

Note

Caste and the Problem of Social Reform in Indian Equality Law

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I. INTRODUCTION

For nearly sixty years, India, through a policy called “reservations,” has attempted to put an end to its ancient caste system by using quotas and other benefits to ensure that historically disadvantaged groups have political voice, access to education, and opportunities for state employment. The legal doctrine developed alongside this policy traces the national memory of the caste system and its consequences, and reflects an understanding that the caste system has left a pervasive mark on nearly every aspect of Indian society.

The doctrines developed by courts in response to these policies, however, have a peculiar relationship to the political authority of castes and other communities subordinate to the state. To a surprising extent, Indian courts have shown deference to the authority of the caste system in ways that

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underscore the political authority of the caste hierarchy and undermine the constitution's aspiration to greater equality. This feature of Indian equality law reflects a tension between the constitutional aspiration to social reform on the one hand, and deference to the authority of the caste or tribe to define its own boundaries on the other.

Indian law has sought to include these communities in its project of far-reaching social reform. When constitutional law attempts to dismantle a status hierarchy and articulate a normative framework for doing so, it must contemplate this process of reform as involving not only the enactment of legal rules to protect these groups, but also the important role these groups will play in the evolution of the normative commitments that structure law's relationship to that hierarchy. The castes themselves have a view of Indian history that has been shaped by their history of social subordination. Indian constitutional law has sought to break with that history and to articulate new constitutional values that mark the beginning of a new social order.

These exchanges between subordinated groups and the law look peculiar to U.S. eyes. They can, however, help U.S. jurists understand components of U.S. law so engrained that they are often overlooked. By providing a detailed account of the Indian doctrine relating to the reservation policy and membership rules within the caste system, this Note aspires to uncover part of the theory through which Indian doctrine negotiates the relationship between law and the social authority lodged in the caste community.¹

By considering the relationship between law and the caste system in Indian equality law, this Note argues that U.S. law has too often seen subordinate groups as the object of legal reform without appreciating the ways that they exert normative authority and the notion that they, too, envision a relationship with the broader social order. The common norms of these communities emerge from deeply rooted social arrangements and typically involve more fundamental social and political commitments.

The contrast between India and the United States illustrates the relationship between legal doctrine and the subordinate groups, and between their experience and shared cultural understandings. U.S. law conceives of these groups as the subject of protection, but it does not seek to engage them in a shared project that would collectively remake the basic normative commitments of the polity. Racial minorities, women, and other protected groups are thus not invited to participate in ongoing efforts to shape our constitutional commitments. U.S. law does not envision racial minorities or women as part of a community that could provide a separate and important source of constitutional values that challenge and respond to those of the rest of the society. Our law's conception of these communities as the object of protection, rather than as allies in reform, marks the basic difference between Indian and U.S. equality law.

1. See Julie Chi-hye Suk, *Equal by Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMP. L. 295 (2007); Frank I. Michelman, *Reasonable Umbrage: Race and Constitutional Antidiscrimination Law in the United States and South Africa*, 117 HARV. L. REV. 1378, 1396-1418 (2004) (exploring the relationship between constitutional law and constitutional culture in South Africa and the United States).

This Note investigates the tension between the Indian Constitution's aspiration to repudiate the past practices of the caste system and the forms of normative authority that continue to be exerted by these communities. It argues that Indian courts recognize the authority of caste communities to define their own terms of membership at the same time that they seek to eradicate them, because they understand that they must invite caste communities to participate in efforts to dismantle a status hierarchy if they are to be successful. Incursions by constitutional law into a social order with deep roots and powerful authority require that the communities themselves participate in the process of undoing centuries of oppression. Indian courts have come to understand that it is not possible to remake the social order in the image of the aspirations articulated in the constitution without engaging subordinate communities in the process of reform.

This Note approaches Indian constitutional law on the caste system from a different perspective than existing scholarship in this field.² A number of scholars have evaluated the effectiveness of the reservation policy in India as compared to affirmative action in the United States.³ This Note, however, does not centrally aim to contribute to the debate on the effectiveness of the reservation policy or weigh the arguments for its justification.⁴ Although some of the observations about the efficacy of the legal doctrine in the Note will bear on the evaluation of the effectiveness of the doctrines the Indian Supreme Court has developed, these considerations are not the main thrust of the argument. Instead, this Note provides an account of Indian constitutional law on the reservation policy and attempts to explain the theoretical assumptions that lie beneath the tension between its assertion of national authority and its deference to the practices of local communities. Through a study of the Indian cases, this Note seeks to contribute to the growing literature on comparative constitutionalism by providing an account of the tensions within Indian equality law that emerge from the interaction between constitutional law and caste communities.⁵

2. Significant studies of Indian constitutionalism in comparative perspective include GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* (1966); S.C. DASH, *THE CONSTITUTION OF INDIA: A COMPARATIVE STUDY* (1968); and SARBANI SEN, *THE CONSTITUTION OF INDIA: POPULAR SOVEREIGNTY AND DEMOCRATIC TRANSFORMATIONS* (2007). A recent and important contribution to the literature on Indian constitutional law and comparative secularism is GARY JEFFREY JACOBSON, *THE WHEEL OF LAW: INDIA'S SECULARISM IN COMPARATIVE CONSTITUTIONAL CONTEXT* (2003).

3. There have been several efforts to compare affirmative action in the United States and the reservation policy in India, which have tended to focus on the mechanics and effectiveness of each system. *See, e.g.*, SUNITA PARIKH, *THE POLITICS OF PREFERENCE: DEMOCRATIC INSTITUTIONS AND AFFIRMATIVE ACTION IN THE UNITED STATES AND INDIA* (2000); *see also* Clark D. Cunningham & N.R. Madhava Menon, *Race, Class, Caste . . . ? Rethinking Affirmative Action*, 97 MICH. L. REV. 1296, 1302-07 (1999) (arguing that Indian jurisprudence has gone beyond U.S. law in accounting for the underlying social dimensions of caste).

4. *See, e.g.*, Marc Galanter, *Pursuing Equality: An Assessment of India's Policy of Compensatory Discrimination for Disadvantaged Groups*, in *SOCIAL AND ECONOMIC DEVELOPMENT IN INDIA: A REASSESSMENT* 129 (Dilip K. Basu & Richard Sisson eds., 1986).

5. *See, e.g.*, VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (2d ed. 2006); CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* (2001); ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* (1996); Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 794 (1997) ("Comparative constitutional law is in its infancy."); Vicki C. Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional*

Existing scholarship on the reservation policy and its surrounding legal regime gives scant attention to the strategies through which constitutional law navigates the authority of caste communities. Among the few studies of the reservation policy in India, the most exhaustive is Marc Galanter's 1984 book *Competing Equalities*, which offers a detailed description of the reservation policy and attempts to evaluate its overall effectiveness as a program of social reform.⁶ The book focuses on the general outlines of constitutional doctrine, such as caste quotas and the ways in which these benefits are assigned to particular groups.⁷ Galanter gives some attention to the expulsion and readmission of members of castes and tribes, but he does not focus on the specific doctrinal and theoretical questions that are the subject of this Note.

Laura Dudley Jenkins's 2003 study *Identity and Classification in India: Defining the Disadvantaged*, explores the basic tension at the heart of the reservation policy: the effort to eradicate caste while at the same time giving it a permanent legal significance.⁸ Jenkins, a political scientist, offers a great deal of insight about the specific ways that the Indian state implements the reservation policy. The book asks what the Indian case can offer as an example of an effort to deconstruct a social hierarchy by reinforcing it, and the questions at the heart of its argument are guided by social and postcolonial theory.⁹ Jenkins examines state practice with a wide lens, as her focus is not only on constitutional law. On the other hand, Jenkins devotes only one chapter to the legal doctrine of the reservation policy.¹⁰ Since her primary interest is the role of identity within India's state-driven efforts at social reform, Jenkins examines cases in which courts were asked to determine whether a person was entitled to caste membership.¹¹ Jenkins does not place these cases in a broader discussion of the constitutional doctrine on the reservation policy, and does not explain how these aspects of the doctrine might rest on a particular conception of social order that shapes constitutional doctrine.

In contrast to these scholars, this Note attempts to understand a different puzzle: why Indian law recognizes caste communities and underscores their authority while it seeks to put an end to caste subordination. This tension in the Indian jurisprudence of caste marks a striking contrast to the way that U.S. law has conceptualized the social order. As Indian courts have appreciated, legal reform of entrenched social structures can only be achieved through complicated dialogues between legal doctrine and normative commitments, as well as cultural affiliations that exist in the communities that Indian law hopes to save from centuries of oppression.

Experience, 51 DUKE L.J. 223, 254-63 (2001); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1228-30 (1999).

6. MARC GALANTER, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA* (1984).

7. *See id.* at 121-47.

8. LAURA DUDLEY JENKINS, *IDENTITY AND IDENTIFICATION IN INDIA: DEFINING THE DISADVANTAGED* (2003).

9. *Id.* at 4.

10. *Id.* at 27-41.

11. *Id.*

This Note proceeds in four stages. Part II offers an account of the operation of the modern caste system and the history of the reservation policy enacted by the Indian Constitution. Part III examines the narratives developed by courts to explain the history of the caste system and to reconcile the reservation policy with an aspiration of eradicating the injustices of the caste system and achieving a deeper and more lasting form of equality.

Part IV turns to the tension between deference to local authority and national objectives of constitutional reform, and describes this tension as a reflection of the Indian Supreme Court's understanding that the caste system is intertwined with the structure of Indian society in ways that make such deference necessary to achieve the objective of social reform. This Part examines several theorists, and draws from the work of Robert Cover and others to understand the relationship between the law and the social order that is envisioned by these cases.

Part V examines the ways that Indian law's theorization of the authority of caste communities might bear on U.S. antidiscrimination law. It speculates that U.S. law might be more successful at its project of achieving a more just social order, if it were more attuned to the way that subordinate communities are centrally involved in the process of social reform.

II. THE HISTORY OF THE CASTE SYSTEM AND RESERVATION POLICY

A. *The History and Structure of the Caste System*

Although scholars continue to debate the precise origins of the caste system, there is general agreement among historians and anthropologists that it has existed in India for as long as two thousand years.¹² The ancient Hindu scriptures, the Veda, describe a strict social hierarchy that bears some resemblance to the modern Indian caste system.¹³ According to the Veda, the universe is organized into a strict classification scheme and a set of hierarchical relationships that are reflected in the organization of society.¹⁴ The relationship between the caste system and the structure of the universe provided a deep religious justification for the stratification of society according to caste, and its compartmentalization into sovereign communities with the power to govern their own affairs.¹⁵

The caste system divides society into discrete groups that are traditionally associated with a certain profession and that strongly prohibit marriage outside of the caste.¹⁶ These groups exist in a hierarchical relationship to one another, and a person born into a caste remains within it

12. OLIVER MENDELSON & MARIKA VICZIANY, *THE UNTOUCHABLES* 7 (1998) (“[W]hy the varna system or Untouchability developed in India is far from clear, but perhaps it had something to do with the incursion of ‘Aryans’ who migrated from Europe and established themselves in India.”); 1 ROMILA THAPAR, *A HISTORY OF INDIA* 48-49 (2d ed. 1990).

13. BRIAN K. SMITH, *CLASSIFYING THE UNIVERSE: THE ANCIENT INDIAN VARMA SYSTEM AND THE ORIGINS OF CASTE* 46-47 (1994); *see also* LOUIS DUMONT, *HOMO HIERARCHICUS: THE CASTE SYSTEM AND ITS IMPLICATIONS* 65-89 (1970).

