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AFFIRMATIVE ACTION, CASTE, AND CULTURAL COMPARISONS

Cass R. Sunstein*

What is permitted, and what is prohibited, by the equality principle of a liberal democracy? Does affirmative action run afoul of that principle? And where should we look to answer these questions?

Many critics of affirmative action take it as axiomatic that affirmative action violates the equality principle. But this is far from clear. Every law classifies. The current law of equality itself classifies by, for example, treating discrimination on the basis of race differently from discrimination on the basis of age. No one thinks that the law of equality is, for this reason, inconsistent with the Equal Protection Clause. No one thinks that constitutional doctrine gives a “special preference” to race discrimination. Whether affirmative action violates the equality principle depends on the content of that principle.

There is good reason to think that the best understanding of the equality principle of the United States Constitution has a great deal to do with a prohibition on second-class citizenship, or “caste.”¹ An anticaste principle can claim considerable support from the theory and the practice of those who defend the Fourteenth Amendment. Such a principle also fits well — far from perfectly, but well — with the general fabric and thrust of constitutional doctrine. As a matter of political theory, the anticaste principle also has considerable appeal, connected as it is with some of the defining ideals of liberal democracy, which is designed to ensure that morally irrelevant characteristics are not turned into a systematic basis for social disadvantage.² The anticaste principle seems to serve as a promising basis for both organizing and reformulating many aspects of the law of equal protection.

Of course the implications of the anticaste principle must be specified, and here reasonable people can differ. I have urged, for

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1. The point is argued in Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994).

2. See JOHN RAWLS, A THEORY OF JUSTICE 108-10 (1971).

example, that the principle forbids government from turning morally irrelevant and highly visible characteristics into a basis for systemic social disadvantage. Whether or not that particular specification is valid, and whether or not it counts as a sufficient specification, it seems clear that the anticaste principle would raise no serious questions about affirmative action policies. The basic reason is that it is implausible to say that such policies entrench second-class citizenship. No one urges, or could urge, that such policies would make whites, or for that matter African Americans, into second-class citizens. This is not to say that affirmative action policies are a good idea. To be sure, they may have stigmatizing effects on their intended beneficiaries, and they may also increase rather than decrease racial antagonism. But these are essentially political complaints, not constitutional ones. Some people, for example, object that affirmative action programs reflect pity and condescension toward African Americans³ — an interesting objection to the meaning and consequences of such programs, not entirely disconnected from the problem of second-class citizenship. But this objection, partly empirical in nature, is best heard in legislatures rather than courtrooms.

Clark Cunningham and N.R. Madhava Menon have contributed a great deal to the debate over racial equality through their intriguing discussion of caste, and anticaste, in India. American legal debates are often remarkably parochial, and the American debate over the anticaste principle has given strikingly little attention to comparative questions. This is an especially serious omission in light of the fact that the caste system in India seems to be a primary inspiration for those complaining about caste-like features of American life. Let me emphasize a few of the valuable points that Cunningham and Menon offer. First, they suggest that the Indian caste system operates without “highly visible” characteristics. High-caste Indians might look much like low-caste Indians. Second, they suggest that in India, systemic social disadvantages began first, and only later created stigmatic differences to “mark the disadvantage.” In America, the sequence was, or seems to have been, just the opposite. Thus, in India caste is “clearly a social construction,” unlike in the United States, where it is believed that “race” is an immutable and obvious physical condition.

Third, and perhaps most interestingly, India has gone down the route not traveled by the United States, which has adhered to the

3. See SHELBY STEELE, *A DREAM DEFERRED* (1998).

view that past discrimination is sufficient justification for affirmative action. India has tackled with some sophistication the issue whether different, particular groups have different needs for affirmative action. For example, the Indian government looks to various factors indicating group status, placing importance on whether the relevant unit “practices extensive endogamy, restricting marriage to other group members.” In India, social and economic factors help undergird the judgment about the kind of compensatory measure to which members of the relevant group are entitled.

Several features of this discussion are particularly striking. Perhaps the most striking is the very different nature of Indian debates over affirmative action. While India has not avoided the high level of contentiousness that has characterized American debates, it has self-consciously gone in the direction of a highly programmatic method for redressing past social discrimination — an experiment in social engineering far beyond anything in American law. From the authors’ description, moreover, it is unclear to what extent there is a widespread perception of a pervasive conflict between merit and affirmative action, or between liberty and equality, or of affirmative action as an insidious way of providing protection to a “special interest.”

