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A Comparative Analysis of Reservation and Affirmative Action Laws: Reassessing the Creamy Layer Doctrine in India through the Experiences of the United States and the United Kingdom

PIYUSHA PRADHAN* AND SIMRAN SAHOO**

ABSTRACT

The practice of affirmative action is considered to be one of the most contentious means of ensuring substantive equality in historically discriminatory and structurally exclusive societies. Even though the pursuit of equality constitutes a common goal for India, the United States, and the United Kingdom, the specific approach to achieving this aim has been unique to each state, reflecting its socio-political history and philosophy of law. India practices the system of constitutionally guaranteed reservations based on the principles of substantive equality and social justice, the United States follows the model of judicially controlled race-conscious affirmative action under the Equal Protection Clause, and the United Kingdom focuses on the principle of formal equality through anti-discrimination laws and proportionate positive action. In this research paper, a comparative legal analysis of these three jurisdictions is made with special attention to the Indian concept of the creamy layer and the mechanism of preventing elite capture in backward classes. This paper considers the theoretical basis, implementation, judicial control, and current issues of affirmative action in general and absence of similar exclusionary mechanism in the United States and the United Kingdom in particular. The paper posits that traditional identity-based affirmative action has grown increasingly ineffective in tackling the modern inequalities. In this regard, the study proposes a multidimensional approach whereby not only social identity but also socio-economic status, education, geographical location, and institutions are used to enhance beneficiary targeting. Using a doctrinal and comparative analysis of constitutional texts, legal precedent, statutory law, and academic literature, the study reveals that affirmative action needs to be continually modified in order to stay constitutionally valid and socially relevant. The research contends that the creamy layer doctrine in India can be useful in informing equality policies, although it needs modification.

* Author is an Advocate at Orissa High Court, Cuttack, Odisha, India.

** Author is a PhD Scholar at KIIT School of Law, Bhubaneswar, Odisha, India.

Keywords: affirmative action, reservation, creamy layer doctrine, substantive equality, comparative constitutional law, social justice, equal protection clause, Equality Act 2010, India, United States, United Kingdom, constitutional jurisprudence

I. LITERATURE REVIEW

Author	Work	Critical Contribution
Marc Galanter	Competing Equalities: Law and the Backward Classes in India (1984)	Classic book outlining the constitutional theory of reservations and the development of backward classes jurisprudence in India.
Marc Galanter	"Protective Discrimination for Minorities in India"	Analyses reservation as a means of distributive justice rather than as an exception to the rule of equality.
Christophe Jaffrelot	India's Silent Revolution	Discusses the political history of reservations for OBCs and caste politics.
Ashwini Deshpande	The Grammar of Caste	Shows how caste discrimination continues in spite of upward social mobility, challenging income-based exclusion criteria.
Thomas E. Weisskopf	Affirmative Action in the United States and India	The single most comprehensive comparative analysis of affirmative action systems in India and the US.
Ronald Dworkin	"Affirmative Action: Does it Work?"	Explains the normative constitutional rationale for affirmative action in liberal democracies.
Owen Fiss	"Groups and the Equal Protection Clause"	Establishes the theory of group-disadvantage that lies at the heart of affirmative action jurisprudence.
Richard H. Sander & Stuart Taylor Jr.	Mismatch	Outlines the major criticism of affirmative action, questioning its efficacy in higher education.
Sandra Fredman	Discrimination Law	The leading expert on equality law and positive action under the UK Equality Act 2010.
Sandra Fredman	Substantive Equality Revisited	Explores the concept of substantive equality as a constitutional principle.

II. RESEARCH GAP

Although affirmative action has been studied extensively, several gaps remain in the existing scholarship.

- Much of the literature treats affirmative action in India, the United States and the United Kingdom separately, without an integrated comparative constitutional perspective.
- The creamy layer concept is rarely used as a comparative lens for examining intra-group inequality and elite capture in affirmative action.
- There has been little study of whether multidimensional variables, such as socio-

- economic class, level of education, geographic location and social capital, would identify beneficiaries more accurately than existing identity-based criteria.

The present research therefore seeks to address these gaps by comparing the constitutional principles, mechanisms, judicial review and evolution of affirmative action across the three jurisdictions.

