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RACE, CLASS, CASTE . . . ? RETHINKING AFFIRMATIVE ACTION¹

Clark D. Cunningham*
and N.R. Madhava Menon**

Many who oppose affirmative action programs in the United States because they use “racial” categories such as black, African American, or Latino, claim that equally effective and more equitable programs can be developed using only class categories, such as “low income.”² A key test case for the “race v. class” debate is admission to law schools, made urgent by recent legal prohibitions on the use of “race” in the admission procedures to state universities in California, Washington, and Texas.³ An empirical study by Linda Wightman, the former director of research for the Law School Admissions Council (LSAC), has shown that had a “race-blind” admissions process — based solely on undergraduate grade point average (GPA) and scores on the national Law School Admissions Test (LSAT) administered by the LSAC — been applied to the group of persons entering law school in 1991, ninety

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** Member, Law Commission, Government of India. B.Sc. 1953, B.L. (Law) 1955, Kerala; M.A. 1960, Punjab; LL.M. 1962, Aligarh Muslim; Ph.D. 1968, Aligarh Muslim — Ed. This analysis is based on a longer paper written by Cunningham and Menon while Menon was dean of the National Law School of India and does not necessarily reflect positions of the Government of India.

1. This analysis and a response by Cass R. Sunstein, which appears at 97 *MICH. L. REV.* 1311 (1999), were the subject of a public panel discussion on September 9, 1998, at Washington University led by Professors Cunningham and Sunstein with comments by four other Washington University faculty — Barbara Flagg (law), Pauline Kim (law), Sunita Parikh (political science), and Robert Pollak (economics and business) — and subsequently on January 14, 1999, of a faculty workshop sponsored by the Department of Government, Dartmouth College. The authors thank the commentators and participants at those sessions for their suggestions on the draft.

2. For a good summary and critique of the “class-based” alternative approach to affirmative action, see Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 *TEXAS L. REV.* 1847 (1996).

3. The debate over law school admissions runs the risk of greatly oversimplifying the variety of justifications for affirmative action. For example, it focuses more on the need of an excluded group for access to a scarce resource than on the value to the larger society of inclusion of many groups regardless of need; it also assumes that racist decisionmaking is no longer a threat, surely a dangerous assumption in other contexts such as employment and contracting. We use the law school admission problem only as an illustration, fully aware that a nonracial approach that helps resolve that problem may not adequately address other contexts where race-based affirmative action is now found.

percent of those self-identified as "black" would not have been admitted to any law school in the United States.⁴ Adding a preference based on socioeconomic factors to the GPA/LSAT criteria would not have significantly increased the number of African Americans because among applicants with similar socioeconomic backgrounds, those self-identified as "white" significantly outperformed African Americans on the LSAT.⁵ One response to such evidence as presented by Wightman's study is simply to argue for the restoration of traditional racial categories to admission criteria. Another response, though, is to seek a new category to be used to modify the GPA/LSAT criteria, a category that might correlate lower performance on standardized testing with current social structures more precisely than socioeconomic "class," yet would be sufficiently distinguishable from the increasingly forbidden classification of "race." Such a category should be both theoretically coherent and empirically grounded. Proposals appearing in recent legal scholarship to reinterpret the Fourteenth Amendment in terms of an "anticaste" or "anti-pariah" principle appear to be one attempt to develop such an alternative criteria: caste.

The use of "caste" in Fourteenth Amendment jurisprudence has, of course, a long tradition, with origins in the Reconstruction Congressional debates on the Amendment,⁶ and most famously in

4. Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 50-51 (1997). Wightman's analysis is supported by the actual experience at the Texas Law School and the University of California Law School in Berkeley after these schools were prohibited from using race as an admission criteria: the number of African-American students admitted to the Texas Law School dropped from 65 in 1996 to 11 in 1997. Telephone Interview with M. Michael Sharlot, Dean, University of Texas Law School (Mar. 9, 1999). At Berkeley, the number of African-American students admitted went from 75 in 1996 to 14 in 1997. See *Affirmative Action Loses Ground*, ST. LOUIS POST DISPATCH, July 8, 1997, at B6. It is important to note that Wightman's study also indicates that 78% of those black students admitted to law school in 1991 who would have been excluded by using GPA/LSAT criteria did in fact graduate, and 73% of those black graduates (who would have been excluded) did pass a bar examination. See Wightman, *supra*, at 36-38. The 73% bar passage rate is a projection based on data available to Wightman. See *id.* at 37.

