the hospital lawsuits have sued private hospitals for directly discriminating against them or

163. See supra Part II.A.2.
164. See, e.g., Presley v. Etowah County Com'n, 502 U.S. 491 (1992) (considering Title VI claims brought by African American county commissioners against their counties); Cudjoe v. Independent School Dist. No. 12, 297 F.3d 1058 (10th Cir. 2002) (considering an African American student's Title VI and other claims against a public school district); Tolbert v. Queens College, 242 F.3d 58 (2d Cir. 2001) (considering Title VI and section 1981 claims brought by an African American student against Queens College and two professors).
165. See, e.g., Chowdhury v. Reading Hosp. and Medical Ctr., 677 F.2d 317, 318-19 (3d Cir. 1982) (reversing dismissal of Title VI claim where physician alleged racial discrimination by nonprofit hospital receiving federal funding); NAACP v. Medical Center, Inc., 657 F.2d 1322, 1328-29 (3d Cir. 1981) (noting that Medicare and Medicaid payments made to defendant nonprofit medical center subjected it to the purview of Title VI).
167. Several articles discuss the use of Title VI as a litigation device against hospitals and health care facilities. See, e.g., M. Gregg Bloche, Race and Discretion in American Medicine, 1 YALE J. HEALTH POL'Y, L. & ETHICS 95, 111-12 (2001) (discussing the "unfulfilled potential of Title VI... as a tool for reduction of racial disparities in health care provision"); Marianne Engelman Lado, Unfinished Agenda: the Need for Civil Rights Litigation to Address Race Discrimination and Inequalities in Health Care Delivery, 6 TEx. F. ON C.L. & C.R. 1 (2001) (discussing the role of litigation in battling racial discrimination in healthcare); Gwendolyn Roberts Majette, Access to Health Care: What A Difference Shades of Color Make, 12 ANNALS HEALTH L. 121, 127-30 (2003) (examining the use of Title VI in the fight for minorities' geographical access to hospitals); Barbara Plantiko, Comment, Not-So-Equal Protection: Securing Individuals of Limited English Proficiency With Meaningful Access to Medical Services, 32 GOLDEN GATE U. L. REV. 239 (2002) (discussing the reach of Title VI over language access rights in the medical services context); Watson, supra note 154, at 944 (noting that nearly every hospital in the country receives federal funds and is therefore subject to Title VI liability).
institutionalizing discriminatory healthcare practices or programs. However, because Alexander v. Sandoval eliminated the private right of action for disparate treatment claims under Title VI, the plaintiffs using Title VI to bring airline racial profiling lawsuits must ground their claims in proof of intentional discrimination.

C. The Use of Title VI in Racial Profiling Claims Against Airlines

Title VI has been actively deployed against governmental law enforcement institutions that have used racial profiling as a security tactic. In Maryland State Conference of NAACP Branches v. Maryland Dep’t of State Police, the plaintiffs filed a class action suit against the Maryland State Police, claiming that its policies resulted in a discriminatory pattern of vehicle stops, searches, and detentions on an interstate highway running through Maryland. The court relied upon National Credit Union Admin. v. First Nat’l Bank and Trust Co., 522 U.S. 479 (1998), for its decision that the plaintiffs had standing to sue under Title VI because they fell within the “zone of interests” Congress intended the statute to cover. Applying this test to the Title VI racial profiling claim, the district court in Maryland Dep’t of State Police concluded that the plaintiffs were within the “zone of interests” protected by Title VI and rejected the defendants’ motion to dismiss.

Similarly, in Rodriguez v. California Highway Patrol, the plaintiffs alleged that state drug interdiction efforts resulted in unlawful use of racial profiling to select targets for detainment and interrogation. Central to the plaintiffs’ allegation was the assertion that law enforcement necessity did not justify use of these tactics; the plaintiffs alleged that although large numbers of minority motorists suffered racial discrimination through racial profiling, only a small percentage of the stops and searches uncovered incriminating evidence. The court ultimately denied the defendant’s motion to dismiss the Title VI discriminatory impact claim.