14. SMITH, *supra* note 13, at 49.

15. *Id.*

16. DUMONT, *supra* note 13, at 92-112.

unless he or she is expelled from it.¹⁷ By tradition, moving from one caste to another was extremely difficult if not impossible; the caste identity that one received at birth could not typically be altered by any means.¹⁸ The caste groups commonly known as “untouchables” are at the very bottom of the caste system and have traditionally been subject to discrimination and severe forms of oppression by the higher castes.¹⁹ The relationships among the castes, especially between higher castes and the untouchables, frequently take the form of physical distance.²⁰ The caste hierarchy is founded on the belief that the lower castes can pollute the higher castes, and the fear that members of the higher castes who have contact with the lower castes will be spiritually damaged.²¹

Today, caste remains a major feature of village life throughout India.²² Drawing on fieldwork in several North Indian villages conducted in 2002, for example, the sociologist Anirudh Krishna concluded that “[c]aste continues to be a primary source of social identity in these villages.”²³ Indeed, “people live in caste-specific neighborhoods,” and even “the clothes that they wear reveal their caste identity.”²⁴ Some scholars point to changing features of the caste system, such as the decline of some of its religious features and the decreasing number of seats in Congress occupied by members of the higher castes, but they concede that, especially in rural areas, caste remains a striking and fundamental aspect of life in many regions of the country.²⁵

In addition to establishing a firm social hierarchy, the caste system also involves a complicated distribution of political authority among the various communities that comprise the Hindu social structure. In some areas, castes are governed by a *panchayat*, an assembly usually composed of a small number of representatives who promulgate legal standards to govern the caste, and who resolve internal disputes relating to excommunication, intermarriage, and other matters pertaining to the community.²⁶ On occasion, a *panchayat* will consist of several members of other groups that are similarly situated in society. Each group sends one or two elder members to one *panchayat*, which then exerts authority over these subordinate groups. Typically, however, a

17. GALANTER, *supra* note 6, at 8.

18. *Id.*

19. See MENDELSON & VICZIANY, *supra* note 12, at 5-20.

20. *Id.* at 12-13.

21. GALANTER, *supra* note 6, at 14.

22. Dennis B. McGilvray, *Paraiyar Drummers of Sri Lanka: Consensus and Constraint in an Untouchable Caste*, 10 AM. ETHNOLOGIST 97 (1983) (arguing that upper castes and lower castes continue to agree about the ideological underpinnings of the caste system); Ashutosh Varshney, *Is India Becoming More Democratic?*, 59 J. ASIAN STUD. 3 (2000) (arguing that politics in South India is increasingly caste-based).

23. Anirudh Krishna, *What Is Happening to Caste?: A View from Some North Indian Villages*, 62 J. ASIAN STUD. 1171, 1190 (2003).

24. *Id.*

25. Craig Jeffrey, ‘A Fist is Stronger than Five Fingers’: *Caste and Dominance in Rural North India*, 26 TRANSACTIONS INST. BRIT. GEOGRAPHERS 217, 218 (2001) (“[W]hile caste as a religiously sanctioned system of resource transfer is declining in importance in India, caste remains a powerful political identity and form of symbolic and social capital.”).

26. George Mathew & Ramesh C. Nayak, *Panchayats at Work: What It Means for the Oppressed?*, 31 ECON. & POL. WKLY. 1765, 1765-68 (1996).

panchayat is comprised of members of the same caste who are all situated in a particular community.²⁷

In its present form, the caste system does not establish merely a hierarchy of groups in society, but also a system of political authority with formal terms of membership. One's particular caste is a form of identity, and also an affiliation to a community—with some elements of sovereignty—that has limited authority to establish its own system of governance.²⁸

B. *Caste and the Indian Constitution*

When India achieved independence in 1947, one of the first tasks taken up by the Constituent Assembly was dissolution of the caste system.²⁹ The Congress Party, led by Prime Minister Jawaharlal Nehru, had become captivated by the ideology of an emergent Indian nationalism which, influenced by Western socialist thinkers and Congress Party members' own reactions to devastating inequalities present in India society, rested upon a profound commitment to social reform. Since the early nineteenth century, Hindu nationalist thinkers had been interested in the historical consequences of the caste system, and believed that eradicating the caste system would be the first step toward establishing a new government in India and ensuring that the country would be able to compete with other modern nations.³⁰

During the Constituent Assembly debates, Granville Austin has argued, the delegates believed that “[t]he Constitution was to foster the achievement of many goals. Transcendent among them was that of social revolution. Through this revolution would be fulfilled the basic needs of the common man, and, it was hoped, this revolution would bring about fundamental changes in the structure of Indian society”³¹ Looking to U.K. and U.S. examples, the delegates at the Constituent Assembly determined that the “negative” rights associated with these constitutional regimes would be insufficient to combat the entrenched inequalities they witnessed.³² Instead of the mere legal prohibition of discrimination and a commitment to “formal equality,” they sought a more aggressive commitment to social reform that aimed to completely restructure society in pursuit of a complete abolition of the ancient hierarchies that they saw pervading, and crippling, Indian communities.³³

During the Constituent Assembly debates, the injustices perpetrated under the caste system were one of the most pressing matters facing the delegates. During an initial discussion of a resolution that would define the fundamental “aims and objects” of the Assembly, Mr. M.R. Masani argued

27. For a description of the organization of a *panchayat*, see Robert M. Hayden, *Excommunication as Everyday Event and Ultimate Sanction: The Nature of Suspension from an Indian Caste*, 42 J. ASIAN STUD. 291, 294 (1983). See also MANOJ RAI ET AL., *THE STATE OF THE PANCHAYATS: A PARTICIPATORY PERSPECTIVE* (2001); T.K. Oommen, *Rural Community Power Structure in India*, 49 SOC. FORCES 226 (1970).

28. Hayden, *supra* note 27, at 294-96.

29. AUSTIN, *supra* note 2, at xvii-xviii.

30. CHARLES H. HEIMSATH, *INDIAN NATIONALISM AND HINDU SOCIAL REFORM* 309-52 (1964).

31. AUSTIN, *supra* note 2, at xvii.

32. *Id.* at 60.

33. *Id.*

that the caste system had crippled India's political development and expressed hope that the new constitution would allow historically oppressed lower castes to have greater equality in the new polity:

I hope . . . that these minorities which exist in our country, will, along with the majority, continue their progress towards becoming a nation, a process which in this ancient country was happening through the absorption of new groups that came into it through the centuries, but a process which seems to have been retarded through the rigidity of caste and through the exclusiveness of society in the past few centuries.³⁴

Masani argued that despite a history that included considerable immigration and diversity, the possibilities for equality in India had been frustrated by the burdens of caste membership.

Later in the debates, Dr. S. Radhakrishnan argued that India must have a "socio-economic revolution"³⁵ that would result in "a fundamental alteration in the structure of Indian society," and this would necessarily include the complete dismantling of the caste system.³⁶ While considering the merits of a draft constitution, Kaka Bhagwant Roy expressed his hope that the new constitution would help bring about the radical reorganization of society and, in particular, that it would strike at the roots of the caste system. He offered a vision of India's future that aspired to the elimination of caste and that would be characterized by a deep engagement with the nation's history of severe social inequality:

Now it is the duty of the people to consolidate this change and to infuse life by their good actions in this Constitution which is based on beautiful ideas I would like to say that those who called themselves of higher castes have perpetrated brutalities [on the "Harijans," or untouchables] throughout the centuries. I cannot understand how those who have praised India and Indians have done so? That country is very low and mean in which discrimination has been made and is being made between man and man. For centuries together the untouchables and the Harijans of India have been so badly down-trodden that they cannot be compensated even if the reins of Indian Government are handed over to them. In this age of progress a day will dawn when the future generations will hang their heads in shame.³⁷

The new constitution, for Bhagwant Roy, and for many of the delegates, would allow Indians finally to free themselves from an ancient history of inequality and social oppression. Its guarantees would provide the beginning of redemption. Over time, he prophesied, "that great revolution which lies implicit in the Constitution and looks like a dream, will reveal itself in its true color."³⁸

The final constitution adopted by the Constituent Assembly in November 1949 contains many powerful commitments to social reform and to the abolition of existing social inequalities associated with the Hindu caste system.³⁹ Article 14 states that the "State shall not deny to any person equality before the law or the equal protection of the laws within the territory of

34. 1 CONSTITUENT ASSEMBLY DEBATES 91 (1949) [hereinafter DEBATES].

35. 2 DEBATES, *supra* note 34, at 273.

36. *Id.* at 269.

37. 11 DEBATES, *supra* note 34, at 892-93.

38. *Id.* at 892.

39. JACOBSOHN, *supra* note 2, at 7-8.

India.”⁴⁰ Article 15 prohibits discrimination on the basis of religion, race, caste, sex, or place of birth.⁴¹ Article 17 abolishes untouchability and makes “[t]he enforcement of any disability arising [from it] an offence punishable in accordance with law.”⁴² Additionally, Article 29 provides that “[a]ny section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.”⁴³

The conception of equality that is at the center of this constitutional structure is substantially broader than the basic guarantee of equality before the law. Article 15(4) provides that “[n]othing in this article . . . shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.”⁴⁴ The constitution contains many different provisions that explicitly provide benefits to these groups. Articles 341 and 342 empower the President, with consultation of the governor of a particular state, to identify the Scheduled Tribes and Scheduled Castes that will receive benefits under the constitution. The Scheduled Tribes are indigenous communities that had been, like the untouchables, the subject of historical discrimination and treated in ways equivalent with untouchability.⁴⁵ Under the constitution, therefore, the Scheduled Tribes are regarded as akin to lower caste groups for the purposes of the benefits accorded by the constitution. Article 330 reserves seats in the legislature for the Scheduled Castes and Scheduled Tribes in proportion to the populations of these groups in each state.⁴⁶ Article 335 entitles Scheduled Castes and Tribes to receive special consideration in hiring for government posts.⁴⁷

In his study of Indian secularism, Gary Jacobsohn has characterized the model of social reform under the Indian Constitution as “ameliorative” in orientation.⁴⁸ He argues that the constitution “seeks an amelioration of the social conditions of people long burdened by the inequities of religiously based hierarchies, but also embodies a vision of intergroup comity whose fulfillment necessitates cautious deliberation in the pursuit of abstract justice.”⁴⁹ Jacobsohn understands the Indian Constitution’s commitment to abolishing caste distinctions as a part of its aspiration to create a secular and modern society while at the same time avoiding conflicts among the castes, among different religious groups in the society, and most importantly, between Muslims and Hindus.⁵⁰ The constitution, for example, established a “uniform civil code,” in order to abolish Hindu law and establish a new foundation for the legal system based on secular principles.⁵¹ The

40. INDIA CONST. art. 14.

41. *Id.* art. 15.

42. *Id.* art. 17.

43. *Id.* art. 29.

44. *Id.* art. 15, § 4.

45. *See* GALANTER, *supra* note 6, at 147-53.

46. INDIA CONST. art. 330.

47. *Id.* art. 335.

48. JACOBSON, *supra* note 2, at 94.

49. *Id.*; *see also id.* at 120-21.

50. *See id.* at 120.

51. INDIA CONST. art. 44 (“The State shall endeavor to secure for the citizens a uniform civil

constitution's aspiration to social reform, then, was grounded in a hope to eliminate caste-based distinctions and create a secular society where the nation's many diverse communities can fully participate in the new polity.⁵²

The commitment to social reform in the Indian Constitution has been criticized by some commentators who see the constitution as neglecting large segments of the population, and as reflecting a Hindu nationalist and anti-Muslim bias. Because the reservation policy was aimed at abolishing the Hindu caste system, and not other features of inequality in India, there has been an ongoing debate in India about whether Muslims, who have also been disadvantaged in some parts of the country, should have access to similar benefits.⁵³ The relevance of this controversy for the jurisprudence on the reservation policy is that the continuing insistence in the doctrine that the caste system is a product of Hinduism results from a tense political environment in India, because some non-Hindu groups are unable to obtain benefits under the reservation program and some see this as an example of discrimination against Muslims by the Hindu majority. This aspect of the doctrine marks a significant limit to the aspirations of the constitution and the reformist principles that express these commitments.⁵⁴

On the whole, the Indian Constitution, as evidenced by its textual provisions and the intentions of its ratifiers, contemplates a remarkable departure from the past. The caste system imposed such structures on the daily experiences of individuals, on their fundamental perspectives, and on their judgments of others. On its face, therefore, the constitution's ambition to remove these taints from Indian society and usher in new forms of freedom was radical in scope, and deeply antagonistic to nonlegal forms of authority throughout society.

III. CASTE AND CONSTITUTIONAL ASPIRATION

The equality provisions of the new constitution—with their bold assertion of a new standard of social equality—amounted to an aspiration that the nation would break free from the structures and forms of discrimination that had characterized India's past. The constitutional doctrine on the reservation policy also engaged with the memory of past discrimination and emphasized that the constitution would mark the establishment of a new political order in which these ancient forms of oppression would finally be put to rest.

