

Representations of Disadvantage: Evolving Definitions of Disadvantage in India's Reservation Policy and United States' Affirmative Action Policy

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INTRODUCTION

Seven months after the Supreme Court of the United States scaled back racial affirmative action by requiring direct evidence of past discrimination to justify its implementation,¹ the then Prime Minister of India, V.P. Singh, announced the implementation of long-shelved recommendations to expand reservations in government employment. This expansion entailed reservation of 27% of government positions for Other Backward Classes, in addition to the existing quota reserving 22.5% of government positions for Scheduled Castes and Scheduled Tribes.² In the years following, the U.S. Supreme Court has continued its severe curtailment of affirmative action. Meanwhile, the India Supreme Court, amidst frequent riots and several self-immolation protests, affirmed the additional 27% of reservations for those groups considered more advanced than the Scheduled Castes and Tribes, yet still gravely disadvantaged in their ability to access equal opportunity.

India's policy of reservation, or "compensatory discrimination," is a "daring attempt to remedy the past injustices suffered by those who are at

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1. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 499 (1989) (O'Connor, J., plurality opinion) ("While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to the lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota . . .").

2. See Michael Byrnes, *India: Reeling Under a Wave of Violence, Nihilism, and Bitter Fragmentation*, AUSTRALIAN FINANCIAL REVIEW, Oct. 19, 1990. The Scheduled Castes generally consist of what were once Untouchable groups. The Other Backward Classes, in comparison, consist of members of castes that are higher than Untouchables, but still considerably low in the caste hierarchy.

the lower levels of India's four-tier caste-hierarchy."³ Before India declared independence in 1947, the British maintained separate electorates and reserved seats for these groups in Indian Parliament. Soon after Independence, by recommendation of the Kaka Kalelkar First Backward Classes Commission, the Indian government implemented the model of reservation schemes for the Scheduled Castes and Tribes in government employment, as one means of addressing the disadvantage suffered by these groups most subordinated in the traditional caste hierarchy. The government implemented no such policy for Other Backward Classes at that time. Over time, the Indian courts imposed various limitations on the reservation policy, attempting to refine its definition of a disadvantage sufficient to merit reservations, occasionally adapting the schedule of groups deemed to have suffered this disadvantage.

In 1978, the government appointed another commission, the Mandal Commission, to reevaluate the reservation policy. Most notably, the Mandal Report of 1980 suggested reserving an additional 27% of government positions for Other Backward Classes. Amidst violent protest, the Supreme Court validated this plan, a decade after its proposal, but added to the scheme a family/individual means test for all individuals claiming backward status by their caste membership.

The United States experienced a vastly different evolution of affirmative action policy. Introduced to manage the crisis of violent urban discord, the government encouraged employers to protect their businesses and stave off nascent riots by addressing one key cause of these riots—the devastating level of unemployment in African American communities. However, over time, the U.S. philosophical orientation to individualism eroded this policy, which was temporarily legitimated by a mode of crisis management, and it was reduced to a card played for political gain. Moreover, the U.S. judiciary limited the use of affirmative action, acknowledging only a very limited definition of disadvantage and effacing the presumption of a disadvantage which metastasizes from race discrimination.

As racial affirmative action decays, critics and supporters alike call for a redefinition of disadvantage, specifically one that is based on socioeconomic status and/or experience. However, limited again by the U.S.'s philosophical predilection for the philosophy of individualism, these proposed policies are unlikely to result in systemic socioeconomic affirmative action, nor will they approximate disadvantage created by racial discrimination. Unfortunately, the call for socioeconomic affirmative action functions to redefine disadvantage to exclude racialized disadvantage.

This paper contemplates this drastic difference in policy trajectories, asking how India and the United States, both seeking to repeal inequality in

3. E.J. Prior, *Constitutional Fairness or Fraud on the Constitution? Compensatory Discrimination in India*, 28 CASE W. RES. J. INT'L L. 63, 65-66 (1996) (citations omitted).

multicultural societies, and confronted by similar challenges to their resultant policies, have evolved to such different definitions of disadvantage, as rendered by their current policies. Perhaps there are as many answers to this question as there are constitutive variables, or "moving parts" that define a society. This paper tinkers with a few possible moving parts, specifically three factors to which the differences in India's and the United States' evolutions in affirmative action policy may be attributed: electoral politics and political leaders' motivation to capture or retain voting blocs; the philosophical role of individualism in each society, and the origins and goals established for the policies; and the willingness of each country to engage the complexity of defining disadvantage in the course of significant policy shifts.

Part One describes the seeds of the Indian policy of reservation in government employment, explains the salient policy changes up to the present, and confronts some of the contemporary challenges to the policy's current paradigm of disadvantage. Part Two provides a similar explication of U.S. policy, its origins and evolution in executive policy and judicial definition, and the nature of opposition to the model of disadvantage that inculcates racial disadvantage. Finally, Part Three explores three variables of the policies—electoral politics, the influence of individualism, and engagement of complexity—and how they have in part catalyzed policy shifts and propagated the current models of disadvantage in each country.

PART ONE

INDIA'S RESERVATION POLICY: DISADVANTAGE AS CONTESTED BUT SHARED BY THE PHENOMENA OF CASTE AND CLASS

"The real secret was that communism had crept into Kerala insidiously. As a reformist movement that never overtly questioned the traditional values of a caste-ridden community. The Marxists worked from within the communal divides, never challenging them, never appearing not to. They offered a cocktail revolution. A heady mix of Eastern Marxism and orthodox Hinduism, spiked with a shot of democracy."⁴

I. The Caste System: Corporate Organization, The Structure of Inequality, And the Roots of Critique

A nation composed of several groups and loosely organized according to these group identities and their interconnections, India is most often recognized for its caste system. The caste system is a hierarchy stratifying society on the basis of group membership ascribed by birth. While the caste system has withstood many internal attacks, British colonial rule provided significant catalysts for the movement toward equality across the caste hierarchy. Most notably, by operating a colonial enterprise in India, the

4. ARUHNHATI ROY, *THE GOD OF SMALL THINGS* 64 (1997).

British existed as a common enemy against which the many sub-societies of India had to unite. Moreover, in order to unite against a colonial, racist enemy, the leaders of India's nationalist movement were forced to contend with the rampant inequality within the nation.

A. The Caste System and Its Organization of Indian Society.

The caste system is Hinduism's hierarchical organization of Indian society, by group membership, typically determined by birth.⁵ The hierarchy consists of four major "classes," or *varnas*. *Brahmins*, traditionally known as priests and scholars, occupy the uppermost position, followed by the *Kshatriyas*, traditionally the ruler/warrior class, the *Vaishyas*, traditionally comprised of merchants and farmers, and lastly, the *Sudras*, traditionally the menial/servant class. Untouchables, or Dalits,⁶ exist outside of the four-class hierarchy.⁷ Various subcastes occupy each of these four classes. These subcastes are "endogamous group[s] bearing a common name and claiming a common origin, membership in which is hereditary . . . imposing on its members certain obligations and restrictions in matters of social intercourse, and having a more or less determinate position"⁸ in the hierarchy.

While the *varna* system functions at the national level, the caste system typically functions at the local level,⁹ where *jajmani*, the division of labor among castes, operates and creates interdependent relationships among castes.¹⁰ While "[l]ocal, regional and pan-Indian schemes all draw on a common ideological fund,"¹¹ there is both a tremendous local variation in the caste hierarchy,¹² and a "bewildering and irregular set of regional and subregional groupings of castes and conceptualizations of caste hierarchy."¹³ Perhaps most notably, North India is thought to have far more complex interrelations of caste groups, and more interdependent divisions of labor, making it difficult to subdivide groups into the hierarchy. In comparison, South India, where the majority of the population stands uneasily on the bottom rungs of the hierarchy, has always had clearer divisions of labor and therefore a more simplified hierarchy.¹⁴

Caste is only one of many organizing variables in Indian society.

5. See MARC GALANTER, *COMPETING INEQUALITIES* 8 (1984).

6. The group originally called Untouchables, who Gandhi named Harijans, or "Children of God," have rejected both of these labels in favor of "Dalits" - "the Oppressed." See John Rettie, *India's Oppressed Millions Awaken*, *GUARDIAN*, Mar. 5, 1994, at 12.

7. See Prior, *supra* note 3, at 66 n.15 (citation omitted).

8. GALANTER, *supra* note 5, at 8.

9. See *id.* at 9.

10. See *id.*

11. *Id.* at 11.

12. See *id.* at 10.

13. *Id.* at 11 (citation omitted).

14. See *id.* at 125.

More importantly, these organizing variables interact with one another, thus redefining the role of each variable as a dynamic of societal organization. Religion, like region, is also an important grouping mechanism. Indian society includes a multitude of religions, and though caste is regarded as a purely Hindu phenomenon, it operates within many religions.¹⁵ For example, many low-caste Hindus converted to Islam or Christianity to escape subordination by a caste system perceived as a primarily Hindu convention.¹⁶ However, though these religions consistently refused to officially recognize the caste system, remnants of the caste hierarchy still functioned for converts despite adoption of another religion.¹⁷ Thus, just as the Hindu caste system does not function independent of religion, religion does not function completely independent of caste. Just as mobility along the axis of religion may have promised to reduce the salience of caste, the caste system, by infiltration, reshapes religion's organizing role in society. Religion fails to provide such a mechanism completely alternative to the caste system, and, because other religions replicate the caste system, religion cannot become more salient than, or a viable alternative to, caste via claims of providing such an alternative. These various organizing factors and their ever-shifting interactions thwart most simplistic, single-faceted interpretations of Indian society. Nevertheless, caste is still considered a fundamental organizing variable of Indian society.

B. The Roots of Formal Equality: Challenges to the Caste System.

India's caste system has sustained a long history of indigenous critiques,¹⁸ but many of these "anti-caste" movements never succeeded at the all-India level. While the British did not invent or introduce this critique of societal inequality,¹⁹ the "establishment of British rule and the many forces which it let loose"²⁰ fostered an optimal context for these seeds of critique to take root. In opposition to the British colonial enterprise, the Indian Independence movement grew and demanded that the Indian elite reckon

15. *See id.* at 16.

16. *See* Asghar Ali Engineer, *Muslims and Reservation*, MAINSTREAM, Nov. 12, 1994, at 23; *see also* SHRIRAM MAHESHWARI, MANDAL COMMISSION REVISITED: RESERVATION BUREAUCRACY IN INDIA 80 (citing REPORT OF THE (FIRST) BACKWARD CLASSES COMMISSION (Kaka Kalelkar chair, 1956).

17. *See* Clark D. Cunningham & N.R. Madhava Menon, *Seeking Equality In Multicultural Societies*, Address Before the International Conference on Rethinking Equality in the Global Society (Mar. 13, 1998).

18. *See* M.N. Srinivas, *Caste: A Systemic Change?* 15-16 (1997) (unpublished manuscript, on file with the author) ("[R]ight from the sixth century B.C., when Jainism and Buddhism appeared on the scene, continuous attacks have been made on Brahminical claims to supremacy in the caste hierarchy . . .").

19. *Cf.* SUNITA PARIKH, *THE POLITICS OF PREFERENCE* 50 (1997) ("Beginning in the nineteenth century, however, acceptance of corporate, unequal society was challenged by a Western emphasis on the primacy of the individual.").

20. Srinivas, *supra* note 18, at 16.

with the rampant inequality within their India.

British assessment and treatment of India as a corporate society perpetuated a framework conducive to addressing group-based inequities. Though India began to reference aspects of Western culture and philosophy, including the Western emphasis on the "importance of the individual as the primary unit, standing above corporate religious and caste groups,"²¹ India was still primarily a pluralistic nation organized by group memberships, and the British treated it as such.²² The British regarded India as a society comprised of discrete groups²³ whose interests were fundamentally distinct from one another.²⁴ Consequently, the British typically formulated policies that addressed these supposedly discrete groups as separate, non-interwoven entities.²⁵ Despite a growing sentiment among the liberal, secular Indian elite that individual rights should supersede group identity, this predisposition to accept policies structured around perceptions of corporate identity outlived British rule and influenced post-Independence India, thereby propping open the door for reservation policy.²⁶

The Indian elite maintained concerns about this tendency to construct policies around group cleavages. Driven by nationalist interests in Indian unity, they "argued that India should be treated as a single entity with an undifferentiated electorate . . ."²⁷ The elite were attempting to create a unified India that could successfully oppose British rule and achieve independence. However, British policies which recognized, and sought to capitalize on, the divisions within India reminded the Indian elite that they could not feign unity and fail to reckon with the rampant division and inequality within the nascent nation. The British presence thereby served as another catalyst for India's scrutiny of its own system of inequality. These critics of British colonialism and oppression could no longer struggle for independence while continuing to oppress the lower castes.

[The Indian elite] was essentially an upper caste intelligentsia which had within its traditional cultural context taken its own social superiority for granted. It now found itself despised, and its traditional culture denigrated by alien rulers acutely conscious of their own racial superiority. The situation itself called for an assertion of equality as a general value,

21. PARIKH, *supra* note 19, at 51.

22. Cf. ELIZABETH FOX-GENOVESE, *FEMINISM WITHOUT ILLUSIONS: A CRITIQUE OF INDIVIDUALISM* 46 (1991) ("A society legally grounded in communities must be a corporatist—emphatically not individualistic—society, and, by implication, must be based on particularist rather than universalist principles.").

23. Cf. GALANTER, *supra* note 5, at 7-17 (exploring the complex, cross-cutting nature of India's many grouping mechanisms).

24. See SUNIL KHILNANI, *THE IDEA OF INDIA* 24-25 (1997) ("The groups who were accorded political representation were identified as religious 'communities' with immutable interests and collective rights . . .").

25. See PARIKH, *supra* note 19, at 52.

26. See *id.*

27. *Id.*

not merely equality among races or among nations, but also equality among castes. . . .²⁸

In essence, an Indian elite attempting to mount a struggle for independence could not demand its freedom from an oppressive colonial authority and simultaneously perpetuate within its borders a system of tremendous inequality.²⁹ While this concern may have been primarily tactical (i.e., attempting to establish unity against the British), the nationalist independence movement revitalized India's long-standing indigenous critique of the caste system in the crucial decades prior to Independence. Combined with a grant of formal equality to lower castes, and the growing tendency, encouraged by the British, to structure policies around corporate organization, India was ripe for the development of reservation policy.

C. The Seeds For Reservations In Government Employment: Separate Electorates and Reserved Seats Under Colonial Rule.

The first iteration of reservation policy called for reserving seats in Indian Parliament for several groups, including Untouchables. "In the early part of the twentieth century, changing political, social, and economic conditions under colonial rule brought minority interests on to the political agenda and gave disadvantaged groups a new influence."³⁰ Meanwhile, the British were slowly providing Indians access to representation, allowing prominent Indians to serve on government advisory councils, establishing provincial councils, and eventually providing for limited population-based representation on these councils.³¹ Naturally, the British ensured that these councils were populated with their allies, attempting to maintain "the three major pro-British interest groups: commercial, landed, and Muslim."³² When the British announced in 1908 their intention to reform political practices, a delegation of conservative Muslims requested that they be given separate electorates,³³ "fear[ing] that they would be dominated by liberal Muslims of the new generation and by Hindus in joint electoral bodies."³⁴ The British, eager to maintain alliances with these powerful representatives of the Muslim population,³⁵ and to continue to deploy their

28. *Id.* at 50 (quoting ANDRE BETEILLE, *THE IDEA OF NATURAL INEQUALITY AND OTHER ESSAYS* 48-49 (1983)).

29. *Cf.* discussion *infra* note 155 (noting that the influence of global attention focused on U.S.' civil rights policy, on U.S.' formation of race conscious policies).

30. PARIKH, *supra* note 19, at 71.

31. *See id.* at 72.

32. *Id.* (citation omitted).

33. A separate electorate would entail a system where only members of the specified group would vote on certain seats, reserved for whomever this group, voting alone, elected. *See GALANTER, supra* note 5, at 26 (defining separate electorates for Muslims as "an electorate for Muslims in which they alone would vote" (quoting Eleanor Zelliot, "Dr. Ambedkar and the Mahar Movement," 141 (1969) (unpublished Ph.D. dissertation, University of Pennsylvania))).

