Compensatory Discrimination: Judicial Response in India and America

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The Central Government has implemented the 'Mandal Commission Report' as part of a continuing compensatory discrimination programme. But the Supreme Court stayed that order on first October 1990. Does this represent the tussle between the court and the national political process creating a familiar democratic dilemma: an antidemocratic court, thwarting the will of the majority in the name of the Constitution? The question naturally arises whether the court is justified in doing what it did. It may be argued that the court is justified because it is the only way to maintain the proper balance between democracy and constitutionalism. For this purpose American cases dealing with similar issue can also be examined to understand

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1. The II Backward Classes Commission Report submitted by B. P. Mandal, under Article 340 of the Constitution in 1980. (hereinafter cited as the "Mandal Report"). The Report had recommended that 27% of all jobs in Central Government, public sector undertakings, nationalised banks and certain private sector undertakings, must be reserved for 'Other Backward Classes'.


3. 'Majority' is used here to refer to the 'Other Backward Classes' (OBC's) since they constitute 52% of the population. See the Mandal Report supra, n. 1 at 63. This added to the 22.5% population of Scheduled Castes and Scheduled Tribes (SC's & ST's) comes to 74.5% of the population. Consequently any provision in their favour is a majority wish.
the relevant issues because of the obvious structural and institutional similarities between India and America. A study of the system of compensatory discrimination will help to learn more about democracy because the battle lines have always been drawn along group lines and the groups’ conduct generally determines the contours of a democracy, in states where there is political equality, as in India or America.

Compensatory Discrimination in India: Constitutional Setting

The Indian Constitution, it is often said, is the longest constitution in the world. The reasons for such an approach to the Constitution by our framers are, as Professor Franck said, threefold: firstly, it was intended to “help the courts... to adjudicate the relationship between the individual and the State” by “limiting” the discretion to depart from the text; secondly, in a country where the social fabric is rent by fissiparous tendencies, a detailed setting out of the rights of each can have a hortatory effect in reassuring and educating the people; and thirdly, the post world war II momentum had a strong humanistic impact. It is against this historical background that the equality clauses in the Constitution, have to be viewed. It has been said, that the “Indian Constitution is first and foremost a social document” and that the Fundamental Rights and Directive Principles of State Policy are the “conscience of the Constitution”. These words have frequently been used to depart from the language of the Constitution in a non-interpretivist

4. The clearest example of the successful use of compensatory discrimination for this purpose is found in the southern states, especially Tamil Nadu. Caste groups and associations have ‘democratised’ the state. For a detailed account of the changes in power structures, See, Vol. IV, Mandal Report, Supra n. 1 at 271. See generally, Report of the Tamil Nadu Backward Classes Commission (A. N. Sattanathan as Chairman).


6. See Granville Austin, The Indian Constitution; Cornerstone of a Nation (1966), p. 50. (hereinafter cited as Austin).

7. Ibid.
desire to do 'social justice', by the Supreme Court. But the nature of the Constitution, especially the Fundamental Rights Chapter, does not allow much less warrant, such a freewheeling attitude towards its interpretation.

The Right to Equality, under Indian Constitution is covered by Articles 14 to 18. In the Constituent Assembly, Article 14 did not provoke a discussion, whereas Articles 15, 16 and 29 (2) attracted prolonged discussions and much controversy. The framers of the Constitution were particular at making their terms as clear as possible to avoid any unwarranted judicial interpretation. That is why, the language of these articles, as compared to that of Article 14, is more specific and categorical. Article 14 embodies a universal rule by stipulating that the State shall not deny to any person equal protection of the laws or equality before the law. Article 15 (1) amplifies this general doctrine by specifically outlawing discrimination by the State on ground only of religion, race, caste, sex, place of birth or any of them. This onus of non-discrimination is placed upon all educational institutions receiving aid out of State funds under Article 29 (2). However Article 15 (4) creates an exception to this principle of equality by providing that “nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes”. Similarly, while Article 16 (1) provides for equality in the sphere of employment under the State, and Article 16 (2) outlaws classification on specific grounds of religion, race, caste, sex, descent, place of birth, residence or any of them, Article 16 (4) provides the exception to the rule by stating that “nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any back-

9. Ibid.
10. Ibid.
ward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State”.

That such a detailed scheme of rights and exceptions was adopted is not surprising. India was a land of communities and minorities — racial, religious, linguistic, social, and caste. If we believed that in our ‘federation of minorities’ a declaration of rights was as necessary as it had been for the Americans when they established their federal constitution, the reasons for providing exceptions to those rights — unlike America — in the Constitution itself are two fold; firstly, it is the recognition of the granting of political equality to all by adult suffrage unlike in America where it was left to the Supreme Court to bring about political equality; secondly, as a corollary, the political power had to be re-distributed in proportion to the size of the organized groups which existed prior to 1950. K. M. Panikkar said about adult suffrage that it “has social implications far beyond its political significance”. With such a recognition, it was wishful thinking to hope for older, local loyalties to break down and for assimilation of disparate

11. See Austin, supra n. 6 at 54.
12. Ibid.
13. See Article 326.
15. Redistribution as a justification for compensatory discrimination programmes is not new. See the cost-benefit table in Marc Galanter, Competing Equalities (1984), pp. 81 and 106. (hereinafter cited as Galanter). However, re-distribution is used here with reference to political power and not merely confined to resources. This distinction becomes important when the re-distributive effects are found to have ‘democratised’ the country by arming the numerical majority with substantive power. In America Reapportionment cases did what the political processes failed to do but in India, the redistributive effects are for reaching as, what the Reapportionment cases achieved in America, namely one man-one vote principle, had already been implanted in the Constitution itself.
16. See Austin, supra n. 6 at p. 47. K. M. Panikkar was a distinguished member of the Constituent Assembly.
groups. Modern Indian political history has been a witness to exactly the opposite trend. As has been correctly pointed out, "being the unit of social organization in India, the role of caste was bound to increase under a political system based on adult franchise". It is then, not surprising, that the exceptions to the equality rule have been used to increase the majority of the population's share in the national bounties and benefits by re-distribution or that traditional channels like caste were used for that purpose. In fact, as Professor Rajni Kothari observes, "those in India who complain of casteism in politics, are really looking for a sort of politics which has no basis in society".

