CHAPTER 40

RESERVATIONS

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I. Introduction

Few debates excite as much passion in India as those on reservations.1 Alongside land redistribution and judicial independence, reservation policies have seen the most tussles between the courts and legislatures. These disputes can veer between two extremes. They either invoke abstract ideals that obscure the fact that reservations are concrete policy that have reshaped the public sphere, or they focus on the minutiae without a larger constitutional narrative. In contrast, this chapter surveys the constitutional provisions, cases, legislation, and parliamentary debates on reservations in a way that provides both intricate detail and the larger visions that animate a ‘branch of Indian constitutional law [that] was built from scratch . . . with little guidance or borrowing from abroad’.2 This chapter is, accordingly, divided into four components: ‘who’ benefits; ‘where’ do reservations extend; ‘how’ do they work in practice; and finally, ‘why’ are reservations required?

II. Who

The Indian Constitution recognises three main beneficiary groups of reservation policy: Scheduled Castes (SCs), Scheduled Tribes (STs), and a third group termed ‘Other’ Backward Classes (OBCs). This section analyses the legal construction of these categories, the attempts at better targeting, and some other beneficiary groups recognised in the Constitution.

1 ‘Affirmative action’ is not a phrase used in India, nor is it particularly helpful in explaining the scale and nature of schemes. The Constitution uses the phrase ‘special provision’, and some use the phrase ‘compensatory discrimination’ or ‘preferential treatment’. Indian newspapers simply use ‘reservations’ or ‘quotas’, though affirmative action in India extends beyond quotas. For simplicity alone, I use the phrase ‘reservations’ in this chapter.
1. Scheduled Castes and Tribes

The original beneficiaries of reservations under the Indian Constitution are SCs and STs. SCs were first mentioned in British India's Government of India Act 1935, and were provided benefits by the British colonial government and some Princely States. In independent India, SCs and STs are explicitly mentioned in twelve separate Articles of the Indian Constitution.

SCs number 16.6 per cent of the population, and include 1,206 main castes that were considered untouchable within the stratified Hindu caste system. These castes have at different points in history been referred to as ‘Depressed Classes’ and ‘Harijan’, and are currently referred to as ‘Dalits’. There is much scholarship on Dalits as a social and political category. But Scheduled Caste is a legal category of reservation beneficiaries, and only those Dalits who are Hindu, Sikh, or neo-Buddhist are considered Scheduled Caste; Christian and Muslim Dalits do not qualify. The Supreme Court is yet to decide on the constitutionality of this exclusion. STs, on the other hand, consist of 701 tribes and constitute 8.6 per cent of India’s population. They have been referred to in various Supreme Court judgments as ‘adivasi’ and ‘girijans’, and are present mainly in central, southern, and northeastern India. Unlike SCs, STs can be of any religion.

The Constitution grants the power to the Union executive to define castes and tribes as SC or ST. The Supreme Court has held that this power is not subject to judicial review. The central executive has exercised its power to revise the SC and ST list by adding multiple castes and tribes over the years, but there have been few, if any, occasions where a caste or tribe has ever been removed from the list. Since the Constitution and case law unambiguously recognise SCs and STs as a legal category, and since they have distinct social identities, their categorisation has proved less controversial.

2. Other Backward Classes

More controversial is the third category to benefit from reservations. Since SCs and STs were originally thought of as ‘Backward Classes’, this third group is referred to as ‘Other’
Backward Classes or OBCs. Unlike SCs and STs, OBCs are not a distinct social group. A simple way to think of them is as middle castes within (mainly) Hinduism, in between upper castes and SCs. Some of these castes are numerically large and control agricultural land, and are thus politically dominant, but they are under-represented in higher education and the professions.

There is much confusion about the social location of OBCs, given that, by one estimate, they number 52 per cent of the Indian population, and sociologists have argued that they consist of socially and economically heterogeneous castes. This chapter avoids these social nuances, focusing instead on four constitutional nuances regarding OBCs. First, they have different meanings in different sections of the Constitution. Secondly, different States and the Centre identify different caste groups as ‘backward’. Thirdly, the definition of ‘backward’—particularly the use of caste as the sole criterion—is heavily debated. And fourthly, there is confusion over empirical data on the nature and number of caste groups considered OBCs. We explore these four nuances in the paragraphs below.

a. Provisions Use Term Differently

OBCs are defined by different phrases in different parts of the Constitution. Article 15(4) refers to special provisions for ‘Socially and Educationally Backward Classes’, while Article 16(4) refers merely to ‘Backward Classes’. Some court decisions have held this to be an immaterial difference, while others have stressed that Article 15(4) specifically refers to ‘educational’ backwardness while Article 16(4) is only concerned with ‘social’ backwardness. Besides, some have argued that a backward class under Article 15 (education) could well be a numerical majority, but Article 16 (employment) requires inadequate representation. In practice, however, government policy has treated these different phrases the same, evolving a single criterion for Backward Classes for the purposes of education and employment.

b. Different Central and State Lists

The second nuance is that unlike SCs/STs, Union and State governments define OBCs differently. The Union List, to which the phrase OBCs typically refers, applies to Union employment and education. But ‘other’ backward classes can also be defined by the States for the purposes of reservations in State education and employment. There are plenty of caste groups that are backward class in one State, but not in another State, nor according to the Union government. These different lists were also drawn up at different times. Southern States such as Tamil Nadu pushed for State backward class reservations in their own States in the 1950s. But it was only in 1991 that reservations for ‘other backward classes’ were implemented in

17 The best research on the social condition of the backward classes is by the sociologist Andre Beteille. See eg, the dated but conceptually superb book Andre Beteille, The Backward Classes in Contemporary India (Oxford University Press 1992).
20 This provides the political context to the case State of Madras v Champakam Dorairajan AIR 1951 SC 226, which led to the First Amendment to the Constitution—developments we discuss later in this chapter.
Union employment. The courts have held that these Union and State Lists are not permanent and need to be constantly revised, though in practice this is far from the case.