34. PARIKH, *supra* note 19, at 74.

35. *See id.*

successful divide-and-conquer strategy, granted the request.

Though separate electorates were not established for Untouchables at this time, the creation of separate electorates for Muslims unleashed this possibility.³⁶ After almost 25 years, and many attempts to secure further political reforms that would benefit non-Brahmins,³⁷ and against a backdrop of internal conflict over the wisdom of separate electorates for Untouchables,³⁸ a coalition of Indian groups presented the Poona Pact, which was quickly accepted by the British. The Poona Pact established reserved seats, but no separate electorates, for Untouchables. It represented a compromise between Untouchable leaders who sought separate electorates and other leaders who opposed a recent British award of separate electorates and reserved seats³⁹ to Untouchables,⁴⁰ out of fear that this award would only drive wedges into an Indian community in desperate need of unity to achieve independence. The implementation of this difficult compromise furthered the trend of determining policy along group identities, and laid the groundwork for reservations in government employment after Independence.

II. Implementation of Reservations in Government Employment.

Having won a long battle for independence from British colonial authority, the founders of a renewed India had developed an acute sense of the need to stake the nation on a fundamental commitment to equality. The battle in the Constituent Assembly—the body that drafted India's original, post-Independence constitution—came in settling on the means India would employ to this end. India was somewhat infused with the Western liberal traditional emphasis on individualism. Yet India was self-consciously a nation comprised not just of atomized individuals,⁴¹ but of several societies in which these individuals were grouped. Individuals were avowedly locations for the residence of complexes and compendiums of these many group identities. Thus, while championing the individual's right to equality, the Constituent Assembly could not ignore the group as a fundamental organizational unit. The Indian Constitution reflected these tensions, creating flexibility for the interpretation and adjudication of the conflicts between individual and group rights.

36. *See id.*

37. *See id.* at 76-84.

38. *See id.* at 81-82, 147-49.

39. Reserved seats differ from separate electorates in that everyone votes for the seats, but the candidates are selected by the group to whom the seats are reserved.

40. *See* PARIKH, *supra* note 19, at 152.

41. *See* KHILNANI, *supra* note 24, at 24 ("The idea of natural rights, essential to modern liberalism, was only faintly articulated and failed to find a niche in nationalist thought.").

A. The Indian Constitution: Provisions for Reservations for The "Backward Classes."

When the Constituent Assembly convened in 1948 to draft India's Constitution, the concept of creating group-based protections through a corporate framework was familiar.⁴² It was also consistent with the vision of an inclusive India, and of promulgating policies with a flexibility that did not coarsen the delicate, nuanced rendering of Indian identities. Furthermore, safeguards for various underprivileged groups were adjudged to be of sufficient import to be enshrined in the Constitution and "put beyond the reach of temporary or narrow majorities."⁴³ The Constitution thus included explicit provisions protecting reservations for "backward classes" in representative branches of Central and State governments.⁴⁴ It also included Article 15, which prohibited discrimination on grounds of "religion, race, caste, sex, [or] place of birth"⁴⁵ with an exception permitting special provisions for women and children.⁴⁶ Article 15(4), an exception permitting special provisions based on caste, was passed to effectively overrule a Supreme Court decision⁴⁷ which invalidated reservations under Article 15.

The Constituent Assembly openly debated the possibility of reservations in public employment,⁴⁸ attempting to navigate the "tension between individual and group rights."⁴⁹ Finally Dr. Ambedkar, a leader in India's achievement of Independence and in the nation's infant years, helped strike a compromise in Article 16.⁵⁰ Article 16 prohibits public employment dis-

42. See Cunningham & Menon, *supra* note 17, at 10.

43. GALANTER, *supra* note 5, at 37. See also Prior, *supra* note 3, at 73 ("As India's independence movement gathered momentum, conflicts with British officials became increasingly frequent. Repressive actions by British authorities bolstered demands for constitutional guarantees of fundamental rights. The protection of these rights were not realized until the creation of the Indian Constitution.")

44. See Prior, *supra* note 3, at 75-76 (citing INDIA CONST. pt. XVI, art. 332). "Backward classes" were not defined in terms of specific castes (i.e., Untouchables vs. low-caste non-Untouchables), and this ambiguity forms the crux of the debate over precisely who is sufficiently disadvantaged to require the remedy of reservations. Specifically, while some contend that "backward classes" consist only of Scheduled Castes (Untouchables), others claim Other Backward Classes (low-caste non-Untouchables) are also subsumed within the term. The reluctance of some to expand reservation policy to encompass Other Backward Classes reflects adherence to the belief that caste itself is the genesis of disadvantage and that class is secondary. In other words, opposition to including Other Backward Classes seems to revolve around assuming that these castes – higher in the hierarchy than Scheduled Castes – are not truly disadvantaged because they are of higher caste, regardless of whether these castes face socioeconomic disadvantage irrespective of caste. For further analysis of this "caste vs. class" debate, see *infra* Part Three.

45. INDIA CONST. pt. III, art. 15(1).

46. See INDIA CONST. pt. III, art. 15(3).

47. See *Madras v. Champakam Dorairajan*, 1951 A.I.R. (S.C.) 226 (invalidating under Article 15 quotas for various castes and non-Hindus for admission to state institutions of higher education).

48. See Cunningham & Menon, *supra* note 17, at 10-11.

49. PARIKH, *supra* note 19, at 54. ("While the legitimacy of individual rights has come to be more widely accepted . . . , Indian society is still organized primarily in terms of castes and communities, and the ideology of caste hierarchy continues to conflict with emerging ideologies of individualism and equal rights.") *Id.* at 53.

50. See Cunningham & Menon, *supra* note 17, at 11.

crimination on grounds of "religion, race, caste, sex, descent, place of birth, [or] residence . . .".⁵¹ Still, Article 16 explicitly acknowledges the implicit tension of providing facial "equality of opportunity" in a society rampant with systemic, functional inequities.⁵² Thus, it includes Article 16(4), which provides that nothing in Article 16 "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."⁵³ Moreover, the Constitution requires the government to "promote educational and economic interests of Scheduled Castes and Scheduled Tribes [and] protect them from all forms of injustice and exploitation."⁵⁴

The Indian Constitution houses both the notion of equal treatment of individuals and the notion that members of a group who have suffered from hierarchical subordination and structuralized inequality may face unique obstacles to advancement that facial equal treatment cannot obviate. The Constitution charges the government with promoting these groups' interests, and explicitly permits the use of reservations or other preferences to repeal the negative consequences of membership in a "backward class." Therefore, the Indian government, including the judiciary, need not debate whether equality must always entail ignoring potentially salient group membership, or whether group membership can, in fact, be ignored. Similarly, attempts to justify caste-based assistance need not work around a vague or inflexible mandate for equality. In fact, arguments for preferential treatment marshal the Constitution strongly in their favor. Instead, debate inheres in attempting to define "backward classes" — those who have suffered the kind of disadvantage that calls for the remedy of reservations. Thus, in India, debates turn on which group memberships are, in fact, salient.

B. The Parameters of Disadvantage: Implementation of Reservations For Scheduled Castes.

The Constitution contemplated reservations not as a rule, but as an exception, "authorized only for the limited purpose of advancing the backward."⁵⁵ However, the Constitution neither specified which groups should comprise the beneficiaries of this exception, nor provided detailed guidance or standards for the identification of these groups. The Constitution merely permitted special provisions for "backward classes," a category comprised of the Scheduled Castes (noted for their untouchability), Scheduled Tribes (included for their geographic and socio-cultural isolation from the general

51. INDIA CONST. pt. III, art. 16(2).

52. INDIA CONST. pt. III, art. 16(1).

53. INDIA CONST. pt. III, art. 16(4).

54. Prior, *supra* note 3, at 79.

55. GALANTER, *supra* note 5, at 121.

population), and Other Backward Classes (the designation for backward groups not included in the first two groups, typically a low caste that is not untouchable).⁵⁶ The Scheduled Caste and Scheduled Tribe categories were intended to recognize the disadvantage to which groups were subjected "because of their low ritual status in the traditional Hindu hierarchy or their spatial and cultural isolation"⁵⁷

1. Early Attempts at Identifying The Scheduled Castes: The Disadvantage of Untouchability.

Identification of these supposedly discrete groups required resorting to the evaluation of data from the 1936 census, a reporting mechanism initiated by the British to order Indian society in the form most digestible to the British. This order "imposed a [formal] rigidity and apparent permanence on a caste system that had historically been somewhat fluid and local in its scope."⁵⁸ Census investigations attempting to record the exact rank of each caste failed to represent caste membership and group interrelations accurately because many low caste members claimed high rank. Many low castes viewed the census as a means of securing official recognition of higher caste status, thereby protecting claims to that higher status from dispute.⁵⁹ Thus, perhaps because of the inherently elusive nature of caste, the census created a formal record of caste that fell short of accurately characterizing the system.

From this inadequate census data, the British created the list of the Scheduled Castes in 1936. The purpose of the list was to facilitate electoral reforms, namely the reform of reserving seats for these Scheduled Castes.⁶⁰ The questions for determining untouchability "clearly point[ed] to the incidence of disabilities as the crucial test."⁶¹ These questions were fairly vague, but "[t]he existence of multiple (and ambiguous) criteria permitted regional variation"⁶² by providing the Census supervisors with a fair amount of discretion. Ultimately, each provincial supervisor was to draw up his own list, accounting for the questions, and was instructed to "reckon as depressed only those castes who definitely suffer from serious social and

56. *See id.*

57. *Id.* at 122.

58. PARIKH, *supra* note 19, at 56. *Accord* GALANTER, *supra* note 5, at 125 (noting that untouchables in South India were "set off by some uniform and distinctive pattern of practices" but that this pattern did not function on the all-India level, and North India was more notably characterized by non-uniform expressions of untouchability) (citation omitted).

59. *See* M.N. SRINIVAS, VILLAGE, CASTE, GENDER AND METHOD 81 (1996) ("The census became the equivalent of the traditional copper-plate grants of Indian kings declaring the rank and privileges of a caste, highlighting the role of the political authority in the caste system."). *See also id.* at 129 ("[W]hile the census officials wanted an accurate record of the rank of each caste in their jurisdiction, castes wanted to use the census to move higher up in the local hierarchy.").

60. *See* GALANTER, *supra* note 5, at 127-29.

61. *Id.* at 128.

62. *Id.* at 129.

political handicap *on account of their degraded position in the Hindu social scheme.*⁶³ (emphasis added). The policy contained the basic premise that because the injury was inflicted along lines of group categorization, the remedy could and should be available for the group qua group.

After the enactment of the Constitution, the President adopted a list of Scheduled Castes that basically reenacted the 1936 list.⁶⁴ A 1956 list eliminated a few more anomalies and made the significant addition of all Sikh untouchables.⁶⁵ This list, however, the Government acknowledged, was not exhaustive:

[The list] designates all of those groups who in the view of Parliament require the special protections provided by the Constitution: it defines who may stand for reserved seats and enjoy benefits and reservations for the Scheduled Castes. But it does not necessarily include every person or group that might be considered "untouchables" by any conceivable definition . . . There is . . . no single inclusive list of all groups considered untouchable, just as there is no single criterion for identifying them.⁶⁶

Thus while the government did not attempt to create a more accurate accounting than the 1936 census, it acknowledged to some degree that the 1936 census, or perhaps any census, could not provide a complete account of untouchability.

The government did, however, deem the slightly adapted 1936 tally sufficient for determining beneficiary groups of the reservation policy. This suggests the government was, though perhaps unwittingly, wrestling with the challenge of addressing the complexity of such determinations. On the one hand, they realized that the system of untouchability was far too nuanced a phenomenon to tabulate, contrary to the British assumption. On the other hand, the government needed some system of group categorization and relied on the 1936 census, perhaps because the census did not attempt to approximate untouchability, but rather its incumbent disabilities.⁶⁷

63. *Id.* (citation omitted).

64. *See id.* at 132 (explaining that the few changes made in 1951 consisted of "elimination of anomalies, rather than any basic change in policy.").

65. *See id.*

66. *Id.* at 134.

67. There was considerably less dispute over delineating the Scheduled Tribes. Generally, the Scheduled Tribe category was designed to "include those groups distinguished by 'tribal characteristics' and by their spatial and cultural isolation from the bulk of the population." *Id.* at 147 (citations omitted). Tribal characteristics included "social, religious, linguistic, and cultural distinctiveness . . ." *Id.* at 150. Preferential policies for Scheduled Tribes functioned somewhat differently because their protection was premised on different motivations. Whereas, in the case of the Scheduled Castes, "the aim of the policy is to eliminate their distinctiveness by dispelling all of the differences that set them apart from other Indians," *id.* at 153, the intent for Scheduled Tribes was "preservation of their separate integrity, rather than complete assimilation . . . [and] to balance improvement of their condition and a degree of assimilation with preservation of their distinctiveness and a measure of autonomy," *id.* at 152-53. To this end, the British had created "Scheduled Areas," which were to maintain their own provincial governance, with minimal interference from the British. The Scheduled Tribes were typically culled from these areas. *See id.*

2. Early Attempts to Circumscribe Disadvantage: The 1st Backward Classes Commission.

In accordance with the Constitution, in 1951 the President established the First Backward Classes Commission, chaired by Kaka Kalelkar. The Commission was charged with investigating the plight of socially and educationally backward classes, and recommending "steps to remove [the difficulties under which they labour] and to improve their condition."⁶⁸ The Commission's majority report recommended a system of reservations in government employment,⁶⁹ analogous to those that several southern states had maintained for years.⁷⁰

The Kalelkar Report first noted that "before the disease of caste is destroyed all facts about it have to be noted and classified,"⁷¹ and recommended a new and continuous census operation. The Report also took notice of "Special Groups" whose summary exclusion from the existing lists of backward groups should be reconsidered, calling for further examination of several groups, including Muslims, Christians, and Sikhs, as well as inhabitants of certain regions.⁷² Moreover, the Commission affirmed the practice of turning to caste as a primary criterion of backwardness.⁷³ In its report, the Commission acknowledged that injuries inflicted upon groups as groups could not be remedied without recognition of this "group" characteristic of the injury.

The government instituted a system of reservations based upon the Commission's recommendation, though it qualified reservation policies in many important respects. It excluded Christians and Muslims (including Hindus who had converted to these religions) from eligibility, limiting the scope of the policy to the Hindu community.⁷⁴ In addition to religious qualifiers, the government, in recognition of caste's regional variance, instituted regional qualifiers. Reservation policy designated Scheduled Castes by state, and sometimes by district, "on the ground that the social and educational backwardness of a group may vary in degree in different areas."⁷⁵ Yet, despite these limitations, India's policy of "compensatory dis-

68. MAHESHWARI, *supra* note 16, at 9.

69. *See id.*

70. *See id.* at 6 (noting long standing existence of reservation schemes in Kerala, Tamil Nadu, and other southern states).

71. *Id.* at 79 (quoting REPORT OF THE (FIRST) BACKWARD CLASSES COMMISSION (Kaka Kalelkar chair, 1956)).

72. *See id.* at 80-83.

73. *See id.* at 83 ("The Commission is justified in interpreting the terms of reference as mainly relating to social hierarchy based on caste.").

74. *See GALANTER, supra* note 5, at 143 (noting that "the major purpose of the list [of Scheduled Castes] was to provide for electoral representation, and Christians and Muslims were the beneficiaries of special electoral treatment as minorities."). However, the new employment reservation policies failed to account for these groups at all.

75. *Id.* at 140. The area limits have proved problematic because these lines in the sand may not correlate with any exactness to levels of disadvantage, and because they provide odd constraints for

crimination" consisted primarily of quotas, or strict reservations of designated percentages of government positions for beneficiary groups, according to their representation in the society. Membership in a beneficiary group alone qualified a candidate to receive a reserved position.

C. Non-Static, Flexible Definitions of Disadvantage: Judiciary Developments In Reservation Policy.

With the implementation of reservations for employment with the Central government, and ongoing state policies of employment reservations, the judiciary continually confronted reservation policies. Specifically, the courts began to examine these various attempts to proffer an operable definition of disadvantage. Attempting to give parameters to the Constitutional exception which permitted reservations for "backward classes," courts noted time and again that caste was a particularly salient variant of disadvantage, but could not function as the sole definition.

