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Compensatory Discrimination in India Sixty Years After Independence: A Vehicle of Progress or a Tool of Partisan Politics?

Karthik Nagarajan

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Compensatory Discrimination in India Sixty Years After Independence: A Vehicle of Progress or a Tool of Partisan Politics?

Karthik Nagarajan*

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* Washington and Lee University School of Law, J.D. Candidate 2009; London School of Economics, M.S. 2003; Georgetown University, School of Foreign Service, B.S. 2001. I would like to thank Professor Ann Massie for her insights and encouragement throughout the research and writing process. I also wish to thank Professor Timothy Lubin for his guidance.

The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

CONSTITUTION OF INDIA, 1950, art. 14

The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place or birth or any of them.

CONSTITUTION OF INDIA, 1950 art. 15

The above two excerpts from the Indian Constitution of 1950 are clear indicators that the Indian state is committed, in theory, to building an egalitarian society. However, critics have alleged that the Indian state, acting through its legislature and its judiciary, has violated the spirit of the Indian Constitution, in which the principles of equality and non-discrimination are enshrined, by establishing one of the most comprehensive affirmative action programs in the world.¹ Proponents of affirmative action have responded by accusing opponents of being "casteist"; they point to specific constitutional provisions promoting compensatory discrimination as proof that the Indian state is acting within constitutional boundaries. Affirmative action in India is referred to as "compensatory discrimination" by many academicians and is termed "reservations" or "quotas" in the mainstream Indian media. This Note will use these terms interchangeably, but will primarily use the term "compensatory discrimination."

India's compensatory discrimination system is modeled on an economic theory, pioneered by Glenn Loury, that differentiates between "human capital" and "social capital."² "Human capital" refers to an individual's characteristics that may help him succeed in the material world.³ "Social capital" refers to the benefits a person gains from being a member of a community and is characterized by access to networks and mentors, and by proximity to the power structure.⁴ The two "capitals" are related—the more access one has to social capital, the more likely one is to enjoy greater human capital.⁵

1. ARUN SHOURIE, *FALLING OVER BACKWARDS: AN ESSAY AGAINST RESERVATIONS AND AGAINST JUDICIAL POPULISM* (2006).

2. Clark D. Cunningham, *Affirmative Action: India's Example*, 4 C.R.J. 22, 23 (1999).

3. *Id.*

4. *Id.*

5. *Id.*

In India, the two "capitals" are related and determined by caste—the lower castes (formally referred to as the Other Backward Classes) and Dalits (formerly referred to as "untouchables" and formally referred to as the "Scheduled Castes") have historically enjoyed significantly less social capital than the upper castes. Thus, Indian lawmakers instituted a compensatory discrimination system the aim of which was to eliminate the adverse impact of the historical oppression and segregation of these communities.⁶ This compensatory discrimination system has resulted in preferential treatment for Scheduled Castes, Scheduled Tribes, and "Other Backward Classes" in the spheres of education and jobs in government-managed institutions.⁷

This Note will assess whether the Indian state has been successful in reducing caste-based inequalities in society or is instead perpetuating the caste system and the divisions it fosters. Specifically, the Note will focus on whether the compensatory discrimination system established for the benefit of the "Other Backward Classes" is reducing caste-based distinctions in India and leading to a more egalitarian society.

The Note begins by explaining the legal understanding of the term "caste" and provides an overview of compensatory discrimination in British-ruled India. Part I briefly examines the judicial and administrative system that was established in independent India. It then highlights the relevant constitutional provisions that the Indian Supreme Court (Court) has interpreted as allowing for compensatory discrimination. Part III analyzes the landmark cases that the Court has developed in the last sixty years on the subject of compensatory discrimination. An analysis of these cases will help the reader understand how the Court's position has evolved from opposition to compensatory discrimination to that of openness to such policies. This Part also explains how the term "class" has essentially become synonymous with "caste." The fourth Part evaluates whether the compensatory discrimination system is achieving its stated goals of achieving equality and eradicating caste-based disparities among the Indian populace or has resulted in perpetuating divisive caste-based identity politics.

This Note contends that the compensatory discrimination system for Other Backward Classes (OBCs), which has been designed by the

6. *Id.*

7. The Scheduled Castes are generally referred to as SCs, Dalits, or Harijans, and were previously known as the "untouchables." The Scheduled Tribes are referred to as STs or Adivasis, and the OBCs are normally thought to constitute non-upper caste communities who do not fall into the SC/ST category.

legislature and approved by the judiciary, is too politically tarnished to continue in its present form. The inclusion of politically powerful castes under the umbrella of "socially and educationally backward classes" (SEBC) has made a partial mockery of India's compensatory discrimination program. This abuse of the system is most noticeable at the state level and now threatens to extend to the central level. The perpetuation of the current system violates the spirit of the Constitution and furthermore deprives the most vulnerable sections of society from fully realizing the benefits of compensatory discrimination. The current system has increased caste-based distinctions in Indian society and is highly unlikely to lead to the emergence of a more egalitarian society in the foreseeable future.

I. The Meaning of "Caste" and Its Impact on Indian Society

A. What is "Caste"?

The term "caste" has long been identified with Indian society and culture. According to Laura Jenkins, a professor at the University of Cincinnati, "caste"

is a rough translation of the indigenous term *jati*, referring to countless birth groups that vary depending on context and region, or of another term, *varna*, which literally means 'color' and refers to an idealized hierarchy of Brahmins, Kshatriyas, Vasihyas, Shudras, and, below all of these, the *avarna*, [referred to as "Dalits" in contemporary India].⁸

However, A.M. Shah, an Indian academician, states that "although the ancient four varna scheme is part of the dynamics of the caste system, the word 'caste' should not be used interchangeably with class," and further adds that "there is no historical evidence for the popular idea that the present jatis are a result of the continuous fission of the varnas."⁹

Regardless of the debate among sociologists over what constitutes "caste," Indian law has classified disadvantaged communities who are entitled to preferential governmental treatment in the sphere of admissions

8. Laura Dudley Jenkins, *Contemporary Caste Discrimination and Affirmative Action*, in HINDUISM AND LAW: AN INTRODUCTION (Timothy Lubin, Jayanth Krishnan, & Donald R. Davis, Jr. eds., Cambridge University Press, forthcoming 2010); see also Frank de Zwart, *The Logic of Affirmative Action: Class, Caste, and Quotas in India*, 43 ACTA SOCIOLOGICA 235, 236-37 (2000) (explaining that the caste system is characterized by hierarchal, endogamous units whose defining feature is ritual purity).

9. A.M. Shah, *The Judicial and Sociological View of Other Backward Classes*, in CASTE: ITS TWENTIETH CENTURY AVATAR 174, 179 (M.N. Srinivas ed., 1997).

at government-controlled educational institutions and government jobs as Scheduled Castes (SCs), Scheduled Tribes (STs), and Other Backward Classes (OBCs).¹⁰ The term "SC" refers to sub-castes collectively referred to as the "Dalits" today [previously known as the "untouchables"];¹¹ "ST" refers to tribal communities who live in isolated pockets of India; and "OBCs" are constituted of those castes identified by government commissions as "socially and educationally backward classes of citizens" (SEBC) deserving of preferential treatment.¹² The identification of those communities that constitute the SEBC, and the extension of quotas to them, has been a process that has caused much controversy and violence in contemporary India.¹³ However, there is a strong consensus in the country that the Dalits have been subject to historical persecution and continue to remain marginalized in modern-day India.¹⁴ Thus, the reservation system for Dalits and STs has not aroused too much controversy in India.

B. The British and Reservations

When the British arrived in India, they discovered that the caste system was an integral part of Indian society and that the system, through sources such as the *Vedas* and the *Manava Dharmasastra*, assigned different rules and regulations to various caste members.¹⁵ Marc Galanter, a prolific author on the caste system and a law professor at the University of

10. Clark D. Cunningham & N.R. Madhava Menon, *Race, Class, Caste . . . ? Rethinking Affirmative Action*, 97 MICH. L. REV. 1296, 1304 (1999).

11. Dalit loosely translates as "oppressed" or "broken."

12. Cunningham & Menon, *supra* note 10, at 1304.

13. See E.J. Prior, *Constitutional Fairness or Fraud on the Constitution? Compensatory Discrimination in India*, 28 CASE W. RES. J. INT'L L. 63, 64-68 (1996) (describing the violence and chaos that followed the 1990 announcement by the Indian federal government that the Mandal Commission Report would be implemented); *id.* (stating that the Commission, whose findings were concluded in 1980, recommended that 27% of federal governmental jobs would be set aside for OBCs, in addition to the 22.5% that was already reserved for SCs (15%) and STs (7.5%) as mandated by the Indian Constitution).

14. See Human Rights Watch, *Hidden Apartheid: Caste Discrimination Against India's "Untouchables"* (February 2007) (describing the various atrocities that Dalits are subject to in modern India); see also Siddharth Vardarajan, *Caste Matters in the Indian Media*, THE HINDU, June 3, 2006, available at <http://www.thehindu.com/2006/06/03/stories/2006060301841000.htm> (explaining how Dalits face discrimination in the Indian media and in the educational establishment).