c. Caste as Sole Definition

The third—and critical—nuance on OBCs is the centrality of caste in defining a group as backward. The legal situation today is that the Union and State Governments have defined ‘backward class’ solely in terms of caste. The Constitution does not mandate this, but the question to the Court has always been whether the Constitution enables this. While the Supreme Court has ultimately endorsed these caste-based definitions as constitutional, judicial confusion stems from judges emphasising different criteria, sometimes even within the same judgment. From amidst this confusion, three judicial ‘standards’ on the use of caste in defining ‘backward classes’ have emerged. I categorise these standards as ‘relevant’, ‘sole’, or ‘dominant’. The first judicial standard, exemplified by the MR Balaji case, has been to hold that caste could not be the sole or dominant criterion, but that caste could be a ‘relevant’ factor in determining backwardness. This was because ‘social backwardness is in the ultimate analysis the result of poverty to a very large extent’. This judicial standard was more likely to invalidate reservation policies, but soon gave way to a second judicial standard, exemplified by the NM Thomas case. The majority judgment in this case held that caste could be used as the sole criterion to identify a backward class. A third standard, the current one, is typified by the majority judgment in Indra Sawhney and all five judges in Ashoka Kumar Thakur. This standard is that while caste cannot be the sole criterion in determining backward classes, it can be used, even as the dominant criterion. As the majority judgment in Indra Sawhney put it, ‘a caste can be and often is a social class in India’. Since Indra Sawhney, the most important Court judgment on reservations in India, will reappear many times in this chapter, it is perhaps useful to lay out its structure. Nine judges heard the case, seven of whom authored separate judgments. The majority judgment is thus not obvious, but there is generally a divide between the six judges who held that caste could form the basis for assessing backwardness—what I term the ‘dominant’ standard—and the three-judge minority which argued that economic criteria alone should be the measure of backwardness. Jeevan Reddy J’s judgment is generally considered the leading judgment within the majority, and this chapter—and indeed later Supreme Court judgments—relies on this judgment. The Indra Sawhney standard, though it stresses factors other than caste, has had the effect of permitting all caste-based definitions of backward class in government policy.

d. Data on Who are the OBCs

A final debate is data on OBCs: the actual state of backwardness of these castes, and their numerical percentage. The Constitution enables the Central executive to appoint

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21 See eg, Indra Sawhney (n 19) [847] (Jeevan Reddy J); Jagdish Negi v State of Uttar Pradesh (1997) 7 SCC 203.
24 MR Balaji (n 23) [23].
26 NM Thomas (n 25).
27 Indra Sawhney (n 19) (Jeevan Reddy J).
29 Indra Sawhney (n 19) [859 (3)(a)], referring to [746]–[779] (Jeevan Reddy J).
a ‘commission to investigate the conditions of backward classes’. The government has appointed two commissions thus far, neither of which gathered any new data on the number and socio-economic conditions of OBCs. The most famous of these was the Mandal Commission, which used data from the 1931 census. It is this extrapolated data that forms the basis for the OBC reservation policy of the Union government. This use of 1931 census data to determine twenty-first-century policy has been heavily criticised. However, supporters justify its use, arguing that even if the OBC percentage is not 52 per cent—as the Mandal Commission claims—it is surely more than 27 per cent, which is the extent of OBC quota. A recent attempt at data collection was in the aftermath of the Union government’s decision to extend OBC reservations in Union education institutions in the mid-2000s. In this instance too, the Supreme Court asked for better data, yet upheld the government policy for which better data was required. The one recent exception to this judicial deference, despite poor data, concerns OBC reservations for Jats. Jats are a socially and politically (though not educationally) powerful landed caste in northern India. In 2014, the Union Government, in the face of intense political lobbying, notified Jats as ‘OBCs’ in nine states, despite a contrary recommendation from the National Commission for Backward Classes (NCBC). In response, the Supreme Court struck down the government notification, terming the original NCBC recommendation ‘adequately supported by good and acceptable reasons’. The Court reiterated that outdated statistics could not be used to establish backwardness, as there was a presumption of general advancement over time. The Court also emphasised that the government should be alive to new kinds of backwardness—such as of transgenders—rather than just focusing on older forms of disadvantage. Regardless of which side of the reservation debate you take, it is striking that the government has promulgated such profound policies with so little updated information.

3. Targeting Techniques: List Revision, Creamy Layer and Sub-Classification

The 2011 Indian census categorised 1,206 castes as SCs and 701 tribes as Scheduled Tribes. Together they constitute 25.2 per cent of the population. This wide range of groups and individuals means that some are less ‘backward’ than others, whether on income, education, land access, representation in the public sphere, or social status. As a result, some castes and the wealthy within each caste disproportionately corner benefits. The few empirical studies there are confirm this. Both opponents and proponents of reservations accept this as a legitimate concern, but are divided over solutions. Some of these solutions, present in case law and scholarly debate, are: to declassify castes and tribes disproportionately benefiting from reservations; to exclude wealthy (creamy layer) individuals within these groups from benefits; and to create sub-quotas for especially disadvantaged groups within the quota. These are examined below.

32 As we see later, one exception to this general judicial attitude is in the case of reservations in promotion, where the Court has insisted on empirical data.
34 Galanter (n 2).
a. **List Revision**

The first technique is to remove castes or tribes that have disproportionately benefited from the SC, ST, or OBC lists. Several Supreme Court judgments refer to this. In practice, there are few, if any, castes or tribes that have been removed completely from this list. On the other hand, the lists have been frequently amended to add castes and groups. While the Supreme Court has not questioned this policy, it is slowly being challenged in politics. Caste or tribe groups that are already benefiting from quotas fear that new additions will deny their group members reserved seats. Conflicts such as these will intensify over the coming years. But their mediation is likely to be through electoral politics, not through the courts.

b. **Sub-classification**

The second way is through sub-classification, what is colloquially called ‘quota within quotas’. This is to ensure that, in the words of the Supreme Court, ‘one or two such classes do not eat up the entire quota leaving the other backward classes high and dry’. The Supreme Court has held that neither the State nor the Court can sub-classify within the SC/ST list. On the other hand, the Court has permitted, even encouraged, sub-classification of OBCs on the basis of ‘social backwardness’. Several State governments, such as Andhra Pradesh and Tamil Nadu, do this. Politically, the demand for sub-classification has picked up, and is part of the basic logic of reservations in India. Some State governments sub-classify, others provide additional benefits to the ‘most backward’ amongst the OBC castes, and some have even attempted schemes for the more backward among SCs. In the coming years, this will be a significant issue, but will be driven more by electoral politics than by judicial construction.

c. **Creamy Layer**

A third technique to exclude the better off from reservation benefits is the concept of the ‘creamy layer’. The phrase was first used in the *NM Thomas* judgment, and describes those individuals within the backward classes who are themselves advanced. Unlike list revision and sub-quota, this targets individual—not group—beneficiaries. In the *Indra Sawhney* case, the Supreme Court held that this creamy layer should be excluded from the benefits of reservation, since ‘After excluding them alone, would the class be a compact class. In fact, such exclusion benefits the truly backward.’ The courts have not provided a clear definition of ‘creamy layer’, but have struck down government definitions for being unreasonably high or absent, since creamy layer exclusion is a necessary part of the principles of equality articulated in Articles 14 and 16. One uncertainty over the creamy layer doctrine is whether it applies only to OBCs, or to SCs and STs also. A five-judge bench in the *Nagaraj* case—dealing with SC/ST quotas—had stated that the creamy layer concept was part of the

