TRANSFORMING AFFIRMATIVE ACTION JURISPRUDENCE: APPLYING EIDELSON'S THEORY ON THE SUPREME COURT OF INDIA

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Abstract

This paper compares the affirmative action jurisprudence developed by the Indian Supreme Court with United States affirmative action jurisprudence in the context of the philosophy of equality developed by Harvard Law School Professor Benjamin Eidelson. It evaluates the potential of Eidelson's claim that if the U.S. Supreme Court accepts his philosophy, it may incrementally allow the Court to adopt a more favorable attitude towards the affirmative action

policies. The question raised here is whether Eidelson's approach can provide a constitutional foundation capable of giving us a consistently benevolent interpretation of affirmative action policies, as he hoped. This article concludes that, at least in the cases of India and the United States, this is highly unlikely. This conclusion is derived from a showing that Eidelson's suggestions to the U.S. Supreme Court have already been adopted and applied by the Indian Supreme Court with little to no effect. To prove this, I extensively engage with Indian equality jurisprudence, comparing and unpacking the legal, philosophical, and moral reasoning given by the supreme courts of India and the United States.

I. INTRODUCTION

American affirmative action jurisprudence oscillates more than Indian affirmative action jurisprudence. There are substantial differences, yet there are uncanny similarities. These similarities can be seen not only in the two supreme courts' interpretive attitudes toward various concepts of equality, but also in the evolution of affirmative action jurisprudence in each country. This article engages with scholarship developed by Benjamin Eidelson[1] on the U.S. Supreme Court's interpretation of the race-based affirmative action programs. It agrees with and accepts Eidelson's critique and philosophical analysis through which he unpacked the foundations of concepts such as "individualism" and "respect," which are used by the U.S. Supreme Court to justify its canonical interpretation of equality. According to Eidelson, the U.S. Supreme Court's underlying reason for repeatedly upholding a colorblind approach and for striking down race-based affirmative programs "is that race-based state actions show a fundamental kind of disrespect for each person's standing as an autonomous, self-defining individual."[2]

In a paper published in the Yale Law Journal, titled "Respect, Individualism, and Colorblindness," Benjamin Eidelson applied a philosophical concept that he called "autonomy account" to the U.S.

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1 Benjamin Eidelson is Assistant Professor of Law at Harvard Law School. His philosophy explores the topics of discrimination, disrespect, and the role of the U.S. Supreme Court in interpreting affirmative action policies. This paper will focus on and engage with the ideas he expressed in his latest paper, *Respect, Individualism, and Colorblindness*, published in Yale Law Journal in 2020.

2 Benjamin Eidelson, *Respect, Individualism, and Colorblindness*, 129 YALE L.J. 1600, 1604 (2020).

Supreme Court's equality jurisprudence.[3] He detailed the U.S. Supreme Court's insistence that race-based affirmative action programs only demean and treat people merely as a product of their race. Eidelson critiqued the Court's moral reasoning and unpacked the relationship between the doctrine of colorblindness and what the Court terms "[r]espect for people's individuality."[4] He explained that respecting a person's individuality means, first, "taking due account of the information conveyed by her self-defining choices,"[5] or in other words, her autonomy. Second, there must be no "disregard of information carried by her race."[6] This means that her social status and identity play a fundamental role in conditioning her self-defining choices; further, that due regard to a person's social group or race is required to respect a person's individuality. Eidelson's theory of interpretation is based on his philosophy of respect and individual autonomy, which he applied to U.S. equality jurisprudence.

Despite this article's acceptance of Eidelson's analysis, the main aim of this article is to argue that Eidelson's suggestions[7]—which he delivers in the hope that they might help the U.S. Supreme Court adopt a more benevolent interpretive attitude toward affirmative action policies—are likely to be ineffective. This argument is supported by highlighting similar suggestions that have been adopted and applied by the Supreme Court of India with little to no effect. This article engages extensively with the ebb and flow of the Supreme Court of India's evolution of affirmative action jurisprudence. It highlights the similar foundations of equality jurisprudence and interpretive approaches between these two jurisdictions. Then, through this comparison, it evaluates the potential of Eidelson's claim that the U.S. Supreme Court would cause incremental change in favor of affirmative action policies if it accepted his philosophical account.

This article is divided into four parts. Part I demonstrates that the Supreme Court of India gave primacy to the concept of formal equality and highlights similarities to the United States. Part II underscores the similarity in moral and philosophical foundations of the affirmative action reasoning deployed by the supreme courts of India and the United States. Part III demonstrates that the Supreme Court of India

3 *Id.* at 1635–49.
4 *Id.* at 1604.
5 *Id.* at 1600.
6 *Id.*
7 *Id.* at 1650–72.

adopted a philosophy with a "similar bottom-line"[8] to that developed by Eidelson. This article will show that, temporarily, the Supreme Court of India transformed its narrow understanding of equality; and through the discussion of some important cases, it will show that the Supreme Court of India's changed approach brought results similar to what Eidelson hoped for. At the end of Part III, this article questions whether a bonafide interpretive approach like Eidelson's, even if adopted by the apex court, could provide a permanent constitutional foundation in favor of affirmative action. I argue that at least in the cases of India and the United States, it is highly unlikely. Part IV demonstrates that, despite the transformation in India's affirmative action jurisprudence, the Supreme Court of India eventually relapsed into its previous understanding, indicating that Eidelson's hope of incremental change toward a colorblind approach, even if the courts accept his philosophy, is at best temporary.

II. FORMAL EQUALITY AS MERIT AND INDIVIDUALITY

In this part, I establish the constitutional context and similar interpretive approaches of the two jurisdictions. The two supreme courts established the dominance of the color/caste-blind approach. I will draw an analogy between Eidelson's autonomy account and the concept of "merit" used by the Indian Supreme Court. I will then highlight that the Supreme Court of India indirectly relied on the merit concept to defend personal autonomy and formal equality provisions. I will also argue that the concept of merit as used by the Supreme Court of India could be considered as an instance of Eidelson's "convention-dependent disrespect."

A. Constitutional Structure of Equality in the Indian Constitution

The Constitution of India's equality provisions' text and structure appear to prima facie support the color/caste-blind interpretation of equality. The Constitution has given priority to the principle of equality of treatment, or formal equality. Formal equality consists of two parts: non-discrimination forbids discrimination on the basis of religion, race, caste, etc., and equality before the law, or equal opportunity, mandates that everybody is equal before the law. The underpinnings of these two ideas are that everybody is to be treated

8 *Id.* at 1659.

equally, irrespective of their social or historical background. Hence, formal equality is also referred to as equality of treatment.

Expressing this idea of formal equality, Article 14 states that, "[t]he State shall not deny . . . equal protection of the laws . . .";[9] Article 15(1) states, "[t]he State shall not discriminate . . . on grounds only of religion, race, [or] caste . . .";[10] and Article 16(1) states, "[t]here shall be equality of opportunity for all citizens in matters relating to employment . . . ."[11] These provisions represent the principle of formal equality—that all citizens must be treated "equally" irrespective of their social, historical, or economic status. The language is mandatory.

Conversely, when it comes to substantive equality,[12] the constitutional provisions empowering the state to identify the relevant social classes and to amend historical wrongs are discretionary. Article 15(4) states, "[n]othing in this article . . . shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens . . .";[13] while Article 16(4) states, "[n]othing in this article shall prevent the State from making any provision for the reservation of appointments . . . in favour of any backward class of citizens . . . ."[14] Unlike the formal equality provisions above, the State is not required to enact affirmative action policies. The nature of the relationship between these provisions gives the impression that the Indian Constitution prioritizes formal equality in its overall scheme of equality. In its earlier phase, the Indian Supreme Court held that the fundamental aim of equality provisions in the Constitution is to preserve formal equality through the color/caste-blind approach, which I demonstrate below.

