

# THE CONSTITUTIONAL FLAWS OF INDIA'S ATTEMPT TO PROMOTE EQUALITY AND A LOOK AT THE UNITED STATES CONSTITUTION AS A SOLUTION

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I. Introduction.....	195
II. Historical Background of Discrimination.....	198
A. The United States.....	198
B. India .....	199
III. Constitutional Guarantees of Equality .....	202
A. The United States Constitution .....	202
B. The Indian Constitution .....	204
IV. Equality Promoting Mechanisms .....	206
A. Affirmative Action in the United States.....	206
i. Education .....	206
ii. Employment.....	208
B. The Reservation System in India .....	209
i. Education .....	209
ii. Employment.....	211
V. The United States and India: A Statistical Analysis of Advances under Affirmative Action/Reservation System.....	212
A. The United States.....	212
B. India .....	214
VI. The United States vs. India: Who's Affirmative Action Policy is More Successful at Promoting Equality and Why? .....	216
VII. Conclusion .....	220

## I. INTRODUCTION

Discrimination against minority groups is present in the history of almost every nation, however, what sets nations apart are the

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mechanisms they implement to overcome this historical oppression. A nation's constitution can lay the foundation for the promotion of equality and dictate the type of equality promoting mechanisms that the nation may or may not adopt. Therefore, a nation's constitution essentially sets forth how successful a nation will be at promoting equality.

This note identifies the shortcomings of the Indian Constitution that continue to inhibit minority groups from overcoming oppression while highlighting the strengths of the US Constitution that promote equality. The US Constitution fosters equality by providing for equal protection under the law through the Fourteenth Amendment. The Indian Constitution attempts to do the same through a more aggressive approach with its Ninety-third Amendment, which allows for government programs that promote the interests of specific minority groups. Specifically, the Indian Constitution allows for "reservations," a system which sets aside a certain quota of government positions and seats in public education institutes for members of traditionally oppressed groups.

As a result, the Indian Constitution has inherently created a framework that actually hinders the nation from fostering equality since the reservation system is based on recognition of the hierarchal caste system which stigmatized the traditionally oppressed groups in the first place. To overcome this impediment to equality, the Indian Constitution should follow the US Constitution's framework of the Equal Protection Clause, and, in order to do so, the Ninety-third Amendment of the Indian Constitution must be repealed.

The history of both the United States and India contains significant discrimination against certain minority groups which continue to affect society. In the United States, discriminatory practices have been targeted at African Americans, Native Americans, Hispanics, and other minority groups. In India, discriminatory practices focused on the lowest level of the caste system – the Dalits, which are also referred to as the "untouchables." The past oppression of minority groups will continue to affect these nations' societies and future if minority individuals are deprived of the opportunity to contribute to their nation's development. Many minority individuals may have the potential to advance society in tremendous ways; however, the discrimination that deprived them of education or employment also steals their potential to contribute to society.

Today, both the United States and India explicitly provide for equality through their nation's constitution<sup>1</sup> and have established mechanisms to foster this equality: the United States through affirmative action and India through its reservation system.<sup>2</sup> These mechanisms focus on promoting equality in important categories such as education and employment. Promoting equality in these areas is essential because it allows minority individuals to overcome past oppression and become actively contributing members of society. Nonetheless, there is a thin line between promoting equality and impeding equality. India's reservation system, created by the Ninety-third Constitutional Amendment, is an overzealous attempt at promoting the interest of certain minority groups and inherently fosters inequality by creating disadvantages for non-minority individuals.

Through a comparative analysis of the US Constitution and the Indian Constitution, this note will explain why India will be unable to effectively promote equality without repealing its Ninety-third Constitutional Amendment. First, this note provides an overview of the historical discrimination of certain minority groups in the United States and India. In Part II, this note identifies each nation's constitutional provisions that attempt to promote equality. Part III provides an explanation of the reservation system in India and the affirmative action programs in the United States. Here, this note discusses the judiciary's role, both in the United States and in India, in interpreting the nation's constitution and promoting equality. Part IV compares US affirmative action and India's reservation system. Through this comparative analysis, this section illustrates the fault in the Indian Constitution, the Ninety-third Amendment, which not only renders itself as an ineffective tool in fostering equality, but also serves as a serious impediment to equality. This section then turns to the US Constitution and highlights the Fourteenth Amendment as an effective and powerful tool for absolute adherence to the promotion of equality. Finally, Part V concludes that the US Constitution's Fourteenth Amendment Equal Protection Clause is a better tool for promoting equality and determines that the Ninety-third Amendment must be repealed for India's Constitution to be effective in promoting equality.

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<sup>1</sup> Nicole Lillibridge, *The Promise of Equality: A Comparative Analysis of the Constitutional Guarantees of Equality in India and the United States*, 13 WM. & MARY BILL RTS. J. 1301, 1301-02 (2005).

<sup>2</sup> *Id.* at 1303.

## II. HISTORICAL BACKGROUND OF DISCRIMINATION

### A. THE UNITED STATES

Race-based discrimination presented itself in the United States even before the nation's formation in 1776. For instance, George Washington initially banned the recruitment of black soldiers during the Revolutionary War.<sup>3</sup> While the American colonists fought for their own independence they also accepted and practiced slavery; realizing the irony in this John Jay, one of the nation's founding fathers, stated that "to contend for liberty, and to deny that blessing to others involves an inconsistency not to be excused."<sup>4</sup> John Jay's statement exemplified an early sign of the abolitionist movement and foreshadowed slavery as a controversial issue with the power to divide the nation.<sup>5</sup>

In 1857, the issue of slavery came before the US Supreme Court in *Dred Scott v. Sandford*.<sup>6</sup> By this time, slavery had become a fiercely debated issue throughout the nation and the Supreme Court held that people of African descent, slave or free, were not considered to be citizens of the United States within the definition of the US Constitution.<sup>7</sup> Thus, the Court concluded that African Americans were not afforded the individual rights that were guaranteed to US citizens by the Constitution. Here, Chief Justice Taney interpreted the US Constitution to express that

[Blacks] had for more than a century before [the Declaration of Independence] been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his own benefit.<sup>8</sup>

Chief Justice Taney hoped the Supreme Court's decision would settle the issue of slavery by transforming it from a contested political issue into a matter of settled law;<sup>9</sup> however, it actually produced the

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<sup>3</sup> Philip Sheldon Foner, *Blacks in the American Revolution* 44 (1976).

<sup>4</sup> Evan Carton, *Patriotic Treason: John Brown and the Soul of America* 17 (2006).

<sup>5</sup> *Id.* at 18.

<sup>6</sup> *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

<sup>7</sup> *Id.* at 427.

<sup>8</sup> *Id.* at 407.