15. Jenkins, *supra* note 8, at 3.

Wisconsin, has asserted that one of the chief characteristics of ancient India's legal culture was that of "graded inequality."¹⁶

In the administrative province of Madras Presidency in southern India [comprising modern day Tamil Nadu, Andhra Pradesh, and parts of Kerala and Karnataka], "backward class movements" began protesting against the dominance of the Brahmins in British-sponsored jobs and educational institutions as early as 1853. These protests prompted the British to introduce measures that aimed to limit Brahmin monopoly of influential positions in the administrative sector.¹⁷ Efforts to limit Brahmin dominance of employment and educational opportunities were met with limited success. During the period 1901–1917, although Brahmins accounted for only around 3% of the populace in the Madras Presidency, they nevertheless composed 63% to 66% of the total college graduates.¹⁸ In contrast, non-Brahmin Hindus, who constituted 86% of the population in the Madras Presidency, accounted for only 23% to 24% of the total college graduates during the same period.¹⁹

The opposition to Brahminical dominance led to the formation of the South Indian Liberal Federation [commonly referred to as the Justice Party] in 1917.²⁰ The Justice Party was not led by Dalits or politicians necessarily

16. Marc Galanter, *The Aborted Restoration of "Indigenous" Law in India*, 14 COMP. STUD. IN SOC'Y & HIST. 53, 61 (1972). The term was originally coined by Dr. Ambedkar, a Dalit and India's first law minister. See Christopher Jaffrelot, DR. AMBEDKAR AND UNTOUCHABILITY: ANALYZING AND FIGHTING CASTE 35–36 (2005) (attributing the term "graded inequality" to Dr. Ambedkar as his "main sociological finding" and stating that graded inequality, distinct from traditional inequality, is a key element of the caste system). But see Clark D. Cunningham, *Why American Lawyers Should Go to India: Retracing Galanter's Intellectual Odyssey*, 16 LAW & SOC. INQUIRY 777, 782–83 (1991) (explaining that the Dharmashastra should be thought as encompassing more than just a legal system). The word Dharma is understood to mean not just "law", but also "religion" or "duty"—thus, the Dharmashastras cannot be merely conceived as a legal system, but should rather be construed as a system that dictated how the Hindu should ideally lead his or her life. *Id.* Furthermore, Indian society, although influenced by the above-mentioned religious texts, was also dynamic—the Vedas and the Dharmashastras did assign rules, but legal practice was also determined by factors such as custom, geography, and the proximity of a caste group to the power structure. *Id.*

17. See P. Radhakrishnan, *Backward Class Movements in Tamil Nadu*, in CASTE: ITS TWENTIETH CENTURY AVATAR 110, 112 (M.N. Srinivas ed., 1997) (describing how in 1853, the Board of Revenue issued an order that mandated that a certain percentage of revenue officers should be non-Brahmins and furthermore that the chief revenue servants in the Collector's office must be from different castes).

18. *Id.* at 112.

19. *Id.*

20. *Id.* at 113.

belonging to the lower castes.²¹ Rather, it was a non-Brahmin upper-caste movement that in 1919 successfully lobbied the British administration to reserve 28 out of 98 elected seats for non-Brahmin candidates in the Madras legislature.²² The non-reserved seats were open to candidates from any caste. The Justice Party was also responsible for government legislation that in 1927 reserved 41.7% of jobs for non-Brahmin Hindus, 16% for Muslims, 16% for Anglo-Indians and Christians, 16% for Brahmins, and 8% for Scheduled Castes.²³

At the national level, the Poona Pact of 1932 was the foundation for reservations for the SCs.²⁴ The Pact, reached between Hindu caste leaders and SCs who were organized under the leadership of Dr. B.R. Ambedkar (independent India's first law minister and a principal drafter of the Constitution), guaranteed that only SC candidates would be able to stand for election from certain "reserved" constituencies for provincial and national elections.²⁵ The Pact symbolized a national recognition that reservations would be a "countervailing mechanism against the social discrimination instinct of Indian society."²⁶

The above examples of pre-independence reservations illustrate one important difference—at the state level, non-SC communities, some of whom were not necessarily "oppressed," were able to utilize reservations to counter Brahmin domination of government jobs. However, at the national level, reservations were extended only to SCs.

21. See *id.* (explaining that the Justice Party consisted mainly of Vellalas, Reddys, Kammas, Velamas, and Nairs who belonged to the trading castes; the Party's ideology propounded that Brahmins were supposedly Aryan invaders who had usurped the glory of the "Dravidian south"); see also de Zwart, *supra* note 8, at 243 (highlighting that the Justice Party was composed mainly of non-Brahmin elites who demanded representation in government services and claimed "backwardness" on the grounds of under-representation and not because of their poverty or social backwardness). But see Dr. Subramaniam Swamy, *Redefining Secularism*, THE HINDU, Mar. 18, 2004, available at <http://www.hindu.com/2004/03/18/stories/2004031801941000.htm> (explaining how the Aryan invasion theory, which is the basis of the supposed difference between the "Dravidian south" and the "Aryan north," is the propaganda of prominent Marxist scholars). Swamy also explains that Hindu society has offered an avenue for upward caste mobility through a process known as Sanskritization. *Id.*

22. *Id.*

23. *Id.* at 114.

24. Anand Teltumbde, *Reverting to the Original Vision of Reservations*, ECON. & POL. WKLY, June 23, 2007, at 2383–84.

25. *Id.*

26. *Id.*

II. Independent India and Its Choices

India gained her independence from Great Britain in 1947. The new Indian state was modeled essentially on British lines—a parliamentary democracy was established with the President as the titular head of state, while the legal system was constituted according to common-law traditions. There are a few key reasons why Indian leaders chose to establish a legal system based on the British model. First, the existing system was well-entrenched and supported by a powerful class of lawyers who genuinely believed in its merits and did not consider a revival of the traditional Hindu sastric system to be beneficial either to them or to the country as a whole.²⁷

27. See Clark D. Cunningham, *Why American Lawyers Should Go to India: Retracing Galanter's Intellectual Odyssey*, 16 A.B.A.J. 777, 784 (1991) (reviewing MARC GALANTER, *LAW AND SOCIETY IN MODERN INDIA* (1989)), explaining that the British first exercised power in parts of India through the East India Company from the 17th century until 1858). During this time period, the British allowed the sastras and the sharia to remain the source of authority for Hindus and Muslims respectively in legal matters related to the civil arena (as opposed to criminal law topics). *Id.* However, even during this period, profound changes were introduced in the legal sector. *Id.* For instance, the British authorized translations of the Dharmashastras (sacred Hindu texts) into English legal terminology—in this process, many concepts were distorted. *Id.* Second, the British added "clarifications" to these translated doctrines, thereby further distorting the original meaning of the translated texts. *Id.* Third, Cunningham highlights that "the very elevation of the sastric text over unwritten custom was a fundamental shift from the sastric tradition." *Id.* Finally, the British, in their efforts to accord due importance to the "force of custom," misunderstood how to apply this concept to legal matters in a spirit consistent with sastric methodology. *Id.*

On a procedural level, British practices further eroded the traditional Hindu structure. Litigation of a certain case was conceived as an isolated incident between two concerned parties without taking into account other existing disputes between them. *Id.* at 785. Furthermore, Cunningham notes that "the status and ties of the parties were ignored." *Id.* Moreover, the British system promoted binding, "winner-take-all" resolutions to conflicts, whereas the panchayat system focused on solutions that promoted consensus and compromise among the parties involved. *Id.* Finally, the British system enforced rulings through the police powers of the state, but the sastric system enforced its rulings generally through more localized and unofficial avenues such as community pressures, the honor system of the "caste," and ex-communication. *Id.* The above lines indicate that the sastric method of legal dispute resolution, while having some positive features, also took into account less egalitarian principles such as the caste of the parties at dispute which perpetuated the existing status quo system of "graded inequality." *Id.*

In 1858, the British Crown took over the administration of India from the East India Company—the Anglicization of the Indian legal system proceeded at a rapid pace from this point onwards. *Id.* The judicial and administrative systems were subject to massive reforms, the British stopped relying on *pandits* (Brahmin scholars) for advice on how to interpret the sastras, and commercial, criminal, and procedural laws were codified by 1882. *Id.* Although Hindus continued to rely on the sastras for personal law matters related to topics such as marriage and inheritance, British courts, and not *pandits*, were the sole interpreters and arbiters on outstanding disputes. *Id.* Cunningham highlights that sastric

Second, the proponents of a sastric system were not well organized and were unable to articulate a clear vision.²⁸ Furthermore, Jawaharlal Nehru, India's first Prime Minister, and B.R. Ambedkar, the architect of India's Constitution, were both common-law trained attorneys. Although M.K. Gandhi's followers and the "traditionalists" wanted to adopt some version of the panchayat-sastric system, the Nehru-Ambedkar vision triumphed.²⁹

Nehru and Ambedkar were both committed to the idea of an egalitarian India. These men were cognizant that a Dharmasastra-based system would be contrary to egalitarian principles and would evoke discontent among the lower castes.³⁰ In 1946, a Constituent Assembly was established under Ambedkar's leadership.³¹ In a clear sign that independent India would be committed to an egalitarian society, the Constitution drew its inspiration from the United States Bill of Rights, the Declaration of the Rights of Man from France, the Irish Constitution of 1935, and the Universal Human Rights Charter.³² It declared the Republic of India to be committed to the ideals of securing justice, liberty, equality, and fraternity for all its citizens.³³

The key Articles of the Constitution that would aid India in its objectives included Article 14 of the Constitution, which guaranteed equal protection of the law for all of India's citizens; Article 15, which prohibited discrimination on numerous grounds including caste; Article 16, which promoted equality in public employment; and Article 17, which abolished the practice of untouchability.³⁴ The Constitution also specifically set aside seats in state legislatures and the Parliament for SC/ST individuals.³⁵

tradition was thus replaced "with a body of British judicial precedent misleadingly called 'Hindu law.'" *Id.*

28. *Id.*

29. *Id.* at 788.

30. *Id.*

31. See Prior, *supra* note 13, at 75 (discussing the historical background of the Constituent Assembly).

32. *Id.* at 786.

33. *Id.* at 787.

34. *Id.* at 74-80; see INDIA CONST. art. 14 ("The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India"). The Constitution further states:

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them; (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to disability, liability, restriction or condition with regard to—(a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained

India's Constitution, described as the world's "most complex,"³⁶ consists of more than 370 articles and over ninety amendments.³⁷ India is a union of twenty-eight states with a strong federal (central) government; it is a bicameral parliamentary democracy; and the unitary three-tiered judicial system is composed of lower trial courts, a high court for every state, and a Supreme Court.³⁸ In India, "fundamental rights" include equality, speech and assembly, personal liberty, and religious freedom.³⁹ The Court has an obligation to enforce these rights.⁴⁰ The Constitution also contains "Directive Principles" which although non-justiciable, nevertheless declare economic justice and social equality as aspirational goals.⁴¹

wholly or partly out of State funds or dedicated to the use of general public; (3) Nothing in this article shall prevent the State from making any special provision for women or children.

