

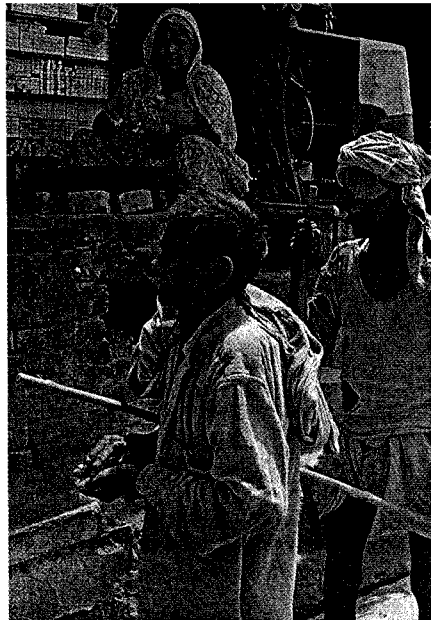
Affirmative Action: India's Example

By Clark D. Cunningham

As the U.S. debate over affirmative action seems to grow ever more rancorous and divisive, it seems clear that America desperately needs an infusion of new ideas to address the fundamental problems that affirmative action programs were intended to remedy. Help may be available from an unexpected source: the legal systems of other countries. Many other multi-cultural democracies have also been struggling to reconcile a commitment to equality with the need to remedy the effects of past discrimination; America might well be able to learn from their experiments. Indeed it is not even necessary that we know whether another country's experiment can be judged a success or failure in that country; studying their approach can be valuable simply if it expands our own vision of what is possible. The suggestions that appear here for redesigning American affirmative action are offered in this spirit: to provoke at least some new discussion and to prompt greater curiosity about what is happening outside our borders.

India has developed a legal system that is probably more similar to that of the United States than that of any other country, particularly in the field of constitutional law. Both countries use a federal system with power shared between states and a central

government. Both have written constitutions containing similar guaranteed rights; both have supreme courts with vast powers including the power to declare statutes unconstitutional; both countries turn to their courts to resolve their most important public controversies. (Indian law is also very accessible to U.S. readers because, like American law, it rests on the foundation of the English common law and because the constitution, statutes and



Prior to Independence, India's caste system made demeaning and menial occupations hereditary - creating a caste known as "untouchables"

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appellate court decisions are all written in English.)

Affirmative action in the U.S. focuses on whether it can be shown that each beneficiary of an affirmative action program is likely to have suffered from what can be called the "cognitive bias" form of discrimination, that is, a harm caused by an actor who is aware of the person's "race" and is motivated (consciously or unconsciously) by that awareness. Much of the current skepticism about affirmative action may result from this narrow focus: many white people seem to believe themselves free of such cognitive bias and thus doubt that it is a continuing problem of sufficient magnitude to justify affirmative action. Such a focus makes affirmative action particularly vulnerable in settings like university admissions where decisions based on grades and test scores seem, to many, to be immune to cognitive bias.

Although cognitive bias-type discrimination based on caste status is treated as a serious, continuing problem in India, affirmative action there is focused more on eradicating the enduring effects from centuries' of oppression and segregation. There appears to be a more conscious commitment than in the U.S. to change the basic social structure of the country. The Indian approach perhaps can

Global Views

be understood best using the economic theory pioneered by Glenn Loury that distinguishes between "human capital" and "social capital." Human capital refers to an individual's own characteristics that are valued by the labor market; social capital refers to value an individual receives from membership in a community, such as access to information networks, mentoring and reciprocal favors. Potential human capital can be augmented or stunted depending on available social capital. Economic models demonstrate how labor market discrimination, even several generations in the past, when combined with ongoing segregated social structure can perpetuate indefinitely huge differences in social capital between ethnic communities. The limitation of human potential caused when access to social capital is blocked is viewed in India not only as a personal tragedy, calling out for compassion and justice, but also as a huge loss to the society itself, that must be remedied given the vast needs and aspirations of the world's largest democracy. Although, for historical reasons, affirmative action in India is phrased largely in terms of assisting "backward" groups, "backwardness" should be understood as a comparative rather than a pejorative or patronizing term. Indians are acutely aware that the problem of unevenly distributed social capital can arise as much from the concentration of social capital in a few "forward" groups as from any deficiency in "backward" groups.