B. The Primacy of Formal Equality in India and the United States

For purposes of this article, it is important to highlight the role of formal equality for two reasons: first, because formal equality is perceived to be predicated solely on the preservation of individual

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9 *See* India Const. art. 14.

10 *See* India Const. art. 15.

11 *See* India Const. art. 16.

12 The term substantive equality is used to denote the principle that those who are unequal cannot be treated equally—that an account of an individual's socio-historic background must be taken into consideration for the concept of equality to satisfy the ends of justice.

13 India Const. art. 15, cl. (4).

14 India Const. art. 16, cl. (4).

liberty ; and second, because Eidelson has focused on the concept of individuality in his scholarship. He has expanded on the Supreme Court of the United States' understanding of individuality; and his philosophical thesis, autonomy account, is also based on the concept of a person's individuality. Similarly, as per the Supreme Court of India, the principle of formal equality manifests itself as an individual's right. Therefore, this section highlights the significance that the Supreme Court of India gave to formal equality in matters of judicial interpretation related to affirmative action.

The affirmative action jurisprudence in India developed as a result of challenges made to reservation (i.e., quota) policies based on relaxed merit.[15] These quotas were granted in educational institutions and government services in favor of "backward classes," "scheduled castes" ("SCs"), and "scheduled tribes" ("STs").[16] In *Dorairajan*, before the Supreme Court of India, a non-reserved category candidate[17] challenged a reservation policy that allowed admission into a medical college for reserved category candidates with lesser

15 These reservation quota policies allowed for a reserved category candidate to be eligible for higher studies or public service even if she attained a lower grade or percentage than a non-reserved category candidate. For the application of quotas, reservation rosters were prepared throughout the states in India. There is an entire genre of equality jurisprudence discussing how the reservation rosters should operate. A reservation roster is essentially a mathematical formula designed to ensure that the exact percentage of reserved seats are allocated to a category. This is done by dividing the percentage of reserved seats by one hundred. For example, if scheduled castes have been granted 15% reservation, then 100/15 will become 6.66. The round off figure is seven, which means that every seventh position in the roster is earmarked for the appointment of the member of a scheduled caste category. Similarly, for scheduled tribes, let us say the reservation quota is 7.5%. 100/7.5 will become 13.33, so on every fourteenth position in the roster a member of a scheduled tribe category is to be appointed. Reservation rosters are actually much more complicated than this. There is a two hundred-point roster in case there are more than twenty-one vacancies, and there is a thirteen point roster if in a department there are less than twenty-one vacancies. The Supreme Court of India held many times that the application of rosters is constitutionally permissible. *See, e.g.*, Kelkar v. Chief Controller of Import and Exports, 1967 AIR 839. There are other issues related to the operation of rosters; for a general idea see MARC GALANTER, COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA 396–443 (1984).

16 In India, reservations in public education and institutions have been allotted to different categories of social classes or group castes. For the purposes of this debate, I will focus on the two groups which are at the lowest level of the social hierarchy known as "scheduled-castes" ("SCs") and "scheduled-tribes" ("STs"). The SCs are erstwhile "untouchables" and are locally known by several names such as harijan, girijan, and dalit. STs are the members of the aboriginal tribes of India.

17 These candidates belong to so-called high castes. The social groups that are not classified as backward or scheduled are referred to here as non-reserved category candidates.

academic merit.[18] The non-reserved category candidate argued that these quotas violated her right to be treated equally before the law and discriminated against her on the basis of her caste.[19] The Supreme Court of India held that equality provisions must be interpreted as rights granted to an individual without any consideration of social or historical factors.[20] To justify this approach, it argued that "[t]he right to get admission into any educational institution of the kind mentioned in [clause] (2) is a right which an individual citizen has as a citizen and not as a member of any community or class of citizens."[21]

Similarly, the supremacy of the political notion that equality should be interpreted only as an individual's right has been expressed in U.S. jurisprudence through various cases. Justice Harlan's dissent in *Plessy v. Ferguson* was one of the first attempts in a U.S. Supreme Court opinion to establish a colorblind approach.[22] In his dissent, Justice Harlan opined: "The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."[23] In *Bakke,* Justice Powell, arguing that the Equal Protection Clause of the Fourteenth Amendment should only be interpreted as an individual right, quoted from several other judgments: "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual."[24] And because the rights created by the Equal Protection Clause are predominantly individual rights, according to Justice Powell, this meant that it should be interpreted as equality of treatment, that is, "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[25]

Similarly to the Indian case of *Dorairajan*, in *Fisher v. University of Texas* an affirmative action program used in university admissions was challenged by a non-minority woman.[26] Although the program

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18 State of Madras v. Champakam Dorairajan, AIR 1951 SC 226, 227 (1951) (India).

19 *Id.*

20 *Id.* at 226.

21 *Id.* at 227.

22 Plessy v. Ferguson, 163 U.S. 537 (1896).

23 *Id.* at 559.

24 Regents of the University of California v. Bakke, 438 U.S. 265, 289 (1978).

25 *Id.* at 289–90.

26 Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297, 300–02 (2013).

ultimately survived the strict scrutiny test in the majority opinion,[27] Justice Thomas stated in his concurrence that, "the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups."[28] In fact, the notion that any race-based benign policy is "inherently suspect, and thus call[s] for the most exacting judicial examination"[29] illuminates that U.S. jurisprudence upholds the primacy and prioritization of formal equality.

I will argue that both the U.S. Supreme Court and the Indian Supreme Court emphasized that primarily the state must treat people as individuals. Both courts reach the same conclusion through the primacy of formal equality in their respective ways. Eidelson explained the philosophical reasoning of the U.S. Supreme Court within the context of "respect and autonomy." In India, on the other hand, the Supreme Court interpreted the relationship between formal and substantive equality provisions by indirectly giving primacy to the individuality of a person.[30]

For the Supreme Court of India, the principle of equality of opportunity, or formal equality, at its core is aimed at preserving the individual's right of equality before the law and thereby the individuality of a citizen. Notwithstanding the Court's understanding of the concept of individuality, whenever it argues in favor of or prioritizes this form of equality, it is trying to safeguard the individual autonomy of a citizen. In *Rangachari*,[31] the Supreme Court of India declared that the substantive equality provision of the Indian Constitution, Article 16(4), is merely an enabling clause of the main provision guaranteeing formal equality. The Court opined, "[i]n construing Art. 16(4) the respondent is no doubt entitled to contend that this sub-article in substance provides for an exception to the fundamental rights guaranteed by Art. 16 (1) and (2) . . . ."[32] Its philosophical meaning was that the Supreme Court of India is bound to safeguard the form of equality that preserves the individual autonomy of a citizen, while the form of equality taking account of a

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27 Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198, 2214 (2016).

28 *Fisher I*, 570 U.S. at 316 (Thomas, J., concurring) (quoting Missouri v. Jenkins, 515 U.S. 70, 120–21 (1995) (Thomas, J., concurring)).

29 *Bakke*, 438 U.S. at 291.

30 *See* State of Madras v. Champakam Dorairajan, AIR 1951 SC 226, 227 (1951) (India).

31 The General Manager, Southern v. Rangachari, AIR 1963 SC 36 (1961) (India).

32 *Id.* at 42.

citizen's socio-historic background can be ignored.[33] Consequently, the Supreme Court of India concluded that substantive equality is not a matter of right within the constitutional scheme of equality. Later, in *C.A. Rajendran*,[34] when reserved category candidates claimed that they had a constitutional right to enjoy remedial measures, the Court held, "Article 16(4) does not confer any right on the petitioner and there is no constitutional duty imposed on the Government to make reservation for [SCs] and [STs], either at the initial stage of recruitment or at the stage of promotion."[35]

In substance, the Supreme Court of India's conceived legal reasoning is predicated on an understanding that equality, when pushed on society through affirmative action programs, violates the individual autonomy of those against whom such special treatment is granted. To enforce this understanding, the Supreme Court of India used the concept of merit to defend the primacy of individual autonomy and hence adopted a color/caste-blind interpretation.

