Neither Here nor There: Creating a Legally and Politically Distinct South Asian Racial Identity

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At about 9:20 p.m. on Monday, May 19, 2003, Avtar Singh Cheira, a 52-year-old Phoenix, Arizona, truck driver and Sikh immigrant from India was shot twice in the legs. Cheira had been waiting to be picked up by his family when the men who shot him with bullets from a small caliber gun drove by in a red pickup truck. The Sikh immigrant had lived in the United States for 18 years, and that night he was wearing a turban, a symbol of his religious identity. Cheira’s youngest son discovered him and cradled him in his arms while awaiting medical assistance. “I heard that voice say, ‘Go back to where you belong to,’ and at the same time I heard that shot,” Cheira said from his hospital bed, unable to move his legs without cringing from the pain. “There is no doubt this is a hate crime,” said Phoenix Police Detective Tony Morales.

The shooting was the second in the Phoenix area alone targeting a member of the Sikh community since the September 11, 2001, (“9/11”) attacks. On September 15, 2001, Balbir Singh Sodhi, also Sikh, was killed at his Mesa, Arizona, gas station. According to law enforcement officials, his killer was planning a hate crime against Arabs and may have erroneously misidentified the Sikh immigrant as an Arab because of his turban. When Mesa police arrested Frank Silva Roque, the suspect who has since been convicted of first-degree murder for the hate crime, he yelled, “I’m an American. Arrest me and let those terrorists run wild.”

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1. Susan Carroll, Sikh Shooting Called Hate Crime, ARIZ. REPUBLIC, May 21, 2003, at 1B.
2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id.
8. Id.
I. INTRODUCTION

In this paper, I will explore the argument that because of their collective racialized experience, South Asians should be identified as a legally and politically distinct racial group for the limited purpose of encouraging group empowerment. Section II of this paper explores how traditional definitions of race have given rise to a South Asian racial identity that incorporates various distinct ethnic identities. More specifically, I will trace how traditional notions of race rely on physical and socio-political attributes to categorize racial groups and analyze how these traditional notions support the conclusion that South Asians should be classified as a distinct racial group.

Section II continues by demonstrating that U.S. statutory, judge-made, and administrative law have categorically rejected the notion of legally classifying South Asians as White for the significant purposes of immigration, naturalization and identification. Thus, the legal system has denied South Asians the rights and privileges that have historically been granted to Whites. I argue that if the law were to include South Asians under the white umbrella, either as a single large ethnic group or as multi-ethnic group, it would ignore the current and historical racism against South Asians and the societal inequities arising from it. Classifying South Asians as white, instead of recognizing their minority status, for the purposes would blatantly ignore the fact that South Asians were initially denied entry into the United States. It would also ignore that they were later denied citizenship and the rights and privileges attached to it. Moreover, it would ignore how they are currently denied civil liberties in certain contexts.

In Section II I will further discuss the circumstances under which the legal and social apparatus in the United States categorizes South Asians as part of the API race. There is no doubt that this construction is often a source of discomfort for many who currently fit the API classification. This classification derives from the arbitrary and Eurocentric monolithic grouping of Asians based on geography rather than racial identity. By breaking apart this categorization in favor of creating a distinct legal and political South Asian/South Asian-American identity, the first step will be made against the particularized racialization South Asians face.

I will draw parallels from Latina/o Critical (LatCrit) theory, where scholars have argued against the current construction of the Latina/o race conglomerate. As a disclaimer, this investigation does not seek to support or refute the idea that that the API characterization may or should also be dismantled to identify separately, for example, East Asians, Southeast Asians, and Pacific Islanders. It only explores the argument that South Asians should be identified as a distinct racial group for the limited purpose of recognizing that this most "brown" of Asian groups has faced an increase in forms of racism in post-9/11 America not common to other Asians.

In Section III I argue that the identification and use of a distinct South Asian race in advancing the cause of racial justice does not preclude South Asians and members of other races from joining in the efforts of coalition-building, a concept widely advocated by Critical Race theorists and others. Without a common sense of racial identity among South Asians, the group will remain largely silent in the realm of racial justice, whether in the context of a separate South Asian civil
rights movement, the API movement, or the cause at large. Once this identity is set into place, I posit that South Asians will be more proactive and aggressive in forming coalitions with other racialized groups.

II. A DISTINCT IDENTITY: RECOGNIZING SOUTH ASIANS AS A NON-WHITE AND NON-API GROUP

To better understand how South Asians have been racialized in American society, one needs to first ask the questions: what is South Asia, and who are the South Asian people?