<sup>9</sup> See Courtney Mabeus, *Taney Decision Shaped Slavery Debate*, *FREDERICK NEWS-POST* (June 26, 2013), [http://www.fredericknewspost.com/arts\\_and\\_entertainment/arts\\_and\\_entertainment\\_topics/history/article\\_6a330a80-91bd-5e51-aace-1ac987d23d3c.html](http://www.fredericknewspost.com/arts_and_entertainment/arts_and_entertainment_topics/history/article_6a330a80-91bd-5e51-aace-1ac987d23d3c.html).

opposite result. The *Dred Scott* decision catalyzed the abolitionist movement in the northern states and encouraged the southern states to secede from the nation in order to maintain slavery.<sup>10</sup> The escalated tension between the Northern and Southern states and the resulting divide in the nation led to the start of the Civil War in 1861.<sup>11</sup> After four years of war, the Southern states surrendered and the United States abolished slavery throughout the nation.<sup>12</sup>

Although the end of the Civil War abolished slavery throughout the nation, African Americans still suffered racial discrimination in almost every aspect of everyday life. Unhappy with the abolition of slavery, legislators in the southern states enacted laws allowing segregation of African Americans for public education, transportation, bathrooms, and many other areas.<sup>13</sup> These laws also prohibited African Americans from testifying against whites and owning land and firearms.<sup>14</sup> In response to the oppression of the newly freed African Americans, Congress added the Thirteenth, Fourteenth, and Fifteenth Amendments to the US Constitution to protect the civil liberties of all citizens under federal law.<sup>15</sup> Over time, these constitutional amendments have played a significant role for fostering equality throughout the nation.

## B. INDIA

Similar to the US, India has had a significant presence of discrimination throughout its nation's history. In India, discrimination is rooted in the caste system, a hierarchal system of division of labor and

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<sup>10</sup> See Paul Finkelman, *Scott v. Sandford: The Court's Most Dreadful Case and How it Changed History*, 82 CHI.-KENT L. REV. 3, 13, 32 (2007).

<sup>11</sup> *Id.*

<sup>12</sup> See James McPherson, *A Brief Overview of the American Civil War*, CIVIL WAR TRUST, <http://www.civilwar.org/education/history/civil-war-overview/overview.html> (last visited Apr. 13, 2014).

<sup>13</sup> Kevin D. Brown & Vinay Sitapati, *Lessons Learned from Comparing the Application of Constitutional Law and Federal Anti-Discrimination Law to African-Americans in the U.S. and Dalits in India in the Context of Higher Education*, 24 HARV. BLACKLETTER L.J. 3, 11–13 (2008). See also RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 603 (2004).

<sup>14</sup> Brown & Sitapati, *supra* note 13, at 12.

<sup>15</sup> *Id.*

power in society.<sup>16</sup> The caste system consists of four distinct occupational groups: the Brahmins (priests and teachers), the Ksyatriyas (rulers and soldiers), the Vaishyas (merchants and traders), and the Shudras (laborers and artisans).<sup>17</sup> The first three classes are referred to as “high caste” and control the power and function of the Indian society.<sup>18</sup> On the next “tier” are the Shudras, their purpose is to serve the needs of the other three castes, essentially acting as servants.<sup>19</sup> Below the Shudras are the Dalits, who are also referred to as the “untouchables” because they are considered to fall outside of the four recognized castes listed above.<sup>20</sup>

The caste system is regarded as an ancient fact of Hindu life and has constrained individuals’ rights in the Indian society for thousands of years.<sup>21</sup> On this matter, the book *Competing Equalities: Law and the Backward Classes in India*, notes the following:

The notion of graded inequality is explained and justified by the traditional Hindu notions of *dharma* and *karma*. Each caste group has its own *dharma* – the path which each of its members should follow in accordance with his nature and his station in life. The inequality of stations and the more onerous duties incumbent on some is explained and justified by the theory of *karma* and rebirth – that is, every human action has a positive or negative worth, and the moral balance of an individual’s actions in previous lives is manifested in the station into which he is reborn. . . . Hope for the future is provided, for one may progress through successive rebirths to higher positions . . . by fulfilling the [things traditionally done] by one’s caste, stage of life, and family position.<sup>22</sup>

This structure of the caste system designates occupational roles to certain castes without the consideration of an individual’s merits or abilities,<sup>23</sup> and ensures that certain groups are excluded from holding

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<sup>16</sup> Priya Sridharan, *Representations of Disadvantage: Evolving Definitions of Disadvantage in India’s Reservation Policy and United States’ Affirmative Action Policy*, 6 ASIAN L.J. 99, 102 (1999).

<sup>17</sup> *Id.*

<sup>18</sup> Kevin D. Brown, *African-Americans within the Context of International Oppression*, 17 TEMP. INT’L & COMP. L.J. 1, 9 (2003).

<sup>19</sup> Sridharan, *supra* note 16, at 102.

<sup>20</sup> *Id.*

<sup>21</sup> 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, 753 n.25 (2004).

<sup>22</sup> Marc Galanter, *Competing Equalities: Law and the Backward Classes in India* 11 (1984).

<sup>23</sup> See Jenkins, *supra* note 21, at 753 n.25.

positions of respect and responsibility.<sup>24</sup> As a result of sitting at the very bottom of the caste system, the Dalits suffered the most extreme levels of discrimination and oppression.<sup>25</sup> Essentially, the Indian society considered Dalits the “outcastes” of the community and treated them as such by prohibiting Dalits from participating in the religious, social, economic, and political arenas of the society.<sup>26</sup>

Efforts to help the Dalits did not begin until the 19<sup>th</sup> century, where, under British rule, the Dalits were viewed as a political group for the first time.<sup>27</sup> In 1919, the British re-named the Dalit class as the “Depressed Classes” as an attempt to release the Dalits from the degrading title of the “untouchables.”<sup>28</sup> Soon after, the British enacted the Government of India Act which introduced a system of “reservations” that specifically set aside a certain quota of government positions for members of the Depressed Classes.<sup>29</sup> The British implemented this system as a form of reparation for the oppression of the Depressed Classes.<sup>30</sup> In 1902, as a result of reservations, members of the Depressed Classes were finally given the opportunity to contribute to the nation’s governmental functions, a first in the history of the nation.<sup>31</sup>

India, as an independent sovereign nation, formally recognized the need to address the oppression of the Dalits through the ratification of the Indian Constitution.<sup>32</sup> To give formal authority to mechanisms of reparation, India’s Constitution provided that “nothing 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.”<sup>33</sup> Through this clause India created the formal authority to preserve the reservation system that was put in place by the British during their rule of India from 1858 to 1947.<sup>34</sup>

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<sup>24</sup> See *id.* at 754.

<sup>25</sup> See *id.* at 753.

<sup>26</sup> See Devanesan Nesiah, *Discrimination with Reason?: The Policy of Reservations in the United States, India and Malaysia* 38 (1997).

<sup>27</sup> Brown & Sitapati, *supra* note 13, at 18.

<sup>28</sup> *Id.* at 15.