III. SIMILAR PHILOSOPHY UNDERPINNINGS OF "AUTONOMY ACCOUNT" AND "MERIT"

Highlighting an underlying similarity between the concept of merit used by the Supreme Court of India and Eidelson's two dimensions of autonomy, I will summarize Eidelson's autonomy account and underscore that the Supreme Court of India construes merit in an equivalent way to Eidelson's first dimension of autonomy.

In developing his autonomy account, the first issue Eidelson raised was, "in what morally important sense people *are* individuals."[36] For him, the individuality of a person depends upon her potential to exercise and finally realize her autonomy—a person can be said to be an individual when she is autonomous. Hence, respecting a person's individuality depends upon respecting her autonomy. Eidelson wrote, "[t]o treat someone respectfully as an individual . . . is essentially to treat her as an autonomous being—that is, as a person who can meaningfully author her own life, and who is, as a result, partly of her own making."[37] He also argued, "people are individuated

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33 *Id.* at 44.

34 C.A. Rajendran v. Union of India, AIR 1968 SC 507 (1967) (India).

35 *Id.* at 513.

36 Benjamin Eidelson, *Treating People as Individuals*, *in* PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 203, 204 (Deborah Hellman & Sophia Moreau eds., 2013).

37 *Id.*

by their standing as the owners or authors of their respective choices and actions—by their autonomy."[38]

After establishing the interdependence of individuality and autonomy, Eidelson further bifurcates autonomy into two dimensions. The first dimension represents the degree of freedom with which an individual acts out of her own will to fulfil her desires. "[A]utonomy consists in a kind of deliberative agency that permits critical choice not only among simple options for how to *act*, but among ways of valuing one's own volitions, desires, and plans."[39] The second dimension argues that this capacity to take action has to be relatively free of undue social influences.[40] Where this freedom to act and choose is a core condition for a person to realize her autonomy, it is actually the collective result of all such actions which allow her to author her own life. Therefore, in order to respect a person's individuality, both dimensions of autonomy must be allowed to operate. Applying this two-dimensional structure of autonomy to the argument of merit reveals that the Supreme Court of India, in the aforementioned cases, considered only the first dimension and ignored the second.

As such, in the Indian context, it can be said that when a non-reserved category candidate argues that her right to be "considered equal before the law" is violated because caste has been taken into consideration, she means that her individuality is violated. Implicit in this argument is a violation of her individual autonomy. That is, in pursuit of her desire, the effort she exerted did not give the desired results, through no fault of her own but because the external limitation (in the form of quotas) was imposed on her. For this purpose, the Court accepted the concept of merit as an argument against affirmative action programs. It can be argued that the Supreme Court of India relied on merit in a manner which implied that upholding merit will amount to respecting an individual's autonomy and hence her individuality. Michael Sandel, political philosopher at Harvard University, explained this thinking as meritocracy,[41] stating that the idea that, "[m]y affluence is my due" is the heart of meritocracy.[42] This unrealistic boost to individualism acts as egoistic balm on an

38 *Id.* at 211.

39 *Id.* at 213.

40 *Id.*

41 MICHAEL J. SANDEL, THE TYRANNY OF MERIT: WHAT'S BECOME OF COMMON GOOD (2020).

42 *Id.* at 59.

individual's imagination that her success is of her making alone and that external factors like socio-historic conditions or luck have no impact.

In *Dorairajan*,[43] the Supreme Court of India built this argument and critiqued the quota system in place:[44]

> He may have secured higher marks than the Anglo Indian and Indian Christians or Muslim candidates but, nevertheless, he cannot get any of the seats reserved for the last mentioned communities for no fault of his except that he is a Brahmin and not the member of the aforesaid communities.[45]

This view manifested indirectly but strongly in *M.R. Balaji* while discussing the extent of the reservation in educational institutions.[46] The Supreme Court of India presumed that quotas would lower the standards of education: "We cannot overlook the fact that in meeting that demand standards of higher education in Universities must not be lowered";[47] "[i]f admission to professional and technical colleges is unduly liberalised it would be idle to contend that the quality of our graduates will not suffer."[48] This means that merit has to be maintained, even at the cost of affirmative action policies. For a long time, the Court used this abstract concept of merit within administrative and constitutional jurisprudence. Many judgments reaffirmed this attitude, including *Janki Prasad Parimoo*,[49] where the Court stated, "[i]t is implicit in the idea of reservation that a less meritorious person is to be preferred to another who is more meritorious."[50] Moreover, merit has been extolled as the ultimate virtue in public service and is projected as a harbinger of efficiency in administration.

In his paper, Eidelson highlighted the fact that the U.S. Supreme Court has never given a satisfactory explanation for its understanding

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43 *Dorairajan*, SC 226.

44 The quotas discussed in this case were based on pre-independence communal quotas. A candidate belonging to one of the quota groups in this system could not be considered in any other group. This promoted communalism within society. After independence this system of quotas was abolished. In post-independence reservation systems, a candidate of a reserved category must be considered as a non-reserved category candidate if she is able to attain merit.

45 *Dorairajan*, SC 226 at 228.

46 M. R. Balaji v. State of Mysore, AIR 1963 SC 649 (1962) (India).

47 *Id.* at 662.

48 *Id.*

49 Janaki Prasad Parimoo v. State of Jammu and Kashmir, AIR 1973 SC 930 (1973) (India).

50 *Id.* at 939.

of respecting a person's individuality. Specifically, he argues that "the argument linking colorblindness to respect for people's individuality remains highly opaque."[51] Similarly, the Supreme Court of India indirectly relied on the concept of merit to defend personal autonomy reflected through the formal equality provisions. Yet, it never clearly articulated the core relationship between the concept of merit and a person's individuality. Thus, in my view, the underlying logic of the Supreme Court of India can be articulated as such: merit represents a person's choices and efforts to author her own life, or as Eidelson explains, "[i]t is the cumulative accretion of such choices that defines a person's life as her own . . . ."[52] Therefore, according to the Supreme Court of India, the fruits of those efforts are part of her individuality and her individuality will be violated if she is not allowed to enjoy the consequences of her efforts represented by her merit. This approach, similar in both jurisdictions, leads to a color/caste-blind interpretation of affirmative action policies.

A. Merit and Social Conventions

Eidelson focused on the concept of respect in the composite phrase "respecting an individual's autonomy." His argument underpins a relationship between respect and social conventions.[53] Eidelson further classified respect and disrespect into two types, based largely on how social conventions can impact these notions: First, "convention-independent disrespect," in which an act is disrespectful in itself, irrespective of any social-convention.[54] This is *genuine* disrespect. Second, "convention-dependent disrespect," which is an act of *apparent* disrespect; the act is disrespectful because social conventions mark it so even though it may or may not be disrespectful in reality.[55]

In the cases discussed above, the Supreme Court of India incorrectly treated the concept of merit as an independent reality, free of all social contingencies. In doing so, it predicated its understanding on the popular social meaning of merit. The moral force that the Court drew upon is supplied by the popular understanding of what merit means and represents. Merit represents respect for individual autonomy. This notion of merit, adopted and used by the Supreme

51 Eidelson, *supra* note 2, at 1604.
52 Eidelson, *supra* note 2, at 213.
53 Eidelson, *supra* note 2, at 1617–23.
54 *Id.* at 1621.
55 *Id.*

Court of India, can be understood as an instance of convention-dependent respect.