South Asia is a subcontinental landmass that one of every five humans calls home. This area includes Afghanistan, Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan, Sri Lanka, and Tibet. The giant of the region, India, has a population of over one billion, the second largest in the world, while Pakistan’s estimated 162 million people and Bangladesh’s estimated 144 million people rank them at sixth and eighth, respectively.

As the birthplace of the Hindu, Buddhist and Sikh religions, and as the home of approximately 455 million, or 31 percent, of the world’s Muslims, South Asia encompasses enormous religious diversity. It is the child of the Indus Valley Civilization, which dates from about 2500 B.C., and mother of over 30 languages and countless dialects, spanning a comparable number of ethnic groups to that of Europe.

The boundaries of the South Asian region are clearly defined by dramatic geographic features. Running from the northwestern part of the region to the northeast, the Hindu Kush Mountains of Afghanistan link to the icy Himalaya Mountains and the high Plateau of Tibet, creating a jagged curtain of land between the subcontinent and the rest of Asia, while the Arabian Sea, Bay of Bengal and vast Indian Ocean triangulate peninsular India and create islander South Asia.

This sociology and geography has played a significant role in the creation of a common racial identity among South Asians. The technical deconstruction of what is meant by “race” is based on the premise that “there is no distinctive biological reality called ‘race’ that can be determined by objective scientific procedures.” It is impossible for one to arrange humans into clearly defined racial

categories simply because of the continual global genetic intermingling of peoples through the course of millennia. Nevertheless, it is not debated that at any given point in history, the classification of large groups of people into "races" has been used for many purposes. Theories on the definition of race abound, but the overwhelming majority encapsulate common components, which include aspects of both physical or phenotypical characteristics and sociopolitical implications. Theorists Michael Omi and Howard Winant capture these components in their definitional analysis.

There is a continuous temptation to think of race as an essence, as something fixed, concrete and objective. And there is also an opposite temptation: to imagine race as a mere illusion, a purely ideological construct which some ideal non-racist social order would eliminate. It is necessary to challenge both these positions...

The effort must be made to understand race as an unstable and "decentered" complex of social meanings, constantly being transformed by political struggle. With this in mind, let us propose a definition: Race is a concept which signifies and symbolizes social conflicts and interests by referring to different types of human bodies...

We define racial formation as the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed... From a racial formation perspective, race is a matter of both social structure and cultural representation... [T]he theory of racial formation suggests that society is suffused with racial projects, large and small, to which all are subjected... Everybody learns some combination, some version, of the rules of racial classification, and of her own racial identity, often without obvious teaching or conscious inculcation. Thus are we inserted in a comprehensively racialized structure. Race becomes "common sense" – a way of comprehending, explaining, and acting in the world. 17

Given this two-part definition, it is not as difficult to identify South Asians as sharing certain phenotypical characteristics such as dark hair and skin color of varying shades of brown, as it is to identify where in society's racial project they fit and are assigned a group identity. However, some of the roles that have been defined consistently and continually, and which I will discuss below, include those of the perpetual foreigner, the "model minority," and the terrorist. The discomfort with the inclusion or exclusion of South Asians in the United States in other racial categories helps to contextualize the argument that South Asians ought to be characterized as a distinct racial group based on their collective racialized experience.

A. The South Asian as White?

From the time that South Asians entered the United States around the beginning of the 20th century as small and relatively scattered groups,18 American
law and society have mirrored each other's view of South Asians as an alien group of non-whites. "The fact that these persons are referred to as 'non-Whites' rather than 'non-Blacks' reflects the fact that Whiteness is the racial norm in America, and race is largely defined as deviation from Whiteness."¹⁹

By pointing out how law has categorically determined for us, and how society has evidenced for us, that South Asians are not white, I do not advocate that they should be considered white for any purpose. Classifying South Asians as white would ignore both their historical and current status as a racialized group in this country. Therefore, South Asians, in addition to other racialized groups, would be well-served by theories that advance both the objectives of the post-Civil War Reconstruction era (i.e., the First Reconstruction)²⁰ and the civil rights movement of the 1950s and 1960s (i.e., the Second Reconstruction). Such theories include the race-conscious approach that is cemented in the Equal Protection Clause of the Fourteenth Amendment, and an alternative dual race-and humanity-consciousness approach²¹ that is rooted in existentialist thought and abolitionist notions of universal humanity, which may aid in the reinterpretation of the Constitution as a whole.