5. The mean LSAT score for black students was consistently seven to nine points lower than white students of the same socioeconomic class for each of the four socioeconomic classifications used. See Wightman, *supra* note 4, at 44. Indeed, the group of black law students classified as "Upper Class" (both parents had graduate or professional training and held professional jobs) had a mean LSAT score about six points lower than white law students in the lowest classification, "Lower-Middle" (neither parent college-educated and both engaged in blue collar work). See *id.* at 41-44.

6. See Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2435 (1994) ("[T]he purpose of the Fourteenth Amendment was to . . . '[do] away with the injustice of subjecting one caste of persons to a code not applicable to another.'" (second alteration in original) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (statement of Sen. Howard))).

Justice Harlan's dissent to *Plessy v. Ferguson*.⁷ Indeed, according to one recent law review article, the word "caste" appears in thirty-six Supreme Court cases.⁸ However, both the venerable and recent references to "caste" fail to make explicit which features of American society are thought to be analogous to the generally recognized referent of "caste" — the traditional social structure of India — an omission which particularly represents missed opportunity, given that India has a much longer legal history of affirmative action jurisprudence than does the United States. Characterizing the use of "caste" in American jurisprudence as "at best an effective hyperbole" for "forms of unjust social hierarchy" rather than a serious comparison with "true" caste societies, Jack Balkin has recently suggested that "caste" either be "jettison[ed]" or "serious[ly] reapprais[ed]" as an explanatory category.⁹

We urge reappraisal rather than abandonment of the caste analogy: a reappraisal that would prompt American legal scholars to begin a long overdue look beyond their own borders for fresh ideas on the affirmative action debate.¹⁰

CASS SUNSTEIN'S ANTICASTE PRINCIPLE

To illustrate, we will focus on one of the most influential and extensively reasoned of these recent law review articles, *The Anticaste Principle*, by Cass Sunstein.¹¹ He proposes that the

7. The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. *There is no caste here.* Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.

Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (emphasis added).

8. See Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENTARY 257, 270 n.59 (1996).

9. J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2358 (1997).

10. An important first step in this expansion of perspectives took place on November 8-10, 1997, when Washington University hosted an international conference, *Rethinking Equality in the Global Society*, that brought together leading legal scholars, social scientists, and policy makers from the United States, India, and South Africa, including Justice Jeevan Reddy, author of the majority opinion in the most important Indian Supreme Court case on affirmative action, *Indra Sawhney v. Union of India*, A.I.R. 1993 S.C. 477 (India), and Professor M.N. Srinivas, a distinguished Indian sociologist and the leading expert in the world on the caste system. See Conference, *Rethinking Equality in the Global Society*, 75 WASH. U. L.Q. 1561 (1997) [hereinafter *Rethinking Equality Conference*] (providing transcripts of the plenary and panel sessions on the final day of the conference); *Rethinking Equality in the Global Society* (visited Feb. 18, 1999) <<http://ls.wustl.edu/Conferences/Equality>> (publishing conference papers by Cunningham & Menon, Reddy, and Govender (a South African scholar), information about the participants, a bibliography, and related materials).

11. Sunstein, *supra* note 6.

Fourteenth Amendment be reconceived, both as to original intent and current application, in terms of what he calls “the anticaste principle.” This principle, as he defines it, would require that “social and legal structures should not turn differences that are both highly visible and irrelevant from the moral point of view into systematic social disadvantages.”¹² In contrast to the dominant “anti-discrimination” interpretation of the Fourteenth Amendment, the anticaste principle does not treat affirmative action as a limited exception to the constitutional guarantee of equality, but rather as a logical, perhaps necessary, method of correcting the effects of caste, which interfere with equality.

Sunstein seems to have several objectives in proposing this approach. First, he is seeking a theoretically coherent and morally appealing justification for affirmative action. Second, he wants to offer a principled and empirically grounded basis for deciding which groups should receive the benefits of affirmative action. Third, he wants to shift greater responsibility and authority for implementing the Fourteenth Amendment from the judiciary to the legislature and executive.

