
AFFIRMATIVE ACTION THROUGH FINANCIAL AID: IS INDIA'S CONSTITUTIONAL FRAMEWORK READY FOR PRIVATE DIVERSITY SCHOLARSHIPS? A COMPARATIVE STUDY WITH THE USA

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ABSTRACT

The understanding of affirmative action in higher education in the case of India has been that of a constitutionally mandated State duty flowing from Article 15 and 16 of the Constitution while in the case of the US it has been that of an exception to the otherwise strict equality of protection guarantee of the Fourteenth Amendment of the US Constitution. However, one relatively new and not very well theorised question in affirmative action in higher education is whether non-State institutions, viz., corporations, trusts, foundations, philanthropists, can independently set up diversity scholarships using caste, religion, gender and economic class as markers and if so, then under what kind of constitutional and statutory restrictions. The paper will attempt a comparative doctrinal examination of the constitutional law on affirmative action in India and the US, particularly focussing on whether the Indian jurisprudence, founded upon Articles 14, 15, 15(5), 16, 19(1)(g) and elaborated in cases like *Indra Sawhney v. Union of India*, *T.M.A. Pai Foundation v. State of Karnataka*, *P.A. Inamdar v. State of Maharashtra* and *Janhit Abhiyan v. Union of India*, is ready for privately endowed diversity scholarships. This paper draws a distinction between the Indian case and that of the United States, where the judgement in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and the further invocation of 42 U.S.C. Section 1981 in *American Alliance for Equal Rights v. Fearless Fund Management, LLC* have considerably restricted the ambit of race-conscious decision-making even for private entities. It makes a case for the fact that the Constitution of India, as compared to the Fourteenth Amendment to the American Constitution, is horizontally silent on private discrimination in this sphere.

1. INTRODUCTION

The concept of affirmative action, which refers to various initiatives undertaken by the government to rectify the injustices experienced by certain groups in the past, forms an integral component of the constitutional law in both India and America, even though they take different starting points. The concept of affirmative action in India is directly provided for under the Constitution. Sections 15(4), 15(5), 16(4), 16(4A), 16(4B), and more recently Sections 15(6) and 16(6) authorize the State to take special measures in favour of socially and educationally backward classes, Scheduled Castes, Scheduled Tribes, and economically weaker sections in regard to education and public employment.¹

Unlike the U.S., the Constitution does not include any such enabling clause. In the American context, affirmative action has always been judicially recognized as an exception to the overall mandate of the Equal Protection Clause of the Fourteenth Amendment, and one that can be permitted only as long as it passes the stringent test of strict scrutiny.² This judicially crafted compromise has largely been reversed: in 2023, the Supreme Court of the United States decided that in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, racial affirmative action programs used by Harvard and the University of North Carolina are a violation of the Equal Protection Clause.³

The issue that has received relatively less attention is that of privately funded scholarships tied to one's identity, that is, forms of financial assistance that are not funded or managed by the state, but rather, corporations, trusts, alumni associations, NGO's and individual philanthropists, who use caste, religion, gender, disability or race as a criterion in their effort to achieve diversity. While in India, the framework of private diversity scholarships is emerging in an embryonic stage through CSR grants targeting Scheduled Caste and Scheduled Tribe students, minority scholarship trusts and fellowships for women in STEM education, there exists no specific Constitutional or statutory test that determines the legitimacy of such a framework.⁴ In the United States, however, the same issue has evolved from a relatively obscure area to one being litigated in court, leading to the invocation of Reconstruction era

¹ Constitution of India, 1950, arts. 15(4), 15(5), 16(4), 16(4A), 16(4B), 15(6), 16(6).

² U.S. Const. amend. XIV, § 1; *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

³ *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).

⁴ Ministry of Social Justice and Empowerment, Government of India, Post-Matric and Pre-Matric Scholarship Schemes for Scheduled Castes and Other Backward Classes (co-funded, in part, through private and corporate contributions under the Companies Act, 2013, Schedule VII).

