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E. J. Prior

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CONSTITUTIONAL FAIRNESS OR FRAUD ON THE CONSTITUTION? COMPENSATORY DISCRIMINATION IN INDIA

E.J. Prior*

The service of India means the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity.¹

INTRODUCTION

ON SEPTEMBER 19, 1990 T. RAJEEV GOSWAMI, a twenty-year old Brahmin² student at Delhi University, put a lit match to his gasoline-soaked body and burst into flames as friends and classmates watched on in horror.³ This dramatic scene was repeated⁴ throughout India as univer-

* J.D., Washington College of Law, The American University 1995. Editor-in-Chief *The Export Practitioner* 1995-present; Editor-in-Chief, *The American University Journal of International Law and Policy* 1994-1995; Rotary Foundation Scholar, School of International Studies, Jawaharlal Nehru University, New Delhi, India 1991-1992. This Article is dedicated in memory of Sean T. Wert.

¹ Prime Minister Jawaharlal Nehru, Midnight "Tryst with Destiny" Speech, Address to the Indian Constituent Assembly the moment India achieved independence (Aug. 14/15, 1947) in 1 THE FRAMING OF INDIA'S CONSTITUTION, at 559 (B. Shiva Rao ed., 1968).

² See discussion of Brahmins, *infra* note 15 (explaining the history and hierarchy of the Hindu caste system and the status of the Brahmin caste).

³ See David Housego, *A Retreat From Modernisation*, FIN. TIMES (London) Sept. 29, 1990, at 6 (reporting on Goswami's self-immolation, the deep caste divisions in India, and the subsequent rioting in protest of the job and university reservation scheme); see also Mark Fineman, *Students Sacrifice Selves To Protect Caste Privilege*, L.A. TIMES, Oct. 20, 1990, at A1 (stating that Goswami, while still on fire, exclaimed that his motive was to reignite a movement that would have died without his sacrifice).

Rajeev Goswami was hospitalized with severe burns on over 50% of his body. Christopher Thomas, *Hindu Marchers Step Up Pressure On Prime Minister*, THE TIMES (London), Oct. 15, 1990, available in LEXIS, News Library, Arcnws File (reporting on caste and Hindu-Muslim tensions sweeping across India). In September of 1991, Goswami was elected president of the Delhi University Students' Union and renewed his drive to end caste-based job reservations. See *Indian Government Increases Job Quotas For Poor*, AGENCE FRANCE PRESSE, Sept. 25, 1991, available in LEXIS, News Library, Arcnws File [hereinafter *Job Quotas For Poor*] (reporting on renewed protests over the Indian Government's announcement to implement the caste-based reservation policy); Christopher Thomas, *India's Underdogs Learn To Fight Back*, THE TIMES

sity students followed Goswami's example of self-immolation to protest then Indian Prime Minister V.P. Singh's implementation of the Mandal Commission Report,⁵ an extensive affirmative action program.⁶

Thousands of Indian students boycotted classes, blocked traffic,⁷ smashed car windshields, and threw stones at police in vehement defiance of the proposal.⁸ The displays of violence were as bizarre as they were hideous.⁹ In one incident, a fourteen-year-old New Delhi schoolgirl was

(London), Oct. 7, 1991 available in LEXIS, News Library, Arcnws File (stating that the Indian Government had again announced its intention to implement the job reservation program).

⁴ See Michael Byrnes, *India: Government At Risk As Crisis Engulfs Country*, AUSTRALIAN FIN. REV., Oct. 15, 1990, at 1 (quoting one observer as noting that the wave of self-immolations was a strange psychology of copycat suicide committed by upper-caste Indians who felt they were being cheated out of their proper place in society).

⁵ See *infra* notes 98-140 and accompanying text (discussing the recommendations of the Mandal Commission Report).

⁶ See Tim McGirk, *Indian Caste War That Made a Man Set Himself Alight*, THE INDEPENDENT (London), Sept. 28, 1990, at 14 [hereinafter McGirk, *Indian Caste War*] (recounting the story of a young Indian government bureaucrat whose act of self-immolation instigated a fresh wave of student riots in protest of the reservation program); Michael Byrnes, *India: Reeling Under a Wave of Violence, Nihilism and Bitter Fragmentation*, AUSTRALIAN FIN. REV., Oct. 19, 1990, available in LEXIS, News Library, Txnws File (predicting that the violence would prove to be the most formidable of India's history of epic political contests). Student self-immolations became a daily occurrence. *Id.*

The first protests and demonstrations began in August of 1990. See Christopher Thomas, *Job Quotas Scheme in India Stirs Caste Hatred*, THE TIMES (London), Aug. 25, 1990, at 9, available in LEXIS, News Library, Non-US File (reporting on Indian police firing tear gas at students attempting to surround the Indian Parliament building in New Delhi); David Wigg, *High-Caste Fury at Plan to Help "Untouchables,"* THE INDEPENDENT (London), Aug. 17, 1990, at 9, available in LEXIS, News Library, Arcnws File (stating that police fired tear gas at students trying to pound in the roof of a city bus with their feet).

⁷ *Indian Students Set Out To Close Delhi Over Job Dispute*, REUTERS, Aug. 27, 1990, available in LEXIS, News Library, Wires File. Rioting students demanded that motorists fly black flags on their cars. Several motorists complied by sticking black umbrellas out of their car windows. *Id.*

⁸ See Thomas, *supra* note 6, at 9, (reporting that many of the students had traveled to New Delhi by hijacking busses). The mass demonstrations were the worst since the 1984 assassination of Prime Minister Indira Gandhi. Fineman, *supra* note 3, at A1; cf. Barbara Crossette, *A Holiday Quiets India After a Week of Rioting*, N.Y. TIMES, Sept. 30, 1990 at 3 (reporting that after a week of rioting and violence, the towns and cities in India were calm because of preparations for a major Hindu holiday).

⁹ See Fineman, *supra* note 3, at A1 (noting that one student committed suicide in

soaked with fuel by her classmates and fatally set alight.¹⁰ On the same day, near the city of Hyderabad, forty people were massacred after extremist supporters of the affirmative action program set an entire train carriage on fire.¹¹ The pictures and news stories of student riots over the job and university reservation scheme soon symbolized the powerful force of caste division which had exploded in India.¹²

India's affirmative action program, referred to as compensatory discrimination by most scholars,¹³ is a daring attempt to remedy past injus-

protest of the Mandal Commission report by swallowing a lethal dose of insecticide and that another student, who had hanged herself, left a suicide note donating her eyes to Prime Minister V.P. Singh so that he could see for himself the misery that the Mandal Commission Report had brought upon the student community).

¹⁰ See Byrnes, *supra* note 6, at 1 (reporting on violent reactions by students and others to Prime Minister V.P. Singh's decision to implement the Mandal Commission Report).

¹¹ See Fineman, *supra* note 3, at A1 (reporting on the self-immolation of Monica Chadha, a nineteen-year-old New Delhi university student, and the difficulties of understanding the desperate reaction of Indian students to the reservation scheme for federal jobs and university seats). Shortly after announcing to her family that she too would burn herself to death, Monica Chadha walked out onto the terrace of her family's home, poured gasoline over her body, lit a match, and burst into flames. *Id.* Her display took place directly in front of her family who had been watching a movie on television while eating breakfast. *Id.* Monica's self-immolation was also clearly visible to a group of people, including her father, who were attending a political rally against Prime Minister V.P. Singh across the street. *Id.* Before she died ten days later, Monica declared that she wanted to teach a lesson to Prime Minister V.P. Singh and that she was proud of what she had done. *Id.*

¹² See MARC GALANTER, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES OF INDIA* 1 (1984) [hereinafter GALANTER, *COMPETING EQUALITIES*] (explaining that the controversy of the Mandal Commission Report was more than political warfare but was a reflection of unresolved pressures in the constitutional scheme of compensatory discrimination); see also Housego, *supra* note 3, at 6 (claiming that India was retreating from modernity to a past that most Indians would rather forget).

¹³ See GALANTER, *COMPETING EQUALITIES*, *supra* note 12, at 2-3. Use of the term *compensatory discrimination* does not ignore the fact that some people are left out by these policies and that the policies are more than a harmless process of inclusion. *Id.* The purpose, however, is not to exclude and deny. *Id.* Rather, it is to include and compensate for centuries of historic repression and to counter present disabilities suffered by India's underprivileged. *Id.* The term also carries with it an implication that the discrimination will end when the current unequal conditions are cured. *Id.* Other terms that have been used are special treatment, protective discrimination, and progressive discrimination. *Id.* For purposes of clarity and consistency, the term *compensatory discrimination* will be used throughout this Article.

See also Patel v. State of Maharashtra, 77 A.I.R. (Bom.) 114, 115 (1990) (stating

tices¹⁴ suffered by those who are at the lower levels of India's four-tier caste hierarchy.¹⁵ The Mandal Commission Report, first announced in

that India's founding fathers were aware of the disabilities suffered by many sections of Indian society and therefore included compensatory discrimination provisions in the Constitution to advance underprivileged classes); Samuel M. Witten, Comment, "Compensatory Discrimination" in *India: Affirmative Action as a Means of Combating Class Inequality*, 21 COLUM. J. TRANSNAT'L L. 353, n.2 (1983) (noting that compensatory discrimination in India is analogous to affirmative action in the United States).

There are several leading Supreme Court cases dealing with affirmative action in the United States. *See, e.g.*, *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547 (1990) (holding that there is no violation of equal protection where an affirmative action program has longstanding congressional support, and where it is substantially related to an important government objective of achieving racial diversity in the broadcasting industry); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding that the preferential awards of municipal construction contracts to minority-owned businesses must be justified by a compelling government interest and be narrowly tailored to accomplish its remedial purpose); *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978) (holding that racial and ethnic classifications for university admissions are inherently suspect and call for strict judicial scrutiny).

There are several studies comparing affirmative action in the United States with compensatory discrimination in India. *See generally* M. Varn Chandola, *Affirmative Action in India and the United States: The Untouchable and Black Experience*, 3 IND. INT'L & COMP. L. REV. 101 (1992) (comparing compensatory discrimination in India with affirmative action in the United States and concluding that both India and the United States can benefit by studying each other's efforts to advance the underprivileged); Alan M. Katz, *Benign Preferences: An Indian Decision & the Bakke Case*, 25 AM. J. INT'L L. 611 (1977) (comparing *Regents of Univ. v. Bakke* with *Kerala v. Thomas* and concluding that India's flexible reasonable basis test is preferable to the U.S. Supreme Court view that classifications are inherently suspect and demand strict scrutiny).

¹⁴ *See* Wigg, *supra* note 6, at 9 (noting that India's program is being called the boldest effort by any country at reverse discrimination).