The Court's doctrine renders an account of disadvantage that reservation policy is meant to remedy. This more flexible account of disadvantage allows some resort to a group's position in the social hierarchy, recognizing that social status may bear on a group's experience of disadvantage. Still the policy counterweighs the variable of socioeconomic class, determining that one's caste status alone does not create an absolute presumption about the nature of one's socioeconomic status, which is also deemed a measure of disadvantage.

The Court also retains emphasis on groups as the unit by which the benefit is distributed. In the U.S., the permissibility of an *individual* to benefit from affirmative action based partly on her group membership is weighed against the right of a nonbeneficiary individual to receive the position in contention, or the injury he suffers by losing the position in part because he is not a member of the beneficiary group.⁷⁶ In India, however, the counterweight to a benefit garnered by someone solely because of group membership is his socioeconomic status—a measure of whether he, in fact, suffers disadvantage consistent with the claimed group membership, and is thereby entitled to the remedial benefits accruing to that group.⁷⁷ Thus, even the counterweights to granting reservations operate to

spatially mobile members of Scheduled Castes. Specifically, they pose the twin problems of out-migration and in-migration. *See id.* at 140-42. Out-migration refers to someone who leaves her state (where her caste is a Scheduled Caste) for a state where her caste is not Scheduled. She then cannot compete for reserved posts, even though she may have incurred the type of grave disadvantage in her home state which the reservation policy seeks to counteract. The in-migration quagmire refers to someone who moves from a state where his caste is not Scheduled to a state where his caste is scheduled. Yet he might benefit from a policy whose goal is to remedy an accumulated harm he has not suffered. *See id.* Though the regional qualification attempts to confront the local flavor of caste, it fails to account for a type of disadvantage (or advantage) that travels. *See id.* at 141-42.

76. *See infra* text accompanying notes 195-199.

77. *See infra* text accompanying note 298 (discussing "creamy layer" test's effect of maintaining homogeneity within group classifications).

maintain the primacy of the group as the unit of remedy.

In *Balaji v. State of Mysore*,⁷⁸ the Indian Supreme Court first confronted the possible limitations of caste as an index of disadvantage. The Court criticized the State of Mysore's heavy reliance on caste as a criterion of backwardness,⁷⁹ but still approved of using caste as "a unit of designation."⁸⁰ However, while leaving "intact caste or communal units as the things to be measured, [the Court confined] the role of caste as the measuring rod."⁸¹ In *State of Andhra Pradesh v. Sagar*,⁸² the Court, citing *Balaji*, invalidated a list of backward classes because the Court found that the State had not presented "any evidence . . . about the criteria adopted by them for the purpose of determining the backward classes."⁸³ Still, this did not shift the policy's focus to the individual, but maintained emphasis on the group. Though the Court was unwilling to allow an automatic presumption of disadvantage for the group, it sought evidence about the group's status, and not the status of individual members of the group, to establish the propriety of reservations for this group.

Similarly, in *Rajendran v. State of Madras*,⁸⁴ the Court noted that "a caste is also a class of citizens and if the caste as a whole is socially and educationally backward reservation can be made in favour of such a caste on the ground that it is a socially educationally backward class of citizens within the meaning of Article 15(4)." While the Court noted that a reservations schedule based solely on caste would be problematic, caste could be one of several factors considered, including "social and educational backwardness based on occupation."⁸⁵ The Court later reaffirmed *Balaji*, but specifically repudiated the notion that caste, while potentially useful in indicating disadvantage, was a *necessary* component of the calculus.⁸⁶

More recently, in *Vasanth Kumar v. State of Karnataka*,⁸⁷ the Court gave an advisory opinion on the criteria to be used to define disadvantage for the purposes of reservations. Four of the five opinions approved the

78. 1963 A.I.R. (S.C.) 649.

79. See GALANTER, *supra* note 5, at 191.

80. *Id.*

81. *Id.* at 192.

82. 1968 A.I.R. (S.C.) 1379.

83. *Id.* at 1383.

84. 1968 A.I.R. (S.C.) 1012.

85. *Id.* at 1015.

86. See GALANTER, *supra* note 5, at 192-93 (citing *Chitrallekha v. State of Mysore*, 1964 A.I.R. (S.C.) 1823, 1833) ("[T]here is nothing in [*Balaji*] which precludes the authority concerned from determining the social backwardness of a group of citizens if it can do so without reference to caste. While this court has not excluded caste from ascertaining the backwardness of a class of citizens, it has not made it one of the compelling circumstances."). The Court also expressed a desire to effectuate the policy of making "a sincere attempt to promote the welfare of the weaker sections" of society, but not "to give weightage to progressive sections of our society under the false colour of caste to which they happen to belong." REPORT OF THE (SECOND) BACKWARD CLASSES COMMISSION (B.P. Mandal chair, 1980) (quoting *Chitrallekha v. State of Mysore*, 1964 A.I.R. (S.C.) 1823, 1833).

87. 1985 A.I.R. (S.C.) 1495.

"use of caste as a unit to identify backward classes."⁸⁸ One judge recommended that caste could be used as one index, but "in certain cases an income ceiling might be set" to cull out those members of a generally backward class who are advanced.⁸⁹ One other judge suggested that caste rank should not be considered at all, and economic factors alone should determine backwardness.⁹⁰

D. Expanding the Parameters of Disadvantage: Implementation Of Reservations For Other Backward Classes.

1. The Mandal Commission's Recommendations to Extend Reservations to Other Backward Classes.

With this backdrop, in 1978 the Janata government, "[p]ursuant to [an] electoral promise,"⁹¹ appointed the Second Backward Classes Commission, chaired by B.P. Mandal, himself a member of a backward caste.⁹² The Commission, charged with reassessing reservations policy, tackled the challenge of creating a sophisticated calculus of disadvantage to define the beneficiaries of the policy. The Commission found that, in fact, caste was the genesis of social backwardness.⁹³ Congruent with Supreme Court holdings, it treated caste as a viable *unit* by which to mete out reservation policies, and also accorded significant weight to caste as the *rod* by which to measure inclusion in a list of backward classes. The Commission, again, recognized that if group membership was the source of injury and inequality, it might be integral to the remedy.

Accordingly, the Commission specified castes subordinated in the hierarchy (though ranked above those designated as Scheduled Castes) as Other Backward Classes, and recommended a 27% reservation in government employment for these groups.⁹⁴ The Report also recommended an

88. Prior, *supra* note 3, at 90.

89. *Id.*

90. *See id.*

91. GALANTER, *supra* note 5, at 186.

92. *See* MAHESHWARI, *supra* note 16, at 10 (suggesting that Mandal was a "fabulously wealthy politician from a backward caste.").

93. *See* Cunningham & Menon, *supra* note 17, at 16 (citing REPORT OF THE (SECOND) BACKWARD CLASSES COMMISSION pt. 1, at 4 (B.P. Mandal chair, 1980). *See also* REPORT OF THE (SECOND) BACKWARD CLASSES COMMISSION pt. 1, ch. IV, at 14-17 (B.P. Mandal chair, 1980). ("Castes are the building bricks of Hindu social structure . . . As caste conditioned and controlled every aspect of an individual's life, it led to the creation of a society in which there was no 'rank disequilibrium.' In other words, the lower castes were backward not only socially, but also educationally, politically and economically. On the other hand, the higher castes were advanced in all these spheres. The basic cause of this phenomenon was the higher or lower rank of a particular caste in the ritual hierarchy.").

94. While the OBC's actually totaled 52% of the Indian population, according to the Commission, the Commission limited its recommendation to 27% (in addition to the 22.5% already reserved for Scheduled Castes and Tribes) because of the Supreme Court's holding in *Balaji*, 1963 A.I.R. (S.C.) 649, that reservations in the Central government could not exceed 50%. *See id.*

additional 10% reservations for economically backward sections of society who did not fall under the other existing reservation schemes.⁹⁵ Moreover, the Report recommended that reservation be expanded from hiring to promotion as well,⁹⁶ that unfilled quotas should be carried for three years, and that all private sector organizations receiving public financial assistance should be subject to the policy.⁹⁷

Additionally, the Report attempted to verify the economic backwardness of these social and educationally backward castes, presenting the sort of empirical knowledge on which the *Sagar* Court placed a premium.⁹⁸ The Commission compiled results of questionnaires which asked State governments about "their concept of social and educational backwardness, steps taken for the welfare of Other Backward Classes, representation of Other Backward Classes in Government services . . . , etc."⁹⁹ The Commission also asked of Central Ministries and Departments their employment rate of Other Backward Classes (as defined by States).¹⁰⁰ Moreover the Commission solicited the general public for responses to a questionnaire incorporating several indices of financial, social, and educational achievement and status.¹⁰¹ Moreover, the Commission did surpass caste to include the most backward subsections of various religions¹⁰² in the list of Other Backward Classes, suggesting "that 'low caste' and 'backward class' were not co-extensive."¹⁰³

2. Implementation of the Mandal Recommendations.

Perhaps wary of the political controversy it might ignite, though the Mandal Report was issued in 1980, the government shelved it for ten years. Then, in August 1990, Prime Minister V.P. Singh, who "[looked] likely to

95. See Cunningham & Menon, *supra* note 17, at 21.

96. See Prior, *supra* note 3, at 85.

97. See *id.*

98. See Cunningham & Menon, *supra* note 17, at 5-6. But see MAHESHWARI, *supra* note 16, at 23 (criticizing Commission's methodology, noting that "Commission did not survey even 1 percent of India's total population . . . [and] received not more than 1,872 replies from the whole country").

99. REPORT OF THE (SECOND) BACKWARD CLASSES COMMISSION pt. 1, ch. III, at 12 (B.P. Mandal chair, 1980).

100. See *id.*

101. See *id.* pt. 1, at 102-07. The detailed questionnaire asked several specific questions including traditional occupations associated with respondent's caste; household facilities, such as distance to potable drinking water, main source of lighting, main source of fuel for cooking, structure of house, and annual household income; particular characteristics of household members, such as age, age of marriage, level of education, main occupation (as wage earner, or as owner of business), distance of place of work; description of assets, including ownership of animals, tools (and whether primarily made of wood or metal), ownership of particular items such as fodder chopper, tractor, furniture, etc.; and amount of loan indebtedness. See Cunningham & Menon, *supra* note 17, app. at 1.

102. These groups most likely occupied the same strata as Scheduled Castes, but because they were not Hindu, they were considered external to the caste system. See Cunningham & Menon, *supra* note 17, at 18.

103. *Id.*

fall in the face of multiple political crises,¹⁰⁴ announced that he would implement the Report's recommendation of 27% reservations in government employment for Other Backward Classes.¹⁰⁵ Many observers characterized Singh as a political opportunist, "no doubt calculating that his announcement would earn him a powerful slab of (mainly rural) electoral support at the expense of his rivals."¹⁰⁶ Still, amidst violent riots and protests, Singh continued to back the policy, implementation of which was stayed while the Supreme Court considered its constitutionality in *Indira Sawhney v. Union of India*.¹⁰⁷

In *Sawhney*, a majority of a nine-judge panel of the Supreme Court, in a 300-page opinion,¹⁰⁸ validated the Mandal Report, and the implementation of 27% reservations, but added one crucial dimension to the definition of disadvantage. First, the Court affirmed that caste can be a vital, even the first, consideration in compiling a list of socially and educationally backward classes, as long as the caste is primarily socially and educationally backward, as determined by empirical evidence that surpasses caste.¹⁰⁹ The Court continued to explore the value of economic criteria, determining that criteria need not be solely economical, to the exclusion of caste considerations,¹¹⁰ and noted that "[s]ocial hierarchy and economic position exhibit an indisputable mutuality."¹¹¹

However, to assure that benefits would truly flow to the most disadvantaged, the Court issued a requirement of a means test, or the "creamy layer" test.¹¹² The test called for, among other things, an "imposition of an income limit, for the purpose of excluding persons (from the backward classes) whose income is above the said limit."¹¹³ The Central government then implemented a far more complex means test, to be applied to individuals (and their families) who attempted to claim backward status.¹¹⁴

104. The Economist Intelligence Unit, *Review: India*, EIU COUNTRY REPORT, No. 4 (1990), at 11.

105. Many critics note that the "proposal is not as far reaching as it sounds . . . Only 50,000 jobs (a small number in the Indian context) are to be affected." *Id.*

106. *Id.* Accord Michael Byrnes, *supra* note 2 ("[The announcement] has the appearance of a courageous and just reform. But within India it seems clearly to be an expression of the Prime Minister's desperate political need.").

107. 1993 A.I.R. (S.C.) 477.

108. Interestingly, the *Sawhney* majority included a retrospective of United States Supreme Court affirmative action decisions.

109. See MAHESHWARI, *supra* note 16, at 201 (quoting *Sawhney*, 1993 A.I.R. (S.C.) 477).

110. See *id.* at 232 ("The homogenous groups based on religion, race, caste, place of birth, etc. can form a class of citizens and if that class is backward there can be a reservation in favour of that class of citizens." (quoting *Sawhney*, 1993 A.I.R. (S.C.) 477)).

111. *Id.* at 235 (quoting *Sawhney*, 1993 A.I.R. (S.C.) 477). See also *id.* at 237 ("[M]ere poverty, it seems, is not enough to invite the constitutional branding, because the vast majority of the people of our country are poverty-stricken, but some among them are socially and educationally forward and others backward." (quoting *Sawhney*, 1993 A.I.R. (S.C.) 477)).

112. *Id.* at 249 (quoting *Sawhney*, 1993 A.I.R. (S.C.) 477).

113. *Id.* at 256 (quoting *Sawhney*, 1993 A.I.R. (S.C.) 477).

114. See *id.* at 133-34 (quoting Government of India Ministry of Welfare Resolution No. 12011/16/3-BOC (C)).

The creamy layer test attempts to account for a variety of indices of transcendence of social, educational, and economic disadvantage. For example, the test addresses intergenerational transmission of status by disallowing children whose parents have achieved high-ranking positions in the government or military from claiming reserved positions.¹¹⁵ The test also prescribes income criteria for people engaged in professional employment and trade/commerce,¹¹⁶ develops various calculations of wealth derived from agricultural landholdings, depending on whether and to what extent the land is irrigated,¹¹⁷ and sets a general income/wealth test, premised on the belief that "the rise in social status is presumption-based, indicating that it has flowed necessarily from the economic betterment."¹¹⁸

III. Critiques of the Current Definitions of Disadvantage: The Interaction of Caste and Socioeconomic Class.

India's reservation policies have engendered intense controversy, including fervent concern that a policy that is driven by caste is inherently divisive, and will act, in fact, to solidify the caste system.¹¹⁹ Many critics contend that reservation "has its uses but only up to a point, and there is no way by which it can become an instrument for restructuring society."¹²⁰ Moreover, several scholars believe that the reservation policy has "strengthened the anti-Scheduled Caste attitudes."¹²¹ Perhaps the most challenging critique of reservation policy entails an investigation of the relationship between caste and socioeconomic class. This criticism often calls for greater to complete reliance on economic determinants of backwardness in constructing the list of Other Backward Classes.¹²² This package of criticisms often suggests that purely economic determinants may still generate a rough approximation of caste groups (i.e., caste may end up being the unit), but contests caste as the starting point.

Several critics contend that because of social reforms, including reservation policy, many socially backward, or low, castes have achieved sig-

115. *See id.* at 137-38 (quoting Ministry Resolution).

116. *See id.* at 140.

117. *See id.* at 140-42.

118. *Id.* at 143.

119. *See infra* text accompanying note 121.

120. M.N. Srinivas, *The Pangs of Change*, FRONTLINE, Aug. 22, 1997, at 68 (arguing for broader social change such as the eradication of mass poverty and wide scale improvements in education).

121. RAVINDER SINGH BAINS, RESERVATION POLICY AND ANTI RESERVATIONISTS 93 (1994). India's history with the British—specifically the British use of corporate organization of society to weaken and dominate the society through divide-and-conquer colonial strategies—may make it particularly sensitive to the claim that caste-consciousness can only beget and worsen caste-consciousness, ensuing in division that weakens society, given the British's success in colonizing India by employing such a strategy.

