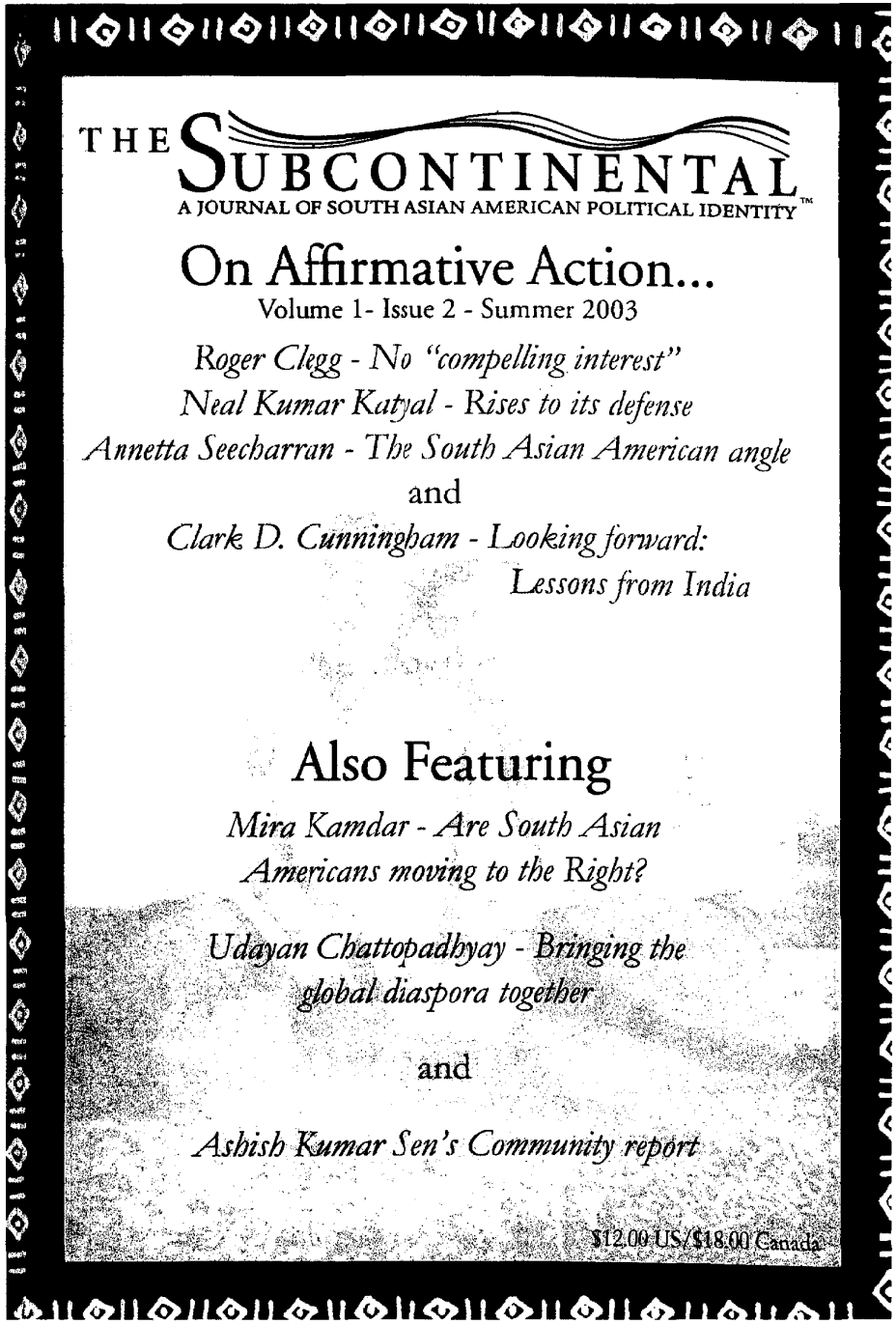

Lessons on Affirmative Action from India

Clark D. Cunningham

As debates over affirmative action continue to be rancorous and divisive, America desperately needs new ideas about ways in which to address the most fundamental problems that affirmative action programs were intended to remedy. Perhaps some new approaches to America's challenges concerning affirmative action may be developed by looking to an unexpected source: the legal system of India.