¹⁵ *See* GALANTER, *COMPETING EQUALITIES*, *supra* note 12, at 7-17 (explaining the social dynamics of the Hindu caste system in India). The caste system is the predominant characteristic of Hindu social organization. DECLAN QUIGLEY, *THE INTERPRETATION OF CASTE* 1 (1993). The essence of the Hindu caste system is the arrangement of hereditary groups into a hierarchal social order. M.N. SRINIVAS, *INDIA: SOCIAL STRUCTURE* 5 (1980). The hierarchy of the caste system is divided into four classes, or *varnas*. GALANTER, *supra* note 12, at 10. At the highest level are the Brahmins who are primarily known as priests and scholars. *Id.* Beneath the Brahmins come Kshatriyas, the classes of rulers and warriors. *Id.* Next come the Vaishyas, which are generally merchant and farmer classes. *Id.* The lowest caste is the Sudras, the menial and servant classes. *Id.* The Untouchables are generally considered to be outside the four-tier caste system and are often referred to as "outcastes." *Id.* at 13-14. The Untouchables were considered to be polluted and were assigned menial tasks such as sweeping and toilet

1980, recommended that twenty-seven percent of federal government jobs be reserved for the Other Backward Classes¹⁶ of India.¹⁷ This was in addition to an already guaranteed twenty-two and a half percent for India's Scheduled Castes¹⁸ and Scheduled Tribes¹⁹ by the Indian Consti-

cleaning. *Id.* at 14. In Hindu religious thought the four *varnas* emanate from the body of Purusa, the lord of beings, who is portrayed as a primeval god-man sacrificed at the inception of time. QUIGLEY, *supra*, at 6. Purusa's mouth became the Brahmins, his arms became the Kshatriyas, his thighs became the Vaishyas, and his feet the Sudras. *Id.*

Within each caste there are several sub-castes, or *pan-varnas*. GALANTER, *supra* note 12, at 11. Each caste group is alleged to have its own *dharma*, the path from which each individual member of a particular caste is destined to follow in accordance with his or her place in life. *Id.* The inequality of an individual's position in the caste hierarchy is justified by the theory of rebirth, or *karma*. *Id.* According to this theory, every person has a positive or negative value and the moral balance of a past life is revealed in the position into which he or she is reborn. *Id.* Hope for the future arises from the promise of achieving higher levels in subsequent rebirths so long as one fulfills his or her caste's *dharma*. *Id.* The word *caste* is not indigenous to India but has its origins in the Portuguese word *casta*. *Id.* at 7 n.1. See QUIGLEY, *supra*, at 4 (explaining that the word *castas*, from which the English and French derived the word *caste*, was first used by the Portuguese who traded on the west coast of India in the 16th and 17th centuries).

See generally Roshani M. Gunewardene, *The Caste System: A Violation of Fundamental Human Rights?*, 11 HUM. RTS. L. J. 35 (1990) (claiming that the caste system has denied fundamental rights to some groups while at the same time granting an overabundance of rights to other groups in the same society and concluding that India is in violation of internationally recognized human rights standards); SIDNEY VERBA ET AL., *CASTE, RACE, AND POLITICS* (1971) (comparing the main features of the Hindu caste social order with the experiences of African-Americans in the United States); G.S. GHURYE, *CASTE AND RACE IN INDIA* (1969) (discussing historical developments and the main features of the caste system in India).

¹⁶ See generally GALANTER, *COMPETING EQUALITIES*, *supra* note 12, at 154-87 (describing which groups of Indians fall within the category of the Other Backward Classes). Generally, the classification of Other Backward Classes includes those Indians who qualify as neither Scheduled Castes nor Scheduled Tribes, but are still socially and educationally deprived. *Id.* at 156-57. Though most Americans would not want to be labeled backward, in India it is not perceived as a derogatory term. See George H. Gadbois, Jr., *Affirmative Action in India: The Judiciary and Social Change*, 8 L. & POL'Y 329, 331 (1986) (discussing how the Other Backward Classes are identified by the Indian government and courts). Indeed, many Indians desire to be designated as backward so that they can gain eligibility for special treatment. *Id.*

¹⁷ Report of the Mandal Commission § 13.11.

¹⁸ See generally GALANTER, *COMPETING EQUALITIES*, *supra* note 12, at 121-47 (defining and discussing India's Scheduled Castes). The term *Scheduled Caste* is a euphemism used to discuss India's Untouchables. *Id.* at 122. Untouchables are also re-

tution.²⁰ The Mandal Commission Report classified 3,743 castes as backward and deserving of special treatment in the form of federal employment and educational reservations.²¹ These particular castes were ineligible to benefit from the federal jobs and educational seats already exclusively reserved for Scheduled Castes and Scheduled Tribes.²² In all, the program recommends setting aside forty-nine and a half percent of federal government jobs and educational seats for lower-caste Hindus and other socially and educationally backward classes in India.²³

ferred to as *Harijans*, a term coined by Mahatma Gandhi during India's independence movement meaning *children of God*. See LARRY COLLINS & DOMINIQUE LAPIERE, *FREEDOM AT MIDNIGHT* 112 (1975) (discussing the plight of India's Untouchables); see also *supra* note 15 (discussing the Hindu caste social structure).

The designation of a group as a Scheduled Caste is done by presidential order. INDIA CONST., pt. XVI, art. 341. There are 104,755,000 persons designated as Scheduled Castes in India making up 15.8% of the population. OBSERVER RESEARCH FOUNDATION, INDIA: 1992 OBSERVER STATISTICAL HANDBOOK 55 (B.N. Uniyal & Kumaresh Chakravarty eds., 1992). India has a total population of over 844,000,000. THE WORLD ALMANAC AND BOOK OF FACTS 1992 767 (1991).

¹⁹ See generally GALANTER, *COMPETING EQUALITIES*, *supra* note 12, at 147-53 (discussing and defining India's Scheduled Tribes). Scheduled Tribes are generally those Indians who are spatially and culturally isolated from the majority of the population. *Id.* at 147. Scheduled Tribes are distinguished from the Scheduled Castes along social, cultural, linguistic, and religious lines. *Id.* at 150. The designation of a group as a Scheduled Tribe is done by presidential order. INDIA CONST. pt. XVI, art. 342; see, e.g., *Choudhury v. State of Tripura*, 77 A.I.R. (S.C.) 991 (1990) (holding that the Court may interpret which tribes are included in a presidential order but may not add to nor subtract from the list of designated Scheduled Tribes).

There are 51,629,000 persons designated as Scheduled Tribes in India making up 7.8% of the population. OBSERVER RESEARCH FOUNDATION, INDIA: 1992 OBSERVER STATISTICAL HANDBOOK 55 (B.N. Uniyal & Kumaresh Chakravarty eds., 1992).

²⁰ See *infra* notes 136-40 and accompanying text (discussing the reasoning of the Mandal Commission's recommendation for the Central Government to reserve 27% of jobs and university places for the benefit of the Other Backward Classes).

²¹ Wigg, *supra* note 6, at 9; See also McGirk, *Indian Caste War*, *supra* note 6, at 14.

²² See B. Sivaramayya, *Protective Discrimination and Ethnic Mobilization*, 22 J. INDIAN L. INST. 480 (1980) (stating that separate reservations exist for the benefit of groups classified as either Scheduled Castes, Scheduled Tribes, or under the category of the Other Backward Classes); see also Derek Brown, *India: Gandhi Waits In The Wings*, THE GUARDIAN (London), Nov. 12, 1990, at 25, available in LEXIS, News Library, Txtnws File (stating that the program of compensatory discrimination was aimed at Indians who were in neither the highest nor the lowest segment of the caste hierarchy).

²³ See *infra* notes 101-40 and accompanying text (discussing the reasoning and recommendations of the Mandal Commission Report).

Until Prime Minister V.P. Singh announced that his government would begin to implement the caste-based reservation scheme, most government officials had ignored the 1980 Mandal Commission Report.²⁴ Prime Minister Singh's decision to implement the Mandal Commission recommendations instigated a tremendous public outcry that eventually led to the collapse of his government and his fall from power.²⁵

In September of 1991, the newly installed Government of Prime Minister P.V. Narasimha Rao's Congress party announced that it had not only retained the controversial caste-based reservation policy, but had also set aside an additional ten percent for poorer members of the upper castes and non-Hindu minorities.²⁶ This brought the total amount of reserved jobs to fifty-nine and a half percent.²⁷ Riots and violence again broke out in towns and cities across India when the Supreme Court of India, in *Indra Sawhney v. Union of India*,²⁸ ruled that the initial 1990 decision

²⁴ See Tim McGirk, *The Battle of the Haves and the Have-nots: In a Bid to Win Favour Among India's Lower Classes, V.P. Singh Has Dragged the Country to the Brink of a Caste War*, THE INDEPENDENT (London), Oct. 20, 1990, at 25 [hereinafter McGirk, *The Battle of the Haves and the Have-nots*] (explaining that every government has ignored the Mandal Commission Report since it was first drafted because it was too controversial); see also Brown, *supra* note 22, at 25 (contending that the government treatment of the Mandal Commission Report was an example of a 10-year exercise in the old Indian custom of substituting words for action).

²⁵ See Brown, *supra* note 22, at 25 (asserting that Prime Minister V.P. Singh failed to anticipate the public reaction to his adoption of the Mandal Commission Report); Barbara Crossette, *A Question Unanswered: Where is India Headed?*, N.Y. TIMES, Nov. 11, 1990 at 18. V.P. Singh was removed from office by the Indian Parliament in a vote of no confidence on November 9, 1990. *Id.* His fall has been attributed to negative press publicity and reactions by the Indian public to his decision to implement the Mandal Commission recommendations. *Id.* Poor economic conditions and the rise of fundamental Hinduism are also cited as other elements leading to his defeat, as well as his failure to consult with his political allies. *Id.* He was further accused of attempting to enlarge his electoral base by promising government jobs to lower castes. See Brown, *supra* note 22, at 25 (stating that Singh was attempting to build a voting bank); Michael Fathers, *India's Parliament Scores a Victory Over the People*, THE INDEPENDENT (London), Nov. 11, 1990 at 13 (claiming that V.P. Singh's government fell because he attempted to challenge India's ruling castes); see also Gadbois, *supra* note 16, at 332 (stating that politicians often use promises of reservation to unify and mobilize supporters and claiming that the promise of being designated as a backward class is often used as a vote-catching technique).

²⁶ See *Job Quotas For Poor*, *supra* note 3 (adding that Prime Minister Rao attempted to soften the impact of the announcement by specifying that lower caste individuals from low-income families would be preferred over the wealthy members of the same caste).

²⁷ *Id.*

²⁸ *Indra Sawhney v. Union of India*, 80 A.I.R. (S.C.) 477 (1993); see Seema Guha,

by Prime Minister V.P. Singh to implement the Mandal Commission Report was indeed constitutional.²⁹ In September of 1993, with the constitutionality of the Mandal Commission recommendations affirmed by the Indian Supreme Court, the government of Prime Minister P.V. Narasimha Rao announced it would immediately implement the plan to set aside federal jobs for India's underprivileged.³⁰

Government positions are highly coveted in India because they offer security, pensions, and free housing when one is promoted to upper-level positions.³¹ Most students protesting against implementation of the Mandal Commission recommendations are from lower-middle economic classes but come from caste backgrounds that disqualify them from the reservation scheme.³² Quotas for the backward classes threaten the position of upper caste students who traditionally have an advantage in merit-based competitions because of their superior education.³³

Indian Court Upholds Quotas For Lower Castes, REUTERS, Nov. 16, 1992, available in LEXIS, News Library, Reuwlid File (noting that the judgment, entered on cases brought on behalf of more than 100 individuals and organizations, was well-received by leaders of lower-caste Hindus).

²⁹ *Indian Students Step Up Protest Against Job Quotas*, REUTERS, Nov. 19, 1992, available in LEXIS, News Library, Reuwlid File. Students blocked traffic and attacked trains and post offices to protest the Indian Supreme Court's ruling on job reservations. *Id.* Post offices were attacked because they were perceived as symbols of government property. *Id.*; see also *Schoolboy Sets Himself Ablaze in Caste Protest*, REUTERS, Nov. 20, 1992, available in LEXIS, News Library, Reuwlid File [hereinafter *Schoolboy Sets Himself Ablaze*] (reporting on self-immolation of a student and stating that groups of students stoned busses, set cars on fire, and blocked traffic in response to the Supreme Court decision). Most universities were closed as students boycotted classes. *Id.*

³⁰ See *India to Implement Caste-Based Job Reservation Plan*, REUTERS, Sept. 8, 1993, available in LEXIS, News Library, Reuwlid File (emphasizing that caste background should not be a factor for promotions once hired); *India Plans to Widen Jobs For Underprivileged*, N.Y. TIMES, Sept. 9, 1993 at A14 [hereinafter *Jobs For Underprivileged*] (reporting that some analysts believe that Prime Minister P.V. Narasimha Rao was introducing the plan to win the votes of low-caste Indians in state elections held in November 1993).

³¹ See Thomas, *supra* note 6, at 9 (stating that students are fearful they will not be able to get government jobs because of the reservation policy).