Over the past sixty years, the Indian Supreme Court has developed a body of case law that articulates a theory of social reform, and theorizes a relationship between the legal order and the social structure. The case law in this area has undergone numerous evolutions and is the subject of a great deal

code throughout the territory of India.”); see JACOBSOHN, *supra* note 2, at 115.

52. JACOBSOHN, *supra* note 2, at 115.

53. See Zoha Hasan, *Communal Mobilization and Changing Majority in Uttar Pradesh*, in *CONTESTING THE NATION: RELIGION, COMMUNITY, AND THE POLITICS OF DEMOCRACY IN INDIA* 81 (David Ludden ed., 1996); INST. OF OBJECTIVE STUDIES, *MARGINAL MUSLIM COMMUNITIES IN INDIA* (M.K.A. Siddiqui ed., 2004); *PM, Advani Agree Muslims Lag in Education*, *TIMES OF INDIA*, May 18, 2007, <http://timesofindia.indiatimes.com/article/show/msid-2058355,prtpage-1.cms>.

54. See JACOBSOHN, *supra* note 2, at 31, 112-16.

of existing scholarship.⁵⁵ This Part will focus on just two cases, *State of Kerala v. N.M. Thomas*⁵⁶ and *Indra Sawhney v. Union of India*,⁵⁷ which illustrate how the Court evaluates the law's interventionist role in the social order. The goals of this Part are not to trace the evolution of constitutional doctrine on reservation policy, but instead to trace the outlines of the Court's approach and to highlight the assumptions about the relationship between the constitution's objective for social reform and structures of inequality.

Before turning to these cases, I must make a further caveat. Since 1995, the Indian Parliament and Supreme Court have engaged in a series of exchanges that has, in the end, extended the reservation benefits beyond those originally included in the constitutional text.⁵⁸ This recent series of constitutional amendments underscores that the Indian Constitution is a product of exchanges between the legislature and the courts, and also a result of popular mobilizations by members of the castes and political parties.⁵⁹ Equality law in India is not a static monolith. The shifting political and social arrangements that have shaped Indian equality law have changed it in important respects.⁶⁰

These specific changes in the reservation policy and the surrounding case law that have occurred in recent years, however, are not directly relevant to the tension in the doctrine that this Note aims to identify. Rather than attempting to tell every aspect of this complex story, this Part focuses on the *N.M. Thomas* and *Indra Sawhney* cases to illustrate the way that the Court has conceptualized the relationship between law and the problem of social subordination. Each case marks a turning point in the constitutional doctrine of reservations, with respect to higher education, or the extent of the policy's protections, but while this Part will touch on the details of the doctrine, it will not extensively elaborate on them. Instead, this Part presents the underlying objectives of social reform in India in order to provide context for the more detailed analysis of the doctrine addressing religious conversion and intermarriage and to draw contrasts to U.S. equal protection jurisprudence.

A. *N.M. Thomas and the Constitutional Concept of Equality*

In 1973, the Indian Supreme Court considered the case of the *State of Kerala v. N.M. Thomas*.⁶¹ The case involved a challenge to a provision of the Kerala State and Subordinate Services Rules, which gave members of the Scheduled Castes and Scheduled Tribes temporary preference in promotions for state employment. In the course of upholding the provisions granting

55. See GALANTER, *supra* note 6, at 147-53.

56. A.I.R. 1976 S.C. 490.

57. (1993) 1 S.C.J. 353.

58. See RAJEEV DHAVAN, RESERVED! HOW PARLIAMENT DEBATED RESERVATIONS 1995-2007, at 7-10 (2008) (outlining the central cases and constitutional amendments the legislature passed during this period). For a similar view of legislative constitutionalism in the American context, see Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1946-48 (2003).

59. See LUCIA MICHELUTTI, THE VERNACULARISATION OF DEMOCRACY: POLITICS, CASTE, AND RELIGION IN INDIA 8-25 (2008).

60. *Id.* at 20-24.

61. A.I.R.1976 S.C. 490.

special standards for members of the Scheduled Castes, the Court offered one of its most complete explanations of the conception of equality that lies at the heart of the constitution's commitment to social reform. In *N.M. Thomas*, a lower division clerk in Kerala challenged the State's promotions policy, which guaranteed a certain number of slots for members of the lower castes and tribes, as being in violation of the prohibition against discrimination in Article 15 and the guarantee of equality before the law in Article 14.⁶²

The Court acknowledged the numerous provisions of the constitution that provide special treatment to the Scheduled Castes and Tribes despite the guarantee of equality before the law:

The Constitution makes a classification of the Scheduled Castes and Scheduled Tribes in numerous provisions and gives a mandate to the State to accord special or favoured treatment to them. Article 46 contains a Directive Principle of State policy—fundamental in the governance of the country enjoining the state to promote with special care educational and economic interests of the Scheduled Castes and Scheduled Tribes and to protect them from any social injustice and exploitation.⁶³

From the provisions contained in the constitution, the Court developed a particular theory of equal citizenship that was consistent with its view of the constitution's aspiration to end untouchability. "Equality," the Court reasoned, "is amongst equals. Classification is, therefore, to be founded on substantial differences which distinguish persons grouped together from those left out of the groups and such differential attributes must bear a just and rational relation to the object sought to be achieved."⁶⁴ For the purposes of Article 14, then, the guarantee of equality did not simply mean equality among individuals, but needed to be understood as applying among similarly situated groups.⁶⁵

In defense of this conception of equality, Judge Krishna Iyer, writing in support of the majority, offered an account of the experience of the untouchables throughout Indian history:

The Father of the Nation adopted, as his fighting faith, the uplift of the bhangi and the assimilation, on equal footing, into Hindu society, and the Constitution . . . made social justice a founding faith and built into it humanist provisions to lift the level of the lowly scheduled castes and tribes to make democracy viable for all. Studies in social anthropology tell us how cultural and material suppression has, over the ages, crippled their personality, and current demography says that nearly every fifth Indian is a harijan and his social milieu is steeped in squalour.⁶⁶

Judge Iyer described the constitution's commitment to eradicating social inequality, along with a history of the caste system and its effects on the lower castes.⁶⁷ He provided a narrative of the foundation of the new nation that explicitly breaks from this past and that is rooted in a commitment to social

62. *Id.* at 495.

63. *Id.* at 500.

64. *Id.* at 497.

65. *Id.*

66. *Id.* at 529 (opinion of Iyer, J.).

67. *Id.* For a survey of Judge Iyer's jurisprudence on social reform, see P. KRISHNASWAMY, JUSTICE V.R. KRISHNA IYER: A LIVING LEGEND 176-82 (2000). "Krishna Iyer left his imprint on almost all dimensions of human rights jurisprudence. He propounded new interpretative approaches to livelihood and employment security, to penal law and prison law and introduced new concepts like [the] law of poverty." *Id.* at 178.

transformation through the law.⁶⁸ Toward the end of the opinion, he quoted a speech made by Dr. Bhimrao Ramji Ambedkar at the Constituent Assembly during the debates over the reservation policy: “[W]e have in India a society based on privilege of graded inequality which means elevation for some and degradation of others We must remove [social inequality] . . . or else those who suffer from [it] will blow up the structure of political democracy which this Assembly has so laboriously built up.”⁶⁹

Judge Iyer then described the memories of the ancient atrocities of the caste system, which remained visible throughout Indian society in the present: “[T]he Court must so interpret the language” in the equality provisions, he wrote, “to remove that ugly ‘inferiority’ complex which has done genetic damage to Indian policy and thereby suppress the malady and advance the remedy, informed by sociology and social anthropology.”⁷⁰ Judge Iyer envisioned the effects of the history of the caste system as having deep roots in Indian society, roots that could not be easily untangled with the sharp distinctions of legal doctrine. “If the Court has its listening posts on raw Indian earth,” he concluded, “its assessment of ‘equal opportunity’ cannot remain legalistic or individualistic but should see the age-old inequality to mend which is also the means to real equality, a demanding command of our Constitution.”⁷¹ He saw that the caste system was in fact alive throughout society and that its effects could be seen everywhere. The efforts to apply rigid constitutional provisions to a nation that was still living out the consequences of its past wrongs required an unusual combination of intuition and historical sensitivity.

There was hope, Judge Iyer suggested, in at least some other aspects of the nation’s history. “The roots of our constitutional ideas,” he argued, “can be traced to our ancient culture. The noble Upanishadic behest of collective acquisition of cultural strength . . . is involved in and must evolve out of ‘equality’, if we are true to the subtle substance of our finer heritage.”⁷² With this suggestion, he offered a more imaginative historical narrative about India’s past that aimed to rewrite Indian history to include not only simply casteism and social oppression but also the ideas contained in the constitution. Constitutional doctrine would need to be attentive to the entrenched disabilities and cultural artifacts—the lived experience—of caste, but it might also reconfigure memory itself.

This new conception of equality was not a constitutional abstraction distant from everyday experience or India’s long history, or a foreign notion imported from Western political theory, but was, along with the caste system, rooted in the nation’s past. This new conception of equality, Judge Iyer argued, had been learned from this experience. He suggested that India’s past would need to be rewritten to emphasize that equality is indeed part of Indian history, and that the constitution reflects the realization of ideals that were not brought from abroad but instead grew from Indian national experience.

68. *N.M. Thomas*, A.I.R. 1976 S.C. at 529 (opinion of Iyer, J.).

69. *Id.* (internal quotation marks omitted).

70. *Id.* at 530.

71. *Id.* at 539.

72. *Id.* at 532.

B. Indra Sawhney and the Return to Localism

In *Indra Sawhney v. Union of India*, decided in 1993, the Supreme Court again considered the underlying principles at the heart of the reservation policy.⁷³ The Court settled the question of whether the constitutional concepts of Scheduled Castes and Scheduled Tribes should take into consideration economic advantage and held that the most economically advantaged members of a Scheduled Caste or Tribe could not claim reservations under the policy. In considering the difficult question of what significance economic status should have within the reservation policy, the Court turned to the history of the caste system in order to explain its continuing salience in Indian society.

Judge Kuldip Singh's opinion offered a devastating account of the history of caste. "The caste system as projected by Manu and accepted by the Hindu Society," he wrote, "has proved to be the biggest curse for this country With the passage of time the caste-system became the cancer-cell of the Hindu society."⁷⁴ The social and political divisions imposed by the caste system, he speculated, had made India vulnerable to invasion and colonial exploitation:

This country remained under shackles of slavery for over one thousand years. The reason for our inability to fight the foreign-rule was the social degeneration of India because of the caste-system. To rule this country it was not necessary to divide the people, the caste-system conveyed the message "Divided we are—come and rule us."⁷⁵

This story about caste is less about the effect of caste on the victims than on its effect on the whole society. Caste had been a "cancer" that plagued the health of the nation.⁷⁶ The modernizing effect of legal reform, in his view, was the medicine that would be necessary to cure the society of this past. "The Constitution," Judge Singh wrote, "completely obliterated the caste-system and assured equality before law The progress of India has been from casteism to egalitarianism—from feudalism to freedom."⁷⁷

This history has continued to reproduce itself, and the burdens of this past have continued to plague communities where caste identity still afflicts children at birth. Caste, therefore, is deeply embedded into the normative commitments of the village communities where it still has strong roots. Judge Pandian wrote:

The moment a child comes out of the mother's womb in a Hindu family . . . and takes its first breath and even before its umbilical cord is cut off, the innocent child is branded, stigmatized, and put in a separate slot according to the caste of its parents despite the fact that the birth of the child in the particular slot not by choice but by chance.⁷⁸

"Though in India, caste evil originated from Hindu religion," he continued, "that evil has taken its root so deep in the social structure of all the Indian

73. (1993) 1 S.C.J. 353.

74. *Id.* at 453 (opinion of Singh, J.).

75. *Id.* at 453-54.

76. *Id.* at 453.

77. *Id.* at 454.