Eidelson's differentiation between these two concepts of respect resembles Kant's framework in the second part of his book entitled *Groundwork of the Metaphysics of Morals.*[56] Kant warns of the dangers of misinterpretations when a (moral) principle from its metaphysical form—which, for Kant, means the pure idea free of any empirical factor—descends onto society for people to understand. For Kant, the popular understanding of moral principles is empirical and based on a number of impure factors. He wrote, "[t]his descending to popular concepts is certainly very commendable, provided the ascent to the principles of pure reason has first taken place . . . ."[57] This descent of principles (which were pure in their metaphysical form) to the popular understanding, inevitably allows fickleness of the human heart to set in and influence the interpretation of principles (moral and political).[58] According to Kant, these empirical factors, which influence a human's heart and mind are, "a mixed doctrine of morals, put together from incentives of feeling and inclination and also rational concepts . . . ."[59] In other words, these factors operate at the level of popular understanding.

Comparing Eidelson's classification then, the U.S. Supreme Court's convention-dependent approach resembles, at least indirectly, Kant's understanding of popular notions shaped by social conventions. As such, Eidelson has argued that the Court should be more aware of these social influences and must detach from them to reach a better understanding of concepts such as respect and individuality.[60]

IV. APPLYING EIDELSON'S SUGGESTIONS AND TEMPORARY SIGNS OF TRANSFORMATION

Eidelson argues that, if the U.S. Supreme Court endorses his philosophical account, "or some other one with a similar bottom line,"[61] the Court's interpretation of "respect" in the context of race-based affirmative action would have an "important bearing on how the

56 IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 23–55 (Mary Gregor ed. & trans., 1998) (1785).

57 *Id.* at 21.

58 *Id.*

59 *Id.* at 65.

60 Eidelson, *supra* note 2, at 1634.

61 *Id.* 1658.

implementation of colorblindness . . . should proceed."[62] Consequently, according to Eidelson, the project of colorblindness should not "be pursued from a place of righteous indignation, as it has been,"[63] but rather, "with ambivalence and regret."[64] This part shows how the new interpretive approach adopted by the Supreme Court of India is similar to Eidelson's suggestions and how, once applied to affirmative action, it transformed the color/caste-blind theory, as predicted by Eidelson, but only temporarily.

I also highlight the underlying similarity in the nature of changes suggested by Eidelson and practiced by the Supreme Court of India. Eidelson made two important suggestions about what the U.S. Supreme Court could do in this regard. First, the Court should avoid entrenchment of overbroad and costly respect conventions.[65] Second, it should aid in reform by delivering a "saving construction" to affirmative action programs by interpreting them consistently with constitutional values.[66]

A. Affirmative Action Does Not Violate Individuality

In cases such as *Rangachari* and *Balaji*, caste as the basis of classification was accepted strictly as an exception to the main rule of formal equality. But then, the Supreme Court of India pressured by Indian society's reality that an individual's social, political, cultural, and economic backwardness, especially those of an SC or ST, predominantly depends on her group's socio-historic status. There is also the reality that individuality of a person does not exist in society free of the above socio-historic factors. In *Balaji*, the Supreme Court of India considered the relationship between caste and class within the context of determining the social backwardness of a community.[67] Interpreting Article 15(4) of the Constitution of India, the Court held that the correct term is actually "socially and educationally backward classes of citizens,"[68] not castes of citizens. Thereby it removed the focus from caste as a major factor in perpetuating social backwardness, stating that although "castes in relation to Hindu may be a relevant factor to consider in determining the social backwardness

62 *Id.*
63 *Id.* at 1650.
64 *Id.*
65 *Id.* at 1659–60.
66 *Id.* at 1667.
67 *M. R. Balaji*, AIR 1963 SC 649, at 658.
68 *Id.*

of groups or classes of citizens, it cannot be made the sole or dominant test . . . ."[69]

One of the most conservative applications of this notion[70] can be seen in *Chitralekha*,[71] where the court opined that, "[c]aste is only a relevant circumstance in ascertaining the backwardness of a class . . . ,"[72] and, "if in a given situation caste is excluded in ascertaining a class within the meaning of [Article] 15(4) of the Constitution, it does not vitiate the classification if it satisfied other tests."[73] The Court accepted the relevance of an individual's social group in ascertaining her social status; yet it diluted the significance of the most important factor, caste, responsible for maintaining backwardness of certain groups compared to less significant factors, such as economic status or geographical remoteness. Through this conceptual maneuver, the Supreme Court of India defended the centrality of the notion of individuality and formal equality.

In the United States, the Supreme Court took a similar approach to race-based affirmative action policies. In *Bakke*, the U.S. Supreme Court held that quotas violate the principle of formal equality.[74] The Court stated that states can have affirmative action programs for benign purposes, but that such policies cannot solely emphasize a candidate's race.[75] Writing the plurality opinion, Justice Powell presented the concept of "diversity" in a way that did not mandate consideration of socio-historical factors in determining university admissions.[76] For example, in discussing Harvard College's admissions program, Justice Powell drew a conclusion very similar to that of *Chitralekha*, that "[t]he file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared . . . with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism."[77] By comparing race with economic and geographical factors, American courts downplayed the importance of race in

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69 *Id.* at 659.

70 *See* GOV'T OF INDIA, MANDAL COMMISSION REPORT 26 (1980).

71 R. Chitralekha & Another v. State of Mysore, AIR 1964 SC 1823 (1964) (India).

72 *Id.* at 1833.

73 *R. Chitralekha*, AIR 1964 SC 1823, at 1834.

74 *Regents* of the *University of California* v. Bakke, 438 U.S. 265 (*1978)*.

75 *Id.* at 319.

76 *Id.* at 272.

77 *Id.* at 317.

identifying historically oppressed communities. As Eidelson explained, whenever race-based inferences arise, they are considered violations of personal autonomy and dignity.[78]

The Supreme Court of India, however, later showed a change in the decisions of *Minor P. Rajendran*[79] and *P.Sagar*.[80] In *Minor P. Rajendran*, the Court accepted that a caste is a type of class: "caste is also a class of citizens and if the caste as a whole is socially and educationally backward, reservation can be made in favour of such a caste . . . ."[81] Going a step further, in *Periakaruppam,*[82] the Supreme Court of India explicitly accepted that caste-based inferences are required to address issues of social justice: "It cannot be denied that unaided many sections of the people in this country cannot compete with the advanced sections of the Nation. Advantages secured due to historical reasons should not be considered as fundamental rights."[83] Indirectly, the court pinpointed the role of caste in securing advantages for some sections of society and not for the others. This was an important observation, which gave strength to the court's acceptance of caste-based affirmative action policies. In subsequent cases, the Court ascertained that caste plays a major role, along with other factors, in maintaining social backwardness; and also that caste-based inferences in affirmative action policies cannot be ignored or removed.

In *K.S. Jayasree*,[84] the Supreme Court of India also emphasized that economic criteria itself cannot be considered a major factor for social and educational backwardness; "Poverty by itself is not the determining factor of social backwardness."[85] Similarly, the Kerala High Court in *Laila Chacko* refused to accept a family's annual income as the sole determinant of its social and educational backwardness.[86] However, in *Chhotey Lal*,[87] the Allahabad High

78 Eidelson, *supra* note 2, at 1635.

79 Minor P. Rajendran v. State of Madras & Others, AIR 1968 SC 1012 (1968) (India).

80 State of Andhra Pra & another v. P. Sagar, AIR 1968 SC 1379 (1968) (India).

81 *Minor P. Rajendran*, 1968 AIR 1012, at 1013–15.

82 A. Periakaruppan, Etc v. State Of Tamil Nadu, AIR 1971 SC 2303 (1971) (India).

83 *Id.* at 2309.

84 Kumari K.S. Jayasree & Another v. State of Kerala, AIR 1976 SC 2381 (1976) (India).

85 *Id.* at 2385.