It is in this light that the exceptions to the equality clauses along caste lines and the permission by the Supreme Court to such a course — however grudging it may be, — have to be viewed. Unless these constitutional principles are viewed in this way, we run the risk, not only of mis-understanding the reasons for judicial behaviour but also of a failure to appreciate the role of judicial function, in the area of compensatory discrimination. Thus, judicial behaviour has been analysed in terms of different concepts of equality, such as formal, weighted and proportional group equalities, as the true meaning of equality clauses, or in terms of a group-rank differentiation of caste. What appears closer to truth is the inherent tension between majoritarian wishes and a charter of rights and striking a

17. See the Mandal Report, supra n. 1, at 18.
18. Ibid.
20. See Galanter, supra n. 15 at pp. 189-190. See also Report of the Karnataka Backward Classes Commission (L. G. Havanur, Chairman), in five volumes, 1975, which makes the same distinction. (id., 60). Galanter however acknowledges the difficulty of maintaining such a distinction. (supra n. 15 at p. 190).
21. To the extent that popular legislation which clashes with individual rights have expressly been declared to be pro tanto void, in Article 13, the fundamental rights chapter can be viewed as the most
balance between them by the judiciary. It can also be a distinction between, — as Judge Abe Fortas remarked, “the concept of equality or egalitarianism in its total and awesome generality and equality of right as a constitutional doctrine”. On a legal plane, the same can be viewed as a clash between Fundamental Rights and Directive Principles of State Policy, but such a view is legally suspect, since the present trend is to harmonise the two chapters. But reference to the tension between fundamental rights and majoritarian wishes is found in unambiguous terms in Minerva Mills v. Union of India, where, Chandrachud, C.J. observed: “(As) observed by Brandies J., the need to protect liberty is the greatest when Government’s purposes are beneficial. If the discipline of Article 14 is withdrawn and if immunity from the operation of that article is conferred, not only on laws passed by the Parliament but on laws passed by the State Legislatures also, the political pressures exercised by numerically large groups can tear the country as under by leaving it to the legislature to pick and choose favoured areas and favourite classes for preferential treatment”. These remarks are most important and they clearly acknowledge the anti-majoritarian nature of fundamental rights and ipso facto, ‘anti-democratic’ part of the Constitution. See for a functional view of the same idea, Jesse H. Choper, Judicial Review and the National Political Process (1980), Ch. 1 and 2. (hereinafter cited as Choper). Though Choper does not declare individual rights as anti-democratic, in so far as he ascribes the main function of judicial review, which he describes as the “most anti-majoritarian of all exercises of national power”, to securing individual rights, it virtually amounts to what has been expressed above.

24. This distinction was always obfuscated by the Court and it reached its natural culmination in State of Kerala v. N. M. Thomas A.I.R. 1976 S.C. 490. See for details, infra.
that of judicial review. In this light, the attempts by the Supreme Court to strike a balance between democracy and constitutional limitations upon it in the sphere of compensatory discrimination has to be looked at.

**Judicial Response to Compensatory Discrimination:**

1. **Dorairajan to Balaji**

Mr. T. T. Krishnamachari was prophetic when he said, regarding Article 16 (4), that it would be "a paradise for lawyers".27 Virtually all of the litigation about compensatory discrimination policies in education has been about reservations in medical and engineering colleges for the backward classes, whereas 16 (4) has been a fertile ground for Scheduled Castes and Scheduled Tribes. But it was left to the Supreme Court to prompt the political process to carve out an exception to Article 15 (1). Thus, in *State of Madras v. Champakam Dorairajan*,29 the Supreme Court struck down a communal order of the Madras Government reserving seats in medical colleges and in *Venkataramana v. State of Madras*,30 the Court struck down part of a similar communal quota in regard to Government posts. However, both judgements were reversed by the first constitutional amendment by incorporating Article 15 (4).31 The Court in these two cases, was typically anti-

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27. VII Constituent Assembly Debates, p. 699.
28. See Galanter, *supra*, n. 15 at 64.
31. The Constituent Assembly had rejected the inclusion in the original Constitution of a provision similar to Article 15 (4). Prof. K. T. Shah who moved the amendment argued for including only SC's & ST's and Dr. Ambedkar, Chairman of the Assembly opposed it as an opening for "segregated facilities". However, the wording of Article 15 (4) was keyed to that of Article 340. See Nehru’s (f. n. contd.)
majoritarian by striking down quotas, and the Parliament was
typical equally in quelling that challenge. Thereafter, until today,
the conflict between the Supreme Court and the political pro-
cess has been confined to whether ‘caste’ can be the sole criterion
of ‘backwardness’. This conflict can be viewed basically as one
between an assertion by the organized caste groups of their
political power by virtue of their numerical majority and the
attempt by the Supreme Court to dilute those assertions by
insisting that ‘caste’ is not ‘class’ and thereby protecting the core
of Articles 15 (1) and 16 (1) and (2). This conflict reached
its natural culmination in M. R. Balaji v. Mysore.32 This case
is the locus classicus of compensatory discrimination and the
court’s approach is a tribute to its capacity to understand its
role in our society.

The events leading up to the case started in 195933 and
Balaji were nothing but denouement. A Government order
had reserved 68 per cent of the seats thereby designating 88
percent of the population as reserved. Six applicants to medical
college and seventeen applicants to engineering college filed
writ petitions challenging the Government order and the court
struck it down. The court held that the order was invalid be-
cause “the basis adopted by the order in specifying and enumer-
ating the socially and educationally backward classes of citizens
in the State is unintelligible and irrational and hence outside

Nehru observed that ‘economic backwardness’ was excluded only
because of that reason. Interestingly, he observed that “socially”
is a much wider word, including many thing and certainly includ-
ing ‘economically’. (id. at 9830).

32. 1963 A.I.R. S.C. 649. This case was ‘clarified’ in Heggade Janar-
dhan Subbarye v. Mysore, A.I.R. 1963 S.C. 702. (that the reserv-
ation for SC’s & ST’s was not to be taken as having been quash-
ed in Balaji). See, for a criticism of this clarification, H. M. Seer-
(hereinafter cited as Seervai).

Mys. 338, the Mysore High Court struck down a 1959 govern-
ment order which had reserved 65 per cent of the seats, thereby
designating over 90 per cent of the population as ‘backward’,
declaring it as a “fraud on the Constitution”. See for a narrative
of the events, Stanton, supra, n. 19 at 7-10.
Article 15 (4)”. The court also held that the extent of the reservation was unreasonable and a fraud on the power conferred by Article 15 (4). The court clearly said that Article 15 (4) is an exception to Articles 15 (1) and 29 (2). The court’s eagerness to dilute the assertions of the political majority is evident in the way in which it repudiated ‘caste’ as the sole determinant of backwardness and so prevented it from being equated with ‘class’. At the same time keeping in view the perceived group inequalities, it could not uphold individual rights absolutely. On a fundamental level it had to strike a compromise between conflicting democratic forces — that of majoritarian wishes on the one hand and that of individual rights as the cornerstone of a libertarian democracy on the other. For example, the court spoke of “adjusting” the interests of the weaker sections of the society to “the interests of the community as a whole’ and declared that” a formula must be evolved which would strike a reasonable balance between the several relevant considerations”. Before Balaji, in General Manager, Southern Railway v. Rangachari35 the court had held that reservation extended to selection posts. The implication of this was that Article 16 (4) has a re-distributive function at all levels. Backward classes required not only that they should have adequate representation in the lowest rung but also in selection posts as well. In this case the court acknowledged the power of the legislature to re-distribute national bounties over individual rights and thereby conceded some ground which it later doctrinally recovered in Balaji.