Cunningham and Menon deserve a great deal of credit for the simple feat of bringing new information to bear on the debate over affirmative action. Too often the American debate has operated in a factual vacuum — a vacuum about both international and domestic experience. Their new facts should spark fresh discussion. I would like to begin that discussion by offering three comments. The first involves the critical role of facts in constitutional law; the second involves the potential virtues of rule-free constitutional law; the third involves the uses and limits of comparative constitutionalism. The first two are inspired by what Cunningham and Menon have to say, but I do not directly engage their argument; in the third comment, I attempt to do this.

I. FACTS RATHER THAN CONCEPTS

Constitutional and political debates about equality and liberty often operate at a high level of abstraction. They raise questions, for example, about whether we are committed to equality of opportunity or instead equality of result, to individual rights or group rights, or to equality over liberty or vice-versa. Often the arguments work by choosing one concept over another, by assembling some particular practice that is said to tell, decisively, against a cer-

tain claim or alleged principle (for example, the generally accepted preferential treatment given to children of alumni), by suggesting that a certain concept necessarily means a certain thing (as in the view that equality necessarily forbids, or requires, affirmative action), or by specifying a concept with the suggestion that this, rather than that, is the best specification (perhaps because it fits better with the rest of what we believe).

These debates, though common and frequently illuminating, often seem hopelessly conceptual and interminable, stylized, a form of Kabuki theater; often no one is convinced at all, and, even worse, often no one learns anything. I think that a great deal of further progress might be made by learning more about the facts. It is very hard to know where to stand on affirmative action programs without investigating some empirical questions. What do such programs look like? How do they differ? The term "affirmative action" is extremely broad, and it covers a wide range of activities in the private and public sectors and at the national, state, and local levels. Do such programs actually stigmatize people, and if so in what sense? These are empirical questions, not (only) conceptual ones. And what are the actual differences in qualification between the programs' beneficiaries and their victims, and how much difference do these differences make? What would happen if affirmative action programs were abolished? What would happen if some alternative sort of affirmative action were adopted, such as wealth-based admissions judgments? What are the effects of affirmative action programs for their intended beneficiaries in, for example, college, medical school, and law school? Do such programs make people better off, and if so in what sense?⁴

These questions are important because when progress cannot be made on conceptual matters or on issues in high-level theory, it might instead be made by investigating facts. This is the great promise of empirical work: to enable progress and even closure when conceptual debates produce uncertainty, holy wars, or blank stares. I hypothesize, for example, that many people would be skeptical of affirmative action programs to the extent that the record shows that they involve hiring people whose qualifications are not marginally lower, but actually much lower than those of their (majority group) competitors. It also seems likely that many critics of affirmative action would be less critical if it appeared that the

4. See WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* (1998), for what seems to me to be the most valuable contribution to the affirmative action debate in the last decade.

abolition of affirmative action would mean that only a handful of African Americans would be able to attend the major law schools.

When people disagree on high principle, they can often be brought into agreement, or at least make progress, if they investigate the facts.⁵ In the context of affirmative action we need much more in the way of facts. A Supreme Court brief dealing with the consequences of a principle of colorblindness would be far more helpful than a brief quoting from past cases and pushing conceptual arguments one way rather than another. The discussion by Cunningham and Menon is very much in this spirit insofar as comparative work brings actual experience to bear on equality claims.

II. AGAINST RULES, AGAINST JUDICIAL RESOLUTIONS⁶

It is tempting to think that the Supreme Court has erred in maintaining its casuistical, rule-free, fact-specific course in the context of affirmative action. This course might well seem to represent a failure of the rule of law. But there are good reasons for the Court to have followed this path. No clear constitutional commitment forbids affirmative action programs; as a matter of text and history, the attack on such programs is remarkably weak.⁷ It is imperative that constitutional law not be used to strike down political judgments about which reasonable people differ and to which the Constitution does not clearly speak — especially in light of the absence of much factual knowledge by the judiciary of domestic or international experiences with affirmative action. My emphasis on the centrality of facts to the legal question is thus a reason for caution from the judiciary, which ought not to invoke a controversial reading of the Constitution when it is at least possible that a good understanding of the facts would lead in another direction.

At the same time, it would be wrong to celebrate the democratic character of the institutions that have adopted affirmative action programs. On the contrary, the nation has not, until recently, had much of a debate about affirmative action, and some of the relevant programs have been adopted with far too little deliberation and far too little democracy. In these circumstances, the Court has adopted, perhaps by inadvertence, an intriguing alternative to the three conventional options of validation, invalidation, and denial of certiorari. That alternative consists of rulings that draw sharp at-

5. Thus facts are a great ally, and a potential part, of incompletely specified agreements. See CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1996).