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37 *Indra Sawhney* (n 19) [797] (Jeevan Reddy J).
38 *Indra Sawhney* (n 19) [792] (Jeevan Reddy J).
39 Jeevan Reddy J in *Indra Sawhney* provided one clear example of creamy layer exclusion: if the candidate’s parents were grade A (eg, IAS, IPS) officers in the All-India Services. *Indra Sawhney* (n 19) [792] (Jeevan Reddy J).
constitutional principle of equality. But a later Court in *Ashoka Kumar Thakur* has held that the creamy layer does not apply to SCs and STs.\(^{41}\)

### 4. Other Beneficiaries

Apart from reservations for SCs, STs, and OBCs, the Constitution also permits reservations for other groups, such as women. Another category is reservations for religious groups, but this remains constitutionally contested. These categories are only illustrative; the State can make special provisions for those not specifically mentioned, where there is ‘reasonable classification’. Reservations for women and religious groups (ie, Muslims) are described below.

#### a. Women

Article 15(3) of the Constitution permits the State to make ‘special provision’ for women (and children). The Supreme Court has interpreted this Article to allow for all forms of affirmative action for women, including reservations.\(^{42}\) In practice, the government has chosen to enact reservations for women in very few instances. This is perhaps because gender is not as salient a political identity as caste is in India—despite women numbering 48 per cent of the population. An exception to this political disinterest despite judicial assent is the Women’s Reservation Bill, which mandates 33 per cent reservations for women in the Lok Sabha and in State legislative assemblies (with a sub-quota for women within the SC/ST quota).\(^{43}\) The Bill has since lapsed.

#### b. Muslims and Other Religious Groups

While reservation beneficiaries have been defined by the government—and permitted by the courts—to be solely on the basis of caste, reservations based solely on religion have faced judicial resistance. Reservations already extend to some members of non-Hindu religions. For instance, several State governments classify some Muslim sub-groups as ‘backward castes’ and as such eligible for reservations—the argument being that caste hierarchies extend beyond Hinduism to other religions in India.\(^{44}\) The courts have generally upheld the principle of OBC sub-quotas for some ‘backward’ Muslim groups, though they have quashed specific policies on technical grounds.\(^{45}\) More controversial are quotas solely based on religion. The constitutional founders were well aware that special provisions for Muslims such as separate electorates were precursors to the division of India. Yet, post-Independence, some

\(^{41}\) *Ashoka Kumar Thakur* (n 28) (KG Balakrishnan CJ).


\(^{43}\) Constitution (One-hundred-and-eighth Amendment) Bill 2008.

\(^{44}\) Muslims benefit from affirmative action mainly as ‘backward castes’, and in rare cases, as STs, but never as SCs.

\(^{45}\) In *T Muralidhar Rao v State of Andhra Pradesh* (2010) 2 ALD 492, a seven-judge bench of the Andhra Pradesh High Court struck down a State OBC sub-quota for some Muslim groups on the grounds that there was no proper empirical investigation, and such an investigation should investigate ‘backwardness’ among all religions (and not Islam alone). However, in *Sanjeet Shukla v State of Maharashtra* (2015) 2 Bom CR 267, the Bombay High Court has permitted 5% quotas in Maharashtra State owned or aided higher education for fifty Muslim sub-castes on the grounds that data shows that they are educationally under-represented.
State governments have sought reservations for all Muslims. This is partly driven by the electoral need for Muslim votes. But it is also driven by the fact that Muslims—as a whole—are under-represented in government services, and have worse socio-economic indices compared to even Scheduled Castes and Tribes (who are beneficiaries of reservations). The courts have generally opposed these attempts at reservations for all Muslims. The Andhra Pradesh High Court has repeatedly held them to be unconstitutional, and the Supreme Court has not quashed this. Unlike caste-based reservations—for which there is broad political consensus—religion-based reservations are politically disputed, with several parties—notably the BJP—opposing it. This makes it a key political and legal debate in the years to come.

III. Where

1. Public (State) Education

Article 46 of the Indian Constitution directs the State to promote with 'special care the educational and economic interests of the weaker sections of the people', including SCs and STs. But this is a non-enforceable directive principle, and the constitutional provision from which the State has derived the power to mandate reservations in education is Article 15(4), and now (5). Article 15(4) permits 'special provision' for SCs, STs, and 'socially and educationally backward classes'. Though the clause does not explicitly mention public education, this has been interpreted to constitutionally protect reservations in public education from the equality clauses of Articles 15(1) and 29(2). Clause (4) of Article 15 was not part of the original Constitution, but was inserted as part of the First Amendment to the Indian Constitution in 1951. This amendment was in response to the Supreme Court judgment in State of Madras v Champakam Dorairajan, where a seven-judge bench of the Supreme Court invalidated the 'communal order' of the Madras State, reserving seats for various caste groups in State educational institutions. The Madras State justified the order on the basis of Article 46, a Directive Principle of State Policy. Speaking for the Court, Das J held that a non-enforceable directive could not override a fundamental right. He also held that the framers had specifically provided for affirmative action in public employment through clause (4) to Article 16, but had omitted this from Articles 15 and 29. ‘It may well be’ , he reasoned, ‘that the intention of the Constitution was not to introduce at all communal considerations in matters of admission into any educational institution maintained by the State or receiving aid out of state funds.’ Parliament’s response, through the First Amendment, was to invalidate this judgment and permit reservations in public education for SC, STs, and ‘socially and educationally backward classes’.

Since then, the principle of reservations in education for these three groups has been judicially accepted. This general constitutional allowance is subject to three caveats. First, reservations do not apply to minority educational institutions. Secondly, the Court has sought...
to limit reservations in superspecialty education. Thirdly, the extension of reservations in public education has been gradual: from the States to the Centre, from SC/STs to OBCs, and from higher education to schools. Let us explore these caveats below.

a. **Minority Institutions**

Parliament has chosen not to apply reservations to educational institutions established by linguistic or religious minorities. These minority educational institutions enjoy special autonomy under Article 30 of the Indian Constitution. Various Supreme Court decisions have interpreted this autonomy to include administration, fees, curriculum, and internal quotas. These are not available to other non-minority institutions. While amending the Constitution to permit reservations in aided and unaided educational institutions, Parliament has exempted minority educational institutions from reservations.

b. **Superspecialty Posts**

The Court has opposed reservations in superspecialty posts (higher medical degrees, for example). The reason for this is that superspecialty posts are more vital for the requirements of ‘efficiency’ under Article 335. A recent five-judge bench of the Court reiterated this view, and in 2014, another five-judge bench chose to withstand executive pressure and declined to review that judgment. This might well be one of the few instances where the courts have stood up to State pressure.

c. **Gradual Extension**

Reservations in public education have come to be extended in three ways: from the States to the Centre, from SC/STs to OBCs, and from higher education to primary education. Reservations for SCs and STs have existed since the enactment of the Constitution, that is, 1950. Reservations for ‘backward classes’ began in some States— notably the southern States— in the 1950s, and was instituted by some northern Indian States by the 1980s. In 2005, the Union executive extended quotas for OBCs to Union government educational institutions— such at the Indian Institutes of Technology. This has been held to be constitutionally valid by the courts. A final extension of reservations in education has been from higher education to schools, as we discuss later in this chapter.