Sunstein seems to believe that reconceiving the Fourteenth Amendment in terms of eradicating caste rather than preventing discrimination would change the affirmative action debate in two fundamental ways. First, if, as Sunstein asserts, “the Fourteenth Amendment to the Constitution was [and should be] understood as an effort to eliminate racial caste — emphatically not as a ban on distinctions on the basis of race,”¹³ the range of persons who can make Fourteenth Amendment claims would be drastically reduced from the entire population (all of whom have a “race”) to those who are members of a low caste. Thus “reverse discrimination” claims by whites affected by affirmative action would disappear.¹⁴ Second, it would not be necessary to prove discrimination — either contemporaneous discrimination against an individual plaintiff or historical discrimination against that person’s group — since the purpose of the Fourteenth Amendment would not be to prevent or remedy discrimination but rather to alter “systemic social disadvantage.”

12. *Id.* at 2429 (emphasis omitted).

13. *Id.* at 2439.

14. *See id.* at 2452 (“On the account I have offered, there is no constitutional objection to genuinely remedial race- and sex-conscious policies, at least as a general rule. If a basic goal is opposition to caste, affirmative action policies are ordinarily permissible.” (footnote omitted)).

One recurring criticism of affirmative action programs points to the absence of “any neutral decisionmaking mechanisms” for deciding which groups deserve special treatment and describes the result as “a crude political struggle between groups seeking favored status.”¹⁵ In response to such criticism, Sunstein offers two criteria for selecting groups: (1) a highly visible, morally irrelevant characteristic; and (2) systemic social disadvantage.

It is not entirely clear why Sunstein insists under his principle that a necessary feature of a low-caste group is a “highly visible” characteristic. Part of his rationale appears to be a theory that low-caste status is created in part by market forces that “rationally” use race and gender as “cheap proxies” for costly but more accurate methods of acquiring information about morally relevant individual traits, such as educational attainment or work ethic.¹⁶ A second, related rationale is that a “highly visible” characteristic “will probably trigger reactions from others in a wide variety of spheres,” thus causing social disadvantage to be “systemic.”¹⁷ Common to both rationales is the assumption that the primary disadvantage of being a member of a low caste derives from the psychological attitudes, and consequent behavior, of a person’s contemporaries who have power over various aspects of life (for example, prospective employers, teachers, police officers). Sunstein emphasizes the behavior of a person’s “contemporaries” because a history of discrimination against a group is not a necessary criterion for low-caste status under his analysis;¹⁸ rather, he assumes that high visibility of group status is necessary and sufficient to cause caste effects.¹⁹

Sunstein’s second criterion is systematic social disadvantage: “[T]he inquiry into caste has a large empirical dimension . . . focus[ing] on whether one group is systematically below others along

15. Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1321 (1986). Writing for herself and three other justices in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), Justice O’Connor stated that one reason that race-based affirmative action required strict scrutiny was the risk of “simple racial politics,” 488 U.S. at 493, noting that a majority of the city council that adopted a plan favoring African-American contractors were themselves African American. See 488 U.S. at 495.

16. See Sunstein, *supra* note 6, at 2416, 2430-31.

17. *Id.* at 2432-33.

18. See *id.* at 2433. Sunstein does add that a history of discrimination is “highly probable” for low-caste groups. See *id.*

19. See *id.* at 2432 (“When the group characteristic is not highly visible, we cannot have a caste system as I understand here”); *id.* at 2431 (“The [caste] system can operate largely because of the high visibility of the group characteristic.”). Sunstein does also state that “[f]or some purposes . . . it might make sense to speak as well of characteristics that, while not highly visible, are easily verified.” *Id.* at 2432. But he goes on to say that “the argument I am making works best when the morally irrelevant characteristic is highly visible.” *Id.*

important dimensions of social welfare.”²⁰ For Sunstein the key dimensions are income level, rate of employment, level of education, longevity, crime victimization, and ratio of elected political representatives to percentage of population.²¹

Sunstein would apply his anticaste principle to extend affirmative action from African Americans, the original “low caste” that concerned the framers of the Fourteenth Amendment, to women, Jews, Asian Americans, and homosexuals would be excluded because the latter three groups do not place low on his scale of socioeconomic indicators and thus do not meet the systemic social disadvantage criteria.²² His principle would also exclude homosexuals and the poor on the separate ground that these groups are not visually identifiable.²³