6. I borrow here from CASS R. SUNSTEIN, *ONE CASE AT A TIME* 117-36 (1999).

7. See *id.* at 125-29.

tion to underlying questions of policy and principle — which activates political debate — but that do not displace public discussion and that leave a great deal undecided. This may well be taken as a democratic approach to judicial review, one that falls in the basic category of representation-reinforcement.

I think that Cunningham and Menon fortify this basic point. They show that any simple solution to the problem may overlook the wide range of possible approaches, and their investigation of India reveals that a nation in some ways like our own has approached the issue quite differently. We need much more work of this kind in constitutional law. A judicial foreclosure of experimentation informed by international experience may well be hopelessly parochial. The point applies not only to the law of equality, but also to other areas of constitutional law; the approach to libel law, for example, may well be improved by seeing how other nations do things.

III. NOTES ON COMPARATIVE CONSTITUTIONALISM

Perhaps the most intriguing aspect of the discussion by Cunningham and Menon involves its depiction of a path not taken by the United States. Recall that India maintains a list of 3,500 “backward classes” and that empirical factors, including social discrimination, educational deprivation, and economic status, are used to determine group status. Some groups — the most disadvantaged — have their own independent quotas, generally proportional to population. Other groups also receive a reserve, but one smaller than their population share. Individual entitlements may depend on whether the relevant individuals have been raised in privileged circumstances. Thus there is a careful, elaborate, and quite refined method for determining how government policies will counteract or even dismantle the system of caste. India appears, in short, to be engaged in a process of social engineering that goes well beyond anything in American practice.

A full assessment of India’s program would require answers to two questions: (1) Does the Indian approach make sense for India? (2) Would that approach, or some variation on that approach, make sense for the United States? I cannot attempt a full assessment here, but let me venture a few puzzles and thoughts. The first question itself raises several questions.

Does this kind of close attention to caste background increase or decrease social antagonism? Timur Kuran has written of the dangers of “ethnification,” in which small shocks to a system can

create widespread consciousness of ascriptive (or other) differences, in a way that eventually causes segregation, resentment, hatred, and even violence.⁸ Is there any similar problem in India? Cunningham and Menon suggest the possibility of an affirmative answer. A great risk of race-conscious or ethnicity-conscious policies is that they can heighten attention to questions of race and ethnicity in a way that compromises social cohesion. (Of course social cohesion is not the only social goal, and may not be in good shape in the first instance.)

Does the system create, or is it perceived to create, a kind of caste spoils system? Judgments about the degree of disadvantage are hardly a purely scientific enterprise, and controversial judgments are likely to enter into any decision about who counts as sufficiently disadvantaged. There is also a natural risk here of strategic and self-interested behavior, in which groups jockey with one another for position as "most disadvantaged," with harmful consequences for society as a whole. Nor is it an unambiguous good if members of one or another group play the game of "more victimized than thou." Does this happen in India?

Does this system significantly weaken the Indian economy? Does it compromise performance-related goals, and if so to what extent? It is surely imaginable that such a system might compromise merit, rightly conceived (though of course this is a contestable ideal). From what Cunningham and Menon have said, however, there is no clear answer to this question.

The fact that India seems to have arrived at its approach through something close to agreement (if that is a fact) is extremely illuminating, but it is not by itself a sufficient reason to think that the approach is justified. It would be helpful if Cunningham and Menon would, in the future, say a bit more about the above questions. Their current discussion focuses more on describing the Indian practice than on demonstrating its success, or even on identifying the criteria by which success or failure might be measured.

What about America? Cunningham and Menon appear to believe that America should have taken the road suggested by some Justices in *Bakke*: that is, the Court should have allowed the political branches to conclude that past social discrimination is sufficient

8. See Timur Kuran, *Ethnic Norms and Their Transformation Through Reputational Cascades*, 27 J. LEGAL STUD. 623 (1998).

to justify affirmative action programs.⁹ I very much agree with this judgment: if the nation, or a state, would like to compensate for the continuing effects of past discrimination, there should be no constitutional problem so long as the program is reasonably well-tailored. The Court should have allowed the government room to maneuver in this way, and future courts should allow the democratic process to handle this sharply contested issue in any reasonable manner.¹⁰ But the further question remains: Should the political process in America attempt to do something like what India has done?