These Title VI racial profiling cases capture the flavor of the racial profiling undertaken by the airlines in the instant discrimination cases, and can serve as useful analogies to these cases. However, the scope of the aforementioned Title VI racial profiling cases was much broader than the scope of the airline racial profiling cases. Maryland State Conference of NAACP Branches was a class action lawsuit, while several plaintiffs

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168. See supra note 165.
171. Id. at 567.
172. Id. at 567-68.
174. Id. at 1139.
175. Id.
brought suit in Rodriguez.\textsuperscript{176} Both cases rested upon allegations that the defendants’ policies included widespread, long term, and multifaceted practices of racial profiling.\textsuperscript{177} In contrast, individual plaintiffs have brought the ACLU-Relman lawsuits.\textsuperscript{178} Moreover, while the \textit{Maryland State Conference of NAACP Branches} and \textit{Rodriguez} targeted the practices of governmental law enforcement institutions, the individual ACLU-Relman plaintiffs are suing private entities receiving federal financial assistance. Racial profiling or racial discrimination claims against governmental law enforcement entities raise a series of problems not implicated in the private sector context.\textsuperscript{179}

IV. POSSIBLE AIRLINE DEFENSES TO SECTION 1981 AND TITLE VI CLAIMS

The airlines challenged in the ACLU-Relman lawsuits raised several defenses, including preemption under the Warsaw Convention and “permissive refusal.”\textsuperscript{180} Federal courts recently denied defendant airlines’ motions to dismiss the ACLU-Relman lawsuits filed against them.\textsuperscript{181} However, the permissive refusal and preemption defenses raised by the airlines in their motions to dismiss the ACLU-Relman profiling lawsuits must be scrutinized because they pose challenges relevant to the remainder of the ACLU-Relman lawsuits, as well as to potential future airline profiling lawsuits.

\textbf{A. Permissive Refusal Doctrine}

49 U.S.C. section 44902(b) (“section 44902(b)”) grants pilots and airlines the discretion to refuse to board and to remove passengers whom they believe will threaten flight safety.\textsuperscript{182} This provision, entitled

\begin{footnotesize}
\textsuperscript{176.} \textit{Maryland State Conference of NAACP Branches}, 72 F. Supp. 2d at 560; \textit{Rodriguez}, 89 F. Supp. 2d at 1131.

\textsuperscript{177.} \textit{Maryland State Conference of NAACP Branches}, 72 F. Supp. 2d at 560; \textit{Rodriguez}, 89 F. Supp. 2d at 1131.

\textsuperscript{178.} See, e.g., Dasrath Complaint, \textit{supra} note 17; Chowdhury Complaint, \textit{supra} note 19. Although the American-Arab Anti-Discrimination Committee was also a plaintiff in some of the lawsuits, the lawsuits were not class action suits.

\textsuperscript{179.} See, e.g., Garrett, \textit{supra} note 22 (explaining that plaintiffs challenging discriminatory governmental racial profiling policies must consider \textit{City of Los Angeles v. Lyons}, 461 U.S. 95 (1983), which required plaintiffs to show likelihood of suffering future injury in order to establish standing); Rudovsky, \textit{Law Enforcement by Stereotypes and Serendipity}, \textit{supra} note 22, at 330-32 (2001) (describing possible plaintiff’s standing difficulties). These issues in the context of racial profiling are beyond the scope of this Comment.


\textsuperscript{182.} 49 U.S.C.A. § 44902(b) (1994). The statute reads: “Subject to regulations of the Administrator, an air carrier, intrastate air carrier, or foreign air carrier may refuse to transport a
"Permissive Refusal," constitutes a defense to charges of wrongful removal for airlines and pilots. Airline operators are considered common carriers by air and are subject to the guidelines of 49 U.S.C. section 44902(b).\textsuperscript{183} Section 44902(b) gives the air carriers the discretion to determine the level of danger that a particular passenger poses.\textsuperscript{184} For example, courts applying this doctrine have upheld an airline's decision to refuse passage to certain people because the airline feared that they posed a hijacking threat.\textsuperscript{185} Courts have also upheld passenger removals when the individual passenger's impaired physical condition posed a safety threat or when the passenger's behavior would have disrupted the flight's smooth operation.\textsuperscript{186}

Courts have implied a "reasonableness" term into section 44902(b),\textsuperscript{187} generally holding that an airline's decision to bar a passenger from a flight must be careful and prudent, not arbitrary or capricious.\textsuperscript{188} The test of reasonableness is objective; a carrier's discretion is protected only "if exercised in good faith and for a rational reason."\textsuperscript{189} Courts have often held that pilots and airlines have properly exercised this discretion if the
airline's decision was reasonable in light of the facts and circumstances as
known to the airline at the time of the particular passenger's ejection. Consequently, the passengers who were refused passage because of a perceived security threat have no right of action against the airline, even if they actually posed no risk, as long as the airline had well-founded suspicions and reasonable grounds for excluding them.