Id. at art. 15. Article 16 states:

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State; (2) No citizen shall, on ground only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. (3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office [under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory] prior to such employment or appointment; (4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

Id. at art. 16;

Id. at art. 17 'Untouchability' is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with the law.

35. *See generally.*

36. Burt Neuborne, *The Supreme Court of India*. 1 INT'L J. CONST. L. 476, 476 (2003).

37. *Id.*

38. *Id.*

39. *Id.* at 479.

40. *Id.*

41. *Id.*

III. Legal Challenges to Compensatory Discrimination and the Judiciary's Response

A. From Procedural Equality to Substantive Equality

The judiciary's position on compensatory discrimination in India today differs from that in 1950. In 1951, an upper-caste Hindu based in the region then called the State of Madras challenged a state medical college's reservation system.⁴² The college based its admissions policy for different castes and religious groups on the demographic composition of these communities in the state.⁴³ The plaintiff in *State of Madras v. Champakam Dorairajan* asserted that the government's reservation policies violated Article 14 and Article 15(1) of the Indian Constitution.⁴⁴ The plaintiff argued that a state could not reserve seats in educational institutions on caste-based criteria because the Constitution declared all men equal before the law regardless of caste.⁴⁵

State of Madras v. Dorairajan was the first major test of the Indian judiciary on the issue of compensatory discrimination. The Supreme Court of India adopted a narrow and literalist reading of the Constitution by ruling that compensatory discrimination policies violated the named Articles of the Constitution.⁴⁶ However, the central government, led by Prime Minister Nehru, which enjoyed a comfortable majority in the Parliament, amended Article 15 of the Constitution to authorize affirmative action in favor of untouchables and "backward classes."⁴⁷ Specifically, the amendment reads: "Nothing in this article or in clause (2) shall prevent the State from making any special provision for the advancement of socially and educationally backward classes or citizens or for the Scheduled Castes and the Scheduled Tribes."⁴⁸

Prime Minister Nehru is generally given credit for bravely advocating progressive policies by pushing forth the amendment.⁴⁹ However, some

42. *State of Madras v. Dorairajan*, 1951 A.I.R. 38 (S.C.) 226.

43. *Id.*

44. *Id.* at 227.

45. *Id.*

46. *Id.* at 228.

47. See Neuberne, *supra* note 36, at 488 (describing how the government amended Article 15 after *State of Madras v. Dorairajan* was decided).

48. INDIA CONST. art 15, § 4. For the full text of article 15, see *supra* note 34.

49. Marc Galanter, *Symbolic Activism: A Judicial Encounter with the Contours of India's Compensatory Discrimination Policy*, in *JUDGES AND THE JUDICIAL POWER: ESSAYS IN HONOR OF JUSTICE V.R. KRISHNA IYER* 229, 231 (R. Dhavan et al. eds., 1985).

critics questioned whether India's new leaders had committed a grave error by including the phrase "socially and educationally backward classes" in the Constitutional amendment. They criticized the lack of consensus as to what criteria should be used to determine which groups constituted these "backward classes."⁵⁰ B.R. Ambedkar, India's first law minister and a principle drafter of the Constitution, stated that "backward classes are . . . nothing else but a collection of certain castes."⁵¹ However, academicians, such as Frank de Zwart, have posited that neither the Constituent Assembly nor post-independence parliaments intended for reservations to be tailored on the basis of caste.⁵²

In 1953, the first Backward Classes Commission was established under Article 340 of the Indian Constitution⁵³ to identify communities that would qualify for compensatory discrimination.⁵⁴ The Commission used four criteria to determine social and educational "backwardness": low status in the traditional caste system, poor educational achievement, under-representation in public-sector employment, and under-representation in the trade and business sector.⁵⁵ The Commission identified 2,399 castes as "backward"; this computation did not include the SC/ST population of

50. See de Zwart, *supra* note 8, at 239 ("[W]hen Nehru spoke on behalf of the Socially and Educationally Backward Classes, nobody knew who these classes were."); K.D. Saksena, *Policy Changes Needed on Reservations*, ECON. & POL. WEEKLY, June 30, 2007, at 2494 ("There has been no census of backward classes in the absence of any systematic attempt to conceptualize and scientifically define these categories of citizens.").

51. De Zwart, *supra* note 8, at 239.

52. See *id.* at 240 (highlighting that the Constituent Assembly and successive Parliaments after independence never intended for caste-based reservations and further noting that a Central Minister of Home Affairs in the early 1960s recommended state governments to use economic indicators, rather than caste status, to identify candidates for reservations).

53. INDIA CONST. art. 340(1). The article states:

The president may by order appoint a commission, consisting of such persons as he thinks, fit to investigate the conditions of socially and educationally backward classes within the territory of India and the difficulties under which they labor and to make recommendations as to the steps that should be taken by the union or any state to remove such difficulties and as to improve 'their condition and as to the grants that should be made, and the order appointing such commission shall define the procedure to be followed by the commission.

Id.

54. Saksena, *supra* note 50, at 2494.

55. *Id.*

India.⁵⁶ The Commission also recommended that women be treated as a "backward class."⁵⁷

However, the Commission's findings were never implemented.⁵⁸ Even Kaka Kalelkar, Chairman of the Backward Classes Commission, expressed grave misgivings about the report.⁵⁹ Kalelkar requested that the Indian President reject the Commission's findings because quotas on the basis of caste would have an adverse effect on society. Specifically, he observed that indigent Muslims and Christians, many of whom may have been former Hindu SC's, might not qualify for quotas because their faiths did not officially recognize a caste system.⁶⁰ Furthermore, Kalelkar noted that "[i]f we eschew the principle of caste, it would be possible to help the extremely poor and deserving from all communities."⁶¹ Yet, he also observed that "care [should be] taken to give preference to those who come from the traditionally neglected social classes."⁶² Thus, Kalelkar was not against the concept of reservations *per se*; rather, he was only expressing skepticism over the methodology by which disadvantaged sections had been identified by his own Commission.

The Commission's recommendations lay dormant and ignored by the central government for many years. State governments freely tailored reservation policies for disadvantaged sections of their populations on the basis of caste, although the federal Ministry of Home Affairs declared in the early 1960s that it would be preferable to apply economic tests rather than caste criteria.⁶³ This advice has essentially been ignored by state governments and by successive post-1990 federal governments. In hindsight, Kalelkar's fears were well founded. Today, Hindu castes battle

56. *Id.*

57. A. Ramaiah, *Identifying Other Backward Classes*, ECON. AND POL. WKLY., June 6, 1992, at 1203.

58. *Id.*

59. *See id.* (stating that the government did not implement the report because it feared that backward communities who were not identified by the Commission would be isolated and that the genuinely disadvantaged in the communities identified would not be able to obtain benefits since too many communities were identified); de Zwart, *supra* note 8, at 241 (explaining that Kalelkar foresaw that certain castes would corner all the benefits).

60. *Balaji v. State of Mysore*, 1963 A.I.R. 50 S.C. 649, 656.

61. *Id.*

62. *Id.*

63. *See Saksena, supra* note 50, at 2494 ("The ministry of home affairs addressed all the state governments stating that while they 'have the discretion to choose their own criteria, in view of the government of India it would be better to apply economic tests than to go by caste.'").

for inclusion in the list of OBCs, while Dalit Christians and Dalit Muslims demand inclusion in the list of SCs.

Even though the Kalelkar report was never implemented, the Indian Supreme Court granted certiorari to cases emanating from state courts dealing with compensatory discrimination. Many of these cases involved compensatory discrimination for OBCs at the state level. In *Balaji v. State of Mysore* (1963), the Supreme Court held that caste could not be used as the only criterion for backwardness when responding to a petition challenging Mysore's policy of reserving 68% of the seats in engineering and medical colleges for those communities categorized as SC, ST, or OBC.⁶⁴ The Court highlighted its view that while caste could be a relevant factor in determining backwardness, poverty also played a significant role in determining social backwardness. It stated, "classes of citizens who are deplorably poor automatically become socially backward."⁶⁵ The Court also held that reservations should not exceed 50% of available seats.⁶⁶

In *Balaji*, the Court attempted to strike a balance between the need to help the non-SC/ST backward classes, while also ensuring that well-qualified upper caste candidates were not denied admission due to their caste. Furthermore, the Court conceded that the quality of graduates from these professional colleges would diminish if admissions policies were "unduly liberalized."⁶⁷ In *Chitrallekha v. State of Mysore*, the Supreme Court reaffirmed its holding in *Balaji* and firmly reiterated "that under no circumstance [can] a 'class' be equated to a 'caste.'"⁶⁸ However, the Court sent out a confusing message in *A. Periakaruppan v. State of T.N.* when it confirmed its holdings in the prior cases while also noting that "a caste has always been recognized as a class."⁶⁹ The Court articulated its rationale for upholding compensatory discrimination policies by stating:

64. See *Balaji*, 1963 A.I.R. 50 S.C. at 654-55 (describing in detail the effect of the impugned order passed on July 31, 1962).

65. *Id.* at 659 (recounting the links between poverty and social backwardness); see also Prior, *supra* note 13, at 87 ("Essentially, *Balaji* allows caste to be considered, but does not allow it to be the sole criterion of backwardness.").

66. *Id.* at 663 ("[S]peaking generally and in a broad way, a special provision should be less than 50 per cent; how much less than 50 per cent would depend on the relevant prevailing circumstances in each case."); see also Prior, *supra* note 13, at 87 (recounting the Court's analysis leading to the 50% limitation).

67. *Id.* at 662 (refusing to deny the fact that "it would be against the national interest to exclude from the portals of our Universities qualified and competent students on the ground that all the seats in the University are reserved for weaker elements in society").