One recurrent criticism of affirmative action programs in the United States is that the selection of groups for preferential treatment is based either on inaccurate stereotypes or political considerations rather than on actual need. A second, related criticism is that some individuals who benefit from affirmative action come from well-educated and affluent families. This criticism makes two different points: affirmative action beneficiaries from privileged backgrounds do not really need affirmative action and affirmative action benefits do not reach the "truly needy" because they are monopolized by more privileged members of the group. Similar concerns have been raised in India, but, in contrast to the United States, these criticisms have led to nation-wide, systemic changes in the design of affirmative action programs rather than simply being used as ammunition in a war of rhetoric.[1]

New approaches concerning affirmative action may be developed by looking at the legal system of India.

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India has developed a legal system that is more similar to that of the United States than to that of any other country, particularly in the field of constitutional law. America and India both use a federal system in which power is 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; and both countries rely on their courts to resolve their most important public controversies.

As is well known, the leaders of India's movement for independence from British rule also worked to correct the injustices of India's ancient caste system. The most oppressed group under the caste system were, of course, those persons once known as "untouchables," whose descendants are defined as "Scheduled Castes" under the Indian constitution and more commonly referred to now as "dalits." The constitution also recognizes another oppressed group, tribal peoples living in remote areas, defined as the "Scheduled Tribes." The injustices of the caste system, however, extended beyond the Scheduled Castes and Scheduled Tribes. A large portion of the population sometimes termed "Shudras," although not traditionally treated as untouchables, occupied the lowest rung of the caste ladder and were relegated to menial labor serving the higher castes.

The constitution, adopted in 1950, specifically abolished "untouchability" (Article 17), guaranteed equality and equal protection under the law (Article 14), and also prohibited discrimination on the basis of "religion, race, caste, sex, descent, place of birth, [or] residence" (Article 15). However, unlike the U.S. Constitution, these general guarantees of equality were followed by another Article, Article 16, which contained an explicit authorization of affirmative action in government employment: "Nothing in this article shall prevent Parliament from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which ... is not adequately represented in services under the State." The phrase "backward class" was intended to be broad enough to include at least some of the "Shudras" as well as the Scheduled Castes and Tribes.[2]

However, in 1951, less than a year after the implementation of the new Indian Constitution, the Supreme Court of India was asked to decide on a case that had a striking similarity to America's first Supreme Court case on affirmative action,

University of California v Bakke, 438 U.S. 265 (1978). Like the *Bakke* case, in the case before the Supreme Court of India, a state medical school followed a detailed and rigid quota system (based on caste and religious categories) to produce an entering class with demographics similar to that of the general population.[3] Like the U.S. Supreme Court in *Bakke*, the Supreme Court of India decided that this quota system violated the guarantee of equality. At this point, though, the parallel ends. Although five of the nine U.S. Supreme Court justices agreed in the *Bakke* case that some form of affirmative action was still permissible, no single judicial opinion was supported by all five. In the 25 years since the *Bakke* case, the Supreme Court has been unable to put together a majority of justices that agree on a consistent approach to affirmative action. The nation is coming to terms with the Supreme Court decision in two cases involving affirmative action at the University of Michigan. While the court affirmed that race can be a factor in admissions in the law school case, it provides greater clarity on how it can be a factor in the undergraduate case.

The history in India has been quite different. The Indian Parliament responded to the 1951 Supreme Court decision by using its power to amend the constitution by a two-thirds vote of each house to expand the limited "affirmative action" exception in Article 16 for government employment, adding a provision in Article 15 allowing for all government programs (including educational institutions) to make "special provision" for the advancement of "socially and educationally backward classes of citizens." The President of India appointed a commission to recommend criteria for identifying these "other backward classes" (OBCs) in 1953; however, two years later, the commission was still unable to reach a consensus. Consequently, Indian states were left to develop criteria for identifying OBCs on their own, which led to a recurrent problem: the extension of affirmative action to caste groups often appeared to be based more on their political clout in a particular state than on 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.[4] (Affirmative action for the previously defined Scheduled Castes and Scheduled Tribes was much less controversial.)

In 1979 the President appointed a new national commission, known as the Mandal Commission after its chairperson. In

1980 the Mandal Commission issued a comprehensive report and a set of recommendations for national standards concerning OBCs. Responding to the Supreme Court's concern about using objective and transparent processes, the Mandal Commission conducted a national survey based on generally recognized group categories and tested each group using a standardized set of criteria to determine "backwardness." Eleven alternately weighed, numerical factors were assigned to each group based on the survey results, and those groups scoring below a specified total were identified as OBCs. The approach used by the Mandal Commission would, thus, seem to answer, at least in part, the first criticism of affirmative action mentioned at the beginning of this article: that the selection of groups for preference is based on stereotype and politics rather than on need.