<sup>29</sup> *Id.* at 18–19, 21.

<sup>30</sup> Jason Morgan-Foster, *From Hutchins Hall to Hyderabad and Beyond: A Comparative Look at Affirmative Action in Three Jurisdictions*, 9 Wash. & Lee Race & Ethnic Anc. L.J. 73, 96 n.118 (2003).

<sup>31</sup> See Nesiah, *supra* note 26, at 57.

<sup>32</sup> Brown & Sitapati, *supra* note 13, at 4.

<sup>33</sup> INDIA CONST. art. 15, §§ 4–5.

<sup>34</sup> See generally Sridharan, *supra* note 19, at 99–100, 104–05.

Furthermore, by authorizing the creation of “any special provision for the advancement of” previously oppressed groups, the Indian Constitution gave the government unrestrained power to create programs tailored to further the interests of the “Scheduled Castes,” the new official term for the Depressed Classes.<sup>35</sup> Over time, this allowed for the implementation of a wide variety of reservation programs which now encompass positions set aside by quota in legislative bodies, government service, and educational institutions that receive government funding.<sup>36</sup>

### III. CONSTITUTIONAL GUARANTEES OF EQUALITY

#### A. THE UNITED STATES CONSTITUTION

In 1776, under the preamble of the US Declaration of Independence, the United States’ founding fathers proclaimed that “all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”<sup>37</sup> Nonetheless, African Americans in the United States were subjected to slavery and robbed of their so-called “unalienable rights” of life, liberty, and pursuit of happiness.<sup>38</sup> This treatment of African Americans persisted for almost ninety years after the proclamation of the US Declaration of Independence.<sup>39</sup> The enactment of the Thirteenth Amendment in 1865 finally abolished slavery throughout the nation by providing that “neither slavery nor involuntary servitude . . . shall exist within the United States.”<sup>40</sup> Even after the abolition of slavery, however, African Americans continued to suffer discrimination under the law, which allowed for unequal treatment of African Americans through segregation in public schools, jobs, and public transportation.<sup>41</sup> Congress recognized the need for additional measures to guarantee and protect the individual rights of the newly freed African Americans, and as a result, enacted the Fourteenth

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<sup>35</sup> B.R. Ambedkar, *Reservation in India*, AMBEDKAR.ORG 22, 28 – 31, [http://www.ambedkar.org/News/reservationin\\_india.pdf](http://www.ambedkar.org/News/reservationin_india.pdf) (last visited Apr. 13, 2014). *See also* Brown & Sitapati, *supra* note 13, at 21–23; Sridharan, *supra* note 16, at 108–09.

<sup>36</sup> Ambedkar, *supra* note 35, at 23, 44.

<sup>37</sup> THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776).

<sup>38</sup> *See* Brown & Sitapati, *supra* note 13, at 9–12.

<sup>39</sup> *See id.* at 11.

<sup>40</sup> U.S. CONST. amend. XIII.

<sup>41</sup> Brown & Sitapati, *supra* note 13, at 12.



Amendment to the US Constitution.<sup>42</sup> The Fourteenth Amendment prohibits States from denying “any person within its jurisdiction the equal protection of the laws.”<sup>43</sup> Here, for the first time the word “equal” appeared in the US Constitution.<sup>44</sup>

Two years later, the ratification of the Fifteenth Amendment furthered the notion of “equal rights” by providing that “the right of citizens of the United States to vote shall not be denied . . . on account of race, color, or previous condition of servitude.”<sup>45</sup> These post-Civil War amendments established the rights of US citizens and also served a remedial purpose addressing the nation’s history of slavery and oppression of African Americans.<sup>46</sup> As such, these amendments have repeatedly provided the constitutional basis to prohibit racial discrimination and allowed certain instances of affirmative action.<sup>47</sup>

In turn, US courts have interpreted and applied the post-Civil War amendments to safeguard and maintain equality throughout the nation. When US courts are presented with analyzing certain laws in the context of this conflict, the courts employ a formalistic distinction between “strict,” “intermediate,” and “rational-basis” scrutiny to apply the Fourteenth Amendment’s Equal Protection Clause.<sup>48</sup> If the challenged law categorizes individuals on the basis of race or national origin, “strict scrutiny” is employed and the court may conclude the law is constitutional only if it finds that the law is “necessary” to serve a “compelling government interest.”<sup>49</sup> If the challenged law categorizes individuals on the basis of sex, courts use the “intermediate scrutiny” standard under which the law is constitutional only if it has a “substantial relationship” to an “important government interest.”<sup>50</sup> Finally, if the challenged law concerns social welfare and economic legislation, courts utilize a “rational basis” standard of review, where the law is held as constitutional as long as it has a “rational relationship” to a “legitimate

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<sup>42</sup> *Id.*

<sup>43</sup> U.S. CONST. amend. XIV.

<sup>44</sup> See M. Varn Chandola, *Affirmative Action in India and the United States: The Untouchable and Black Experience*, 3 IND. INT’L & COMP. L. REV. 101, 116 (1992).

<sup>45</sup> U.S. CONST. amend. XV, § 1.

<sup>46</sup> Chandola, *supra* note 44, at 111.

<sup>47</sup> *Id.*

<sup>48</sup> Kristen K. Davis, *Equal Protection for Women in India and Canada: An Examination and Comparison of Sex Equality Provisions in the Indian and Canadian Constitutions*, 13 ARIZ. J. INT’L & COMP. L. 31, 44 (1996).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

government end.”<sup>51</sup> Thus, the courts play a significant role in interpreting the implementation of the “equal protection” guaranteed under the Fourteenth Amendment of the US Constitution.

## B. THE INDIAN CONSTITUTION

The framers of the Indian Constitution acknowledged the importance of equality and anti-discrimination provisions by explicitly providing equality promoting mechanisms in the constitution from the beginning of its drafting in 1947.<sup>52</sup> The Indian Constitution, under Part III, lays out the “Fundamental Rights” that are guaranteed to the people of India.<sup>53</sup> Here, similar to the US Constitution’s Fourteenth Amendment Equal Protection Clause, Article 14 provides that “the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”<sup>54</sup> The Indian Constitution however, does not stop there, and goes even further to include several additional articles addressing equality. This attempt to guarantee equality through the use of supplemental articles is illustrated in the following articles of the Indian Constitution:

**Article 15(1)** of the Indian Constitution specifically prohibits the States from discriminating against any citizen based on “religion, race, caste, sex, [or] place of birth.”<sup>55</sup>

**Article 15(4)** provides that “nothing 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.”<sup>56</sup>

**Article 15(5)** permits the State to create special provisions for the advancement of traditionally disadvantaged groups in terms of “their admission to educational institutions including private educational institutions, whether aided or unaided by the State.”<sup>57</sup>

**Article 16** establishes equal opportunity in public employment by permitting the government to create special “provision[s] for the reservation of appointments or posts in favour of any backward class

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<sup>51</sup> *Id.*

<sup>52</sup> Lillibridge, *supra* note 1, at 1314–15.