68. *Chitrallekha v. State of Mysore*, 1964 A.I.R. 51 S.C. 1825, 1834 (emphasizing the Court's separation of the two constructs and its reasoning for erecting this barrier).

69. *A. Periakaruppan v. State of T.N.*, 1971 A.I.R. 58 S.C. 2303, 2309-10 (citing to

[W]e should not forget that it is against the immediate interest of the Nation to exclude from...our medical colleges qualified and competent students but then the immediate advantages of the Nation have to be harmonised with its long range interests. It cannot be denied that unaided many sections of the people... cannot compete with the advanced sections.... Advantages secured due to historical reasons should not be considered as fundamental rights. [The] Nation's interest will be best served—taking a long range view—if the backward classes are helped to march forward and take their place in line with the advanced sections of the people⁷⁰

Even though the primary focus of this Note is on analyzing the reservation policies for OBCs, the Court's holding in *State of Kerala v. Thomas* (1976) that the government could justify exempting SC/ST employees from mandatory tests for job promotions under the aegis of Article 16(1) indicates how broadly the Court moved toward endorsing substantive equality.⁷¹ In *Thomas*, the Justices upheld a Kerala government order exempting SC/ST government clerks from passing compulsory tests required for job promotions for a period of two years and further gave the clerks two more opportunities to pass the examination.⁷² Article 16(1) guarantees equality of opportunity in matters of public employment.⁷³ Article 16(4) states, "Nothing in this article shall prevent the State from making any provision for the reservation of appointment or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State."

Although the Court could have construed this exemption for SC/ST candidates under the aegis of Article 16(4), it instead relied on Article 16(1). The Court highlighted the fact that Article 46, which is a Directive Principle [i.e. a non-justiciable principle], urges the Indian State to "promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."⁷⁴ Furthermore, the Court added that Article

Chitralakha to assert that "caste is not a relevant circumstance in ascertaining the backwardness of a class" and downplaying the strict parameters of "that earlier case").

70. *Id.* at 2309 (describing a reasoning opposite to that taken in the *Balaji* case).

71. See Galanter, *supra* note 49, at 234 (describing the system by which SC/ST employees were exempted from passing certain tests).

72. *Id.* at 235 (illustrating the Court's reasoning in upholding the government order).

73. INDIA CONST. art. 16(1).

74. INDIA CONST. art. 46.

335,⁷⁵ which directs the state to give special consideration to the claims of SC/ST communities in matters of public employment, bolstered the government's position.⁷⁶ Thus, the Court found that the government's policy of categorizing SC/ST employees as deserving of special treatment is "a just and reasonable classification [that has] rational nexus to the object of equal opportunity . . . relating to [public] employment."⁷⁷ Supreme Court Justice K.K. Mathew declared that the Constitution guaranteed not just "equality of opportunity," but also "equality of result."⁷⁸

The Court's holding in *Thomas* is relevant to the subject of this Note in two ways. First, it allowed the government greater freedom to design and implement affirmative action programs.⁷⁹ Second, the "efficiency" aspect of Article 335, which instructed the government to consider the competent functioning of the administration when designing affirmative action programs, took a backseat to the goal of uplifting the SC/ST communities.⁸⁰ While the goal of uplifting SC/ST communities is admirable, the Court's approach in *Thomas* sets a poor precedent. It allows the government to relax standards for promotion in jobs and stretched the interpretation of Article 16(1) to include compensatory discrimination not just for entry into government service but also for promotions.⁸¹

75. Art. 335 states: "The Claims of the members of Scheduled Castes and Scheduled Tribes shall be taken into consideration, constantly with the maintenance of the efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union of a State." *Id.*

76. Galanter, *supra* note 49, at 235 (treating Article 335 as an essential link in the Chief Justice's chain of reasoning, and stating that it "directs the state to take into their consideration their claims regarding service under the state").

77. *Id.*

78. *Id.* at 236 (articulating Justice Mathew's view of what equality requires).

79. *Id.* at 240 (describing the relative freedom the government enjoys in implementing such programs); see also Prior, *supra* note 13, at 90 (describing the "new thinking" that took place after *Thomas*).

80. See SHOURIE, *supra* note 1, at 192 (describing as a "chant" progressive Justice Krishna Iyer's commentary on Article 355, which the author states "cannot but imperil administrative efficiency"). Shourie goes on to quote the Justice's assertion that "social stratification, the bane of the caste system, could be undone and vertical mobility won not by hortative exercises but by experience of *shared* power." *Id.*

81. In *Indra Sawhney v. Union of India*, 1992 A.I.R. 80 S.C. 447, the Court later ruled that compensatory discrimination should not be extended to promotions. However, a Constitutional amendment in 1995 granted this special treatment to SC/ST communities. See SHOURIE, *supra* note 1, at 12 (describing how a new clause, 4(A), was added to Article 16 and contained language that would allow for such treatment). Specifically, 4(A) provides: "[n]othing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and Scheduled Tribes which, in the opinion of the

B. The Mandal Commission and the Sawhney Judgment.

In 1978, two years after *Thomas*, the government established a new Backward Classes Commission, known as the Mandal Commission, to identify communities that were "socially and educationally backward."⁸² The Commission ignored prior Supreme Court holdings and used the term "caste" synonymously with "class"; it also utilized eleven criteria for determining social and economic backwardness.⁸³ While the Kalelkar Commission had identified 2,399 castes as "socially and educationally backward," (SEBC) the Mandal Commission identified 3,743 castes as fitting that category.⁸⁴

The methodology used by the Commission was fraught with errors.⁸⁵ First, the Commission claimed that 52% of India's population was

State, are not adequately represented in the services under the State."

82. Saksena, *supra* note 50, at 2494 (describing the formation and membership of the second commission).

83. *Id.*; *Indra Sawhney v. Union of India*, 1992 A.I.R. 80 S.C. 447, 510–11 (describing the eleven criteria the court determined to be significant). Specifically, the Court laid forth the following categorization:

(A) Social: (i) Castes/Classes considered as socially backward by others; (ii) Castes/Classes which mainly depend on manual labor for their livelihood; (iii) Castes/Classes where at least 25% females and 10% males above the State average get married at an age below 17 years in rural areas and at least 10% females and 5% males do so in urban areas; (iv) Caste/Classes where participation of females in work is at least 25% above the State average

(B) Educational: (v) Castes/Classes where the number of children in the age group of 5–15 years who never attended school is at least 25% above the State average; (vi) Castes/Classes where the rate of student drop-out in the age group of 5–15 years is at least 25% above the State average; (vii) Castes/Classes amongst whom the proportion of matriculates is at least 25% below the State average;

(C) Economic: (viii) Caste/Classes where the average value of family assets is at least 25% below the State average; (ix) Caste/Classes where the number of families living in kucha (mud) houses is at least 25% above the State average; (x) Caste/Classes where the source of drinking water is beyond half a kilometer for more than 50% of the households; (xi) Caste/Classes where the number of households having taken consumption loan is at least 25% above the State average. A weightage of 3 points each was assigned to social indicators, 2 points each to the educational indicators, and 1 point each to the economic indicator.

84. *Id.* at 593–94 (describing the findings of both commissions).

85. *But see* V. Venkatesan's interview with P.S. Krishnan, former Secretary, Minister of Welfare, *Petitioners Were Wrong in History*, FRONTLINE, Apr. 7, 2007, available at <http://www.hinduonnet.com/thehindu/fline/fl2407/stories/20070420003901900.htm> (defending the Mandal Commission's methodology of measuring the backward classes).

comprised of castes belonging to the OBC category, based on a census taken by the British in India in 1931.⁸⁶ This percentage is inconsistent with the findings of the National Sample Survey's 1999–2000 findings that only 36% of the nation's population comprises OBC communities.⁸⁷

Arun Shourie, a noted journalist and a former Indian federal minister, has exposed the numerous flaws in the Mandal Commission's methodology.⁸⁸ Some of his main criticisms include that experts suggested that type of employment, or at a minimum a combination of caste and employment, was a better determinant of backwardness than just caste, but the Commission chose caste alone,⁸⁹ that the Commission, although deeply skeptical of the accuracy of the information provided by states about which castes constituted the backward classes, nevertheless eventually accepted the information,⁹⁰ and that the Commission itself conceded that its final list was not the product of rigorous "academic research," but rather the result of a survey that was a "rough and ready tool for evolving a set of simple criteria for identifying social and educational backwardness."⁹¹

The most scathing criticism leveled at the Commission came from one of its own members. L.R. Naik, the sole SC member of the Commission, which was otherwise comprised of members who belonged to communities labeled as OBCs, noted:

I hold very sincerely that castes/classes mentioned in the common list . . . are not at the same degree or level of social and educational backwardness and I fear that the safeguards recommended for their advancement will not percolate to less unfortunate sections among them and that the Constitutional objectives proclaiming an establishment of an egalitarian society will remain a myth [D]uring the course of my extensive tours [through India], I observed that a tendency is fast developing among "Intermediate Backward Classes" to repeat the treatments or rather ill-treatments, they themselves have received from times immemorial at the hands of the upper castes, against . . . the

86. Surjit Bhalla & Sunil Jain, *Quota: Just How Many OBCs Are There?*, REDIFF NEWS, May 8, 2006, available at <http://in.rediff.com/money/2006/may/08quota.htm>.

87. *Id.*

88. See generally SHOURIE, *supra* note 1 (critiquing what Mr. Shourie believes is a twisting of the Indian Constitution to allow for the furtherance of the caste system, via a refiguring of castes to enable them to receive certain benefits).

89. See *id.* at 91 (discussing the experts suggesting that occupation was a better indicator of backwardness, thus occupations, or at least occupation and caste should be used as criterions for backwardness).

90. See *id.* at 86–88 (describing the Commissions reaction to the information provided by the States).

91. *Id.* at 88.