2. Balaji to Thomas

In response to Balaji, the Mysore Government formulated another test for designating backwardness which had excluded caste as a criterion. This test was challenged and upheld by the Mysore High Court in Viswanath v. State of Mysore.36 In dicta, that court recommended that ‘caste’ ought to have been

added to the new test. But this view was repudiated by the Supreme Court in *Chitralekha v. State of Mysore*. Subba Rao, J. said: "We would hasten to make it clear that caste is only a relevant circumstance in ascertaining the backwardness of a class and there is nothing in the judgement of the court which precludes the authority concerned from determining the social backwardness of a group of citizens, if it can do so without reference to caste". This case is a landmark in so far as it was a very brave attempt, — perhaps the bravest yet — by the court to stop re-distribution along traditional lines and include within the recipients persons from non-traditional groups. But the attempt was a short-lived exercise because it was unhistorical and it failed to temper its ideal anti-majoritarian role with a little pragmatism. This is very important, as the court has peculiar institutional constraints such as exhaustion of institutional capital by popular non-compliance while exercising its anti-majoritarian power and what is needed is a balance such as the one the court struck in *Balaji*.

The combined effect of *Balaji* and *Chitralekha* was felt differently in different states. Thus, while the Kerala High Court took a cautious line, deferential to the state government, the Andhra Pradesh High Court took a more aggressive stand, more in tune with the *Chitralekha* line. The Sup-

38. It was unhistorical in two ways: firstly because, it ignored the traditional caste groups' role in shaping the compensatory Discrimination Policy in India; and secondly it had probably no support in the constituent Assembly Debates. For a detailed analysis of the first, see Galanter, supra n. 15, Ch. 2, 5 For support of the second, see Havanur Commission Report (1975) supra, n. 20. See also Galanter, supra n. 15 at 194.
39. See Choper, supra n. 21, Ch. 3.
42. Galanter has said that the difference in judicial response corresponds to the contracting fashions in which the state governments handled the matter. See Galanter, supra n. 15 at 197.
reme Court in *Devadasan v. Union of India*, 43 considered the scope of Article 16 (4) and decided that it was an exception to Article 16 (4) and (2). The court relied on *Balaji* and said that reservation ought to be less than 50 per cent if the individual rights are not to be rendered "illusory". In so far as the case dealt with the "carry forward" rules with respect to Scheduled Castes and Scheduled Tribes, the judgement teaches us less about our concern; of numerical majorities overriding individual rights.44 It was in *P. Rajendran v. State of Madras*, 45 that the court showed, as Robert Dahl stated, that "(it) would be most unrealistic to suppose that the court would, for more than a few years at most, stand against any major alternatives sought by a lawmaking majority". 46 In this case, the court upheld the use of castes as the units by which Madras's backward classes were designated. It said, "(I)t must not be forgotten that a 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 on the ground that it is a socially and educationally backward class within the meaning of Article 15 (4)". The court in this case certainly moved away from a classic compromise position as in *Balaji*, and put its stamp of legitimacy upon traditional channels of redistributive articulation. Its judicial review power lost much of its traditional sting and the court, instead of fashioning substantive principles, took upon a policing function.47


44. It is the reservation for Other Backward Classes (OBC's) which concern us primarily as they constitute the majority of the population. See *supra* n. 3.


47. This theory of judicial review is advocated by John Hart Ely, *Democracy and Distrust* (1980) where he advocates a theory of equal access and equal result, as procedural view of judicial review. (hereinafter cited as Ely).
However, in *State of A.P. v. Sagar*, the court retreated again. This retreat is seen when Shah J., said: "In determining whether a particular section forms a class, *State of A.P. v. Sagar*, the Court retreated again, and Shah J., said, "In determining whether a particular section forms a class, caste cannot be excluded altogether. But in the determination of a class a test solely based upon the caste or community cannot also be accepted". Justice Shah's rule was clarified in *Triloki Nath Tiku v. State of J & K*, where the court observed that caste cannot be the exclusive test of what is a class. In both *Sagar* and *Triloki Nath*, the court walked on a tightrope and struck a good balance between conflicting forces. The court also implicitly acknowledged multiple tests for determining backwardness by ruling out caste as the only test. In *Periakaruppan v. State of Tamil Nadu*, the court relied on *Rajendran*, and Justice Hegde (as he then was) bluntly observed: "a caste has always been recognized as a class". But the court recommended review of the policies and said that a class cannot be perpetually treated as backward. In *State of Andhra Pradesh v. Balaram*, a two-judge bench reiterated that caste units are permissible and said that a caste may be a backward class notwithstanding the presence in it of a "few individuals (who are).... both socially and educationally above the general average". By neglecting the 'creaming' effect, the court in effect argued that a few, individuals may be unfairly enriched at the cost of few other individuals. Quite apart from the fact that, such a decision is one of policy, which the court ought not to make, the court also gave up its traditional role — that of safeguarding individual rights and thereby weakened its power of judicial review.

In *Janki Prasad Parimoo v. State of J & K*, the court upheld the use of caste units again and said economic considerations should not be above other considerations "which go to show whether a particular class is socially and educationally backward". Interestingly it wanted to avoid giving poverty primacy, since it wanted to avoid too large a number of recipients.

This approach makes it appear as if the court understood its role clearly, by favouring a large content of 15 (1) to be kept intact. In *State of U.P. v. Pradip Tandon*, the court suddenly in a spurt of confusion declared "(The) socially and educationally backward classes of citizens are groups other than groups based on caste". Since the remarks are obiter dicta, they probably reflect an urge rather than advance any principle.

3. *Thomas to Karmachari Sangh*

It has been said that much of the earlier understanding of constitutional policies of compensatory discrimination is cast into doubt by the court’s ruling in *State of Kerala v. N. M. Thomas*. The court seemed pre-determined to re-examine the old postulates relating to Articles 15 (4) and 16 (4). The case came up on a certificate granted by the Kerala High Court. The petitioner before the High Court, N. M. Thomas, was a lower division clerk in the Registration department. For promotion to the upper division on the basis of seniority, lower division clerks had to pass a test in three subjects. The petitioner complained that although he had passed all the tests by 1971, he had not been promoted to the upper division, because Scheduled Caste lower division clerks who had not passed the tests had been promoted, under a state government rule. Out of 51 vacancies in the category of upper division

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54. See Galanter, *supra* n. 15 at 382.
56. The Court clearly knew that *Dorairajan* (7 judges), *Rangachari* (5 judges), *Balaji* (5 judges) and *Rajendran* (5 judges) cases had been decided unanimously by Constitution Benches and if it had to extensively alter the doctrines therein laid down, it had to constitute a larger bench. The bench in fact consisted of 7 judges. (Ray C.J., Khanna, Mathew, Beg, Krishna Iyer, Gupta and Fazal Ali, J.J.). See for a criticism of the constitution of the Bench, *Seervai, supra* n. 32 at 430-431.
57. Rule 13 AA, promulgated in 1972: "Notwithstanding anything contained in these rules, the Government may, by order, exempt for a specified period, any member or members, belonging to a Scheduled Caste or a Scheduled Tribe, and already in service, from passing the tests".
clerks, 34 were filled by Scheduled Caste persons who had not passed the tests. He challenged it, and the Kerala High Court struck down the rule as not within the ambit of Articles 16 (4) or 15 (4), and violative of Article 335, and observed: “(R)eservations had already been made.... what has been attempted by Rule 13AA is to exempt persons from possessing the necessary qualifications.... The action therefore cannot be supported under Article 16 (4)”. On appeal to the Supreme Court, counsel for the state argued that the exemption for taking tests, need not be subsumed under Article 16 (4)’s provision for reservations, but could be justified as a reasonable classification under Article 16 (1). The court decided by a majority of five to two that the rule was valid and reversed the Kerala High Court’s decision, issuing in the process, seven separate opinions. Justice Beg thought that Article 16 (4), would itself authorize the state’s provision while Chief Justice Ray, Justices Mathew, Krishna Iyer and Fazal Ali, accepted the classification argument advanced by the state. The case presented hard choices if the Government rule had to be upheld. The first choice was to treat the provision as ‘reservation’ under Article 16 (4). But the difficulties in toeing that line were two fold; firstly to treat the ‘exemption’ as ‘reservation’ which the Kerala High Court had declined to do, and secondly, if it is treated as ‘reservation’, to avoid conflict with earlier authorities’ limit on quantum of reservation; and in the present case 34 out of 51 seats was more than the 50 per cent quantum. The second choice was to treat the provision as not reservation but classification under Article 16 (1). But again the difficulty was that the power to classify under Article 16 (1) did not include a power to employ those classifications specifically for-