122. While several critics focus on the policy in general, *see id.*, those challenging the presumed nexus between caste and class often accept reservation policies for Scheduled Castes and Tribes, and focus their critique on the designation of Other Backward Classes.

nificant degrees of economic mobility and have thereby achieved significant degrees of social mobility as well. M.N. Srinivas suggests that British rule replaced traditional forms of mobility, and "Indian society ceased to be stationary and became mobile, and the quantum of mobility increased as the years went by."¹²³ These changes included "the application of British concepts of ownership to land which made it saleable,"¹²⁴ the efficiency of "a single political power straddling the entire subcontinent,"¹²⁵ and the Western emphasis on individuality and equality.¹²⁶ Moreover, the English introduced an education system that some argue became integral to capitalizing on advancement opportunities.¹²⁷

Such opportunities for advancement were frequently captured by the high castes, "resulting in a considerable overlap between the traditional and the new elites,"¹²⁸ yet low castes had some minimal access to these avenues of mobility. As a result, the cultural and ideological gap between high and low castes grew, and the low castes were also encouraged to traverse that gap to achieve high status via economic mobility.¹²⁹ Moreover, some low caste members did have access to trading or employment opportunities,¹³⁰ and "[t]he mobility of a few low castes had a 'demonstration effect' on all the others in the region."¹³¹ The achievement of some community members gave the community valuable cultural capital,¹³² suggesting to the community at large that "they were no longer condemned to poverty, oppression, and lack of esteem. They could also move up if they tried hard enough."¹³³ Srinivas suggests that this spurred Backward Classes Movements, through which backward classes developed their powerful role as a political pressure point.¹³⁴

Moreover, Srinivas suggests that, as exemplified in urban environments, which experience greater fluidity and economic/social mobility than villages, increased mobility has reduced the salience of caste in people's experiences:

In the big cities of India there are small numbers of rich people who are educated and have a highly Westernized style of life. These may be described as *living minimally in the universe of caste and maximally in that of class*. The occupations practised by them bear no relation to the tradi-

123. SRINIVAS, *supra* note 59, at 76.

124. *Id.* at 77.

125. *Id.* at 76.

126. *See id.* at 77.

127. *See id.* at 78.

128. *Id.*

129. *See id.*

130. *See id.* at 79.

131. *Id.*

132. *See* Cunningham & Menon, *supra* note 17, at 34-35 (defining social capital as "the average stock of human capital" in a given community).

133. SRINIVAS, *supra* note 59, at 79.

134. *See id.* at 82-83.

tional occupations of the castes into which they were born.¹³⁵ (emphasis added).

Other scholars note, however, that achieving economic mobility and advancement does not necessarily correlate to mobility in social status, which is an agglomerate of socio-economic position and caste status.¹³⁶ Studies suggest that members of low castes who surpass the bounds of economic strata still encounter significant difficulty in achieving full identification with a higher social status.¹³⁷ Specifically, several people suffer "from status-anxiety resulting from an incongruity between their caste and class statuses,"¹³⁸ and "members of the new middle-class have not yet been able to get themselves fully accepted in the old middle-class."¹³⁹

Other critics, who perhaps desire a class-based view of Indian society, worry that the emphasis on caste undercuts the recognition of class which they claim is the primary structuring phenomenon of Indian society.¹⁴⁰ Caste and class, as cross-cutting categories, interact in an inversely proportionate relationship.¹⁴¹ Caste classifies individuals on the basis of *shared* characteristics, such as birth into a particular (endogamous) group. Caste, then, as a system of ranking, relies on the homogeneity of these groups.¹⁴² In contrast, class is a function of individual factors such as "education, occupation, wealth, style of living and so on."¹⁴³ Class operates as a potential source of heterogeneity within caste groups and can cut against the prominence of caste. As caste groups achieve more socioeconomic heterogeneity, caste becomes less salient, and class becomes a more significant grouping mechanism:

This leads to a transformation of the caste system itself . . . [T]he changes in the individuals' properties take place in such a way that the members within each group become heterogeneous and the various [caste] groups become similar in the distribution of the [socioeconomic] properties of members. Consequently, the tendency for groups to be ranked would tend to disappear. But the individuals in the community would still be ranked according to their individual properties, and persons within the same hereditary group would be found distributed in different prestige categories which may be termed social classes constituting the class sys-

135. *Id.* at 83.

136. See Nandu Ram, *Social Mobility and Status-Identification*, in *SOCIAL INEQUALITY IN INDIA* 440, 453 (K.L. Sharma ed., 1995).

137. *See id.*

138. *Id.*

139. *Id.* at 456.

140. See A.B. Bardhan, *Caste-Class Situation in India*, in *CASTE AND CLASS IN INDIA* 405, 415 (K.L. Sharma ed., 1994) ("[Class as a social differentiation] is growing more powerful each day, and is breaking up the rigid framework imposed by the caste system.")

141. See Victor S. D'Souza, *Caste and Class: A Reinterpretation*, in *SOCIAL INEQUALITY IN INDIA* 228, 234 (K.L. Sharma ed., 1995).

142. *See id.* at 229-31.

143. *Id.* at 231.

tem.¹⁴⁴

Therefore, maintaining a caste's boundaries of homogeneity — that is, refusing this transformation of the caste system — attenuates the possibility of class becoming a potent framework for sociopolitical organization.

Interestingly, the creamy layer test polices these boundaries of caste homogeneity. The Court specifically sought to maintain the "connecting link" of backwardness for so deemed caste groups by expelling from the caste category the forward members of the group.¹⁴⁵ While the creamy layer test individualizes some members of the group, it does so only in service of maintaining the efficacy and/or fairness of the group status as a proxy for disadvantage.

Other critics worry that political leaders manipulate this very phenomenon to avoid pending class struggle and imminent class war:

The vested interests [i.e., the political leaders] have a powerful weapon in the caste division that exists in Hindu society. This is being used on an increasing scale, precisely because class divisions and class struggles are becoming sharper, threatening hegemony. The aim that is pursued by these vested interests is to manoeuvre their caste-following in such a manner as to divide the militant masses who are locked in class struggle, to keep them away from the struggles and even to engineer a split in the fighting ranks.¹⁴⁶

While this criticism demands reckoning with the opportunistic motives of political leaders implementing reservation schemes, it also assumes that the relevance of caste, and oppression on the basis of caste, has somehow fallen to "the march of time."¹⁴⁷ By proposing that caste is merely an inorganic, external tool of division that interferes with the real struggle to "unite all sections of the exploited masses against their exploiters,"¹⁴⁸ this attack presupposes that caste itself is not another framework of exploitation, or has overcome its position as such.

India's reservation policy grew from a desire to reject its own systems of inequality as it simultaneously rejected the yoke of British colonialism. Moreover, it sought to provide equality in a manner consistent with the complex nature of inequality in Indian society. Recognizing that inequities had calcified through delineations of group membership, the founders of

144. *Id.* at 232-33. Accord M.N. Srinivas, *Caste: A Systemic Change?*, *supra* note 18, at 16 ("[U]pwardly mobile families or sections of castes, want very much to become part of the middle classes, and once this happens, education, profession and lifestyle become the determinants of status pushing caste to the background.").

145. See *Sawhney*, 1993 A.I.R. (S.C.) at 487 ("[I]f the connecting link is the social backwardness, it should broadly be the same in a given class. If some of the members are far too advanced socially (which in the context necessarily means economically and, may also mean educationally) the connecting thread between them and the remaining class snaps. After excluding them alone would the class be a compact class.").

146. Bardhan, *supra* note 140, at 414.

147. *Id.* at 415.

148. *Id.*

the renewed India insisted that, while individual rights assumed an esteemed role in the new society, they were to be balanced against the needs and the rights of *groups* to receive remedy for their oppression. Thus, the Constitution acknowledged the need to balance these positions, and provided a flexible space for the phenomena of individual rights and group rights to confront and interact with each other.

Reservation policy reflects the shape of this confrontation in the discourse brewing over the interaction of caste and socioeconomic class. Elected officials have often expanded caste-based reservation policies, perhaps as a prize for votes from groups who are invaluable to their electoral success. However, courts have consistently avoided drawing permanent lines that define disadvantage as a function of either caste or class. Instead, the policies, as refined by the Court, have attempted to encompass neither caste nor class, but the constantly shape-shifting yet symbiotic relationship between the two.

PART TWO

U.S. AFFIRMATIVE ACTION POLICY: SHIFTING DEFINITIONS OF DISADVANTAGE FROM SYSTEMIC AND RACIAL DISADVANTAGE, TO INDIVIDUALIZED AND SOCIOECONOMIC DISADVANTAGE

"And once again, only the Small Things were said. The Big Things lurked ever inside."¹⁴⁹

The United States broached affirmative action as a bandage for deep racial wounds, and a temporary antidote to the spreading infection of minority unemployment. India carefully considered reservation policy as a valuable tool to achieve a goal that co-founded its rebirth as a nation. In marked contrast to India's painstaking attempts to craft a conception of equality that accurately represented the sociocultural dynamics of the nation, U.S. policy, otherwise incongruent with national myths of moral desert as based on individual achievement,¹⁵⁰ fell into legitimacy as a buffer

149. ARUNDHATI ROY, *THE GOD OF SMALL THINGS* 165 (1997).

150. See generally, JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE AND JUSTICE IN AMERICA* 37 (1996). It is worth noting, however, that preferences for military veterans have posed a long-standing exception to this theme of individualist meritocracy. See *id.* at 37. Supposedly, the boundaries of legitimate employment policy excluded preferences based on group membership, because they would constitute a "violation of cherished principles of equal opportunity and meritocracy." *Id.* The exception of veterans' preferences suggest that rather than strict eschewal of employment preferences, "[t]he key idea in the cultural logic of employment preferences is the social construction of desert or worthiness" for those preferences. *Id.* at 36. Veterans' preferences, validated and no longer questioned, see *id.* at 48, pose two interesting counterexamples to racial preferences. First, veterans' preferences were characterized as an entitlement held by the veterans, see *id.* at 42. Under the Veterans' Preference Act of 1944, if a hiring officer passed over an eligible veteran, he was required to justify this choice, his proffered reasons incurring rigorous scrutiny from the Civil Service Commission. Thus, the policy recognized an entitlement held by the veteran, as opposed to a benevolent gift to the veteran, of someone else's entitlement. In comparison, while a denied White candidate bringing a Title VII challenge to a racial affirmative action program maintains the burden of persuasion, see, e.g., *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), an employer attempting to establish the defense of a legitimate affirmative action program must establish that the program does not impede the legitimate interests of White employees. See *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987). Minority beneficiaries of affirmative action programs, then, are perceived as receiving the legitimate entitlement of the White candidate, and preferences for people of color are thereby constructed as the exception to the meritocracy. Second, veterans' preferences were championed, in part, because they rewarded and encouraged patriotism. See SKRENTNY at 47. Thus, veterans' preferences do not rely upon justifications which directly assail the history or basic myths of the nation, and they reward and encourage pro-U.S. sentiments and the defense of the nation. Racial preferences, on the other hand, recognize the U.S.'s most embarrassing legacy – structural inequity born in slavery and perpetuated through pervasive discrimination. Rather than resting on girders that praise the U.S., racial preferences, as a remedy for racial discrimination and potentially for structuralized racial inequities, indict the U.S.'s systematic denial of its foremost promise of equality and equal opportunity. Cf. *id.* at 47 ("A common strategy for judges uncomfortable with the moral worthiness of veterans and the apparent conflict with the cultural rules of meritocracy was to equate veteran status with job qualification. In this view, not only were veterans perhaps especially morally worthy, but simply by virtue of being veterans, they were also super-workers, especially for government." (emphasis added)). The "diversity" justification for affirmative action operates similarly. It suggests that a candidate's race/ethnicity contributes value to the workplace, particularly if the workplace interacts with a diverse group.

against the burgeoning violence of urban unrest.¹⁵¹ Moreover, though the courts initiated a representation of racial inequality as systemic and thus requiring systemic remedies, the election of Ronald Reagan, on a platform explicitly condemning such remedies, including affirmative action and busing, and the machinations of the Department of Justice under his command informed a redefinition of discrimination. This in turn led to a complete overhaul of the definition of disadvantage remediable by affirmative action. This reshaped definition has come to include socioeconomic disadvantage, but has excluded structuralized racial disadvantage.

I. The Shifting Parameters of Disadvantage.

A. The Inception of Affirmative Action as a Temporary Salve for Urban Unrest.

In fear of racial tension and violence, President John F. Kennedy arranged private, unpublicized meetings with a variety of leaders, specifically encouraging business leaders to utilize affirmative action methods to "desegregate and hire more black workers."¹⁵² Unsure that his modest proposal for a version of the Civil Rights Act of 1964 would suffice "to manage the coming nationwide racial crisis," he urged these leaders to emulate the many efforts private businesses had already made to hire and train African Americans.¹⁵³ Kennedy emphasized the urgency of nascent violent racial tensions, and reminded business leaders that such agitation would no doubt harm their businesses.¹⁵⁴ Kennedy employed this agenda in the service of "maintaining control, and not fidelity to any ideas of justice."¹⁵⁵ By hinting at an affirmative action model under the banner of staving off imminent violence, Kennedy moved closer to the implementation of affirmative action through the utilitarian logic of crisis management. Kennedy did not pose affirmative action as a model that subverted adherence to the individualist meritocratic model, treating the policy only as a brief exception to this "colorblind" meritocracy. He thus forewent the possibility

151. See SKRENTNY, *supra* note 150, at 79-80.

152. *Id.* at 79.

153. *Id.* at 79-80.

154. *See id.* at 80.

155. *Id.* Moreover, while the logic of crisis management made race conscious policies possible, they certainly did not necessitate them. However, as Skrentny notes, race conscious measures, as opposed to outright oppression, were the chosen solution to urban unrest because the U.S. encountered intense visibility on the global stage. *See id.* at 106 ("[P]romotion of America as a force of democracy in a battle with a racist dictator and against Japanese expansion [during World War II] in the developing world transformed domestic racial repression and discrimination into foreign policy disasters . . ."). While contending worldwide that it was the purveyor of democracy as a morally superior model of governance, and seeking the support of non-aligned countries (such as India) the United States could not afford to provide "proof to the increasingly curious world that America's domestic situation was immoral." *See id.* at 107. Thus, when given the choice between outright repression and violence to quell violent urban protest, and race conscious policies, the former was considerably unappealing.

of a fruitful discussion of disadvantage that questioned the meritocracy, and questioned it along racial lines.

Lyndon Johnson not only continued the promotion of affirmative action programs and justified them as buffers against burgeoning crisis,¹⁵⁶ but attempted to code these programs as colorblind because they were targeted at poverty and unemployment.¹⁵⁷ Policy makers still maintained the camouflage of colorblindness, proposing "color blind" attacks on the conditions underlying the riots, such as poverty and unemployment, but which Johnson "hoped would have the effect of ameliorating the precarious poverty of black Americans."¹⁵⁸

Thus, the inception and early development of racial affirmative action programs occurred both in secret and with barely a nod toward the structural racial inequities causing the problems it was meant to correct. While India engaged in frank debates about systemic caste-based inequality, and struggled to create and constitutionalize a flexible balance of methods to accomplish equality, the U.S. failed to explicitly name a goal of combating systemic racial inequality. In addition, the U.S. failed to embark on a candid exploration of a systemic remedy.

B. The Rise of Judicial Recognition of Systemic Racial Inequality and Creation of Systemic Remedies.

The early analyses of affirmative action programs in the judiciary, however, verged on a representation of racial inequality, and racial disadvantage, as systemic. With the formulation of disparate impact theory and early cases upholding affirmative action, the Supreme Court recognized the systemic phenomenon of racial discrimination and resultant racial disadvantage. The Court's validations of an outcome-sensitive disparate impact theory, and of affirmative action as an outcome-sensitive remedy to functional inequities, shaped a definition of racial disadvantage as systemic and demanding, therefore, systemic eradication.