In 1951, only a year after the newly independent India adopted its constitution containing guarantees of equality taken in part from U.S. law, the Indian Supreme Court was faced with a case remarkably like the landmark 1978 *Bakke* case (in which the U.S. Supreme Court barred the use of racial quotas for admission to a state medical school but permitted consideration of race to achieve diversity). A medical school had used a detailed

and rigid quota system based on caste and religious categories to assure that its entering class had a demographic make up similar to that of the general population. The Court ruled in favor of the petitioner, a high caste Hindu denied admission. The Parliament immediately modified the ruling by using its power to amend the constitution by a two-thirds vote of each house to add an explicit "affirmative action" exception to the constitutional guarantee of equality, authorizing

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"special provision" for the advancement of "socially and educationally backward classes of citizens."

For the next thirty years different states in India experimented with a variety of ways to interpret and implement this constitutional "special provision" with a pendulum swing from overemphasis on caste identity to purely economic criteria. A continuing problem was the extension of affirmative action to caste groups apparently based more on their political clout in a particular state than their actual need for preferential treatment relative to other groups, leading to repeated Supreme Court decisions

ordering states to redesign their programs using more objective and transparent processes.

In 1980 a Presidential Commission (known as the "Mandal Commission" after the name of its Chairperson) issued a comprehensive report and set of recommendations for national standards. Although the Mandal Report did not use the term "social capital," its central premise was that the mere prohibition of discrimination and a policy of "equal opportunity" were insufficient to remedy the profound social effects of the caste system. It stated: "People who start their lives at a disadvantage rarely benefit significantly from equality of opportunity ... Equality of opportunity is also an asocial principle, because it ignores the many invisible and cumulative hindrances in the way of the disadvantaged."

Responding to the Supreme Court's concern about objective and transparent processes, the Mandal Commission conducted a national survey that started with generally recognized group categories (typically based on caste name or hereditary occupation) and tested each group using standardized criteria of "backwardness" (such as comparing the percentage of group members who married before the age of 17 or did not complete high school with other groups in the same state). Eleven numerical factors, given varying weights, were assigned to each group based on the survey results and those groups with total scores below a specified cut-off point appeared in a list of Other Backward Classes (OBCs). The Commission then recommended that a percentage of new hires for most central government jobs be reserved for OBC members under a quota system.

The Mandal Report generated lively debate but it was not until 1990 that the national government actually proposed implementation of the Report. This announcement, by then-Prime Minister V.P. Singh, prompted wide-

spread civil disturbance, instances of self-immolation by high-caste Hindus in protest, and litigation leading to an epic three months of oral argument before the Supreme Court. In 1992 the Supreme Court reached a 6-3 decision, largely approving the Report and its recommendations, and issuing a book-long set of judicial opinions. A majority of the Supreme Court justices approved the following basic principles:

1. Reservation of government positions for OBCs should not be interpreted as a narrow exception to the constitutional guarantee of equality but rather as a way of achieving true, substantive equality. ("Turning the caste system on its head" in the words of Justice Jeevan Reddy, author of the majority opinion.)
2. Traditional caste categories can be used as a starting point for identifying OBCs but selection criteria must include empirical factors beyond conventional assumptions that certain castes are "backward."
3. Identification of a group as an OBC cannot be based on economic criteria alone.
4. Because the Mandal Commission used objective, empirical criteria to create these new group categories, distribution of government benefits based on OBC membership does not perpetuate the stigma of traditional caste categories.
5. OBC membership only creates a rebuttable presumption that a person needs preferential treatment; therefore, the state must also use an individualized economic means test to eliminate persons from affluent or professional families (termed "the creamy layer test").

At first glance it might appear that affirmative action in India and the United States are so different, both in terms of basic assumptions and implementation, that useful comparison is impossible. India's constitution specifically states that "special provision" for certain "backward classes" is not prohibited by the general right to equal-

ity. In contrast, according to the U.S. Supreme Court's 1995 decision in *Adarand Constructors v Pena*, there is no "affirmative action exception" to the constitutional guarantees of equal protection, even for programs created by Congress under its powers to implement the 14th Amendment. However, a closer look at the *Adarand* decision and cases that followed it in the lower courts suggests some ways India's experience might be relevant to the U.S.