<sup>53</sup> INDIA CONST. arts. 12–35.

<sup>54</sup> INDIA CONST. art. 14.

<sup>55</sup> INDIA CONST. art. 15, § 1.

<sup>56</sup> *Id.* art. 15, § 4.

<sup>57</sup> *Id.* art. 15, § 5.

of citizens which, in the opinion of the State, is not adequately represented in the services under the State.”<sup>58</sup>

**Article 17** abolishes the practice of “untouchability.”<sup>59</sup>

Furthermore, Part IV of the Indian Constitution, titled the “Directive Principles of State Policy,” explicitly authorizes the reservation of seats for protected groups in the arenas of education and public sector employment.<sup>60</sup> Some of the most prominent attempts to achieve equality through the use of reservations are pronounced in the following articles listed under the Indian Constitution’s Directive Principles of State Policy:

**Article 38(2)** demands that “the State shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.”<sup>61</sup>

**Article 46** states “the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.”<sup>62</sup>

The enforcement mechanism of the articles listed under the Directive Principles of State Policy drastically differs from those listed under the Fundamental Rights of the Indian Constitution.<sup>63</sup> The constitutional guarantees provided by the latter are enforceable by a citizen’s petition to the courts because these provisions are considered an individual’s constitutional rights.<sup>64</sup> The articles under the Directive Principles of State Policy, however, cannot be enforced by individuals because these provisions are duties of the state itself.<sup>65</sup> By classifying the articles under the Directive Principles of State Policy as “duties of the State” and not “constitutional rights,” the Indian Constitution prevents

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<sup>58</sup> *Id.* art. 16, § 4.

<sup>59</sup> *Id.* art. 17.

<sup>60</sup> *Id.* pt. IV.

<sup>61</sup> *Id.* art. 38, § 2.

<sup>62</sup> *Id.* art. 46.

<sup>63</sup> MARC GALANTER, *THE UNTOUCHABLES IN CONTEMPORARY INDIA* 227–314 (J.M. Mahar ed. 1972).

<sup>64</sup> A.M. Bhattacharjee, *Equality, Liberty & Property under the Constitution of India*, 18–35 (1997).

<sup>65</sup> *Id.*

courts from interfering in the enforcement of these provisions.<sup>66</sup> Instead, the Indian Constitution authorizes the state to enforce the principles contained in the articles under the Directive Principles of State Policy.<sup>67</sup> Here, the constitution keeps its commitment to individual equality separate from group equality. As a result, the Indian Constitution demands that the courts give broad deference to the state's implementation of reservation programs which provide preferential treatment for traditionally disadvantaged groups.<sup>68</sup>

#### IV. EQUALITY PROMOTING MECHANISMS

##### A. AFFIRMATIVE ACTION IN THE UNITED STATES

###### *i. Education*

In the United States, public and private colleges and universities have created special affirmative action admissions programs to increase the minority student enrollment in their institutions.<sup>69</sup> The first affirmative action programs implemented by universities, in the early 1970s, called for reserving a certain percentage of admissions seats for minority groups while other affirmative action programs considered race as one of the many factors in the admissions decision.<sup>70</sup> Over time, however, individuals have presented courts with claims challenging the constitutionality of these affirmative action programs under the Fourteenth Amendment of the US Constitution.<sup>71</sup>

In 1978, the US Supreme Court issued its first opinion addressing the constitutionality of affirmative action within the context of race-based admissions in higher education.<sup>72</sup> In *Bakke*, the University of California at Davis Medical School twice rejected Allan Bakke—a white male—even though his grades and test scores were much higher than a number of minority students who were admitted.<sup>73</sup> Bakke argued

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> MARC GALANTER, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA* 537–38 (1984).

<sup>69</sup> *See infra* text accompanying notes 77–82.

<sup>70</sup> Morgan-Foster, *supra* note 30, at 87–88.

<sup>71</sup> *See infra* text accompanying notes 72–81.

<sup>72</sup> *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

<sup>73</sup> *Id.* at 276–78.

that his rejection from UC Davis's Medical School was due to its affirmative action program, which reserved sixteen seats out of a hundred for minority group applicants.<sup>74</sup> In *Bakke*, the Supreme Court was asked to determine whether this affirmative action program violated the prohibition against racial discrimination in federally funded programs.<sup>75</sup>

The Court adopted the strict scrutiny standard to maintain that the goal of "attaining a diverse student body" was a "compelling governmental interest," and focused on whether UC Davis's affirmative action program was "narrowly tailored to achieve that goal."<sup>76</sup> The Court held that an affirmative action admissions program that uses race as the sole criterion for promoting diversity does not withstand strict scrutiny and is unconstitutional.<sup>77</sup> Nonetheless, the Court also held that colleges and universities may use race as a "plus factor" in an individualized admissions process if its purpose is to achieve the benefits that come from a diverse student body enrollment.<sup>78</sup>

Twenty-five years later, two cases – *Grutter v. Bollinger* and *Gratz v. Bollinger* – presented the US Supreme Court with another opportunity to review the constitutional application of the Fourteenth Amendment to affirmative action programs for admission at higher education institutions.<sup>79</sup> In *Grutter v. Bollinger*, the Court upheld a university's affirmative action program that considered racial factors as one of many components in its admissions process in order to attain enrollment of otherwise under-represented minorities.<sup>80</sup> Concurrently, in *Gratz v. Bollinger*, the Court held that an affirmative action program that gave certain minorities additional points for admissions considerations was unconstitutional.<sup>81</sup>

These affirmative action cases illustrate the role of the US Supreme Court in protecting the rights of all individuals through the application of the Fourteenth Amendment's neutral principle of equality.

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<sup>74</sup> *Id.* at 276 n.6.

<sup>75</sup> *Id.* at 278.

<sup>76</sup> Shira Galinsky, *Returning the Language of Fairness to Equal Protection: Justice Ruth Bader Ginsburg's Affirmative Action Jurisprudence in Grutter and Gratz and Beyond*, 7 N.Y. CITY L. REV. 357, 359 (2004).

<sup>77</sup> *Bakke*, 438 U.S. at 315.

<sup>78</sup> *Id.* at 317.

<sup>79</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 246 (2003).

<sup>80</sup> *Grutter*, 539 U.S. at 307.

<sup>81</sup> *Gratz*, 539 U.S. at 246.

Equality, under the US Constitution, embodies non-discrimination as both a right and a remedy.<sup>82</sup> Therefore, the Court must balance non-discrimination and “reverse discrimination” when interpreting the equality provisions of US Constitution for affirmative action cases.