1. The "Othering" of the South Asian in Society

Applying Michael Omi and Howard Winant's theory on racial formation, South Asians are often assigned to play a role in society. Historically, under colonialism, a distinct composite identity developed as South Asians immigrated to

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²¹ Id. at 487.

foreign lands as indentured servants. The presence of various South Asian groups in such places as the Caribbean, Africa, and the South Pacific in very significant numbers established the basis for a single "Indian" identity that has endured to the present day. The system of indentured servitude resulted in a vast "Indian," or South Asian, diaspora and furnished the particular context for this process of identity formation and deployment beyond colonial possessions in places like today's America. In the United States today, three large roles for South Asians exist that provide the foundation for and accompany many smaller roles including those of: (1) The "perpetual foreigner" by virtue of his/her unpronounceable name, undecipherable accent, alien and funny, yet exotic culture; (2) the "model minority" who all other minority groups should aspire to emulate by virtue of his/her "success" in education and economic status, and; (3) the terrorist by virtue of his/her brown skin, and in the case of Sikhs, by virtue of their turbans, and in the case of South Asian Muslims, by virtue of religion.

a. The Perpetual Foreigner

South Asians, like other non-white European immigrant groups in the United States, still face the stigma of being inassimilable foreigners, even if they are not recent immigrants and have been American citizens for years. Remarks such as, "'You speak English very well,' or 'You don't look Filipino,' or 'Where are you from?"' to individual members of these minority groups, who may be born and/or raised in the United States, "reveal a common attitude towards the groups who do not fit majoritarian notions of 'American.' These perceptions of foreignness subject members of the group to both overt and subtle forms of discrimination in education, employment, and daily life.

My personal story as the perpetual foreigner repeats in many different cities and at many different stages of my life. For example, my family of seven (racially, six Asian Indians and my white, Jewish uncle), were customers at a greasy spoon in Charleston, South Carolina, where our white waitress innocently asked us, "Where y'all from?" I obviously knew that she was alluding to our race, but decided to answer with a sigh, "New York," the place that was my parents' and my home since 1979, my sister's place of birth, my aunt's home since 1968, and my middle-aged Jewish uncle's home since birth. The waitress then responded, "No, I mean where are you from originally?" After I dismissively replied, "India," she curiously asked if that was "where they wear them red dots on their forehead," and continued with more questions about the significance of the bindi as she handed my order of barbequed ribs to me. My answer nowadays, "I was born in India, but was raised in New York," often discourages others from making such poor attempts to subtly decode my race through a barrage of awkward questions. Although I doubt her inquiries were mean-spirited, they were grounded in the preconception that we were

23. Id.
24. Id.
26. Id. at 1295-96.
foreign and brown, not "American."

On a daily basis my name reminds me of my foreignness, too. Putting my peers and others aside, professors and teachers who have struggled with the pronunciation of my first name, "Jagdish," often asked if I had a nickname or "go by something else." As a response to my exhaustion of feeling compelled to explain my "origin," and in fear of being viewed as unreasonably stubborn and unapproachable, I have often introduced myself as "Jay" since my junior year at college. Although my pride in my brownness does not allow me to legally change my name to "Jay," a thorough introspection reveals that its use has effectively resulted in the muting of my self-expression to an extent to which I have played into society's game of name racism. In the game, non-Judeo-Christian or "non-American" names are derided as strange and even funny, and are comically pronounced using incorrect awkward and exaggerated motions of the tongue. The pervasiveness of name racism makes it acceptable to not be able to, or at least make a conscientious effort to, pronounce such names correctly.

The role of perpetual foreigner that society assigns to South Asians manifests itself just as well in the realm of accents as it does in that of names. Many adolescents and adults who immigrate to the United States retain accents in English throughout their lives, and are thereby considered foreigners no matter how well they speak English or how long they have lived here. It is clear that, in the United States, the white American accent without any regional flavor is the norm. A clear example of this fact is that U.S. corporations outsourcing their customer service jobs to India train workers residing there in "accent neutralization" in an effort to make them sound more "American." An attempt to shed the role of the perpetual foreigner, this willingness to consciously adopt a mainstream "white" accent arguably greases the wheels of the ironically subordinate role of the South Asian as a "model minority" because it serves as an example of the generally idealized notion of assimilation.

b. The Model Minority

Vijay Prashad identifies two images on which the South Asian "model minority" discourse rests: (1) "of being inherently hardworking high-achievers, and (2) of being spiritual and pliant." The first stereotype, in particular, "furnishes White supremacist ideology with yet another weapon to assign degradation of African Americans" and Latinas/os to "their supposedly inherent incapacities and deficiencies." The second stereotype relating to the spiritual and pliant nature of South Asians perpetuates Eurocentric notions of orientalism and both sexual and non-sexual exoticism. The two stereotypes converge into a single image of "yet another 'not-white-but-good' immigrant community."