³² See Crossette, *supra* note 8, at 1 (quoting a history professor at Delhi University who claimed that the students burned themselves out of deep despair). Upper-caste students do not necessarily come from wealthy families. *Id.*

³³ See McGirk, *The Battle of the Haves and the Have-nots*, *supra* note 24, at 25 (quoting one political leader as claiming that the students were committing suicide out of cowardice because they knew that the lower castes had nothing to lose by calling for change). But see Susanne H. Rudolph & Lloyd I. Rudolph, *Modern Hate: How Ancient Animosities Get Invented*, THE NEW REPUBLIC, Mar. 22, 1993 at 24, 28

Although many Indians accept the fact that some reverse discrimination is necessary for India's Scheduled Castes and Scheduled Tribes, they oppose having almost half of federal jobs decided on factors other than merit.³⁴ Critics charge that reservations reinforce and harden the legitimacy of caste distinction, deny qualified candidates opportunities,³⁵ and promote inefficiency in an already immense Indian bureaucracy.³⁶ Opponents also contend there is a strong potential for fraud because lower-caste Indians who take advantage of reservations are often those who are already wealthy and need special treatment the least.³⁷ Muslim and Christian Indians may also make reservation claims adding to an already complicated system of preferences.³⁸ Instead, critics claim, jobs and places in universities should be awarded on the basis of merit.³⁹

The issue of public job and university seat reservations for the Other Backward Classes that were so contentious during the Fall of 1990 are still passionately debated today.⁴⁰

(claiming that the true causes of recent caste violence and Hindu-Muslim tension in India are not ancient animosities, but India's political and religious leaders who have instigated the hatred).

³⁴ Rudolph & Rudolph, *supra* note 33, at 28-29.

³⁵ See Sivaramayya, *supra* note 22, at 496 (asserting that the concept of reservations should transcend caste identity and assume a class character because reservations are aimed at relieving immense social tensions resulting from widespread unemployment and poverty).

³⁶ See Paul Lansing & Sarosh Kuruvilla, *Job Reservation in India*, 37 LAB. L.J. 653, 654 (1986) (contending that because merit is not the only criterion, the process of hiring government employees often results in the hiring of poorly qualified candidates and provides inferior quality professionals); see also *Jobs For Underprivileged*, *supra* note 30, at A14 (adding that every year, university students desperately compete for one of only a few thousand positions in the federal government- or state-owned companies).

³⁷ See Sivaramayya, *supra* note 22, at 495 (stating that the reservations based on caste benefit the more advanced members of the "backward" castes and harm the weaker members of the "forward" castes and therefore adversely affect members both within and without the backwards castes); see also Wigg, *supra* note 6, at 9 (reporting on claims by critics that India will eventually be run by incompetents and that the reservations will create pressure to raise the number of federal jobs which in turn will create an even larger bureaucracy); *Jobs For Underprivileged*, *supra* note 30, at A14 (stating that government jobs are frequently bought with bribes); Arthur R. Kroeber, *Can India's Affirmative Action Survive a Brahmin Backlash?*, NEWSDAY (Melville, NY), July 8, 1988, at 86 (reporting that fraudulent certificates of backwardness can be bought for as little as \$7.70).

³⁸ *Id.*

³⁹ See Brown, *supra* note 22, at 25 (inferring that, in any event, many jobs and positions in higher education in India are obtained through bribes).

⁴⁰ See Housego, *supra* note 3, at 6 (quoting a noted Indian politician as saying that

This Article addresses India's policies of compensatory discrimination. Part I of this Article outlines the historical background of compensatory discrimination in India and analyzes relevant sections of the Indian Constitution. Part II discusses the Mandal Commission's method of identifying the Other Backward Classes and examines the Commission's recommendations for their advancement through reservations in government employment and educational institutions. Part III reviews and interprets the Indian Supreme Court's decision in *Indra Sawhney v. Union of India*⁴¹ and discusses earlier Supreme Court decisions on compensatory discrimination. Part IV of this Article notes the accomplishments of the Indian Supreme Court in dealing with the controversial issue of compensatory discrimination. Despite these achievements, this section recommends that the Indian government lower the percentage of reserved places for the Other Backward Classes and gradually phase out reservations entirely as specific performance goals are reached. In the interim, the government should expand reservations to the private sector. Additionally, the government should continue to use caste as an indicator of backwardness along with other relevant criteria. Finally, the Indian Government should set up a permanent ministry to manage backward class identification, set reservation levels, and decide which classes are backward and deserving of special treatment. The goals of India's compensatory discrimination policies should be to advance the backward classes to a level where they can compete with the rest of society in both employment and education without government assistance.

I. HISTORICAL BACKGROUND

A. *Compensatory Discrimination Under British Rule*

Public employment and university reservations began while India was still under British rule.⁴² The British had a policy of reservations in

the government had opened a "Pandora's Box"); see also McGirk, *Indian Caste War*, *supra* note 6, at 14 (stating that past Indian governments had purposely ignored this "Pandora's Box").

⁴¹ 80 A.I.R. (S.C.) 477 (1993).

⁴² See Witten, *supra* note 13, at 359 (stating that the granting of preferences based on group membership began during the later stages of British rule); see also Lansing & Kuruvilla, *supra* note 36, at 654 (stating that as early as 1885, provincial governments implemented assorted welfare measures to advance India's backward classes). See generally GALANTER, *COMPETING EQUALITIES*, *supra* note 12, at 18-40 (reviewing the policies of the British and the events leading to provisions for reservations in the Indian Constitution).

India achieved independence from Great Britain at midnight on August 15, 1947.
1 THE FRAMING OF INDIA'S CONSTITUTION 556 (B. Shiva Rao ed., 1966) [hereinafter

public service posts for Muslims, Christians, Anglo-Indians, and other communal groups.⁴³ British reservation policies were aimed at adjusting the political balance among different caste and religious groups and improving the plight of the disadvantaged.⁴⁴ Reservations also served to ameliorate and appease minorities.⁴⁵ Reservations were limited to recruitment for jobs and did not apply to promotions once an individual was employed.⁴⁶ The granting of special preferences to India's minorities and underprivileged were viewed by many as part of Britain's divide-and-rule strategy, a plan designed to pit different segments of the Indian populace against each other so that Britain could remain dominant.⁴⁷

In preindependence India there were few provisions to safeguard fundamental human rights.⁴⁸ As India's independence movement gathered momentum, conflicts with British officials became increasingly frequent.⁴⁹ Repressive actions by British authorities bolstered demands for constitutional guarantees of fundamental rights.⁵⁰ The protection of these rights were not realized until the creation of the Indian Constitution.⁵¹

FRAMING I]. The presence of Great Britain dated back to 1600 when Queen Elizabeth I granted a charter to the East India Company giving it a full monopoly on British trade with India. See M.V. PYLEE, *CONSTITUTIONAL HISTORY OF INDIA* 1-4 (discussing the establishment of the East India Company and the developments leading to India's independence from Britain). Britain assumed full control of India in 1858. *Id.* at 4, 24-25. By the mid-eighteenth century, Indian opposition to British rule was wide-spread. *Id.* at 24. With the end of World War II it was clear the British colonial era was over and independence for India would soon be granted. *Id.* at 94-112. On August 15, 1947, with the clock striking midnight, India awoke "to life and freedom" from British domination and assumed full sovereign power over its governance. FRAMING I, *supra*, at 556.

⁴³ See PARMANAND SINGH, *EQUALITY, RESERVATION AND DISCRIMINATION IN INDIA* 82 (1985).

⁴⁴ See Witten, *supra* note 13, at 359 (claiming that these were the two central purposes behind the granting of group preferences).

⁴⁵ See SINGH, *supra* note 43, at 82 (adding that the British especially wished to pacify Muslim groups).

⁴⁶ *Id.* (stating that promotions were based solely on merit).

⁴⁷ *Id.*; Witten, *supra* note 13, at 359 (stating that because of Britain's divide-and-rule governing technique, many Indians are skeptical about British attempts at compensatory discrimination).

⁴⁸ 5 *THE FRAMING OF INDIA'S CONSTITUTION* 170 (B. Shiva Rao ed., 1966) [hereinafter FRAMING V].

⁴⁹ *Id.* at 171.

⁵⁰ *Id.* (noting that British authorities often interred and deported individuals arbitrarily and without the benefit of trial. *Id.* Demands for equal protection before the law came as early as 1895).

⁵¹ INDIA CONST. pts. III and IV.

B. Provisions for Compensatory Discrimination in the Indian Constitution

The Republic of India was founded with the four-fold objective of securing for its citizens justice, liberty, equality, and fraternity.⁵² The instrument used to secure these objectives is the Constitution of India written by the Constituent Assembly.⁵³ Articles 14, 15, 16, and 17 specifically guarantee the right to equality and provide for the advancement of the underprivileged.⁵⁴

⁵² *Id.* at pmb1. The preamble to the Constitution of India states:

We, The People of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure to all its citizens:

Justice, social, economic and political;

Liberty of thought, expression, belief, faith and worship;

Equality of status and of opportunity;

And to promote among them all;

Fraternity assuring the dignity of the individual and the unity and integrity of the Nation;

In Our Constituent Assembly this twenty-sixth day of November, 1949, Do Hereby Adopt, Enact And Give To Ourselves This Constitution. *Id.*; *see also* *Indra Sawhney v. Union of India*, 80 A.I.R. (S.C.) 477, 501 (Reddy, J.) (stating that the founders of India wrote the Constitution to provide its citizens with justice, liberty, equality, and fraternity); G.P. VERMA, *CASTE RESERVATION IN INDIA: LAW AND THE CONSTITUTION*, 18 (1980) (stating that the framers of India's Constitution were well-aware of the horrible living conditions of Indians who were segregated, socially condemned, and economically oppressed). *Compare* INDIA CONST. pmb1. *with* U.S. CONST. pmb1. (establishing justice, tranquility, welfare, and liberty).

⁵³ *See Indra Sawhney*, 80 A.I.R. (S.C.) at 501 (stating that the founders of India's Constitution were well-aware of the injustices and inequities afflicting their society and that they were faced with the herculean task of forming an egalitarian society from a perplexing mix of religions, castes, ethnic groups, and languages).

⁵⁴ *See* V.D. MAHAJAN, *CONSTITUTIONAL LAW OF INDIA* 104 (7th ed. 1991) (discussing the provisions for the general right to equality for all persons in the Indian Constitution); *see also* *Lansing & Kuruvilla*, *supra* note 36, at 654 (stating that the Indian Constitution provided equality before the law and prohibited discrimination based on religion, race, sex, caste, and language in education and public employment); GALANTER, *COMPETING EQUALITIES*, *supra* note 12 at, 1-2 (stating that the Indian Constitution initiated a plan of formal equality meant to penetrate a legendary hierarchal society, and that the Constitution envisioned a government that would work to mitigate the conventional inequalities in terms of wealth, education, and power).

1. Equality Before the Law

The Constituent Assembly was formed in July 1946 with the purpose of creating India's Constitution.⁵⁵ In December of 1946, the Assembly set up a special committee to deal with the issue of fundamental rights.⁵⁶ Members of the Constituent Assembly faced a difficult choice in deciding which rights should be designated as fundamental.⁵⁷ Together, the United States Bill of Rights, the Declaration of the Rights of Man from France, the Irish Constitution of 1935, the post-war constitutions of Japan and Burma, and the Universal Human Rights Charter, inspired the enumeration of fundamental rights to ensure equality in the Indian Constitution.⁵⁸ In addition, India's experience under British rule and the necessity of protecting religious and racial minorities considerably influenced the inclusion of rights in its Constitution.⁵⁹

The Constituent Assembly made specific provisions in the Constitution to obtain a political balance by reserving seats in state legislatures⁶⁰ and the House of the People⁶¹ for Indians who were members of Sched-

⁵⁵ *Id.* at 11 (explaining the events leading to the formation of the Indian Constitution).

⁵⁶ *Id.* at 137 (describing the role of the Constituent Assembly in the framing of India's Constitution).