*ii. Employment*

Similar to education, the US Supreme Court has played a significant role in affirmative action policies in the arena of employment.<sup>83</sup> In *City of Richmond v. J.A. Croson Co.*, the city of Richmond had adopted an affirmative action plan that required government funded construction contractors to give thirty percent of its contracts to businesses owned by minority group members.<sup>84</sup> The Richmond City Council explained that the purpose of this affirmative action plan was to promote the participation of minority group member owned businesses in the construction of public projects.<sup>85</sup> The J.A. Croson Company challenged the constitutionality of the city’s affirmative action plan and brought the case in front of the US Supreme Court.<sup>86</sup> The Supreme Court held that the city’s affirmative action program was unconstitutional under the Equal Protection Clause of the US Constitution’s Fourteenth Amendment.<sup>87</sup> Here, the Court applied the strict scrutiny standard and found that “the city ha[d] failed to demonstrate a compelling interest in apportioning contracting opportunities on the basis of race.”<sup>88</sup>

In the many affirmative action cases discussed above, the US Supreme Court has analyzed the constitutionality of affirmative action programs under the standard of strict scrutiny.<sup>89</sup> This strict scrutiny standard is not explicitly provided for in the US Constitution; instead, the Court has created three “circumstance-specific” levels of scrutiny to determine whether the challenged law has violated the Fourteenth

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<sup>82</sup> See generally Ruth Bader Ginsburg & Deborah Jones Merritt, Fifty-First Cardozo Memorial Lecture, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 255–56 (1999).

<sup>83</sup> See generally Jared M. Mellott, Note, *The Diversity Rationale for Affirmative Action in Employment After Grutter: The Case for Containment*, 48 WM. & MARY L. REV. 1091 (2006).

<sup>84</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 469 (1989).

<sup>85</sup> *Id.*

<sup>86</sup> *J.A. Croson Co.*, 488 U.S. 469.

<sup>87</sup> *Id.* at 469, 511.

<sup>88</sup> *Id.* at 505.

<sup>89</sup> See *supra* text accompanying notes 72–88.

Amendment of the US Constitution.<sup>90</sup> Thus, the courts act as an independent body with the responsibility of interpreting the US Constitution and its proper enforcement in the context of affirmative action.<sup>91</sup> The US Constitution's insistence on equality for all, combined with the authority delegated to the judiciary system to ensure compliance to the constitution, allows for the nation to foster equality by looking after the interests of all individuals, not just those of individuals belonging to minority groups.<sup>92</sup>

## B. THE RESERVATION SYSTEM IN INDIA

### *i. Education*

Contrary to the United States, affirmative action in India not only allows for, but actually requires, that public colleges and universities reserve admissions seats for traditionally disadvantaged minority groups.<sup>93</sup> Since the Indian Constitution specifically allows for special provisions to promote the interests of certain classes, the concept of equality in India focuses on promoting group equality, not individual equality.<sup>94</sup> As long as India's reservation system is directed at promoting certain minority groups, individual inequality will remain present throughout its society. Furthermore, there is no avenue to challenge these reservation systems because the Indian Constitution gives the state complete authority to implement these special provisions in the manner they see fit to promote these certain groups.<sup>95</sup>

The Indian Supreme Court plays a less significant role in the affirmative action mechanisms implemented throughout the nation because these affirmative action programs are explicitly authorized by the Indian Constitution.<sup>96</sup> Article 15(4) provides that "nothing in this article . . . shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of

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<sup>90</sup> See *supra* notes 54–57 and accompanying text.

<sup>91</sup> *Id.*

<sup>92</sup> See Brian C. Eades, Case Note, *The United States Supreme Court Goes Color-Blind: Adarand Constructors, Inc. v. Peña*, 29 CREIGHTON L. REV. 771, 802 (1996); Joy Milligan, *Religion and Race: On Duality and Entrenchment*, 87 N.Y.U. L. REV. 393, 399 (2012).

<sup>93</sup> P.P. VIJAYAN, RESERVATION POLICY AND JUDICIAL ACTIVISM 23–33 (Kalpaz Pub. 2006).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 34–40.

<sup>96</sup> *Id.* at 22–23, 34–40, 68–70.

citizens,”<sup>97</sup> thus, the courts are forced to give deference to the state’s creation and implementation of affirmative action programs.

Nonetheless, the Indian Supreme Court stated that while reservations should be adopted to advance underprivileged sections of society, such compensation should not exclude qualified applicants of other communities from admission to educational institutions.<sup>98</sup> The interests of the backward classes had to be arranged in relation to the community as a whole.<sup>99</sup> Consequently, the Supreme Court ruled that reservations for the Other Backward Classes and the Scheduled Castes and Scheduled Tribes, when added together, should total no more than fifty percent of the total positions.<sup>100</sup> Here, the Court based their ruling upon their determination that the objective of Article 15(4) was to advance society as a whole while still promoting the weaker communities.<sup>101</sup>

Furthermore, in 2005, the Indian Supreme Court decided that private education institutions have a constitutional right to be free from government control regarding the reservations system in the absence of legislative authority.<sup>102</sup> In response, Parliament enacted the Ninety-Third Amendment to the Indian Constitution.<sup>103</sup> The Ninety-Third Amendment added Article 15(5) to the Indian Constitution, which authorized the state to create reservations for the advancement of traditionally disadvantaged groups in “private educational institutions, whether aided or unaided by the State.”<sup>104</sup> This amendment further illustrates the way in which the parliament forced the Indian judiciary into a submissive role in the context of India’s affirmative action programs and the government’s reservations scheme.<sup>105</sup>

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<sup>97</sup> INDIA CONST. art. 15, § 4.

<sup>98</sup> *Balaji v. State of Mysore*, A.I.R. 1963 S.C. 649, 663 (holding that the total percentage of reservations permissible under Article 15(4) of the Indian Constitution generally should be less than 50%). *See also* *Rajkumar v. Gulbarga Univ.*, A.I.R. 1990 (Kant.) 320, 332 (following the 50% limit for reservations stated in *Balaji*).

<sup>99</sup> *Balaji*, A.I.R. 1963 S.C. at 660.

<sup>100</sup> *Id.* at 663.

<sup>101</sup> *Id.*

<sup>102</sup> *P.A. Inamdar v. State of Maharashtra*, A.I.R. 2005 S.C. 3226.

<sup>103</sup> *Brown & Sitapati*, *supra* note 13, at 51; Abhishek Singhvi, *India’s Constitution and Individual Rights: Diverse Perspectives*, 41 GEO. WASH. INT’L L. REV. 327, 341 (2009).

<sup>104</sup> INDIA CONST. art. 15, § 5.