III. PROBLEM STATEMENT

Affirmative action is now a well-established constitutional means of tackling discrimination and of advancing substantive equality. India's system of reservation, the affirmative action jurisprudence of the United States and the equality framework of the United Kingdom have each been studied, but largely in isolation. Comparative analysis engaging all three systems together remains scarce. The Indian creamy layer principle in particular has not been examined comparatively as a device for preventing elite capture of affirmative action benefits. The decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (2023) has reshaped international debate on affirmative action and invites renewed comparative study.

This paper seeks to address that gap by comparing the constitutional foundations, operational structures, judicial approaches and contemporary challenges of affirmative action in India, the United States and the United Kingdom, and by considering the applicability of the creamy layer doctrine to affirmative action more generally.

IV. RESEARCH QUESTIONS

- What is the constitutional understanding of affirmative action and substantive equality in India, the United States and the United Kingdom?
- What distinguishes the creamy layer doctrine in India from the affirmative action models of the United States and the United Kingdom?
- How far can the creamy layer doctrine prevent elite capture and secure a more equal distribution of the benefits of reservation?
- What role have the constitutional courts played in developing affirmative action jurisprudence in the three jurisdictions?
- Can India's creamy layer doctrine serve as a model for other affirmative action systems?
- Should the criteria for identifying beneficiaries become multidimensional in the

future?

V. RESEARCH METHODOLOGY

This research adopts a qualitative comparative and doctrinal methodology. The doctrinal element examines constitutional provisions, statutory legislation, judicial decisions, law commission reports, parliamentary papers and relevant academic literature concerning affirmative action and reservation. Particular attention is paid to the constitutional provisions on equality, to the leading judicial decisions and to the doctrine of the creamy layer.

The comparative element assesses the constitutional and institutional architecture of India, the United States and the United Kingdom through their underlying theoretical frameworks, operational mechanisms, standards of judicial scrutiny and contemporary challenges. A functional comparative method is used to draw out similarities and differences between the systems and to identify lessons that each may offer the others in terms of constitutional principle.

The study relies solely on secondary sources, including peer-reviewed academic articles, books, official government reports, constitutions, statutes and judicial decisions. Analytical and critical approaches are used throughout to assess the existing legal framework and to propose improvements.

VI. INTRODUCTION

Equality remains a central constitutional objective in democracies across the world, but the means by which different jurisdictions pursue substantive equality vary considerably. Each system balances its own history, the values written into its constitution and its social and political conditions, and this has produced distinct frameworks for confronting systemic discrimination: reservation, affirmative action and positive equality duties. Each framework seeks to redress disadvantage and to secure representation. Each also generates debate about fairness, the distribution of benefits, and the limits of constitutional authority and of the role of the State.¹

The affirmative action frameworks of India, the United States and the United Kingdom differ considerably. The Constitution of India entrenched affirmative action through its equality provisions and its remedies for caste-based exclusion. Affirmative action in the United States, by contrast, developed within the constitutional and civil rights framework, principally under the Equal Protection Clause, and is tested against strict scrutiny, the most exacting standard of

¹ SANDRA FREDMAN, *DISCRIMINATION LAW* 15–48 (2d ed. 2011).

judicial review. The United Kingdom relies instead on the Equality Act 2010, which is centred on anti-discrimination and permits only limited positive action rather than group preference.

The ruling in *Indra Sawhney v. Union of India* (1992) illustrates the distinctive character of the Indian system. That decision established the creamy layer doctrine, under which socially and economically advanced members of the Other Backward Classes are excluded from the benefit of reservation. The Court reasoned that the benefit of reservation should not become concentrated in the more advanced sections of a backward class and should instead reach those who remain socially and educationally disadvantaged. Whether the same exclusion extends to the Scheduled Castes and the Scheduled Tribes has been contested; the Supreme Court applied the principle to reservation in promotion for those groups in *Jarnail Singh v. Lachhmi Narain Gupta* (2018). It remains a mode of differentiation that neither the United States nor the United Kingdom has adopted.²

The United States confines affirmative action based on race, while the United Kingdom promotes equality through proportionate positive action. Neither system employs a distinction equivalent to the Indian creamy layer. These differences reflect divergent conceptions of equality and of the obligations of the State.

Against that background, this research analyses the affirmative action systems of India, the United States and the United Kingdom. It assesses India's creamy layer doctrine as a mode of differentiation within a comparative constitutional frame and examines how each system addresses equality in its legal and social context.