The Fourteenth Amendment by its terms looks to the legislature to implement the guarantee of equality. Sunstein links the shift from the original anticaste principle to the current antidiscrimination interpretation of the Fourteenth Amendment — “one of the great untold stories of American constitutional history”²⁴ — to a twentieth-century transfer of responsibility and authority from Congress to the courts. As courts assumed a primary role, they recast the guarantee of equality in terms of the antidiscrimination principle — persons similarly situated must be treated similarly — which was more hospitable to judicial thinking and amenable to judicial processes. In contrast, Sunstein asserts, the “judiciary simply lacks the necessary tools to implement the anticaste principle . . . [which], if taken seriously, calls for significant restructuring of social practices. For this reason legislative and administrative bodies, with their superior democratic pedigree and fact-finding capacities, can better implement the principle”²⁵

20. *Id.* at 2444.

21. *See id.* at 2429, 2444-49 (citing data comparing African Americans to whites and women to men).

22. *See id.* at 2443-44.

23. *See id.* at 2433 & n.74 (excluding homosexuals); *id.* at 2438 (excluding the poor). Farber and Sherry’s “pariah principle,” although also based on an analogy to the Indian caste system, differs from Sunstein’s anticaste principle by protecting homosexuals, because they are — like India’s “untouchables” — treated as extreme social outcasts; socioeconomic condition and visually identifiable group status are not relevant to their use of the caste analogy. *See* Farber & Sherry, *supra* note 8, at 272-73.

24. Sunstein, *supra* note 6, at 2440.

25. *Id.*

RACE, CLASS OR CASTE: LOOKING AT THE INDIAN EXPERIENCE

Although Sunstein includes a qualifier that his use of “caste” differs in some degree from the features of what he calls “genuine caste systems” such as India, he does assume that his theory conforms to the basic features of India’s caste system. Indeed he counts on the aptness of the analogy to provide both coherence and moral force to his thesis: “[T]he similarities between true caste systems and existing American inequalities are what make our current practices a reason for collective concern.”²⁶ We agree that the analogy is apt and powerful, and the general framework of his analysis tracks the Indian experience well. However, there are also striking contrasts between the way Sunstein imagines his anticaste principle would be implemented and the reality of India’s fifty years of constitutional jurisprudence. The contrasts do not detract from the value of the caste analogy; but they should, we think, prompt further and perhaps even more fundamental rethinking of the American approach to affirmative action.

The persistent metaphoric use of “caste” seems to arise out of a need for several kinds of semantic resources. First, the term is more general than “race” and is felt to be a coherent category that includes otherwise seemingly disparate groups claiming need for affirmative action. Second, it connects disadvantage to social structure rather than simply cognitive bias or hostility. Third, it gives defenders of affirmative action a rhetorical moral imperative that counteracts the force of the “colorblind” position.²⁷ Perhaps “caste” mobilizes these resources precisely because its use connects the American dilemma in deep ways to a phenomenon that is truly global. If so, points of similarity and contrast between societies like the United States and India may *both* be highly salient.

One difference is that Sunstein’s anticaste principle seems to focus only on the disadvantages created by a caste system. The historic caste system in India was truly systemic: everyone had a place within it. As a result, the caste system not only drastically exploited and disadvantaged certain groups, such as the erstwhile untouchables; it also concentrated advantage in other groups, such as the Brahmins. *Both* suffering and success were largely attributable to where one was born into the social hierarchy rather than individual effort and virtue. Thus, India’s approach to affirmative action has a

26. *Id.* at 2429.

27. Being against “caste” rather than “color-conscious” seems a move similar to being “pro-choice” as an alternative to being “anti-life” in the abortion debate.

more complex origin than the comparable civil rights movement in the United States.²⁸ Two different efforts converged in the early twentieth century to change the caste system, one starting at the bottom (the “backward classes” movement), and another more mass-based initiative attacking the top (the anti-Brahmin movement). When the drafters of India’s constitution met in 1948, they were confronted not only with demands to alleviate the suffering of a pitiful minority, but also to reduce the power of a privileged elite and redistribute the benefits they had monopolized (particularly seats in higher education and positions in government employment) to a larger segment of the population — “turning the caste system on its head.” The drafters worked out a complex compromise, further developed by the courts, that has served to regulate this slow-motion social revolution by insisting that reservation programs be developed through a transparent, rationalized process to avoid a political spoils system and imposing limits that leave open some avenues for advancement based on merit.²⁹ In contrast, Sunstein does not seem to contemplate that his anticaste principle would have significant long-term redistributive effects: “The anticaste principle seems to have greatest appeal in discrete contexts . . . in which there will be no major threat to a market economy; and in which the costs of implementation are most unlikely to be terribly high.”³⁰

