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 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
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 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-length 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 opportunity. 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.

Parliament amended the constitution to add an explicit “affirmative action” exception to the constitutional guarantee of equality

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 Gonzalez 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 Construction 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 action program in Hardeman v. City of Dallas.
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 unconstitution,
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 pro-
gram because its use of racial cate-
gories was not "narrowly tailored." As
a result of this ruling, the State of Col-
orado changed its procedures for certi-
fying DBEs by eliminating the pre-
sumption 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
grafted him DBE status while the Fed-
eral 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 dis-
trict 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 affir-
mative 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 dra-
strict forms of segregation. (The Shudras approximately cor-
respond to the ethnic groups referred to as "Other Back-
ward Classes" in India's affirmative action programs; these
"OBCs" are described as "other" because an earlier cate-
gory of "Scheduled Castes" was created for descendants of
the untouchables.) A central principle of the Indian inde-
pendence movement, led by Mohandas ("Mahatma")
Gandhi, was abolition of caste prejudice, especially against the untouchables. This principle has been realized to a con-
siderable 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
rains 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 gov-
ernment to promote the interests of ethnic and religious groups that have been the victims of discrimination, a commit-
ment that has not disappeared despite the opposition of the privileged and numerically powerful.

Family of Brahmins. Members of the highest Hindu caste,
later 19th century. CORBIS/Allan Warren 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 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 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)
in which he or she has lived, indicating the dates and applicant’s age at the
time. Another category could be educational segregation, listing ele-
mentary, 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 Com-
mission 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 com-
bined with an economic disadvantage score based on applicant-supplied information (primarily parental income and occupation during appli-
cant’s formative ages) and the total used to decide whether DBE certifica-
tion 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 disad-
vantaged would not be presumptively excluded simply because their ethnic-
ity 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 substit-
tute for such categories since not all members of an ethnic group would be
able to present data giving rise to a sig-
ificant segregation score.

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Other useful insights can be gained by looking at India, for example from the
many critiques by Indian intellec-
tuals of the Mandal Report. Those cri-
tiques suggest some cautionary les-
sons about the use of affirmative action: the continuing pressure to
expand beneficiaries by adding cate-
gories; the risk that affirmative action will be used primarily to mobilize vot-
ing blocks; the despair and resent-
ment by members of the younger generation who feel their opportuni-

ties are restricted by their non-OBC status; the persistence and indeed
revitalization of the very social cate-
gories that the state seeks to eliminate in creating a “casteless society” due to
the value they are given by affirma-
tive action; the way debate over affirma-
tive action can distract attention from continuing acts of intentional discrimination, particularly in the pri-
vate section; and the impact on the efficiency of government when merit
in hiring and promotion is de-empha-
sized. Perhaps the most valuable les-
tones, 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.

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version of this essay with footnotes; other arti-
cles and working papers by Cunningham &
Menon and others on this subject; a bibliogra-
phy; 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 (cunning@law.wustl.edu or fax: 314-
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