VII. CONCEPTUAL FOUNDATIONS OF AFFIRMATIVE ACTION: A COMPARATIVE PERSPECTIVE

Affirmative action is a constitutional and policy instrument for redressing historical disadvantage and for advancing the substantive inclusion of marginalised communities. The United States and the United Kingdom share with India the objective of advancing equality, but they differ significantly in their constitutional underpinnings, legal rationale and institutional architecture. Their approaches rest on different understandings of disadvantage, of state responsibility and of the relationship between equality and preferential treatment.

A. India: Affirmative Action as Substantive Equality and Social Justice

The Indian system of affirmative action is built on the ideas of social reform and equality contain-

² MARC GALANTER, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA* 541–79 (Univ. of Cal. Press 1984).

ned in the Constitution. Where other systems treat preferential treatment as an exception to equality, the Indian constitutional scheme treats affirmative action as an instrument for achieving genuine equality in a society long marked by caste-based exclusion. Articles 15(4) and 15(5) empower the State to make special provision for socially and educationally backward classes and for the Scheduled Castes and the Scheduled Tribes. Article 16(4) permits reservation in public appointments for backward classes that are not adequately represented in the services of the State. Article 46 further directs the State to promote the educational and economic interests of the weaker sections.³

India's affirmative action policy has its roots in the theory of compensatory discrimination. The framers of the Constitution recognised that exclusion on the basis of caste was not merely a question of economic inequality but a system of social stratification affecting dignity, status and access to opportunity. Formal equality was therefore regarded as an insufficient means of dismantling a structure built over centuries. That view has been confirmed in judicial decisions.

The introduction of the creamy layer doctrine by the Supreme Court in *Indra Sawhney v. Union of India* (1992) was a significant milestone in Indian law. Under the doctrine, the socially and economically advanced sections of the Other Backward Classes are to be excluded from reservation so that the benefit reaches those who remain genuinely disadvantaged. The principle is thus directed at intra-group equity while preserving the wider commitment to social justice.⁴

Despite its constitutional strength, the Indian model continues to face difficulties concerning the identification of backward classes, the periodic revision of eligibility conditions and the scope for extending the creamy layer concept to the Scheduled Castes and the Scheduled Tribes. The central aim of the model remains the achievement of equality through the active involvement of the State.

B. United States: Affirmative Action as a Remedial and Compelling State Interest

The United States approach to affirmative action rests on the guarantee of equal protection contained in the Fourteenth Amendment. Unlike India, the United States does not constitutionally mandate affirmative action. It developed instead as a judicial and political instrument for addressing the legacy of slavery, segregation and discrimination against African Americans and other minorities.⁵

³ GRANVILLE AUSTIN, *THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION* 50–83 (Oxford Univ. Press 1966).

⁴ Pavan Srinivas, *Affirmative Action and the Marginalized Population: A Study on the Creamy Layer and Its Relevance Today*, 5 CHRIST U. L.J. 45 (2016).

⁵ Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

The constitutionality of affirmative action in the United States is assessed under strict scrutiny, the most rigorous standard of judicial review. Race-based measures must serve a compelling governmental interest and must be narrowly tailored to that end, so affirmative action has been permitted only within closely defined constitutional limits. In *Regents of the University of California v. Bakke* (1978), for example, the Supreme Court invalidated the racial quota before it while accepting that diversity in higher education could be a permissible objective. The Court followed similar reasoning in *Grutter v. Bollinger* (2003).

American jurisprudence has nevertheless moved steadily towards colour-blind constitutionalism. That development culminated in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (2023), in which the Supreme Court held that race-conscious admissions programmes violated the Equal Protection Clause, signalling deep judicial mistrust of such programmes. The present American position is therefore marked by an unresolved tension between the aim of correcting past discrimination and a constitutional insistence on racial neutrality.⁶

A frequently noted feature of the American model is the absence of any counterpart to the Indian creamy layer doctrine. Once an applicant is identified as belonging to a protected racial group, socio-economic advantage does not remove that applicant from the scope of an affirmative action programme. Some scholars have argued, on that basis, that such programmes may operate without regard to relative economic disadvantage within a protected group.