The facts of the ACLU-Relman lawsuits are easily distinguishable from cases where courts have upheld passenger ejections. In these earlier cases, courts rested findings of "reasonableness" on several factors that are absent from the ACLU-Relman cases. First, the prior ejection cases involved passengers verbally or physically threatening airline personnel and passengers. However, none of the ACLU-Relman plaintiffs acted in a verbally or physically threatening manner. Neither did the ACLU-Relman plaintiffs violate explicitly defined aircraft rules (for example, by smoking in an airplane lavatory). In fact, the ACLU-Relman plaintiffs were denied passage in spite of posing no identifiable security threat. For these reasons, courts are unlikely to find the airlines' actions in cases similar to the ACLU-Relman ones justifiable under section 44902(b).

Case law suggests that these decisions to bar passengers from traveling were unreasonable. Indeed, a district court concurred with this interpretation in denying Continental's motion to dismiss the ACLU-Relman lawsuit concerning the ejections of plaintiffs Edgardo Cureg and Michael Dasrath: "[p]laintiffs have sufficiently alleged that [their] removal from the flight was the product of intentional racial discrimination, not of a

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190. Klein, supra note 183. Yet, some courts have suggested that airlines have a "duty to investigate" the potential threat posed by a passenger prior to ejecting him. See, e.g., Cordero v. CIA Mexicana de Aviacion, S.A., 681 F.2d 669, 673 (9th Cir. 1982) (holding that an airline's decision to exclude a passenger without undertaking a minimal investigation into his background precluded a finding for the defendant as a matter of law). But cf. Williams, 509 F.2d at 948-49 (delimiting the airline's duty to inquire into a passenger's background); Zervigon, 558 F. Supp. at 1307 (holding that "[t]he contention that he [the pilot] should have questioned each member of the group before ordering their removal is unrealistic. He had sufficient indicia of conduct centering about the members of the group that 'would or might be inimical to the safety of [the] flight' to warrant forthwith action").


192. See, e.g., Huggar, 1999 WL 59841, at *1 (ruling against the plaintiff's section 1981 claim where he threatened to "kick somebody's fucking ass" and otherwise "engaged in threatening behavior"); Sedigh, 850 F. Supp. at 198-99, 202 (granting airline's motion for summary judgment where plaintiff was heard to say "kill the Jews" and had shouted "kill everyone" when he was on the plane); Rubin, 96 Cal. App. 4th at 368-70, 385 (upholding airline's decision to eject a passenger who tried to invade the first class cabin without a first-class ticket, attempted to sit in several seats other than her properly-assigned coach class seat, vociferously refused to cooperate with flight crew, and created a "mob scene" on the aircraft); MacIntosh, 1999 WL 26914, at *1-2 (granting airline's motion for summary judgment where passenger smoked in the airplane lavatory in violation of federal law, loudly uttered obscenities, and appeared to be intoxicated).

193. See, e.g., Dasrath Complaint, supra note 17; Chowdhury Complaint, supra note 19.

194. Id.

195. See supra note 181.
rational determination that their presence was . inimical to safety." 196
Thus, their removal was not shielded by the immunities of section
44902(b). 197

B. Preemption Doctrine

Airlines defending against post-9/11 lawsuits have also alleged that
such claims are preempted by Article 24 of the Warsaw Convention
(“Convention”). 198 The Convention applies to all international travel and
exclusively governs the rights of the parties to an action for damages and
preempts all other causes of action. 199 For instance, in El Al Israel Airlines,
Ltd. v. Tseng, the Supreme Court held that the Convention preempted a
passenger's state law claims. 200 In Waters v. Port Authority of New York &
New Jersey, a physically disabled passenger brought state law claims of
negligence, assault and battery, as well as discrimination claims under the
Federal Aviation Act (“FAA”) and the Air Carrier Access Act (“ACCA”)
against two airlines and the Port Authority of New York and New Jersey
(“PATH”). 201 In granting the defendants’ motion for summary judgment,
the Waters court held that the Convention was intended to preempt all local
and federal causes of action seeking damages against a carrier. 202
Similarly, the court in Brandt v. American Airlines held that a plaintiff’s
federal discrimination claims under the ACAA were preempted by the
Convention. 203