27. Pronounced: /'jag-ˈdēsh/. While on the subject of pronunciation, my last name is pronounced: /bi-ja-ˈlā-nē/.  
30. Mahmud, supra note 22, at 658. According to WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 904 (1983), “pliant” means pliable, or “supple enough to bend freely or repeatedly without breaking.”  
31. Id. at 658-59.  
32. Id. at 658.
The model minority concept is not new. The racialization of South Asians as a model minority in the United States today bears a strikingly similar resemblance to the colonial racial hierarchy. In conformity with the imperialists' "divide and rule" policies, South Asian indentured servants and merchants were socially sandwiched between the White colonial settlers and the "natives" in the Caribbean, Africa, and the South Pacific. In place of facilitating such policies, modern day social sandwiching takes the form of the model minority concept, which advances the notion that South Asians have successfully assimilated into American society, having risen above significant racial inequities, which are ideals that African Americans and most Latinas/os seem to not have achieved. Despite the fact that many Asian Indians are well-settled members of the American middle to upper middle classes and fare as some of the highest salaried immigrant professionals, "many of them face discrimination in the form of glass ceilings in terms of promotion, tenure, or advancement." Moreover, South Asians are still underrepresented in the political and legal systems. Furthermore, the impressive statistics on the wealth and education of South Asians may be changing, as many immigrant professionals use the family preference provisions of the Immigration Act of 1965 to bring their less educated relatives to the United States, many of whom will work in entry-level service jobs such as taxi drivers, gas station and newsstand attendants, and restaurant employees. Therefore, as much as South Asians as a group would like to wear a medal of honor for being high achievers, ignoring the contrary realities facing a significant segment of them face avoids a solution to problems they share in common.

By presenting the second image of South Asians under a model minority view, namely to see India as mysterious and spiritual, Prashad highlights the issue of persistent orientalism in the United States. In this context, the exoticized South Asians are portrayed as a desirable "other," which under the model minority myth would serve as an alternative to alienation. The American entertainment and media industries have long portrayed India, in particular, as, in the words of the Detroit Journal, "a land of ghastly and beautiful mysteries." In this manner, the model minority myth thrives on the heels of exoticism in the form of India's mysterious spirituality, which can be found not only in gurus like Bhagwan Shree Rajneesh and new age leaders like Deepak Chopra, but also in its pliant women (in the heterosexual context) and men (in the homosexual context).

In short, the idea of the model minority, which translates as "not white but good," does the greatest disservice to poorer and less-educated immigrants, by ignoring their difficulties, and African Americans and large segments of Latinas/os, by perpetuating their subordination.

33. Id. at 672.
34. McBeth Chopra, supra note 25, at 1304; See also Mahmud, supra note 22, at 676.
35. McBeth Chopra, supra note 25, at 1305.
36. Id. at 1343.
37. Id. at 1305.
38. Mahmud, supra note 22, at 666.
39. Id.
40. Id.
41. Id.
42. Id. at 658.
c. The Terrorist

Unlike the model minority myth, which advances the “not-white-but-good” label, the image of the South Asian as a terrorist is far more malicious and has become widespread since the terrorist attacks of 9/11 and the advent of the War on Terrorism. In the United States, thousands of people of South Asian, Arab, and Middle Eastern descent have been victims of hate crimes and subjects of racial profiling. In the post-9/11 backlash, many of the aggressors discriminating against South Asians have done so apparently based on what they perceive as a racial, ethnic and religious connection between their victims and the 19 Arab Muslim hijackers of four civilian airliners. Notably, a Pakistani Muslim, an Indian Hindu, an Egyptian Coptic Christian, and Mr. Sodhi, an Indian Sikh, all of whom were killed as targets of hate crimes, were all “socially constructed” as Arab Muslims, but were not in fact.

The victimization of South Asians after 9/11 is not limited to places like Chicago O’Hare International Airport, where a Pakistani American woman was subjected to a demeaning strip-search by Illinois National Guard troops. Nor is it limited to the case of the atrocious attacks against the two Phoenix-area Sikh men mentioned earlier; discrimination against South Asians, especially South Asians of the Muslim and Sikh faiths, is also persistent in the spheres of employment, housing, and education.

In the following part, I will discuss, inter alia, how the law permits the U.S. government to detain hundreds of South Asian immigrants without due process, impinging on their civil rights and liberties.