C. United Kingdom: Equality of Opportunity and Proportionate Positive Action

The United Kingdom takes a comparatively cautious approach, grounded in formal equality, non-discrimination and equality of opportunity. The legislative basis is the Equality Act 2010, which consolidates anti-discrimination protection across the protected characteristics, including race, sex, disability, religion or belief and age. Rather than introducing reservation or quotas, the Act permits positive action intended to support disadvantaged or under-represented groups. The distinction matters: the Act authorises positive action, not positive discrimination, and selection on the basis of a protected characteristic alone remains unlawful.⁷

Section 158 of the Equality Act contains the general positive action power, permitting proportionate measures to meet the needs of, or to overcome disadvantage suffered by, persons who share a protected characteristic. Section 159 makes narrower provision for recruitment and

⁶ RANDALL KENNEDY, *FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW* 183–231 (Pantheon Books 2013).

⁷ Bob Hepple, *Enforcing Equality Law: Two Steps Forward and Two Steps Backwards for Reflexive Regulation*, 40 INDUS. L.J. 315 (2011).

promotion: an employer or educational institution may treat a candidate from a disadvantaged or under-represented group more favourably where that candidate is as qualified as the comparator. This 'tie-break' provision allows a proportionate intervention without creating an automatic preference based on group membership alone. Section 149 further imposes the Public Sector Equality Duty (PSED).

Theoretically, the British model reflects a liberal conception of equality in which removing barriers matters more than redistributing outcomes. In contrast with India, the United Kingdom does not recognise constitutionally entrenched group entitlements and does not deploy extensive redistributive tools to counteract historical discrimination. There is likewise no mechanism resembling the creamy layer, because positive action in the United Kingdom is neither categorical nor numerical.

Although the model has secured broad political acceptance and has avoided some of the controversies surrounding merit and preference, it has also attracted criticism. Commentators have argued that procedural equality may be insufficient to dislodge deep-rooted structures of inequality in employment, housing, education and criminal justice, and that the absence of redistributive measures limits the practical effect of the equality framework. The British model nevertheless remains significant for its emphasis on proportionality, institutional accountability and the promotion of equality through regulation.⁸

The discussion above may be understood more readily through the following tables.

Table 1: Creamy Layer Equivalent in Global Context

Country	Creamy Layer Doctrine Exists?	Mechanism to Prevent Elite Capture
India	Yes Yes (Only for OBCs)	Income threshold, occupational filters, under debate for SC/ST
United States	No No	None; subject to general scrutiny and legal challenge
United Kingdom	No No	None; individual merit and opportunity-based tie-breaks

Table 2: Affirmative Action Justification: Legal and Philosophical Models

Justification	India	USA	UK
Moral/Philosophical	Justice for inherited caste-based exclusion	Compensating for slavery, segregation, racism	Procedural fairness and liberal access
Legal Doctrine	Reasonable classification, group justice	Compelling state interest, strict scrutiny	Proportionality, statutory discretion

⁸ Christopher McCrudden, *Rethinking Positive Action*, 15 INDUS. L.J. 219 (1986).

Justification	India	USA	UK
Temporal Scope	Ongoing and expanding	Temporary, limited	Situational, discretionary

Table 3: Challenges Across Jurisdictions: A Cross-Jurisdictional Snapshot

India	United States	United Kingdom
Overexpansion & political misuse	Judicial rollback (e.g., SFFA v. Harvard)	Minimal impact on systemic inequality
Creamy layer under-enforcement	Lack of socio-economic filters	No recognition of group-based disadvantage
Backlash from general category	Reverse discrimination claims	Limited data-driven outreach
Need for legislative codification	Increasing court restrictions	Absence of outcome-oriented frameworks

Table 4: Affirmative Action in Practice: Tools and Scope

Tool	India	U.S.	U.K.
Quotas	Yes Yes	No No	No No
Tie-break Provisions	No No	Yes Indirectly	Yes Yes
Mandatory Public Duty	No No	No No	Yes PSSED
Monitoring Mechanism	NCBC (limited)	OCR, EEOC	EHRC
Legal Constraint	Equality test	Strict scrutiny	Proportionality

VIII. TARGETING THE DISADVANTAGED: CREAMY LAYER VERSUS BROAD CLASS PROTECTION IN INDIA, THE UNITED STATES AND THE UNITED KINGDOM

Affirmative action seeks to address past discrimination by opening opportunities to marginalised social groups. The persistent problem is to ensure that those opportunities reach the intended beneficiaries rather than the relatively advantaged members of the protected group. India has developed the creamy layer doctrine for that purpose; the United States and the United Kingdom have no equivalent device.