78. *Id.* at 374 (opinion of Pandian, J.).

communities and spread its tentacles far and wide thereby leaving no community from being influenced by the caste factor.”⁷⁹

The caste system is reproduced not only through social obligations, but also through official policies and institutions: “The perpetuation of casteism, in the words of Swami Vivekananda ‘continues social tyranny of ages.’ The caste system has been religiously preserved in many ways including by judicial verdicts, pronounced according to the traditional Hindu Law.”⁸⁰ It was therefore inappropriate, Judge Pandian concluded, to consider caste membership alone when awarding reservation posts in the government, because other criteria were necessary to abolish the caste system as a whole. The caste system had left an indelible mark on communities and institutions throughout the country, and its effects were not merely associated with caste membership but spread far beyond the untouchables to some of the historically higher castes and to other religious communities, such as Muslims and Christians.⁸¹ Caste membership should be relevant, but it should not be the dominant criterion.⁸²

As Judge Thommen emphasized, the relationship between discrimination in the present and in the past should be the basis for determining the extent of the reservation policy. Poverty, he concluded, was not enough to support a designation under the Scheduled Castes and Scheduled Tribes, but at the same time, neither was membership in a particular caste. “[T]he question to be asked, for the purposes of reservation,” he wrote, “is whether such poverty is the result of identified historical or continuing discrimination. No matter what caused the discrimination and exploitation; the question is, did such inequity and injustice result in poverty and backwardness[.]”⁸³ The dispositive inquiry, then, was the relationship between a group’s standing in the contemporary society and its history of prior discrimination. The constitutional protections thus envision a connection between this history and contemporary discrimination and these links should be evaluated through an examination of the social meaning of this group designation over time.⁸⁴

The *N.M. Thomas* and *Indra Sawhney* decisions illustrate the significance of collective memory in shaping the construction of legal doctrine to support the reservation policy. Specifically, the cases illustrate the ways that the Court locates the authority of each caste in the process of social reform. In these cases, the Court told a set of narratives about the history of the caste system and crafted a legal doctrine that is attentive to the fact that the consequences of this history remain embedded in the society. They remain embedded not only in the lived experience in the social structure, but also in the values of particular communities and in the identities imposed on individuals by the structures of authority “the moment a child comes out of

79. *Id.* at 393.

80. *Id.* at 375.

81. *Id.*

82. *Id.* For an earlier statement of this position, see *K.S. Jaysree v. State of Kerala*, A.I.R. 1976 S.C. 2381.

83. (1993) 1 S.C.J. at 438 (opinion of Singh, J.).

84. *Id.*

the mother's womb."⁸⁵ Caste hierarchy continues to be relevant not only for the deformed skeletons of social and economic inequality it has left behind, but also for the conceptions of membership and caste and tribal authority that remain alive in communities throughout the society. Collective memory in these cases invests particular caste communities with great significance and serves as the groundwork for their authority.

IV. CASTE MEMBERSHIP AND THE BOUNDARIES OF EQUALITY

The *Indra Sawhney* and *N.M. Thomas* cases both imagined a new social order based on a greater commitment to equality, and also contemplated the continuing salience of the vestiges of these ancient social arrangements. The Indian Supreme Court, in other words, articulated in these cases a vision of the project of constitutionalism as the creation of a new social order to undo the injustices of the past. The Court, however, also appreciated that efforts at social reform must also engage existing communities that are entrenched in the social hierarchy.

In view of the continuing salience of these communities, and their relationship to the past that the constitution repudiates, the Court granted considerable and surprising deference to each caste in continuing to exert traditional forms of authority over its members. It granted this authority not out of a pragmatic gesture to gradualism, but instead because by inviting these communities to participate in the articulation of new moral commitments, they would become the basis for interventions in the social order.

A. *The Problem of Religious Conversion and Caste Membership*

The Indian Constitution's commitment to establish a new social order, free of the hierarchy of caste, finds expression in a surprising contradiction. Despite the constitution's explicit claims to reform society and the Court's continuing insistence that the reservations should not depend exclusively on caste membership, Indian equality law permits a great deal of deference to the castes and tribes on these questions. It permits so much deference that it recognizes them as having an agency and normative generativity that is all their own.

The Indian Constitution affirms forms of political attachment to caste communities. The significance of Hinduism in the history of the caste system makes the question of what happens when a member of a caste converts to a different religion particularly difficult to untangle.⁸⁶ These situations put substantial pressure on the Court's assertion that reservation benefits should be awarded on the basis of caste membership, and, as a result, they reveal with great incisiveness the significance of memory and existing structures of social authority in shaping the constitutional doctrine supporting the reservation policy.⁸⁷

85. *Id.* at 374 (opinion of Pandian, J.).

86. See JACOBSON, *supra* note 2, at 35 n.42 (describing the state of the scholarly debate on the relationship between Hinduism and caste).

87. Conversion, and especially conversion to Christianity, has been the subject of significant

The Indian Supreme Court first considered the problem of religious conversion and the distribution of reservation benefits in 1954. In *Chatturbhuj Vithaldas Jasani v. Moreshwar Parashram*,⁸⁸ the Court considered a challenge to the nomination of several candidates for election to Congress, including Gangaram Thaware, who was alleged to have converted to Christianity. Judge Bose, writing for the Court, noted that “[c]onversion brings many complexities in its train, for it imports a composite of many ingredients,” and it was therefore necessary to consider the effect of conversion in its full social and regional context.⁸⁹ “Religious beliefs,” he continued, “spiritual experience and emotion and intellectual conviction intermingle with more material considerations such as severance of family and social ties and the casting off or retention of old customs and observances.”⁹⁰ As a result, the Court determined that it was necessary to consider three factors to evaluate the effect of the conversion on the right to claim reservation benefits: “(1) the reactions of the old body, (2) the intentions of the individual himself and (3) the rules of the new order.”⁹¹ The convert’s right to claim caste membership would depend largely on the caste’s own rules, both formal and informal, for tolerating the religion that he hoped to join. The reaction of the caste to the conversion would in many cases be the crucial factor in the Court’s determination. “If the old order is tolerant of the new faith and sees no reason to outcaste or excommunicate the convert and the individual himself desires and intends to retain his old social ties,” then “when we have to consider the legal and political rights of the old body, the views of the new faith hardly matter.”⁹²

Applying these criteria, the Court relied on testimony of members of the Mahar caste to determine the rules of this body and its reaction to the conversion.⁹³ None of the witnesses whom the lower court called could offer an example of the caste excommunicating a member for conversion to Christianity or any other religion. “No single instance,” the Supreme Court noted, “has been produced in which any person . . . has ever been outcasted from the Mahars [because of conversion] . . . and as the sect is said to be over 1000 years old, there has been enough time for such instances to accumulate.”⁹⁴ The Court ultimately found that the caste’s own rules were more significant than the response of the new faith embraced by the convert, and that “conversion to this sect imports little beyond an intellectual acceptance of certain ideological tenets” and does not result in a loss of caste membership.⁹⁵

Recent cases have continued to grant the castes considerable deference to make their own rules for excommunication in cases of conversion. The

controversy and political turmoil in India. See Kukum Sangari, *Gender Lines, Personal Laws, Conversion*, 27 SOC. SCIENTIST 17 (1999).

88. A.I.R. 1954 S.C. 236.

89. *Id.* at 244.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 245.

94. *Id.*

95. *Id.*

caste's reaction to the conversion has become the only factor of any salience in the Court's determination of whether or not a convert can claim benefits under the reservation policy. In *Guntur Medical College v. Mohan Rao*,⁹⁶ the Court was faced with the question of whether a person whose parents had been members of a Scheduled Caste, but had converted to Christianity, could claim caste membership upon reconversion to Hinduism. Mohan Rao had applied for admission to the medical college in the State of Andhra Pradesh and his application was denied.⁹⁷ He subsequently renounced Christianity and went through the necessary ceremonies to reconvert to his parents' caste, the Madiga. The medical college, however, again denied his application for one of the seats reserved for members of the Scheduled Castes, because "[n]o candidates can claim to belong to the Scheduled Castes except by birth."⁹⁸

The Court emphasized once more that each caste has the authority to sets its own rules for membership, even where there might be reason to be suspicious of the individual's motives for electing to convert to Hinduism:

It is for the members of the caste to decide whether or not to admit a person within the caste. Since the caste is *a social combination of persons governed by its rules and regulations*, it may, if its rules and regulations so provide, admit a new member just as it may expel an old one. The only requirement for admission of a person as a member of the caste is acceptance of that person by the other members of the caste, for as pointed out by [Judge] Krishnaswami Ayyangar, . . . "in matters affecting the well being or composition of a caste, the caste itself is the supreme judge."⁹⁹

The Court reasoned that, when determining whether a particular individual should be granted a reservation, courts should give considerable deference to the sovereignty of the caste in determining its own terms of membership. The Court noted that caste has both a social and political dimension.¹⁰⁰ The social meaning of conversion can only be understood, then, from inside the caste itself, and these meanings are given expression in the particular rules and regulations that a caste develops to adjudicate these disputes. Even if the elimination of the caste system is one of the primary goals of the constitution, it is unwise, the Court found, to allow law to reach within the caste itself and attempt to alter its shared commitments and values.

B. *Marriage and Community Sovereignty*

The Indian Supreme Court has developed a similarly deferential approach in cases where marriage outside of the caste or tribe jeopardizes a claim of reservation benefits. The case of *N.E. Horo v. Smt. Jahan Ara Jaipal Singh*,¹⁰¹ decided in 1972, involved a challenge to the eligibility of a woman who attempted to run for a seat in Parliament that had been reserved for a member of the Munda tribe, one of the Scheduled Tribes given special

96. A.I.R. 1976 S.C. 1904.

97. *Id.*

98. *Id.* at 1906.

99. *Id.* at 1908 (emphasis added and different emphasis omitted) (quoting Durgaprasada Rao v. Sudarsanaswami, A.I.R. 1940 Mad. 513, 516 (opinion of Krishnaswami Ayyangar, J.)).

100. *Id.*

101. A.I.R. 1972 S.C. 1840; see ROBERT PARKIN, *THE MUNDA OF CENTRAL ASIA: AN ACCOUNT OF THEIR SOCIAL ORGANIZATION* (1992).

designation under the constitution. The Respondent had not been born a member of the Munda tribe, but she argued that she had acquired membership in it by marriage and was therefore eligible to run for the seat.¹⁰² Traditionally, the Court acknowledged, “whatever might have been the origin of the Hindu castes and tribes in ancient times, gradually status [in a caste] came to be based on birth alone.”¹⁰³ As a result, a person who had been born into a particular caste or tribe would have probably not been able to alter that status over the course of his or her lifetime.¹⁰⁴ Nonetheless, over time, the Munda and other tribes had entered Indian society, and the past application of certain rules was not a reason to apply them today.¹⁰⁵

The seats in Parliament had been reserved for each caste or tribe so that “the community, as a whole, [could have] a right of representation and therefore the question of the membership of a particular individual of that community could not be considered divorced from the very object of legislation.”¹⁰⁶ The Court determined that whatever had been done in the past, the current practice among the Munda was to allow the community authorities to sanction the marriage. The Court considered evidence of the ceremonial practices that the Munda use in order to approve a marriage between a Munda man and a non-Munda woman, and the ceremonies that were done to approve Ara’s marriage in this case. A member of the Munda tribe described the ceremonies that take place after a wedding between a Munda male and a non-Munda: “[A] feast is given and if the elders of the society accept the marriage and participate in the feast that by itself would show that the tribal society has accepted the marriage and the wife has become a member of the tribe.”¹⁰⁷ There was evidence to show, provided by Ara’s nephew, that these ceremonies were performed after the wedding.¹⁰⁸ “From all this evidence[,]” the Court concluded, “it is proved that once the marriage of a Munda male with a non-Munda female is approved or sanctioned by the Parha panchayat [regional tribal government] they become members of the community.”¹⁰⁹

There was tension, however, between deference to the practices of these communities and the hope, at the center of the project of Indian constitutionalism, to remake society through legal reform. “When a person, in the course of time,” the Court concluded, “has been assimilated in the community it is somewhat difficult to comprehend how that person can be denied the rights and privileges which may be conferred on that community *even though tribal by constitutional provisions.*”¹¹⁰ Even as it noted that such deference was the only acceptable result, the Court acknowledged that the community had been recognized under “constitutional provisions.”¹¹¹ This deference to membership rules of particular tribes and castes, then, expresses

102. A.I.R. 1972 S.C. at 1848.

103. *Id.*

104. *Id.*

105. *Id.* at 1846-49.

106. *Id.*

107. *Id.* at 1846.

108. *Id.*

109. *Id.* at 1849.

110. *Id.* at 1850 (emphasis added).