In addition to contemplating more limited reform, Sunstein’s anticaste principle makes basic assumptions about caste in the United States that differ in two crucial respects from the caste system in India. First, the Indian caste system operates without “highly visible” physiological characteristics; a high-caste Indian might be physically very similar to a low-caste Indian. Second, Sunstein describes a caste system as using social and legal structures to turn highly visible differences “into systematic social disadvantages,”³¹ yet in India causation worked in the other direction. Social and legal structures *began* with systemic social disadvantage

28. The leading study of the development of India’s affirmative action jurisprudence by an American legal scholar is MARC GALANTER, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA* (1984). Another excellent book, by an American political scientist, that also covers important events after Galanter’s work was published, is SUNITA PARIKH, *THE POLITICS OF PREFERENCE: DEMOCRATIC INSTITUTIONS AND AFFIRMATIVE ACTION IN THE UNITED STATES AND INDIA* (1997). A collection of essays by leading Indian intellectuals, including several critiques of the current system of affirmative action in India, can be found in *CASTE: ITS TWENTIETH CENTURY AVATAR* (M.N. Srinivas ed., 1996).

29. See Clark D. Cunningham & N.R. Madhava Menon, *Seeking Equality in Multicultural Societies* (visited Mar. 18, 1999) <<http://ls.wustl.edu/Conferences/Equality/art-23index.html>>.

30. Sunstein, *supra* note 6, at 2438.

31. *Id.* at 2429 (emphasis omitted); see also *id.* at 2430 (“the highly visible but morally irrelevant characteristic that gives rise to lower-caste status”) (emphasis added); *id.* at 2433

and then *created* stigmatic differences (distinctive garb, segregation, and practices of physical avoidance) to mark the disadvantage.³²

Perhaps because caste in India is so clearly a social construction — in contrast to continuing folk beliefs in the United States that “race” is an immutable and obvious physical condition — Indian jurisprudence has advanced well beyond American law in constructing and justifying affirmative action in terms of underlying social features as disclosed by empirical research. Instead of relying on folk categories, Indian law has created a set of artificial legal categories: Scheduled Castes (“SCs”), the referent of which are the formerly untouchable castes; Scheduled Tribes (“STs”), referring to isolated hill groups with aboriginal cultural features; and the “other backward classes” (“OBCs”), the most interesting and controversial category. The OBC category extends the principle of affirmative action in education and government employment from the paradigmatic case of the untouchables to “socially and educationally backward classes of citizens.” Considered in light of the current American “all or nothing” debate over whether race or class should be the basis for affirmative action, the Indian approach is particularly thought-provoking: both traditional low-caste status and economic class are factors in determining whether a group is categorized as an OBC, but neither by itself is considered sufficient. The definition of OBC, found in the constitutional text, refers to “social and economic” backwardness rather than economic status; the deliberate use of the term “classes” rather than “castes” has been interpreted by the Indian Supreme Court to refer to general social groupings rather than economic classes. Indeed, experiments several decades ago in India which relied entirely on economic status had results similar to those predicted by American opponents of the “class” approach: lower income members of more privileged communities took virtually all the reservations.

Sunstein’s proposal and the Indian approach have in common the use of such empirical data as income and educational attainment. India has boldly explored “the path not taken” in *Bakke*, identifying more than 3,500 distinct social groups as needing preferential treatment and reserving up to fifty percent of all new central government jobs for members of these groups. Similar quotas exist for higher education, including exclusive medical and engineering schools. This system has been fifty years in the making, going back

(“Under the principle I am describing, a history of discrimination is not a necessary condition for status as a lower caste, though in practice such a history is highly probable.”)