2. The “Othering” of the South Asian under the Law

a. Exclusion from Entry

In the 1910s, various acts of Congress, particularly the Alien Land Act of 1913, the National Origin Act of 1914 and the “Pacific Barred Zone” of the Immigration Act of 1917, effectively barred all South Asian immigration into the United States. The exclusion of South Asians through immigration policy emerged from both internal anti-immigrant groups and British pressure to suppress Indian independence movements based in the United States. Although some South Asians did enter the United States in the 1920s and 1930s, albeit illegally, in the 1920s and 30s, these acts remained effective until repealed in 1946 in appreciation of India’s
effort and aid to the Allied forces in World War II.\textsuperscript{51}

Immigration from Asia became noticeable in 1965 when the national origins quota system was abandoned, along with the "Pacific Barred Zone" regulation, which prohibited immigration from within a large triangular area of Asia that included all of South Asia.\textsuperscript{52} The Immigration Act of 1965 abolished the national origins quota system and instated in its place a framework in which no more than 20,000 immigrants were allowed from any single country.\textsuperscript{53} However, the Immigration and Nationality Act Amendments of 1976, the Health Professionals Education Assistance Act of 1976, and the Immigration Act of 1990, imposed strict controls against certain immigrant groups seeking to join the U.S. labor market.\textsuperscript{54} For example, Congress passed the Immigration Act of 1990 as a reaction to concerns that the immigration legal apparatus was inconsistent with the nation's economic situation and immigration from Asia and Latin America was favored over that from Europe.\textsuperscript{55} The overall goal of the Act was to affect a higher number of White European immigrants, which would not have been the result of an unrestricted or a country-neutral immigration standard.\textsuperscript{56} However, the increase in need for skilled workers in the field of information technology at the turn of the 21\textsuperscript{st} Century created a temporary adjustment to the immigration system, allowing a significant influx of information technology professionals from South Asia to enter on a temporary basis.\textsuperscript{57}

\textit{b. Exclusion from Citizenship}

Exclusion of South Asians from fully participating in the growth and development of America over the past one hundred years did not stop at the borders; South Asians already in the United States were excluded from the privileges of citizenship, which was determined, in part, by "Whiteness." In 1923, federal naturalization statutes granted American citizenship only to "aliens being free white persons and to aliens of African nativity and to persons of African descent." The Supreme Court in \textit{United States v. Bhagat Singh Thind}, held that "'free white persons' are words of common speech, to be interpreted in accordance with the understanding of the common man," and therefore do not include a high-caste Punjabi Hindu from the extreme northwest of India.\textsuperscript{58} Following the \textit{Thind} decision, South Asians, who had previously become U.S. citizens by being categorized as "free white persons," were not White anymore and were precluded from gaining citizenship through the naturalization process.\textsuperscript{59} As a result of the decision, the government's revocation of naturalized citizenship granted to early South Asian immigrants made them feel "isolated, not knowing for certain their place and future

\begin{table}
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51. & \textit{Id.} at 1290. \\
52. & \textit{Id.} \\
53. & \textit{Id.} \\
54. & Mahmud, \textit{supra} note 22, at 676. \\
55. & McBeth Chopra, \textit{supra} note 25, at 1291. \\
56. & \textit{Id.} at 1292. \\
57. & Mahmud, \textit{supra} note 22, at 676. \\
59. & \textit{Id.} at 214-15. \\
60. & \textbf{IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE} 149 (1996). \\
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in America".\textsuperscript{61} It was not until 1946 that South Asians were eligible for citizenship.\textsuperscript{62}

The context of citizenship is one example of the fact that the assertion of a White identity is at root an attempt to locate oneself at or near the top of the racial hierarchy that forms an intrinsic part of U.S. society.\textsuperscript{63} In other words, asserting Whiteness, or a White identity, cements a racial hierarchy.\textsuperscript{64} It legitimizes the notions that fundamental differences between Whites and non-Whites exist and are based in nature rather than social constructs, and that Whites are deservingly above non-Whites.\textsuperscript{65} These accompaniments of Whiteness skewed South Asian American politics. Early South Asian immigrants saw citizenship as a key attribute of Whiteness and belonging; South Asians seeking citizenship sought to be included in this White category so as to avoid being classed with groups barred from naturalization.\textsuperscript{66} Such notable groups who were not White for purpose of citizenship included the Chinese, as decided by a Circuit Court in \textit{In re Ah Yup},\textsuperscript{67} and the Japanese, as decided by the Supreme Court in \textit{Takao Ozawa v. United States}.\textsuperscript{68}

c. Exclusion from Humanity: The Derogation of South Asians' Human Dignity in Post 9/11 America

Not all exclusionist and other racist sentiments against South Asians were indoctrinated in the law and later repealed; despite the enactment of legislation such as the Immigration Act of 1965, the law continues to perpetuate old and promulgate new racialized notions of South Asians. One need only to look at the practices at the nation's land borders and certain types of legislation enacted after 9/11.