2. **Public (State) Employment**

For much of the time since Indian Independence, a small private sector and diminishing returns on land made public employment one of the few ways of social mobility. Even

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50 See Vivek Reddy, ‘Minority Educational Institutions (chapter 51, this volume).
51 Reddy (n 50).
52 Ninety-third Amendment to the Constitution (2005) introducing clause 5 to art 15.
53 See eg, Dr Jagadish Saran v Union of India (1980) 2 SCC 768; Dr Pradeep Jain v Union of India (1984) 3 SCC 654; Indra Sawhney (n 19).
54 Faculty Association of AIIMS v Union of India (2013) 11 SCC 260.
55 Ashoka Kumar Thakur (n 28).
today, government salaries—especially at the lower end—are much higher than their private equivalent. Constitutional protections for government employees also make them hard to fire, providing job stability, which is rare in other forms of employment. These factors have made public employment a prized object of redistributive politics in democratic India.

The constitutional provisions allowing for reservations in public employment are Articles 16(4) for SCs, STs, and ‘Backward Classes’, and 335 for only SCs and STs. Unlike Article 15(4)—which has been inserted later to permit reservations in education—Article 16(4) was part of the original Constitution of India. So was Article 335, which permits reservations for SCs and STs, and Article 15(3), which has been interpreted by the courts to permit reservations for women in employment. It is important to note that these are enabling provisions, conferring discretionary power on the State to mandate a variety of measures. In practice, the State has used this provision to mandate one particular form of affirmative action: reservations. A key judicial debate has been whether Article 16(4), which permits reservations in public employment, is an exception to Article 16(1), or merely an illustration of it. As we shall see later in this chapter, this distinction matters in providing logic to numerical limits on quotas.

Studies have shown that reservations in entry-level government jobs have been well implemented, especially in recent times. For instance, a survey of class 1 officers found that 12.4 per cent of all posts were occupied by SC candidates—close to the quota mandate of 15 per cent.

The principle of reservations in public employment is subject to the following caveats. First, the courts have used the limitations of 'efficiency of administration' contemplated in Articles 335 to prohibit reservations in public services that require the 'highest level of intelligence, skill, and excellence'. Secondly, the courts have prohibited reservations for single-post jobs, and thirdly, the courts have limited reservations in the judiciary. Regarding the lower judiciary, the Supreme Court has held that this must be done in consultation with the High Court, and the power of the government to mandate reservations in the higher judiciary is limited by various provisions and case law that safeguard the independence of the judiciary. This is unlikely to change in the coming years, though political pressure for a more 'representative' judiciary may well see the judge's caste being an informal factor in judicial appointments.

These caveats are puzzling. Since all jobs in public employment, by definition, are offices of public trust that mould multitudes, why should efficiency matter in some posts and not in others? A judge, for instance, no more requires 'efficiency in administration' than, say, a bureaucrat in charge of a district. Proponents of reservations use this inconsistency to argue that reservations should extend to every sphere of public employment. But another conclusion is that this doctrinal inconsistency typifies the judicial approach to reservations policy.

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57 Deshpande (n 56) 7–8.
58 Indra Sawhney (n 19) [840] (Jeevan Reddy J). The Court has provided examples (which are not exhaustive) of such jobs such as defence services, superspeciality in medicine and pilots.
3. Private Sector

Reservations in the private sector are one of the most contested political issues in India. Economic reforms since the 1990s have led to a growing number of jobs in the private sector, while government jobs have stagnated in terms of number and income. Private schooling and higher education has also boomed, with several studies showing that it has outstripped State-funded education in both quantity and quality. This has led political parties and other proponents to argue for reservations in all parts of the private sector. Given below is the legal architecture—recent in origin—to deal with reservations in private colleges, schools, and employment.

a. Private Colleges

The Supreme Court had initially held that mandating reservations in private colleges was unconstitutional. This was enunciated by an eleven-judge bench in *TMA Pai Foundation v State of Karnataka* in 2002, and clarified by a five-judge bench in *Islamic Academy of Education v State of Karnataka* and by a seven-judge bench in *PA Inamdar v State of Maharashtra*. In *PA Inamdar*, the Court held that ‘the imposition of quota seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions’. The Court held that this was a violation of the private institutions’ ‘right to occupation’ protected under Article 19(1)(g) of the Constitution, and reservations were not a reasonable restriction within the meaning of Article 19(6). Parliament responded with the Ninety-third Amendment to the Constitution, introducing clause (5) to Article 15. Among other things, this clause constitutionally enables the State to mandate reservations in private educational institutions, effectively overriding the *PA Inamdar* judgment. However, this clause does not apply to minority educational institutions, which are protected by Article 30(1) of the Constitution. As legal scholar Rajeev Dhavan demonstrates in his study of the legislative passage of this amendment, no party objected to this effective nationalisation of the private educational sector, the only objections being to exemptions for minority institutions. In a subsequent Supreme Court judgment, the *Ashoka Kumar Thakur* case, four out of the five judges left the issue open as to whether the part of clause (5) that enabled reservations in private educational institutions was constitutionally valid, while one judge clearly held that such a provision violated the basic structure of the Constitution. However, a recent judgment of a five-judge bench of the Supreme Court has ended this ambiguity by holding Article 15(5) in its entirety to be valid and not a violation of the basic structure of the Constitution.