Precedent suggests that the Convention would preempt the claims of
plaintiffs who were undertaking international travel when they experienced
airline racial profiling. However, in denying the motions to dismiss filed
by Continental and United, two federal courts held that Article 24 of the

197. Id.
198. International efforts to protect the developing aviation industry from potentially debilitating liability led to the adoption of the Warsaw Convention in 1929. Andres Rueda, The Warsaw Convention & Electronic Ticketing, 67 J. AIR L. & COM. 401, 402-03 (2002). The goals of the Convention were to “foster uniformity in the law of international air travel” while limiting the “liability of air carriers in order to foster the growth of the fledgling commercial aviation industry.” Id. (citations omitted). There are currently more than 130 signatory nations to the Warsaw Convention. Id. Article 24 of the Warsaw Convention, as amended by Montreal Protocol No. 4, states:

In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.


200. Id. at 175.
202. Id. at 428.
Convention did not preempt federal claims for declaratory or injunctive relief. Although plaintiffs in future airline profiling cases that occur during the course of international travel may have claims for damages barred by the Convention, courts will likely deny motions to dismiss claims for declaratory or injunctive relief.

V  SOUTH ASIAN COMMUNITY RESPONSE TO 9/11

It is important to acknowledge that South Asians, both Muslim and non-Muslim, as well as people of Middle Eastern and Arab descent, all suffered devastating racial profiling and violence in this country after the tragedy of 9/11. Given the commonality of post-9/11 experiences across several ethnic groups, the racial profiling endured by South Asians cannot be divorced from that endured by Arab, Muslim, and Middle Eastern groups in the United States. Indeed, several of the ACLU-Relman plaintiffs are South Asian, Arab, or Muslim. Furthermore, South Asian, Arab, Muslim, and Middle Eastern groups have forged alliances to combat racial profiling and violence and to challenge detentions, supporting the idea that ethnic and minority groups should build coalitions to combat the post-9/11 rollbacks of civil rights and civil liberties and advance progressive civil rights goals.

204. See Dasrath v. Cont’l Airlines, Inc., 228 F. Supp. 2d 531, 543 (D.N.J. 2002) (holding that injunctive relief is not preempted by the Convention); Cruz, 193 F.3d. at 532 (holding that declaratory and injunctive relief are not preempted by the Convention).

205. See Abdelkarim, supra note 8 (suggesting that the actual number of airline racial profiling incidents is likely to be higher than the number of occurrences reported to the Council on American-Islamic Relations since non-Muslim South Asians and others have also been victimized). The implication of Abdelkarim’s findings is that identity categories are being confused after the 9/11 attacks; although the hijackers were not South Asian, South Asians have been the targets of post-9/11 racial discrimination and violence. The identities of the ACLU-Relman plaintiffs provide another example of perpetrators of post-9/11 racial profiling confusing ethnic, religious, and national origin. For example, one of the ACLU-Relman plaintiffs, Edgardo Cureg, is Filipino. ACLU/Relman Press Release, supra note 10.

206. Many scholars have championed the need for ethnic and minority communities to build coalitions to work towards advancing broad civil rights and immigrants’ rights objectives. See, e.g., Keith Aoki, A Tale Of Three Cities: Thoughts On Asian American Electoral And Political Power After 2000, 8 ASIAN PAC. AM. L.J. 1 (2002) (suggesting that Asian Americans seeking political office must form coalitions with other ethnic and minority groups); William R. Tamayo, When the “Coloreds” are Neither Black Nor Citizens: The United States Civil Rights Movement and Global Migration, 2 ASIAN L.J. 1, 3-11, 21-31 (1995) (calling for a multi-ethnic civil rights and immigrants’ rights movement).
The 9/11 attacks devastated the South Asian American community.\textsuperscript{207} South Asian families lost countless family members and friends in the World Trade Center and Pentagon attacks.\textsuperscript{208} Moreover, the South Asian American community suffered an onslaught of harassment and abuse from both governmental and private actors post-9/11.\textsuperscript{209} In response, as discussed below, the South Asian American community—as well as the Arab American community, the Asian American community and civil liberties groups nationwide—organized to respond to the increase in hate crimes, racial profiling, and detention endured by South Asians and other groups in the United States.