⁵⁷ *Id.* at 363 (stating that the framers realized that India did not have the resources to implement all the rights that could be conceived as fundamental because of practical difficulties regarding government enforcement).

⁵⁸ *Id.* at 41 (constitutional provisions permit departure from formal equality for the purpose of favoring specified groups).

⁵⁹ *Id.* at 362.

⁶⁰ INDIA CONST. pt. XVI, art. 332. Article 332 provides in relevant part: "Seats shall be reserved for the Scheduled Castes and the Scheduled Tribes . . . in the Legislative Assembly of every State." *Id.*; see, e.g., *Wilson Reade v. C.S. Booth*, 45 A.I.R. (Assam) 128 (1958) (holding that a man whose father was British but whose mother was a member of the Khasi tribe, a Scheduled Tribe, could run for elected office despite his British blood because most other Khasis in the community had accepted him as a member of their group, as he had adopted their customs and way of life). *But cf.* Telephone Interview with Wanrie A. Booth, Khasi tribe member (Oct. 19, 1993). Ms. Booth stated that the reason Wilson Reade was allowed to run for office was because C.S. Booth, Ms. Booth's grandfather and the man who brought the case, was also neither a Khasi nor an Indian, and so his objections were not very convincing to the judge).

⁶¹ INDIA CONST. pt. XVI, art. 330. Article 330 provides in relevant part: "Seats shall be reserved in the House of the People for — (a) the Scheduled Castes; (b) the Scheduled Tribes" *Id.* The House of the People is the lower House of Parliament. *Id.* pt. V, ch. II, art. 79.

uled Castes or Scheduled Tribes.⁶² To improve the condition of the poor and assail the hierarchical structure of Hindu society, the Constituent Assembly provided for a general right to equality for all persons before the law in Article 14.⁶³

2. Prohibitions Against Discrimination on the Grounds of Religion, Race, Caste, Sex, and Place of Birth

Article 15 of the Indian Constitution was written to prohibit discrimination on the basis of religion, race, caste, sex, or place of birth.⁶⁴ Dur-

⁶² See Witten, *supra* note 13, at 359 (stating that the Constituent Assembly included these provisions in the Constitution to incorporate the goals of compensatory discrimination under early British programs); Sivaramayya, *supra* note 22, at 480 (stating that reservations for the Scheduled Castes and Scheduled Tribes in the legislature conferred political power to groups of Indians whose representation in the federal and state elected branches of the Indian government was previously inadequate); see also *supra* notes 49-58 and accompanying text (discussing provisions designed for the safeguarding of fundamental human rights).

⁶³ INDIA CONST. pt. III, art. 14. Article 14 provides: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." *Id.*; see Witten, *supra* note 13, at 359-60 (stating that the Constituent Assembly was working towards the formation of an egalitarian society). Compare INDIA CONST. pt. III, art. 14 with U.S. CONST. amend. XIV, § 1, which states in relevant part: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws"

The inclusion of equal protection before the law in Article 14 was influenced by the equal protection clause in the Fourteenth Amendment of the United States Constitution. TRIMBAK K. TOPE, *THE CONSTITUTION OF INDIA* 46 (1971); cf. MAHAJAN, *supra* note 54, at 104-05 (stating that the guarantee of equal protection is similar to the one included in the Fourteenth Amendment of the United States Constitution).

⁶⁴ INDIA CONST. pt. III, art. 15. Article 15 provides:

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

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to —

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) or article 29 shall prevent the State

ing the drafting of Article 15 it was noted that in a country like India,⁶⁵ constitutional provisions protecting fundamental rights would be meaningless unless there were specific safeguards to protect individuals from discrimination on the basis of race, religion, or social status.⁶⁶ Article 15(4), however, allows the state to make special provisions in the form of reservations⁶⁷ for the advancement of both socially and educationally backward classes and those who are designated as Scheduled Castes or Scheduled Tribes.⁶⁸ Article 14⁶⁹ does not forbid these types of classifications because the right to equality is not necessarily hurt by classifications.⁷⁰

3. Equal Opportunity in Matters of Government Employment

In Article 16, the Constituent Assembly considered matters of equal opportunity in public employment.⁷¹ The Constituent Assembly believed

from making any special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. *Id.*

⁶⁵ See *FRAMING V*, *supra* note 48, at 183 (stating that in India there is an extreme potential for relentless widespread discrimination).

⁶⁶ *Id.*

⁶⁷ See, e.g., *Damodaran v. Secretary to Govt. Educ. Dept., Hyderabad*, 78 A.I.R. (A.P.) 194, 196 (1991) (holding that reservations for university admissions must be set at the government level, not at the university level).

⁶⁸ INDIA CONST. pt. III, art. 15(4). Article 15(4) was added to the Constitution in 1951 by the Constitution (First Amendment) Act. *THE CONSTITUTION OF INDIA* 6 n.1 (Rakesh Bagga ed., 1987). Article 15(4) was written when the government realized that the article did not automatically give backward classes the same opportunities conferred upon other classes. See *Lansing & Kuruvilla*, *supra* note 36, at 654. Article 15, as amended by Article 15(4), gave states the ability to provide for the advancement of any socially or educationally backward class. Such advancement includes the reservation of appointments in government institutions and undertakings. *Id.*

⁶⁹ See *supra* notes 55-63 and accompanying text (discussing the right to equality under Article 14 of the Indian Constitution).

⁷⁰ VERMA, *supra* note 52, at 5.

⁷¹ INDIA CONST. pt. III, art. 16. Article 16 provides:

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory,

that compensatory discrimination in this field was both a method to strengthen India's underprivileged and a means of preventing upper classes from obstructing the admission of backward classes into government employment.⁷² Article 16(1) guarantees the opportunity to be considered for government employment, but does not confer a right to actually obtain such employment.⁷³ Article 16(2) states specific grounds that may not be the basis of discrimination against citizens.⁷⁴ These include race, caste, sex, descent, place of birth, and residence.⁷⁵

Article 16(4) amplifies Article 16(1) by stating two requirements⁷⁶ for an individual to benefit from a reservation scheme:⁷⁷ First, the person must be both socially and educationally backward, and second, his social group must be inadequately represented in government employment.⁷⁸ The decision of whether a class is deemed backward is determined by an objective analysis decided by the government.⁷⁹ Taken together, Article 14 protects the general right to equality, while Articles 15 and 16 guarantee the same right in favor of disadvantaged groups.⁸⁰

any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class or citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

Id.

⁷² See Witten, *supra* note 13, at 360 (stating that the Constituent Assembly included these provisions in Article 16 because Untouchables were historically barred from employment with the Indian government).

⁷³ VERMA, *supra* note 52, at 10.

⁷⁴ *Id.* at 12.

⁷⁵ *Id.* In Article 16(3), however, the Parliament is authorized to regulate the degree to which a state can depart from this principle. *Id.* at 14.

⁷⁶ *Id.* at 15.

⁷⁷ See *Indra Sawhney v. Union of India*, 80 A.I.R. (S.C.) 477, 541 (ruling that Article 16(4) makes more specific what is already inherent in Article 16(1)); cf. VERMA, *supra* note 52, at 15 (stating that Article 16(4) is an exception to Article 16(1)).

⁷⁸ VERMA, *supra* note 52, at 15; see Chandola, *supra* note 13, at 109 (observing that Article 16(4) must be read in the context of Article 15(1), which protects citizens against discrimination on the basis of religion, race, caste, sex, and, place of birth).

⁷⁹ VERMA, *supra* note 52, at 17.

⁸⁰ See *id.* at 8 (explaining that Articles 15 and 16 should not be interpreted as contradicting Article 14).

4. Abolition of Untouchability

The Constituent Assembly also dealt with the ancient social stigma of untouchability.⁸¹ Article 17 was written with the intention of abolishing untouchability, the practice of which was perceived as a disgrace to Indian society.⁸² The abolition of untouchability gave millions of Indians equal status before the law.⁸³

The Indian Constitution explicitly incorporates compensatory discrimination policies in Article 46. Article 46 dictates that the government shall promote educational and economic interests of Scheduled Castes and Scheduled Tribes and will protect them from all forms of injustice and exploitation.⁸⁴ The government may revise the list of backward classes needing special treatment as their economic and educational conditions improve.⁸⁵

⁸¹ See *FRAMING V*, *supra* note 48, at 202. See generally R.K. KSHIRSAGAR, *UNTOUCHABILITY IN INDIA: IMPLEMENTATION OF THE LAW AND ABOLITION* (1986) (discussing the problem of untouchability that exists in India despite the constitutional protection of Article 17).

⁸² INDIA CONST. pt. III, art. 17. Article 17 provides: "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of 'Untouchability' shall be an offence punishable in accordance with law." *Id.*; see *FRAMING V*, *supra* note 48, at 205 (noting that those who welcomed Article 17 the most were members of Scheduled Castes); see, e.g., *People's Union for Democratic Rights v. Union of India*, 69 A.I.R. (S.C.) 1473, 1490-91 (1982) (holding that when a person's fundamental right to be free from the stigma of untouchability is violated the government is obligated to enforce compliance under Article 17).

⁸³ See *VERMA*, *supra* note 52, at 4 (stating that the abolition of untouchability was analogous to the abolition of slavery in the United States).

⁸⁴ INDIA CONST. pt. IV, art. 46. Article 46 provides: "The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation." *Id.*; see Nandan Nelivigi, *Constitutional Validity of Mandal: Chitralekha Revisited*, 3 NAT'L L. SCH. J. 127 (1991) (stating that the institution of compensatory discrimination is a constitutional mandate).

⁸⁵ See *MAHAJAN*, *supra* note 54, at 373 (explaining that when a section of the population is deemed backward it is not assumed that they will permanently be treated as such because economic, educational, and social conditions for them may improve).

II. IDENTIFYING THE BENEFICIARIES AND RECOMMENDATIONS FOR THEIR ADVANCEMENT

A. *The First Backward Classes Commission*

To determine the criteria for identifying socially and educationally backward classes, the Indian Central Government appointed the first Backward Classes Commission⁸⁶ under Article 340 of the Constitution⁸⁷ on January 29, 1953.⁸⁸ Two years later the Commission presented a list of 2,399 groups it considered backward and recommended numerous measures to improve their status.⁸⁹ The criteria used to identify backwardness were trade and occupation, security of employment, level of education, general representation in government positions and, most importantly, position in the Hindu caste hierarchy.⁹⁰

On March 30, 1955 the first Backward Classes Commission submitted its report to the President.⁹¹ The Commission proposed reservations in government jobs ranging from twenty-five percent to forty percent according to the level of the position.⁹² They further recommended a reservation of seventy percent in technical and professional institutions for qualified students of backward classes.⁹³

At the same time the Commission submitted its recommendations, the chairman of the Commission, Kaka Kalelkar, repudiated the report by claiming that the Commission should have used criteria other than caste

⁸⁶ See *Indra Sawhney v. Union of India*, 80 A.I.R. (S.C.) 477, 506 (stating that the popular name of the first Backward Classes Commission was the Kaka Kalelkar Commission, named after its chairman).

⁸⁷ See INDIA CONST. pt. XVI, art. 340 (providing that the President may appoint a commission to investigate the conditions of the backward classes and that this commission should report back with their findings and recommendations).

⁸⁸ MANDAL COMMISSION REPORT: MYTH AND REALITY 7 (K.L. Chanchreek & Saroj Prasad eds., 1991) [hereinafter MYTH AND REALITY].

⁸⁹ See GALANTER, *COMPETING EQUALITIES*, *supra* note 12, at 169 (stating that the measures were aimed at improving the Backward Classes' economic, educational, social, cultural, and political status); see also Nelivigi, *supra* note 84, at 129 (adding that 837 of these groups were classified as "most backward").

⁹⁰ See GALANTER, *COMPETING EQUALITIES*, *supra* note 12, at 170 (noting that the Commission found it inevitable to identify backwardness by examining an individual's position in the caste hierarchy).

⁹¹ MYTH AND REALITY, *supra* note 88, at 7.