111. *Id.*

a tension between an aspiration to social reform, and a deep sensitivity to the entrenched values associated with the caste system in Indian society and in each of these communities. Moreover, as this case demonstrates, many of these communities were changing, if gradually, and it was inappropriate to attempt to establish a uniform rule that would interfere with what appeared to be an ongoing process of reform within each caste.

C. *Caste Sovereignty and the Boundaries of Reform*

The reasons for this deference to caste are rooted in the different ways that the Court conceptualizes the relationship between legal doctrine and sources of normative authority that are associated with the structure of the caste system. In each of the cases, the Court recognized the persistence of the rules and practices in these communities over time, and the extent to which the notion of membership in a particular caste group is connected to the Court's impression of the deep roots of some of these practices. More crucially, the caste's status is a source of authority over the individuals that comprise it, and this conception of authority lies in a particular form of memory that resists the repudiation of the caste system articulated in the constitutional principle. As the Court observed in *Chatturbhuj*, there had been "[n]o single instance" in which any person had been excluded from the caste because of religious conversion, "and as the sect is said to be over 1000 years old, there has been time enough for such instances to accumulate."¹¹² Each caste, the Court implied, obtained the ground for its authority, and the constituent components of its identity, from the memories—including narratives, stories, and rituals—that were shared by members of the caste.

In *Ganpat v. Presiding Officer*, the Court argued that "[t]he monstrous curse of untouchability has got to be eradicated," and that it must "be eradicated not merely by making constitutional provisions or laws but also by eradicating it from the minds and hearts of men."¹¹³ These cases involving caste membership, however, seem to be very much at odds with this stated aspiration. The Court not only recognized the existence of caste hierarchies in formal doctrine—for, indeed, the constitution had already done that—but it also gave constitutional status to the political authority of the system of caste governance.

By giving each caste the opportunity to determine its own rules of membership, the Court gave the lower castes the authority to reproduce themselves over time, by reasserting ancient rules of membership.¹¹⁴ Such rules could, in many cases, allow prejudice and skepticism among the tribes to

112. A.I.R. 1954 S.C. 236, 245.

113. A.I.R. 1975 S.C. 420, 424.

114. A similar theory is at the heart of U.S. federalism jurisprudence with respect to Native American tribes in the sense that such tribes generate their own norms in relation to the broader polity, but can nonetheless remain sites of substantial prejudice. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 751 (1989) ("[W]e also know that some communities are communities of oppression. In Marilyn Friedman's words, '[b]esides excluding or suppressing outsiders, the practices and traditions of many communities are exploitative and oppressive toward many of their own members. This problem is of special relevance to women.'" (quoting Marilyn Friedman, *Feminism and Modern Friendship: Dislocating the Community*, 99 ETHICS 275, 281 (1989))).

deepen. It gave each caste the authority to establish either more traditional rules of membership—such as rules refusing to recognize marriages with outsiders—or more liberal rules that reflected changing conceptions of the significance of caste in Indian society. Rather than attempt to require each caste to adopt a certain legal definition of membership, one that would reflect a certain constitutional conception of equality, the Court allowed the tribes to craft their own evolving definitions of membership that would then be used by the state in the allocation of reservation posts and other opportunities and legal entitlements.¹¹⁵

1. *The Caste and the Nomos*

The Indian caste system is different from the forms of social hierarchy, such as race, gender or sexual orientation, that are more familiar in the U.S. context. Jack Balkin has used the term “status hierarchy” to describe the characteristics of these arrangements:

Social status is the degree of prestige and honor that individuals or groups enjoy. This prestige involves the approval, respect, admiration, or positive qualities imputed to a person or group. Lower social status confers and imputes corresponding disapproval and negative qualities. Although individuals may have different degrees of status within a single group, they also have status because they are members of a group. . . . In many societies, status hierarchies emerge between groups with distinctive identities or styles of life.¹¹⁶

The Indian caste system, however, has at least one characteristic that makes it different from the “status hierarchies” that Balkin describes. At its core, the Indian caste system imposes a social status in the more familiar sense—like race, gender, and class—but it also has attributes that these more familiar status hierarchies do not. In particular, the caste system is a hierarchical social arrangement with ongoing ties of social and political affiliation that provide forms of legal and political authority that are separate from, but undoubtedly related to, the status conferred on each individual because of his or her membership in a group within a status hierarchy.

The structures of authority in each caste, which complicate the project of social reform, have more in common with the “interpretive communities” described by Robert Cover than they do with a conception of a status hierarchy.¹¹⁷ In fact, they have more in common with these communities than with Balkin’s hierarchical conception of these communities that posits that each is defined primarily by its relationship to the social hierarchy. Cover believed that these communities were notable for the powerful forms of “jurisgenesis,” or the process by which normative commitments are shaped and articulated by a community, that were possible because of the overlapping forms of religious and legal authority that constituted the communities.¹¹⁸ Cover argued:

115. See Resnik, *supra* note 114, at 751.

116. J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2321-23 (1997).

117. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 26 (1983).

118. *Id.* at 11, 40-41.

Sectarian communities differ from most—but not all—other communities in the degree to which they establish a *nomos* of their own. They characteristically construct their own myths, lay down their own precepts, and presume to establish their own hierarchies of norms. More importantly, they identify their own paradigms for lawful behavior and reduce the state to just one element, albeit an important one, in the normative environment.¹¹⁹

These communities were more capable of generating new normative commitments not merely because they were more intimate, but also because they enabled a connection to an imagined past that was itself a source of normative authority. These sectarian communities were especially significant for Cover, because they resembled the ancient forms of attachment that he called “paidieic communities,” which combined “a common understanding of creed and ritual” with “a common understanding of their relation to the primordial, imaginary, *true* unity that occurred in a vanished instant of long ago.”¹²⁰ Like Cover’s sectarian communities, each caste has its own forms of political authority that are historically and culturally determined. The caste communities are part of an ancient tradition that gives their normative commitments authority distinct from state-centered conceptions of law.

Applying Cover’s argument, it is possible to see that the caste system is thus not simply a hierarchy of status in the conventional sense, but also involves attachment to communities with normative authority over their members. Scholars have not appreciated the implications of Cover’s view of the relationship between law and social authority for U.S. scholarship on antisubordination. Conversely, the Indian Supreme Court has found that this normative authority has great significance in the ongoing effort of social reform through law. The doctrine on reservation policy is therefore sensitive not only to the persistence of group identities that correspond to a comprehensive hierarchy in Indian society, but also to the forms of political attachment that coincide with caste membership. In other words, the Court envisions each caste community as continually engaged in a project of redefining its own terms of membership in ways that may, at some point in the future, cut at the core of the persistent and intractable salience of caste.

The doctrine that the Court developed to address questions that involve the substantive authority of these communities and the constitution’s commitment to legal reform takes Cover’s invitation to “stop circumscribing the *nomos*” and “invite new worlds.”¹²¹ The doctrine serves as an invitation to these communities to reform their own rules to embody the constitutional commitment to social reform, but the Court stops short of requiring the castes or tribes to enact these rules. Instead, the Court allows these communities to devise their own rules, and to protect their own conceptions of caste identity in the face of ongoing injustice and social subordination. “It is even more important,” the Court found in *Ganpat*, “that members of communities who are untouchables should assert their self-respect and fight for their dignity than that the members of other communities should forget about it.”¹²² The

119. *Id.* at 33.

120. *Id.* at 15.

121. *Id.* at 68.

122. A.I.R. 1975 S.C. 420, 424.

risks associated with reinscribing caste identity and the coercive authority of the caste structure are acceptable, the Court suggests, because it is ultimately necessary to preserve the existing borders of communities in order to achieve the constitution's aspiration for greater equality and, ultimately, the elimination of caste hierarchies. The Court, however, goes further than simply recognizing caste as a relevant criterion for the distribution of entitlements in society. It also affirms the constitutive authority of a caste to define itself. The hope is that by giving each caste the capacity to participate in refashioning the nation's social arrangements, new conceptions of social equality will be deeper and more sustainable, because they will come from within the caste itself.

Cover's description of interpretative communities, and his suggestion that a constructed past often gives these communities their greatest significance, underscores the importance of the memory of the caste system for Indian equality law.¹²³ As Benedict Anderson has argued, an imagined past often underlies political authority, and in many ways a necessary foundation for it.¹²⁴ The Court's emphasis on the rootedness of the injustices in Indian history are, in a sense, a way of marking a departure from that past, and of indicating that the constitution will depart from this history. This dimension of the Court's use of historical narrative, however, is profoundly "jurispathic," in Cover's terminology.¹²⁵ The abstract principles of legal meaning, Cover worried, "exercise[d their] superior brute force . . . [and] shut[] down the creative hermeneutic of principle that is spread throughout our communities."¹²⁶

From Cover's point of view, the Indian Constitution's intention to mark time by breaking free from the persistence of the caste system would thus be a project fraught with self-contradiction, because it does violence to the existing social arrangements that were connected to powerful memories that were the source of authority and genuine normative affiliation.¹²⁷ In the process of enacting a new social order based on constitutional principles, the project of equality runs up against the sources of normative authority that are grounded in memories supporting ongoing forms of attachment and political power within caste communities.

The narrative of the caste system told by the Court is also a statement of continuity, of the persistence of these structures in modern India, and of their continuing salience in people's lives. Moreover, the narrative is about the challenge posed not only by the hierarchical structure of the caste system, but also of the continuing ties of attachment that Indians feel to the social and

123. Cover, *supra* note 117, at 33.

124. Anderson suggests that a nation is "an imagined political community," which "regardless of the actual inequality and exploitation that may prevail . . . is always conceived as a deep, horizontal comradeship." BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 6-7 (rev. ed. 1991).

125. Cover, *supra* note 117, at 40.

126. *Id.* at 44.

127. *Id.* at 42 ("To state, as I have done, that the problem is one of too much law is to acknowledge the nomic integrity of each of the communities that have generated principles and precepts. It is to posit that *each* 'community of interpretation' that has achieved 'law' has its own *nomos*—narratives, experiences, and visions to which the norm articulated is the right response.").

normative worlds that they inhabit in a particular caste. Caste, Judge Pandian argued in *Indra Sawhney*, “has taken its root so deep in the social structure of all the Indian communities and spread its tentacles far and wide,”¹²⁸ so much so that it began to impose its authority over a newborn child from the moment it “takes its first breath.”¹²⁹ The historical persistence of caste also created communities to which individuals feel powerful forms of affiliation. Reading the history of the caste system offered by the major decisions on reservation policy from this perspective emphasizes the powerful forms of affiliation of caste in Indian society, and by implication notes the difficulties inherent in any serious effort to restructure Indian society through the aspirations of constitutional principle.

Cover thus helps reveal a basic tension in the uses of memory in equality law by the Indian Supreme Court. Equality law almost always produces a new historical narrative, characterized by an explicit repudiation of past injustice and that references memories of the prior social order.¹³⁰ From this point of view, equality law puts to use a version of history in ways that run counter to the pervasive memories and perceptions that underlie status relations. On the other hand, equality law must be engaged in an ongoing and sensitive relationship both to memory and to the existing social forms which give rise to these memories. Cover’s conception of nomic communities underscores the fact that the Court understands the nomic community of each caste as the site of changing norms and changing memories about the history of the caste system, which are inevitably bound together with the identity and the normative authority of the caste.

2. *Collective Memory and Authority*

Whereas history is the mobilization of past events through narrative, collective memory is rooted in the experience of particular communities in the collective process of remembering. While history and memory are reinforcing and overlap in deeply complicated ways,¹³¹ Cover recognizes that memory, as a social process, is deeply relevant to law, which is, in part, involved in the expression of shared understandings that connect to these memories.¹³² Collective memory is especially relevant to law, because it describes a process in which society, or groups within that society, comes to formulate narratives and shared understandings about the past.¹³³

128. (1993) 1 S.C.J. 353, 393 (opinion of Pandian, J.).

129. *Id.* at 374.

130. See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1145 (1997).

131. See Pierre Nora, *The Era of Commemoration*, in 3 REALMS OF MEMORY: THE CONSTRUCTION OF THE FRENCH PAST 609, 615-38 (Lawrence D. Kirtzman ed., Arthur Goldhammer trans., 1998).