A. India's Creamy Layer Doctrine: Intra-Group Equity in Focus

India's affirmative action policy, founded on the constitutional commitments to equality and social justice, has developed to take account not only of disadvantage between groups but also of disparities within backward classes themselves. In *Indra Sawhney v. Union of India* (1992), the Supreme Court formulated the creamy layer doctrine, under which socially and economically advanced members of the Other Backward Classes (OBCs) are excluded from the

benefit of reservation so that those who remain genuinely disadvantaged are not displaced.⁹

The doctrine currently operates through parameters such as parental income, occupation and professional status. While this has improved distributive justice, it remains contested. Income alone may not capture social advancement in a society where caste-based disadvantage can persist even after economic circumstances improve. The exclusion was initially applied to the OBCs, and its extension to the Scheduled Castes and the Scheduled Tribes has been debated; in *Jarnail Singh v. Lachhmi Narain Gupta* (2018) the Supreme Court held that the creamy layer principle applies to reservation in promotion for those groups as well.

A multidimensional assessment that takes account of education, social capital, occupation and regional disadvantage would arguably improve the accuracy of the test.¹⁰

B. United States: Group Protection Without Internal Filters

In the United States, affirmative action has been treated principally as a response to racial discrimination under the Equal Protection Clause of the Fourteenth Amendment. Strict scrutiny requires that racial classifications serve a compelling governmental interest and be narrowly tailored. Decisions such as *Grutter v. Bollinger* (2003) and *Fisher v. University of Texas at Austin* (2013) permitted limited consideration of race within a holistic admissions process, while *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (2023) substantially foreclosed race-conscious admissions policies.¹¹

Unlike India, the American system has no analogue of the creamy layer doctrine. Where an applicant falls within a protected racial group, socio-economic advantage does not render that applicant ineligible for an affirmative action programme. Some academic commentators have criticised this feature as operating disproportionately in favour of more affluent applicants within protected groups. Although the scholarly literature has long discussed combining considerations of race and class, the prevailing judicial trend leaves limited room for such an approach.

C. United Kingdom: Formal Equality and Indirect Filtering

The Equality Act 2010 adopts a moderate approach centred on formal equality and anti-discrimination rather than reservation. Sections 149, 158 and 159 provide for proportionate

⁹ Satish Deshpande, *Exclusive Inequalities: Merit, Caste and Discrimination in Indian Higher Education Today*, 46 ECON. & POL. WKLY. 49 (2011).

¹⁰ SUKHADEO THORAT & KATHERINE S. NEWMAN, *BLOCKED BY CASTE: ECONOMIC DISCRIMINATION IN MODERN INDIA* 1–28 (Oxford Univ. Press 2010).

¹¹ Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986).

positive action, including the tie-break rule under which preference may be exercised only where the candidate benefiting from it is as qualified as the comparator.

Unlike India, the United Kingdom has no constitutionally entrenched group rights and no express exclusionary device comparable to the creamy layer. In practice, positive action programmes tend to be targeted at groups with demonstrable socio-economic disadvantage, which may indirectly limit the concentration of benefits among relatively advantaged members of those groups. That filtering is incidental rather than systematic, and in the absence of socio-economic screening, inequalities within groups are likely to persist.¹²

The tables below may be referred to for an overview of the concepts discussed in this segment.

Table 5: Thematic Comparison

Theme	India	United States	United Kingdom
Basis of Affirmative Action	Caste-based historical disadvantage	Race-based structural inequality	Formal equality & anti-discrimination
Legal Foundation	Constitution + Judicial Pronouncements	Equal Protection Clause + Case Law	Equality Act 2010 (Statutory Law)
Group vs. Class Filtering	Combines group entitlement with individual exclusion (Creamy Layer)	Group-based without intra-group differentiation	No formal exclusion but indirect socio-economic filters
Implementation Tools	Reservations (education, jobs, politics)	Holistic review, diversity goals	Outreach, training, need-based local actions
Challenges Identified	Outdated thresholds, limited scope	Poor targeting of the most disadvantaged	Procedural focus over redistributive depth
Reform Potential	Codification, multidimensional criteria	Class-based or hybrid affirmative action	More granular socio-economic targeting within legal limits

Table 6: Comparative Insights

Lesson	Implication
India's Creamy Layer Doctrine	Provides a structured model to avoid elite capture in group-based policies
U.S. Broad Classification	Risk of benefiting already advantaged within marginalized groups due to lack of filtering
UK's Contextual Positive Action	Balances merit and equity but lacks formal intra-group exclusion tools
Global Relevance	India's model offers normative and practical insights for refining affirmative action in plural societies

¹² Sandra Fredman, *Substantive Equality Revisited*, 14 INT'L J. CONST. L. (2016).