"Depressed Backward Classes" Several observers feel that the logic of democratic politics and mass mobilization has brought casteism to the center of the stage. It is with regret, I affirm that [OBC] political leaders . . . are not immune from such aberration . . . all they seem to be doing is to emulate some disgruntled upper castes in usurping economic and political power in the name of backward classes.⁹²

The above lines clearly indicate that Naik was deeply concerned that upper caste prejudice against the lower castes and Dalits was now being replicated by certain sections of the OBC community itself. His reference to "Intermediate Backward Classes" and "Depressed Backward Classes" is crucial—the former category referred to the privileged among the OBCs, many of whom owned large tracts of agricultural land.⁹³ The latter term referred to the genuinely disadvantaged among the OBCs who traditionally were employed as blacksmiths, fishermen, or barbers, for example.⁹⁴ Furthermore, Naik was also concerned that the implementation of the Mandal Commission would perpetuate the caste system and would serve as a tool by which casteism would remain 'as a social evil in Indian society.⁹⁵

Like the Kaka Kalelkar Report, the Mandal Report lay dormant for ten years. However, in August 1990, the federal government decided to implement one part of the Mandal Commission report—the recommendation that 27% of vacancies in government employment be reserved for those communities labeled as OBCs.⁹⁶ Violent protests followed.⁹⁷ In August 1992 the Supreme Court passed judgment in what is popularly referred to as the "Mandal" case.⁹⁸ In *Indra Sawhney v. Union of*

92. *Id.* at 102–03.

93. Chandrabhan Prasad, *Mandal's True Inheritors*, THE TIMES OF INDIA, Apr. 12, 2006, available at <http://timesofindia.indiatimes.com/articleshow/1486250.cms> (looking back at Naik's earlier failure to sign the Mandal recommendations and his hypothesis that OBCs are now split into two groups, the "Intermediate Backward Class," consisting of relatively powerful landowners and "Depressed Backward Classes" or "Most Backward Classes" that are economically marginalized).

94. *Id.*

95. See SHOURIE, *supra* note 1, at 102–03 (outlining the potential for continuation of the caste system under the Mandal Commission's framework).

96. See *Indra Sawhney v. Union of India*, 1992 A.I.R. 80 S.C. 447, 592 (upholding the Constitutionality of implementing the recommendations of the Mandal Commission regarding OBCs, although it also held that the "creamy layer" of the backward classes must be excluded from benefits).

97. See *V.P. Singh to be Cremated at Sangam Today*, HINDUSTAN TIMES, Nov. 29, 2008, available at <http://www.htmedia.in/Section.aspx?Page=Page-HTMedia-AboutUs> (describing the violent protests that followed the implementation of the Mandal recommendations).

98. *Indra Sawhney v. Union of India*, 1992 A.I.R. 80 S.C. 447.

India, the Supreme Court of India upheld the government's decision to implement the Mandal Commission recommendation regarding quotas for OBCs in government jobs.⁹⁹ The Court highlighted the fact that a state has broad powers to determine whether a given class of citizens comprise a backward class or not, although ultimately such a determination was subject to judicial review.¹⁰⁰ The Court tackled the issue of the meaning of the term "Backward Classes." It first noted that Article 16(4), which allowed the government to make special provisions for "Backward Classes" in matters of public employment, did not define the term.¹⁰¹ The Court then pointed out that the term "Backward" in Article 15(4) of the Constitution, which prohibits discrimination on the basis of caste, was qualified by the phrase "socially and educationally."¹⁰²

In a departure from its position in *Balaji*, where the Court had unequivocally refused to equate caste and class, the Court now posited that backward class under Article 16(4) did not imply "socially and educationally backward" classes of citizens.¹⁰³ It acknowledged that since *Balaji*, "it has been assumed that the backward class of citizens contemplated by Article 16(4) is the same as socially and educationally backward classes . . . mentioned in Article 15(4)."¹⁰⁴

It then rejected such an understanding and stated that "it would . . . be not correct to say that 'backward class of citizens' in Art. 16(4) are the same as the socially and educationally backward classes in Art. 15(4)."¹⁰⁵

99. *See generally id.* (weighing, within acceptable Constitutional parameters, the social and economic realities of castes against the Government action in instituting the Mandal Commission recommendations).

100. *Id.* at 555–59 (describing how "backward" will vary from state to state but adopting certain limits—i.e. the "creamy layer" of the backward classes must be removed from the equation).

101. *Id.* at 598 (noting that while Article 16, § 4 of the Indian Constitution, which deals with Equality of Opportunity in Public Employment, states: "[N]othing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State . . .," it did not itself define "backward class").

102. *Id.* at 598 (pointing to Article 15, § 4 of the Indian Constitution art 15, which states, "[N]othing in this article or in clause (2) or article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.").

103. *Id.* at 557; *Balaji v. State of Mysore*, (1963) 50 S.C.R. 649, 656.

104. *Indra Sawhney v. Union of India*, 1992 A.I.R. 80 S.C. 447, 556.

105. *Id.*

Rather, the Court said that Article 16(4) was designed specifically to promote the interests of socially backward classes.¹⁰⁶ It noted:

Social backwardness leads to educational backwardness and both of them together lead to poverty—which in turn perpetuates the social and educational backwardness We are, accordingly, of the opinion that the backwardness contemplated by Article 16(4) is mainly social backwardness. They feed upon each other constituting a vicious circle.¹⁰⁷

The Court asserted that in a diverse nation such as India, a variety of methods were permissible to determine which groups of people constituted backward classes.¹⁰⁸ The Court said that although caste alone may not always be the determinant of backwardness,¹⁰⁹ it also noted however that caste was the equivalent of a "social class."¹¹⁰ Members of a caste were part of a "socially homogenous class," and membership in this group was involuntary and hereditary.¹¹¹ The Court also pointed out that the Mandal Commission gave more priority to indicators of *social* backwardness than educational backwardness in its determination of which groups constituted OBCs.¹¹² It then rejected the proposition that Article 16(2), which prohibited the government from discriminating in matters of public employment on the basis of caste, explicitly prevented the consideration of caste in determining backwardness.¹¹³

The Court explained that reservations were being instituted for "backward classes," and not backward castes.¹¹⁴ However, it then stated that a caste would be considered a "backward class" if: (i) it met the criteria used to measure backwardness and, (ii) the caste "was not adequately

106. *Id.* at 557 ("[F]urther, if one keeps in mind the context in which Art. 16(4) was enacted it would be clear that the accent was upon social backwardness.").

107. *Id.*

108. *Id.* at 555.

109. *Id.* (pointing to the classification of Muslims and certain Christian denominations in Kerala as backward).

110. *Indra Sawhney v. Union of India*, 1992 A.I.R. 80 S.C. 447, 553.

111. *Id.*

112. *Id.* at 557.

113. *See* INDIA CONST. art 16, § 2 (stating that, "no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State"); *Indra Sawhney v. Union of India*, 1992 A.I.R. 80 S.C. 447, 555 (rejecting the proposition that once it is found that a backward class is not adequately represented in the Services of a State, the bar of Article 16, § 2 of the Indian Constitution is not a limitation).

114. *Indra Sawhney v. Union of India*, 1992 A.I.R. 80 S.C. 447, 555.

represented in the services under the State," as mentioned in Article 16(4).¹¹⁵ The Court asserted that socially backward classes [such as the OBCs identified by the Mandal Commission] were under-represented in public employment and this was the "lingering effect" of past discrimination—thus, quotas were necessary to remedy this discrimination.¹¹⁶ However, in future scenarios, communities other than those characterized by caste could be considered as "backward classes" and thus qualify for reservations.¹¹⁷

The Court directed the government to ensure that the "creamy layers"—i.e. privileged—sections of OBCs be excluded from the benefit of reservations.¹¹⁸ The Court left the factors that would be used for the identification of this "creamy layer" in the hands of the government.¹¹⁹ The Court added that individuals comprising this "creamy layer" were not necessarily required to be identified on the basis of income.¹²⁰ It explained that an OBC individual who earned a substantial sum of money in a rural area could still be considered poor in an urban setting and thus, may not be a part of the "creamy layer."¹²¹ Furthermore, the Court added that the OBC family of an individual who earned a significant salary in a foreign nation as a laborer could still be "socially backward" in their home setting.¹²² Thus, the Court possibly permitted even affluent individuals belonging to OBC communities to qualify for reservations if the government chooses not

115. *Id.*

116. *Id.* at 556.

117. *See Sawhney*, 1992 A.I.R. 80 S.C. at 560. (providing that "backward classes" includes socially and educationally backward classes).

118. *See id.* at 560 (recommending that the government of India specify the basis of exclusion from the reservations, whether it be on the basis of income, the extent of holding, or of "creamy layer").

119. *See id.* (recommending that the government specify the basis, but not requiring particular factors).

120. *Id.*

121. *See id.* at 559 (stating that a particular income made in Bombay, Delhi, or Calcutta may not be extraordinary, whereas in rural India, such income would be a "handsome income").

122. *See id.* (providing that a member of the carpenter caste who goes to the Middle East to work may receive income that is high by Indian standards, but not necessarily in the particular country where it was made); *see also* NATIONAL COMMISSION FOR BACKWARD CLASSES, PERSONS EXCLUDED FROM RESERVATION WHICH CONSTITUTE CREAMY LAYER, <http://ncbc.nic.in/html/creamyayer.htm> (last visited Mar. 5, 2009) (providing that the Government eventually mandated that the off-spring of those OBC members who earned more than Rs 100,000 per annum (\$2500 U.S.D.) would be classified as belonging to the "creamy layer") (on file with Washington and Lee Journal of Civil Rights and Social Justice).

to identify the "creamy layer" based on economic criteria. The Court also rejected a 10% quota for the poor among the upper castes.¹²³

C. *The Mandal II Judgment: Perpetuating Caste-Based Reservations*

The issue of compensatory discrimination has refused to fade away from public controversy and litigation. In May 2006, upper-caste students and professionals protested vehemently against the central government's decision to implement another part of the Mandal Commission's Report recommending a 27% reservation for OBCs in government-managed educational institutes.¹²⁴ The government implemented this part of the Mandal Report by passing the Central Educational Institutions Act of 2006¹²⁵ after parliament approved the Ninety-Third Amendment to the Constitution.¹²⁶ This Amendment was applied to Article 15 of the Constitution and stated that:

Nothing in this article . . . shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens . . . in so far as such special provisions relate to their admission to the educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30.¹²⁷

123. See *id.* at 578 (stating that the 10% quota is constitutionally impermissible).

124. See Arun Ram, *Protests Erupt in Chennai's Streets*, DAILY NEWS & ANALYSIS, May 25, 2006, <http://www.dnaindia.com/report.asp?NewsID=1031349&CatID=2> (last visited Feb. 28, 2009) (describing the protests of students in response to the government's support of the proposed 27 percent reservation) (on file with Washington and Lee Journal of Civil Rights and Social Justice); see also *Doctors End Strikes Not Protests*, EXPRESSINDIA.COM, May 31, 2006, <http://www.expressindia.com/news/fullstory.php?newsid=68532> (last visited Feb. 28, 2009) (stating that though resident doctors at the five premier medical colleges ended their strikes, they would continue to protest) (on file with Washington and Lee Journal of Civil Rights and Social Justice).

