Deceptive Comparison: US Affirmative Action and Private Sector Reservations in India

The state government of Maharashtra, home to India's commercial capital Mumbai, passed a bill earlier this year mandating up to 52% reservations in the private sector for schedule castes, scheduled tribes and other backward classes. The state government plans to announce details for the execution of the policy in July. Indications are that the quotas will apply to every company in the state regardless of size. Similar policies are also being contemplated at the federal level. In its recent Common Minimum Programme, the Congress led United Progressive Alliance (UPA) government stated that it is "very sensitive to the issue of affirmative action, including reservations, in the private sector." It suggests a national dialogue "to see how best the private sector can fulfill the aspirations of scheduled caste and scheduled tribe youth."

Affirmative action proponents are generally of two types. The more conservative view of affirmative action is that government must ensure equal opportunity for all individuals through the removal of state-imposed barriers to fair treatment. More liberal (left-leaning) backers of affirmative action envision going a step further and advocate using "positive discrimination" to redress past wrongs and achieve desired social outcomes.

Amidst the din of the debate on this highly charged issue, some Indian advocates of preferential policies have cited American efforts—specifically affirmative action—for support and justification for Indian measures. In fact, the very use of the term "affirmative action", first coined in the US, is suggestive of a conceptual link between Indian and American policy. The logic is apparently as follows: the US has affirmative action, so why not India? Such a view is misinformed. To stop at this level of comparative analysis fails to recognize the critical differences in character between American and Indian policies, and is therefore misleading.

As will be shown, due to constitutional constraints, American affirmative action policies are not nearly as aggressive as India's in their attempts to engineer social change. US law is definitively against reservations or quotas both in the public and private sectors, and the current trend in the US indicates a steady dismantling of any sort of preferential policies.

Historical Origins and Perspective

After the end of the Civil War in 1865, the US Congress passed the 13th and 14th amendments to the Constitution outlawing slavery and prohibiting all states of the union from discriminating against persons on the basis of race. Despite these measures, many southern states passed what became known as "Jim Crow" laws, which mandated separate facilities for whites and colored people. The Supreme Court upheld "separate but equal" facilities in the infamous case of Plessy v. Ferguson (1896), where a man who claimed to be seven-eights white was required under a state law to ride in a separate train car from whites.

In reality, such facilities were not equal, and upholding segregation laws amounted to government-sponsored racism. It took nearly sixty years for the Supreme Court to reverse its ruling in *Plessy* in another landmark case, Brown v. Board of

Education (1954). The Court struck down the separate but equal practice, here in the context of lawsuit regarding segregated state-run public schools. The Court's decision cited sociological studies in an attempt to demonstrate that the separate facilities were inherently unequal and irreparably harmed blacks. The ruling sparked an era of social upheaval in the US.

Affirmative Action Conceived

At its inception, affirmative action was meant to redress *state-sponsored discrimination*, an attempt to remove government erected barriers to the fair and equal treatment of individuals. In various executive orders in first half of the 1960's, Presidents Kennedy and Johnson popularized use of the term "affirmative action", mandating that private companies contracting with the federal government take verifiable steps to ensure equal opportunity in hiring and employment for racial and ethnic minorities. In essence this was the articulation of an "anti-discrimination" principle as applied to the government and its institutions.

However, the US Constitution applies only to government actors and does not directly constrain private sector discrimination. As a result, decisions of the US Supreme Court up to the early 1960's had limited enforcement of the anti-discrimination principle solely to the public sector. In order to reach the actions of important private institutions, the US Congress, through use of its broad constitutional power to regulate "interstate commerce", enacted the Civil Rights Act of 1964. The Act made discrimination based on "race, color, religion, or national origin" illegal in public establishments with connections to interstate commerce (hotels, restaurants, etc.) or supported by the state.

Title VII of the Act applied to many more aspects of the employment relationship by prohibiting discrimination in hiring, discharging, compensation, or terms, conditions, and privileges of employment. The Act and subsequent legislation also declared a strong policy against discrimination in public (state run) schools and colleges, to aid in desegregation. Additionally, the Act stipulated that federal funding to private business for government projects could be cut off if there was evidence that such companies engaged in discrimination.

Importantly, the Civil Rights Act itself never suggested quotas or reservations, only removal of barriers to equal opportunity. But due to subsequent rules and interpretations issued by government agencies charged with enforcement of the Act, many institutions began using quotas in their admissions standards and employment practices in order to protect themselves from litigation.

The Limits and Decline of US Affirmative Action Policies: Important Cases

From the outset, there was considerable opposition to the more liberal application of affirmative action. Just over a decade after the Civil Rights Act, preferential government policies were challenged in the courts. The case of Regents of the University of California v. Bakke (1978), which involved California state medical schools' use of racial quotas in admissions, was the first important case in defining the limits of government preferential policies.

Bakke argued that through use of such policies the government was discriminating against whites. The Supreme Court disallowed the quotas, with the majority opinion stating "preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This, the Constitution forbids." Despite this explicit ruling against quotas, the Court's decision was the cause of some confusion, as it permitted admissions departments to award minority students a "plus" factor in order to insure a "diverse student body." This meant that state-run universities continued to use mechanisms similar to quotas in admissions practices.

Another major Supreme Court decision in the history of affirmative action came in Adarand Constructors v. Pena (1995). The case involved the award of construction contracts by a federal government agency. In question was a government policy that gave financial incentives to bidders for federal contracts to hire subcontractors certified as small businesses controlled by "socially and economically disadvantaged individuals." In a competitive bidding process, Adarand lost despite having submitted the lowest bid for the contract, which was awarded to a minority-owned company due to the incentives from the government policy. Adarand challenged the government's race-based assumption in identifying socially and economically disadvantaged individuals.