59. Article 335 reads: “The claims of the members of the SC’s & ST’s shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State”.
60. The dissenting judges were Khanna and Gupta, JJ.
61. See supra n. 56 for the cases cited there. The rule had consistently been held to be 50%.
bidden in Article 16 (2). The only way to overcome this is by holding that Scheduled Castes and Tribes do not constitute a classification on the basis of 'caste'. That course would obviate a clash with earlier authorities and would uphold the provision. The court exercised its option and chose the latter course, with Justice Beg alone concurring on traditional grounds.

Chief Justice Ray said that such a classification is to provide 'equal opportunity' in the light of Articles 46 and 335. Justice Mathew said that the 'equality of opportunity' is actually 'equality of result'. He further said, "If equality of opportunity guaranteed under Article 16 (1) means effective material equality, then Article 16 (4) is not an exception to Article 16 (1). It is only an emphatic way of putting the extent to which equality of opportunity could be carried, viz, even up to the point of making reservation". Both the opinions clearly obfuscate the distinction between equality as egalitarianism and equality as a constitutional doctrine. By such obfuscation, both of the judges failed to protect individual rights and thereby shook the reason for judicial review power, and also tried to bring about egalitarianism which is a policy decision best left to the political process. Justice Krishna Iyer's opinion is different in a crucial way from that of Justice Mathew. While Justice Mathew would allow classification under Article 16 (1) for "all members of the backward classes", Justice Krishna Iyer would confine it to the harijans. For other classes, "their only hope is in Article 16 (4)". The difference is crucial from the re-distributive point of view. By confining the 'other backward classes' — which are the majority — to Article 16 (4) alone,

62. Seervai has said that such a view is wrong. However his most important objection to such a course is that the classification would in any case be based on religion — since SC's can only belong to Hindu or Sikh religion — and classification based on religion is forbidden under Article 16 (2) and so the reasoning is invalid. See Seervai, supra n. 32 at 433-434.


64. It is Judge Abe Fortas' distinction, see supra n. 23.

65. See Galanter supra n. 15 at 387.
Justice Krishna Iyer impliedly imposes the 50 per cent limit upon any provision in their favour while freeing the 'harijans' from any such constraints; he allows them to enjoy "lesser orders of advantage" under Article 16 (1) in addition to reservations under Article 16 (4). This is certainly more in the nature of a traditional exercise of judicial review power — that of preventing the majorities and helping the minorities —, than that of Justice Mathew who openly proclaims that compensatory discrimination was to fulfill a representative function for "all backward classes". 66 Justice Fazal Ali, after opining that Article 16 (4) is not an exception to Article 16 (1) says that he would liberalize the 50 per cent rule. 67 The amazing thing about the four majority judgements is that all of them declared Article 16 (4) as not an exception to Article 16 (1), when they had no need, much less reason, to do so. All four had adopted the classification argument and once the provision is taken out of Article 16 (4), where is the need for 'escaping' from Article 16 (4)? Quantum limit of 50 per cent is inapplicable to a classification under 16 (1) and the need to treat Article 16 (4) 'outside' Article 16 (1) arises only if the Kerala provision was treated as 'reservation', which it was not. As a result, all the four judgements clearly 'overkill' the issue by proclaiming Article 16 (4) to be 'outside' Article 16 (1) when it was unnecessary for them to do so.

Justice Beg advanced a traditional view and said that the effect of Kerala promotion rules is "a kind of reservation". These rules may be viewed as "implementation of a policy of qualified or partial or conditional reservations" which could "be justified under Article 16 (4)". 68 Thus, he takes the first choice articulated above but it is unclear as to how he avoids clash with earlier authorities' limit of 50 per cent since in the present case the 'reservation' was far above 50 per cent. Anyhow, Justice Beg advanced a proposition which showed how correctly he understood not only the constitutional scheme but also

67. Id. at 555.
68. Id. at 524.
his judicial function. “Article 16 (4) was designed to reconcile the conflicting pulls of Article 16 (1) . . . . and of Articles 46 and 335 . . . .” 69 What Justice Beg did was to strike a balance — which is commendable — but the doctrinal justification he advances for it is unique and innovative: he ‘uses’ a constitutional provision, namely Article 16 (4), which has been the major tool of egalitarian and re-distributive policies, to strike a balance between equality as egalitarianism and equality as a constitutional doctrine. Justice Beg also appears to say that Article 16 (4) is an exception to Article 16 (1). 70 Quite apart from the fact that it conflicts with the rest of the majority opinions, its major lack is, ironically, the reasoning adopted by the rest of the majority to prove that Article 16 (4) is not an exception to Article 16 (1). Because, if he was asserting that the provision was ‘reservation’ under Article 16 (4), he was compelled to reconcile the facts of this case to the 50 per cent rule. The only way he could have accomplished that is by arguing that Article 16 (4) is not an exception to Article 16 (1) and that it was a ‘facet’ of equality code and it was “only an emphatic way of putting the extent to which” Article 16 (1) can be carried. That he argued exactly the reverse is a surprise. On the whole, Thomas produced conflicting opinions but has served a good purpose; that of articulating traditionally held interpretations and advancing new theories.

In K. S. Jayasree v. Kerala, 71 the court upheld a scheme of the Kerala Government, under which members of backward classes with an annual income of Rs. 10,000 were excluded from reservation benefits. The court held that neither caste nor poverty constituted backwardness, by itself, though both were relevant. Coming on the heels of Thomas, one would expect doctrinal innovations but there are none here. What seems evident is a consistent effort to uphold all government schemes in compensatory discrimination, the main object being to ren-

69. Id. at 522 (emphasis added).
70. Id. at 521.
der adhoc justice on a case by case basis rather than laying down principles which will keep the fine balance between conflicting forces. The court at this juncture seems more eager to ensure equal results by policing the discrimination polices.