IX. IMPLEMENTATION MECHANISMS AND JUDICIAL OVERSIGHT: INDIA, THE UNITED STATES AND THE UNITED KINGDOM

The effectiveness of affirmative action depends not only on its constitutional validity but also on the institutional mechanisms that give it effect and on the intensity of judicial supervision. Although India, the United States and the United Kingdom share a commitment to equality, they differ markedly in institutional design, enforcement structure and the role of the courts. India operates an administratively managed system of reservation that is shaped by judicial interpretation, while the United States relies principally on constitutional adjudication.

A. India: Bureaucratic Filters and Judicial Ambiguity

Reservation policy in India is implemented through state agencies that identify backward classes, issue caste certificates and apply the creamy layer rule. Although rooted in the Constitution, the policy has encountered numerous administrative difficulties, including inconsistent identification of backward classes, failures in caste certification and the absence of uniform guidelines for determining eligibility. The creamy layer exclusion, which turns largely on parental occupation and income, operates without a comprehensive legislative framework, which has led to uneven application and infrequent revision of the eligibility criteria. The absence of a central registry has also been said to make repeated access to the benefit of reservation difficult to monitor.¹³

Judicial intervention has been central to shaping India's affirmative action jurisprudence. The Supreme Court introduced the creamy layer concept in *Indra Sawhney v. Union of India* (1992) in order to prevent the benefit of reservation from being captured by the more advanced sections of the Other Backward Classes. The significance of the criterion was later reinforced in *Jarnail Singh v. Lachhmi Narain Gupta* (2018). Its lack of codification, however, has left implementation largely in the hands of the executive.¹⁴

B. United States: Judicially Driven Compliance with Minimal Administrative Oversight

The United States, by contrast, operates a system in which the constitutionality of affirmative action is assessed under the Equal Protection Clause of the Fourteenth Amendment. An affirmative action policy must satisfy strict scrutiny, requiring a compelling governmental interest and narrow tailoring. Decisions such as *Regents of the University of California v. Bakke* (1978), *Grutter v. Bollinger* (2003), *Fisher v. University of Texas at Austin* (2013) and *Students*

¹³ NAT'L COMM'N FOR BACKWARD CLASSES, Annual Report 2021–2022, at 18–34 (Gov't of India 2022).

¹⁴ M. P. Singh, *Reservation, Creamy Layer and the Constitutional Quest for Equality*, 2 INDIAN J. CONST. L. 1 (2008).

for *Fair Admissions, Inc. v. President and Fellows of Harvard College* (2023) have defined and progressively confined the permissible scope of affirmative action.¹⁵

Unlike India, the United States has no central administrative body governing affirmative action. Individual institutions and public employers adopt their own diversity programmes, and implementation proceeds largely through litigation and complaints made to the relevant offices for civil rights.¹⁶

C. United Kingdom: Procedural Compliance and Regulatory Oversight

The Equality Act 2010 is the principal instrument through which the United Kingdom regulates equality, emphasising anti-discrimination, equality of opportunity and proportionate positive action rather than reservation or quotas. The Public Sector Equality Duty (PSED) is set out in Section 149 and requires public bodies to have due regard to the equality implications of their policies, decisions and actions, often through Equality Impact Assessments.¹⁷

Compliance is overseen by the Equality and Human Rights Commission (EHRC), which is responsible for enforcement and for issuing guidance on equality obligations. Positive action under Section 159 applies only where candidates are equally qualified, which preserves procedural fairness without creating a category-based preference. While the system secures institutional accountability and legal clarity, it has been criticised for its limited capacity to address structural inequality because of its emphasis on process.¹⁸

The tables below summarise the discussion in this segment.

Table 7: Key Comparative Themes

Theme	India	United States	United Kingdom
Legal Foundation	Constitution (Articles 15 & 16) + Judicial doctrine	Equal Protection Clause (14th Amendment)	Equality Act 2010
Nature of Affirmative Action	Group entitlements with exclusions (creamy layer for OBCs)	Race-conscious policies, recently curtailed	Needs-based procedural tools; no quotas
Role of Judiciary	Policy shaper (Indra Sawhney, Jarnail Singh); inconsistent due to lack of codification	Dominant role; strict scrutiny doctrine; rollback in <i>SFFA v. Harvard</i>	Ensures procedural compliance; no active intervention in outcomes

¹⁵ Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517 (2007).