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60 (2002) 8 SCC 481.
63 PA Inamdar (n 62) [125].
65 The five-judge bench in this case provided four separate judgments. In order to prevent confusion, they also signed a separate, short order, which states this.
66 *Ashoka Kumar Thakur* (n 28) [636] (Dalveer Bhandari J).
b. Private Schools

Reservations in private schools is a recent phenomenon. The Right of Children to Free and Compulsory Education Act 2009 mandates 25 per cent reservations for weaker sections and disadvantaged groups in private unaided schools.68 Its validity was questioned before a three-judge bench of the Supreme Court. In response, the two-judge majority upheld the validity of the Act and its application to unaided private schools—though all three judges had held it inapplicable to unaided minority educational schools that were protected under Article 30(1) of the Constitution.69 The constitutionality of the enabling amendment (Article 21A)—especially its application to private unaided educational institutions—was once again challenged before a five-judge bench of the Supreme Court as being a violation of the private educational institutions' fundamental right under Article 19(1)(g).70 In response, the Court upheld Article 21A, holding that:

[S]o long as such law forces admission of children of poorer, weaker and backward sections of the society to a small percentage of the seats in private educational institutions to achieve the constitutional goals of equality of opportunity and social justice set out in the Preamble of the Constitution, such a law would not be destructive of the right of the private unaided educational institutions under Article 19(1)(g) of the Constitution.71

c. Private Employment

Political parties have long advocated reservations in private employment. But there is currently no constitutional provision that allows for it, no Supreme Court judgment on the subject, and no government Bill pending. Proponents see this as the logical culmination of India's extensive reservation policy. They argue that, with the economic reforms of the 1990s, it is the private sector that has seen the biggest growth in jobs, while government jobs (for which there are reservations) has shrunk. They also point to studies suggesting that private sector employers discriminate on the basis of caste while selecting employees.72 To pre-empt this move, some industry groups have accepted forms of 'voluntary affirmative action', and some companies have showcased schemes to provide special training to candidates from disadvantaged groups to help them in private employment. Opponents of reservations in the private sector, on the other hand, argue that there is no systematic caste discrimination in the profit-driven private sector.73 More crucially, they argue, such a move would hurt the economy—driven, as it is, by private sector growth—and the global competitiveness of Indian industry. This last factor is likely to play an important role, in the near future, in preventing the State from mandating reservations in the private sector.

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68 Right of Children to Free and Compulsory Education Act 2009, s 12(1)(c).
70 Pramati Educational Trust (n 67).
71 Pramati Educational Trust (n 67) [51].
4. Legislature

Articles 330, 332, and 334 enable reservations of seats in the Union and State legislatures for SCs and STs. This has happened in the Lok Sabha and in legislative assemblies in direct proportion to the population of SCs and STs. In the current (sixteenth) Lok Sabha, for instance, out of a total of 543 seats, 79 have been reserved for SCs and 41 for STs. This is, of course, in addition to non-reserved seats, which SCs and STs can also contest. Constituencies are chosen as reserved if they have a relatively large proportion of SCs or STs. The Seventy-third Amendment to the Constitution also provides for reservations in local representative bodies such as panchayats and municipalities for SCs, STs, women, and OBCs. Apart from reservations of seats, SC and ST candidates also enjoy other benefits, for instance lower election deposits.

This general description needs four qualifications. First, this idea was extensively debated in the Constituent Assembly, and it was agreed—and stated in Article 334—that these reservations would be phased out after twenty years. In practice, Article 334 has been repeatedly amended to extend these reservations, and it is unlikely to be discontinued. Secondly, reservations in legislature have helped create a consolidated political block for laws that are perceived to be in the interests of SCs and STs—such as reservations in promotion. This is inevitable; the sixteenth Lok Sabha, for instance, has 120 seats reserved for SCs and STs (from all parties), while the second largest (Congress) party has a mere 44 seats. This is not necessarily a criticism, but merely to point out that representation creates its own reality. Thirdly, OBCs do not have reservations in the Union and State legislature, despite demands for it. However, Articles 243-D(6) and 243-T(6) of the Constitution enable reservations for ‘backward classes’ in local representative bodies. A five-judge bench of the Supreme Court upheld this in 2010. Fourth and finally, while reservations for women do exist in local bodies, there is a move to introduce 33 per cent reservation for women in the national and State legislatures, as we have discussed earlier in this chapter.

IV. How

Perhaps the most controversial aspect of affirmative action is the method it has taken. With some exceptions, affirmative action has taken the form of numerically mandated quotas, extends to both entry-level positions as well as promotions with consequential seniority, and requires no minimum standards for the beneficiary to conform to. While it is generally limited to 50 per cent of all seats, unfilled seats from one year can ‘carry forward’ to the next, even if the total exceeds 50 per cent, and States have avoided this limit by placing legislation in the Ninth Schedule of the Constitution, rendering it immune from judicial review.


1. Entry-level Reservations

The most prominent examples of affirmative action in India are entry-level quotas. Articles 15(4) and (5) have been interpreted to permit entry-level quotas in public and private educational institutions, and Article 16(4) permits entry-level quotas in public employment. As pointed out earlier, there are currently no entry-level quotas in private employment. It is important to note that these constitutional provisions do not use the phrase 'quotas' or 'reservations'. The phrase used in the Constitution is 'special provision'. But the executive and legislature have defined this phrase almost solely in terms of numerically mandated quotas, and the Supreme Court has validated this interpretation.

This general allowance of entry-level quotas in public employment and education is subject to a few caveats. First, as we have seen earlier, the Court has resisted entry-level quotas in certain specialised posts (such as in the defence services). Secondly, the Court has banned entry-level quotas in single posts. Thirdly, the Court has permitted unfilled quota seats from one year to be filled in the next year. This is the ‘carry-forward rule’ that we shall examine later in this chapter. Fourth and critically, the Court has permitted the executive not only to prescribe a general percentage to be filled in each form of employment (say, a percentage of all university faculty), but to prescribe for specific positions (say, a post meant for an administrative law teacher). This is known as the ‘roster’ system, and has led to particularly anomalous consequences.

While the principle of entry-level quotas is by now judicially uncontroversial, the two controversies are on quota limits and relaxation of minimum standards. We discuss these in the next two sub-sections.