86 Miss Laila Chacko v. State of Kerala, AIR 1967 Ker 124 (1966) (India).

87 Chhotey Lal v. State of Uttar Pradesh, AIR 1951 All 228 (1951) (India).

Court reaffirmed that, "caste is a relevant factor in determining social backwardness but is not the sole or dominant test."[88]

There is a marked difference here between the U.S. Supreme Court's recommendation to use race in affirmative action programs and the acceptance of caste by the Supreme Court of India as a major relevant factor. In the United States, the Court's direction for the use of race was predicated on contingent factors. In *Bakke*, Justice Powell explained, through the Harvard College program example, that race may or may not be used by an admissions committee; meaning that race may not be used at all in several cases.[89] The very factor which historically caused the most severe oppression and continues to exercise great influence could be interchangeable with other factors, effectively diluting its significance. This was similar to the approach taken by the Supreme Court of India in *Balaji*, where the Court was trying to ascertain what kinds of socio-economic factors affirmative action policies should consider. Hence, it was indirectly embroiled in the debate whether to allow caste as fundamental or even one of the major factors to enact affirmative action policies when other political or economic factors are present in society.

Contrary to the United States, however, in the cases *Minor P. Rajendran* to *Chotelal*, state high courts and the Supreme Court of India gradually changed their approach. The Supreme Court of India recognized that caste as a social factor is as significant as economic factors. In later cases the Court recognized that in some communities, like the SCs and STs, caste identity plays a dominant role. To support this conclusion the Mandal Commission Report observed, "historical and sociological evidence does not support the view that, in the ultimate analysis, social backwardness is the result of poverty to a very large extent. In fact, it is just the other way round."[90] Once Parliament decided to implement the Mandal Commission Report, it was challenged before the Supreme Court of India. *Indra Sawhney* held that caste is a valid basis on which to enact an affirmative action policy.[91]

I argue that, in these cases, the Supreme Court of India made conscious efforts to aid the needed reforms, as suggested by

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88 *Id.*

89 *Regents* of the *University of California* v. Bakke, 438 U.S. 265, 316–17 (1978).

90 MANDAL COMM'N REP., *supra* note 71.

91 Indra Sawhney v. Union of India, AIR 1993 SC 477 (1992) (India).

Eidelson.[92] The philosophical bottom-line used by the Court may not be identical to Eidelson's theory, but it is similar. Though the Court never indulged in detailed discussion of personal autonomy or dignity in articulating the importance of caste-based classifications, it accepted that such policies are not violative of any fundamental right of those individuals against whom they are enacted. Conversely, the U.S. Supreme Court has consistently considered race-based inferences as harm to personal dignity,[93] but the Supreme Court of India challenged the notions of merit and violations of individual rights as constitutional objections to caste-based affirmative action policies. The Court took on the question of merit indirectly by reassessing the relationship between the substantive equality and formal equality provisions in the Constitution of India. In my view, whether caste-based affirmative action policies violated an individual's autonomy & dignity depended upon how the relationship between the two forms of equality was interpreted by the Court. I argue that by harmonizing the relationship between formal and substantive equality within the constitutional scheme, the Supreme Court of India embraced and applied a philosophy similar to Eidelson's theory.

B. Considering Merit as an Artificial Social Construct

Suggesting what the U.S. Supreme Court could do if it accepted his philosophical framework, Eidelson commented, "[i]n particular, the Court could uphold, but offer its own gloss on, state actions that arguably transgress existing social understandings about respect."[94] My account of Indian jurisprudence suggests that the Supreme Court of India did more than just offering its own gloss. It was able to draw on moral and political philosophies implicit in the Constitution of India to refute merit arguments against reservations.

The Supreme Court of India attempted to harmonize the relationship between the two equality principles.[95] Justice Koka Subba Rao first attempted to do so in his dissenting opinion in *T. Devadasan*.[96] Justice Subba Rao opined that there is an essential link between the formal and substantive equality provisions. Regarding the substantive equality provision, Justice Subba Rao stated, "[i]t has not

92 Eidelson, *supra* note 2, at 1667–72.

93 *See* Parents Involved in Cmty. Sch. v. Seattle Sch. District No.1, 551 U.S. 701 (2007).

94 Eidelson, *supra* note 2, at 1667.

95 The principles of substantive equality and formal equality.

96 T. Devadasan v. Union of India, AIR 1964SC 179 (1964) (India).

really carved out an exception, but has preserved a power untrammelled by the other provisions of the Article."[97] As discussed above, the Supreme Court of India previously held that any preference or quota on the basis of one's social community was an exception to the main principle of formal equality. But by articulating the interdependence of the formal and substantive equality provisions, Justice Subba Rao foreshadowed a major change in Indian equality jurisprudence.

For Justice Subba Rao, Article 16(1)'s formal equality alone is insufficient to deliver social justice: "[i]f it stood alone, all the backward communities would go to the wall in a society of uneven basic social structure."[98] He emphasized that it is pertinent to account for the social circumstances within which an individual is conditioned for any concept of equality to be meaningful. He also stressed that, "[c]enturies of calculated oppression and habitual submission reduced a considerable section of our community to a life of serfdom."[99] This means that a person's social situation or status is not only important, but in many instances it is essential. In my view, this argument is identical to Eidelson's claim that "respect for a person's individuality does not inherently require, or even favor, disregard of information carried by her race."[100]

In *N.M. Thomas*,[101] the Supreme Court of India adopted a definitive position in relation to caste-based affirmative action policies. In one of the clearest expansions of Justice Subba Rao's dissent, Justice Mathew stated that equality "is a symbol of man's revolt against chance, fortuitous disparity, unjust power and crystallized privileges."[102] More specifically, he challenged the foundation of formal equality, which is considered an ultimate moral virtue. "Formal equality of opportunity simply enables people with mere education and intelligence to capture all the posts and to win over the less fortunate in education and talent even when the competition is fair."[103] It is noteworthy that Justice Mathew's statement challenged the popular or social understanding of what constitutes equality or equality of opportunity. In this judgment, a majority of the justices

97 *Id.* at 190.
98 *Id.* at 189.
99 *Id.* at 189–90.
100 Eidelson, *supra* note 2, at 1600.
101 State of Kerala v. NM Thomas, AIR 1976 SC 490 (1975) (India).
102 *Id.* at 513.
103 *Id.* at 518.

attempted to rescue the true meaning of equality from popular notions adopted by the Court itself in its previous decisions. This attempt can be seen as a fundamental transformation in the Supreme Court's outlook. It stopped interpreting formal equality and merit from a convention-dependent viewpoint and advocated instead for a convention-independent viewpoint.

In *N.M. Thomas*, Chief Justice Ajit Nath Ray held, "[t]he rule of equality within Articles 14 and 16(1) will not be violated by a rule which will ensure equality of representation in the services for underrepresented classes . . . ."[104] Chief Justice Ray claimed that the substantive equality provision was essential for formal equality to operate. Substantive equality, pursuant to Article 16(4), is "one of the methods of achieving equality embodied in [Article] 16(1)."[105] Further reforming this issue, Justice Krishna Iyer interpreted the Directive Principles of State Policy, Part IV of the Constitution, as imposing moral and constitutional obligations on the State to deliver transformative justice: "In a spacious sense 'equal opportunity' for members of a hierarchical society makes sense only if a strategy by which the underprivileged have environmental facilities for developing their full human potential."[106] Further, "[s]ociety being, in a broad sense, responsible for these latter conditions, it also has the duty to regard them as relevant differences among men and to compensate for them whenever they operate to prevent equal access to basic, minimal advantages enjoyed by other citizens."[107] This decision attempted to transform the entire constitutional jurisprudence of equality and disrupted the Supreme Court's canonical understanding of substantive equality and individual rights.

In *N.M. Thomas*, the Court did all that Eidelson suggested. It made a conscious effort to interpret caste-based affirmative action policies in a new light, avoided unnecessary entrenchment of older understandings, and contributed to reform. The Court's reform continued for approximately a decade as it attempted to legitimize the use of caste inferences. The Court prioritized the caste-based identity of the SCs and STs. In *E.V. Chinnaiah*,[108] the Court stated, an "[SC] consists of not only the people who belong to some backward caste

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104 *Id.* at 499.