The Mandal Commission recommendations lay dormant for a decade. Then, in 1990, Prime Minister V.P. Singh announced that the government would implement the report. This decision was challenged in 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. Some of the major principles established by this decision were: (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 can not be based on economic criteria alone; and (4) because the Mandal Commission used objective, empirical criteria to create these new group categories, the distribution of government benefits based on OBC membership does not perpetuate the stigma of traditional caste categories.

The Supreme Court also added a major new eligibility criteria to the recommendations of the Mandal Commission. The Court announced that 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").[5] This creamy

layer test looks to the occupation and income of a person's parents, apparently assuming that if one's parent has achieved substantial occupational and financial success (perhaps despite suffering personal discrimination), the parent will pass on that social capital to the child, minimizing the "lingering effects" of discrimination. The creamy layer test, thus, responds to the second criticism of affirmative action, mentioned earlier, that affirmative action benefits may be monopolized by relatively well-off members of a group. Each state in India was directed to add a creamy layer test to its programs to benefit OBCs. Although there has been resistance from some state governments to the creamy layer test and continuing criticism of affirmative action in public discourse, since the 1992 Supreme Court decision each national government that has come into power has affirmed its commitment to the principles of the Court's decision.

The United States now seems to be stuck at a point comparable to that of India before the Mandal Commission began its work. Our "map" of group categories, essential to program design, appears to be based on a mixture of inadequately examined folk categories and interest-group politics. The key to the relative success[6] of the Mandal Commission approach seems to be that the criteria and procedures for deciding whether a group is sufficiently disadvantaged were announced in advance, and, then, applied on the basis of empirical research. This approach helped to assure that classification was not "the product of rough compromise struck by contending groups within the democratic process," as Supreme Court Justice Lewis Powell said in his 1978 *Bakke* opinion,[7] or, as Supreme Court Justice Sandra Day O'Connor said in the 1995 Adarand case, "simple racial politics."[8]

The U.S. government should consider following the example of India's Mandal Commission.

The U.S. federal government should consider creating a national body following the example of India's Mandal Commission, that could assemble the basic data on the lingering effects of discrimination, as well as provide the tools with which to refine that data, both geographically and in terms of different programmatic settings.

1. For an extended discussion of these topics, see Clark D. Cunningham, Glenn C. Loury & John David Skrentny, "Passing

Strict Scrutiny: Using Social Science to Design Affirmative Action Programs," 90 *Georgetown Law Journal* 835-82 (2002).

2. For a brief overview of India's approach to affirmative action, see Clark D. Cunningham, "Affirmative Action: India's Example," 4 *Civil Rights Journal* 22 (1999) and Clark D. Cunningham & N. R. Madhava Menon, "Race, Class, Caste ...? Rethinking Affirmative Action," 97 *Michigan Law Review* 1296 (1999) (both available on the Equality Web Site). The classic account is Marc Galanter, "Competing Equalities: Law and the Backward Classes in India," (Oxford Univ. Press 1984).

3. State of Madras v. Champakan Dorairajan, *All India Reports* 1951 S. Ct. 226.

4. For a concise overview of this history, see Clark D. Cunningham & N. R. Madhava Menon, "Seeking Equality in Multicultural Societies," (available on the Equality Web Site). For greater detail, see Sunita Parikh, "The Politics of Preference: Democratic Institutions and Affirmative Action in the United States and India," (Univ. of Michigan Press 1997).

5. Indra Sawhney v. Union of India, 1993 *All India Reports* (S.Ct.) 477, 501, 505-7 (Opinion of Justice B.P. Jeevan Reddy)

6. Many intellectuals in India have been critical of the Mandal Commission's report and have characterized its methodology as outdated and simplistic. See, for example, the comments of the distinguished Indian sociologist, M. N. Srinivas, at the Rethinking Equality in the Global Society Conference, 75 *Washington University Law Quarterly* 1561, 1657-60 (1997) (available on the Equality Web Site).

7. *Bakke*, 438 U.S. at 299.

8. *Adarand Constructors v. Pena*, 515 U.S. 200, 226.