2. Quota Limits

Since the debate over quota limits is a key feature of reservations in India, it is important to separate and analyse four different questions. First, what is the 50 per cent rule? Secondly, are ‘carry-forwards’ allowed, and are they subject to the 50 per cent rule? Thirdly, what happens when a reserved category candidate gets a general category seat? And fourthly, what explains why States such as Tamil Nadu have 69 per cent quotas?

a. Fifty Per Cent Rule

The logic of the 50 per cent rule is based on three different visions of the relationship between affirmative action and the equality provisions of the Indian Constitution. The first vision is what I term one of ‘balance’ between competing constitutional principles of formal equality, social justice, and efficiency. This is explained in much detail in the final section of this chapter. One consequence of this vision is to see Article 16(4)—which permits reservations in employment—as being an exception to the formal equality provision of Article 16(1). Since the exception cannot be greater than the rule, reservations could not exceed 50
per cent. This was the vision of the framers of the Constitution such as BR Ambedkar—as the legal scholars HM Seervai76 and Anirudh Prasad77 point out. It was also the vision in early Supreme Court judgments such as *Balaji*.78 A second vision is to see the Constitution as enunciating the principle of substantive equality—a vision I elaborate upon in the final section of this chapter. Under this vision, Article 16(4) is merely an elaboration of 16(1), which includes within it the idea that unequals cannot be treated equally. Seen this way, reservations do not limit the equality provisions of the Constitution, but merely elaborate upon them. Therefore, a 50 per cent limit has no constitutional justification. This second vision is seen in the Supreme Court judgments of *NM Thomas*79 and *ABSK Sangh (Railways)*.80 A third vision, articulated in *Indra Sawhney*, seeks—in a style ubiquitous to Indian jurisprudence—to harmonise these two visions into a third one. In this case, the majority judgment held that Article 16(4) was merely an elaboration of 16(1). But it also held that balancing various provisions of the Constitution meant that total quotas could not cross 50 per cent in any given year. The effect of *Indra Sawhney* has been to reiterate the principle of *NM Thomas* with the consequences of *Balaji*. Since the percentage of central reservations for SCs and STs is 22.5 per cent, this has meant that OBC reservations cannot exceed 27 per cent (bringing the total to 49.5 per cent).

b. Carry-forward

Closely linked to the 50 per cent rule is the debate over ‘carry-forward.’ The phrase applies to reserved seats in an institution that are not filled in a given year. The question is whether these unfilled seats can ‘carry forward’ to the next year as reserved seats in addition to the seats reserved for that year. The issue becomes controversial, since while the seats reserved for a given year might be within the 50 per cent limit mandated by the courts, the additional ‘carry-forward’ reserved seats might push the total seats in a given year to more than 50 per cent. A five-judge bench of the Supreme Court in the *Devadasan* case first debated the issue in 1964.81 A four-judge majority held the very concept of ‘carry-forward’ to be unconstitutional,82 while the sole minority opinion argued that while unfilled seats could ‘carry forward,’ the total number had to be ‘reasonable’ and could not exceed 50 per cent in any given year.83 In a later judgment, *Indra Sawhney*, the Court overruled this majority judgment in *Devadasan* with a ruling that followed instead the logic of the minority view—permitting ‘carry-forwards’ but subjecting them to the 50 per cent rule in any given year.84 But even this balance was deemed insufficiently protective of the interest of the Scheduled Castes and the Scheduled Tribes by Parliament,85 which chose to amend the Constitution for the eighty-first time to permit ‘carry-forwards’ even if the total exceeded 50 per cent.86 The problem, the amending Bill points out, was heightened by the introduction of 27 per cent quotas for OBCs due to the implementation of the Mandal Commission report in 1991. Since the total

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78 MR Balaji (n 23).
79 NM Thomas (n 25).
80 Akhil Bharatiya Soshit Sangh (Railways) v Union of India (1981) 1 SCC 246.
81 T Devadasan v Union of India AIR 1964 SC 179.
82 T Devadasan (n 81) (Mudholkar J).
83 T Devadasan (n 81) (Subba Rao J).
84 Indra Sawhney (n 19) [859] (Jeevan Reddy J).
86 Clause 4B to art 16 was inserted through the Constitution (Eighty-first Amendment) Act 200.
was now close to 50 per cent, it was inevitable that any carry-forward seats would cross the 50 per cent limit. The amending Bill was hardly debated and overwhelmingly voted for in both houses. Interestingly, the only vote against the Bill in the Lok Sabha was by Prakash Ambedkar, an SC leader and grandson of Dr BR Ambedkar, who was worried that SCs and STs were becoming political pawns.

c. General Seats for Reserved Candidates

Another feature of the 50 per cent rule is that SC, ST, or OBC candidates who get seats in the general category are not considered reserved candidates. In practice, this has led to seats for reserved groups—especially OBC candidates who more often make it to the general list—to be expanded, and seats available for individuals from non-reserved groups to be limited. This seems another case of confused adjudication. One justification for reservations is often that the beneficiary group is under-represented. If that is the justification, then it matters not if the beneficiary group is represented in reserved or general seats. A competing justification is the ‘backwardness’ of the caste or tribe. But if individuals from a ‘backward’ group systematically get general category seats, it calls into question whether that particular group should be classified as ‘backward’ in the first place.

d. Ninth Schedule

A final feature of the 50 per cent rule is that some legislation have been considered immune from it. The Supreme Court’s decision in *Indra Sawhney* placed reservations in States like Tamil Nadu, where quotas extend to 69 per cent, in jeopardy. To protect these reservations, Parliament placed the enabling Tamil Nadu State legislation in the Ninth Schedule to the Constitution. Laws placed in the Ninth Schedule were thought to be immune from judicial review, but a recent Supreme Court judgment has held that even laws in the Ninth Schedule are subject to judicial review to ascertain whether they comply with fundamental rights and the basic structure of the Constitution. However, the Supreme Court is yet to apply this judgment to the Tamil Nadu law, and the Court is yet to determine whether other States like Andhra Pradesh and now Maharashtra—that have State quotas that exceed 50 per cent, but that are not in the Ninth Schedule—are constitutionally compliant. These exceptions to so extensively considered a judicial concept leads to the question: have the courts mattered at all in shaping reservations policy?

3. Promotion

Reservations in promotions are one of the most controversial aspects of affirmative action policy in India, and go some way in explaining its underlying rationale. The judiciary has broadly opposed the principle of reservations in promotion. While in the *Rangachari* case, the Court held that the Constitution permitted reservations not only
in entry-level posts but also in promotions, the matter was conclusively decided (or so the Court thought) in *Indra Sawhney*. Here, the Court unambiguously held that reservations in promotions were unconstitutional. The Court gave a five-year deadline to the State to phase out existing policies of promotions in reservation. Three years later (in 1995), Parliament invalidated this judicial decision by inserting clause (4A) to Article 16, in order to permit reservations in promotion. The statement of objects and reasons of the amending Bill states that its purpose was to strike down the *Indra Sawhney* judgment, ‘in view of the commitment of the Government to protect the interests of the Scheduled Castes and Scheduled Tribes’. Like other amendments invalidating judicial decisions on reservations, this one too was not debated with any seriousness in Parliament; the main criticism was that the benefits not be limited to only SCs/STs, but also include OBCs.