132. Cover, *supra* note 117, at 33.

133. The term “collective memory” has been the subject of a great deal of debate and revision in the theoretical literature, but for the purposes of this discussion, collective memory simply refers to the construction of memories within a national social and political context in the conventional sense of the term. The concept has its origins in the work of Emile Durkheim and Maurice Halbwachs. See EMILE DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* (Joseph Wardswain trans., 1947); MAURICE HALBWACHS, *ON COLLECTIVE MEMORY* (Lewis A Coser ed. & trans., 1992); see also JAMES FENTRESS & CHRIS WICKHAM, *SOCIAL MEMORY* (1992).

From the perspective of equality law, therefore, collective memory is relevant in at least two different ways. First, collective memory articulates values that ultimately find expression in law—in particular, the repudiation of past practices—but these memories may not be shared by all or may not be rooted in the constitutional culture.¹³⁴ Second, collective memory engages with memories that are present in the broader culture; ones that it must address in order to meaningfully reshape society. It is the tension between these two dimensions of memory about which Cover’s framework is especially insightful in the context of Indian equality law.

Norman Spaulding has explored this set of difficulties from a somewhat different perspective. Whereas, for Cover, the significance of history for equality law was, in part, that it gave legitimacy to existing social structures, for Spaulding, memory impedes the process of addressing past wrongs through constitutional principles.¹³⁵ Like Cover, Spaulding understands equality law as having a particular relationship, in contrast to other types of law, to collective memory. Spaulding aims to understand the way that memory of past injustices is related to corresponding legal doctrines of equality that aim to address it. As a general matter, equality law, he suggests, is engaged in dynamic tension with the collective memory of past wrongs. In his analysis of the significance of historical memory in shaping the doctrine that interprets the Reconstruction Amendments to the U.S. Constitution, Spaulding argues that “[m]emory here confronts the paradox . . . [of] the insatiable temptation for a nation to elide its grave misdeeds in the very act of remembrance.”¹³⁶ This conception of memory as “monument” allows a community to bury past wrongs under a fictional and triumphalist narrative. Such is the case with the Reconstruction Amendments and their surrounding mythology, which allowed the nation to move beyond the wrongs of slavery with the myth that the people of the nation have fully repudiated them in legal principle.

In contrast to this monumental version of history, in which constitutional principles render other sources of memory impotent and useless, Spaulding proposes a theory of “countermemory,” which emphasizes the need to involve the broader civic community in the remembrance of past injustices.¹³⁷ “Countermonuments,” Spaulding writes, “and the mode of historical consciousness they reflect are committed to a more rigorous form of memory work, one that seeks and exposes precisely what collective memory wishes (indeed, needs) to forge, what memory resists remembering.”¹³⁸ They relocate the site of remembrance in smaller communities of commitment to engage

134. Robert W. Gordon, for example, discusses the ways that the memory of the atrocities of World War II was relevant in the drafting of postwar European constitutions. Robert W. Gordon, *Undoing Historical Injustice*, in *JUSTICE AND INJUSTICE IN LAW AND LEGAL THEORY* 35, 35 (Austin Sarat & Thomas R. Kearns eds., 1996) (“Each [legal] response comes embedded in a history, a narrative that stitches together the society’s past and future.”).

135. Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 *COLUM. L. REV.* 1992, 1992-95 (2003).

136. *Id.* at 2001 (emphasis omitted).

137. *Id.* at 2003.

138. *Id.* at 2004.

them in a more active process of reform.¹³⁹ Whereas the memory of the Fourteenth Amendment is that it ended slavery and racial prejudice and inaugurated a principle of equality before the law, the countermemory of it would be rooted in the continuous remembering of the lineage of our present injustices.

The theoretical frameworks provided by Cover and Spaulding are complementary. Cover's ambitions are much broader and his claims about the nature of legal relationships reach much farther. However, Spaulding's narrower focus on memory, which he explicitly situates in reference to Cover,¹⁴⁰ helps explain the particular narrative of injustice in India's past, and the subsequent repudiation of that memory in the doctrine that recognizes the authority of each caste to promulgate its own rules and engage in its own process of forming shared memories about its origins.

The Indian Supreme Court engages in several forms of memory discourse throughout these cases. In some sections of *N.M. Thomas* and *Indra Sawhney*, the Court mostly engages in a form of collective memory that is more akin to the "monumental history" that Spaulding critiques; there, the Indian Supreme Court is primarily interested in asserting the ways that the constitution will denote a sharp break with the past.¹⁴¹ Alternatively, at other places in these decisions and, more implicitly, in the line of decisions granting authority to each caste, the Court engages in a form of countermemory, because it both recognizes the persistent salience of caste and also notes that rules of caste membership, which are connected to memories about the identity of the caste and its history as well as narratives about the significance of the caste system in Indian history.¹⁴² These narratives are what, in a Coverian sense, help to deepen the feelings of attachment that caste members would have to each community.¹⁴³

3. *Nancy Fraser and the Question of Remedy*

In order to clarify further the tensions within the Indian Supreme Court's approach to social authority and memory, it is useful to turn to the framework developed by Nancy Fraser to describe the two basic strategies for undertaking a program of reform.¹⁴⁴ Fraser draws a helpful distinction between "transformative" and "affirmative" remedies aimed at ending forms of structural inequality.

"Affirmative remedies," Fraser writes, are associated with "mainstream multiculturalism," and attempt to "redress disrespect by revealing unjustly devalued group identities, while leaving intact both the contents of those identities and the group differentiations that underlie them."¹⁴⁵ Alternatively,

139. *Id.*

140. *See id.* at 1998 n.42 (citing Cover, *supra* note 117, at 4).

141. *See, e.g.,* State of Kerala v. N.M. Thomas, A.I.R. 1976 S.C. 490, 493.

142. William R. Pinch, *Reinventing Ramamand: Caste and Hierarchy in Gangetic India*, 30 MOD. ASIAN STUD. 549 (1996).

143. Cover, *supra* note 117, at 44.

144. NANCY FRASER, JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION 24 (1997).

145. *Id.*

“transformative remedies . . . are associated with deconstruction [and] . . . [w]ould redress disrespect by transforming the underlying cultural-valuational structure.”¹⁴⁶ “By destabilizing existing group identities and differentiations,” Fraser concludes, “these remedies would not only raise the self-esteem of members of currently disrespected groups; they would change *everyone’s* sense of self.”¹⁴⁷

Transformative remedies aim to avoid the central paradox of an affirmative remedy, which is that its recognition of group identities, “as iterated over time, tends to set in motion a second-stigmatizing-recognition dynamic, which contradicts its official commitment to universalism.”¹⁴⁸ Official recognition of the identities of groups who have experienced past injustice can result in their stigmatization and backlash against them, frustrating the effort to restructure society in pursuit of greater equality.

Fraser’s approach, unlike Spaulding’s or in some ways Cover’s, is less concerned with the problem of memory, because it takes an even broader view of the difficulties associated with reforming a system of status relations. While Fraser is more interested in the fundamental problem of culturally constructed identities, her conception of the relationship between law and entrenched social hierarchy is useful for understanding the functions of memory, and the shared group identities of which memory is a part, within Indian equality law. To deconstruct both gender and race, she argues, would require “that all people be weaned from their attachment to current cultural constructions of their identities and interests.”¹⁴⁹ These identities and cultural constructions are deeply held, and are shaped and given authority by memory in the ways that Spaulding and Cover describe.

In Fraser’s typology, the Indian Supreme Court’s doctrinal approach may not be fully amenable to straightforward categorization as either transformative or affirmative, but this distinction helps to reveal some of its most salient aspects.¹⁵⁰ The constitutional recognition of affirmation of caste membership as a basis for the distribution of entitlements is an explicit affirmation of the status of these historically disadvantaged groups. On the other hand, recognition of the political authority of each caste to establish its own standards of membership is also an effort to ensure that the constitutional principles articulated by courts do not frustrate a process of reform grounded in local communities.

* * *

Indian constitutional doctrine therefore takes as a starting point the notion that the deconstruction of caste-based hierarchies must occur through the channels of normative authority that constitute the caste system itself. Rather than attempting to eliminate caste hierarchies through either a commitment to formal equality that prohibits all recognition of caste, or a

146. *Id.*

147. *Id.*

148. *Id.* at 25.

149. *Id.* at 31.

150. *Id.*

formal recognition of caste hierarchies aimed at granting some castes greater standing, the Court also assented to the ongoing political significance of the structures of caste governance so that they might be deconstructed over time.

The relationship between caste authority and constitutional commitments to equality is based on subordinate normative communities in which the authority of law and caste can powerfully reinforce one another. Strangely, the emphasis in the doctrine is rarely on the continuing persistence of historical inequities, or even in many cases on a showing of prejudice. The Court instead puts the focus on the historically determined sovereignty of the castes and tribes to inscribe their own borders and to participate, at the level of each locality and community, in the process of eradicating the caste system.

The constitutional aspiration to reform depends on the assent and indeed the active participation of a society that has many entrenched sites of authority. The constitutional guarantee of equality can only be achieved, then, with the involvement of the castes and tribes, and a dynamic interaction between established sources of memory and jurisgenesis and the force of constitutional principle.¹⁵¹

V. A VIEW OF INDIAN EQUALITY LAW FROM U.S. SHORES AND VICE VERSA

The most obvious analog to the notion of caste in Indian jurisprudence in U.S. constitutional law is almost certainly race.¹⁵² Like caste in India, racial inequality in the United States has deep roots in U.S. history still visible today. The constitutional provisions articulating the principles of modern U.S. equality law, the Thirteenth and Fourteenth Amendments, were drafted, in large part, to address the injustices perpetrated under slavery.¹⁵³ Furthermore, as in Indian debates over poverty and social injustice, the history of slavery and segregation still shapes debates about the legal treatment of race in the United States as well as formal constitutional discourse about its legal status.¹⁵⁴

Indian law's deep commitment to remedying forms of past status harm suggests that both Indian equality law and U.S. equal protection doctrine include anticlassification and ant子ordination principles. U.S. lawyers have identified a struggle between these principles. In debates over the meaning of the Fourteenth Amendment, proponents of anticlassification argue that the harms at which the Constitution is directed are a consequence of the invidious classification of individuals.¹⁵⁵ The ant子ordination principle, by contrast,

151. Such an interaction has at least the potential to make the *nomos* of Indian society whole again and to create laws that "present not only bodies of rules or doctrine to be understood, but also worlds to be inhabited." Cover, *supra* note 117, at 6.

152. See Laura Dudley Jenkins, *Race, Caste and Justice: Social Science Categories and Antidiscrimination Policies in India and the United States*, 36 CONN. L. REV. 747 (2004).

153. These debates, however, were hardly straightforward, and the notion of social reform during Reconstruction was a subject of deep dispute and, ultimately, was seriously constrained. See Robert J. Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 N.Y.U. L. REV. 863 (1986).

154. See Siegel, *supra* note 130, at 1129-48.

155. Reva B. Siegel, *Equality Talk: Ant子ordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472-73 (2004).

resists the view that the Constitution prohibits such classification, and instead holds that it is “wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups.”¹⁵⁶

The different relationships between antistatutory values and anticlassification values in each legal system are in part a consequence of the relationship between memory and law in the two societies. The comparison also emphasizes what is perhaps the most distinctive feature of India’s legal treatment of caste—its commitment to the recognition of the political authority of each caste community, and the nuanced conception of the forms of authority within a social hierarchy that is theorized as an element of constitutional doctrine.