32. See Cunningham & Menon, *supra* note 29.

to explicit provisions in India's constitutional guarantees of equality that authorize the government to make "special provision" for "socially and educationally backward classes." In the first three decades, selection of groups to receive preferential treatment was left largely to state governments, with the result that the Indian Supreme Court repeatedly struck down plans that seemed primarily to benefit politically powerful groups or that were based on traditional assumptions about caste-based prejudice without empirical research to show which groups were truly in greatest need. Then, in 1980, the President of India appointed a commission (the Mandal Commission), which conducted a nationwide survey that used a variety of empirical factors — including social discrimination, educational deprivation and economic status — to define groups in need, producing the list of 3,500 "backward classes."³³

Where Sunstein's theory and Indian reality part company is over the basic unit of group definition, which of course must be determined before relative socioeconomic status can be evaluated. Consistent with the core meaning of caste as descent group, in India the unit that is tested for potential OBC status is a group that practices extensive endogamy, restricting marriage to other group members. Castes are paradigmatic but not exclusive examples of such groups. Endogamy not only provides clear group boundaries but also plays a major role in the intergenerational transmission of inequality. In contrast, Sunstein's two groups — African Americans and women — are each constituted in utterly different ways, and for women, group status has no intergenerational effects: they are born to rich and poor alike.

Sunstein does not address whether the two groups he identifies might have differential needs for affirmative action, a sticky question so far largely avoided in American affirmative action jurisprudence.³⁴ India, though, has tackled this issue in a variety of ways. The Scheduled Castes and Scheduled Tribes, considered the most disadvantaged in every respect, each have their own separate quotas that are generally proportional to their share of the population

33. See Cunningham & Menon, *supra* note 29.

34. *But see* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 506 (1989) (criticizing the "random inclusion" of Aleut, Eskimo, and Oriental categories in municipal affirmative action plan); Hopwood v. Texas, 78 F.3d 932, 962-66 (5th Cir. 1996) (Wiener, J., concurring) (holding law school admission program to violate Equal Protection Clause because it was not narrowly tailored: it ignored non-Mexican Hispanic Americans, Asian Americans, and Native Americans); Adarand Constructors, Inc. v. Peña, 965 F. Supp. 1556, 1580 (D. Colo. 1997) (finding federal affirmative action program for awarding government contracts not narrowly tailored because it included such groups as Aleuts, Samoans, and Bhutans, without evidence that they needed preferential treatment).

at the state level; they do not have to compete for these reserved seats against the more populous and frequently more affluent and influential OBCs. The OBCs often receive a reservation smaller than their population share because in many states the sum of the SC, ST, and OBC population exceeds fifty percent; the Supreme Court has capped total reservations at fifty percent, which means that the OBCs receive only what is left of the fifty percent available for reservation after the SC and ST quotas have been set aside.³⁵ Some states have begun replicating the SC/OBC dichotomy by creating two categories of OBCs: more and less backward.

In 1992, the Indian Supreme Court created a further level of differentiation within beneficiary groups by imposing a means test for individual eligibility.³⁶ This “creamy layer” approach addresses two different but related concerns: (1) that the benefits of reservations are not distributed evenly throughout a backward group but instead are monopolized by persons at the socioeconomic top of the group; and (2) that reservations are going to persons who do not in fact need them because they have been raised in privileged circumstances due to parental success in overcoming the disadvantaged status of the backward group.³⁷ In contrast, Sunstein seems to assume that evidence of low socioeconomic status of a person’s ascribed group (an ascription apparently based only on the individual’s physical appearance, the “highly visible characteristic”) is sufficient to demonstrate that person’s own disadvantage, an assumption that underlies most American affirmative action programs.³⁸

As to the role of the different branches of government, the Indian approach is consistent with Sunstein’s anticaste principle: the legislative and executive branches in India have the power and responsibility to initiate affirmative action schemes, and, at their best, do utilize their greater factfinding abilities and more flexible procedures to this end. But the vote bloc potential of affirmative action programming³⁹ has led to abuse and public distrust. As a

35. See *Rethinking Equality Conference*, *supra* note 10, at 1598-99 (panel presentation by Justice B.P. Jeevan Reddy); B.P. Jeevan Reddy, *Equality and Social Justice: Rethinking Equality in the Global Society* (visited Feb. 19, 1999) <<http://ls.wustl.edu/Conferences/Equality/reddy3.html>>.