In *Griggs v. Duke Power Co.*,¹⁵⁹ the Court "shifted civil rights policy to a group-rights, equality-of-result rationale that made the social consequences of employment practices, rather than their purposes, intent or motivation, the decisive consideration in determining their lawfulness."¹⁶⁰ The

156. *See id.* at 80.

157. *See id.* at 80-81 (noting that though both the Civil Rights Act and the War on Poverty were color-blind, Johnson hoped that they would "have the effect of ameliorating the precarious poverty of black Americans" and they "seemed likely to help many Black Americans"). *But cf.* RICHARD KAHLENBERG, *THE REMEDY* 8-11 (1996) ("Johnson did not back racial preferences. . . . Johnson saw 'affirmative action' as social mobility programs combined with an antidiscriminatory effort. . . . [Similarly, t]he Kerner Commission identified white racism as the central cause of unrest but proposed a wide variety of class-based initiatives.").

158. SKRENTNY, *supra* note 150, at 80-81.

159. 401 U.S. 424 (1971).

160. SKRENTNY, *supra* note 150, at 166 (quoting HERMAN BELZ, *EQUALITY TRANSFORMED* 51

Court validated the adverse impact theory of discrimination, holding that Congress' goal in crafting Title VII "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."¹⁶¹

The Court recognized that, even in absence of intentional unequal treatment in the decision-making process,¹⁶² functional inequities plagued African Americans' employment opportunities, and "that race was a reality in American life that must be recognized in everyday practice."¹⁶³ Because the flaw was not necessarily with bad acting employers, "[e]mployers were not to purge themselves of racist, discriminatory intent. They were to scrutinize their labor practices, the Court ordered, perceiving their employees' race as paramount reality."¹⁶⁴ The Court emphasized how systemic racial inequity had reduced the plaintiffs' employment opportunities, noting that the difference in performance between White candidates and African American candidates was a direct consequence of race:

Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. *Because they are Negroes*, petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences[emphasis added].¹⁶⁵

The Court recognized the systematic disadvantage African Americans experienced *because of* racism's and race discrimination's perversion of the structure of opportunity.

The Court later validated awards of retroactive seniority to plaintiffs suing an employer for discriminatory hiring practices.¹⁶⁶ The Court deemed Title VII's language evidence of Congress' intent "to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination based on race"¹⁶⁷ Moreover, the Court recognized that Title VII plaintiffs not awarded seniority with an employer for whom seniority controlled subsequent employment decisions¹⁶⁸ would fail to effectively remedy the plaintiff's harm.¹⁶⁹

(1991)).

161. *Griggs*, 401 U.S. at 429-30.

162. *See id.* at 432 ("[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups.").

163. SKRENTNY, *supra* note 150, at 170.

164. *Id.* at 170-71.

165. *Griggs*, 401 U.S. at 430.

166. *See Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747 (1976).

167. *Id.* at 763.

168. *See id.* at 766 ("Seniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation (citations omitted). Seniority principles are increasingly used to allocate entitlements to scarce benefits among competing employees").

169. *See id.* at 764-66 ("Adequate relief may be well denied in the absence of a seniority remedy slotting the victim in that position in the seniority system that would have been his had he been hired at the time of his application [instead of experiencing discrimination]. It can hardly be questioned that ordinarily such relief will be necessary to achieve the 'make-whole' purposes of the Act.").

A few years later, in *United Steelworkers of America v. Weber*, the Court validated an affirmative action program that overrode a seniority scheme in an attempt to eliminate conspicuous racial imbalances in the employer's workforce.¹⁷⁰ The Court noted from the outset that the plant from which the case arose had a policy of hiring "as craftworkers . . . only persons who had had prior craft experience. Because blacks had long been excluded from craft unions, few were able to present such credentials."¹⁷¹ The Court thus attributed the gross underrepresentation of African Americans in the workforce to this exclusion.¹⁷² The affirmative action program required that 50% of all employees selected for the plant's in-house training program "were to be black until the percentage of black skilled craftworkers in [the plant] approximated the percentage of blacks in the local labor force."¹⁷³ This requirement meant that white employees with more seniority were to be skipped over in favor of black employees.

The Court relied on the underrepresentation of minorities to justify the affirmative action program, and held that private, voluntary affirmative action programs can be justified by unbalanced racial representation in the workforce.¹⁷⁴ They recognized the value of outcome-conscious programs, outcomes being measured by racial representation in the workforce, to address segregation that did not necessarily result solely from the employer's decision-making formula, but from patterns of segregation elsewhere, patterns which created underrepresentation of minorities in the applicant pool itself. Specifically, the Court noted that the employer in *Weber* was faced with an almost exclusively White applicant pool for positions requiring craftworker experience because African Americans had been consistently denied access to craft unions through which they could garner the proper credentials for the job.¹⁷⁵

Moreover, the Court refused to require that an employer admit to prior discrimination in employment decisions as prerequisite to the implementation of a valid affirmative action program.¹⁷⁶ Instead, without avowing any violative intent, motivation, or practices of its own,¹⁷⁷ the employer simply

170. 443 U.S. 193 (1979).

171. *Id.* at 198.

172. While African Americans constituted 39% of the local workforce, the plant's workforce was only 1.83% African American. *See id.* at 198-99.

173. *Id.* at 199.

174. *See id.* at 208.

175. *See id.* at 198.

176. *See id.* at 213 (Blackmun, J., concurring) ("The individual employer need not have engaged in discriminatory practices in the past.").

177. Requiring employers to expose themselves to liability by admitting to discriminatory employment practices, or by requiring a finding of discrimination, would have provided tremendous disincentives to voluntary implementation of valid affirmative action programs as a remedy to systemic discrimination. Moreover, the Court noted that Title VII was passed with the understanding that "management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible," *id.* at 206 (quoting H.R. REP. NO. 914 (1963)), and thus a "prohibition against all voluntary, race-

had to demonstrate that its workforce suffered an imbalance of racial representation in a traditionally segregated job category. Then, the employer's success with the affirmative action program would be measured by attaining balanced racial representation.¹⁷⁸

The Court also introduced a counterbalance to this validation of outcome-conscious justifications for affirmative action programs by requiring that private, voluntary affirmative action programs not "unnecessarily trammel the interests of the white employees."¹⁷⁹ While the Court did not fully refine this requirement, it noted that the plan in *Weber* fulfilled it because it did not require discharging White employees, to be replaced by Black hires. The plan did not create an absolute bar to the advancement of white employees because they still received 50% of the training program positions. And since the plan was temporary, it was designed to attain but not maintain a racial balance.¹⁸⁰ Thus, in validating affirmative action based on group representation, the Court did not ignore the individual member of the nonbeneficiary group, balancing his rights against the need for systemic eradication of systemic discrimination.¹⁸¹ Still, the Court recognized that this might not be the primary interest in the case of affirmative action, aimed at the eradication of job segregation, which was recognized to result from systemic discrimination.

C. Shrinking Representations of Disadvantage: Executive and Judicial Distortions of Civil Rights, and the Dismantling of Affirmative Action.

The Court's growing insight into the nature of functional inequities engendered by racial discrimination pervading all blocks of the opportunity structure downshifted dramatically with the election of Ronald Reagan, and his changes to the Department of Justice and federal courts.¹⁸² Ronald Reagan, winning election on an explicitly anti-affirmative action platform,¹⁸³ perceived this electoral victory as a popular mandate for change in such areas of policy:

Early in his first term, it became apparent that one of the areas perceived by the president as requiring change was that of the mode of enforcement of civil rights laws. Propelled by his personal conviction as much as by

conscious, affirmative action efforts would disserve these ends," *id.* at 207.

178. *See id.* at 208.

179. *Id.* at 208.

180. *See id.*

181. The Court later defined this balancing act between the outcome-conscious measure of racial underrepresentation as justification for affirmative action, and the interests of White and/or male employees, not benefiting from the affirmative action program. *See Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616 (1987). *See also infra* text accompanying notes 194-202.

182. *See* THOMAS BYRNE EDSALL & MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* 185 (1992) ("The Justice Department became, in fact, the heart and mind of the Reagan revolution, as Reagan himself was forced by political reality to bend in his appointments to such other departments and agencies . . .").

183. *See* PARIKH, *supra* note 19, at 128.

his perception of his electoral mandate, the president adopted policies designed to facilitate the change he and his advisers believed was needed and, in so doing, reversed many of the existing policies in a manner often described as "turning back the clock" of civil rights enforcement.¹⁸⁴

Through his command of civil rights enforcement, Reagan eroded the presumption of the prevalence and pervasiveness of racial discrimination, and rescripted racial discrimination as an isolated and individually occurring phenomenon. Reagan effaced the conception of racial discrimination as a systemic harm. He redefined the type of disadvantage to be remedied by civil rights law, returning to an almost absolute emphasis on the individual both as the perpetrator of discrimination, and as the recipient of the remedy.

Opposition to racial affirmative action policies "was a priority item on the Reagan administration's ideological agenda."¹⁸⁵ Under Reagan's stewardship, the Justice Department switched positions on school desegregation,¹⁸⁶ and initiated and pursued new cases disfavoring busing as a remedy.¹⁸⁷ The administration's determination to initiate suit only against schools where there was evidence of intentional segregation, and its unwillingness to permit busing as a tool to desegregate reflected both its reluctance to recognize discrimination as a systemic and prevalent phenomenon, as opposed to an isolated set of actions perpetrated by actors with evil intent, as well as its refusal to apply a systemic remedy to racial discrimination.¹⁸⁸

Similarly, the Reagan Justice Department vociferously attacked affirmative action plans, and succeeded in diluting their potency as a tool to remedy systemic racial inequality through a series of cases both initiated and decided during the Reagan era. These cases both rendered and re-

184. NORMAN C. AMAKER, *CIVIL RIGHTS AND THE REAGAN ADMINISTRATION* 3 (1988). See also EDSALL & EDSALL at 185 ("In 1981, the Reagan administration established its credentials as the adversary of the liberal redistributive state, making it abundantly clear to both the beneficiaries of liberalism, and to those who felt that they were paying the costs of the liberal state, where the administration stood.").

185. Joel L. Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong*, 1985 U. ILL. L. REV. 785 (1985).

186. See *id.* at 26-27. See also AMAKER, *supra* note 184, at 34-37.

187. See Selig, *supra* note 185, at 26-27. See also AMAKER, *supra* note 184, at 35 (noting director of the Civil Rights Division, William Reynolds' comment that "the department's decisions about what litigation would be initiated would be made without reliance 'on the *Keyes* presumption' [that racially dictated actions in part of a school district may affect the whole] and would instead 'define the violation precisely and seek to limit the remedy only to *those schools* in which racial imbalance is the product of intentionally segregative acts of school officials," even though such views "ran counter to statements in Supreme Court decisions made before President Reagan assumed office.").

188. See AMAKER, *supra* note 184, at 35 ("A generalization that seems to characterize fairly the action taken in every case is that, regardless of the specific issue involved or of the posture of the case, the department opposed any action that would have required some form of mandatory reassignment of pupils to achieve a greater amount or, indeed, any measure of school desegregation."). See also *id.* at 42 (noting that the administration filed no new desegregation cases, failed to investigate potential cases, and failed to appeal adverse rulings).

flected an erosion of the presumption of the invidiousness of discrimination, as well as the presumption that disadvantage attaches to racial minority status. Moreover, these cases were specifically concerned that such presumptions alone could neither justify nor support the supposed heavy weight of the harm of affirmative action to non-preferred, White candidates.

In *Wygant v. Jackson Board of Education*,¹⁸⁹ a school board implemented an affirmative action plan that included a layoff provision. The plan provided that in the event of a reduction in force of the teaching staff, teachers were to be retained according to seniority, except that minorities were to be laid off at a percentage no greater than their representation on the staff at the time of the layoff. The plan reflected a concern that, because minority hires were often the least senior (because of possible prior discrimination in hiring), a strict seniority scheme for layoffs would result in a repeal of the gains made through the affirmative hiring policy adopted only ten years earlier.¹⁹⁰

The Court held that under the Equal Protection clause of the Fourteenth Amendment, "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."¹⁹¹ The Court rejected, as justification for affirmative action promulgated to achieve teaching staff integration, the School Board's "interest in providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination."¹⁹² The Court thus abbreviated the scope of disadvantage which affirmative action could tackle, by ruling out as a valid justification systemic discrimination which did not necessarily infect the individual employer's actual employment practices, but avowedly plagued the desired equality of the entire structure of opportunity.

Moreover, the Court was unwilling to accept the presumption that disparities in racial representation arose from discriminatory decision making because the statistical disparities in this case had been attributed to societal discrimination as a taint in employment practices.¹⁹³ By this determination, the Court failed to avow the possibility of an overlap between societal discrimination and an employer's individual discrimination, and that this shady nexus would in fact make it difficult to discern an employer's discrimination that is somehow discrete from societal discrimination.

More importantly, the Court explicitly curtailed the availability of af-

189. 476 U.S. 267 (1986).

190. *See id.* at 303 (Marshall, J., dissenting) ("The principal state purpose supporting [the policy] is the need to preserve the levels of faculty integration achieved through the affirmative hiring policy adopted in the early 1970's.").

191. *Id.* at 276.

192. *Id.* at 274.

193. *See id.* at 278 (expressing concern that in prior litigation, "[b]oth courts concluded that any statistical disparities were the result of general societal discrimination, not of prior discrimination by the Board").

firmative action as a prophylactic against, or a remedy to, societal discrimination, limiting its availability to employers who had discriminated in the past. Affirmative action—a tool which originally had potential to be a remedy to a systemic harm—was no longer an available tool to address societal discrimination. Thus, affirmative action jurisprudence no longer recognized the disadvantage generated and perpetuated by societal racial discrimination.

Just one year later, the Court again confronted affirmative action promulgated pursuant to Title VII. In *Johnson v. Transportation Agency, Santa Clara County*,¹⁹⁴ the Court confirmed the validity of affirmative action programs implemented to remedy manifest racial imbalances in the employer's workforce,¹⁹⁵ which did not unnecessarily trammel the interests of White job candidates.¹⁹⁶ However, the Court refined both sides of this balance, and slightly reshaped the conception of disadvantage that affirmative action could remedy.

First, the Court addressed in detail how the determination of a manifest imbalance should be made. It noted that in jobs requiring no special training, there must be a manifest imbalance between the beneficiary group's representation in the employer's workforce and the representation of that group in the general population. However, in jobs requiring special training, "the comparison should be with those in the labor force who possess the relevant qualifications."¹⁹⁷ This requirement somewhat limited the scope of disadvantage affirmative action could address. By limiting the relevant labor market to those who had already garnered the skills necessary for the job, affirmative action could no longer address the plight of those who had been systematically denied access to the training necessary for these positions, as it had been able to do in *Weber*.¹⁹⁸

Second, the Court refined the determination of whether nonbeneficiary employees' interests had been unnecessarily trammelled. The Court required that affirmative action programs be flexible, temporary, and never result in the hiring of unqualified candidates.¹⁹⁹ Thus no program could

194. 480 U.S. 616 (1987).

195. *See id.* at 631.

196. *See id.* at 631-32.

197. *Id.* at 632 (citing *Hazelwood Sch. Dist. v. U.S.*, 433 U.S. 299 (1977)).

198. *But cf. id.* at 633 n.10 (arguing that the manifest imbalance bests the prima facie standard precisely because "the 'manifest imbalance' standard permits comparison with the general labor force [in the absence of limiting necessary qualifications]. By contrast, the 'prima facie' standard would require comparison with the percentage of minorities or women qualified for the job for which the trainees are being trained, a standard that would have invalidated the plan in *Weber* itself."). The Court's claim is not entirely convincing because according to its holding, relying on *Hazelwood*, if the job category requires any qualifications, they must, or at least may, limit the relevant labor pool. While the *Weber* Court opted not to limit the relevant labor pool for statistical comparison to those already bearing the qualifications to which racial minorities had been denied access, the *Johnson* Court allows, and may be read to require, such a limit.

199. *See id.* at 639-40.

employ race or gender as the sole determinative factor, even though it could be the final determinative factor, because to grant an ascribed characteristic the status of sole determining factor would risk the hiring of unqualified candidates over qualified candidates. Moreover, affirmative action programs, required to be temporary, could only function to attain, not maintain, racial balances. Thus, affirmative action could not function, as the *Wygant* and *Franks v. Bowman* plans intended, to protect the hard-fought gains made through antidiscrimination measures, including affirmative action, by attempting to maintain a racial balance. The imposition of these interests in the name of the White/male employee with a legitimate interest represented the logic of meritocratic principles, to which affirmative action could only function as an exception.