The most obvious response is that this is a genuinely academic question. There is no possibility that the United States would attempt to identify the fifty groups, let alone the 3,500 groups, which ought to qualify as backward classes. But as in India, the existence of a political consensus or obstacle cannot be decisive; perhaps the consensus or obstacle is wrong. Our own anticaste principle, reflected in our history and our practices, seems to emphasize highly visible identifying characteristics (most notably race and gender), on the theory that such characteristics present the greatest opportunities for unjustified and pervasive subordination. The anticaste idea builds narrowly from the cases of African Americans to pick up women and the handicapped (with a partial, limited inclusion of homosexuals). This limitation is not entirely without appeal. A decent society does not humiliate its members,¹¹ and humiliation is especially likely when the government discriminates against people whose characteristics are highly visible. (Of course it is not limited to those cases.)

In addition, and perhaps most importantly, it is easiest to maintain a caste society, even when market forces are quite vigorous, when the characteristics that lead to lower-caste status are highly visible. It is in such circumstances that customers and coworkers can most easily entrench existing inequality.¹² It is in such circumstances that rational discrimination may result in the use of sex and race as proxies. And it is in such circumstances that screening strat-

9. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 344 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

10. It follows that the decision of the court of appeals in *Hopwood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996), was a mistake, indeed a form of hubris; a lower court should not forbid educational institutions from proceeding in this way without a much clearer signal from the Supreme Court.

11. See the excellent discussion in AVISHAI MARGALIT, *THE DECENT SOCIETY* (Naomi Goldblum trans., 1996).

12. See GEORGE A. AKERLOF, *AN ECONOMIC THEORIST'S BOOK OF TALES* 23-44 (1984); Harry J. Holzer & Keith R. Ihlanfeldt, *Customer Discrimination and Employment Outcomes for Minority Workers*, 113 Q.J. ECON. 835 (1998).

egies may perpetuate social subordination.¹³ Market forces are especially unpromising correctives to caste-like aspects of society when a highly visible characteristic is at work in the context of systemic social disadvantages.

None of these points suggests that this limited anticaste principle, understood by reference to American understandings and experiences, is ideal, even for America. Surely the anticaste principle does not exhaust the content of the notion of equality. At a minimum, there is also a place for an antidiscrimination principle, for fair equality of opportunity (an idea that cuts very broadly), and for programs of redistribution designed to ensure that everyone lives in minimally decent conditions. These ideas overlap with the anticaste principle but are independent of it. It is even possible to think that the three ideas would do most of the good work done by the anticaste efforts in India, perhaps more successfully. Thus, for example, I might speculate that an effort to ensure fair equality of opportunity, and minimally decent conditions for all, bears something of the same relation to the Indian experience as a negative income tax bears to minimum wage legislation. A negative income tax is a far more effective and direct way of assisting the poor than a minimum wage increase.¹⁴ So too, an insistence on fair equality of opportunity and minimally decent conditions might well be a far more effective and direct way of dealing with systemic disadvantages than India's extremely complex affirmative action program.

For America, with its very different history, a large question is whether a limited anticaste principle, suitably supplemented with these other ideals, is not a better approach to the problem of inequality than an approach that would attempt compensatory measures for a wide range of socially disadvantaged groups. It is even possible to wonder whether India might not have done better to adopt a narrower anticaste principle for the most disadvantaged groups, and to attempt to promote other equality goals with other policies, including better education and job training, and minimal economic and social guarantees for all, ensuring against desperate conditions.¹⁵ But it is very hard to disentangle this normative judgment from an awareness of political and cultural understandings, which obviously diverge between India and America, perhaps espe-

13. See Bradford Cornell & Ivo Welch, *Customs, Information, and Screening Discrimination*, 104 J. POL. ECON. 542 (1996).

14. See Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405 (1997).

15. Cf. INDIAN DEVELOPMENT (Jean Drèze & Amartya Sen eds., 1997).

cially so in their different conceptions of what it means to undo a system of caste.

CONCLUSION

For constitutional purposes, the American equality principle has been an anticaste principle — one that forbids government from turning a morally irrelevant and highly visible characteristic into a systemic basis for second-class citizenship. This principle ought not to be taken to authorize federal judges to invalidate reasonable affirmative action programs. The appropriate content of such programs should be a democratic rather than a judicial responsibility; the most extreme judicial attacks on affirmative action programs are a form of hubris.

On the other hand, we know far too little to declare that our current programs are working well. There are two promising paths for the future, both of them involving facts. The first is to learn a great deal more about the operations, achievements, and failures of multiple approaches, race-conscious and otherwise, and to see which of them provides a good model for the future.¹⁶ The second is to see what might be learned from the experience of other nations. The analysis provided by Cunningham and Menon offers no unambiguous lessons for the United States, but it offers a great deal of illumination about our possibilities and prospects.

16. For an excellent model in this regard, see BOWEN & BOK, *supra* note 4.