⁹² See GALANTER, *COMPETING EQUALITIES*, *supra* note 12, at 172 (adding that the Commission recommended the creation of a government ministry for the backward classes' welfare).

⁹³ *Id.*

to designate a group as backward.⁹⁴ The Commission's report was also accused of having methodological flaws and internal contradictions.⁹⁵ Accordingly, the report of the first Backward Classes Commission was rejected by the Parliament and its recommendations were never implemented.⁹⁶

B. Mandal: The Second Backward Classes Commission

On December 20, 1978, then Prime Minister Morarjibhai Desai announced that he would appoint a second Backward Classes Commission under the chairmanship of B.P. Mandal, Member of Parliament.⁹⁷ The Mandal Commission was formed with the purpose of determining the criteria for identifying the socially and educationally backward classes and to report on the desirability of reservations and other measures to advance these backward classes not adequately represented in educational institutions and public employment.⁹⁸ On December 31, 1980, two years later, the Mandal Commission submitted its report to the then President of India, Neelam Sanjiva Reddy.⁹⁹

⁹⁴ *Id.* (stating that the chairman felt this would only perpetuate and encourage caste distinction and that economic, educational, and cultural criteria should be used instead).

⁹⁵ See MYTH AND REALITY, *supra* note 88, at 225-26 (stating that the criteria used were not reliable in terms of how the designated classes were perceived to be backward because the Commission had adopted a list prepared by a separate government agency used for an entirely different purpose).

⁹⁶ See GALANTER, COMPETING EQUALITIES, *supra* note 12, at 173 (stating that the matter was referred back to the State governments); see also MYTH AND REALITY, *supra* note 88, at 7 (stating that the first Backward Classes Commission report was used only for reference and academic purposes and that most people, other than politicians, forgot about the Commission).

⁹⁷ MYTH AND REALITY, *supra* note 88, at 7; see Nelivigi, *supra* note 84, at 129 (stating that the Mandal Commission was formed pursuant to an electoral promise made by the then-ruling Janata Party). The election manifesto of the Janata Party demanded an end to caste distinction and called for the establishment of a civil rights commission to ensure that Scheduled Castes, Scheduled Tribes, and the Other Backward Classes did not suffer from discrimination. See GALANTER, COMPETING EQUALITIES, *supra* note 12, at 186-87 n.141 (discussing the formation of the second Backward Classes Commission). The Janata Party promised to reserve between 26% and 33% of all federal jobs for backward classes. *Id.*

⁹⁸ See MYTH AND REALITY, *supra* note 88, at 226; see Lansing & Kuruvilla, *supra* note 36, at 655 (noting that by the time the Mandal Commission was formed, 18 states had already implemented reservation policies but had different criteria for identifying the backward communities).

⁹⁹ MYTH AND REALITY, *supra* note 88, at 7.

1. Criteria For Identifying the Backward Classes

The Mandal Commission Report noted that Articles 15(4) and 340(1) made special reference to social and educational backwardness but did not state a requirement of economic backwardness.¹⁰⁰ By giving priority to economic tests the government had previously paid little attention to Constitutional requirements which were silent as to a group's economic status as a criterion for backwardness.¹⁰¹

The Mandal Commission further noted that the strength of the caste system was not in upholding the supremacy of the Brahmin.¹⁰² Instead, its strength was in conditioning the consciences of lower castes into accepting their status as inferior persons.¹⁰³ Social and educational backwardness was a direct consequence of the hierarchal caste system.¹⁰⁴ The Mandal Commission noted that the caste system was enduring: it had survived challenges from Buddhism, Islam, British culture and colonial administration, and even the crusades of Gandhi.¹⁰⁵ Finally, the Commission stated that there could be no equality among those who have been historically denied equal opportunity.¹⁰⁶

The treatment of unequals as equals only perpetuated inequality in India.¹⁰⁷ The Mandal Commission noted that by allowing the weak and strong to compete on equal footing, the federal and state governments were in essence creating a "mock competition" where weaker sections of

¹⁰⁰ See Report of the Mandal Commission § 1.21 (explaining that previous government action was preoccupied with economic criterion to determine backwardness because the main goal of the government's development programs was the removal of mass poverty).

¹⁰¹ See *id.* (explaining that the use of an economic test as opposed to a test based on caste status ignores the origin of social and educational backwardness in Indian society); see, e.g., *Shivaji v. Chairman, M.P.S. Commission*, 1984 A.I.R. (Bom.) 434 (1984) (holding that economic backwardness may not be used as the sole test of social and educational backwardness to merit special protection under Article 16(4)).

¹⁰² See *id.* § 4.5 (noting that the caste system had been in existence for over 3,000 years and that there were no indications of its collapse).

¹⁰³ See *id.* (explaining that through a complex scheme of scripture, mythology and ritual the Brahmins invested the caste system with a seldom challenged moral authority).

¹⁰⁴ *Id.* § 4.33.

¹⁰⁵ See *id.* § 5.4 (explaining that the caste system has survived because it adapted to changes in Indian society).

¹⁰⁶ See *id.* § 6.2 (asserting that there is equality only among equals).

¹⁰⁷ *Id.*

society were destined to fail from the start.¹⁰⁸ The Mandal Commission was determined to remedy this inequality.¹⁰⁹

In Chapter XI of the report, the Mandal Commission set forth its criteria for identifying the Other Backward Classes.¹¹⁰ The Mandal Commission considered the criticisms of the first Backward Class Commission and also several judgements of the Indian Supreme Court.¹¹¹ The Commission based its conclusions on a survey of 405 districts by the Bureau of Economics and Statistics.¹¹² The survey used was designed with the assistance of top Indian social scientists and specialists.¹¹³ From this analysis the Commission developed several key indicators of social and educational backwardness.¹¹⁴ These indicators of backwardness were grouped under the three main headings of social, educational, and economic status.¹¹⁵

Indicators of social backwardness included whether most members of society considered their caste or class to be backward¹¹⁶ and whether they came from a region generally considered to be backward.¹¹⁷ Another consideration was whether the caste or class depended on manual labor

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See MYTH AND REALITY, *supra* note 88, at 296 (describing how the eleven criteria for backwardness were determined).

¹¹¹ See *Indra Sawhney v. Union of India*, 80 A.I.R. (S.C.) 477, 510 (reviewing the methodology for determining the criteria for social and economic backwardness).

¹¹² MYTH AND REALITY, *supra* note 88, at 296 (summarizing Chapter XI of the Report of the Mandal Commission).

¹¹³ See *Indra Sawhney*, 80 A.I.R. (S.C.) at 510.

¹¹⁴ MYTH AND REALITY, *supra* note 88, at 296 (summarizing Chapter XI of the Report of the Mandal Commission).

¹¹⁵ *Id.* at 296. A similar set of indicators was set up for non-Hindus. *Id.*

¹¹⁶ *Id.* Report of the Mandal Commission § 11.23. Marriage can raise or lower the social status of women. See *Uma Devi v. Kurnool Medical College*, 80 A.I.R. (A.P.) 38, 39 (1993) (holding that a woman born into a higher caste who marries a man born into a backward caste changes her social status and may take advantage of university admission reservations for his caste so long as the marriage was not a "mock marriage" designed for the sole purpose of benefitting from a reservation). The court reasoned that this would be an incentive to encourage inter-caste marriages which, in the past, were considered taboo. *Id.* Additionally, the court stated that after marriage the woman passes to the domain of her husband and is no longer a part of her own family but instead is a member of her husband's family. *Id.*

¹¹⁷ MYTH AND REALITY, *supra* note 88, at 296. Report of the Mandal Commission §11.23; see, e.g., *Asheesh Sharma v. Himachal Pradesh Univ.*, 78 A.I.R. (H.P.) 39, 41 (1991) (holding that, in the context of admission to a state medical college, reservations for applicants who were educated in a backward region were neither arbitrary nor unreasonable so long as the region was both socially and educationally backward).

for its livelihood.¹¹⁸ An additional indicator was whether twenty-five percent of the females and ten percent of the males above the state's normal average were married at age seventeen or below.¹¹⁹ In urban areas this indicator of backwardness was whether ten percent of the females and five percent of the males above the state's average were married at age seventeen or below.¹²⁰

Educational criteria for backwardness included the number of children who had never attended school.¹²¹ Furthermore, castes or classes where the student drop-out rate was twenty-five percent above average was also relevant when determining whether a class was backward.¹²² Economic indicators of backwardness included castes or classes whose total family assets were twenty-five percent below the state average and the number of households who had taken out loans to pay for basic living expenses.¹²³ In addition, the Mandal Commission considered castes or classes whose source of drinking water was more than half a kilometer from their homes.¹²⁴

2. Recommendations of the Mandal Commission Report

In its report, the Mandal Commission observed that Scheduled Castes and Scheduled Tribes make up approximately twenty-two and a half percent of India's population.¹²⁵ Accordingly, twenty-two and a half percent of government jobs had already been reserved on their behalf.¹²⁶ Because the Other Backward Classes make up fifty-two percent of India's population, fifty-two percent of government posts should therefore be set aside for their benefit.¹²⁷ This, however, conflicted with past Indian Supreme Court and state court judgements that held that the total amount of reservations permissible under Articles 15(4) and 16(4) of the Constitution must be less than fifty percent.¹²⁸ Thus, the percentage of reserva-

¹¹⁸ MYTH AND REALITY, *supra* note 88, at 296. Report of the Mandal Commission §11.23

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* § 13.10.

¹²⁶ *Id.*

¹²⁷ *Id.* § 13.11.

¹²⁸ *Id.*; *Balaji v. State of Mysore*, 50 A.I.R. (S.C.) 649, 663 (1963) (holding that the total percentage of reservations permissible under Article 15(4) of the Indian Constitution generally should be less than 50%); *see also Rajkumar v. Gulbarga Univ.*, 77

tions needed to be set at a figure which, when combined with the twenty-two and a half percent reservations for the Scheduled Castes and Scheduled Tribes, remained below the constitutional ceiling of fifty percent.¹²⁹ Hence, the Mandal Commission recommended twenty-five percent reservations for the Other Backward Classes despite the fact that their population is almost twice that figure.¹³⁰ The twenty-seven percent figure applied to all government services as well as placement in technical and professional educational institutions.¹³¹ Added together, the two sets of reservations came to forty-nine and a half percent, just below the fifty percent ceiling.

With these and other factors in mind, the Mandal Commission made several additional recommendations.¹³² The Commission contended that the percentage of backward classes that obtain public employment through open competition should not be adjusted against the reservation quota of twenty-seven percent.¹³³ Reservations for the Other Backward Classes would apply to promotions as well as for initial placement.¹³⁴ Unfilled quotas would be carried forward for three years.¹³⁵ The reservation policy would apply to all private sector organizations that are recipients of government financial assistance,¹³⁶ including all universities and colleges.¹³⁷ Additionally, the Commission recommended the establishment of

A.I.R. (Kant.) 320, 332 (1990) (following the 50% limit for reservations stated in Balaji).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*; see Nelivigi, *supra* note 84, at 130 (listing the recommendations of the Mandal Commission Report).

¹³² Report of the Mandal Commission § 13.13.

¹³³ *Id.*; see S.P. Sathe, *Constitutional Law*, 26 ANN. SURV. INDIAN L. 7, 7-8 (1990) (contending that if a person from the Other Backward Classes obtains government employment based on merit, that position should not be subtracted from the total amount reserved for that category). This proposal is sound because the purpose of reservations is to assure a minimum of reservations for the Other Backward Classes and not to limit the maximum number of positions or seats at educational institutions that could be acquired by persons in reserved categories.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* § 13.15.