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The affirmative action program at issue in the *Adarand* case provides some striking similarities and contrasts to India's system of reserved government jobs for Other Backward Classes. *Adarand Constructors* was a subcontractor who lost a contract for federally financed highway construction to the Gonzales Construction Company, even though *Adarand* was the lowest bidder. The prime contractor received a bonus payment for subcontracting with Gonzales Construction because it had been certified by the State of Colorado as a "Disadvantaged Business Enterprise" (DBE). *Adarand Constructors* challenged this system as violating its right to equal protection because the only basis for the DBE certification was that Gonzales Con-

struction was owned by an Hispanic American. Congress had created the DBE program under the Small Business Act, which defined a DBE as a small business owned and controlled by one or more "socially and economically disadvantaged individuals" and had further created a presumption that all "Black Americans, Hispanic Americans, Native Americans, [and] Asian Pacific Americans" were socially and economically disadvantaged individuals. This presumption would only be set aside if some third party came forward with evidence that the owner was not in fact socially or economically disadvantaged; neither the government agency that provided the certification nor the prime contractor had a duty to verify whether the owner was actually disadvantaged. In contrast, persons not members of one of the specified groups who sought DBE status were required to prove by "clear and convincing evidence" that they met a five-part test for social disadvantage as well as a separate test for economic disadvantage.

By a 5-4 vote, the Supreme Court held that all racial classifications, even those enacted by Congress and intended to benefit groups affected by racial discrimination, must be analyzed by the same standard of "strict scrutiny." However, writing for herself and three other members of the majority, Justice O'Connor emphasized that "strict scrutiny" still left open the possibility of affirmative action if programs were "narrowly tailored" to further "compelling governmental interests," stating that the "unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." Despite this language, many read the *Adarand* decision as sounding the death knell of affirmative action, notably the federal appellate judges who struck down the affirmative

Global Views

action admission program at the Texas Law School in the 1996 case of *Hopwood v. Texas*, holding that neither diversity nor remedying past societal discrimination were sufficient "compelling governmental interests."

In the *Adarand* case, the Supreme Court did not actually decide whether the DBE system was unconstitutional, but sent the case back for a "strict scrutiny" review. On remand the trial court reviewed the extensive history of Congressional efforts to eliminate barriers preventing racial minorities from successfully competing in the highway construction industry, and concluded that Congress, acting under its 14th Amendment powers, did have a compelling interest in remedying the effects of past societal discrimination. Nonetheless, in 1997, the trial court

ruled in favor of Adarand Constructors and barred the use of the DBE program because its use of racial categories was not "narrowly tailored." As a result of this ruling, the State of Colorado changed its procedures for certifying DBEs by eliminating the presumption of disadvantage for racial and ethnic minorities, basing the determination of social disadvantage solely on the applicant's statement that he or she was disadvantaged. The owner of Adarand Constructors then applied for DBE status, apparently claiming that the pre-existing system of racial preferences for federally-funded contracts had made him, as a white male, socially disadvantaged. Colorado accepted this claim and granted him DBE status while the Federal government was still appealing


the trial court's decision. The Federal appellate court then dismissed the case entirely this past spring on the grounds that the case was moot since Adarand Constructors was no longer harmed by the DBE program, and vacated the district court's decision.

The lack of a final court decision on the specific facts in *Adarand*, and the strange turn of events in which an aggrieved white male ends up as a kind of affirmative action beneficiary, seems to leave considerable room for rethinking affirmative action, as does the Supreme Court's consistent refusal since *Adarand* to decide any new affirmative action cases (including the *Hopwood* decision, thus making the use of race for deciding admission to state universities unconstitutional in the three states under the jurisdiction

India's Castes

The traditional caste system of India is usually described as a hierarchy of four groups:

At the top were the Brahmins, who were priests and scholars; next was the warrior caste; third the merchant caste; and fourth (and much lower), the Shudras who provided menial labor for the first three castes. Below even the Shudras, often described as outside the caste system ("outcastes") were the "untouchables," so-called because they were considered ritually unclean and subject to drastic forms of segregation. (The Shudras approximately correspond to the ethnic groups referred to as "Other Backward Classes" in India's affirmative action programs; these "OBCs" are described as "other" because an earlier category of "Scheduled Castes" was created for descendants of the untouchables.) A central principle of the Indian independence movement, led by Mohandas ("Mahatma")

Gandhi, was abolition of caste prejudice, especially against the untouchables. This principle has been realized to a considerable extent in a remarkably short time. The primary draftsman of the Indian constitution and India's first Minister of Justice, Dr. B.R. Ambedkar, was from an "untouchable" caste, as is the current President of India. In several states, the reins of government are in the hands of political parties dominated by "lower castes." The convulsions of inter-caste and inter-religious strife that attract the attention of Western media almost always arise from the commitment of the government to promote the interests of ethnic and religious groups that have been the victims of discrimination, a commitment that has not disappeared despite the opposition of the privileged and numerically powerful. 



Family of Brahmins. Members of the highest Hindu caste, late 19th century. CORBIS/Hulton-Deutsch Collection

of that federal appeals court but leaving the issue up in the air for the rest of the country.)

There are a number of intriguing points of comparison and contrast between the DBE program and India's system of reservations for Other Backward Classes. Both the DBE and OBC programs begin with a general, abstract category of "disadvantage" or "backwardness" and claim to be providing preferential treatment to specific ethnic groups only because they happen to fit into the category. (This starting point does, however, create a risk of perpetuating demeaning and patronizing stereotypes and ignores other rationales for affirmative action advanced in both the U.S. and India, such as the values of diversity, inclusion, and positive role models, which are particularly relevant in the context of government and higher education.) Both programs insist that disadvantage cannot be explained solely in economic terms; for both social disadvantage provides the rationale for using ethnicity to identify and delimit beneficiary groups. A third similarity is that both programs treat ethnic identity as only a presumption of disadvantage that can be rebutted: by the creamy layer test in India or challenge by a third party in the DBE program.

Contrasts are even more intriguing because some of the most distinctive features of the Indian approach may actually suggest ways that a redesigned DBE program might survive even the strict scrutiny of American courts. The trial court found that the DBE system was *both* overinclusive *and* underinclusive. DBE certification was overinclusive because it presumed that all individuals within the four broad groups were socially and economically disadvantaged; it was underinclusive because it excluded other minority groups (unnamed by the court) whose members were in fact socially and economically disadvantaged. The trial court quoted with apparent approval Adarand Constructors' claim that the

selection of racial groups was "random and haphazard," including Aleuts, Samoans and Bhutans as ethnic groups who had suffered discrimination in the highway construction industry, and added the observation that even the famously rich Sultan of Brunei would qualify for a DBE certification. The fact that Adarand Constructors subsequently won a DBE certification after

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the racial and ethnic presumptions were replaced with an applicant's mere claim of social disadvantage (seemingly inconsistent with the fact that Adarand Constructors was able to submit a bid that would have won if the DBE program had not been in effect) strongly suggests that the basic theory and criteria of "disadvantage" had not been well worked out.

According to the trial court in Adarand, Congress found that minority businesses were unable to compete effectively for construction contracts in large part because they lacked working

capital, could not meet bonding requirements, had inadequate "track records," and were unaware of bidding procedures—all deficiencies that could be attributed to the owners' lack of relevant social capital (despite plenty of potential human capital). After years of unsuccessful, race-neutral efforts to address these problems, Congress apparently decided that the only effective way to increase the number of minority businesses able to compete successfully for work was to get them more work in the first place, giving them relevant social capital directly. If the DBE program was viewed more clearly as a redistribution of social capital, Congress might then appoint its own version of the Mandal Commission to identify groups that clearly lacked relevant social capital to a degree likely to limit significantly the human capital of their members. (An additional criterion could be clear evidence linking the current lack of social capital to past discrimination.) Such an approach should address the critical concerns of "narrow tailoring" that group selection is not "random and haphazard" or, perhaps worse, the result of "racial politics."