4. **Karmachari Sangh and After**

The next major case is *Akil Bharatiya Soshit Karmachari Sangh v. Union of India*. The case came before the court impugning ten circulars issued by the Railway Board fixing reservation quotas for members of SC’s and ST's in promotion posts, including circulars for the ‘carry forward’ rules. Three judgements were delivered, with Justice Krishna Iyer writing the leading judgement, dismissing the petitions and upholding the validity of the ten circulars. The other two judges were Chinna Reddy, J. and Pathak, J. Krishna Iyer, J.’s judgement has been termed a “strange mixture of sermon, prophecy and platform rhetoric”. It has also been said that there is a conflict between *Thomas* and *Karmachari Sangh*, in so far as the former held Article 16 (4) to be not an exception to Article 16 (1), whereas the latter case did. But such a conflict does not seem to arise because the *Thomas* observations can be treated as obiter dicta, as the court in that case had upheld the ‘super-classification’ argument for which Article 16 (4)’s construction as an exception to Article 16 (1) was irrelevant. Hence the remarks can be considered dicta and any purported conflict between *Thomas* and *Karmachari Sangh* can be resolved.

In fact, in the latter case, the court relied on *Thomas*, and it only reinforces the above view. Viewed this way, the original interpretation of Article 16 (4) was not disturbed in *Thomas*

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72. See especially, the dissenting opinion of Khanna, J. in *State of Kerala v. N. M. Thomas*, 1976 A.I.R. S.C. 490 at 510: “Out of our concern for the facts of one individual case, we must not adopt a construction the effect of which might be to open the door for making all kinds of inroads into a great ideal and desideratum like that of equality of opportunity”.

73. See generally, Ely, *supra* n. 47.


75. See Seervai, *supra* n. 32 at 443.

76. *Id.* at 441.
and reiterated only in *Karmachari Sangh*. For example, Krishna Iyer, J. said in the latter case: “The success of State action under Article 16 (4) consists in the speed with which result oriented reservation withers away as no longer a need, not in the ever widening and everlasting operation of an exception (Article 16 (4)) as if it were a super-fundamental right to continue backward all the time”. 77 “Moreover Article 16 (4) is an exception to Article 16 (2)”. 78 Further, he said that Article 16 (4) can be viewed as “an amplification of Article 16 (1) or as an exception to it”. What he really means is that, if in addition to ‘reservation’ under Article 16 (4), any “lesser orders of advantage” are conferred under Article 16 (1), and the total result exceeds 50 per cent then 16 (4) can be viewed as “an amplification of 16 (1)”. Of course this applies only to SC’s & ST’s. 79 But Article 16 (4) as an exception to Article 16 (1) arises only when ‘other backward classes’ are involved, for then the ‘classification’ argument does not arise. As Krishna Iyer, J. says the carry forward rule “shall not result, in any given year, in the selection of SC & ST candidates considerably in excess of 50% . . . .” 80 This unfortunately is only as helpful as the “all deliberate speed” language used in *Brown v. Board of Education*. 81 Despite all this, if Krishna Iyer J., said that “even though we would, we could not, and even if we could, we would not” depart from *Thomas*, it is truly surprising since he already had departed; for in *Thomas* he had held SC’s to be not castes, whereas in the present case he said “a verdict need not be rested on the view that SC’s are not castes”. 82

78. Id. at 322.
79. See supra n. 65.
82. A.I.R. 1981 S.C. 322. See further id; “Also a caste, subjected qua caste, to the most humiliating handicaps may be a backward class although the court will hesitate to equate caste with class except where the degree of dismalness is dreadful”. This is a recitation of *Balaji*, and found subsequently in *Thomas*, that ‘Backward Classes’ should be comparable economically and educationally to SC’s & ST’s.
This is the actual conflict with Thomas. Justice Pathak's judgement has been termed to be a dissenting judgement in content, if not in form. He also committed the error of treating Thomas and Devadasan as hostile and said, "(as) the position is not clear, and in any event, as my learned brothers, have taken a definite view in favour of the 'carry forward rule', he was dismissing the petitions. Justice Chinnappa Reddy's opinion as well as that of Krishna Iyer, J's, distinguishing Balaji and Devadasan on the basis that in both, the viciousness of the impugned rule was based on the "actual working" of the rule rather than any "theoretical consideration". If by that statement, it is meant that, a person who challenges an alleged abridgement of the equality rule, has to prove an actual previous abridgement of equality to succeed, it amounts to shifting the onus of proof and is plainly legally inconsistent. Finally, Krishna Iyer J., made some important observations regarding the use of Article 16 (4): "To lend immortality to the reservation policy is to defeat its raisond'etre: to politicise this provision for communal support and party ends is to subvert the solemn undertaking of Article 16 (1), to casteify 'reservation' even beyond the dismal groups of backward — most people, euphemistically described as SC & ST, is to run a grave constitutional risk. Caste, ipso facto, is not class in a secular state". These remarks clearly express the concern the court ought to have in protecting the core of equality clauses by explicitly condemning the use of compensatory discrimination as a tool of the majority. Also, by rejecting caste as the sole determinant of backwardness, the court expressed itself in a way which can only mean that it was concerned about its own role in tackling 'steamroller' wishes. The court was clearly anti-majoritarian though the case dealt broadly with minorities, namely SC's.

The court was expected to resolve the so-called 'conflict' between Thomas and earlier cases in K. C. Vasanth Kumar v.

83. See Seervai, supra n. 32 at 442.
84. See Kathi Raning Rawat v. Saurashtra, A.I.R. 1952 S.C. 123. (that there is no presumption that any action taken under Article 16 was reasonable as there was in any action taken under Article 14). See also Jagdish v. Union, A.I.R. 1980 S.C. 820 at 353.
Karnataka. It has been said that it is hoped that the case will have no successor in the history of our Supreme Court. In that case, the petitioners challenged the Karnataka Government's orders reserving for backward classes 66% of seats in educational institutions under Article 15 (4) and 68% of posts in public employment under Article 16 (4). On 8 May 1985, the Judges acceded to the request of the Government of Karnataka to lay down guidelines for the commission to be appointed by the Government for laying down “nationally acceptable and constitutionally valid criteria for backwardness”. The result is that there are five opinions which are not judgements but as Chandrachud, C.J. said, “well-meaning innovations”. Nevertheless, the opinions expressed are relevant in examining judicial attitude towards compensatory discrimination. Sen J., and Venkataramiah J. did not make any reference to the proposed commission and the latter held that Articles 15 (4) and 16 (4) were exceptions and that reservation exceeding 50% was invalid. Sen J. supported “economic backwardness” and said caste should be used only for purposes of identification of persons. Desai J., too said: “The only criterion which can be realistically devised is the one of economic backwardness”. Chinnappa Reddy, J’s opinion reflects a confusion about the purpose of the 50% rule, when he says that if reservation exceeds 50%, “there is neither statistical basis nor expert evidence to support the assumptions that efficiency will necessarily be impaired”. The truth is, if reservation exceeds 50%, it would cease to be an exception and merit or efficiency has nothing to do with 50%. However, he advocates “class poverty and not individual poverty” as the “primary test”. Chandrachud, C.J. lays down

89. See e.g., Desai, J’s opinion: “This is not a judgement in a lis in an adversary system.... This does not purport to be an exhaustive essay on guidelines but may point to some extent, the direction in which the proposed commission should move”. See for a trenchant criticism of such a modus operandi, Seervai, supra n. 87.
different guidelines for SC's & ST's and other backward classes. For the former, he would apply the income criterion after 2000 A.D. whereas for the latter, they should not only satisfy a means test but also be comparable to the SC's & ST's in the matter of their backwardness. He also suggested that there should be a review every five years. All the opinions show an underlying concern for the gradual erosion of equality clauses by the aggressive use of 'equalising' clauses by the political majority and all the opinions except Chinnappa Reddy, J’s markedly move away from a policing perspective of their own function to a more traditional perspective of their function — namely that of safeguarding individual rights by discouraging the use of traditional groups as either beneficiaries of compensatory discrimination or as levers of democratising the society.