36. See *Indra Sawhney v. Union of India*, A.I.R. 1993 S.C. 477 (India).

37. See *Cunningham & Menon*, *supra* note 29; *Rethinking Equality Conference*, *supra* note 10, 1597-98 (panel presentation by Justice B.P. Jeevan Reddy).

38. See *Adarand*, 965 F. Supp. at 1580 (criticizing federal affirmative action programs for contracting as overinclusive because they presume “that all those in the named minority groups are economically . . . disadvantaged”).

39. See *PARIKH*, *supra* note 28, at 169-92.

result, the judiciary in India has played a more active role than Sunstein contemplates under his anticaste principle, both in imposing objective and transparent procedures for program design and also in actual policymaking, particularly by striking balances among the competing interests articulated in the constitutional text.⁴⁰ The Indian Supreme Court has also bolstered the legitimacy of political decisions. In 1990, proposed executive action to expand reservations led to widespread protest and urban unrest; yet when the Supreme Court two years later approved most of the proposed changes, public acceptance was equally widespread.⁴¹

CONCLUSION

The Indian “anticaste principle” incorporates, rather than supplants, a general antidiscrimination principle. Like the “colorblind Constitution,” Indian equality jurisprudence aspires to secure a society free of all distinctions based on caste; but at the same time, it permits as a necessary means to that end caste-based remedial programs — but only when those programs are carefully designed, limited, and self-liquidating over time. Anticaste and antidiscrimination principles are integrated into a single jurisprudence in which both equality and discrimination have more complex meanings than in American legal discourse. Substantive and not merely formal equality is guaranteed, and discrimination can be “positive” and “compensatory.”⁴²

The Indian perspective is that the basic philosophy of affirmative action is nothing but the rationale of a just and fair social order. Affirmative action is not an exception to equality of treatment, but a method of providing it, by enabling all individuals to perform according to their potentials.

40. For example, both the 50% cap on total reservations and the creamy layer test were imposed by the Indian Supreme Court without explicit support in the constitutional text. See Cunningham & Menon, *supra* note 29.

41. The fact that the Supreme Court opened its processes to many interested parties and conducted very many public hearings over a span of months may have contributed to this result. See *id.* However, there continues to be strong criticism of the Mandal Commission Report and the Supreme Court's decision in the *Sawhney* case from Indian intellectuals. See, e.g., *Rethinking Equality Conference, supra* note 10, at 1657-60 (panel presentation by M.N. Srinivas).

42. Constitutional discourse in the new South Africa, based in part on India's example, differentiates between “fair” and “unfair” discrimination in permitting various kinds of affirmative action. See *Rethinking Equality Conference, supra* note 10, at 1624-28 (panel presentation by Karthigasen Govender); *id.* at 1675 (closing speech by Clark D. Cunningham); Karthigasen Govender, *Equality — The South African Perspective* (visited Feb. 19, 1999) <<http://ls.wustl.edu/Conferences/Equality/Gov-art4.html>>.

There is enough empirical evidence in both India and the United States to suggest that some sections of society suffer from social, economic, and cultural disabilities — through no fault of their own — that deny them equal access to scarce resources. Therefore, we suggest that government focus primary attention on designing and implementing affirmative action programs, identifying beneficiaries, and evaluating the permissible limits of preferential standards. The Indian experience with affirmative action, particularly in the recent past, certainly reveals many pitfalls that attend different program designs, schemes of certification of beneficiaries, and methods of adjudging compatibility of programs with constitutional guarantees of equality of opportunity.

India's most difficult problem has been identifying the beneficiaries for affirmative action programs. The initial effort was structured in terms of caste: the Central Government in India identified the Scheduled Castes and Tribes, and the Constitution itself provided the methodology of identification. In the case of the SCs and STs, a problem arose when it was discovered that (1) the benefits were being appropriated by the relatively better-offs among Scheduled Castes, and (2) the beneficiaries could not reach higher levels of education and employment, despite the reservation, because of systemic factors for which reservation alone was not the best solution. A more intractable problem arose when the government sought to extend the reservation to "other backward classes" for which the Constitution had only provided enabling provisions but not a mechanism for identification. The quick and ready methods of identification adopted by political leaders in different states were shot down by the courts on the ground of unfair discrimination. The courts interpreted the "reasonable classification test" of the equality guarantee to require two criteria: (1) that the purpose of the classification be clear and legitimate, and (2) that there be a sufficient link between the classification criteria used and the governmental objectives.