In response to this (and other amendments on promotion that we will examine), the Supreme Court, in *Nagaraj*, held these promotion amendments to be valid. But it also held that every particular policy of the State with respect to reservations in promotions would have to pass individual constitutional muster, with each policy requiring the demonstration of backwardness, inadequacy of representation, and maintenance of efficiency. This allowance of judicial review over individual promotion policies has led to courts invalidating particular policies requiring reservations in promotions, while upholding the general principle. In response, a Bill was introduced in the Rajya Sabha in 2012 seeking to invalidate *Nagaraj* and limit judicial review of reservation in promotion policies. This Bill has since lapsed.

a. **Consequential Seniority**

A related issue is whether reservations in promotion would extend to consequential seniority. This matters because promotions in the bureaucracy are made after factoring in the number of years of service. A reserved candidate who is promoted to one post may not be eligible for a second promotion because he may have fewer years of experience than a competing candidate from the general category. The Supreme Court has been divided over the validity of consequential seniority being assumed for reserved candidates. But all its delicate arguments balancing the political push for accelerated seniority with the demands of constitutionalism have been rendered naught by amendment. The Eighty-fifth Amendment to the Constitution expressly sought to overturn judicial decision making in this regard by providing accelerated seniority to promoted reserved candidates without any caveats whatsoever. This was hardly debated in the Lok and Rajya Sabha before being passed with overwhelming vote. As in the case of reservations in promotion, any judicial attempt to balance has come to naught in the face of determined political will.

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92 *Indra Sawhney* (n 19) (Jeevan Reddy J).
93 Constitution (Seventy-seventh Amendment) Act 1995.
95 Dhavan (n 64) 33.
97 Constitution (One-hundred-and-seventeenth Amendment) Bill 2012.
b. Relaxation of Minimum Standards

In *S Vinod Kumar v Union of India*, the Supreme Court had held that relaxation of minimum standards during promotions of reserved candidates was not permissible due to the requirements of efficiency in Article 335 of the Constitution. The judgment followed *Indra Sawhney*, which had also held that ‘lower qualifying marks or lesser level of evaluation’ in matters of promotion was constitutionally impermissible. In response to *S Vinod Kumar*, Parliament amended the Constitution for the eighty-second time, inserting a proviso to Article 335 permitting the State to make ‘any provision’ for SCs and STs for ‘relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts’. As the statement of objects of the amending Bill make clear, this was an explicit response to the judgments of the Supreme Court in *S Vinod Kumar* and *Indra Sawhney*. The Eighty-second Amendment was passed with minimal debate and overwhelming support: the Rajya Sabha passed the Bill 139–nil, while the Lok Sabha passed it 340–nil. In a 2014 judgment, *Rohtas Bhankhar v Union of India*, the Supreme Court has confirmed that relaxation of minimum standards for reservations in promotions is now constitutionally permissible. It not only relied on the Eighty-second (post-*Vinod Kumar*) Amendment, but interpreted the (pre-*Vinod Kumar*) clause (4A) to Article 16 to permit the relaxation of minimum standards for reservations in promotions. In doing so, the Court in *Rohtas Bhankhar* held that *S Vinod Kumar* was *per incuriam* (ie, made without due regard to the law). This is yet another instance where any attempt of the courts to balance various provisions of the Constitution has been overturned by amendment.

c. Organisational Efficiency

The debate over reservations in promotion is a good place to grasp just how unique affirmative action policy in India is. Reservations in promotion are qualitatively different from reservations in entry-level positions. All organisations are structured around hierarchies, of which a prominent factor is the number of years the person has spent in an organisation. This is particularly true in Indian public employment, where it is known for officers to resign if they are superseded (on merit) by an officer from a junior batch. As the sociologist Max Weber has pointed out, this strict hierarchy ironically creates a strong sense of cadre—key to the organisational efficiency that Article 335 mandates. Reservations in promotions have a strong effect on this principle. As many examples presented before the courts have pointed out, reservations in promotion have led to candidates who joined at the same time—and consider each other as equals within the organisation—being treated unequally, with one being promoted over the other solely on the basis of caste. In no organisation in the world would such a principle be justified as promoting efficiency.

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101 Constitution of India 1950, art 335.  102 Dhavan (n 64) 98–102.
4. Other Forms

Reservations in employment and education for SCs, STs, and OBCs are the primary mode of affirmative action in India. But other forms exist. There are reservations in government contracts. Many State governments also provide scholarships, special hostels, and schools for children exclusively from these groups. There are also reservations in the allotment of government land, subsidies, and State-provided goods such as petrol pumps. These examples reiterate just how ubiquitous affirmative action has become in every aspect of public life in India.

V. Why

In trying to explain a constitutional logic for reservations in India, it is important to avoid utopias. The question is not what is the best constitutional model of reservations there should be. It is what is the best description of the constitutional vision of a policy that exists. Put simply, the debate is not over whether the ‘carry-forward’ rule is correct; it is over deciphering the constitutional vision that enables and justifies this rule. This section begins by examining the two competing notions of constitutional equality that are used to explain reservations policy. It ends by providing a different—and in my view more accurate—way of explaining the policy: as the demands of a democratic majority.

1. Balancing Equality, Social Justice, Efficiency

The initial understanding of reservations policy in India was that it balanced the competing constitutional aims of formal equality, social justice, and efficiency. Articles 14, 15(1), 16(1), and 29(2) embodied the general principle of formal equality for every individual. Articles 15(4), 16(4), and 46 pushed for social justice and were exceptions to this general principle, while Article 335 sought to balance social justice with the ‘maintenance of efficiency of administration’. These principles were not a seamless web. As the scholar Anirudh Prasad puts it, any form of protective discrimination would inevitably clash with principles of ‘merit and efficiency’. Reservations policy would thus have to balance these principles, curbing each while preventing one from dominating. This was the vision of the framers of the Constitution during the assembly debates. Some early Supreme Court judgments also justified reservations policies as shaped by this constitutional theory of balance between competing imperatives, for instance holding Article 16(4) to be an exception to 16(1).

The problem with this argument is that the Constitution of 2014 looks very different from the Constitution of 1950. The kind of constitutional balance the framers had in mind has clearly proved inadequate to deal with reservations policy sixty years later. This logic of balance has also been repudiated by other judgments, most clearly in NM Thomas, where

105 Prasad (n 77) 40.
the Court put forward a parallel vision of substantive equality that saw no clash between these competing values. Judicial attempts at balancing have also been erratic and whimsical. As even one of the most sympathetic observers of the Supreme Court, Marc Galanter, puts it: ‘(t)here is a problem not of questionable doctrine but of the absence of doctrine.’ The less sympathetic have been even more critical of judicial arbitrariness in the name of balancing.

But the clearest invalidation of the theory of balance is the role played by Parliament. As we have seen in this chapter, reservations have been shaped by the legislature and executive, not by the courts. The executive orders and parliamentary debates on reservations rarely—if ever—mention formal equality and efficiency as values that limit their desire for social justice (as they see it). While some judges may still pay lip service to this theory, it does not explain reservations policy any more.