<sup>105</sup> *See* Singhvi, *supra* note 103, at 341; Sridharan, *supra* note 16, at 147 (stating that every time the Supreme Court confronted the nexus between caste and class, it concluded that the legislators would have to wrestle with the question, not the courts); Vijayashri Sripati, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950-2000)*,



The following table displays the reservation quota percentage for certain minority or traditionally disadvantaged groups in regards to higher education institutions and public sector employment in India:

**Table 1: Reservations System in India<sup>106</sup>**

<b>Category</b>	<b>Reservation Percentage</b>	<b>Quota</b>
Scheduled Castes (SC)	15%	
Scheduled Tribes (ST)	7.5%	
Other Backwards Classes (OBC)	27%	
Total Percentage of Reservations	49.5%	

*ii. Employment*

In addition to educational institutions, the affirmative action reservations scheme in India is also implemented in the arena of employment due to Article 16 of India's Constitution, which considers matters of equal opportunity in public employment.<sup>107</sup> The Constituent Assembly believed that compensatory discrimination in this field was both a method to strengthen India's underprivileged and a means of preventing upper classes from obstructing the admission of backward classes into government employment.<sup>108</sup> Article 16(1) guarantees the opportunity to be considered for government employment, but does not confer a right to actually obtain such employment.<sup>109</sup> Article 16(2) states specific grounds that may not be the basis of discrimination against

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14 AM. U. INT'L L. REV. 413, 472–73 (1998) (stating that the Constitution of India is not settled as the law of the land and that India's politicians have frequently resorted to tampering with the Constitution rather than reflecting on their own lawmaking).

<sup>106</sup> Jenkins, *supra* note 23, at 756.

<sup>107</sup> INDIA CONST. art. 16, § 1.

<sup>108</sup> Sridharan, *supra* note 16, at 107–08.

<sup>109</sup> See INDIA CONST. art. 16, § 1.

citizens.<sup>110</sup> These include race, caste, sex, descent, place of birth, and residence.<sup>111</sup>

Article 16(4) amplifies Article 16(1) by stating two requirements for an individual to benefit from a reservation scheme: first, the person must be both socially and educationally backward, and, second, his social group must be inadequately represented in government employment.<sup>112</sup> The decision of whether a class is deemed “backward” is determined through an objective analysis conducted by the Backward Classes Commission – a government organization created for the purpose of listing “the socially and educationally backward classes of citizens.”<sup>113</sup> Taken together, Article 14 protects the general right to equality, while Articles 15 and 16 guarantee the same right in favor of disadvantaged groups.<sup>114</sup> Therefore, the same reservation system implemented in educational institutions is also implemented in the public sector workforce.

## V. THE UNITED STATES AND INDIA: A STATISTICAL ANALYSIS OF ADVANCES UNDER AFFIRMATIVE ACTION/RESERVATION SYSTEM

### A. THE UNITED STATES

Although affirmative action is not explicitly provided for in the US Constitution, courts have allowed the implementation of certain affirmative action programs in accordance with the Equal Protection Clause of the Fourteenth Amendment.<sup>115</sup> As a result of these affirmative

<sup>110</sup> *Id.* art. 16, § 2.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* § 4.

<sup>113</sup> Ambedkar, *supra* note 35, at 30. *See also* GALANTER, *supra* note 22, at 154–79 (“At the time of Independence, the term ‘Backward Classes’ had a less fixed and definite reference.”) (noting the following as various denotations of the “Backward Classes”: (1) as a synonym for Depress Classes, untouchables, Scheduled Castes; (2) as comprising the untouchable, aboriginal and hill tribes, criminal tribes, etc.; (3) as comprising all the communities deserving special treatment, namely those listed above and in addition the lower strata of non-touchable communities; (4) as comprising all non-tribal communities deserving special treatment; (5) as comprising all communities deserving special treatment *except* the untouchables; (6) as comprising the lower strata of non-touchable communities; (7) as comprising all communities above the untouchables but below the most “advanced” communities; (8) as comprising the non-touchable communities who were “backward” in comparison to the highest castes; (9) as comprising all communities other than the highest or most advanced; (10) as comprising all persons who met given non-communal tests of backwardness (e.g., low income)).

<sup>114</sup> *See* Ambedkar, *supra* note 35, at 29.

<sup>115</sup> *See supra* text accompanying notes 72–88.

action programs, the representation of minority groups in the public sector workforce and higher education institutions has significantly increased over time.<sup>116</sup>

**Table 2: Employment-Population Ratios of Traditionally Disadvantaged and Underrepresented Minority Groups<sup>117</sup>**

	1995	2000	2005	2010	2012
White	64.1	63.7	63.2	60.1	59.5
African-American	38.8	44.2	48.6	53.1	53.4
Hispanic	41.4	47.9	52.7	54.8	55.4

The table above illustrates that the gap between the employment-population ratio of African Americans and Hispanics and that of the white population is slowly decreasing. The affirmative action programs permitted by the US Supreme Court has fostered equality by providing opportunities to traditionally disadvantaged groups, while carefully ensuring that the rights' of individuals are protected through the careful balancing test between the state's compelling interests and individual rights.<sup>118</sup>

<sup>116</sup> See *infra* note 117 and accompanying table. See *infra* note 119 and accompanying table.

<sup>117</sup> U.S. Census Bureau, Statistical Abstract of the United States: 2012, Table 587: Civilian Labor Force and Participation Rates with Projections: 1980 to 2018 (2012), available at <http://www.census.gov/compendia/statab/2012/tables/12s0586.pdf>.

<sup>118</sup> Brown & Sitapati, *supra* note 13, at 50. See also Jenkins, *supra* note 21, at 784.

**Table 3: Percentage of High School Graduates Enrolled in a Postsecondary Institution<sup>119</sup>**

<b>Race/Ethnicity</b>	<b>1980</b>	<b>1990</b>	<b>2000</b>	<b>2010</b>
White	68.9	79.1	84.9	87.6
African-American	51.2	66.2	78.5	84.1
Hispanic	44.1	50.8	57.1	62.9

Additionally, Table 3 evidences the significant rise in equality that affirmative action has brought traditionally disadvantaged minority groups in the context of higher education institutions. Furthermore, in the United States “[affirmative action] programs helped many Fortune 1,000 companies and other major corporations break the glass ceiling for minorities.”<sup>120</sup>

The statistics illustrate that over time the United States has fostered the advancement of equality through its carefully designed affirmative action programs. The US Constitution’s Equal Protection Clause has made sure that courts balance individual’s rights when determining the constitutionality of certain affirmative action programs.<sup>121</sup> The US Constitution’s lack of explicit allowance for “special provisions” of affirmative action ensures that the affirmative action programs are kept in check by the courts.<sup>122</sup>

## B. INDIA

In India, public sector jobs are divided into four categories: 2.2 percent of the public sector workforce consists of Class I employees, 3.3 percent are Class II employees, 66.8 percent are Class III employees, and

<sup>119</sup> U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, Table 230: Educational Attainment by Race, Hispanic Origin, and Sex: 1970 to 2010 (2012), available at <http://www.census.gov/compendia/statab/2012/tables/12s0230.pdf>.