There are two dangers against which affirmative action should be guarded if it is to survive challenges. First, it must be self-liquidating — and seen to be so — in order to redeem itself from the compulsions of electoral politics inevitable in democratic socie-

ties.⁴³ Second, we must reassess existing strategies in light of better knowledge of social reality now available from the social sciences.⁴⁴

What would an American affirmative action plan for law school admissions look like if it made use of caste-like categories? The likely effect would be to reduce the absolute number of persons eligible for affirmative action in comparison to conventional race-based plans, even if the number of identified groups was expanded somewhat beyond the four commonly listed: black, Hispanic, Native American and Asian.⁴⁵ (However, we certainly would not expect that, like India, a list of 3,500 distinct groups would be generated!) The Indian approach has been to create artificial groups, identified by abbreviated functional titles (such as OBC), that use intersecting cultural, social and economic factors to narrow, not expand, the number of potentially eligible persons. The first limiting principle is that a person must be a member of a group distinguished by endogamy. A group that intermarries freely with other groups, although identifiable in other ways, would not be eligible.⁴⁶ The second limitation would be that the endogamous group be significantly below average levels of educational attainment, such as the percentage of members graduating from high school. The third factor would consist of a mix of socioeconomic factors indicative of continuing effects of past discrimination.⁴⁷ It is likely that such heterogeneous categories as "Asian" and "Hispanic" would break into much more discrete units, some of which would present more compelling cases for affirmative action than others; such a process might even take place within the group now called African-American, which, at least to the eyes of an anthropologist, might also be

43. Affirmative action has a tendency to perpetuate itself, reinforcing the divisions in society that it is meant to liquidate.

44. For example, Claude Steele, Joshua Aronson, and other psychologists have documented a "stereotype threat effect" that depresses performance by academically skilled African Americans on standardized tests like the LSAT. Their research shows that African-American test performance can be equalized with comparable white test takers simply by altering the testing instructions so as to remove the stereotype threat. See Joshua Aronson et al., *Stereotype Threat and the Academic Underperformance of Minorities and Women*, in *PREJUDICE: THE TARGET'S PERSPECTIVE* 83, 88-90 (Janet K. Swim & Charles Stangor eds., 1998); Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 *AM. PSYCHOLOGIST* 613, 619-21 (1997).

45. See, e.g., *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 205 (1995).

46. Endogamy is a cultural practice which (1) is likely to be found in groups that suffered from de jure segregation, (2) is a reliable indicator of continuing de facto segregation, (3) but is not limited to racial categories, and (4) is likely to reflect the group's own understanding of its boundaries (both as to extent and permeability).

47. In Cunningham & Menon, *supra* note 29, we coin the acronym EDISEG to describe such groups (Educationally Deprived, Involuntarily Segregated, Endogamous Groups).

quite heterogenous.⁴⁸ An interesting approach might be to work backwards from the bottom twenty-five percent of LSAT takers, looking inductively for clusters of factors that correlate strongly with low test performance. Such research at the moment would be seriously limited by the current practice of collecting demographic data in terms of the five large "racial" categories. This approach results in such gross generalizations as "Asians do well on the LSAT and therefore do not need affirmative action." If more precise units, defined by endogamy were used, much smaller groups within the vague category "Asian" might appear with intersecting features comparable to current statistics assigned to African Americans, for example. The resulting set of categories might well produce a system more subtle and more just than simple, and mutually exclusive, reliance on either "race" or "class."

48. For one such anthropological analysis, see VIRGINIA R. DOMINGUEZ, *WHITE BY DEFINITION: SOCIAL CLASSIFICATIONS IN CREOLE LOUISIANA* (1986). Economist Glenn C. Loury has argued that affirmative action is not needed by all African Americans, but instead should be focused on a distinct group whose members share the following characteristics: (1) slave descendants, (2) originally rural and Southern, (3) but now emigrated to northern cities, (4) where they are now "locked in ghettos." See Glenn C. Loury, *The Hard Questions: Double Talk*, *NEW REPUBLIC*, Aug. 25, 1997, at 23. He uses the term "caste" in describing this group. See *id.*