125. See Central Educational Institutions (Reservation in Admission) Act, No. 5 of 2007; INDIA CONST. art. 15: amended by the Constitution (Ninety-Third Amendment) Act, 2005 (providing for the reservation in admission of students belonging to Scheduled Castes, Scheduled Tribes, and the Other Backward Classes of citizens to certain educational institutions maintained by the central government).

126. See INDIA CONST. art. 15: amended by the Constitution (Ninety-third Amendment) Act, 2005 (providing that the government of India may create law to advance socially and educationally backward classes of citizens).

127. *Id.*

The Supreme Court, in its April 2008 judgment, re-affirmed the legality of India's reservations system and its expansion to educational institutions managed by the central government.¹²⁸ Specifically, in *Ashoka Kumar Thakur v. Union of India*,¹²⁹ the Court held that:

- (i) The Ninety-Third Amendment did not "violate the 'basic structure' of the Constitution" and was thereby constitutional;¹³⁰
- (ii) That Articles 15(4) and 15(5) of the Constitution were not mutually contradictory and thus Article 15(5) was not *ultra vires*;¹³¹
- (iii) That the exclusion of minority educational institutions from Article 15(5) was not violative of Article 14;¹³²

128. See *Ashoka Kumar Thakur v. Union of India*, (2008) 6 S.C.C. 1, 3 (upholding the reservations system).

129. *Id.* (holding the reservation and its application to government-managed educational institutions constitutional). In *Thakur*, the Supreme Court of India considered the validity of India's reservation system and its expansion to educational institutions managed by the government. *Id.* at 1, 27–28. The Court stated that it was conscious of the fact that reservation should not result in reverse discrimination. *Id.* at 3. The reservation system was challenged on the basis of various technical constitutional grounds, including grounds that the Ninety-Third Amendment to the Constitution, which permitted the reservation, violated the basic structure of the Constitution; that Article 15(5) of the Constitution was *ultra vires*; that the exclusion of minority educational institutions from Article 15(5) violated Article 14 of the Constitution; that the manner in which SEBCs were identified violated Article 15(1) of the Constitution; and that the "creamy layer" should not be excluded from SEBCs. *Id.* at 28, 34, 36, 47. The Court found that the Ninety-Third Amendment did not violate the basic structure of the Constitution because past judges concluded that the power of amendment could be used, and was used widely, even for fundamental rights. *Id.* at 32. The Court also found that Articles 15(4) and 15(5) were enabling provisions, that operate in their own field, and thus were not contradictory. *Id.* at 35. Thus, Article 15(5) was not *ultra vires*. *Id.* at 35. As to the contention that Article 15(5) provided for the exclusion of minority educational institutions, the Court upheld this because these institutions constituted a separate class and were protected by separate constitutional provisions. *Id.* at 36. In addition, the Court found that the determination of SEBCs did not violate Article 15(1) of the Constitution because lists of SEBCs were not based solely on caste, and that other considerations were taken into account. *Id.* at 47. Finally, the Court found that the "creamy layer" must be excluded from SEBCs because not to exclude them would impair proper identification of the backward class and that one of the main criteria for identifying SEBCs is poverty, to which the exclusion of the "creamy layer" is necessary. *Id.* at 49.

130. *Thakur*, (2008) 6 S.C.C. at 34.

131. See *id.* at 36 (stating that Article 15(5) is "constitutionally valid").

132. See *id.* (stating that Article 15(5) is not violative of Article 14 because the "minority educational institutions, by themselves, are a separate class and their rights are protected by other constitutional provisions").

- (iv) That the manner in which "socially and educationally backward classes" were identified was not violative of Article 15(1) of the Constitution and;¹³³
- (v) That the "creamy layer" of those belonging to these socially and educationally backward classes must be excluded from the benefits of quotas.¹³⁴

Specifically, with regard to the fourth holding, the Court highlighted that the "determination of SEBCs is not done solely based on caste, and hence, the identification of SEBCs is not violative of Article 15(1) of the Constitution."¹³⁵ Yet, the Court also recalled and re-affirmed its *Sawhney* holding that "caste could be the starting point for determining the socially and educationally backward classes of citizens"¹³⁶ and that "[c]aste is often used interchangeably with 'class' and can be called as the basic unit in social stratification."¹³⁷ Essentially, this judgment endorsed the methodology used by the Mandal Commission, the National Commission for the Backward Classes, and the State Commission for Backward Classes to identify SEBCs deserving of quotas. Pro-reservationists rejoiced at the Court's latest endorsement of the quota system. Yet, anti-reservationists took solace by emphasizing that the Court also held that the "creamy layer" sections of the OBCs must not benefit from quotas.

IV: The Importance of Caste in 21st Century India

A. Caste-related Issues Continue to Dominate the Limelight

In *Sawhney*, the Court eloquently called for the elimination of caste from society but also noted, "[o]ne cannot fight his enemy [i.e. the caste system] without recognizing him."¹³⁸ In *Thakur*, the Court declared its support for the extension of the quota regime to the educational system that is managed by the central government by declaring:

133. *See id.* at 47 (stating that the "determination of SEBCs is done not solely based on caste" and thus does not violate Article 15(1)).

134. *See id.* (holding that the identification of the SEBCs does not violate Article 15(1) of the Constitution).

135. *Id.*

136. *Id.* at 37.

137. *Id.* at 44.

138. *Indra Sawhney v. Union of India*, 1992 A.I.R. 80 S.C. 447, 554.

Reservation is one of the many tools that are used to preserve and promote the essence of equality In the context of education, any measure that promotes the sharing of knowledge, information and ideas, and encourages and improves learning, among India's vastly diverse classes deserves encouragement. To cope with the modern world and its complexities and turbulent problems, education is a must and it cannot remain cloistered for the benefit of a privileged few. Reservations provide that extra advantage to those persons who, without such support, can forever only dream of university education, without ever being able to realize it.¹³⁹

Thus, the Court has justified using caste as one of the main determinants of measuring the "educationally and socially backward classes" who supposedly comprised the lower echelons of Indian society. As discussed above, the Mandal Commission methodology in identifying backward classes is deeply flawed.¹⁴⁰ Furthermore, this Note has highlighted the fears of prominent leaders such as Naik that OBC reservations would perpetuate caste in Indian society.¹⁴¹ Even assuming that the Court charted the correct path in *Sawhney*, it must be noted that the Mandal Commission itself called for a review of its scheme after twenty years.¹⁴² Yet, the Court shied away from addressing the relevance of this topic in its *Thakur* judgment. Rather, Justice Raveendran merely noted that "preferably there should be a review after ten years to take note of the change of circumstances."¹⁴³

Modern India's founding fathers, such as Prime Minister Nehru and B.R. Ambedkar, intended for reservations to be merely a temporary tool through which historically oppressed communities could uplift themselves.¹⁴⁴ Indeed, Justice Raveendran stated in the *Thakur* case, "if the

139. *Thakur*, (2008) 6 S.C.C. at 2.

140. See SHOURIE, *supra* note 1, at 86–96 (providing the methodology for identifying the castes, including a description of the survey ordered by the Commission).

141. See *id.* at 103 (providing Naik's observation that "a tendency is fast developing among 'Intermediate Backward Classes' to repeat the treatments or rather ill-treatments, they themselves have received from times immemorial at the hands of the upper castes, against their brethren").

142. See *Sawhney*, 1992 A.I.R. 80 S.C. at 594 (stating that the "'entire scheme' should be reviewed after twenty years").

143. *Thakur*, (2008) 6 S.C.C. at 177.

144. *Empower through education, not reservation: Nehru*, THE ECONOMIC TIMES, Apr. 11, 2008 (citing 5 JAWAHARLAL NEHRU, LETTERS TO CHIEF MINISTERS 1947–1964 456–57 (1989)), available at <http://economictimes.indiatimes.com/News/PoliticsNation/EmpowerthrougheducationnotreservationNehru/articleshow/2943009.cms> (urging states to provide backward classes of citizens with good educational and technical training facilities and expressed his opposition to reservations on the basis of caste or religion) (on file with

reservation is continued in spite of achieving the object of reservation, the law which was valid when made, may become invalid."¹⁴⁵ One indicator that caste-based disparities are declining as a result of the reservation system would be the removal of castes from OBC lists in states where reservations have been utilized for many decades. Unfortunately, the reality is that reservations have become a commonly used strategy by which political parties can win over caste-based voting blocs. Thus, no castes have been removed or are likely to be removed from "backward" lists regardless of their social, educational, and political advancement.

Predictably, caste-based divisions are on the rise and caste itself remains highly relevant in contemporary Indian society.¹⁴⁶ Communities clamor for recognition as OBCs and often the determination of their status is made based on their "vote-bank" strength.¹⁴⁷ Although it may be premature to accurately measure the impact of reservations for OBCs in central government employment, there are strong indications that politically powerful castes have cornered the benefits of reservations at the expense of genuinely indigent non-SC castes.¹⁴⁸ These non-SC communities, although included in the OBC list, lack the political means to seize the benefits offered.