For example, while *Johnson* still left some breathing room to deploy affirmative action against systemic racial discrimination pursuant to Title VII, many circuit court rulings have limited the scope of permissible affirmative action to programs remedying past discrimination.²⁰⁰ Some courts interpret that the potentially outcome-sensitive "manifest imbalance" determination in fact serves as approximate evidence of past discrimination,²⁰¹ while protecting the employer from culpability because it need not actually admit to past discrimination. Moreover, the growing hostility to affirmative action threatens these more comprehensive definitions of disadvantage. Because of this hostility, and growing trends in the circuits, employers might be loathe to enact or defend outcome-sensitive affirmative action programs unless they can justify such programs with a manifest imbalance amounting to a sufficient showing under the prima facie standard.²⁰²

Two years later, in *City of Richmond v. J.A. Croson Company*,²⁰³ the

200. See *Taxman v. Piscataway Township Bd. of Educ.*, 91 F.3d 1547 (3rd Cir. 1996) (holding all affirmative action programs must maintain a remedial purpose) *cert. granted*, 117 S.Ct. 763 (1997), *case settled before argument*; *In Re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525 (11th Cir. 1994) (holding affirmative action programs under Title VII must have a remedial purpose), *cert. denied*, 115 S.Ct. 1695 (1995); *Higgins v. City of Vallejo*, 823 F.2d 351, 356 (9th Cir. 1987) ("The City's affirmative action plan was passed after the California Fair Employment Practices Commission conducted an investigation of the City's employment practices and determined that minorities were conspicuously lacking The available evidence further shows that the affirmative action plan was adopted as a result of the FEPC's investigation."), *cert. denied*, 489 U.S. 1051 (1989).

201. Many critics question even the usefulness of evidence of stark imbalances for this purpose. See e.g., THOMAS SOWELL, *PREFERENTIAL POLICIES* 128-34 (1990) (assailing the "assumption that disparities in excess of those attributable to random chance can be regarded as *prima facie* evidence of adverse actions by individuals, institutions, or 'society' against the group for whom compensatory preferences are sought.").

202. Note the recent effort of a coalition of civil rights groups who mustered several hundred thousand dollars to settle *Taxman v. Piscataway*, 91 F.3d 1547, before the Supreme Court heard oral arguments in the matter. In *Piscataway*, the employer proffered no showing of past discrimination, while noting the drastic underrepresentation of minorities in the relevant job category. The coalition of civil rights groups no doubt feared what the Supreme Court would do, not only with non-remedial affirmative action, but affirmative action in general.

203. 488 U.S. 469 (1989).

Court revoked the right of an employer to presume that there exists a disadvantage attaching to racial minority status. It also refused to support an initiative to help remedy society's exclusion of certain groups from the tools and resources necessary to achieve equal footing. The plaintiff challenged the city's affirmative action program for contracting, which required general contractors who were not minority-owned to reserve 30% of the dollar amount of all contracts for minority-owned subcontractors.²⁰⁴ The Court held that, in the absence of direct evidence of race discrimination on the part of an individual public employer,²⁰⁵ the employer could not implement race-conscious affirmative action. The Court recognized that only 4.7% of contracting firms in the United States were minority-owned.²⁰⁶ However, unlike the *Weber* court, it prohibited the city from reckoning with the possibility that this paucity of minority-owned subcontractors was attributable to pervasive discrimination in the construction industry.²⁰⁷ Despite acknowledging that the "effects of past discrimination had stifled minority participation in the construction industry,"²⁰⁸ the Court would not allow a government entity, absent a showing of its own discrimination,²⁰⁹ to promulgate an affirmative action plan to erode this persistent problem.

In *Adarand Constructors v. Pena*,²¹⁰ the Court ratified the *Croson* Court's application of strict scrutiny to affirmative action plans promulgated by state or local governments, extending this standard to plans implemented by the federal government. The program in question gave general contractors financial incentives to hire subcontractors controlled by socially and economically disadvantaged groups.²¹¹ The program also maintained a rebuttable presumption that racial minorities were socially and economically disadvantaged,²¹² and included vague standards by which others could establish their disadvantage for eligibility for the preference.²¹³ The Court subjected the race-based rebuttable presumption to strict scrutiny and remanded to the district court to determine the validity of the presump-

204. *See id.* at 477-78.

205. *See id.* at 480 ("There was no direct evidence of race discrimination on the part of the city . . .").

206. *See id.* at 481.

207. *See id.* at 498 (noting that the factual predicate is insufficient to permit a remedy for "present effects of past discrimination" in the entire industry).

208. *Id.* at 499.

209. *See id.* at 500 (requiring "a prima facie case of a constitutional or statutory violation" to justify an affirmative action plan). *See also* Drew S. Days, III, *Symposium: The State of the Union: Civil Rights: The Court's Response to the Reagan Civil Rights Agenda*, 42 VAND. L. REV. 1003, 1008 (1989) ("This de-emphasis [on outcomes] was necessary, in [the view of the administration], because these concepts were at war with the fundamental aim of the civil rights laws — the punishment of bad actors.").

210. 515 U.S. 200 (1995).

211. *See id.* at 204.

212. *See id.* at 206.

213. *See id.* at 207.

tion,²¹⁴ expressing serious concerns about whether race was the starting point for social and economic disadvantage.²¹⁵ "*Adarand* adds legal support to those who argue on policy grounds that redistributive programs, including affirmative action, should be reoriented toward economic inequality and away from race."²¹⁶

Adarand rendered a significant shift of the definition of disadvantage. The Court assumed that the disadvantage that affirmative action should target was not racial disadvantage, but socioeconomic disadvantage. Moreover, the Court presumed that racial affirmative action was valuable only as a means to this end, and only when race enjoyed a fairly tight correlation to socioeconomic status. *Adarand* both reflected and encouraged critiques of racial affirmative action involving assault on the presumption that not being White is a source of disadvantage.²¹⁷ Furthermore, both critics of racial affirmative action, and some observers who perceive that racial affirmative action has been eroded almost completely from its original purposes, currently espouse socioeconomic affirmative action, contending that it will remedy "true" disadvantage.

D. The Inclusion of Socioeconomic Disadvantage, and the Exclusion of Racial Disadvantage.

Many critics of race-based affirmative action advocate socioeconomic affirmative action, suggesting that

[U]nder the race-based system, preferences can and often do go to the most advantaged people of color, who because of an advantaged background can beat out their less privileged counterparts. . . . By contrast, under a class-based system, the African-Americans who benefit will represent a very different group. They will be those who have faced very real class-based obstacles.²¹⁸

Furthermore, proponents of class-based affirmative action claim that preference formulas created to reach socioeconomic disadvantage will in fact achieve race based affirmative action's goal of integration,²¹⁹

214. *See id.* at 237.

215. *See id.* at 236.

216. Deborah Malamud, *The Changing Workplace: Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1847 (1996) [hereinafter "Malamud, *The Changing Workplace*"].

217. *See* David B. Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921 (1996).

218. Richard D. Kahlenberg, *Race-Based Remedies: Rethinking the Process of Classification and Evaluation: Class-Based Affirmative Action*, 84 CALIF. L. REV. 1037, 1061 (1996) (footnote omitted) [hereinafter Kahlenberg, *Race-Based Remedies*]. Again, Kahlenberg operates from the assumption that the original purpose of affirmative action was not to remedy systemic racial disadvantage, but to remedy systemic socioeconomic disadvantage that had, because of a history of discrimination, accrued on the basis of race. Kahlenberg, thus, does not completely deny the systemic nature of racial disadvantage—at least acknowledging its perversion of systemic socioeconomic disadvantage—but his argument does suggest that racial disadvantage no longer persists as a systemic phenomenon, and one that systematically permeates class structures.

219. *See id.* at 1060 (claiming socioeconomic affirmative action will "indirectly compensate for

contending that preferences given to the poor will most often go to people of color.²²⁰

The implementation, and perhaps even the proposal, of socioeconomic affirmative action would have/has the effect of reapportioning the scheme of moral worthiness for preferences. It alters how we define remediable disadvantage. Specifically, socioeconomic affirmative action attempts to shift the perimeters circumscribing remediable disadvantage to include socioeconomic disadvantage. It does so, however, on the coattails of the trend toward exclusion of racial disadvantage from definition as systemic, and from eligibility for systemic remedy. Socioeconomic affirmative action may also fail at its goal of replacing racial affirmative action as the remedy to "true" disadvantage—that is, socioeconomic disadvantage as opposed to racial disadvantage, which is currently perceived with some skepticism. Furthermore, socioeconomic affirmative action may fall short of implementation as a true systemic remedy, running into the same philosophical challenges of individualism that currently hinder the execution of racial affirmative action.

Socioeconomic affirmative action functions not to broaden our definition of disadvantage, but continues the trend of shrinking the locus by excluding considerations of race. It includes socioeconomic disadvantage not as a qualifier or supplement to racial disadvantage, but in its stead. In fact, the beneficiaries of socioeconomic affirmative action are often positioned in direct opposition to the beneficiaries of racial affirmative action.²²¹ Proponents of socioeconomic affirmative action often buttress this proposal, in part, with the image of a minority middle class, as privileged as the White middle class, snaring preferences from the Black working class, and even the White working class.²²²

This characterization of racial preferences, and its suggestion for the supposedly more just alternative of socioeconomic preferences, discourages us from asking whether "the minority middle class—not merely the minority poor and working class—suffers race-based economic inequality."²²³ Such an examination might reveal the possibility that "the eco-

past discrimination, bring about a natural integration, and provide a bridge to a color-blind future.").

220. See *id.* at 1061.

221. Cf. Jennifer M. Russell, *The Race/Class Conundrum and the Pursuit of Individualism in the Making of Social Policy*, 46 HASTINGS L.J. 1353, 1360 ("The 'race/class conundrum' is about social relationships and relationships of power. It is about the limits of static cataloguing and ordering. And it is about rejecting the notion that only one stable category—either race or class—matches up with the realities of the post-civil rights era.").

222. See, e.g., Kahlenberg, *Race-Based Remedies*, *supra* note 218, at 1061 ("[A] racial preference will unfairly benefit Bill Cosby's offspring over the son of a white sanitation worker . . ."); Cf. Russell, *supra* note 221, at 1367 n.57 ("Each time we hear the fable of the person who pulls him- or herself up by the bootstraps, we are subtly coerced into believing that stigma does not occur, otherwise the individual ultimately would not have succeeded.").

223. Deborah Malamud, *Affirmative Action: Diversity of Opinions: Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 940 (1997) [hereinafter Malamud, *Diversity of Opinions*].

conomic situation of the black middle class . . . is, in the aggregate, systematically worse off than the white middle class"224 In other words, just as critics of racial affirmative action contend that racial disadvantage cannot serve as a proxy for socioeconomic disadvantage—the true disadvantage to which we owe a remedy—the reverse is also true. Socioeconomic disadvantage may fail to approximate racial disadvantage or recognize how socioeconomic status carries inflections of racial disadvantage,²²⁵ but such racial disadvantage may still exist, and its persistence may be systematic in scope. Because the policy is posed to supplant, not supplement, racial affirmative action, its effect is to not treat class as a racialized systemic phenomenon.²²⁶

Some critics of this policy shift charge it with failure to recognize that [R]ace is a factor in black middle-class economic status in the crucial areas of housing, work, income, security, education, wealth accumulation, and the intergenerational transmission of middle-class status. In each of these areas, a combination of present discrimination and the lingering effects of past discrimination²²⁷ suppresses the economic performance of the black middle class.²²⁸

Malamud suggests that "[o]nce one moves beyond facile comparisons, the black middle class and the white middle class are systematically different on every meaningful measure of class privilege."²²⁹

Moreover, the characteristic of beneficiaries of socioeconomic affirmative action may also prove inaccurate. Setting aside arguments that socioeconomic status is racialized, socioeconomic preference programs

224. *Id.* at 967.

225. See also Russell, *supra* note 221, at 1380. Russell explains:

[T]he natural tendency as exemplified by class advocates is to attempt a transfer of maldistributed status and power to a venue where all claimed inequities, regardless of the claimants' racial identity, will be ostensibly recognized and redressed. I am doubtful, though, that the transfer of those maldistributions to the venue of class is the right move. If we were to look at class within the ideological framework of individualistic democratic capitalism, we would see individuals autonomously pursuing their own destinies, and we would be indifferent to the resulting differentiated distributions of status and power.

But as Nobel laureate Toni Morrison, in another context, stated: "In a society with a history of trying to accommodate both slavery and freedom, and a present that wishes both to exploit and deny the pervasiveness of racism, black people are rarely individualized."

(quoting Toni Morrison, *Introduction: Friday on the Potomac*, RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS AND THE CONSTRUCTION OF SOCIAL REALITY xiv-xv (Toni Morrison ed., 1992)).

226. Proponents of socioeconomic affirmative action, who are concerned that racial preferences accrue to the "advantaged" minority middle class, as opposed to the "truly disadvantaged," often do not advocate a means, or creamy layer test, which India has implemented to address situations in which caste membership lacks congruence with socioeconomic status. Thus in India, class operates both as a qualifier and supplement to caste, whereas in the U.S., class operates to replace race as the salient scheme of categorization for the accrual of privilege and disadvantage.

227. Cf. Kahlenberg, *Race-Based Remedies*, *supra* note 218, at 1060 (characterizing racial affirmative action as intended to "[remedy] the legacy of past discrimination," but not addressing the potential value of affirmative action as a combatant of present discrimination).

228. Malamud, *Diversity of Opinions*, *supra* note 223, at 967.

229. *Id.* at 988.

will struggle to approximate even true socioeconomic disadvantage because they will primarily benefit the middle class, and not the working class, "white sanitation worker."²³⁰ As Deborah Malamud notes:

In periods of growth of good unskilled jobs, affirmative action can reach, and seems to have reached, less advantaged workers. But our economy is no longer creating family-supporting jobs for unskilled workers with poor literacy and numeracy skills—especially not in inner cities. Instead, one must have already attained a certain level of education to benefit from affirmative action programs in economic sectors with jobs with career-wage potential.²³¹

Any system of affirmative action, then, will carry the charge of "distinguishing among candidates who occupy positions within the broad middle of the American socioeconomic structure."²³²

A system of socioeconomic preferences may also fail to sufficiently gauge socioeconomic disadvantage if it adheres to simplistic paradigms of disadvantage.²³³ The legal system will confront a few possible models of economic inequality, and is likely to choose the most simplistic of these models.²³⁴ The models include economic individualism; pro-interventionist economic individualism; class as a phenomenon of a structured system of inequality; and class as a phenomenon interacting with "race, gender, and ethnicity . . . in interlocking and mutually defining structures, and it is their interaction that is seen to shape both consciousness and life chances."²³⁵

Economic individualism "depicts the American economic order as completely open to economic mobility for those individuals with gumption to pursue it."²³⁶ Pro-interventionist economic individualism acknowledges that "past economic position is a constraint on future economic position It is thus perceived as necessary to make a modest level of economic assistance available on the basis of need at certain key junctures of personal economic development"²³⁷ The adoption of these theories would coincide with the individualist models the Reagan Revolution brought to bear on racial affirmative action. A model of economic inequality as an individualist phenomenon would be wholly consistent with, and the likely progeny of, the treatment of racial disadvantage as nonsystemic, isolated and individualized.

230. See *supra* note 222.

231. Deborah Malamud, *The Changing Workplace*, *supra* note 216, at 1861-62 (footnotes omitted).

232. *Id.* at 1862-63.

233. See *id.* at 1870 ("I am pessimistic about the capacity of the legal system to capture enough of these complexities to achieve anything resembling a culturally adequate account [of economic inequality]" *But cf.* Kahlenberg, *supra* note 218, at 1084 (noting that racial preferences are just as vulnerable to the challenge of complexity)).

234. See Malamud, *The Changing Workplace*, *supra* note 216, at 1853.

235. *Id.* at 1855.