After Vasanth Kumar, the Court has not delivered any landmark decision. A few cases have been decided. A notable decision is P & T SC's & ST's Employees Welfare Association v. Union, where Venkataramiah J., held that the withdrawal of a scheme of promotions for SC's & ST's violates the equality clause of the Constitution. This is another instance of the obfuscation referred to above and presents the problem of reservation, a constitutional challenge. In Deepak Sibal v. Punjab University, a two judge bench relied on Balaji and held: “the provision of 15 (4) does not... reserve the majority of the seats in an educational institution at the cost of the rest of the society”. One can see how Balaji is still being considered good law despite a spate of confused rulings in the 1970’s.

It is difficult to see a pattern in the judicial approach to compensatory discrimination. The effort to devalue ‘caste’ as a

90. See Balaji case, supra n. 32 where this originated.
93. See supra n. 23.
criterion has been inconsistent and the result is that political power as well as its concomitant benefits have been allowed to be channelised through traditional groups. The compensatory discrimination experience teaches us, as W. H. Morris Jones has pointed out, that "neither the political life nor the constitution can be understood without the other".

Compensatory Discrimination in America

It has been said that "the tensions of affirmative action collide, finally, in the Fourteenth Amendment". The American Supreme Court in Slaughter-House Cases, observed: "[O]ne pervading purpose of the amendment, is the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him". The Fourteenth Amendment guarantees to every person "equal protection of the laws". It has no provision similar to Article 15 or 16 of Indian Constitution. The national political process was also under no constitutional compulsion to help the weak and the downtrodden. Wielding no substantial political power, they were left to the mercy of the majority. As a result, every effort to achieve racial equality between the blacks and whites has been by the court, acting either on its own initiative, or by policing the government efforts. Such a power being enormous the court had committed the understandable though regrettable paradox of denying equality to the blacks by invoking the equality clause itself in cases like Dred Scott v. Sanford and Plessy v. Ferguson. The Court's retrieval from that phase — as part of a longer societal retrieval — has been by building a "two-tiered equal protection clause"


97. 16 Wall. 36, 87 (1873).

98. 19 How. 393 (1857).

(that is, rationality and strict scrutiny) through which ‘invidious classifications’—such as racial discrimination—, and ‘classifications affecting access to fundamental rights’—such as one relating to adult suffrage—have to be admitted, to be constitutionally valid. A crucial point to be noted is that constitutional litigation in issues such as these was being conducted by groups, seeking to win by Constitution, reforms that they could not win in the political arena. It is against this background that the judicial behaviour in affirmative action issues has to be looked at.

J. F. Kennedy was the first President to call for “affirmative action” on the part of government agencies and contractors. This was because, firstly the Civil Rights movement of the 1960’s had its profound impact and secondly, despite the epochal ruling in Brown v. Board of Education, outlawing segregated schools, and despite federal legislations which outlawed private discrimination, real equality of opportunity remained as a myth for blacks. The Carnegie Commission on Higher Education concluded that “(t)he greatest single handicap the minorities face is their under representation in the professions of the nation”. This was equally true with respect to business enterprises as well. Though occupational proportionality as a state goal has been decried, it can not be denied that the

100. The view that “the Constitution might help those who could not help themselves”, is celebrated in R. Kluger, Simple Justice (1976) and A. Lewis, Gideon’s Trumpet (1964).
101. See Cox, supra n. 14 at 306.
102. See Stanton, supra n. 19 at 3.
104. Title VI and VII of the U.S. Civil Rights Act of 1964 reads: “No person in the U.S. shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”.
105. See Prof. Cohen and Prof. Posner’s comments in Wilkinson, supra n. 96 at 268. But see Wilkinson, id. for a view that ‘proportionate society’ is unworkable because of inherent differences among ethnic (f. n. contd.)
goal is ‘democratic’ in so far as it allocates power and resources according to the size of the groups. So, heeding President Kennedy’s call, thousands of affirmative action programs were mooted in education and employment spheres. But, as in India, it is in the sphere of education, that the battlelines were drawn.

It is in DeFunis v. Odegaard\(^{106}\) that the Court had the first look at the affirmative action issues. In the case, DeFunis applied to the University of Washington College of Law twice and was rejected both times whereas minority applicants who had scored less marks than him were admitted. DeFunis brought suit in state court where he won. On appeal the Washington Supreme court reversed and upheld the law school’s affirmative action plan. The Supreme Court then granted certiorari but by the time it came to hear his case, DeFunis had already registered for his last term in law school by virtue of an earlier stay of the Washington Court’s order granted by Douglas, J. Because it was conceded, he would graduate regardless of the outcome, a Supreme Court majority declared the question before it moot. Four justices dissented, pointing out that the case had been fully argued. Brennan, J. said that the issues should not have been avoided. Douglas J. alone reached the merits and concluded that any racial preference was unconstitutional. The court’s action of ducking the issues was generally criticized. But it shows that the court felt uncomfortable in dealing with an issue which was so emotive and political. It is noteworthy that the ‘liberal’ judges were the dissenters and except Douglas, J., the rest were he dissenters in Bakke\(^{107}\) case also. It probably shows an eagerness to legitimise affirmative action programmes by clothing it in constitutional garbs, since in Bakke, the dissenters did precisely that.

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1. The Bakke Case

Beneath the great debate in Bakke lay a less publicized consensus\textsuperscript{108} — a consensus that minority status has to be bettered. The disagreement about affirmative action was one of means. The medical school of the University of California at Davis employed two admissions programmes. Sixteen out of hundred seats were reserved for members of minority groups. The remaining seats were filled by applicants in the general pool. Alan Bakke applied for admission in the general pool twice and was turned down twice. In both years minority students with considerably lower test scores than Bakke were admitted in the reserved quota. Bakke sued for injunctive and declaratory relief to compel his admission to Davis, alleging that the special admission programme excluded him on the basis of his race in violation of the fourteenth amendment, a provision of the California Constitution and Section 601 of title VI of the Civil Rights Act of 1964. The Supreme Court of California ordered the University to admit Bakke on the ground that his exclusion under the race-conscious minority admissions programme violated the fourteenth amendment. The Supreme Court granted certiorari in February 1977. The case gave rise to six opinions. Justice John Paul Stevens, joined by Chief Justice Burger and Justice Stewart and Rehnquist held that the plain meaning of the words of Title VI of the Civil Rights Act of 1964 forbids making race “the basis for excluding anyone from participation in a federally funded program”. These four, did not discuss the constitutional aspects. Five Judges concluded that Title VI merely applies the equal protection standard. Four of these five, Justices Brennan, Marshall, White and Blackmun voted to uphold the School’s programme, because “in order to get beyond racism we must take account of race.... And in order to treat some people equally, we must first treat them differently”.\textsuperscript{109} All four clearly accepted the quota system. This split left Justice Powell to cast the deciding vote. He held that the California programme violated both the fourteenth amendment

\textsuperscript{108}See Wilkinson, supra n. 96 at 263.