The Sikh American community, one of the South Asian American populations most impacted by post-9/11 racial profiling, mobilized to track incidents of racial hostility towards Sikh Americans and to voice their concerns to lawmakers. Sikh Mediawatch and Resource Task Force ("SMART"), a Sikh advocacy group based in Washington, D.C., initiated several programs to address the rise in hate crimes and racial profiling of Sikh Americans post-9/11.\textsuperscript{210} SMART's post-9/11 programs include: advocacy with national and local law enforcement and security agencies; community education in the Sikh community to inform members about their legal rights; media action, which consists of monitoring media representation of Sikhs and proactively working with media outlets to understand issues affecting Sikhs; and legal action, which consists of litigation on employment and public accommodations discrimination, racial profiling, and hate crimes.\textsuperscript{211} Sikh American community leaders have also met with governmental representatives to highlight the discrimination and


\textsuperscript{208} See SAJA, supra note 207 ("Several community organizations have put the death toll of South Asians—US citizens and non-citizens—at more than 200."). The website also has descriptions of several South Asians who perished in the 9/11 attacks. However, it is impossible to quantify the number of friends lost by South Asian families in the 9/11 attacks. See also Shobak, Alternative Asian Voices, \textit{at} http://www.shobak.org/wtc/ (last visited Mar. 5, 2003) (listing missing Bangladeshis post-9/11).


\textsuperscript{211} Id.
violence endured by Sikh Americans since September 11, 2001.\textsuperscript{212} South Asian activist groups have also organized to protest the widespread detentions of South Asian immigrants. Desis Rising Up And Moving ("DRUM"), an organization of working class South Asian immigrants based in New York City,\textsuperscript{213} works closely with New York Pakistani communities that have been particularly targeted by INS policies.\textsuperscript{214} The friends and family of Pakistani detainees comprise DRUM's constituency.\textsuperscript{215} DRUM has also organized an Emergency Family and Legal Fund to provide financial aid to the family members of the detained.\textsuperscript{216} DRUM's Community Self-Defense Project includes a Racial Violence and INS Disappearance Hotline. This multi-language resource enables South Asian immigrants to report hate-motivated incidents and civil rights encroachments such as INS detentions and raids.\textsuperscript{217}

Asian American and Middle Eastern communities have demonstrated remarkable capacity for coalition building in the post-9/11 struggles to preserve the civil liberties and civil rights of South Asian Americans. Given that the Muslim subset of the South Asian population has been so adversely impacted by post-9/11 racial profiling and violence,\textsuperscript{218} South Asian activist groups have joined forces with Arab-American, Muslim, and pan-Asian American groups to fight post-9/11 racial profiling and detentions.\textsuperscript{219} While the Council on American-Islamic Relations ("CAIR") champions the rights of Muslim detainees, sponsors surveys on passenger profiling, tracks harassment endured by Muslim Americans, and vocally advocates for the rights of Muslim Americans in the government and media,\textsuperscript{220} the Chinese for Affirmative Action ("CAA") has sent letters to Northwest and Delta Airlines protesting the racial profiling of South Asian and Arab American men post-9/11.\textsuperscript{221} The Asian American Legal Defense