105 *Id.* at 502.

106 State of Kerala v. NM Thomas, AIR 1976 SC 490 at 536.

107 *Id.* at 538.

108 E.V. Chinnaiah v. State of Andhra Pradesh, AIR 2005 (1) SC 295 (2005) (India).

but also race or tribe or part of or groups within castes, races or tribes. They are not merely backward but the backwardmost."[109] These observations were significant because policies developed for upliftment of such sections were not strictly held to be an exception to formal equality. These efforts specifically led the Court to reject arguments based on the concept of merit and the primacy of formal equality.

In another Supreme Court case, *K.C. Vasanth Kumar*,[110] Justice Reddy stated,

> Efficiency is very much on the[] lips of the privileged whenever reservation is mentioned . . . . The underlying assumption that those belonging to the upper castes and classes, who are appointed to the non-reserved posts will, because of their presumed merit, 'naturally' perform better than those who have been appointed to the reserved, posts and that clear stream of efficiency will be polluted by the infiltration of the latter [members of the reserved category] into the sacred precincts is a vicious assumption, typical of the superior approach of the elitist classes.[111]

One of the most powerful renditions of India's constitutional philosophy and critique of anti-reservation rhetoric was written by Justice Krishna Iyer in *Karamchari Sangh*.[112] Anti-reservation proponents who argue that reservation leads to inefficiency in public administration usually draw support for their argument from Article 335 of the Constitution of India, which mandates that efficiency in public services be maintained.[113] Justice Krishna Iyer acknowledged that, "[t]he sting of the argument against reservation is that it promotes inefficiency in administration by choosing sub-standard candidates in preference to those with better mettle."[114] Dispelling this popular assumption about the supremacy of merit, he commented that "[t]rite arguments about efficiency and inefficiency are a trifle phoney . . . . The preponderant majority coming from the unreserved communities are presumably efficient and the dilution of efficiency caused by the minimal induction of a small percentage of 'reserved' candidates

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109 *Id.* at 429.

110 K.C. Vasanth Kumar & Another v. State Of Karnataka, AIR 1985 SC 1495 (1985) (India).

111 *Id.* at 1509.

112 Akhil Bharatiya Soshit Karamchari Sangh v. Union of India & Others, AIR 1981 SC 298 (1981) (India).

113 *See*India Const. art. 335.

114 *See Sangh*, AIR 1981 SC 298, at 327.

cannot affect the over-all administrative efficiency significantly."[115] The Court did not allow the petitioners here to reopen the fundamental issues settled in *N.M. Thomas*. On the contrary, in a sharp rejection of the argument that reservation in promotion will let otherwise undeserving candidates into higher and more important positions, the Court stated, "[w]e are not impressed with the misfortune predicted about governmental personnel being manned by morons merely because a sprinkling of harijans/girijans happen to find their way into the Services."[116] Specifically, "[t]he malady of modern India lies elsewhere, and the merit-mongers are greater risks in many respects than the naive tribals and the slightly better off low castes."[117]

C. The Mandal Commission Report: Merit is an Artificial Social Construct

One of the most effective assaults on the primacy of formal equality and the concept of merit was made by the Mandal Commission Report.[118] The first Backward Class Commission was established pursuant to Article 340 of the Constitution of India; the Commission submitted its report in March 1955.[119] The Commission's constitutional aim was to recommend ways in which the position of "socially and educationally backward classes" could be improved.[120] But because of the confusion in the definitions of caste and class, and some other fundamental problems, the Chairman of the Commission, Kaka Kalelkar, wrote to the President of India requesting the report's rejection.[121] In 1979, the second Backward Class Commission was appointed, known as the Mandal Commission, and in 1990, Parliament declared its intent to implement its recommendations.[122]

Chapters IV through VII of Part I of the Report addressed the influence of caste on social backwardness, questioned the fundamental logic of formal equality, and reconstructed the concept of merit in social realities.[123] Firstly, it acknowledged that, "[i]n India [the] caste

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115 *See id.* at 328–29.

116 *See id.* at 328.

117 *Id.*

118 *The Mandal Commission Report*, NAT. COMM'N FOR BACKWARD CLASSES (Dec. 31, 1980), http://www.ncbc.nic.in/User_Panel/UserView.aspx?TypeID=1161.

119 *See* Indra Sawhney v. Union of India, AIR 1993 SC 477.

120 *Id.*

121 *Id.* at 9.

122 *Id.* at 12.

123 *See The Mandal Commission Report*, *supra* note 118.

system has endured for over 3,000 years and even today there appear no symptoms of its early demise."[124] It also argued that this system of extreme social hierarchy created the social conditions whereby some communities developed the faculties considered to be "meritorious," while Shudras or untouchables (SCs) were not so lucky. The Report said, "as exclusive custodians of higher knowledge, the Brahmins developed into a highly cultivated community with special flair for intellectual pursuits. On the other hand, the Shudras, being continuously subjected to all sorts of social, educational, cultural and economic deprivation, acquired all the unattractive traits of an unlettered rustic."[125] After establishing this socio-historical context, the report attacked the concept of formal equality: "On the face of it the principle of equality appears very just and fair, but it has a serious catch. It is a well-known dictum of social justice that there is equality amongst the equals. To treat unequals as equals is to perpetuate inequality."[126] As such, "[t]he humaneness of a society is determined by the degree of protection it provides to its weaker, handicapped and less gifted members."[127]

It was highlighted in the Report that formal equality is mostly defended through the concept of merit; "In this connection nothing generates so much heat and genuine indignation as the concept of 'merit.'"[128] To unpack the foundation of the concept of merit, the Report demonstrated its view by example.[129] It hypothesized two individuals, Lallu and Mohan, and placed them in different socio-economic backgrounds: one disadvantaged and backward, and the other advantaged and privileged.[130] The Report claimed that even if both of these individuals have equal levels of intelligence and diligence, the one placed in a disadvantaged position is likely not to achieve the level of success that the privileged individual will achieve.[131]

For the purposes of quotas in educational institutions and public employment, the Report expanded the merit framework: "[I]f merit also includes grit, determination, ability to fight odds, etc., should not the marks obtained by Mohan and Lallu be suitably moderated in view

124 *See id.*at 14.
125 *Id.* at 16.
126 *See id.* at 21.
127 *Id.*
128 *Id.* at 23.
129 *See id.*
130 *Id.*
131 *Id.*

of the privileges enjoyed by the former and the handicap suffered by the latter?"[132] At first, this approach might seem similar to what Justice Powell argued in *Bakke*. But the primary difference between these two approaches is that the Mandal Commission, like *N.M. Thomas* and several other Indian cases, accepted that such affirmative action policies that "moderate the score" and operationalize "set-aside" or quota of seats for socially and historically oppressed communities, do not violate the formal equality principle.

More importantly, the Mandal Commission Report argued that merit is a social construct; that the moral authority reflected by merit and strict formal equality is because of their social or popular understanding. As Eidelson would say, it is but a convention-dependent practice and not a reality in itself. Therefore, the Report concluded:

In fact, what we call 'merit' in an elitist society is an amalgam of native endowments and environmental privileges . . . . The conscience of a civilized society and the dictates of social justice demand that 'merit' and 'equality' are not turned into a fetish and the element of privilege is duly recognised and discounted for when 'unequals' are made to run the same race.[133]

The Report's final perspective satisfies the dimensions of Eidelson's autonomy account and his assertion that court should help in reforming the overbroad and costly social conventions.[134] Eidelson's theory also depends on how a court interprets constitutional values in the presence of social conventions. He argues that the U.S. Supreme Court should not treat a concept in accordance with certain "perceived or felt meanings of actions."[135] If the Supreme Court of the United States adopts his approach, he argues, the Court might acknowledge that, "as a matter of basic moral principles[,] race-based generalizations and decision-making need not be at odds with proper regard for a person's individuality."[136] The discussion above demonstrates a similar story. The Supreme Court of India accepts that, as a matter of basic moral principle, socio-historic factors like caste, if used for benign purposes, are not necessarily at odds with other fundamental constitutional goals.