\textsuperscript{109}See supra n. 107 at 407.
and Title VI because it set aside a quota. He held that in a
country of groups such as America there is no basis for deter-
mining which groups deserve special treatment. He also declar-
ed that the rights created by the fourteenth amendment are
guaranteed to the individual and not groups. But he allow-
ed race to be taken as a factor in judging the qualifications of
individuals. To all this he added a rider, that proof of past
discrimination against minorities — in the form of "judicial,
legislative or administrative findings" — might justify re-
medial quotas. This, as will be seen, has been used subsequently
to uphold other quotas. Since he cast the deciding vote, Powell
J’s opinion prevailed as the court’s opinion. Thus, his was a
classic compromise between individual rights and a felt need
for increasing minority representation as part of a move towards
a true limited democracy, somewhat resembling the compromise
struck in Balaji case by our Supreme Court. Thus quota system
was out, but the Constitution had been rendered more demo-
cratic by making it more acceptable, and by diluting the major-
itarian interpretations previously put upon equality clauses.

2. Bakke’s Aftermath

As controversy over affirmative action in admission to
higher education quieted, controversy over affirmative action in
employment intensified and spread. Powell J’s rider that
quotas can be justified if past discrimination is proved became
more and more relevant. In Fullilove v. Klutznick, the court
upheld an affirmative action programme whereby the congress had
set aside 10% of its State and local public works grants for
contracts with minority business enterprises. A majority of the
court did not apply the strict scrutiny standard to the issue
before them but instead concentrated on whether the govern-
mental objectives were valid. This is important as it shows that
the court not only understood the re-distributive, democratising
effects of compensatory discrimination but also rendered Justice
Powell’s rider in Bakke, redundant. But in Firefighters local

110. Id. at 289, citing Shelley v. Kraemer, 334 U.S. 1 at 22 (1948).
111. See Cox, supra n. 14 at 282.
112. 448 U.S. 448 (1980) (by 6-3).
Union No. 1784 v. Stotts, an affirmative action plan was struck down. In United Steelworkers v. Weber a controversy was touched off, when the court upheld an affirmative action ‘agreement’ between United Steelworkers and Kaiser, under which it had been agreed that Kaiser should increase the proportion of blacks among its employees by prefering blacks with less seniority than whites. Weber had challenged the agreement on the ground that it ran counter to title VII of the 1964 Civil Rights Act. Two lower courts had upheld his claim. But the Supreme Court reversed, five to two, (the two abstained) and Brennan, J., held that “all voluntary, private race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy” were allowed under the statute. The decision however dealt only with statutory violations and as the subsequent decisions reveal, can not be considered as contrary to Bakke.

The issues however, were drawn to a head in a series of cases in 1986. One case was Wygant v. Jackson Board of Education. In this case the Jackson Teachers Association and the Board of Education had agreed that layoffs of teachers should be made in customary reverse order of seniority, except that the percentage of minority teachers would never be reduced. Non-minority teachers commenced a suit complaining that the contract and the Board’s compliance violated the equal protection clause and also the Civil Rights Act. The lower courts did not heed and the Supreme Court, five to four, held the plan unconstitutional. Justices Marshall, Brennan and Blackmun upheld the plan. Justice Stevens also upheld it, noting interestingly, that an integrated faculty serves a representative purpose in a democratic society. Of the majority, Justices Powell, Rehnquist and Burger, C.J., followed the Bakke reasoning. Justice O’Connor held that the plan is bad because the Board’s lawyers had not advanced any ‘integrated faculty’ justification in the lower courts and so they were barred from doing so. Had they done so, she indicated, the result might have been different. This special

ground relied upon by her, as well as Justice Stevens', it has been said, renders the future of other plans suspect.\footnote{116}

Further in \textit{Local 28, Sheet Metal Workers Int'l Ass'n v. Equal Opportunity Commission}\footnote{117} and in \textit{Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland},\footnote{118} the Court upheld two plans of affirmative action. In the former, there had been "pervasive and egregious discrimination" by the union and so this is in line with Powell J's reasoning in \textit{Bakke}. In the latter case, only violation of title VII was involved and moreover since it was an intervenor application objecting a consent decree, it is difficult to say whether it was by applying \textit{Bakke} that the plan was upheld. In \textit{City of Richmond v. J. A. Croson Co.},\footnote{119} the court ruled that public policies that favour minorities are subject to the same strict constitutional scrutiny as policies that favour whites. It ruled six to three that a municipal public works programme that set aside 30\% of the funds for minority contractors violated the white contractor's constitutional right to equal protection. It is truly surprising that the court adopted this approach because not only was there an earlier authority in \textit{Fullilove} which had upheld a similar plan but the court also failed to see that its true function lay in protecting politically weak 'insular and disparate minorities' and one way of doing it is by letting the governments do it, not by preventing it. The court failed to strike a balance — a just balance — between equality as egalitarianism and equality as a constitutional doctrine.

The most recent and in reality the heaviest blow to \textit{Bakke} came in \textit{Metro Broadcasting v. F.C.C.},\footnote{120} decided on the final day of the Supreme Court's term. Two affirmative action programmes which aimed at increasing minority ownership of broadcast licenses, were adopted by the Federal Communication Commission in 1978 and they resulted in a modest increase in

\footnotetext{116}{See for a detailed discussion, Cox, \textit{supra} n. 14 at 282-287.\par
117. 106 S.Ct. 3019, 3031 (1986).\par
118. 106 S.Ct. 3063, 3072 (1986).\par
119. 488 U.S. 469 (1989).\par
120. (No. 89-453), \textit{The New York Times}, June 28, 1990 Al: 1.}
the number of radio and television stations owned by minority members. The programmes gave minority ownership special weight in competitions for new licences, and gave minority owners special opportunities to buy stations in danger of losing their licences. Both the programs were challenged as violative of the equal protection clause. The court decided by five to four, that they were not so violative and in arriving at that conclusion shrugged off the Bakke constraints. Justice Brennan wrote the majority opinion with Justice Stevens concurring with him. Justices White, Marshall and Blackmun also joined them. It is important to note that Justices White and Stevens who were in the Croson majority now joined Brennan, J. Brennan, J. relied on Fullilove and adopted its reasoning. He said, “A majority of the court in Fullilove did not apply strict scrutiny to the race-based classification at issue . . . . Three other members would have upheld benign racial classifications that serve important governmental objectives and are substantially related to achievement of those objectives. We apply that standard today”. He declared that under the Constitution the Federal government has more leeways than state and local governments, to devise “benign race-conscious measures” for dispensing government largesse. This is the first time an affirmative action plan has been upheld to promote a policy for the future and not merely to remedy or rectify past or present discrimination. Stevens J., concurring, said: “Today the court squarely rejects the proposition that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong. I endorse this focus on the future benefit, rather than the remedial justification of such decisions”. One can see here, Justice Powell’s insistence in Bakke, on past judicial or administrative findings as a pre-requisite for affirmative action, being given a decent burial. Justices O’Connor, Kennedy, Scalia and

121. Id. at B 8:1. He distinguished Croson, stating that (1) the question of congressional action was not before the court and (2) in fact, Croson affirmed Fullilove reasoning that race conscious classifications adopted by Congress are subject to a different standard of scrutiny than other lower governmental actions.