¹³⁷ *Id.* § 13.16. The Mandal Commission noted that the Indian educational system was elitist in nature and not suited for an over-populated and developing country. *Id.* § 13.18. India's educational system had not changed since British rule. *Id.* According to the Mandal Commission, reservation of seats at educational institutions was the most important method to advance the backward classes because education would improve their self-image and bolster their social status. See *id.* §§ 13.20-13.24 (declaring that

a separate Ministry for the Backward Classes.¹³⁸ Finally, the Mandal Commission recommended that the entire scheme be evaluated after twenty years.¹³⁹

III. INDIAN SUPREME COURT TREATMENT OF COMPENSATORY DISCRIMINATION

A. *Caste as a Criterion For Backwardness: From Balaji to Rajendran*

The Indian Supreme Court first dealt with the criteria for classifying particular communities of Indian society as backward in the seminal case of *Balaji v. State of Mysore*.¹⁴⁰ In *Balaji*, the Supreme Court dealt with the question of whether caste could be used as the sole test to determine backwardness.¹⁴¹

In 1962, the State of Mysore issued an order that reserved for the Backwards Classes, Scheduled Castes, and Scheduled Tribes sixty-eight percent of the admissions to the engineering and medical colleges and other technical institutions specified in the 1961 order.¹⁴² This left only thirty-two percent of seats to be awarded on the basis of merit.¹⁴³ The order was challenged by twenty-three petitioners claiming that the classification was irrational, that a sixty-eight percent reservation violated Article 15(4),¹⁴⁴ and that it was a fraud on the Constitution.¹⁴⁵

The Indian Supreme Court stated that while reservations should be adopted to advance underprivileged sections of society, such compensation

education is the best catalyst of change).

¹³⁸ *Id.* § 13.37(3); see also Nelivigi, *supra* note 84, at 130 (stating that the Ministry would be created to safeguard the backward classes' interests at both federal and state levels).

¹³⁹ See Report of the Mandal Commission § 13.40 (reasoning that the raising of social consciousness would take at least one generation).

¹⁴⁰ 50 A.I.R. (S.C.) 649 (1963); see GALANTER, *COMPETING EQUALITIES*, *supra* note 12, at 191 n.10 (noting that a decade later, *Balaji v. State of Mysore* was respectfully referred to as the *locus classicus* of instruction on reservations for the Other Backward Classes).

¹⁴¹ *Balaji*, 50 A.I.R. (S.C.) at 659-60.

¹⁴² *Id.* at 654-55.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 653 The petitioners contended that the reservation was a colorable exercise of state power and amounted to a fraud on the Constitution. *Id.*

¹⁴⁵ See H.M. SEERVAI, *CONSTITUTIONAL LAW OF INDIA* 133-34 (1983) The term "fraud on the constitution" is synonymous with the term "colorable legislation." *Id.* at 134. Declaring a government act to be a fraud on the Constitution raises questions of the competency of a state government or the Indian Parliament to enact such a law. *Id.* It does not, however, question the legitimacy of the representatives. *Id.*

should not exclude qualified applicants of other communities from admission to educational institutions.¹⁴⁶ The interests of the backward classes had to be arranged in relation to the community as a whole.¹⁴⁷ Consequently, the Supreme Court ruled that reservations for the Other Backward Classes and the Scheduled Castes and Scheduled Tribes, when added together, should generally total less than fifty percent.¹⁴⁸ The object of Article 15(4) was to advance society as a whole while still promoting the weaker communities.¹⁴⁹

In *Balaji*, the Supreme Court did not object to the use of caste as a criterion for backwardness.¹⁵⁰ The court held, however, that caste could not be the *sole* criterion for the identification of backwardness.¹⁵¹ Other factors such as occupation and place of living should also be considered in addition to caste.¹⁵² Essentially, *Balaji* allows caste to be considered, but does not allow it to be the sole criterion of backwardness.¹⁵³

¹⁴⁶ *Balaji*, 50 A.I.R. (S.C.) at 659.

¹⁴⁷ *Id.* at 660.

¹⁴⁸ *Id.* at 663; *see, e.g.*, *Rajkumar v. Gulbarga Univ.*, 77 A.I.R. (Kant.) 320, 325 (1990) (holding that 33 of 35 professor positions reserved for Scheduled Castes, Scheduled Tribes, and the Other Backward Classes at a state university was well above the *Balaji* 50% reservation ceiling and was therefore violative of Article 16(4) of the Indian Constitution); *Prabha v. Punjab Univ.*, 71 A.I.R. (P&H) 434, 436-38 (1984) (following the *Balaji* decision and holding that a 74% reservation for admission to a university was excessive and violative of Article 14 of the Constitution).

¹⁴⁹ *Balaji*, 50 A.I.R. (S.C.) at 663.

¹⁵⁰ *See* GALANTER, *COMPETING EQUALITIES*, *supra* note 12, at 191 (stating that though the court did not object to the use of caste for determining backwardness, it did disapprove of its use on policy grounds); *see also* Sivaramayya, *supra* note 22, at 481-90 (concluding that members of Scheduled Castes who convert to Christianity and back to Hinduism should be allowed to benefit from reservations because the objective of compensatory discrimination is to compensate for past injuries); *see, e.g.*, *Guntar Medical College v. Rao*, 63 A.I.R. (S.C.) 1904, 1908 (1976) (holding that the son of Scheduled Caste parents who converted from Hinduism to Christianity and then back to Hinduism could be treated as a member of Scheduled Caste for the purposes of compensatory discrimination).

¹⁵¹ *Balaji*, 50 A.I.R. (S.C.) at 660 (noting that only communities with levels of illiteracy below that of the State could properly be regarded as educationally backward).

¹⁵² *Id.* at 659 (strenuously objecting to Mysore's absolute reliance on caste).

¹⁵³ *See* GALANTER, *COMPETING EQUALITIES*, *supra* note 12, at 192 (observing that the failure to make a distinction between a caste as a potential backward unit, as opposed to the hierarchal rank of a caste, encouraged the belief that caste membership was not to be included when determining backwardness); *see also* Sivaramayya, *supra* note 22, at 493 (interpreting *Balaji* as stating that the Constitution specifically states backward classes, not backward castes, and that the determination of backwardness must be both social and educational). A caste test alone would fail with Christian and

In 1963 the Court was confronted with a similar case arising under Article 16(4) in *Devadasan v. Union of India*.¹⁵⁴ *Devadasan* confronted the issue of whether the amount of unfilled reserved positions in government employment could be carried forward and added to reserved positions for the following two years if that amount exceeded fifty percent.¹⁵⁵ Here, after carrying forward unfilled reservations from the previous year, the total amount of reserved positions came to sixty-four percent.¹⁵⁶ This was well above the fifty percent limit announced in *Balaji*. The Supreme Court declined to make such an exception and affirmed the fifty percent principle set forth in *Balaji*.¹⁵⁷

In *Chitrlekha v. State of Mysore*,¹⁵⁸ the Court dealt with the issue of whether it is mandatory to consider caste, along with other factors, when determining backwardness.¹⁵⁹ Here, the Court first found that *Balaji* had laid down two main principles: 1) caste status may be a relevant condition to ascertain social backwardness; but 2) it could not be the sole criterion for this determination.¹⁶⁰ Expanding on its earlier decision, the Court contributed to *Balaji* the notion that though the use of caste is permissible, it is not a mandatory measure of a group's social and educational backwardness.¹⁶¹

The Supreme Court altered its approach in *Rajendran v. State of Madras*.¹⁶² Here, the Court held that a particular caste is in fact a class of citizens, and may be used as a unit to be measured for backwardness.¹⁶³ So long as it could be proven that an entire caste was socially and educationally backward, reservations for it fell within the meaning of Article 15(4).¹⁶⁴ In *Rajendran*, the Court endorsed the view that caste as

Muslim Indians who are socially and educationally backward and deserving of special treatment. *Id.* *Balaji* gave hope that reservations for federal employment and educational institutions would be based on class rather than caste. *Id.*

¹⁵⁴ 1 A.I.R. (S.C.) 179 (1964).

¹⁵⁵ *Id.* at 180.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 188.

¹⁵⁸ 51 A.I.R. (S.C.) 1825 (1964).

¹⁵⁹ *Id.* at 1827.

¹⁶⁰ *Id.* at 1833; see GALANTER, *COMPETING EQUALITIES*, *supra* note 12, at 192 (stating that the Court repudiated the lower court's notion that caste is a mandatory test of social backwardness).

¹⁶¹ *Chitrlekha*, 51 A.I.R. (S.C.) at 1833; see GALANTER, *COMPETING EQUALITIES*, *supra* note 12, at 193 (commenting that the Court failed to articulate what, if not castes, are the classes of citizens whose backwardness is to be gauged).

¹⁶² 5 A.I.R. (S.C.) 1012 (1968).

¹⁶³ *Id.* at 1014.

¹⁶⁴ *Id.* at 1015.

a unit, rather than caste rank, should be the gauge of backwardness.¹⁶⁵ Additionally, the Court placed upon the party challenging the reservation the burden of proving that the method used to identify backward classes was unsatisfactory.¹⁶⁶

B. New Thinking: Thomas and Vasanth Kumar

The Indian Supreme Court's decision in *State of Kerala v. Thomas*,¹⁶⁷ signified the beginning of new thinking on Article 16.¹⁶⁸ In *Thomas*, the State Government of Kerala had issued a notification granting a two-year temporary exemption to employees belonging to either Scheduled Castes or Scheduled Tribes from passing a test for promotions.¹⁶⁹ According to the order, all Scheduled Castes and Scheduled Tribes who were unable to pass the test could still be promoted to higher positions.¹⁷⁰ They were, however, required to pass the test at some point within the two-year exemption period.¹⁷¹

The Supreme Court stated that there can be reasonable classifications in matters of promotions under Article 16(1).¹⁷² Article 16(4) was not an exception to Article 16(1).¹⁷³ Rather, Article 16(4) clarifies and explains that classifications based on backwardness are permissible under Article 16(1).¹⁷⁴ Granting a two-year exemption to employees who are

¹⁶⁵ See GALANTER, *COMPETING EQUALITIES*, *supra* note 12, at 198 (observing that the Supreme Court made a distinction between caste rank and caste units).

¹⁶⁶ *Rajendran*, 55 A.I.R. (S.C.) at 1015. Though disapproving of caste as the sole basis of backwardness, Balaji and Chitralekha were silent as to which party carried the burden of proving that the challenged reservation was unconstitutional. Mohammad Ghose, *Constitutional Law*, 15 ANN. SURV. INDIAN L. 391, 398 (1979). The Court in *Rajendran* required the petitioner to prove that the listed castes were not backward but did not ask the state how it came to the conclusion that the group was backward. *Id.* at 398-99.

¹⁶⁷ 63 A.I.R. (S.C.) 490 (1976).

¹⁶⁸ *But see* *Indra Sawhney v. Union of India*, 80 A.I.R. (S.C.) 477, 527 (stating that the origin of the court's decision in *Thomas* was the dissenting opinion of Subba Rao, J., in *Devadasan*).

¹⁶⁹ *Thomas*, 63 A.I.R. (S.C.) at 493.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 497; *see* Mohammad Ghose, *Constitutional Law*, 12 ANN. SURV. INDIAN L. 240, 243 (1976) (explaining that the Court in *Thomas* read preferential treatment of Scheduled Castes and Scheduled Tribes into the equal opportunity clause of Article 16(1) even though Article 16(4) specifically provides for special treatment). Under *Balaji* and *Devadasan*, Article 16(4) was an exception to Article 16(1). *Id.*

¹⁷³ *Thomas*, 63 A.I.R. (S.C.) at 499.