An example in which overt institutional discrimination commonly arises is when South Asian Americans and others cross the border from Canada.\textsuperscript{69} U.S. immigration and customs officers regularly insist that a South Asian American show them his or her passport or birth certificate despite knowing that he or she is likely carrying a driver's license, which usually serves as adequate identification for White and Black entrants.\textsuperscript{70} I do not intend to imply that restrictions at land borders are unwarranted in, for example, preventing the entry of undocumented persons or illegally imported goods.\textsuperscript{71} However, this illustration demonstrates that in enforcing immigration and customs regulations, government border officers pay special attention to members of certain racial and/or ethnic groups.\textsuperscript{72} The seminal 1975

\begin{thebibliography}{9}
\bibitem{61} RONALD TAKAKI, \textit{STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS} 314 (1989).
\bibitem{62} McBeth Chopra, supra note 26, at 1290.
\bibitem{64} Id.
\bibitem{65} Id. at 3.
\bibitem{66} McBeth Chopra, supra note 25, at 1285.
\bibitem{67} 1 F. Cas. 223 (C.C.D.Cal. 1878) (No. 104.).
\bibitem{68} 260 U.S. 178 (1922).
\bibitem{69} McBeth Chopra, supra note 25, at 1296-97.
\bibitem{70} Id.
\bibitem{71} Id. at 1297.
\bibitem{72} Id.
\end{thebibliography}
Supreme Court decision in *United States v. Brignoni-Ponce*\(^7\) brings to light this issue. There, border officers on patrol stopped the defendant’s car, saying later their only reason for doing so was the occupants’ apparent Mexican descent. Upon questioning defendant and his passengers, the officers learned that the passengers had entered the country illegally, and charged him with knowingly transporting illegal immigrants in violation of the Immigration and Nationality Act.

At trial, the defendant filed a motion to suppress testimony regarding the passengers claiming this evidence was fruit of an illegal seizure in violation of the Fourth Amendment of the Constitution. The Court held that the officers’ reliance on a single factor to justify stopping defendant’s car, the apparent Mexican ancestry of the occupants, did not furnish reasonable grounds to believe that the three occupants were aliens.\(^7\) The Court’s unwillingness “to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops”\(^7\) tacitly allows officials at the border to use race as a factor in determining illegal alienage in manner that negatively affects legal immigrants.\(^7\) The actions thus take the form of overt discrimination against those Americans, both citizens and legal immigrants, who do not fit a preconceived notion of “American” such as South Asians, Latinas/os, East Asians, and Pacific Islanders.\(^7\)

On top of this, the speedy passage of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act),\(^7\) which subjects non-citizens to guilt by association, ideological exclusion, unilateral executive detention, and racial profiling, has restricted the civil liberties of many non-citizens, including many South Asian immigrants.\(^7\) Even “legal” immigrants are deportable for innocent association, without any proof that they supported terrorist activity.\(^8\) “They can be subjected to special, discriminatory registration procedures involving fingerprinting and lengthy questioning concerning their religious and political views.”\(^8\) “Legal” immigrants can be arrested and held in secret for a lengthy period without charge or showing that they pose a threat to national security or are a risk of flight, “denied release on bond without effective recourse,” and “have their appeals dismissed following cursory or no review.”\(^8\)

In addition to being held during a proceeding that can take years, “legal” immigrants can be detained for an indefinite period of time afterwards, even where the result of the proceeding is that they should not be deported.\(^8\) Rules that affect citizens and non-citizens alike include the authorization of secret searches and

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73. 422 U.S. 873 (1975).
74. Id. at 887.
75. Id. at 882.
77. *Id.*
80. *Id.*
82. *ACLU Testimony, supra* note 83.
wiretaps without any probable cause, which is normally required by the Fourth Amendment of the Constitution. A non-citizen woman who is battered by her spouse must second-guess her decision to seek help from local law enforcement officials lest she face deportation. Asylum-seekers fleeing repressive regimes may face mandatory detention without any regard to their personal situation. Under the USA Patriot Act, the U.S. Department of Justice undertook a massive preventive detention campaign against South Asians and Arabs, particularly Muslims in those groups. Senior officials of the American Civil Liberties Union testified before a Congressional panel in June 2003, that “[t]his campaign has resulted in the secret detention and deportation of close to 1000 immigrants designated as ‘persons of interest’ in its investigation of the [9/11] attacks.” Government officials now acknowledge that virtually all of the persons that it detained shortly after 9/11 had no connection to terrorism. While the government told the public not to engage in ethnic stereotyping or to equate immigrants in general with terrorists, its own policies did precisely that.