A. *Antistatutory and Anticlassification in India and the United States*

From the perspective of U.S. constitutional law, Indian jurisprudence on caste is striking, most obviously, for the extent to which it explicitly takes caste membership into account in the distribution of benefits. The Indian reservation system is, at its core, a system of quotas, and the U.S. equal protection tradition has straightforwardly prohibited quotas as a means of redressing past wrongs.¹⁵⁷ This commitment to recognizing caste identities in formal Indian legal doctrine is most clearly stated in Article 15(4), which provides for “special provisions for the advancement” of historically disadvantaged groups.¹⁵⁸ In contrast to equal protection doctrine in the United States, Indian case law is more explicit about its concern with the extent to which caste is connected to status hierarchies. Indeed, the Indian Supreme Court has explicitly repudiated a reading of Article 14, the basic guarantee of equality, as expressing a conception of formal equality.¹⁵⁹

From the earliest cases on the reservation policy, the Indian Supreme Court made explicit references to U.S. case law on affirmative action. Judge Mathew wrote in *N.M. Thomas*:

The guarantee of equality is a guarantee of something more than what is required by formal equality. It implies differential treatment of persons who are unequal. [The] [e]galitarian principle has therefore enhanced the growing belief that the government has

156. See *id.* at 1472. This line of argument about the Equal Protection Clause is most often traced to the contributions of Owen Fiss. See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976). Recent contributions in this tradition include Balkin, *supra* note 116; Siegel, *supra* note 130; and Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 487 (1998). It is commonly accepted, however, that the present day Supreme Court has expressed its assent to anticlassification in its interpretations of the Equal Protection Clause, though scholars continue to debate the persistence of antistatutory values in equal protection doctrine. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Rice v. Cayetano*, 528 U.S. 495 (2000); *Shaw v. Reno*, 509 U.S. 630 (1993); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

157. Jenkins, *supra* note 152, at 756; see *Grutter*, 539 U.S. at 334.

158. INDIA CONST. art. 15, § 4.

159. A.I.R. 1976 S.C. 490, 516 (opinion of Mathew, J.).

an affirmative duty to eliminate inequalities and to provide opportunities for the exercise of human rights and claims.¹⁶⁰

Such comfort with the distribution of entitlements to groups under a principle of equality law is less familiar to those in the United States.¹⁶¹

While anticlassification and antisubordination values may be deeply intertwined in the U.S. tradition,¹⁶² the anticlassification principle has deep roots in understandings of the constitutional salience of race in the United States. “The way to stop discrimination on the basis of race,” Chief Justice John Roberts wrote in *Parents Involved in Community Schools v. Seattle School District No. 1*, “is to stop discriminating on the basis of race.”¹⁶³ Similarly, the Court noted with greater nuance in *City of Richmond v. J.A. Croson Co.*:

To accept [a] claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for “remedial relief” for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently immeasurable claims of past wrongs.¹⁶⁴

Such readings of the equality provisions under the Indian Constitution would be difficult to conceptualize, given the explicit guarantee in Article 15(4) that the state will, in some cases, use racial categories and even quotas to distribute entitlements.¹⁶⁵ The notion that the “Constitution is color-blind,” as Justice Harlan famously claimed in his *Plessy* dissent,¹⁶⁶ is much harder to support by any fair reading of the Indian Constitution. “The Constitution of India,” the Indian Supreme Court has reasoned, “is not caste-blind.”¹⁶⁷

The Indian Supreme Court has frequently made explicit comparisons to the U.S. case law on affirmative action. In early cases on reservation policy, the Indian Court typically avoided citations of foreign law precedents.¹⁶⁸ Once the Congress Party (which had risen to dominance during independence and

160. *Id.*

161. See, e.g., Fiss, *supra* note 156; Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 9 n.2 (2003) (citing references).

162. Siegel, *supra* note 155, at 1475-76; Scott Grinsell, “The Prejudice of Caste”: The Misreading of Justice Harlan and the Ascendancy of Anticlassification, 15 MICH. J. RACE & L. (forthcoming Spring 2010) (on file with author).

163. 127 S. Ct. 2738, 2792 (2007).

164. *Croson*, 488 U.S. 469, 505-06 (1989).

165. See generally *State of Kerala v. N.M. Thomas*, A.I.R. 1976 S.C. 490, 493.

166. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

167. *E.V. Chinnaiah v. State of Andhra Pradesh*, (2005) 1 S.C.C. 394, 426. Although this remark almost certainly references Justice Harlan’s dissent in *Plessy*, the Indian Court does not explicitly note this fact. It is also important to note that Justice Harlan’s opinion invokes the metaphor of “caste” immediately after this sentence, when he famously wrote that “[t]here is no caste here.” *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). There is a long history of discussion about “caste” in the U.S. equal protection tradition that extends to abolitionist arguments about the morality of slavery. The connections between the example of India and the caste metaphor in U.S. law are extremely complex. For a study of the history of caste reasoning in the U.S. context and its significance in Justice Harlan’s dissent in *Plessy*, see Grinsell, *supra* note 162.

168. Adam M. Smith, *Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence: The Indian Case*, 24 BERKELEY J. INT’L L. 218, 251 (2006). On the challenges of citation to foreign law and Western political theory in the Indian Supreme Court, see Gary Jeffrey Jacobsohn, *The Permeability of Constitutional Borders*, 82 TEX. L. REV. 1763, 1794 (2004).

was more skeptical of foreign authority) receded from power in the late 1970s, however, the Indian Supreme Court began to cite U.S. case law to help lend its own decisions greater credibility at home and abroad.¹⁶⁹ In *N.M. Thomas*—decided two years before the U.S. Supreme Court’s landmark decision on affirmative action, *Regents of the University of California v. Bakke*¹⁷⁰—the Indian Supreme Court saw the U.S. Supreme Court’s recent precedents on criminal procedure and compensatory discrimination as useful analogs to India’s effort to enlist the power of the state to remedy past discrimination. Judge Mathew wrote:

The force of the idea of a state with obligation [sic] to help the weaker sections of its members seems to have increasing influence in constitutional law. The idea finds expression in a number of cases in America involving racial discrimination and also in the decisions requiring the state to offset the effects of poverty by providing counsel, transcript of appeal, [sic] expert witnesses, etc.¹⁷¹

In his extended discussion of the treatment of race in U.S. equal protection doctrine, Judge Mathew was less interested in the specific doctrinal analysis of the U.S. Constitution’s commitment to equality, and was more interested in the fact that the U.S. Supreme Court had recognized that the power of the courts could be used in pursuit of social justice.¹⁷²

A careful reading of cases in which the Indian Supreme Court relies on U.S. precedents shows the Indian Court drawing from case law that rests on the articulation of antisubordination values in U.S. equal protection doctrine. In her study of equality law in France and the United States, Julie Suk found that by “comparing the French and U.S. principles of race-blindness,” it becomes clear that, “as a descriptive matter, the U.S. anticlassification principle is closer to the antisubordination principle than it is to any universal or substantive vision of a color blind society that is fully committed to judging individual citizens on the basis of their individual traits, talents and abilities.”¹⁷³

While in its basic structure and by its textual provisions, the Indian Constitution is much more explicitly committed to an antisubordination principle than the U.S. Constitution, it seems from a close reading of these cases that in the U.S. equal protection tradition, the anticlassification principle and the equal protection principle have been, and will likely remain, deeply intertwined and reinforcing.¹⁷⁴ These cases show the Court relying on anticlassification values in ways that limit and circumscribe its basic

169. Smith, *supra* note 168, at 253 (“Almost all of the major cases during this period [1978 to 1991] relied heavily on foreign precedent . . .”).

170. 438 U.S. 265 (1978).

171. A.I.R. 1976 S.C. 490, 516 (opinion of Mathew, J.). The opinion also cited *Griffin v. Illinois*, 351 U.S. 12 (1955), which required states to provide for payment of trial court transcripts for indigent persons on appeal; and *Harper v. Virginia*, 383 U.S. 663 (1966), which struck down a poll tax. A.I.R. 1976 S.C. at 516-17 (opinion of Mathew, J.).

172. A.I.R. 1976 S.C. at 516-20 (opinion of Mathew, J.) (discussing the factual background to cases on poverty and race, but not analyzing the relevant doctrine).

173. Suk, *supra* note 1, at 298-99.

174. See Siegel, *supra* note 155, at 1547 (“[This account] teaches that concerns about group subordination are at the heart of the modern equal protection tradition—and, at the same time, suggests important reasons why such concerns have been persistently disguised, qualified, and bounded.”).

commitment to antisubordination. Often, the anticlassification rhetoric in these cases expresses the Court's basic commitment to antisubordination values.

Like the U.S. equal protection tradition, Indian equality law is also engaged with the problematic tension between these two different conceptions of equality. "It is no doubt a paradox that though in one sense classification brings about inequality," Judge Mathew observed in *N.M. Thomas*, "it is promotive of equality if its object is to bring those who share a common characteristic under a class for differential treatment for sufficient and justifiable reasons."¹⁷⁵ Or, as the Court pointed out in *K.R. Lakshman v. Karnataka Electricity Board*, "It is no doubt true . . . that the classification should not be carried too far lest it may subvert, [and] perhaps submerge the precious guarantee of equality."¹⁷⁶ While the Indian Supreme Court has struck a very different balance between the anticlassification and the antisubordination principles, it remains sensitive to the complex relationships that bind them.¹⁷⁷

In the Indian and U.S. legal traditions, the intersection between antisubordination and anticlassification values is related to the specific uses of the memory of past injustice within each culture. Contemporary equal protection law in the United States articulates an anticlassification principle that is, in part, framed in reference to the repudiation of chattel slavery and nineteenth-century gender norms, but that also complicates efforts to address present injustices because of these references to the extent that present injustices look much less troubling than their analogs in collective memory.¹⁷⁸ The antisubordination reasoning that is often embedded within anticlassification discourse in U.S. case law sometimes addresses underlying status hierarchies, and the memory of those hierarchies, with greater force than is possible under an anticlassification framework.¹⁷⁹

As Robert Post has argued with respect to the U.S. context, constitutional values and constitutional law exist in a dialectic relationship to each other.¹⁸⁰ Each depends on, and is the source of, the other.¹⁸¹ In India, the subordinated groups themselves become the relevant site of cultural production and for carrying out the complex forms of exchange between culture and law, and between organic memories that validate social hierarchies within the culture and legal constructions of memory that repudiate that injustice from afar. These communities take on great significance in the doctrine, because as sites of shared meanings and collective memory, they are crucial to the success of the effort to upend the hierarchy and form of social relationships imposed by the caste system.

175. A.I.R. 1976 S.C. at 516 (opinion of Mathew, J.).

176. (2001) 1 S.C.C. 442, 448.

177. See Balkin & Siegel, *supra* note 161, at 9-14.

178. Siegel, *supra* note 130, at 1146 ("The act of repudiating past practices can exculpate present practices, if we characterize the wrongs of the past narrowly enough to differentiate them from current regulatory forms.").

179. See Balkin & Siegel, *supra* note 161, at 9-14.

180. See Michelman, *supra* note 1, at 1418; Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and the Law*, 117 HARV. L. REV. 4, 5-10 (2003).

181. Post, *supra* note 180, at 10.

B. *Antisubordination, Social Hierarchy, and Equality Law: The Distinctive Challenge Raised by the Indian Case*

In contrast to U.S. antidiscrimination law, Indian equality law must contend with the fact that the caste system is not only a form of social hierarchy, but also a system of political organization that makes claims on its members. While race in the United States has some attributes in common with caste in India, it is difficult to see an analog in the U.S. equal protection tradition to the combination of legal authority and status hierarchy that is so striking about the Indian caste system. Although the metaphor of “caste” is a standard trope in the scholarship on U.S. antidiscrimination law, these accounts of U.S. law typically do not clearly articulate what the supposed analog to the Indian caste system is in practice.¹⁸² Americans do not think of inclusion in a protected class as involving an attachment to a normative community with a form of limited sovereignty that should have an independent status in the law.¹⁸³ The ascendancy of anticlassification values in modern U.S. case law has muted such considerations about the normative worlds created by membership in such groups.¹⁸⁴

To imagine a world such as that would be to suppose that African Americans under slavery or Jim Crow, or women under a nineteenth-century system of gender roles, belonged to communities that could be the source of a form of Coverian jurisgenesis. Taking a somewhat broader view of the U.S. antisubordination principle, however, suggests that U.S. law responds to these concerns in a different way. The basic concern at the heart of equal protection doctrine is, for some observers, the extent to which efforts at legal reform must be oriented in relation to evolving social practices. In her analysis of the salience of early debates over *Brown v. Board of Education*¹⁸⁵ for understanding the evolution of equal protection doctrine, Reva Siegel has described the destabilizing effect of interventions by courts to reform a social order:

As a descriptive matter, concepts of subordination focus attention on agonistic group relations that structure the polity. As a normative matter, concepts of subordination draw into question the legitimacy of customary practices and understandings that regulate, and rationalize, the social position of groups. . . . [A] court seeking to intervene in a status order must make judgments about when and how to proceed, knowing that, in the end, it cannot secure systematic change through brute force; efforts to transform a society

182. See Balkin, *supra* note 116, at 2354.

183. An important exception to this generalization, however, is the voting context. Of course, it has long been recognized that minority groups play an important role in elections. We often speak of the “black vote” or the “women’s vote” or the “Hispanic vote,” and such phrases surely suggest that we invest these communities with a certain political agency. While it is not blind to importance of these groups in our electoral process, the mainstream view in election law has been to focus on creating political communities with diversity among a variety of different groups, rather than on seeing these groups themselves as independent sources of political authority. See Heather K. Gerken, *Second Order Diversity*, 118 HARV. L. REV. 1099, 1102 (2005) (describing “first order diversity” as “the conventional understanding of diversity . . . [and] the normative vision associated with statistical integration, the hope that democratic bodies will someday mirror the polity”).