236. *Id.* at 1853.

237. *Id.* at 1854.

For the legal system to engage the other theories—those which define class as a systematic operationalization of economic inequality—it would have to confront a plethora of complex phenomena, including the relevance of wealth;²³⁸ occupation;²³⁹ income;²⁴⁰ education and its intergenerational transmission;²⁴¹ patterns of consumption;²⁴² and class consciousness.²⁴³ However, the legal system has displayed a tendency to "perceive complex structures and patterns as the absence of all structure or pattern and will conclude that 'individual differences' are the key to inequality and that therefore the economic individualist theory of economic inequality is correct after all."²⁴⁴

Socioeconomic affirmative action, posited as an exclusive alternative to racial affirmative action, has the effect of replacing race with socioeconomic status in the locus of disadvantage that a remedy to systemic inequality may address. Race, already on the periphery of this locus, is characterized as a morally inappropriate mechanism by which to redistribute privilege, presumably because race no longer constitutes a genesis per se of disadvantage. Socioeconomic status is characterized as representing "true" disadvantage, as compared to the supposed sham of race. By positing socioeconomic affirmative action not as a supplement to cure racial affirmative action of its presumed defect of neglecting class, but as an alternative to racial affirmative action, it may actively displace the experience of race from our definition of remediable disadvantage. Thus, the increased use of socioeconomic affirmative action will likely continue the growing trend of disavowing racial disadvantage as a systemic phenomenon deserving, and capable of, remedy.

238. *See id.* at 1871-72 ("Wealth is . . . a source of personal economic freedom . . . it is the freedom to take risks, to make mistakes, to be cushioned from market forces [W]ealth differentials that seem minor in the greater scheme of American wealth inequality may be large enough to be crucial to life chances.").

239. *See id.* at 1872-73 (explaining that the complexity lies in attempting to rank occupations).

240. *See id.* at 1877-80.

241. *See id.* at 1880-83.

242. *See id.* at 1883-85 ("[T]he legal system would choose to ignore consumption as a factor in determining relative economic disadvantage. Consumption varies too widely along the urban/suburban continuum . . . [] and in general seems too 'soft' a criterion to belong in a legal analysis.").

243. *See id.* at 1885-89 ("[D]efenders of class-based affirmative action ought not to exaggerate the degree to which beneficiaries of class-based affirmative action programs will share a common consciousness of economic disadvantage." Since affirmative action is itself a "mechanism of upward class mobility, it is likely that the most successful of the less privileged candidates will be those who have already broken with much of what typifies their original class position The transmission from parent to child of the consciousness appropriate to the child's class of origin is fundamentally changed by the project of class mobility itself.").

244. *Id.* at 1890.

PART THREE

EXAMINING REASONS FOR INDIA'S AND THE UNITED STATES'
DIVERGING TRAJECTORIES IN DEFINING DISADVANTAGE.

India and the United States, both attempting to advance equality in complex, multicultural nations, have evolved to radically different places. India has expanded its reservation policy so that it still includes Scheduled Castes and Tribes, as well as groups who are ranked higher than Scheduled Castes in the ritual hierarchy, yet face severe obstacles to economic and educational advancement. India's current policy recognizes caste as the source of many hindrances, while maintaining a fairly broad target of disadvantage that the policy aims to correct. Meanwhile, the United States' affirmative action policy has devolved from a potentially outcome-sensitive means of correcting for societal functional inequities, to a tool that can be used only to remedy individual, isolated instances of past discrimination perpetrated by bad actors.

Several factors may account for the drastic divergence of paths these two nations have taken. This paper identifies three variables that have contributed to the radical differences in policy formation and development: policy makers' sensitivity to the needs of electoral politics; the philosophical role of individualism in each society; and each country's willingness to tackle the complexity of creating a calculus of disadvantage.

I. Electoral Politics: "Vote Banks" As Pressure Points Influencing Policy.

Both countries' reservation policies largely operate in response to electoral cleavages. In India, the need to capture valuable voting blocs has fueled not only the preservation of the policies, but their extension as well. Similarly, while U.S. policies fermented from the need to abate crisis, significant policy decisions were driven by politicians'/policymakers' need to maintain political legitimacy. However, in the U.S., the need to maintain political legitimacy has most often cued political leaders to curtail affirmative action policies, and has also led to the recommendation of socioeconomic affirmative action.

India's reservation policy was first conceived as a device of electoral politics. Separate electorates and reserved seats in Parliament furthered the British pattern of treating India as an assemblage of categorical group interests, and plugged into their divide-and-conquer colonial strategy.²⁴⁵ The British backed these policies because they "helped counter the challenges posed by the Indian National Congress,"²⁴⁶ who sought national unity against the British, by maintaining divisions based on social standing.

245. See *supra* text accompanying notes 23-29.

246. PARIKH, *supra* note 19, at 84.

In this vein, "expansion of reservation policies [was] generated from [a combination of] grassroots movement [and the] top-down mobilization of new groups."²⁴⁷ Many castes had increasingly developed politico-economic activist strategies to grasp some power and to distribute the benefits of that power to low castes.²⁴⁸ Politicians coincidentally benefited from India's proclivity toward organizing around group cleavages, and from these groups' growing tendency to organize themselves around group membership in seeking redress for harms based on this group membership. With castes themselves assembling into blocs, and stating their interests in bloc, politicians received easily interpretable clues to what policy positions would appeal to these blocs of voters,²⁴⁹ who had formed easily accessed "vote banks."²⁵⁰

India's political leaders have often advanced the reservation policy as a way to capture voting blocs and solidify their own power. Most notably, despite violent opposition, Prime Minister Singh backed implementation of the Mandal Recommendations of additional reservations for Other Backward Classes. Many characterized Singh as "the most wily and elliptical of leaders [who] may or may not be interested in social change . . . [but] he is most keenly interested in backward class votes."²⁵¹

To understand Singh's decision to implement the Mandal Recommendations, one might examine the political climate of the time. Singh was elected, as a member of the Janata Dal Party, with heavy reliance on the votes of the Hindu nationalist party, Bharatiya Janata Party (BJP).²⁵² However, Singh's power was precariously perched on the stilts of regional political leaders,²⁵³ such as Devi Lal, "an important north Indian leader who commanded strong voter support."²⁵⁴ Lal was necessary "because of his demonstrated ability to deliver his vote banks . . . lower-caste small-scale farmers in north India."²⁵⁵ When Lal left the coalition with political aspirations of his own, Singh, in an effort to capture Lal's vote bank²⁵⁶ and

247. *Id.* at 170.

248. See Srinivas, *Caste: A Systemic Change?*, *supra* note 18, at 2-3.

249. See *id.* at 3 (noting that politicians were enabled to appeal "successfully to caste loyalties in order to win votes").

250. See *id.* at 4 (referring to "the rich and influential leaders of the dominant caste [of a village or town] as 'vote banks'").

251. Derek Brown, *Attempts to Change Caste Status In Society Leads To Violence*, *GUARDIAN*, Oct. 12, 1990, at 14.

252. See Byrnes, *supra* note 2 ("[The BJP] performed unexpectedly well in the [recent election]. With its 86 seats in the Lower House, BJP is an indispensable part of the Singh coalition Government . . .").

253. See PARIKH, *supra* note 19, at 187 ("[Singh's majority] was [also] dependent within his [Janata Dal] coalition on the continued cooperation of ambitious regional political leaders . . .").

254. *Id.*

255. *Id.*

256. See *id.* ("Singh himself was an aristocratic north Indian who commanded respect but lacked the personal appeal or background characteristics that might appeal to Devi Lal's constituency.").

fortify his fragile grasp of power,²⁵⁷ announced his proposed implementation of the Mandal Report "just two days before Lal was due to hold a major rally in Delhi."²⁵⁸ Both Singh's decision to dust off and implement the Mandal Report, and the Supreme Court's pronouncements on the expansion of reservation policy continued a vital effort to scrutinize, and often redraw, the boundaries of disadvantage that the government would recognize. This dramatic policy shift reignited the long-simmering debate over the relationship between caste and class, and the ensuing discussions have contributed a great deal to India's complex understanding of disadvantage.

In the U.S., electoral politics have also driven leaders' formulation of affirmative action policy. While affirmative action owes its inception to the sense of pending crisis created by urban unrest, political leaders gauged policy changes, and their presentation, according to anticipated voters' reception. To secure and/or maintain electoral support, U.S. presidents have adhered as closely as possible to the color blind model of equal opportunity.

In anticipation of explosive urban violence,²⁵⁹ Kennedy pitched an affirmative action approach to the underlying crisis of African American unemployment.²⁶⁰ Still, Kennedy justified this line of attack not with fidelity to justice, or with intent to subvert the individualist meritocracy. He offered only the justification of violence prevention.²⁶¹ Kennedy could not take the electoral risk of championing racial affirmative action for the sake of redistribution, and thus broached and justified affirmative action as an option legitimated by crisis.

Johnson, likely weighing the same considerations, also continued a publicly colorblind course.²⁶² In response to urban riots, he chose to promote affirmative action plans, again justifying them as buffers against burgeoning crisis.²⁶³ Moreover, Johnson promulgated a seemingly colorblind attack on poverty and unemployment,²⁶⁴ but which he hoped would "have the effect of ameliorating the precarious poverty of black Americans."²⁶⁵

257. See Byrnes, *supra* note 2 ("[M]ost observers also believe that the Mandal job reservation recommendations . . . would not have been adopted if Singh had held a stable majority."). *But see* The Economist Intelligence Unit, *supra* note 104, at 11 ("[P]ublic opinion surveys suggested that in an election [Singh's] political gains would be outweighed by losses, not only among high caste Brahmins but also among the scheduled castes who see the 'backward' castes immediately above them as competitors."). Singh also lost the support of the Hindu nationalist BJP, who viewed his expansion of reservation policy as contrary to their goal of national unity. See PARIKH, *supra* note 19, at 187-88.

258. Byrnes, *supra* note 2.

259. See SKRENTNY, *supra* note 150, at 78 ("Though rioting provoked a sense of crisis when it began, the threat of widespread rioting actually *preceded* the widespread rioting. That is, some perspicacious government officials saw it coming.")

260. *See id.* at 79.

261. *See id.* at 80.

262. *See id.*

263. *See id.* at 80-81.

264. *See id.*

265. *Id.* at 81 ("Though both were colorblind, the Civil Rights Act and War on Poverty seemed

Johnson also chose affirmative action to abate the urban crisis, and not outright repression, largely motivated by concerns for his own political legitimacy.²⁶⁶ Johnson, intent on embarking on "some creative leadership project,"²⁶⁷ chose "aid to minorities to be one of his enduring legacies."²⁶⁸ Having made this investment, Johnson recognized that "though affirmative action measures were risky, shooting Black Americans undermined his entire leadership project and threatened his legitimacy as a president."²⁶⁹ Johnson, then, was also motivated at least in part by his appearance to the electorate and general public.

Nixon crafted civil rights policies around the goal of maintaining electoral popularity, and destroying the electoral coalitions of the Left. He crafted his "politics of creative destruction"²⁷⁰ around a growing divide in the Democratic Party—the split between civil rights and organized labor.²⁷¹ Because "it had actually become risky to *challenge* the civil rights tradition in any form,"²⁷² to further entrench a classic divide in the Left, Nixon chose to support affirmative action, in extremely limited contexts, and take the prize of alienating organized labor.²⁷³

Perhaps the most dramatic shift of affirmative action policies motivated and reflected in electoral politics was Ronald Reagan's election on a platform openly opposed to affirmative action.²⁷⁴ While there had existed for some time a partisan split over civil rights issues,²⁷⁵ this simmering Republican opposition to existing civil rights policies heated to a boil when facing a civil rights agenda that implemented any remedies of redistribution.²⁷⁶ That is, the Republican platform directly opposed remedies that addressed perceived structural inequities by trying to reorganize the structure.

likely to help many black Americans.").

266. *See id.* at 104-05.

267. *Id.* at 104.

268. *Id.*

269. *Id.* at 105.

270. *Id.* at 182.

271. *See id.*

272. *Id.* at 181.

273. *See id.* at 181-82. Nixon, however, haphazardly courted the working class vote through his policies in Vietnam. *See id.* at 211. With the support of White "helmeted construction workers" who supported Nixon's Vietnam policies, *id.* at 212, in spite of advocating for affirmative action in the construction industry, Nixon could eschew affirmative action and still achieve his electoral goals, *see id.* Nixon, driven purely by electoral goals, navigated affirmative action policies around any substantive debate of disadvantage. *See id.* Moreover, he sowed the seeds later reaped by proponents of socioeconomic affirmative action, by arranging the White working class in direct opposition to the civil rights movement, bearing the "race-liberal-student tag." *Id.*

274. *See* PARIKH, *supra* note 19, at 128.

275. *See* EDSALL & EDSALL, *supra* note 182, at 7.

276. *See id.* (Republican opposition "intensified insofar as [civil rights] objectives required government action to forcibly redistribute private and public goods — goods ranging, on the one hand, from jobs to education to housing, and extending, on the other, to valued intangibles such as cultural authority, prestige and social space.").

Reagan sought to capture large sectors of previously Democratic voters,²⁷⁷ and this partisan split on civil rights policies, particularly issues of structural reform such as busing and affirmative action, played out significant themes in electoral politics.²⁷⁸ First, Reagan's advancement of positions opposing remedial redistribution based on race, as well as demanding less stringent taxation, cornered for the Republicans the "middle-class, anti-government, property-holding, conservative identification among key white voters."²⁷⁹ This powerful policy combination was integral to attracting this target bloc of voters who purportedly resented footing the bill for resources used to create federal policies and programs, many of which were essential to structural reform and redistribution.²⁸⁰

However, Reagan not only captured the White, propertied middle-class, but the White working class as well. By Reagan's run for re-election in 1984, the White working and lower-middle class were "the most vulnerable sector of what remained" of the original Democratic coalition.²⁸¹ But Reagan was able to capture this bloc because the White working and lower-middle class, more than any other voting bloc that hung on the periphery of the Democratic coalition, bore the costs of Democratic policies geared toward redistribution.²⁸² They "frequently competed with blacks for jobs and status, lived in neighborhoods adjoining black ghettos, and [their] children attended schools most likely to fall under busing orders."²⁸³ The resentment felt by White working class voters, and borne of redistributive policies, not only fueled their party defection, but also became a powerful mobilizing force.²⁸⁴ It allowed Reagan to appeal to his traditional supporters—the White upper class—and, in the process, grasp another crucial voting bloc.²⁸⁵

277. *See id.* at 11.

278. *See id.* at 7. (Partisan differences had "powerful reverberations in presidential voting patterns.")

279. *Id.* at 11.

280. *See id.* ("Race and taxes . . . functioned to force the attention of the public on the costs of federal policies and programs. Those costs were often first experienced in terms of loss—the loss of control over school selection, union apprenticeship programs, hiring, promotions, neighborhoods, public safety Those losses or 'costs' were then driven home by rising tax burdens to pay for such services as busing, Medicaid, subsidized public housing, law enforcement, prisons, welfare, and new lawyers of civil rights enforcement at every level of government.")

281. *Id.* at 181.

282. *See id.* at 12; *see also id.* at 17 ("[Many of defecting working class] voters perceived their rising tax burdens going to finance programs disproportionately serving black and Hispanic constituencies.")

283. *Id.*

284. *See id.*

285. *See id.* at 21 ("By constructing a 'top-down' coalition around the issues of race and taxes, the Republican party has altered the balance of power in the traditional 'have' versus 'have-not' political confrontation, so that the segment of the electorate aligning and identifying with the 'haves' outnumber those aligned with the 'have-nots.'"); *see also id.* at 13-14 ("Shared opposition to taxes provides affluent and working-class voters—adversaries in the pre-civil rights era—with a common ground in the fight to restrict the growth of the coercive, redistributive state."). Socioeconomic affirmative action occupies a

Political leaders in both India and the U.S. have advanced policy decisions that best suit their political needs, but the result has been dramatically different. Perhaps the expansion of policies in India and the near elimination of affirmative action in the U.S. are solely attributable to vast differences in the composition of the electorate—whereas the beneficiaries of India's policy constitute the majority of the electorate, the U.S. electorate consists primarily of those who do not benefit directly from affirmative action. Still, while Indian leaders have promulgated and expanded reservation policy largely for political gain, these policy shifts have encouraged a significant degree of discussion over the boundaries of disadvantage that such a policy should/can remedy. The U.S., on the other hand, seems either trapped in a stale debate over the calculus of disadvantage, or can muster no debate at all. This dissonance suggests that there is more at issue than the motivating influence of electoral politics.