B. The South Asian as API?

Interestingly, Asian Indians were classified as White in the 1970 census. But, only a decade later, in the 1980 census, they magically became Asian. In that census, there were six separate response categories for Asians: Asian Indian, Chinese, Filipina/o, Japanese, Korean, and Vietnamese. These six classifications reappeared on the census questionnaires in both 1990 and 2000. For Census 2000, the U.S. Census Bureau created an additional “Other Asian” category with a write-in line, so that respondents would be able to indicate membership in a specific Asian group not covered by the other six categories on the questionnaire. So, am I API? (Ask MR what she thinks about this).

The actual concept of “Asia” is European, and not Asian. It ignores the reality that many Asians exist, and that a starting point from which to explore their diversity is their division into four general regions: East, South, Southeast, and West (more commonly known by the Eurocentric terms, “Near East” and “Middle East”). However, given the scale of diversity of humans that exists even within

84. Id.
85. ACLU Testimony, supra note 83.
86. Id.
87. Id.
88. Id.
89. Id.
91. Id.
92. Id.
93. Id.
94. Li-ann Thio, Implementing Human Rights in ASEAN Countries: “Promises to keep and miles to go before I sleep,” 2 YALE HUM. RTS. & DEV. L.J. 1, 5 n. 16 (1999).
95. Id.
these regions, it is not surprising that APIs as a group are fractionalized. Their wide-ranging cultural backgrounds and group histories often prevent them from characterizing themselves as a unified group. This is particularly true on color, religious, ethnic, linguistic and national lines. For example, Thind came in response to South Asians’ attempts to distinguish themselves from other API groups to attain citizenship as “Whites.”

Yet, for both APIs and Latinas/os, despite the magnitude of diversity under these umbrella categories, the prevalent notions of race, ethnicity, and culture are the predominant characteristics of “colorized otherness.” Both of these conglomerates not only form separately from the “Black/White paradigm,” but also are ignored by it. Taking an introspective view, both of these conglomerates overlook or abandon the diverse identities that are squeezed into them. For these reasons, both LatCrit and Asian Critical (“AsianCrit”) scholars have to excavate many sources and sites of possible or potential “sameness” and “difference” that sometimes separate their perspectives and efforts.

As Berta Esperanza Hernández-Truyol, a preeminent LatCrit theorist, eloquently commented on the state of the Latina/o racial justice movement, “Considering Latinas/os’ exponentially increasing presence and ability to make their voices heard, it is surprising that their potential roar remains a mere whisper. The explanation could lie, in part, in their diversity.” The same could be said of APIs, whose voices are as different as the languages they speak. Although the standard term “API,” like “Latina/o,” labels a group whose members are readily identifiable, it, in fact, categorizes a foreign group that lacks homogeneity. In 2000, of the more than 10.2 million people of Asian descent living in the United States, over 2.4 million were Chinese, almost 1.9 million were Filipino, 1.7 million were Asian Indian, over 1.1 million were Vietnamese, 1 million were Korean and almost 800,000 were Japanese.

The crowding of such diverse groups under the API umbrella has prevented any one issue unique to the API identity from drawing much attention. For example, “AsianCrit” theorists consistently include South Asians under the same umbrella but fail to recognize that the post-9/11 climate has intensified racism against South Asians that is related to their Brownness. As the scholar Ian Haney Lopez argued with regard to Latina/o identity, that in all theoretical discourse and as a practical matter, “there exists no widespread consensus that Latinos/as share a separate identity that can be specified in terms of race, as opposed to, say, ethnicity, national

96. Id.
98. Id.
100. Id.
101. Id.
102. Id.
104. Id.
origin, or culture". Lopez adds that this view of categorizing Latinas/os as an ethnic group whose members are of every race is espoused by the U.S. Census Bureau.

Similarly, the consensus as to South Asians ignores any consideration of a distinct racial identity and inserts them as an ethnic group under the API race. The U.S. Census Bureau also adopted this perspective of South Asian identity as evidenced by the Census 2000 questionnaire. As to race, the questionnaire provided 15 categories from which respondents could choose an enumerate race and three areas where respondents could fill in the blank to further specify a race. These categories and the answers provided in the blanks were combined to generate the five standard federal race classifications set by the Office of Management and Budget, and the Census Bureau classification of "Some other race." Therefore, the six race classifications are: White; Black or African American; American Indian and Alaska Native; Asian; Native Hawaiian and Other Pacific Islander; and some other race.