The experience of state governments with reservations for OBCs provides valuable insight into the potential future and likely efficacy of the implementation of the Mandal Commission's recommendation at the central level. For instance, reservations in Tamil Nadu have a history dating back to 1919,¹⁴⁹ and today, almost a hundred years later, there is no discussion of dismantling the compensatory discrimination system. Instead, the State of Tamil Nadu continues to have a 69% reservation policy, in

Washington and Lee Journal of Civil Rights and Social Justice).

145. *Thakur*, (2008) 6 S.C.C. at 177.

146. See Christophe Jaffrelot, *India: Caste Stronger than Religion?*, 32 INT'L INST. FOR ASIAN STUDIES NEWSLETTER 1, 18 (Nov. 2003), available at http://www.iias.nl/nl/32/iias_nl32_18.pdf (explaining that caste-based formulations are highly important and relevant to electoral success in Indian politics).

147. See Simon Robinson, *The Race to the Bottom of the Ladder*, TIME, June 5, 2007, available at <http://www.time.com/time/world/article/0,8599,1628192,00.html?xid=rss-world&iid=sphere-inline-bottom> (stating that "political parties have pledged to bring more and more groups under the affirmative action umbrella").

148. See Ashok Kumar Pankaj Rothak, *Mandal II: A Dilemma of Democracy*, HARDNEWS MEDIA, April/May 2006, available at <http://www.hardnewsmedia.com/2006/05/438> (stating that "[t]he problem is that those who are better off corner the benefits of reservation policy").

149. See, *supra* note 1 and accompanying text.

defiance of the 50% quota limit set by the Supreme Court in *Balaji*.¹⁵⁰ Although Parliament enacted a law that placed Tamil Nadu's blatant defiance of the 50% quota limit beyond the purview of the Supreme Court, the latter recently held that such laws are subject to judicial review if they violate fundamental rights guaranteed by the Constitution.¹⁵¹

The southern states, led by Tamil Nadu, are considered to be role-models for social progress. If these states have achieved substantial social progress, a discussion needs to commence on the need to dismantle reservations within a stipulated time frame for those castes that have overcome their "backwardness." For instance, a 2005 study detailing medical college admissions in Tamil Nadu reveals that the students from the "reserved" categories actually garnered a larger share of seats than upper-caste candidates in the "open" category—i.e. seats open for students regardless of their caste background.¹⁵² This is evidence that certain castes that continue to be labeled as "backward" no longer require special assistance to compete against so-called upper-castes.

A few examples will demonstrate how reservations, intended to uplift a few disadvantaged communities, have become simply a political tool. In 2000, the then-Chairman of the Backward Classes Commission of Andhra Pradesh noted that most castes except Kammias, Jains, and Anglo-Indians tried to claim "backward" status.¹⁵³ In Karnataka, the Lingayats and Vokkaliga, two powerful castes who constitute a significant portion of the state's population, used their political clout to gain admission into the OBC lists formulated by the state in 1986, despite their initial exclusion.¹⁵⁴ Scholars such as M.N. Srinivas have explained their opposition to the quota system for OBCs due to such abuses of the system.¹⁵⁵

In *Sawhney*, the Supreme Court rejected reservations for the poor among the upper-caste communities, but that did not prevent the Rajasthan

150. Sheela Bhatt, *SC Judgment Exposes the Legislature*, REDIFF NEWS, Jan. 11, 2007, available at <http://us.rediff.com/news/2007/jan/11spec.htm>.

151. *See id.* (stating that "although the government is entitled to place laws in the Ninth Schedule, if it violates the Fundamental Rights guaranteed under Articles 14, 15, 19, 20 and 21 of the Constitution they are liable to be struck down by the courts").

152. K. Ramachandran, *Reserved Classes Forge Ahead*, THE HINDU, July 20, 2005, available at <http://www.hindu.com/2005/07/20/stories/2005072011970100.htm>.

153. P.K. Misra, *Backward Castes Census: An Outmoded Idea*, ECON. AND POL. WKLY., June 16, 2007, at 2247.

154. M.N. Srinivas, *Employment Quotas in India*, 8 ANTHROPOLOGY TODAY 19, 20 (1992).

155. *Id.* (criticizing the quota system as "tokenist" and not a real solution to mass poverty).

government from passing a resolution in 2003 proposing a 14% reservation for impoverished sections of the upper-castes.¹⁵⁶ Recently, Mayawati, the most prominent Dalit politician, promised reservations for the poor among the upper-castes in order to consolidate her Dalit-Brahmin alliance in the state of Uttar Pradesh.¹⁵⁷

In Rajasthan, out of a total of 316 identified castes, only 11 are not entitled to some form of reservation.¹⁵⁸ In 2007, members of the Gujjar caste violently demonstrated for ST status in Rajasthan, even though they are entitled to reservations as OBCs in that state.¹⁵⁹ The Meenas, a sizable ST community in Rajasthan, responded to the Gujjar agitation by threatening to carry out counter-protests.¹⁶⁰ The Gujjars demanded ST status in Rajasthan because they were classified as such in two other Indian states—although they are classified as OBCs in all other Indian states in which they reside—and because an ST classification would enable them to corner a larger share of the reserved seats in employment and education.¹⁶¹ Anand Teltumbde, a Dalit intellectual, posits that the Gujjars did not agitate for SC status because a conferment as Dalit would carry a "social stigma . . . which no non-SC caste would like to incur no matter what the benefit."¹⁶²

B. Reservations Must be Focused Exclusively for the Benefit of SC/ST Communities

The "pie" of government jobs and seats in government-managed educational institutions is shrinking in an India increasingly dominated by the private sector. Nevertheless, politicians successfully convince the general populace that progress is being achieved by merely granting quotas.¹⁶³ The late M.N. Srinivas, India's most renowned sociologist and

156. See Editorial, *Shrinking Pie*, ECON. AND POL. WKLY., July 5, 2003, at 2784.

157. See Teltumbde, *supra* note 24, at 2383 (describing political reservations for impoverished sections of the upper-castes).

158. See *Shrinking Pie*, *supra* note 156, at 2784.

159. See Teltumbde, *supra* note 24, at 2383 (describing a protest demanding ST status in order to obtain reservations).

160. *Id.*

161. *Id.*

162. *Id.*; see also Robinson, *supra* note 147 (describing Gujjar protests regarding government classification).

163. See Teltumbde, *supra* note 24, at 2384 ("[R]eservations came handy for diverting the attention of people from the deepening unemployment . . . during the 1980s and . . . after

best-known authority on the caste system, explained his opposition to the current system:

[T]he gravamen of my charge against reservation is that it has come in the way of adopting a policy of sustained attack on mass poverty. Caste-based reservation of jobs and seats has provided an easy way out, since it satisfies the aspiration of elites in each sub-group. It is "tokenist" and not a real solution to backwardness, economic, social or educational . . . caste-based reservation has heightened caste-consciousness everywhere and promoted inter-caste conflict, and in some areas, what journalists call "caste-wars". . . . I am against caste-based reservations for jobs—except for Scheduled Castes and Scheduled Tribes for a temporary period, because of the institution of untouchability in the case of SCs, and isolation from the mainstream in the case of STs.¹⁶⁴

Ideally, M.N. Srinivas' suggestion, providing reservations only for SC/ST communities, should be implemented by the Indian government at both the federal and state level. The reservations system that is currently in place for OBCs should be dismantled within a stipulated time frame which would then open up over 75% of available vacancies on the basis of merit.

Anand Teltumbde echoes Srinivas' critique by calling for a return to the "original vision of reservations," wherein the focus is on SC/ST communities.¹⁶⁵ He maintains that the reservation system is digressing to a point where eventually all vacancies in government jobs and educational institutions would be reserved proportionally for various castes based on their numerical strength in the total population.¹⁶⁶ This would result in a system that would be "meaningless."¹⁶⁷ Teltumbde also urges the private sector, the judiciary, and the army to consider reservations for SC/ST communities.¹⁶⁸ Furthermore, he also calls for a time-bound phasing out of reservations because the beneficiaries—i.e. SC/ST communities—would disfavor quotas perpetually as that would imply the continued relevance of caste-based distinctions.¹⁶⁹

1991.").

164. M.N. Srinivas, *supra* note 154, at 19–20.

165. Teltumbde, *supra* note 24, at 2385.

166. *Id.* (criticizing the current growth in claims against the reservation system).

167. *Id.* (arguing that allowing everyone to be apportioned equal parts of the system according to population violates social justice principles by ignoring the differential resource bases of castes).

168. *Id.* (claiming that a solution lies in reverting to the original conception of reservations for only the most disabled classes, the SCs and STs).

169. *Id.* (viewing caste-based distinctions as a disease that must be cured quickly).

This Note focuses on the relationship between quotas and OBCs. However, it would be incomplete without a discussion of whether reservations have been successful in uplifting the SC/ST communities. Empirical evidence indicates that SC/ST communities have benefited substantially from reservations in the past few decades. One study posits that approximately one third of all SC/ST students attending colleges in the 1990s were beneficiaries of compensatory discrimination.¹⁷⁰ Staunch anti-reservationists, such as Arun Shourie, have criticized the quota system even for these communities, while some academics, like M.N. Srinivas, note that certain SC sub-castes, such as the Mahars of Maharashtra, have cornered most of the benefits at the expense of other sub-castes, such as Chambar, Mang, and Dor.¹⁷¹

Despite such shortcomings, the scale of the historical oppression of Dalits, combined with their present plight throughout India,¹⁷² makes it imperative that reservations continue for them. Dalit Christians and Dalit Muslims should also be able to take advantage of quota provisions, as they too are heavily discriminated against by their co-religionists.¹⁷³ The issue of whether these Dalit Christians and Dalit Muslims are entitled to reservations, and, if so, whether the 15% quota for SCs must be expanded, is under litigation in the Supreme Court.¹⁷⁴

Teltumbde's suggestion that compensatory discrimination be implemented in the private sector is also worthy of serious consideration. A survey conducted by two academics from the City University of New

170. Thomas E. Weisskopf, *Impact of Reservations on Admissions to Higher Education in India*, *ECON. AND POL. WKLY.*, Sep. 25, 2004, at 4339.