II. Different Roots: The Influence of Divergent Philosophical Traditions and Initial Agendas on Policy Development.

One of the crucial distinctions between India and the U.S. that must be brought to bear on this discussion is the nature of the policies' inceptions, and the myths that undergirded or confronted them, at inception and further on. India's Constitution, the document commemorating India's rebirth as a nation, includes an "equal opportunity"/non-discrimination clause. However, the Constitution also provides an explicit exception to that rule, allowing the State to reserve government appointments or posts for backward, or disadvantaged, classes.²⁸⁶

To Jawarhalal Nehru, the nation's first Prime Minister, "India was a society neither of liberal individuals nor of exclusive communities or nationalities, but of interconnected differences."²⁸⁷ Nehru did not seek a single Indian culture, but instead sought to achieve comfort with a profusion of cultures.²⁸⁸ Thus, Nehru's nationalist imagination was a complex one:

curious place in this scheme of partisan politics. Proponents of a conservative, Republican agenda may advocate socioeconomic preferences to provide a counterclaim to racial preferences, but implementation of a program that redistributes along class lines may be stunted by the possibility that such policies would alienate the stronghold of Republican support—the White upper class. Moreover, because proponents of a liberal agenda including racial affirmative action may indeed identify the proposal for socioeconomic affirmative action as a distracting tool to replace the still-necessary racial affirmative action, and oppose it, contrary to the liberal, Democratic tradition of deep concern for class disparities. See Richard Kahlenberg, *Class, Not Race: An Affirmative Action That Works*, THE NEW REPUBLIC, Apr. 3, 1995, at 21 ("Were Clinton to propose this move [to socioeconomic affirmative action], the media would charge him with lurching to the right But despite its association with conservatives such as Clarence Thomas, Antonin Scalia and Dinesh D'Souza, the idea of class-based affirmative action should in fact appeal to the left as well. After all, its message of addressing class unfairness and its political potential for building cross-racial coalitions are traditional liberal staples.").

286. See *supra* text accompanying notes 48-54.

287. KHLNANI, *supra* note 24, at 172.

288. See *id.* at 167 (noting that Nehru's model of a state was one which was "committed to protecting cultural and religious difference rather than imposing a uniform 'Indianness.'").

It avoided the liberal presumption that individuals could transcend their cultural inheritance and remake themselves however they—or their state—happened to see fit: a view that placed abstracted individual rationality before any sense of cultural identity²⁸⁹ Democracy was intended to recognize the claims of Indians as individuals. In practice, it was also led to recognize the claims of groups, and this certainly scattered seeds of future tension. But the claims of Indians as members of particular communities did require some sort of recognition and accommodation.²⁹⁰

At this historical moment of renaissance through Independence, India undertook full force the project of equality. Indian policy "is thus not a question of choosing between the meritarian and the compensatory principles, but of achieving a proper balance between the two."²⁹¹ As Dr. Ambedkar, an Untouchable leader during and following India's Independence movement, noted during the Constituent Assembly Debates, "we have to safeguard two things, namely, the principle of equality of opportunity and at the same time satisfy the demand of communities which have not had so far representation in the State."²⁹²

Dr. Ambedkar further acknowledged that neither of these positions should function to the exclusion of the other, but that in fact they should be balanced against each other, and that such collusion served the principle, broader goal of equality. Specifically, Dr. Ambedkar noted the calculated inclusion of the word "backward" to modify the "classes" for whom reservations could be promulgated. He noted that "unless you use some such qualifying phrase . . . the exception made in favor of reservation will ultimately eat up the rule together."²⁹³ Yet India's Constitution still acknowledges that groups are accorded different privileges by virtue of group status, and therefore there must always be a balancing of individual rights against group rights. Thus, the Constitution's "grant of universal rights to all was offset by a recognition of historical injustice suffered by particular communities. . . . The Constitution thus established a language of community rights in a society where the liberal language of individual rights and equality was little used. Rights were anchored in collectivities, now recognized as particular interests within the nation."²⁹⁴

India's initial agenda for these policies also accounts for their developmental trajectory. India's Constitution included an explicit attempt to address the plight of the socially, economically, and educationally disadvantaged largely because of the context of its drafting. India drafted its Constitution—a birth certificate for the (re)new(ed) nation—after securing

289. *Id.* at 171.

290. *Id.* at 173.

291. PARIKH, *supra* note 19, at 53 (quoting ANDRE BÉTEILLE, *THE IDEA OF NATURAL EQUALITY AND OTHER ESSAYS* 98 (1983)).

292. Cunningham & Menon, *supra* note 17, app. at 2.

293. *Id.*

294. KHILNANI, *supra* note 24, at 36.

Independence from "alien rulers acutely conscious of their own racial superiority."²⁹⁵ India's national project was one of denouncing unfounded claims to superiority, and trumpeting equality, "not merely equality among races or among nations, but also equality among castes and among human beings in general."²⁹⁶ It followed naturally that this document announcing the equality of India and its constituents would include a provision for reservations, an already employed method of addressing backward classes' needs.

The United States provides a stark contrast to India's emphasis on community over the individual. American society has "steadily repudiated community as the basic social and political unit, preferring, at least in theory but increasingly in law and in social life, to ground their public institutions in the individual."²⁹⁷ In U.S. discourse, then, affirmative action emerged as a temporary anomaly in a nation defined by individualism.

Such policies, and their recognition of community as an albeit secondary organizing principle, were implemented with the sole goal of abating a crisis.²⁹⁸ While, within this limited logic, policymakers at least acknowledged one source of the crisis—exorbitant unemployment rates among African Americans—they made no effort to unravel what forms of disadvantage created, and were created from, this source of discord. In other words, as a temporary band-aid to urban violence, for the most part affirmative action policies were neither motivated by, nor did they acknowledge explicitly, their potential as a systemic remedy organized around communities to a systemic harm perpetrated against communities.

U.S. affirmative action policy has always been counterposed against the idea of meritocracy, only allowed as a temporary exception, justified by violent crisis.²⁹⁹ Conceived as a quick fix, a way to placate a group of people experiencing such a deep desperation that they might be driven to violence, the policy's proffered justifications never occupied the logic of justice, and only the logic of maintaining control. Thus, it failed to ascend beyond its assigned role as an exception to meritocracy, and into the role of opposition or subversion, or even of counterbalance. It was a safety valve, not a counterweight, or an alternative view, which would question the

295. PARIKH, *supra* note 19, at 50 (quoting ANDRE BETEILLE, *THE IDEA OF NATURAL EQUALITY AND OTHER ESSAYS* 48-49 (1983)).

296. *Id.*

297. FOX-GENOVESE, *supra* note 22, at 38.

298. *See id.* at 8 ("In practice, modern individualistic societies have significantly curtailed individual right in the name of the public good, but they have done so apologetically, defensively, not on the grounds of the prior rights of the collectivity.")

299. As noted earlier, *see supra* note 154, violent crisis alone may be insufficient. However, just as the inquisitiveness of the Cold War global audience encouraged the adoption of affirmative action, rather than outright repression, the ever-present watch of the current global audience might discourage its continued existence. *See* SKRENTNY, *supra* note 150, at 229 ("[I]n a context of global ethnic conflict . . . supporting policies which reify racial difference may sound increasingly illegitimate, making it difficult to defend affirmative action.")

abiding belief in meritocracy, and specifically, a purportedly individualist meritocracy that, nevertheless, systematically excluded individuals based on their group membership.

The divergent philosophical orientations of India and the U.S. were manifested in the divergence of the two nations' policies. For example, the subordination of the individual to the group is evidenced by India's promulgation of quotas. By virtue of group membership alone, an individual may be granted a position in government employment or in an educational institution. The U.S., to the contrary, refuses treatment based solely on group status in its eschewal of quotas. An individual's group membership may be used to account for a gap between that individual's performance and the standard of performance required for selection for benefits such as employment and higher education. Using race as a "plus factor," per *Johnson*, allows such an accounting - a policy may attribute the performance gap to racialized disadvantage, and allow this to be one of many factors relevant to candidate selection. Thus, we only read group membership as it pertains, according to our calculations, to an individual's performance.

India's creamy layer test also offers a pointed comparison to the American emphasis on the individual. Just as the U.S. uses group membership to determine individual qualifications, India uses individual characteristics to maintain the salience of the group as the primary organizing variable. With the creamy layer test, the *Sawhney* Court verified that caste is the genesis of disadvantage. The creamy layer test simply expels, as individuals, those people whose individual situation characterizes them as inconsistent with the group. The starting point of calculating disadvantage is still the group. Moreover, only those people who constitute exceptions to the group's experience of disadvantage are then treated as individuals, for the purpose of constructive expulsion from the group. Thus, individual characteristics are used in the service of emphasis on the group.

In addition, the political rhetoric employed in either India or the U.S. demonstrates these divergent emphases on the individual and the group. In India, politicians have reflected back to the voters their tendency to organize for electoral purposes by group membership. These politicians offer reservations almost as a prize, or a reward for the societal blocs that vote for them. Thus, these politicians have created a rhetoric of the corporate society, campaigning for individual votes by appealing to blocs. In the U.S., on the other hand, elections are won by appealing to the voters as individuals. To capture a group of voters who prize the U.S. liberal tradition,³⁰⁰ U.S. politicians have employed the rhetoric of the individual.

300. See EDSALL & EDSALL, *supra* note 182, at 175-76 (in order to win valuable voting blocs, the Republican party espoused the "traditional" or conservative values of "belief in hard work, in the nuclear family, in self-reliance, . . . in doctrines of individual responsibility . . .").

III. *Confronting the Complexity of Defining Disadvantage.*

From these contrasted starting points, India and the U.S. engaged in dissimilar encounters with the complexity of defining disadvantage. India, despite the politically opportunistic motivations driving many policy shifts, has attempted to broach the entanglements that the delineation of disadvantage generates. The U.S., in contrast, has neglected every chance to do so, relegating itself to the position of having no policy that can approximate and attempt to remedy multivariant, systemic forms of disadvantage.

Just as Nehru envisioned an India inclusive of complex interrelations among communities,³⁰¹ India has attempted to engage the complexity of defining disadvantage in a multivariant, intersectional society. The earliest iterations of the policy included regional³⁰² and religious qualifiers, attempting to recognize the shifting, reinventive nature of disadvantage. As employment reservation policies continued, and various permutations developed in different states, the Indian legal system attempted to reckon with the intersectionality of disadvantage in a multivariant society. The Supreme Court confronted head on the purported nexus between caste and class, and attempted time and time again to discern the relationship between the two.

Moreover, the Court concluded every time that the architects and promulgators of reservation policies would have to wrestle with these questions. The Court never simply eliminated caste as a factor of backwardness. Nor did the Court blindly accept definitions of disadvantage predicated solely on low caste status. Instead, the Court acknowledged that caste might occupy valuable space in the determination of disadvantage, but that it could not be the sole measure of disadvantage. The Constitution's equal protection provisions emerged from the compromise of competing conceptions of equality. The choice to not constitutionalize either of the conceptions, but the compromise itself has encouraged this flexibility in the judicial construction of reservation doctrine.

The Mandal Commission, charged with reassessing definitions of backwardness, also attempted to wrestle with defining disadvantage, and steer the channels threading through caste and class, sometimes binding them together. The Commission Report reflects attempts to appraise many of the ways social disadvantage takes root to create economic and educational disadvantage, as well as the significant place that economic and educational disadvantage occupy irrespective of caste. The Report inquires through its individual survey, the educational attainment of members of the family; the relationship of the family to its economic resources, including ownership of the means of production, and employment of or for others;

301. *See supra* text accompanying note 288.

302. Moreover, when regional qualifiers within states were found to elide important forms of disadvantage which traveled, *see supra* note 75, the government eliminated intra-State regional qualifiers.

and the status of the home, including sources of fuel, light, and drinking water. In short, the Report attempts to operationalize class as a systemic phenomenon, and one which bears some important correlation to the systemic phenomenon of caste.

The United States, in its tendency to adopt simplistic approaches to disadvantage, poses a sharp contrast to India's efforts to tackle the difficulties of assessing disadvantage. In the U.S., law has "failed to embrace complexity. In fact it has typically failed even to recognize it."³⁰³ To avoid the complexity of defining disadvantage, the U.S. would have to recognize the multiple, interacting causes of disadvantage, such as race discrimination as well as systemic class oppression:

Complexity recognizes that an effect is often not the product of one, constant cause. Rather it results from the interaction of many forces. Such forces are constantly changing—i.e., the existence and influence of each is not constant. Such changing influence reflects a relationship between cause and effect which is not proportional or, in other words, which is nonlinear. Moreover, the synergism produced by their interaction is a unique product of these forces. The forces act not independently but in an interdependent manner.³⁰⁴

Over time, the U.S. whittled away its affirmative action policies so that, in fact, they do not acknowledge complex and interrelated causes of disadvantage, but only remedy the simplest form of disadvantage—disadvantage borne of proven, intentional discrimination.³⁰⁵

First, U.S. affirmative action policy, crafted by the courts and Reagan's command of civil rights enforcement, has been whittled away so that it can only recognize racialized disadvantage if its genesis is intentional discrimination, as proven by direct evidence. Thus disadvantage, specifically racialized disadvantage, is not understood as a systemic phenomenon, whose roots have invaded all segments of the opportunity structure, and which continues to tap roots into new ground still.

U.S. policy makers who have constructed and administered remedies to disadvantage have also consistently rejected the opportunity to inspect the nexus between race and class. Johnson coded social welfare programs colorblind, though their target population was likely African Americans, to legitimate such programs. The conscious, albeit necessary, distinction drawn between class and race perpetuated this incomplete rendering of disadvantage, which depicted poverty neither as a function of systemic class hierarchy, nor as a systemic class hierarchy in which racialized disadvantage was deeply complicit.

303. Vincent Di Lorenzo, *Complexity and Legislative Signatures Lending Discrimination As A Test Case*, 12 J. L. & POLITICS 637, 639 (1996).

304. *Id.* at 640-41.

305. *See id.* at 644 ("Complexity would make proof of [discrimination due to race] difficult. Combined with the discretionary nature of decisionmaking, such proof of causation becomes impossible in all but blatant cases [of race discrimination].").

Currently, the U.S. seems willing to replace race with class without avowing the intersection, as India has with its flexible doctrine and creamy layer test. The Court's recent pronouncements in *Adarand* erode possible practical applications of a theoretical belief in that nexus by denouncing the rebuttable presumption of social, economic disadvantage for minorities. Thus U.S. policy can only countenance race and class as sharing a binary relationship, where remedial policies can only address one or the other, and never the interrelationship of the two phenomena.

Perhaps the colossal failure of U.S. policy has been its architects' unwillingness to confront the complexity of these phenomena which both reflect and create disadvantage. Certainly, many observers, though few political leaders, have attempted to define a calculus, even a complex one.³⁰⁶ U.S. affirmative action policy has steadily neglected opportunities to, and perhaps repealed the possibility of, understanding a multivariant calculus of disadvantage, particularly one that dwells in the systemic phenomenon of class as it entwines with the systemic phenomenon of race.

CONCLUSION

Both India and the United States continue to confront a long history of systemic inequalities based respectively on caste and on race. Moreover, both nations face the tremendous challenge of responding to this problem in a society that is diverse and complex, and whose systems of oppression are similarly complex and tangled. In the face of this somewhat similar challenge, however, several variables have led to drastically different policy developments in the two nations. As both nations struggle with crafting solutions to these problems, they may well learn from each other's failures, successes, and creativity in approaching this overwhelming task. It is my earnest hope that this paper will offer one entrée to, and perhaps advance, this dialogue.

306. See, e.g., Malamud, *The Changing Workplace*, *supra* note 216; Kahlenberg, *Race-Based Remedies*, *supra* note 218.