Section 1981 of the Civil Rights Act of 1866 against a privately funded venture capital scholarship programme in *American Alliance for Equal Rights v. Fearless Fund Management, LLC*.⁵

This paper situates itself at the intersection of these two trajectories. It asks, in essence, whether India's constitutional architecture built for State action and only awkwardly extended, through the 93rd Amendment, into private unaided educational institutions is doctrinally equipped to answer the question that American courts have now been forced to confront directly: can a private actor lawfully give money away on the basis of identity in the name of diversity, and does anti-discrimination law reach that far into private philanthropy?⁶

2. STATEMENT OF THE PROBLEM

The Indian equality code, Articles 14, 15, and 16 of the constitution, has been largely designed to keep a check on the actions of the State, and Article 15(2) is the only provision that directly addresses private conduct, and that only insofar as it concerns the use of shops, restaurants and other places of public resort, not aid. The 93rd Constitutional Amendment Act, adding Article 15(5) to the Constitution, has allowed the State to enter into private unaided educational institutions with its reservations through legislative permission and not through any direct obligation/restriction on the private philanthropist who voluntarily donates scholarships on the condition of diversity of recipients. Thus, in the case of a private firm or private trust in India that awards a scholarship reserved only for, say, Dalit women engineers or some specific minority religion, there is no settled constitutional doctrine regarding whether such an action (a) falls within the scope of freedom of association and contractual freedom of donors, (b) amounts to discrimination against certain sections that can be challenged under some horizontal reading of Article 15, or (c) does not fall within any scope of Part III because it doesn't bind private parties here.

The problem is further aggravated by the issue of comparative pressure. America which for a long while has been considered the point of reference for Indian diversity discourse has shifted to the other extreme, treating even privately-funded, race-specific contest as potentially discriminatory in the making and enforcement of contract law. Should there ever come a

⁵ *American Alliance for Equal Rights v. Fearless Fund Management, LLC*, 103 F.4th 765 (11th Cir. 2024); 42 U.S.C. § 1981.

⁶ The Constitution (Ninety-Third Amendment) Act, 2005, inserting art. 15(5) of the Constitution of India.

situation where an Indian court was required to adjudicate a similar claim say, where a general category student claims that a reservation of corporate scholarship exclusively for Scheduled Caste students violates his fundamental right to equality under Article 14 read along with Article 21 of the Constitution; or, a man challenges a fellowship exclusively available to women there exists in India neither a corresponding statute such as Section 1981, nor any jurisprudential precedent that explains just how fundamental rights extend horizontally to privately funded financial assistance. Hence, India finds itself at a point of doctrinal ill-preparedness; India's affirmative action jurisprudence has grown substantially more sophisticated concerning State reservations but is notably deficient and silent regarding private diversity scholarships.

3. RESEARCH OBJECTIVES

- To examine the constitutional basis, scope, and judicial evolution of affirmative action in India under Articles 14, 15, 15(5), 16, and the Ninety-Third and One Hundred and Third Amendments.
- To examine the constitutional basis, scope, and judicial evolution of affirmative action in the United States under the Equal Protection Clause, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. Section 1981, with particular attention to the post-2023 jurisprudence.
- To analyse, comparatively, whether and how each jurisdiction's constitutional and statutory framework applies to private, non-State diversity scholarships as distinct from State-administered reservation.
- To critically assess the doctrinal gaps, ambiguities, and regulatory vacuum in Indian law concerning private diversity scholarships, in light of the American experience with Section 1981 litigation.
- To propose suggestions statutory, regulatory, or judicial for clarifying the legal status of private diversity scholarships in India.

4. RESEARCH QUESTIONS

- How has the constitutional framework governing affirmative action in India developed

under Articles 14, 15, 15(5), and 16, particularly following the Ninety-Third and One Hundred and Third Constitutional Amendments?

- How has affirmative action in the United States evolved under the Equal Protection Clause, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981, especially in the wake of post-2023 judicial developments?
- To what extent do the legal frameworks of India and the United States recognise or regulate private, non-State diversity scholarships, and how are such initiatives distinguishable from State-administered reservation and affirmative-action measures?
- What legal uncertainties and doctrinal gaps arise in India in relation to private diversity scholarships, particularly when viewed against the challenges presented by litigation under 42 U.S.C. § 1981 in the United States?
- What legal or institutional measures could be introduced in India to provide greater clarity on the validity, scope, and regulation of private diversity scholarships within the constitutional framework of equality and non-discrimination?

5. RESEARCH METHODOLOGY

The present study uses a doctrinal and comparative approach to legal research. Constitutional language, statute, and Supreme Court of India, the Supreme Court of the United States, and where applicable the United States Court of Appeals judgments are used as the primary sources of law. Secondary sources consist of law journals (academic and peer-reviewed), commission reports (especially the report of the Mandal Commission and the Sinho Commission Report), bar and bench comments and analysis, and think-tanks and higher education associations' analysis and policies. Comparative methodology is applied purposefully, not just for the sake of comparison; the United States is chosen as the comparator state because Indian diversity and affirmative action debates have borrowed heavily from American terminology ("strict scrutiny", "diversity rationale" etc.) and the United States remains the only common law state that has generated relevant case law in recent times.