<sup>120</sup> OFFICE OF FED. CONTRACT COMPLIANCE PROGRAMS, *Facts on Executive Order 11246 – Affirmative Action*, U.S. DEP’T LAB. (Jan. 4, 2002), <http://www.dol.gov/ofccp/regs/compliance/aa.htm>.

<sup>121</sup> See Brown & Sitapati, *supra* note 13, at 50; Lillibridge, *supra* note 1, at 1301, 1330, 1332.

<sup>122</sup> See Brown & Sitapati, *supra* note 13, at 50.

lastly, 27.2 percent are Class IV employees.<sup>123</sup> The classes are categorized based on income brackets and job classifications.<sup>124</sup> For instance, Class I, the highest-paid level, includes members of the elite Indian Administrative Service (IAS), the Indian Foreign Service (IFS), the Indian Police Service (IPS), and connected Central Government services.<sup>125</sup> In the next income bracket, Class II employees are officers of the state civil service organizations.<sup>126</sup> Class I and Class II employees are selected through competitive exams and interviews which require candidates to be highly skilled in order to be selected for employment.<sup>127</sup> In contrast, the bottom two job categories, Class III and Class IV, are not as selective and are usually comprised of low-income jobs, such as primary school teachers, drivers, and sweepers.<sup>128</sup> As evidenced by the table below, over time the reservation system has helped to increase the representation of Scheduled Castes in every category of the public sector workforce classes.

**Table 4: Growth of Percentage of Scheduled Caste Employment in the Public Sector Workplace<sup>129</sup>**

<b>Employee Class</b>	<b>1959</b>	<b>1965</b>	<b>1974</b>	<b>1984</b>	<b>1995</b>
<b>I</b>	1.18	1.64	3.20	6.92	10.12
<b>II</b>	2.38	2.82	4.60	10.36	12.67
<b>III</b>	6.95	8.88	10.30	13.98	16.15
<b>IV</b>	17.24	17.75	18.60	20.20	21.26

Unfortunately, this advancement in representation of the Scheduled Caste does not exemplify an advancement of “equality.” India’s reservation system only ensures that certain groups or castes are represented in the workforce arena.<sup>130</sup> It forces public sector employers to set aside a certain number of seats for these traditionally disadvantaged

<sup>123</sup> Ambedkar, *supra* note 35, at 34.

<sup>124</sup> See GALANTER, *supra* note 22, at 88–95, 100–05.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Ambedkar, *supra* note 35, at 35.

<sup>130</sup> Morgan-Foster, *supra* note 30, at 78.

groups, but does not further the true advancement of these groups.<sup>131</sup> Many individuals employed under the reservations do not get promotions at the levels attained by other “non-reservation” individuals.<sup>132</sup> Instead, by allowing for “special provisions,” the Indian Constitution allows a reservation system that inherently breeds discrimination in other categories of employment and education.<sup>133</sup>

## VI. THE UNITED STATES VS. INDIA: WHO’S AFFIRMATIVE ACTION POLICY IS MORE SUCCESSFUL AT PROMOTING EQUALITY AND WHY?

The main difference between affirmative action in the United States and the reservations system in India is that the reservations system is specifically provided for in India’s Constitution while the United States Constitution does not provide for affirmative action.<sup>134</sup> As a result, affirmative action programs in the United States can be strengthened or diminished by court judgments, executive orders, or ballot initiatives.<sup>135</sup> This allows for a system of “checks” on affirmative action programs in the United States, whereas, in India, the reservations system lays largely “unchecked” since it is enshrined in India’s Constitution.<sup>136</sup>

In the 1960s and 1970s, the United States, through a combination of executive orders and legislation, prohibited discrimination on the basis of sex and race in employment and the payment of wages.<sup>137</sup> Studies of the hiring practices and wages of the state and local public sectors have

<sup>131</sup> *Id.* at 87, 105–06.

<sup>132</sup> Ashwini Deshpande, *Affirmative Action in India and the United States*, WORLD BANK OPEN KNOWLEDGE REPOSITORY (Jan. 2005), [https://openknowledge.worldbank.org/bitstream/handle/10986/9038/WDR2006\\_0012.pdf?sequence=1](https://openknowledge.worldbank.org/bitstream/handle/10986/9038/WDR2006_0012.pdf?sequence=1).

<sup>133</sup> Karthik Nagarajan, *Compensatory Discrimination in India Sixty Years After Independence: A Vehicle of Progress or a Tool of Partisan Politics?*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 483, 516–17 (2009).

<sup>134</sup> INDIA CONST. art. 16, § 1; Ginsburg & Merritt, *supra* note 82, at 264–65.

<sup>135</sup> See James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 IOWA L. REV. 901, 919–22 (1985); Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL’Y REV. 1, 53 (2002) (stating that the major action is now on two fronts: judicial decisions and state ballot referenda).

<sup>136</sup> See *supra* notes 52–68 and accompanying text.

<sup>137</sup> Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2012); Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965 Comp.); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

shown the effectiveness of anti-discrimination policies, especially in contrast to the private sector.<sup>138</sup> Since the creation of equal opportunity and affirmative action programs, traditionally disadvantaged minority groups have seen greater opportunities in both employment and higher education institutions.<sup>139</sup> Thus, the United States serves as a model of how to achieve greater equality in educational institutions and the general workplace.

Since the US Constitution does not have specific language allowing the government to make special provisions or reservations for the advancement of minorities without violating the Equal Protection Clause,<sup>140</sup> affirmative action is a policy seen as both a legal right to equality and also a remedy for past discrimination against individuals.<sup>141</sup> In contrast, the Indian Constitution explicitly authorizes reverse discrimination on behalf of backward castes and tribes.<sup>142</sup> Thus, the Indian courts are relieved of the burden of constitutionally justifying affirmative action, but are faced with the problems of implementing it.<sup>143</sup> Here, the focus of the Indian courts turns to determining which individuals fall under the Scheduled Castes, Scheduled Tribes, or Other Backwards Classes category.<sup>144</sup>

The Indian Constitution, however, does not clarify who falls under these special groups.<sup>145</sup> Thus, after much litigation, the state determined that the reservations system applies to the certain groups that are found to be “backward” according to a legally reviewable standard.<sup>146</sup> These groups are then placed on a governmentally approved list of groups that are privileged to the mechanisms available under the

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<sup>138</sup> Leadership Conference on Civil Rights Educ. Fund, Ams. for a Fair Chance, *Frequently Asked Questions About Affirmative Action*, CIVILRIGHTS.ORG, [http://www.civilrights.org/equal-opportunity/fact-sheets/fact\\_sheet\\_packet.pdf](http://www.civilrights.org/equal-opportunity/fact-sheets/fact_sheet_packet.pdf) (last visited Apr. 13, 2014).

<sup>139</sup> *Id.*

<sup>140</sup> See *supra* notes 69–92 and accompanying text.

<sup>141</sup> See Schuck, *supra* note 135, at 22, 28.