\begin{itemize}
  \item \textsuperscript{212} See, e.g., Singh, supra note 5 (relating meeting between the legal direction of the Sikh Coalition and the EEOC).
  \item \textsuperscript{213} Desis Rising Up and Moving, at http://drumnation.org/drum.html (last visited Jan. 2, 2003) (including background information about DRUM and defining "Desi" as someone of South Asian ancestry).
  \item \textsuperscript{214} See Desis Rising Up And Moving, Stop the Disappearances!, at http://www.drumnation.org/stopdc.html (last visited Feb. 17, 2003) (working with New York Pakistani communities that have been targets of INS policies) [hereinafter DRUM, Stop the Disappearances!].
  \item \textsuperscript{215} Id.
  \item \textsuperscript{216} Id.
  \item \textsuperscript{218} See ARAB AMERICAN INSTITUTE, supra note 2.
  \item \textsuperscript{219} See, e.g., DRUM, Stop the Disappearances!, supra note 214. South Asian American Leaders of Tomorrow (SAALT) has also supported Arab, Middle Eastern, and Muslim groups in combating post-9/11 racial profiling and violence. See SAALT REPORT, supra note 210.
  \item \textsuperscript{220} See http://www.cair-net.org (last visited Feb. 17, 2003).
  \item \textsuperscript{221} Letter from Diane T. Chin, Executive Dir., Chinese for Affirmative Action, to Richard H. Anderson, CEO, Northwest Airlines, Inc. (Sept. 21, 2001), at http://www.caasf.org/0901/
and Education Fund ("AALDEF") has also been tracking incidents of racial profiling, harassment, or violence endured by South Asian Americans since 9/11 and has offered hotline legal assistance and referrals. Further, organizations like the ACLU closely monitor and challenge the rollback of the civil rights and civil liberties of South Asians, Arab Americans, and Muslims both in the courts and in the media.

The intensity of the multi-ethnic coalition response to the post-9/11 racial violence and detentions reflects the enormity of the erosions in the civil rights and civil liberties of thousands of South Asian Americans. Although adverse circumstances have united these various communities to fight for a common purpose, this union offers promise that multi-ethnic coalitions can form in the future to advance progressive agendas for social change involving immigrants and minorities.

CONCLUSION

September 11, 2001 changed the United States forever. The World Trade Center and Pentagon attacks killed thousands and left even more grieving. Consequently, the U.S. government has understandably and justifiably increased its attention on strengthening national security and fighting terrorism. However, an increased focus on strengthening national security and fighting terrorism should not undermine the civil rights and civil liberties of people living in America. Unfortunately, after the events of 9/11, the U.S. government targeted ethnic minority residents, particularly South Asians, for heightened scrutiny, in many cases depriving such individuals of their quintessential American freedoms.

Following the government’s lead, private actors have also attacked the civil rights and civil liberties of South Asians. The airline profiling cases are an egregious and widespread example of such post-9/11 hostility. Given that hijackings caused the destruction of 9/11, airlines rightfully fear threats to aviation security and should undertake additional safety precautions to secure flight safety. However, increased airline safety should not come through racial discrimination. Whether undertaken by

government actors or private companies, racial profiling tactics that deny service to passengers solely on the basis of race or ethnicity are equally pernicious manifestations of racism. For this reason, South Asian profiling victims and all Americans should be concerned with ending this unjustly burdensome practice.

Fortunately, section 1981 and Title VI offer airline racial profiling victims a likely basis for relief. Individuals like the ACLU-Relman plaintiffs have brought claims under these statutes, making strong arguments that such airline behavior is unlawful. Courts have so far looked favorably upon these lawsuits.\(^{225}\)

The ACLU-Relman lawsuits must be understood in the context of the broader erosion of South Asian American civil liberties post-9/11. The debates surrounding airline racial profiling typify larger ongoing controversies about the tradeoff between protecting national security and safeguarding the civil liberties of South Asian Americans and other racial minorities. The outcome of these debates is important not only to the question of preserving national security in a time of terrorist threat, but also to underscoring the importance of safeguarding the civil rights and civil liberties of all Asian Americans.

National security profoundly impacts all Americans, including South Asian Americans. The importance of safeguarding America from terrorist threat cannot be overemphasized. However, racial discrimination and racial profiling are unacceptable responses to terror. Given the historical ease with which Asian Americans have been deprived of their civil rights in times of national crisis, Asian Americans—in fact, all Americans—should contest the current civil rights and civil liberties deprivations currently endured by South Asian Americans. The force of the collective South Asian, Arab American, Muslim, and Asian American community response to the post-9/11 civil rights and civil liberties deprivations signals that Asian Americans possess the strength to forge alliances to safeguard and advance the civil rights and civil liberties for all Asian Americans, in times of terror and beyond.

\(^{225}\) See supra note 181.