¹⁷⁴ *Id.*; *see* Ghose, *supra* note 172, at 249 (stating that *Thomas* gave new content

members of Scheduled Castes or Scheduled Tribes was a just and reasonable classification which had a rational nexus to the goal of providing equal opportunity to all citizens in respect to public employment.¹⁷⁵ The classification was fair because it gave members of Scheduled Castes and Scheduled Tribes two additional years to pass the exam.¹⁷⁶ In sum, the Supreme Court in *Thomas* gave the government greater liberty in implementing compensatory discrimination policies.¹⁷⁷

*Vasanth Kumar v. State of Karnataka*¹⁷⁸ was the last decided case before the 1992 *Indra Sawhney* decision. In *Vasanth Kumar*, the Indian Supreme Court was asked to give an advisory opinion on the criteria that should be used to identify classes that are socially and educationally backward. In four of the five separate opinions, the court accepted the use of caste as a unit to identify backward classes. One judge recommended that while caste may be used as one criterion, in certain cases an income ceiling might be set so that members of a caste who have the economic means to advance themselves without government assistance will not take advantage of a preference system meant for the socially and economically disadvantaged.¹⁷⁹ One judge, however, asserted that there should only be an economic test to make determinations of backwardness and that caste rank should not be considered at all.¹⁸⁰

C. Today's Standards: *Indra Sawhney v. Union of India*

The validity of the order of former Prime Minister V.P. Singh to implement the Mandal Commission recommendations was examined in *Indra Sawhney v. Union of India*.¹⁸¹ The case involved all the issues

to equal opportunity by viewing compensatory discrimination as complementary to Article 16(1)). The Court opined that the principle of equal opportunity embraces the concept of preferential treatment for India's underprivileged. *Id.*

¹⁷⁵ *Thomas*, 63 A.I.R. (S.C.) at 500.

¹⁷⁶ *Id.*

¹⁷⁷ See GALANTER, *COMPETING EQUALITIES*, *supra* note 12, at 390 (stating that the decision gave governmental authorities discretion to design and administer programs of preference).

¹⁷⁸ 2 A.I.R. (S.C.) 1495 (1985).

¹⁷⁹ See *id.* at 1509 (Reddy, J., separate opinion) (stating that there cannot be one rigid, universal test because of the complexities of Indian society). *But cf.* Nelivigi, *supra* note 84, at 132-33 (stating that the opinions expressed in *Vasanth Kumar* did not add any material propositions of law because they were advisory opinions); S.P. Sathe, *Constitutional Law*, 21 ANN. SURV. INDIAN L. 209, 219 (1985) (stating that the decision in *Vasanth Kumar* is moot and not legally binding because the judgement was an advisory opinion).

¹⁸⁰ *Vasanth Kumar*, 72 A.I.R. (S.C.) at 1506-07 (Desai, J., separate opinion).

¹⁸¹ 80 A.I.R. (S.C.) 477 (1993); see *supra* notes 2-40 and accompanying text

previously decided in cases from *Balaji* to *Vasanth Kumar*.

In *Indra Sawhney*, the Court first partially overruled *Balaji* and *Devadasan* by holding that Article 16(4) was not an exception to 16(1).¹⁸² Instead, the Court declared that classifications and provisions for backward classes were implicit in Article 16(1).¹⁸³ Thus, classifications and reservations under 16(4) merely make explicit what was already implied in 16(1).¹⁸⁴ Furthermore, the Court stated that reservations were not the only means available under Article 16(4) to advance the backward classes.¹⁸⁵ The state could make additional less extreme provisions,¹⁸⁶ such as concessions, exemptions, and other relaxations, to advance those classes deemed backward.¹⁸⁷ These supplemental provisions fall within the broad scope of reservations.¹⁸⁸

The Court next addressed the meaning of the term Backward Classes, an issue already examined in *Balaji*.¹⁸⁹ Though *Balaji* and *Devadasan* arose under Article 15(4) and not Article 16(4), their interpretations of Article 15(4) were adopted for cases arising under Article 16(4) as well.¹⁹⁰ Under this interpretation, backwardness had to be both social and educational and must not be determined solely on the basis of caste status.¹⁹¹ Article 16(4) did not contain these qualifying words, social and

(discussing student protests in response to Prime Minister V.P. Singh's order to implement the recommendations of the Mandal Commission Report).

¹⁸² 80 A.I.R. (S.C.) at 477; see *Sivaramayya*, *supra* note 22, at 495 (observing that Article 16 recognizes equal employment opportunities for all citizens and that reservations are merely an exception limited in point of time; accordingly, short-term goals of protective discrimination cannot be allowed to adversely affect the permanent features of the Constitution).

¹⁸³ See 80 A.I.R. (S.C.) at 539 (holding that Article 16(1) permits reasonable classifications for ensuring the equality of opportunity it guarantees).

¹⁸⁴ See *id.* (observing that reservations are permissible even in the absence of Article 16(4)).

¹⁸⁵ *Indra Sawhney*, 80 A.I.R. (S.C.) at 540.

¹⁸⁶ See *id.* (explaining that reservations are the most extreme form of special provision, whereas concessions, exemptions, and concessions are less extreme forms).

¹⁸⁷ *Id.*

¹⁸⁸ See *id.* (stating that the constitutional scheme and general context of Article 16(4) led the justices to believe that the broader concept of reservations includes any potential ancillary or supplemental provisions the state may find reasonable).

¹⁸⁹ See *Indra Sawhney*, 80 A.I.R. (S.C.) at 545, 552 (addressing the issue of identifying those who are among the backward classes has been the most difficult question torturing the country).

¹⁹⁰ *Id.* at 545.

¹⁹¹ *Id.*; see *supra* notes 141-55 and accompanying text (discussing the rulings in *Balaji v. State of Mysore* and *Devadasan v. Union of India*); see also *Sivaramayya*,

educational backwardness were read into it by the Court.¹⁹²

The Court said that in preindependence India, where the words *caste* and *class* were used interchangeably, *caste* was an enclosed class of citizen.¹⁹³ The Constitution did not use the word *caste* in Article 16(4) because the Indian Constitution was meant for the entire country.¹⁹⁴ *Caste*, according to the Court, is nothing more than a term for a socially and occupationally homogeneous class.¹⁹⁵ The Constitution envisioned the possibility that in the future many different classes may qualify as backward and need the protection that 16(4) affords.¹⁹⁶ Accordingly, the Court held that even though the word *caste* is not specifically written in Article 16(4), it may still be used as a criterion for determining backwardness.¹⁹⁷

The Court emphatically stated that it was neither encouraging nor advocating the legitimacy of caste distinction.¹⁹⁸ Rather, it merely pointed out that any program aimed at improving these sections of society must adjust its policy to recognize the evident reality of India's hierarchical caste/social division.¹⁹⁹ If caste is the basis for discrimination, it must also be the foundation for any remedial measures taken under the

supra note 22, at 495 (stating that reservations should not be set solely on the basis of caste, but that multiple factors should be considered, including income, actual occupation, level of literacy, etc.).

¹⁹² See *Indra Sawhney*, 80 A.I.R. (S.C.) at 546 (noting that the terms *social* and *educational* appear in Article 15(4), but do not appear in Article 16(4)).

¹⁹³ See *id.* at 549-51 (discussing various definitions of the word *caste*).

¹⁹⁴ See *id.* at 552 (noting that other religions or sects present in India such as Islam, Christianity, and Sikh do not recognize the caste system, even though castes have existed among these religions or sects to some degree).

¹⁹⁵ See *id.* at 553 (stating there is an occupation-caste nexus in rural parts of India).

¹⁹⁶ See *Indra Sawhney*, 80 A.I.R. (S.C.) at 552 (stating that the Indian Constitution was intended to be a permanent document expected to last centuries and envisioned a time when a person's caste would no longer bear on his or her social status).

¹⁹⁷ See *id.* at 553-54 (stating that any program for the advancement of the backward classes must recognize the existence of the caste system and its accompanying social evils and adjust accordingly). *But cf.* S.P. Sathe, *Constitutional Law (Fundamental Rights)*, 23 ANN. SURV. INDIAN L. 76, 87 (1987) (discussing *V. Narayana Rao v. A.P.*, 74 A.I.R. (A.P.) 53 (1987), which asserted that too much reliance on caste in identifying the "backward" is undesirable).

¹⁹⁸ See *Indra Sawhney*, 80 A.I.R. (S.C.) at 553 (stating that efforts should be made to eradicate the caste system).

¹⁹⁹ See *id.* at 502, 553 (stating that the Hindu caste system constitutes a vicious circle where members of lower castes are condemned to be subordinate). In rural India, members of lower castes had no options but to follow their lowly, assigned occupations generation after generation. *Id.*

Constitution.²⁰⁰ For non-Hindus, the government could use other criteria as it considers appropriate to identify groups as backward.²⁰¹ There is no one standard method to identify the Other Backward Classes.²⁰²

Next, the Court addressed the question of whether backwardness must be both social and educational. According to a plain reading of Article 16(4) the qualifying words *social* and *educational* were not included in the language of this provision.²⁰³ Consequently, the Court asserted that there is no requirement for a group to be both socially and educationally backward for the purposes of Article 16(4).²⁰⁴ The Court believed that the type of backwardness referred to by Article 16(4) was mainly social backwardness.²⁰⁵

To eliminate the possibility of advanced backward class members from profiting from the reservation schemes, the Court ordered the government to adopt an economic means test.²⁰⁶ This means test allows for the exclusion of the "creamy layer," those members of the backward classes who do not need government assistance because they have adequate economic means to promote themselves.²⁰⁷ The line drawn must be realistic and take into account the differences in the cost of living expenses between cities and rural parts of India.²⁰⁸ The Court asserted that exclusion of the socially advanced members from the backward classes would ensure that the groups designated as needing assistance are

²⁰⁰ See *id.* at 554 (observing that the United States Supreme Court has held that if race is the ground for discrimination, race must also be the basis for attempts to remedy this discrimination). The Supreme Court of India noted that though a complete restructuring of the socio-economic system was the final objective, it could not be realized without first advancing India's backward classes both socially and educationally. *Id.*

²⁰¹ *Id.* at 554-55.

²⁰² See *id.* at 555 (stating that in a vast and diverse country such as India it would be impractical to have one uniform test for determining backwardness).

²⁰³ *Indra Sawhney*, 80 A.I.R. (S.C.) at 556.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 557.

²⁰⁶ See *id.* at 558-59 (explaining that there are some backward-class members who are socially, economically, and educationally advanced and who may benefit unduly from reservations meant for the truly backward); see also Sathe, *supra* note 197, at 87 (discussing *V. Narayana Rao v. A.P.*, 74 A.I.R. (A.P.) 53 (1987), which contended that an income ceiling that excludes the wealthy from belonging to a backward class is desirable).

²⁰⁷ See *Indra Sawhney*, 80 A.I.R. (S.C.) at 558 (noting that these persons are by no means backward and should not be treated as such).

²⁰⁸ *Id.* at 559.

truly backward.²⁰⁹ The Court believed this would better serve the objectives of Article 16(4).²¹⁰

The *Sawhney*, the Supreme Court continued to follow the *Balaji* fifty percent rule.²¹¹ Only in exceptional circumstances would reservations be permitted to exceed fifty percent.²¹² Consequently, the twenty-seven percent reservation for backward classes by Prime Minister V.P. Singh added to the existing twenty-two and a half percent reservation for Scheduled Castes and Scheduled Tribes, was safely within the fifty percent limit.²¹³ The Court overruled *Devadasan* by stating that the most it could have done in that instance was to void the reserved appointments exceeding fifty percent.²¹⁴

The Court declined to extend reservations to promotions once a member of a backward class is employed.²¹⁵ The Court observed that once hired, members of backward classes could compete and earn promotions on merit as do other public employees.²¹⁶ Finally, the Court declined to approve of an additional ten percent reservation for poorer members of those upper classes not designated as backward.²¹⁷

²⁰⁹ See *id.* at 560.

²¹⁰ See *id.* The Court reasoned that exclusion of the "creamy layer" would make such classes truly backward. The exclusion of the "creamy layer" from the Other Backward Classes category has no relevance to those designated as Scheduled Castes and Scheduled Tribes. *Id.*

²¹¹ *Id.* at 565-66.

²¹² *Indra Sawhney*, 80 A.I.R. (S.C.) at 566.

²¹³ *Id.* at 568.

²¹⁴ See *Indra Sawhney*, 80 A.I.R. (S.C.) at 568-69. The Court noted that *Devadasan* had unnecessarily made all carry-forward provisions unconstitutional. This was especially unnecessary if the percentage carried forward to the following year, when added to the percentage of reservations for that year, did not exceed 50%. *Id.*

²¹⁵ See *id.* at 572 (stating that reservations would be available for persons applying for upper-level government positions; however, reservations would not be available after the initial stages of hiring).