171. Srinivas, *supra* note 154, at 19 ("[T]he Mahars of Maharashtra . . . tend to predominate in jobs reserved for the SCs and at the expense of other castes such as Mang, Dhor and Chambhar.").

172. See *Police Escort Dalit Students to School*, *THE HINDU*, Feb. 22, 2008, available at <http://www.hindu.com/2008/02/22/stories/2008022254280400.htm> (describing how police were necessary to escort Dalit students to their school); see also Vidya Subrahmaniam, *A System Against the Dalits*, *THE HINDU*, Mar. 14, 2007, available at <http://www.thehindu.com/2007/03/14/stories/2007031402091100.htm> (describing continuing violence against the Dalits).

173. See K. Srilata, *A Palmyra Leaf That Sears Us*, *THE HINDU*, Sep. 16, 2001, available at <http://www.hinduonnet.com/2001/09/16/stories/1316017m.htm> (describing the oppressive state that the Dalits live in); see also *Archbishop Promises Equal Access to Dalits*, *THE HINDU*, Mar. 19, 2008, available at <http://www.hindu.com/2008/03/19/stories/2008031952460600.htm> (describing a Catholic exception to caste distinction in limited circumstances).

174. J. Venkatesan, *Center Gets Time to Decide on Quota for Dalit Christians*, *THE HINDU*, Jan. 24, 2008, available at <http://www.hindu.com/2008/01/24/stories/2008012460161300.htm>.

York reveals that Dalits face significant discrimination when applying for jobs in the Indian private sector.¹⁷⁵ In February 2008, the Mayawati government in Uttar Pradesh announced reservations in projects that involved a public-private partnership, although details of the scheme remain unclear.¹⁷⁶ While quotas in the private sector may not necessarily be the way forward, some companies have begun to take positive steps to encourage the employment of Dalits.¹⁷⁷ Other organizations would do well to emulate the examples set by these companies.

A decision to dismantle the OBC quota system is unlikely to occur in the foreseeable future. Yet, if it ever does happen, those who favor the current system would allege that such a step would ensure upper-caste domination of government jobs and educational seats. They assert that the upper-caste youth enjoy unfair advantages over the OBCs because they tend to be more fluent in English—the medium of instruction at most public universities—and are able to afford superior schooling and tuition facilities. However, this Note has already demonstrated that many of the sub-castes in the OBC list are not truly "backward." Additionally, vociferous supporters of the Mandal Commission state that reservations will end "when equality is achieved,"¹⁷⁸ although statistics reveal that the average OBC is no poorer than the average Indian. With regard to social status, many OBC communities do not perceive themselves as "ritualistically backward," but merely claim backwardness for administrative benefits.

Furthermore, the Mandal Commission also suggested numerous steps, besides quotas, as means through which the OBCs could be uplifted. Some of these steps included intensive tutorials for students applying for entry to technical and vocation-education facilities; implementing land reforms so that those castes trapped in a feudalistic society could break out of their

175. S. Anand, *Not Quite Like Us*, TEHELKA NEWS, Nov. 24, 2007, available at http://www.tehelka.com/story_main36.asp?filename=cr241107not_quite.asp.

176. *Mayawati Announces Reservations in Private Sector*, THE INDIAN EXPRESS, Jan. 18, 2008, available at <http://www.expressindia.com/latest-news/Mayawati-announces-reservations-in-private-sector/262923>.

177. *See With Reservations*, THE ECONOMIST, Oct. 4, 2007, available at http://www.economist.com/world/asia/displaystory.cfm?story_id=E1_JJDJPTJ (describing how leading Indian companies, such as Infosys, provide special training to Dalit employees). *But see* Venkitesh Ramkrishnan, *Examining Reservation*, FRONTLINE, May 5, 2006, available at <http://www.frontlineonnet.com/fl2308/stories/20060505004600400.htm> (explaining that business leaders, while accepting the need for more socially inclusive policies, oppose compensatory discrimination modeled on government lines as it will adversely affect global competitiveness).

178. *With Reservations*, THE ECONOMIST, Oct. 4, 2007, available at http://www.economist.com/world/asia/displaystory.cfm?story_id=E1_JJDJPTJ.

cycle of rural poverty; and taking steps to make credit and other financial facilities available to OBC entrepreneurs.¹⁷⁹ The government may already be taking such steps; if so, it needs to ensure that the delivery system is functioning effectively. The government can also provide vouchers for genuinely needy lower castes (and SCs/STs) to attend private schools, so that they are able to compete effectively against the "privileged" castes when they apply for colleges and jobs.¹⁸⁰ Because government-managed schools are abysmal in most Indian states, such a step is likely to be welcomed by many beneficiaries.

*C. A New Process is Needed to Identify the Truly Needy
Among the "Backward Classes"*

The current system is too well entrenched. Dramatic changes, such as dismantling the entire quota system for OBCs, are highly unlikely to materialize. India has emerged as a relatively stable and cohesive nation, especially in relation to other post-colonial societies, largely due to its well-functioning democratic system. Diverse groups distinguished by caste, ethnicity, religion, and linguistic affiliation have exercised influence in the system through peaceful democratic methods for the most part. If reservations are dismantled for OBCs too rapidly, there is a danger of anarchy. Thus, other compromise solutions must also be considered.

The Mandal Commission suggested a 52% reservation for OBC communities even though this is a proportional quota—i.e. the number of seats reserved is based on the representation in the population.¹⁸¹ Such an approach is unnecessary because Articles 15(4) and 16(4) suggest that reservations be provided for communities whose representation in government services is only "inadequate."¹⁸² The Supreme Court held that reservations should not exceed 50%. Thus, the quota for OBCs was capped

179. See Venkitesh Ramkrishnan, *Examining Reservation*, FRONTLINE MAGAZINE, May 5, 2006, available at <http://www.frontlineonnet.com/fl2308/stories/20060505004600400.htm> (discussing the implementation of another portion of the Mandal Commission report by reserving seats in educational institutions for Other Backward Classes).

180. See Arvind Subramaniam, *Caste Aside*, WALL STREET JOURNAL ASIA, June 8, 2007 (discussing voucher schemes in India that are used to provide educational opportunities for historically disadvantaged segments of the population).

181. Prior, *supra* note 13, at 96.

182. See *id.* (stating that the Indian Constitution does not support proportional representation of classes for jobs and university seats).

at 27%. If a consensus, which will not be easy to reach,¹⁸³ can be arrived at that OBCs constitute only 36% of the population, and not 52%, then reservations for OBCs can be reduced to 15%. Concurrently, communities whose inclusion was on shaky grounds in the first place could be excluded on a time-based schedule, allowing the truly needy OBCs to take full advantage of available benefits.

Yogendra Yadav, a leading sociologist who in principle favors reservations for the OBCs on the basis of caste, has designed a more comprehensive list of criteria than the Mandal Commission to identify the genuinely needy among the OBCs.¹⁸⁴ Recognizing that the Mandal system tends to benefit the affluent among the OBCs, Yadav's criteria are more comprehensive and contain factors such as region, caste, gender, type of school attended, and family background.¹⁸⁵ Jawaharlal Nehru University, a premier institution located in New Delhi, uses a similar system to identify candidates for admission.¹⁸⁶

V. Conclusion

The Supreme Court, in its eagerness to promote equality for all in terms of access to public sector employment and education, has instead helped perpetuate caste-consciousness in India by endorsing the methodically flawed and politically tainted process of identifying "socially and educationally backward classes" deserving of compensatory discrimination. Indeed, some members of the Court, such as Justice Raveendran seem to have recognized this irony by noting in the *Thakur* judgment:

To start with, the effect of reservation may appear to perpetuate caste. The immediate effect of caste-based reservation has been rather unfortunate. In the pre-reservation era, people wanted to get rid of the backward tag—either social or economical. But post reservation, there

183. See P.K. Mishra, *Backward Castes Census: An Outmoded Idea*, ECON. AND POL. WKLY., June 16, 2007, at 2245 (opposing a new census based on a caste criteria on a variety of reasons including that the Indian state is trying to reduce caste consciousness and will encounter too many difficulties in accurately measuring caste).

184. Yogendra Yadav & Satish Deshpande, *Redesigning Affirmative Action*, ECON. AND POL. WKLY., June 17, 2006, at 2424 (discussing alternative model to caste quotas, which is evidence based, focusing on sources of disadvantage).

185. *Id.*

186. *Id.* (mentioning Jawaharlal Nehru University as an example of an institution that uses region to categorize backwardness).

is a tendency even among those who are considered as "forward," to seek "backward" tag, in the hope of enjoying the benefits of "backwardness." When more and more people aspire for "backwardness" instead of "forwardness" the country itself stagnates . . . Any provision for reservation is a temporary crutch. Such crutch, by unnecessary prolonged use, should not become a permanent liability.¹⁸⁷

Unfortunately, such warnings are rarely heeded by legislatures. Furthermore, the Court itself is unwilling to firmly direct the government to ensure that reservations are phased out in a timely manner.

The Indian state deserves credit for embarking on a daunting project to reduce caste-based inequalities. This Note recognizes that caste-based inequalities will not disappear overnight and that the government must take special steps to alleviate the situation of the SCs, STs, and the genuinely needy among the "backward classes." However, quotas are not the only way in which caste-based inequalities can be reduced. Although a system of reservations has played an important role in uplifting the Dalits, it has been ineffective in helping the genuinely needy among the OBCs. Furthermore, the reservation system for OBCs has played a role in the continued suppression of the Dalits. Thus, new measures must be contemplated to assist the truly needy sections of the OBC community. Finally, as India's economy liberalizes further, policy-makers need to find pragmatic solutions that will ensure that the Dalits and other historically oppressed castes act as participants in India's changing economic landscape.

187. *Ashoka Kumar Thakur v. Union of India*, (2008) 6 S.C.C. 1, 182.