The Census Bureau's report on the Asian Population states that "[t]he term 'Asian' refers to people having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent (for example, ... China, India, Japan, Korea, ... Pakistan, ... and Vietnam)." Asian groups are not limited to nationalities, but include ethnic terms, as well.

III. LIMITATIONS ON ASSERTING A DISTINCT SOUTH ASIAN IDENTITY: ANTI-ESSENTIALISM AND THE NEED FOR COALITION-BUILDING

In the long term, significant limitations to advancing the cause of racial justice exist in relying solely on the creation of a South Asian political identity. Critical Race theorists of all backgrounds warn against the danger of essentialism, where the experience basic to a group is considered overall to be representative of the experience of all the individuals of the group. A complete emphasis on a South Asian identity may cause the group to be self-serving and insular, which is counter-productive to breaking oppression of all racial minorities. A general view of the Black and Latina/o civil rights movements demonstrates the reality of this problem.

Furthermore, as far as the goals of organized action are concerned, issues of

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107. Id.
109. Id.
110. Id.
111. Id.
112. Id.
113. Mari Matsuda, Beyond, and Not Beyond, Black and White: Deconstruction Has a Politics, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 393-96 (Francisco Valdes et al. eds., 2002).
both overinclusivity and underinclusivity arise when legal and political empowerment is based on an “essentialized” racial identity. Keith Aoki explains that this approach is overinclusive "in that it may (a) make it easier to impute or imply a false homogeneity and (b) work on a superficial level to inscribe a monolithic set of values ... and political positions on persons and groups with widely differing agendas.” He adds that it is underinclusive because its focus is too narrow. Racial justice and a broader sense of human dignity can be accomplished only with a coalition-building component in which subordinated groups join their struggles. Aoki states that, “[T]here may be significant possibilities for coalition politics that go beyond the definitions of a racially bound identity on issues like immigration, affirmative action, or ‘English Only’ legislation.”

These anti-essentialist points are all very valid, and I agree fully with the approach of coalition-building. However, racialized groups like African Americans, Latinas/os, Native Americans, and non-South Asian APIs have been able to more clearly self-identify their respective collective racial identities over time than have South Asians, who have continually struggled with forming a group identity and drawing attention to their distinct racialization through either a White or API context. In other words, because of being tucked within broad characterizations such as API, South Asians generally lack the clear identity that effectively empowers the group to organize against its particularized racialization. Most civil rights movements, including the African American, queer, and feminist movements, began with identity-based organizing.

Racial identification of South Asians is a necessary element to coalitional activities because understanding the distinct ways in which they are racialized will create a higher level of consciousness for the need for activism. The inherent nature of activism in turn creates a need to seek political alliances with other groups with similar agendas. This takes the form of coalition-building. Therefore, simultaneous independent coalition-building, and coalition-building deriving from the implementation of a legal and political framework accepting of the development of South Asian identity politics, can work toward the goal of racial equality through either a race-conscious or a dual race- and humanity-conscious approach.

IV. CONCLUSION

In addition to playing the longstanding societal roles of the perpetual foreigner and model minority, after 9/11, many South Asians have found that they have been racialized by society and the law in yet another way: as terrorists. The reality of this characterization, which is based on South Asians’ culture and physical appearance as Brown people, has come to light in the wake of increased post-9/11

115. Id. at 48.
116. Mahmud, supra note 22, at 685.
117. Aoki, supra note 114, at 47-48.
hate crimes and anti-immigrant legislation. A unifying South Asian voice against such atrocities appears to exist in a cloud, interspersed with broader issues that affect the monolithic API community, like immigration and affirmative action. Achieving justice and human dignity for South Asians will not come from a Eurocentric arbitrary categorization under the API umbrella. It will derive from recognizing and fomenting energy from the group’s distinctiveness and particularized problems, and then building coalitions with other subordinated groups like APIs, Latinas/os, African Americans and Middle Easterners.

"We cannot build coalitions if we have not created safe places for the equally difficult and important work that families do."¹¹⁹ South Asians' recognition of their group racialization will generate a higher degree of awareness for anti-subordination activity, which will foster coalition-building with other groups. Coalitional outreach formed in this manner will push an agenda specific to issues that South Asians confront by bringing the energies of all coalition communities into line with one another in the mission to remove White supremacy from American law and society.