¹⁶ Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996).

¹⁷ Aileen McColgan, *The Equality Act 2010: Strengthening the Protection Against Discrimination?*, 40 INDUS. L.J. 343 (2011).

¹⁸ Colm O'Cinneide, *The Public Sector Equality Duty: A Catalyst for Change?*, 35 INDUS. L.J. 362 (2011).

Theme	India	United States	United Kingdom
Administrative Role	Fragmented bureaucracy; caste certification; lacks central database	Institutions design internal policies; enforcement reactive via litigation	EHRC monitors compliance; promotes best practices, not mandates
Mechanism for Exclusion within Groups	Creamy layer based on income, occupation, public office (for OBCs)	None: all group members included regardless of class	Indirect filtering via area deprivation and contextual disadvantage
Main Implementation Issue	No legislative codification; outdated thresholds; elite capture persists	Judicially limited scope; no systemic class filters	Procedurally fair but lacks redistributive power

Table 8: Enforcement Spectrum

Country	Implementation Strengths	Enforcement Weaknesses
India	Judicially creative (creamy layer); extensive affirmative action network	Weak institutional support; no statutory codification; inconsistent execution
USA	Legally rigorous; clear constitutional standards	Overly restrictive judicial approach; no administrative oversight or targeting of poorest
UK	Rule-based, non-contentious model; promotes equal opportunity	Procedural focus; lacks transformative ability to address deep inequalities

X. COMPARATIVE CHALLENGES AND EMERGING TRENDS: INDIA, THE UNITED STATES AND THE UNITED KINGDOM

Affirmative action continues to generate constitutional, political and social debate because of the need to reconcile substantive equality with merit, equity and equal opportunity. Although India, the United States and the United Kingdom share the aim of redressing past injustice, the means of implementation differ considerably in light of their distinct constitutional premises. Recent developments suggest a movement away from broad group-based measures towards more finely calibrated approaches.

A. India: The Paradox of Representation and Elite Capture

The Indian reservation system has played an instrumental role in improving the representation of historically disadvantaged communities. A substantial body of scholarship nevertheless argues that the benefit of reservation tends to be captured by the more advanced sections within the beneficiary groups, and that this weakens its effectiveness. The creamy layer concept introduced in *Indra Sawhney v. Union of India* (1992) was designed to exclude the economically and socially advanced members of the Other Backward Classes (OBCs). Its operation is said to be hampered by dated income thresholds, inconsistent administration and the absence of adequate socio-economic data. Although *Jarnail Singh v. Lachhmi Narain Gupta* (2018)

extended the judicial application of the concept, its lack of codification remains a difficulty. A growing number of scholars argue for a multidimensional understanding of backwardness that takes account of education, occupation, geography, social capital and access to technology.¹⁹

B. United States: Constitutional Retrenchment and Class-Based Alternatives

In the United States, affirmative action has undergone considerable constitutional retrenchment. The decision of the Supreme Court in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (2023) foreclosed race-based admissions policies and emphasised a colour-blind reading of the Equal Protection Clause. Educational institutions are consequently making greater use of non-racial proxies such as family income, neighbourhood disadvantage and first-generation college status in order to sustain diversity. Unlike the Indian model, the United States has never adopted a creamy layer doctrine, although it has long been argued in the literature that affirmative action may benefit the more advantaged members of protected groups.²⁰

C. United Kingdom: Formal Equality and Structural Limitations

The United Kingdom continues to rely on procedural equality under the Equality Act 2010, which permits only limited forms of positive action and no reservation or quotas. The approach has the advantage of preserving the merit principle and of retaining political legitimacy. It is nevertheless widely criticised as insufficiently effective against persistent structural inequality. Existing practices, such as Equality Impact Assessments and scrutiny by the Equality and Human Rights Commission, seldom take account of differences between members of the same protected group, and there is a growing argument for more targeted measures.