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132 *Id.*
133 *Id.*
134 Eidelson, *supra* note 2, at 1608.
135 *Id.* at 1617.
136 *Id.* at 1607.

At this juncture, I will raise the fundamental question of whether, in the absence of any definitive constitutional principle guaranteeing the protection and empowerment of historically oppressed sections of the body politic, a bona-fide interpretive approach, like that of Eidelson or the Supreme Court of India, could hold its ground; or whether the inertia of older understandings of constitutional values will always pull back from whatever progress equality jurisprudence has made.

The next section of this article demonstrates how, in a complicated manner, the Supreme Court of India returned to its old understanding of merit within the framework of "reservation in promotion" of government employees.

V. RELAPSE OF INDIAN EQUALITY JURISPRUDENCE

A. Indra Sawhney's Return to Convention-Dependent Merit

In 1990, the Indian Central Government announced an intention to implement the Mandal Commission Report, causing considerable political commotion, violence, and unrest.[137] India's policy, based on the recommendations of the Report, was challenged in the Supreme Court of India in *Indra Sawhney*.[138] Although the Court held that the concept of reservation in initial public service appointments is constitutional, it was the "reservation in promotions" issue that emerged as a major contention.[139] For decades, many felt that the SC and ST candidates were acutely underrepresented in the higher echelons of state power.[140] To that end, there existed State policies that granted the reservations in promotions even after initial appointments in government jobs.

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[137] For a political history of the Mandal Commission Report, see *Sundat Story: Mandal Commission Report, 25 Years Later*, INDIAN EXPRESS (Sept. 1, 2015), https://indianexpress.com/article/india/india-others/sunday-story-mandal-commission-report-25-years-later/. *See also* K. Balagopal, *This Anti-Mandal Mania*, 25 ECON. & POL. WKLY 2231, 2231–34 (1990).

[138] Indra Sawhney v. Union of India, AIR 1993 SC 477 (1992) (India).

[139] *Id.* at 100–07.

[140] *Reservation in Promotion for Members of Scheduled Castes*, NAT'L COMM'N SCHEDULED CASTES (Feb. 21, 2013), http://ncsc.nic.in/files/Reservation%20in%20Promotion.pdf.

In the earlier case of *Rangachari*, the Court held that reservation in promotion is permissible.[141] *N.M. Thomas*[142] and *Karamchari Sangh*[143] confirmed this position. But in *Indra Sawhney*, which sought to "finally settle the legal position relating to reservations,"[144] the concept of merit was used to argue against reservation in promotions in the public sector. The basic argument of non-reserved category candidates remained the same, namely that once reservation is granted at initial appointments, it cannot be granted again for that reason because it violates the fundamental right to "equality before law."[145] They argued that to be consistent with this right, promotions must be based on "strict merit," which in public service is mainly reflected through the seniority of an employee.[146]

Contrary to precedent, in *Indra Sawhney* the Court reasoned that candidates benefiting from affirmative action programs are bound to be non-meritorious. Implying that those promoted via the reserved category inherently will be less efficient and therefore less deserving, it held that, "[i]t cannot also be ignored that the very idea of reservation implies selection of a less meritorious person."[147] In refuting reservations in promotions, the Supreme Court stated, "[i]t must be not forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration."[148] After discussing precedents upholding reservations in promotions, the Court gave primacy to merit and efficiency over social justice. The old convention-dependent understanding of merit was inherent in this reasoning.

The Supreme Court of India returning to its previous understanding of merit—that merit is free of all socio-historic factors—is significant. *Indra Sawhney* demonstrated that even the best of the interpretive approaches are unable to deliver long-term justice. The Supreme Court of India focused on "aiding in reform"[149] and

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141 General Manager, Southern Railway v. Rangachari, AIR 1962 SC 36, 44–45 (1961) (India).

142 *State of Kerala*, AIR 1976 SC 490 at 498, 506, 520.

143 *Akhil Bharatiya Soshit Karamchari Sangh*, AIR 1981 SC 298 at 314.

144 *See Indra Sawhney*, AIR 1993 SC 477 at 26.

145 *Id.* ¶ 5.

146 *Id.* ¶ 103.

147 *See id.* ¶ 111.

148 *See id.* ¶ 107.

149 Eidelson, *supra* note 2, at 1666–70.

"avoiding entrenchment"[150] of "over-broad social norms"[151] when it accepted a philosophical approach similar to Eidelson's. It continued to do so for several decades, but the Court's approach to caste-based affirmative action reverted to the old philosophical premise.

B. Reestablishing Merit Through Efficiency and Seniority

Once *Indra Sawhney* declared that reservations in promotion are unconstitutional, a long struggle between the legislature and the judiciary ensued. The Indian Government introduced several constitutional amendments to Article 16(4) to facilitate reservation in promotions in government services for SCs and STs. After every amendment came a constitutional challenge in the Supreme Court of India. One of the first such amendments was the Constitution (Seventy-Seventh Amendment) Act (1995), which added "reservation in promotions" to the language of Article 16(4).[152] But then the issue arose of who, once a junior reserved category candidate is promoted to the next post, jumping his senior non-reserved category colleague, will be senior when the non-reserved category candidate eventually catches up to the reserved category candidate in the next post.

This question of "consequential seniority" was first addressed by the Court in *Union of India v. Virpal Singh Chauhan*.[153] The Court introduced the "catch-up principle," whereby the reserved category candidate could not claim seniority over the non-reserved category candidate whenever his promotion was accelerated by virtue of reservation.[154] The Court's reasoning was that only the retention of original seniorities[155] would safeguard merit. The impugned order in *Virpal Singh Chauhan* was a National Railway Board circular that did not grant consequential seniority to any such reserved category candidate who was promoted via reservation.[156] The consequence of the National Railway Board's approach was that the reserved category candidate would always remain junior, or "less meritorious," than the non-reserved category candidate, no matter how many reserved promotions he or she received.

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150 *Id.* at 1660–67.

151 *Id.* at 1654–60.

152 *See* India Const. art. 16, cl. 4,.

153 *Union of India & Others*, AIR 1996 SC 448.

154 *Id.* ¶ 26.

155 Original seniorities means the seniority that is allotted to a public employee within her cadre on appointment into the service. *See id.*

156 *Union of India & Others*, AIR 1996 SC 448.

The Court affirmed this approach in *Ajit Singh Janjua-I*.[157] Here, the Court was clear that to balance the rights of reserved and non-reserved candidates, seniorities must be counted from the original merit at the time of initial appointments; the Court held that Articles 16(1), 16(4) and 335 of the Constitution imply that "a process should be adopted while making appointments through direct recruitment or promotion in which the merit is not ignored."[158] This ran counter to the intention of affirmative action, which aims to temporarily suspend the merit framework.

This aim of sharing power with the historically oppressed sections, such as the SCs and STs, within the executive branch never fructified. The idea of merit was indirectly restored in the framework of Indian equality jurisprudence by the Supreme Court itself, acting as a great hurdle for these oppressed sections. After *Indra Sawhney*, *Jagdish Lal*[159] and *Ashok Kumar Gupta v. State of Uttar Pradesh*[160] spread great confusion throughout the country about the application of reservation in promotions. *Ajit Janjua*-II[161] was meant to dispel this confusion. The Supreme Court again emphasized the balancing of rights of reserved and non-reserved category candidates. Moreover, the Court used the rhetoric of efficiency to imply that those promoted by reserved category, rather than merit, will certainly be inefficient in the higher public administrative positions.[162] The Court also implied that the value of efficiency trumps other fundamental constitutional values guaranteed in the preamble of the Indian Constitution, such as justice and equality of status.[163] The Supreme Court of India also drew inferences and reasoning from the U.S. Supreme Court case of *Adarand Constructors*.[164] This case reimposed strict-scrutiny on benign race-based affirmative action policies, overturning *Metro Broadcasting*.[165] Consequently, this approach helped to maintain India's status quo of power in favor of higher castes.