<sup>142</sup> INDIA CONST. art. 16, § 4.

<sup>143</sup> See *id.*

<sup>144</sup> See Lance Liebman, *Equalities Real and Ideal: Affirmative Action in Indian Law*, 98 HARV. L. REV. 1679, 1684–85 (1985) (reviewing MARC GALANTER, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA* (1984)); Jenkins, *supra* note 21, at 760–62.

<sup>145</sup> See Ambedkar, *supra* note 35, at 30 (stating that the President of India and the Parliament determine the list of groups qualifying as Scheduled Castes, Scheduled Tribes, and “backward classes,” not the constitution).

<sup>146</sup> Robert Meister, *Discrimination Law Through the Looking Glass*, 1985 WIS. L. REV. 937, 962–63 (1985) (reviewing MARC GALANTER, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA* (1984)).

reservations system.<sup>147</sup> As a result, for an individual to be privy to the preferential treatment of the reservations system, the individual must be a member of a group on the governmentally approved list.<sup>148</sup>

Groups or castes approved for the reservations system do not always share an immutable or visible trait; therefore, determining whether an individual belongs to a certain group eligible for reservations is a difficult and controversial issue. The state has attempted to address this issue by looking towards the purpose of the reservations system when determining whether an individual is a member of a certain caste approved for the reservations system.<sup>149</sup> For instance, the purpose of the reservations system in the legislative arena is to allow the group a means of representation.<sup>150</sup> Therefore, the standard for determining whether a candidate is a member of an approved caste for the purposes of a legislative reservation is whether the candidate would be recognized as a member by the caste itself of which he or she claims to be a member.<sup>151</sup> Although this standard protects the purpose of legislative reservations, it is irrelevant for reservations in the educational context because “it is unlikely that [an] individual’s eligibility will be made to depend upon his acceptability to the relevant communal organization.”<sup>152</sup> The focus on reservations subsequently turns away from its compensatory purpose and instead turns toward defining the very castes and “backwards groups” that the reservations system attempts to eliminate from contemplation.

The Indian Supreme Court explains that “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.”<sup>153</sup> Rather than encouraging a unified society where caste, class, and race are no longer contemplated, this approach instills the recognition of certain groups of individuals as unequal. As a result, the Indian Constitution’s explicit provisions providing for reservations for scheduled classes and backwards classes enforce the unequal and inferior social status of these groups.

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<sup>147</sup> *Id.* at 961.

<sup>148</sup> *Id.*

<sup>149</sup> *See id.* at 963.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Scott Grinsell, *Caste and the Problem of Social Reform in Indian Equality Law*, 35 YALE J. INT’L L. 199, 227–28 (2010) (quoting A.I.R 1976 S.C. 490, 516 (opinion of Mathew, J.)).



In stark contrast, the constitutional salience of race in the US Constitution enforces that it is “wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups.”<sup>154</sup> Consistent with this approach, the US Supreme Court has noted that

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.<sup>155</sup>

The US Constitution sets itself apart from the Indian Constitution by its absence of provisions allowing for the use of racial categories and quotas to apportion entitlement of historically oppressed groups. Thus, the language of the US Constitution’s Equal Protection Clause protects the rights of individuals, not the rights of groups,<sup>156</sup> and displays that “the way to stop discrimination on the basis of race, is to stop discriminating on the basis of race.”<sup>157</sup> Additionally, the US Supreme Court has claimed that the US Constitution is “color-blind,”<sup>158</sup> whereas the Indian Supreme Court has noted that “the Constitution of India is not caste-blind.”<sup>159</sup>

Ultimately, it is the caste-conscious nature of India’s Constitution which continues to hinder India’s attempts of promoting equality. Ironically, the constitution’s class consciousness fosters inequality by recognizing certain groups as inferior and in need of special mechanisms of reservations because they are unequal. As long as India’s Constitution recognizes special rights for certain groups India will not be able to become a unified society where caste, class, or race are no longer contemplated and used as means for discrimination.

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<sup>154</sup> Id. at 227 (quoting Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472–73 (2004)).

<sup>155</sup> Id. at 228 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505–06 (1989)).

<sup>156</sup> Brown & Sitapati, *supra* note 13, at 52.

<sup>157</sup> Grinsell, *supra* note 153, at 228 (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2792 (2007) (Roberts, C.J.)).

<sup>158</sup> Id. at 227 (citing *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

<sup>159</sup> Id. (quoting *E.V. Chinnaiah v. State of Andhra Pradesh*, (2005) 1 S.C.C. 394, 426).

## VII. CONCLUSION

Since the reservation system is enshrined in India's Constitution, it cannot be legally challenged and is practically irrevocable. Therefore, the reservation system may threaten India's system of democracy. The only way to revoke or change the current reservation systems in India would be to repeal the provisions in the current Indian Constitution which give the government the unbridled authority to implement any kind of special provisions of preferential treatment.

Contrarily, the US Constitution only provides for "equal protection of the laws" to all citizens, therefore, any affirmative action program in the United States can be legally challenged and revoked by many avenues open to the population.<sup>160</sup> For example, an individual can challenge an affirmative action program by filing a lawsuit and bringing the issue in front of a court.<sup>161</sup> Moreover, individuals against affirmative action programs can petition for a ballot initiative and effectively eliminate affirmative action in their state through a majority vote.<sup>162</sup> The language of the US Constitution's Equal Protection Clause protects not only the rights of individuals, but also the system of democracy. Conversely, because the Constitution of India allows for special provisions of entitlement for certain groups, India's reservations system is virtually indestructible and hinders not only individual and societal equality, but also the nation's democratic system.

To effectively promote equality, India should adopt the "color-blind" concept of the US Constitution by amending India's Constitution to eliminate the special provisions that allow for the use of caste categorizations and quotas to apportion entitlement of historically oppressed groups. Although India's Constitution attempts to foster equality, the constitutional language that provides for special provisions for certain groups actually serves as a serious impediment to equality. Once India's Constitution is free of provisions allowing for distinctions based on caste, class, or race, these traits will no longer be contemplated or discriminated against in society. As a result, to foster equality throughout India it is imperative that the articles of India's Constitution

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<sup>160</sup> Keith J. Bybee, *The Political Significance of Legal Ambiguity: The Case of Affirmative Action*, 34 *LAW & SOC'Y REV.* 263 (2000).

<sup>161</sup> See Jones, *supra* note 135, at 919–22; Raphael Rajendra, "The People" and "The People": Disaggregating Citizen Lawmaking from Popular Constitutionalism, 27 *LAW & INEQ.* 53, 53 (2009); *id.* at 273.

<sup>162</sup> Rajendra, *supra* note 161, at 53.

*Vol. 32, No. 1      India's Attempt to Promote Equality* 221

dealing with the fundamental rights of equality are amended to model the Equal Protection Clause of the Fourteenth Amendment of the US Constitution.