D. Emerging Trends: From Group Entitlements to Contextual Equity

In all three jurisdictions, affirmative action policy appears to be moving towards a more contextual and evidence-based conception of equality. In India, the trend is towards internal differentiation within the backward classes; in the United States, institutions are exploring alternative methods in light of recent judicial restrictions; and in the United Kingdom, there is increasing scepticism as to whether procedural equality can address the structural disadvantage that certain groups continue to face. These developments reflect a growing interest in multidimensional approaches to affirmative action.²¹

¹⁹ Satish Deshpande & Yogendra Yadav, *Redesigning Affirmative Action: Castes and Benefits in Higher Education*, 44 ECON. & POL. WKLY. 49 (2009).

²⁰ Neil Goldsmith, *Class-Based Affirmative Action: Creating a New Model of Diversity in Higher Education*, 29 WASH. U. J.L. & POL'Y 289 (2009).

²¹ TARUNABH KHAITAN, *A THEORY OF DISCRIMINATION LAW* 203–32 (Oxford Univ. Press 2015).

Table 9: Challenges Across Jurisdictions

Theme	India	U.S.	U.K.
Elite Capture / Intra-group Inequity	High (within OBCs)	Unaddressed (affluent minorities included)	Unaddressed (no subgroup filters)
Legal Backing for Affirmative Action	Strong (Constitution + SC judgments)	Weakening (due to SC rulings)	Moderate (statutory, not transformative)
Administrative Infrastructure	Fragmented, state-based, no central tracking	Decentralized, institution-led, litigation-driven	Centralized EHRC oversight, limited to procedural reviews
Filtering Mechanism / Doctrine	Creamy Layer (for OBCs only)	Absent	Absent, but contextual filters
Reform Direction	Sub-categorization, multidimensionality	Class-based proxies, intersectionality	Stronger structural targeting under PSED framework

Table 10: Emerging Global Trend: Toward Contextual, Data-Driven Equity

Trend	Description
Third-Generation Affirmative Action	Moving from group identity alone to toward intersectional, context-sensitive models using data, multidimensional indicators, and local targeting
India	Growing interest in Social Disadvantage Index and sub-caste reservations within OBCs
United States	Universities exploring income-based and first-generation status as diversity tools
United Kingdom	EIA-based analysis guiding outreach in underperforming areas without overt preferences

Table 11: Lessons and Future Directions

Jurisdiction	Strengths	Weaknesses	Way Forward
India	Doctrinal innovation (creamy layer); Constitutional legitimacy	Weak legislative backing; income-centric limits	Codify creamy layer; adopt multidimensional indicators; national data system
United States	Strong legal tests; institution-level autonomy	Judicial hostility; lack of targeting for poor minorities	Develop class-based models; combine race + SES data for fairness
United Kingdom	Procedural integrity; low political resistance	Structural blind spots; weak on redistribution	Move toward precision-targeted outreach; address intra-group disadvantage

XI. CONCLUSION

The reservation and affirmative action regimes of India, the United States and the United Kingdom show that the pursuit of equitable outcomes takes a distinct form in each jurisdiction,

shaped by constitutional philosophy, historical experience and legislative and institutional arrangement. Although all three seek to address structural disadvantage, the systems they have produced are legally very different.

India presents the most developed system of group-based affirmative action, because reservation is entrenched in its Constitution. Through the creamy layer doctrine, the courts have sought to exclude the socially advanced members of backward classes so that the benefit of reservation is more fairly distributed. The doctrine is not legislatively defined and has been operated largely through economic rather than social indicators, which has created problems of implementation. It would arguably be more effective and more defensible if the class to which it applies were constructed by reference to social capital, educational disadvantage and historical disadvantage.

In the United States, race-conscious affirmative action was developed over time to address structural inequality. In its movement towards a racially neutral reading of the Constitution, the United States has now sharply curtailed it. The limited use of socio-economic indicators means that inequalities within racial groups have gone largely unaddressed. In the United Kingdom, affirmative action is not a legally mandated policy. Its equality and non-discrimination framework centres on formal equality, and its critics argue that, without stronger measures, it has little effect on systemic inequality.

Taken together, these jurisdictions suggest that a responsive affirmative action policy must move beyond fixed legal categories. India would benefit from a codified, empirically grounded creamy layer test. The United States would benefit from incorporating socio-economic disadvantage within its equality jurisprudence. The United Kingdom would benefit from responsive, proportionate and group-sensitive measures where exclusion is entrenched. The aim in each case is to strike the right balance between the equality and justice provisions of a constitution, so that the enforcement of law delivers genuine social justice.