Though it did not directly resolve the case, the Court settled the issue of the what is the proper standard of review to be applied to cases regarding government mandated racial preferences. The Court stated: "federal racial classifications, like those of a state, must serve a compelling governmental interest, and must be narrowly tailored to further that interest." By applying such a high level of scrutiny to race-based affirmative action policies, the Court made it extremely difficult for the government to maintain such programs. The idea of compelling state interest relates to a "consistency" principle, which applies even when those adversely affected by the policy are in the majority, here white, group. In the Court's words "whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." Predictably, after this case, not a single decision by a lower court upheld an affirmative action program until 2003.

Last year, in what have become known as the Michigan cases, the Supreme Court ruled on two related lawsuits, Grutter v. Bollinger and Gratz v. Bollinger, which both involved white applicants denied admission to the state-run University of Michigan at Ann Arbor. Grutter had applied to the law school; Gratz to the undergraduate school. Both claimed that affirmative action policies used by the university amounted to government discrimination against them.

In the *Grutter* case, the Supreme Court upheld the law school admission program, because it found "compelling state interest in diversity" in higher education, along the lines of the Court's reasoning in the earlier *Bakke* case. Critical to this outcome was the Court's assessment that the law school system was not a quota or reservation system, because no mechanical, predetermined diversity "bonuses" were awarded based on race or ethnicity. It found that the law school's use of race as a "plus factor" to "achieve critical mass" was narrowly tailored. The Court also stated that narrow tailoring of such policies requires "serious, good faith consideration of workable race-neutral alternatives" though not "exhaustion of every conceivable race-neutral alternative."

By contrast, the undergraduate affirmative action program, at issue in the *Gratz* case, was struck down because it was "not narrowly tailored" to serve government interest in diversity. The undergraduate admissions policy included a system that awarded a significant number of points for minority status, which the Court thought was disproportionate to points awarded for other characteristics. It was, in effect, a quota or reservation system, and had to be struck down. The Court stated that the admissions policy did not provide for individualized consideration, and had the effect of making race the decisive factor for virtually every minimally qualified underrepresented minority applicant.

While some may see the Michigan cases as a victory for affirmative action, many others see it as another step in the phasing out of affirmative action. At the very least, it is once again a clear rejection by the Supreme Court of the use of quotas or reservations by the government to advance social objectives.

Public Sentiment Runs Counter to Continuation of Preferential Policies

Indeed race continues to be a sensitive and divisive issue in the US. The debate over affirmative action remains important, with negative sentiment becoming more vocal and visible. Some American critics of affirmative action, including several noted black scholars, argue that preferential treatment programs victimize and stigmatize minorities, increasing friction among groups. Critics cite various studies to indicate that affirmative action beneficiaries are only *relatively* disadvantaged. Affirmative action is not only reverse discrimination but also bad policy, as the beneficiaries of such programs are often those who are better off within the preferred group and do not require assistance. The most disadvantaged rarely benefit from policies at this level because they fail to fulfill even minimum requirements. Efforts should therefore be focused elsewhere. Due to these and other realities, those in favor of ending affirmative action conclude that the costs greatly outweigh the benefits.

The American public has also demonstrated its unfavorable view of preferential policies. In 1996, voters in California banned the use of affirmative action in the state through the adoption of Proposition 209. Even before its passage, the Regents of the University of California voted to eliminate affirmative action from the student admissions process. Subsequently, other states have begun considering whether they should ban affirmative action as well. Texas has instituted a system whereby the top 10% of its high school students automatically qualify for admission to state-run universities. An interesting result of the ban on affirmative action programs in the California public university system is that Asian enrollment (including students of Indian descent) has shot up at the most selective state-run universities, as Asians perform disproportionately well in conventional measures of academic achievement such as grades and standardized test scores.

Surveys done on the affirmative action have shown that Americans support equal opportunity principles, but stop short of supporting preferential policies like quotas. According to an April 2001 poll in the *Washington Post* involving a sampling of Americans across racial, ethnic, gender and political lines, upwards of 90% of respondents were against minority preferences. The survey asked: in order to give minorities more opportunity, do you believe race or ethnicity should be a factor when

deciding who is hired, promoted, or admitted to college, or that hiring, promotions, and college admissions should be based strictly on merit and qualifications other than race or ethnicity? Even amongst blacks, 86% responded no.

Lessons and Conclusions

American courts and the many in the general public in the US have realized that there is a fine balance between redressing past wrongs while maintaining principles of equality for individuals instead of groups. Importantly, the US Constitution protects all citizens equally from government actors, thus the aforementioned affirmative action cases were brought against state-run institutions. Positive discrimination in public sector educational and work settings has limits, as evidenced by the American judiciary consistently disallowing the use of quotas or reservations.

Though the American private sector has been required by federal and state statutes not to discriminate, the decisions of how best to institute anti-discrimination policies have in large part rested with private parties. Private entities, which include Ivy League universities and companies like Microsoft or GE, have far more discretion to set their admission, hiring and employment practices than does the government. This flexibility means that they can institute a greater degree of "positive discrimination" if they see fit.

However, companies have also realized that explicit quotas or reservations create resentment amongst staff and can negatively impact productivity if seen as a barrier to advancement. Equal opportunity hiring makes good business sense, as it allows access to a broader talent pool and fosters a positive image while maintaining meritocratic standards. Many companies have, as part of their stated employment practices, proactively recruited and mentored talented underrepresented minorities. But all of this is a far cry from government-mandated reservations.

In conclusion, the US experience provides little support for instituting private sector reservations in India. If such an issue were to be taken to US courts, there would be absolutely no doubt about the outcome—reservations would not be allowed. Therefore proponents of private sector reservations in India should refrain from looking to the US for support.