²¹⁶ See *id.* at 573 (stating that application of reservations to job promotions was not intended by the members of the Constituent Assembly and that the government could not provide crutches throughout the professional lives of those who benefit from reservations).

²¹⁷ See *id.* at 578 (stating that reservation of an additional 10% based on low income or assets was unreasonable because it would exclude those above the income line from those same positions).

IV. RECOMMENDATIONS

Balaji v. State of Mysore signified the emergence of the Indian Supreme Court as an institution where issues of compensatory discrimination can be analyzed and coherently deliberated.²¹⁸ Subsequently, the Court found logical balancing tests in *Chitralkha v. State of Mysore* and *Rajendran v. State of Madras*. *Chitralkha* permits caste to be used as a measure of backwardness so long as it is not the sole criterion of backwardness.²¹⁹ *Rajendran* requires that the caste be both socially and educationally backward so that only the truly needy will benefit from compensatory discrimination policies.²²⁰ In *Kerala v. Thomas*, the Court resolved the tension between the Indian Constitution's guarantee of a right of equality and preferential treatment for the disadvantaged.²²¹ Generally, *Thomas* is an affirmation of compensatory discrimination policies.²²² In *Indra Sawhney v. Union of India*, the Supreme Court reaffirmed its commitment to balancing the interests of upper class Indians and the Other Backward Classes.²²³ Together, these decisions highlight remarkable advancements in the Court's handling of compensatory discrimination policies.

Throughout its decisions, the Indian Supreme Court has made great strides to provide a workable solution to protect against future inequities, yet guard against outbreaks of divisive and hateful violence as resulted in the Fall of 1990.²²⁴ Unfortunately, these efforts have not always been successful. Periodic violence and protests over reservations for the Scheduled Castes, Scheduled Tribes, and the Other Backward Classes still plague India.²²⁵ The thoughtful decisions by the Indian Supreme Court

²¹⁸ See Witten, *supra* note 13, at 375 (analyzing the importance of the Supreme Court's holding regarding backward class jurisprudence in *Balaji v. State of Mysore*).

²¹⁹ See *supra* notes 161-63 and accompanying text (discussing the Indian Supreme Court's decision in *Chitralkha v. State of Mysore*).

²²⁰ See *supra* notes 162-68 and accompanying text (discussing the Indian Supreme Court's decision in *Rajendran v. State of Madras*).

²²¹ See Witten, *supra* note 13, at 382-83 (noting that preferential treatment for the disadvantaged is compatible with equal opportunity).

²²² *Id.*

²²³ See *India to Implement Caste-Based Job Reservation Scheme*, REUTERS, Sept. 8, 1993, available in LEXIS, Nexis Library, Reuwl File (explaining that the Indian Supreme Court's decision was easier for upper-caste Indians to accept). See also Guha, *supra* note 28, (stating that such considerations would likely "soften the blow" to the upper castes, who contended that reservations would grant jobs and promotions based on caste instead of on merit).

²²⁴ See *supra* notes 2-40 and accompanying text (discussing the protests and violent reactions to the Mandal Commission recommendations by the student community).

²²⁵ See *Schoolboy Sets Himself Ablaze*, *supra* note 29 (reporting on protests that

have been unable to quell the violence and controversy. Accordingly, as the Court suggested in *Indra Sawhney*, the Indian Government should pursue other less extreme forms of compensatory discrimination.²²⁶

One possible option is for the Government to lower the amount reserved for the Other Backward Classes from twenty-seven percent to, perhaps, fifteen percent. The Mandal Commission would have recommended reserving fifty-two percent of government jobs and university seats for backward classes in addition to twenty-two and a half percent for the Scheduled Castes and Scheduled Tribes but for the fifty percent *Balaji* rule.²²⁷ This proportional reasoning is unsound and not substantiated by the Constitution. Articles 15(4) and 16(4) state that reservations may be provided for classes whose representation is *inadequate*, it does not discuss *disproportional* representation.²²⁸ Lowering the percentage of reservations for the Other Backward Classes to fifteen percent would set the total percentage of reservations at thirty-seven and a half percent. Though largely a symbolic gesture, it would likely serve to quiet dissent and protect against future deadly riots by students and other protesters who find it difficult to accept a reservation scheme that grants almost half of public jobs and university seats on criteria other than merit.

Government agencies and universities should also follow the program of compensatory discrimination used by the Indian Institute of Technology (IIT) in New Delhi.²²⁹ IIT operates a compensatory discrimination scheme where members of backward classes who fail the entrance examination by slim margins are nevertheless accepted and given special training and appropriate course work to bolster their technical skills.²³⁰ This program avoids the problem of having unprepared persons thrust into a highly technical environment.²³¹ Compensatory discrimination programs should also be implemented at the grade school level while children are still young.²³² Additionally, financial assistance should be made available

exploded after the Supreme Court upheld implementation of the Mandal Commission Report).

²²⁶ See *supra* notes 188-91 and accompanying text (discussing the Indian Supreme Court's recommendation that the Government pursue less extreme options such as concessions, exemptions, and other relaxations).

²²⁷ Report of the Mandal Commission § 13.11.

²²⁸ See *supra* notes 64-80 and accompanying text (discussing the provisions of Articles 15 and 16 of the Indian Constitution).

²²⁹ See MINISTRY OF INFORMATION AND BROADCASTING, INDIA 1992: A REFERENCE ANNUAL 107-08 (1993) (discussing government efforts to assist India's backward classes through reservations and welfare programs).

²³⁰ *Id.*

²³¹ *Id.*

²³² See Lansing & Kuruvilla, *supra* note 36, at 659 (discussing the necessity of

to students from backward classes who wish to pursue a university degree.²³³ Ideally, the purpose of these programs should be to raise the backward classes to a point where they can compete with advanced classes in education and employment.²³⁴ This will mean a complete restructuring and expansion of the current educational infrastructure.²³⁵

Compensatory policies also need to be expanded to the private sector.²³⁶ The Indian Government should offer incentives to private companies who employ members of the backward classes by granting tax reductions and other incentives.²³⁷ Labor unions, social organizations, and other civic bodies should also put pressure on the private sector.²³⁸ These organizations could also function as informal job placement and career counseling services.²³⁹

After close to fifty years of experimentation with reservations there is still no adequate evaluation of their accomplishments and costs.²⁴⁰ Periodic evaluations are the most critical element of monitoring the performance of a reservation scheme. Accordingly, as recommended by

restructuring, strengthening, and expanding India's current educational system so that it will narrow the gap between the backward and advanced classes).

²³³ *Id.* (stating that increased concentration on education and financial assistance to the backward classes will result in their progress).

²³⁴ *Id.* (noting that the advancement of the backward classes to positions where they can compete with the rest of society will be a difficult task). The main value of improved education is that many backward class members will eventually be capable of securing employment in private organizations based on merit alone. *Id.*

²³⁵ *Id.* (noting that restructuring will be difficult because a government that reduces or ends reservations will most likely not remain in power for very long, and thus will be more likely to use reservations as a means of improving education rather than reducing them in favor of restructuring the system).

²³⁶ *Id.* at 657 (explaining that, already, government employees who are from backward classes often deny licenses to businesses unless they agree, as a sort of bribe, to hire more employees from the backward classes).

²³⁷ *See id.* at 658 (observing that labor unions are already intimately connected with political parties and can assert pressure on companies to give employment opportunities to the backward classes).

²³⁸ *See id.* (observing that many of these organizations are caste-based and do excellent work to increase job recruitment of members from their caste). Political parties, social organizations, and private individuals often apply pressure to these civic groups to approach local industries and request that they employ members from their respective castes or communities. *Id.*

²³⁹ *See id.* at 659 (stating that social organizations can appraise the job market and arrange for job interviews, and can also solicit the assistance of politicians, government officials, and municipal officers to work on behalf of their community).

²⁴⁰ *See generally* GALANTER, *COMPETING EQUALITIES*, *supra* note 12, at 64-72 (describing the inefficient administration of compensatory discrimination policies).

the Mandal Commission, the Indian government should set up a permanent ministry to manage backward class identification and to set the percentage of job and university seats reserved for the Other Backward Classes.²⁴¹ This ministry should follow the *Indra Sawhney* decision and use caste as a criterion for determining backwardness.²⁴² Only by recognizing the reality of the India's caste hierarchy can the government implement programs to advance the backward classes.²⁴³ Instances of fraud and the exclusion of the creamy layer — those members from backward classes who have the economic means to advance themselves — should also be examined by this specialized government ministry. Additionally, the percentage of reservations, criteria for backwardness, and policies to detect fraud should be reviewed at least every five years.²⁴⁴ This is necessary because the criteria for backwardness must be relevant to present conditions. Ideally, in the future all reservations should be gradually phased out once the backward classes achieve social and educational advancement.²⁴⁵ Though this may be a lofty goal, it should, nonetheless, be the central aim of the policy.

²⁴¹ As a model, the Indian government should study the operation of the Equal Employment Opportunity Commission in the United States which was established to assist African-Americans and other minority groups through affirmative action programs. See Lansing & Kuruvilla, *supra* note 36, at 653 (discussing examples of government intervention to promote fundamental rights of different groups in the population). The United States Equal Employment Opportunity Commission was founded as a result of the 1960's civil rights movement. *Id.*

²⁴² See *Indra Sawhney*, 80 A.I.R. (S.C.) at 553.

²⁴³ See *id.* at 554

²⁴⁴ See Lansing & Kuruvilla, *supra* note 36, at 659 (arguing that as larger percentages of backward class members are raised to reasonable levels of social and educational advancement, they should no longer be classified as backward so that government efforts are concentrated on those who genuinely need assistance).

²⁴⁵ See *id.* (asserting that a periodic review of backwardness criteria and a slow phasing out of reservations is the best way to meet India's long-term interests, as failure to periodically review these policies will provide an incentive for backward classes to remain "backward" so they can profit from government guarantees of educational and employment opportunities with little effort); see also GALANTER, *COMPETING EQUALITIES*, *supra* note 12, at 363 (stating that India's policy of compensatory discrimination was initially designed to be self-liquidating; to the degree that these policies succeed, they in turn are to be phased out as specific performance goals are reached). Continued protection based upon class status may perpetuate the social division that the policy was designed to eliminate. *Id.* at 560. The belief that permanent protection is needed for the backward classes reflects the original caste hierarchic ideology that the measure of one's natural ability was based on caste.

CONCLUSION

From a bewildering kaleidoscope of religions, castes, languages, and ethnic communities, the Indian Constitution and subsequent case law has directly confronted issues of caste and ethnic discrimination. In a legal system similar to our own, India has established guarantees of constitutional liberty and spirited protection of human rights despite overwhelming poverty, cultural diversity, and political tension. India's policies of compensatory discrimination, however, have had surprisingly little scholarly analysis in the United States. American law schools and legal scholars would profit by paying closer attention to India's compensatory discrimination policies.²⁴⁶

While poverty exists in almost every country, no other country has had the misfortune of having a rigid four-tier caste social division superimposed on poverty.²⁴⁷ The founders of the Indian Constitution were aware of the problems faced by India's lower castes and wrote the Constitution with the intention of surmounting these obstacles.²⁴⁸ By refining, modifying, and monitoring compensatory discrimination policies and programs, India will be able to better protect the interests of all its citizens and serve as an inspiration to other nations confronting racial and ethnic disparities.

²⁴⁶ See MARC GALANTER, *Epilogue, Will Justice be Done*, in LAW AND SOCIETY IN MODERN INDIA 296, 301-02 (1989) (suggesting that American law schools pay closer attention to India's legal system and emphasizing that this should not be difficult because India's legal system operates in English).

²⁴⁷ See *Indra Sawhney*, 80 A.I.R. (S.C.) at 502.

²⁴⁸ See *id.* (stating that members of lower castes were conditioned not to question their situation).