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157 Ajit Singh Janjua & Others v. State of Punjab & Others, AIR 1996 SC 1189 (1996) (India).

158 *Id.* at 733.

159 *Jagdish Lal*, AIR 1997 SC 2366.

160 Ashok Kumar Gupta & Others v. State of U.P. & Others, AIR 1995 SC 551 (1995) (India).

161 *Ajit Singh Janjua & Others*, AIR 1989 SC 3792.

162 *Id.*

163 *See* India Const. Preamble.

164 Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).

165 Metro Broad.v. FCC, 497 U.S. 547 (1990) (holding that intermediate scrutiny should be applied to race-based affirmative action policies).

C. Primacy of Merit and Formal Equality Maintained

Given the position taken by the Supreme Court of India, many felt that the idea of power sharing with the historically oppressed and excluded classes at the highest levels of public administration would remain unfulfilled. To counter this, Parliament introduced another constitutional amendment, the Constitution (Eighty-Fifth Amendment) Act (2001).[166] It substituted the existing language of Article 16(4-A) with, "in matters of promotion, with consequential seniority, to any class."[167]

The constitutionality of this amendment was challenged in the Supreme Court of India in *M. Nagaraj*.[168] The Court employed a sharp interpretive logic in this judgment, which was implicit in many of its decisions post-*Indra Sawhney*. This interpretive approach was founded on the Court's presumed superiority of the evidentiary value derived from an out-of-context set of empirical data, over the self-evident and widely accepted socio-historical realities and well-established fundamental constitutional concepts. The Supreme Court of India used the idea of empirical data to nullify the effects of the Eighty-Fifth Amendment; it held, "the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance of Article 335."[169]

The Eighty-Fifth Amendment aimed to fulfil the fundamental constitutional values enshrined in the Preamble—equality of status and opportunity—in favor of the SCs and STs. These values are the foundational promise of the Constitution, a pre-condition for the existence of the Democratic Republic of India. In previous cases, the Supreme Court of India used the rhetoric of balancing rights, but when the legislature passed the Eighty-Fifth Amendment, the Court in *M. Nagaraj*, in order to ensure that merit took the shelter of "quantifiable data," argued that only empirical numbers, in the very narrow context of employment, can prove or disprove the existence of the social backwardness of the SCs and STs.

There are a number of conceptual and factual mistakes in this decision. For example, there were no instructions or directions on how any state should quantify social backwardness before the Court. On

166 *See* The Constitution (Eighty-Fifth Amendment) Act, 2001 (India).

167 *See* India Const. art. 16(4).

168 M. Nagaraj & Others v. Union of India & Others, AIR 2002 SC 61 (2006) (India).

169 *Id.* at 278.

the contrary, annual and occasional special reports by the National Scheduled Caste and Scheduled Tribe Commissions sufficed in this regard.[170] Moreover, the Mandal Commission Report proved that, historically and socially, the SCs are not just backward but "backwardmost."[171] The Court essentially asked parties to prove something that was already accepted by the legislature and the judiciary. To further justify this demand, the Court construed the fundamental constitutional values as concepts that are somehow contradictory and separate from each other, rather than treating them as interdependent and harmonious values within the larger constitutional scheme. This approach enabled the Supreme Court of India to erode the grand aim of the substantive equality principle—while maintaining the rhetoric of restorative justice—into smaller administrative strategies (quotas) which were to be justified purely on the existence of some empirical data. Writing about equity, justice, and merit in *M. Nagaraj*, the Supreme Court stated, "[t]he above three concepts are independent variable concepts. The application of these concepts in public employment depends upon quantifiable data in each case."[172] The Court also imposed the condition of efficiency.[173]

The Supreme Court of India de-emphasized the significance of the substantive equality principle in various judgments before *M. Nagaraj* by asserting that Article 16(4) is not a fundamental right but merely an enabling provision. Thus, the Court prioritized formal equality in Article 16(1). The Court then asserted that it is its basic duty to safeguard fundamental rights, which it did by balancing the rights of reserved and non-reserved category candidates. In fact, it was not "balancing" but rather prioritizing the rights of one community over the other by prioritizing one constitutional value over the other—prioritizing liberty over equality and formal equality over substantive equality. This approach eventually allowed the Supreme Court of

170 A Special Report on Reservation in Promotion prepared by National Scheduled Caste Commission was submitted to the President of India on February 21, 2013. It was laid before the Parliament of India for discussion on December 23, 2014. This report produced the required quantifiable data proving the underrepresentation of government employees in higher posts belonging to the SCs and STs category. It made a very compelling argument for the reservation in promotion for these communities. In spite of the availability of this report, the Supreme Court of India continued to quash policies enacted by various states granting reservation in promotion to these communities.

171 *See The Mandal Commission Report*, *supra* note 118. http://www.ncbc.nic.in/User_Panel/UserView.aspx?TypeID=1161.

172 *See M. Nagaraj & Others*, AIR 2002 SC 61.

173 *Id.*

India to reestablish the concept of merit in the overall equality jurisprudence.

The result was that every state's statutory provision granting reservations in promotion to the SCS and STs were struck down by the Court one by one. Unfortunately, where the balancing of rights should have been used to restore the historically oppressed, it was used to impose the popular understanding of merit and disrupt the process of inclusion. There are a plethora of Supreme Court cases in which provisions of reservation in promotion for the SCs and STs were quashed. The same is true of the various high courts of the country.

Eventually, *M. Nagaraj* was partially reversed in *Jarnail Singh* in 2018.[174] The Court agreed that the demand of proving the backwardness of the SCs and STs through quantifiable data was wrong. Even though this requirement was overturned, *Jarnail Singh* held that the overall scheme of constitutional interpretation applied in *M. Nagaraj* was constitutional. This meant that the idea of merit reestablished by the Supreme Court after *Indra Sawhney* remains unchanged. Also, there was no discussion in *Jarnail Singh* of the constitutionality of the various concepts or tests developed by the Court to thwart the legislature's efforts in granting reservation in promotions to the SCs and STs. Therefore, the wider jurisprudential view shows that the contradiction between formal and substantive equality also remains unresolved after no less than seven decades. More importantly, it can be foreseen that the concept of merit will be used again in the future to disrupt the legislature's efforts to include the SCs and STs in the higher echelons of the executive branch. The Supreme Court of India's fundamental philosophical stance, after all of these years, remains the same.

VI. CONCLUSION

Eidelson's paper applies his philosophy to the Supreme Court of the United States' equality jurisprudence. He gives us an interpretation that can potentially allow the U.S. Supreme Court to transcend the hurdles arising out of its interpretations of the concepts of respect and individuality. I have demonstrated that a similar approach was adopted by the Supreme Court of India. Temporarily, it seemed that Eidelson's hope regarding a potential change in the attitude of the U.S. Supreme Court manifested in the Supreme Court of India's stance on caste-

174 Jarnail Singh & Other v. Lachhami Narain Gupta & Others, AIR 2011 SC 30621.

based inferences and affirmative action. But eventually, it lapsed back into the old philosophical framework.

A deeper look at the epistemic foundations of the relationship between the concepts of liberty and equality is necessary. Eidelson's hope may not manifest because of justices' change of heart. The Supreme Court of India's fluctuating understanding of equality demonstrates this. What we need instead is to make an argument that situates Eidelson's philosophical thesis, and other theories with similar philosophical underpinnings, as one of the central and essential characteristics of equality in constitutional philosophy itself, rather than an interpretive approach at the mercy of the court's discretion.