122. Ibid.
Chief Justice Rehnquist dissented. Justice O'Connor drew a parallel between *Plessy* and the majority opinion and also said that the court abandoned the strict scrutiny standard for a "lower standard of review and in practice applies a standard like that applicable to routine legislation".\(^{123}\) For Justice Brennan it was a triumph before his departure from the court. Undoubtedly the decision has made the future of affirmative action bright in America. Importantly it is a blow to the majority white population and by its conduct the court has truly vindicated its existence.

Thus, it will be seen that the American experience has been one of enormous moral import. The court has had a major role in fashioning a true democracy shorn of all its majoritarian stigma.

**Compensatory Discrimination and Democracy**

"Constitutional law appropriately exists for those situations where representative government cannot be trusted, not those where we know it can", John Hart Ely has said.\(^ {124}\) One such area is the realm of private individual rights. The entire spirit of a written Constitution is to be found in a Charter of Rights, not because they embody fundamental principles but because they constitute the only effective control of representative governments. John Agresto has observed thus; "Democracy, not constitutionalism, is the best means of effectively keeping executives, legislators, and legislative acts in accord with the will of the people. The full meaning of constitutionalism on the other hand, carries with it, not only the idea of restraints on governmental action, it surely carries with it also the idea of restraints on the democratic will itself".\(^ {125}\) Thus the very purpose of written Constitutions containing Bills of Rights and guaranteeing judicial independence was to put some rights beyond the reach

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123. *Ibid*. She criticised the movement from 'Separate but equal' to 'unequal but benign'.
124. See Ely, *supra* n. 47 at 183.
of law making majorities so that the persons whose interests are inadequately represented in the political process can be saved. And the branch which can do that is the court. Thus, the argument about compensatory discrimination is one of judicial review of popular will. But "Judicial review in its conventional guise, doesnot entail a direct conflict between the judiciary and the people. It is instead the will of a legislature that is being thwarted in the name of the Constitution. In fact this very lack of identity between the people and their representatives forms the foundation for Alexander Hamilton's defence of judicial review in The Federalist 'No. 78: "(W)here the will of the legislatures declared in its statutes stands in opposition to that of the people declared in the Constitution, the judges ought to be governed by the latter rather than the former".¹²６ Thus the function of judiciary is to uphold the integrity of the Constitution against political process. But this theory is more appropriate in a country such as America where the political processes are kept under check by the court in the name of the Bill of Rights. The trouble arises when the Constitution itself specifies that the rights can be curtailed, as in Articles 15 (4) and 16 (4) of Indian Constitution. Then, integrity of the Constitution itself warrants that the judiciary respect the limitations to rights. But this problem would have been academic but for the blatant mis-use of these exceptions by the majority of the population to further their interests. If the exceptions had been used only in favour of the SC's & ST's and others who are comparable — as the court said in Balaji — to them in backwardness, there would be no need to be apprehensive. But what has happened is a wholesale attenuation of individual rights — as in Balaji — by the majority, not because they are backward but because they wield the political power to declare themselves as such. James Madison's remarks are axiomatic: "The invasion of private rights is chiefly to be apprehended, not from acts of government contrary to the sense of its constituents, but from acts in which, the government is the mere instrument

of the major number of the constituents". Madison directed his venom at ‘majority factions’ who, he feared, would be willing to sacrifice “the public good and the rights of other citizens” to their “ruling passion or interest”. There must be “safeguards against the tyranny of (such) passions”. The primary safeguard is the court. This view of the justification for judicial review was not unknown to our founding fathers. And the apparent conflict between individual rights and the exceptions was also noted by K. Santhanam. B. N. Rau explained why restrictions upon rights were placed in the Constitution itself, instead of leaving it to the courts as in America. He said, it was because, unlike the American Constitution, our Constitution itself declares that any provision inconsistent with the rights shall be void under Article 13. So, “unless the Constitution itself lays down precisely the qualifications subject to which the rights are conferred, the courts may be powerless in the matter.” Thus the founding fathers clearly intended the exceptions to be read as exceptions, — to be read down, — so that the courts can freely perform their hallowed function, of protecting individual and minority rights. But what is happening is that the exceptions have ballooned erasing the rights in the process and the politically insular minorities have been left with no other option but to approach the court. The court, as has already been pointed out, has varied in its responses, but on the whole, has been slow in allowing law making majorities

127. Id. at 1530.
128. The Federalist, No. 10 at 60-61.
129. Id. No. 63 at 425.
130. Both K. M. Munshi and A. K. Ayyar tied the review power with fundamental rights. Both argued for a more explicit basis for it than that exists for it in America. The result is, that Article 13 declares every law which violates fundamental rights protanto void. See Austin. supra n. 6 at 171.
131. He remarked wryly that, the courts would have to restrict the scope of limitations upon rights, unlike in America, where the courts were to restrict the misuse of liberty. (id. at 172).
132. Id. at 174.
133. Ibid.
to obliterate individual and minority rights. In America on the other hand the court has started helping the minorities by easing its hold on governmental actions, that favour minorities. Democracy is being so checked by constitutionalism through judicial review.

**Conclusion**

In fact the aim of Indian judiciary seems to be to keep democracy, constitutionalism and judicial review in a supportive and complementary relationship to one another; that is to keep the tension in balance, not to resolve it. Thus, if the egalitarian ideals proclaimed in the Constitution be converted into a body of self-serving tools by compensatory discrimination techniques by the sheer power possessed by the beneficiary groups due to their numbers, the role of the court is delicate but clear: to strike a balance, between constitutionalism and democracy. Such a balance will only keep the tension between democracy, constitutionalism and judicial review. In India, compensatory discrimination has been used as a tool for ‘democratising’ the society by increasing the majority participation in governance, while in America, it has been used to change the contours of American democracy from that of pure majoritarianism to a ‘true’ limited democracy. And the courts have been sensitive to such developments. But what the implementation of the Mandal Commission Report has done is to guarantee access to limited resources and power to the majority of the population as an institutionalized permanence.

The Supreme Court, as a result

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134. See Agresto, *supra* n. 125 at 85.
135. This aspect of ‘permanence’ of reservations is pointed out by Andra Beteille, “Caste and Reservations — Lessons of South Indian Experience” in *The Hindu* dated 20-10-1990). He says: “To me the most important lesson of the south Indian experience relates not to the workability of caste quotas but to their irremovability”. See also Vol. IV, the Mandal Report, *supra* n. 1 at 279-282; *P. & T. S.C. & S.T. Employees Welfare Association v. Union*, A.I.R. 1989 S.C. 139, where the court held that “reservation” is violative of equality clauses. This decision clearly confirms Beteille’s view on irremovability of Caste quotas. The decision is also legally suspect (f. n. contd.)
is on a threshold of change; from a passive regulator to an active protector of rights which it has been commanded to protect under the Constitution. An opportunity exists for it to vindicate its existence. But more importantly, on its conduct, will depend the answer to the question: What kind of people are we to be?

since, it amounts to making ‘reservations’ a vested right when the court had always held to the contrary, that the power under Articles 15 (4) and 16 (4) was “only discretionary”.