2. Substantive Equality

A more sophisticated explanation for reservations in India is through the doctrine of substantive equality that is entrenched in the Constitution. The emphasis of this doctrine is not to claim equality by transcending caste, but by claiming equality by recognising caste. In doing so, proponents of this vision say, reservations policy has reduced caste inequalities in various ways: for instance, reducing the education gap between SCs/STs and others, creating a Dalit middle class, and increasing the transfer of wealth to lower castes.

The classic exposition of this logic by the Supreme Court is provided in *NM Thomas*. As Ray CJ put it in his majority opinion, the ‘question of unequal treatment does not really arise between persons governed by different conditions and different sets of circumstances.’ The implication of this doctrine is that it does not consider social justice to be constitutionally limited by values of formal equality or efficiency, but a ‘seamless web’ where these values are in harmony. This is what drives the logic that Article 16(4) is merely an ‘illustration’ of 16(1), or that Article 15(5) only reiterates the principles of 15(4). This logic of holding that prima facie clashing values in the constitutional text are in perfect harmony with each other is a distinctive form of adjudication by the Indian Supreme Court. It can be seen not just in equality cases, but also in the way the Supreme Court has sought to reconcile the constitutional imperative of religious freedom with that of secularism.

While this substantive equality is a persuasive way to think of the constitutional vision for reservations policy in India, I would disagree for five reasons.

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106 *NM Thomas* (n 25).
107 Galanter (n 2) 537.
108 For the least sympathetic portrait, see Shourie (n 104).
110 Deshpande (n 56) 16.
111 Deshpande (n 56) 12–13.
113 *NM Thomas* (n 25) [31].
114 *Indra Sawhney* (n 19) [859] (Jeevan Reddy J).
115 Ashoka Kumar Thakur (n 28).
First, even those who argue that caste is the primary social reality of India would agree that there are multiple other inequities—as the Court has argued on multiple occasions. In practice, government policy has not taken these other factors into account. Their lordships may hem and haw about caste being only one of many criteria, but in practice it is the sole criterion. Secondly, beneficiary groups—especially OBCs—are large enough to contain several homogeneous ‘classes’ within them, with individuals within each ‘class’ also varying from each other. Attempts to treat these classes differently—part of the logic of substantive equality—have largely failed. Creamy layer exclusion is patchily implemented and confined to OBCs; list revisions have rarely, if ever, led to a group being removed; and sub-classification is still some way from ubiquity. Thirdly, the absence of data is telling. Substantive equality requires evidence that groups being treated unequally are in reality unequal. While unofficial studies have shown that SCs, STs, and OBCs are, in general, backward, there is little comprehensive official data on this. Fourthly, while the argument for substantive equality is more plausible for SCs and STs, its appropriation by OBCs—causing unequal groups to be treated equally—goes against the essence of substantive equality. Finally—and this argument is similar to the one against a theory of balance—reservations policy has been largely driven by Parliament. Since parliamentary debates on reservations policy has been largely driven by Parliament. Since parliamentary debates on reservations policy reveal no vision of substantive equality, it seems presumptuous to attribute doctrine after the fact.

3. Democracy by Majority Rule

Given the deficiency of theories of constitutional balance and substantive equality in explaining reservations in India, what do we have left? I end by arguing that the most coherent argument for reservations is one that evokes a procedural notion of democracy defended by political philosophers such as Jeremy Waldron,116 Robert Dahl,117 and Joseph Schumpeter.118 As numerically significant but socially and educationally disadvantaged groups have begun to exercise political power in India, they have used reservations through elected representatives to gain educational and professional power. These are groups (or more precisely, elites within disadvantaged groups) working in concert to form a majority, and then pushing their collective will through elected institutions. The effect of this majoritarian politics may well be—and it most certainly has been—to make India less unequal in some ways. But these improvements in inequality are effects rather than drivers of policy. The real driver is the constitutionally permitted principle of rule by majority—with its virtues and vices—rather than any coherent legal doctrine.

That reservations, covering around 77 per cent of the population, benefit the majority in India is clear. This is obvious for OBCs, who some say number 52 per cent of the

118 Joseph Schumpeter, Capitalism, Socialism, and Democracy (Kessinger Publishing 2010).
population. But even Scheduled Castes are large political blocks in India’s fragmented polity, forming an effective interest group in politics. That it is this majoritarian urge that drives reservation policy is also clear from the fact that the Court has shaped little. Contentious issues like ‘backward class’ definitions, promotions, and the carry-forward rule have been solved by legislative fiat. The only two areas where the courts have somewhat shaped policy is through the creamy layer concept and the 50 per cent rule—both of which, as this chapter shows, permit plenty of exceptions. Even the timing of reservation policies in India speaks of electoral politics rather than the evolutionary role of legal precedent.

Accepting this pushes the debate away from the realm of equality doctrines to that of democratic theory. The debate is not between constitutional visions of balance or substantive equality. India’s reservation policy is neither. The real debate should be between those who support reservation policies as furthering a procedural definition of democracy that emphasises preference aggregation and supports majority will, and those who either question majority rule or argue that policies mediated through a constellation of group interests need not necessarily reflect the will of the majority. Framing the debate this way solves an important anomaly in current discourse on reservations in India. This is the inconsistency that those who tend to support reservation policies also typically tend to decry majoritarian tyranny in favour of constitutional rights, while those opposing reservations tend to emphasise majority rule in other contexts. These positions—on both sides of the political divide—contradict themselves. Many of the coming controversies—over women’s reservations, reservations in the private sector, or sub-classification—will be better explained through the majority-rule framework. These controversies will be resolved by party politics, not by the courts. It will prove futile, and likely irrelevant, to explain them by conjuring constitutional visions of normative balance or substantive equality. The vision supporters of reservations should conjure is one of second-principles-based democratic negotiation based on universal adult franchise, a vision at the core of the Indian Constitution.

The arguments against reservations policy in India should, accordingly, subject this ‘democratic negotiation’ defence to two critiques. The first is that reservation policies reflect the contingencies of party and group interests rather than the permanent will of the majority. A second critique is that even if these second-principles-based policies reflect majority will, they violate first-principle constitutional rights of non-beneficiaries (for instance, upper castes or non-Hindus) in a way that amounts to the tyranny of the majority. In the process, India risks ‘losing the identity of non-reservational equality’; that is, the hard-won constitutional notion of formal individual equality. The debate worth having is between those who envision a Constitution that enables the pursuit of power through democratic negotiation and redistribution, and those who see this pursuit as being at odds with a liberal vision of the Constitution.

120 Prasad (n 77) xvi.