184. See Balkin, *supra* note 116, at 2350.

185. 347 U.S. 483 (1954).

through constitutional adjudication require the political confidence and consent of the very groups a court would subject to the force of law.¹⁸⁶

Similar concerns are at the heart of the recognition of caste authority in Indian equality law, but they are often muted in U.S. cases. U.S. law rests on such a view of consent, but U.S. doctrine does not respond to this important cultural background. Indeed, scholars have convincingly shown the ways in which U.S. constitutional doctrine responds to popular mobilizations, and the ways in which incursions by the state into the social order shape legal doctrine.

By blessing the political authority of the caste with constitutional status, the Indian Supreme Court provided space for these historically rooted communities to participate in an ongoing dialogue about the future of these status arrangements. Indeed, the Court consented to each caste drawing its own borders and, in a sense, determining how and when new legal principles would intervene within an established structure of social arrangements. The communities within these social arrangements come to develop understandings of belonging to a particular group in a very meaningful way by the forms of memory that they share and that so strongly resist the colder and more detached values articulated by courts.

A comparison to U.S. equality law raises questions about the nature of the antisubordination and anticlassification principles and their relationship to communities within a status hierarchy. In particular, considering the status hierarchies within the United States from the vantage point of Indian law invites one to ask to what extent the existing social arrangements in the United States—and especially race and gender—make claims of normative authority on individuals and to what extent they rely on the shared consent of the groups that are the subject of these principles.¹⁸⁷

C. *The Problem of Belonging in U.S. Equality Law*

In the U.S. context, a useful example to illustrate the significance of group meanings for individuals is the paradigmatic case of interracial marriage. A person's willingness to reject certain attitudes and pursue a romantic relationship with a person of a different race, implicates a set of profound claims about what it means to be a member of that group. It is the risk of expulsion from the group, the threat of ostracism, with which the Indian cases on marriage and conversion are most concerned.

Turning to the early cases from the Civil Rights Era involving miscegenation laws helps to uncover some of the differences between the

186. Siegel, *supra* note 155, at 1545-46.

187. This conception of membership in a status hierarchy as participation in a community of belonging is similar to the notion of "culture-race" proposed by Neil Gotanda. "Culture-race includes all aspects of culture, community, and consciousness. The term includes, for example, the beliefs, and intellectual and artistic traditions of Black America, and institutions such as Black churches and colleges." Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 56 (1991) (citation omitted). Gotanda's notion of "culture-race," however, while focused on aspects of identity and shared understandings, does not articulate a conception of how these forms of identity are actually also part of a system of authority in which each subordinate community makes claims on individuals who aim to claim membership in the group by the manipulation of unspoken membership rules and shared memories.

approaches that U.S. and Indian law take to the status of the subordinated groups within a system of equality law. In *Loving v. Virginia*, the U.S. Supreme Court struck down a state law that prohibited interracial marriage.¹⁸⁸ “The fact that Virginia prohibits only interracial marriages involving white persons,” the Court found, “demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.”¹⁸⁹ The strict scrutiny analysis that the Court applied in *Loving* did not consider the meaning of marriage in either the white community or the black community, but rather saw the injustice of the particular classification at issue.¹⁹⁰ In this sense, the case began its analysis with the assumption that marriage with a white person would have no impact on one’s standing within the African American community.

The constitutional defect of laws prohibiting interracial marriage turns not only on their promotion of racism in the white community, but also on shared understandings of membership that exist in white and black communities, and indeed all racial communities in this country. Marriage is an act that quite clearly involves positioning oneself in relation to different communities, including one’s family, one’s religion, and for many Americans, one’s race. Marrying outside the black community was doubly difficult not only because it subjected one to an unjust law, but also perhaps because it risked making one something of a pariah for turning one’s back on the rest of the community by taking a partner who was outside of the race.¹⁹¹

Because of its focus on the particular classification at issue—such as gender, race, or disability—and the relevant level of scrutiny, U.S. antidiscrimination law does not begin to question the punitive implications of conceptualizing the constitutional violation from the perspective of the group that is the victim of racism, sexism, or another form of prejudice. In U.S. law, it seems, the social category is defined not by the group itself, but by broader social norms. The meaning of blackness or womanhood or any category is not relevantly situated within the group itself.

If U.S. law were to consider more carefully the forms of normative authority exerted by these groups, certain new claims would be available under an antistatutory principle.¹⁹² In a case such as *Loving*, the added social and personal risk of marrying a white person when one is black—especially in the historical context of the late 1960s—would lend added salience to the status harm caused by the classification prohibiting interracial marriages.¹⁹³ Indeed, the same can be said of laws requiring a member of a racial group to avoid behaviors commonly associated with that group, or requiring a gay person to assume behavior that would be perceived as stereotypically straight.

188. 388 U.S. 1 (1967).

189. *Id.* at 11.

190. *Id.*

191. See PETER WALLENSTEIN, *TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE AND LAW—AN AMERICAN HISTORY* (2002).

192. See Fiss, *supra* note 156 (conceptualizing the relations among groups in a set of hierarchal relationships as the relevant site of inquiry for recognizing a harm under the Equal Protection Clause).

193. See *id.*

Kenji Yoshino has directed attention to the harms that result when a person is asked to adapt to more widely shared but unspoken practices of the majority.¹⁹⁴ He identifies an assimilationist bias in U.S. equal protection law:

[It] maintains that groups that can assimilate are less worthy of protection than groups that cannot. It further suggests that the only acceptable defense to a demand for assimilation is the inability to accede to it. In doing so, the jurisprudence reflects and reinforces a schism between gays on the one hand and racial minorities and women on the other.¹⁹⁵

Abandoning these practices and forms of expression not only risks causing a certain harm to the group, but also risks subjecting anyone who feels compelled to follow those laws to the permanent and perhaps even debilitating ostracism of the group to which he or she belongs. The requirement of assimilation is a pressure that is exerted across groups and that complicates efforts to dismantle a status hierarchy through legal interventions to shape social values. Yoshino's conception of the assimilationist bias points to the ways in which U.S. law maintains subordinate groups within the polity as somewhat detached from efforts of legal reform. Rather than protecting and cultivating the practices that constitute these groups and seeking to thus invite them into a dialogue about our shared commitments to equality, U.S. equality law too often insulates these groups from such discussions. Our law treats such groups as things to be protected, rather than alternate sites of normative authority that are relevant to law.

Along these lines, the conception of community membership in Indian case law is strikingly different from the conceptions of diversity that dominate much of U.S. thinking about efforts to redress various forms of inequality. Rather, the model of diversity that Indian case law seems most strongly to evoke is what Heather Gerken has called "second order diversity," which contemplates the need for different conceptions of diversity in a variety of institutional settings.¹⁹⁶ For a polity in the midst of a disruptive and sustained transformation, the authority exerted by certain groups within the polity can help to give legitimacy to the project, and through exchanges among their members and with the broader society, can contribute to deeper and more permanent social change. From this perspective, and because of the authority exerted by such groups, majority-minority districts can be justified on the grounds that they can help to articulate and reinforce certain normative commitments. On the other end of the spectrum, a jury of one race might be seen as more problematic, because although it has a representative dimension, a jury serves less of a purely representative function, as it is focused on adjudicating a particular case.¹⁹⁷

This Note has not focused on developing a complete framework for accounting for such understandings about the authority of caste communities from the perspective of U.S. equality law. An investigation into the ways that

194. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 772 (2002) ("Covering means the underlying identity is neither altered nor hidden, but is downplayed.").

195. *Id.* at 779.

196. See Gerken, *supra* note 183, at 1104-08.

197. See *id.* at 1137.

such a view of groups in our equality law might be transformed in response to a number of problems would be too extensive to complete here. Rather, this Note has sought to question the assumptions about the nature of the groups protected by U.S. equality law rather than to propose that the model adopted by the Indian courts should be adopted here, or to presume to be able to envision what the Indian conception of groups would look like if we were to import it and let it take root here.

When we observe that U.S. law takes seriously the ways that status hierarchies change in response to legal norms, it then does not seem so unlikely that there are claims of membership made by these communities that are meaningful from the perspective of individuals and of the groups themselves. Such conceptions of membership may be personal, such as one's selection of a marriage partner, and include more transient aspects of our lives which nonetheless define us, such as matters like styles of dress and speech, and taste in popular culture. These requirements are also powerfully backed by the authority of the group to ostracize any member who does not embrace this set of rules. At times, recognition of the group might risk rendering such conceptions coercive. In the end, however, by recognizing the significance of group membership and of the authority that these groups exert over their own members, constitutional law can also help to produce a set of understandings that link the group to its history and to a shared experience with a process of social reform.

The Indian Constitution's promise of greater equality for protected communities remains largely unmet.¹⁹⁸ However, over many years, and perhaps generations, it seems plausible that the Indian case will prove that its vision of equality law has the potential to result in a form of social equality that is more meaningful. The membership rules of the castes may begin to change significantly on their own, and the dissonance between constitutional principle and the potentially exclusionary and even prejudiced practices of some castes might begin to soften.

Social reform that gains the consent of castes in Indian, or of the groups that U.S. equality law seeks to protect, is likely in the long run to sustain a more robust version of equality. By enabling the groups to assert group identities and shared understandings in relation to the law, Indian law allows them eventually to embrace the bold and transformative commitments in the equality provisions of the Indian Constitution. It enables the constitution's principles to be absorbed by culture. The risk is that, over time, the interactions between traditional communities and constitutional law will result in a dilution of the constitution's commitments.

The future of the caste system lies largely with the castes themselves. Law has pointed the way, but it has done so in such a way that understands the limits of law in relation to the forms of authority that exist in places that people can live, touch, and even love. The future of Indian law depends on the

198. See HUMAN RIGHTS WATCH, *HIDDEN APARTHEID: CASTE DISCRIMINATION AGAINST INDIA'S UNTOUCHABLES* 111-12 (1997), available at <http://www.hrw.org/en/node/11030/section/1>; NAT'L CAMPAIGN ON DALIT RIGHTS, *ALTERNATE REPORT TO THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 5-54 (2008); Neeta Lal, *UN's Caste Declaration Riles India*, ASIA TIMES, Oct. 20, 2009, http://www.atimes.com/atimes/South_Asia/KJ20Df02.html.

interactions among the members of the lower castes, their communities, and legal doctrine. It is a project that the courts have only just begun, and one that will continue.

VI. CONCLUSION

Looking at U.S. equality law from the Indian perspective reveals that courts do and must consider the ways that the entrenched status hierarchies in society are transformed by the interventions of constitutional law. To be white, or to be black, or to be a woman, or to be a gay person, involves deeply held understandings of what membership in such a group means for that group—understandings that are shaped by the group, the society, and by courts themselves.

What it means to be an untouchable similarly involves conceptions of group membership articulated by untouchables and in reference to prejudices commonly held throughout Indian society. The deference granted to each caste in Indian constitutional law suggests that membership in a community within a status hierarchy may also involve certain normative commitments, especially the subordinate group's standards for membership, that complicate any effort to use the power of the state to address underlying social inequalities among groups.

As the discourses of antisubordination and anticlassification values in U.S. equal protection law reveal, these principles remain culturally rooted, and exist in a conversation between law and culture. The comparison to Indian law suggests, however, that antisubordination should be shaped by the perspective of the subordinated, rather than from the lofty vantage of constitutional principle.

Indian law suggests that U.S. equal protection jurisprudence should, in certain contexts, be reoriented in relation to the shared understandings and forms of collective memory fashioned by these groups. This basic tension in Indian equality law emphasizes that the assumptions about the normative authority of the subordinated groups in the U.S. legal system are often profoundly obscured. The relationship between these groups and the law, however, is part of the basic architecture of meaningful and lasting efforts to dismantle a system of social subordination.