An alternative approach even more likely to survive strict scrutiny would be to take the Indian experiment one step further by eliminating altogether explicit use of ethnic identity. If a key cause and indicator of inadequate social capital is segregation, why not ask persons seeking affirmative action to provide evidence of their personal experience of segregation rather than presuming it from their ethnic identity? (The Federal DBE regulations allow as one alternative to membership in one of the four specified ethnic groups a showing that the applicant has suffered from "long-term residence in an environment isolated from the mainstream of American society.") One category on an application might be residential segregation, requiring the applicant to list every neighborhood (identified by zip code)

Global Views

in which he or she has lived, indicating the dates and applicant's age at the time. Another category could be educational segregation, listing elementary, junior and senior high schools, also by dates and age when attending. A Federal agency such as the Census Bureau could become the U.S. equivalent of the Mandal Commission by assembling a national data base rating zip codes and schools as to the degree of impact by segregation at various points in time and developing a standard formula for correlating the raw data supplied by applicants into a "severity of segregation" score. This segregation score could then be combined with an economic disadvantage score based on applicant-supplied information (primarily parental income and occupation during applicant's formative ages) and the total used to decide whether DBE certification was warranted. Certification might be granted to applicants from middle class backgrounds if evidence of severe segregation (and presumably reduced social capital) was presented; likewise applicants who grew up in poverty might be certified even if less affected by segregation (as might especially be the case for persons from small towns and rural backgrounds). This approach would resolve both the over-inclusion and under-inclusion problems raised by the trial court in Adarand. Persons not individually disadvantaged would not be included by an automatic presumption based on ethnic identity. Persons actually disadvantaged would not be presumptively excluded simply because their ethnicity did not fit within a limited number of groups. Indeed this approach might not even trigger strict scrutiny since the segregation factor would not be a racial or ethnic category as such and would not merely be a token substitute for such categories since not all members of an ethnic group would be able to present data giving rise to a significant segregation score.

However, our primary concern

should be to eliminate the "lingering effects" of discrimination that has been explicitly based on racial and ethnic identity for generations, and not merely to develop a program that survives judicial review. Can the effects of discrimination be adequately addressed without explicitly using ethnic categories? So far, in India, the government's answer has been no. Elsewhere I discuss why the answer may also be "no" in the United States,

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at least as to higher education, drawing on recent psychological research by Claude Steele, Joshua Aronson and others. This research suggests the existence of a "stereotype threat" that can haunt even the most successful members of ethnic groups when test-takers fear that failure will confirm social stereotypes about them. I urge that the proponents of affirmative action in higher education emulate the Mandal Commission by using such empirical research both to articulate a more compelling need and to design a more "narrowly tailored" response than were shown in the law school admission plan struck down in the Hopwood case.

Other useful insights can be gained by looking at India, for example from the many critiques by Indian intellectuals of the Mandal Report. Those critiques suggest some cautionary lessons about the use of affirmative action: the continuing pressure to expand beneficiaries by adding categories; the risk that affirmative action will be used primarily to mobilize voting blocks; the despair and resentment by members of the younger generation who feel their opportunities are restricted by their non-OBC status; the persistence and indeed revitalization of the very social categories that the state seeks to eliminate in creating a "casteless society" due to the value they are given by affirmative action; the way debate over affirmative action can distract attention from continuing acts of intentional discrimination, particularly in the private section; and the impact on the efficiency of government when merit in hiring and promotion is de-emphasized. Perhaps the most valuable lesson, though, that Americans might learn from India and other countries is greater humility: our problems may be more fundamental than we realize and, at the same time, our methods for addressing them may be less imaginative than we assume. ©

Clark D. Cunningham, Professor of Law at Washington University in St. Louis, has been working for three years on a comparative study of affirmative action in the U.S., India, S. Africa and other countries in collaboration with Dr. N. R. Madhava Menon, Member, Law Commission of India, and former dean, National Law School of India. An expanded version of this essay with footnotes; other articles and working papers by Cunningham & Menon and others on this subject; a bibliography; and proceedings of a 1997 conference on "Rethinking Equality in the Global Society" can be obtained from the following web site: <http://ls.wustl.edu/Conferences/Equality> or by contacting Cunningham (cunningc@law.wustl.edu or fax: 314-935-6493).