6. REVIEW OF LITERATURE

A. Annadurai and Sahoo analyze the First-Generation Graduate Scholarship program adopted

in Tamil Nadu, where no fees are charged to the first-generation college students seeking technical education. Annadurai and Sahoo describe this policy as a case of massive and non-identity-affirmative action program and explore its impact on enrollment rates, choice of technical programs, and labor market performance of the graduates. This paper is especially relevant for the current research since it provides evidence that affirmative action policies may be realized not only through quota system but also through provision of financial aid and waiving tuition fees. However, the analyzed policy is state initiated and hence cannot provide any insight into the issue whether privately funded educational organizations have the opportunity to adopt scholarship programs as affirmative action policies. This difference becomes one of the crucial grounds for exploring the constitutional place of privately funded diversity scholarship programs in India.⁷

B. This article is especially relevant in the context of the relationship between affirmative action and private educational institutions in India. This article covers the role of private unaided institutions in the Indian affirmative action system and the controversy around including reservation policy for private institutions. Especially relevant to this research is the fact that it includes a discussion on scholarships and fellowships as an alternative tool available to private institutions to correct the imbalance in higher education access. In other words, this article brings the discussion outside of constitutionally mandated reservation policy and introduces the idea of voluntary financial policies that private institutions might use. However, this article does not include a detailed constitutional analysis of the issue of the constitutional legality of diversity scholarships offered by private institutions under Articles 14 and 15.⁸

C. Bagde, Epple, and Taylor offer an empirical analysis of affirmative action within Indian higher education, analyzing reservation programs implemented in over 200 engineering colleges. They conclude that affirmative action admissions lead to college enrollments of beneficiaries, especially within relatively better institutions, with no academic negative consequences for the beneficiaries. While the research considers only admission-based affirmative action and does not address financial programs, it is important in the context of the current research since it provides an empirical foundation for examining the link between

⁷ Gopinath Annadurai & Soham Sahoo, "First-generation Status as a Criterion for Affirmative Action: Education and Labour Market Effects of a Tuition Waiver in India," 249 *Journal of Economic Behavior & Organization* 107722 (2026).

⁸ Emon Nandi & Binay K. Pathak, "Affirmative Action in Indian Higher Education," *International Higher Education*, no. 117, 18–19 (2024).

affirmative actions and access to quality higher education. This research also puts forward the wider question regarding whether goals achieved by means of affirmative action programs through admissions can be also achieved via financial instruments such as scholarships. However, this study does not investigate private scholarship programs, providing grounds for further investigation of whether private institutions can achieve equality goals via scholarships.⁹

D. The relevance of Oosterhout's article to the U.S. comparative part of the current research arises from the fact that the article addresses race-conscious university scholarship programs in light of *Students for Fair Admissions v. Harvard*. It has been noted that while SFFA pertains to university admissions, the ruling has created legal ambiguity in relation to race-conscious financial aid programs. In this respect, Oosterhout makes a distinction between scholarships and admissions and considers whether financial aid can fulfill some different functions. Thus, the article is relevant to the current research since it shows that the legality of diversity scholarships cannot be necessarily taken to be the same as the legality of diversity-related admissions policies. This aspect is especially relevant in determining whether the Indian constitution could accept diversity scholarships privately funded despite the fact that the Constitution governs affirmative action in educational admissions.¹⁰

7.1 The Indian Constitutional Framework for Affirmative Action

The Indian affirmative action framework starts off with the equality principle enshrined in Articles 14 to 18 of the Constitution. Article 14 provides for equality before the law and equal protection of the laws; Article 15(1) prohibits discrimination by the state on grounds only of religion, race, caste, sex, and place of birth against any citizen; and Article 16(1) provides for equality of opportunity for public employment. Given that the framers of the constitution foresaw that equality alone may perpetuate social stratification, provisions were made allowing for affirmative discrimination, viz. Article 15(4), added through the Constitution (First Amendment) Act, 1951, empowers the State to make special provisions for advancement of socially and educationally backward classes and Scheduled Castes and Scheduled Tribes.¹¹

⁹ Surendrakumar Bagde, Dennis Epple & Lowell Taylor, "Does Affirmative Action Work? Caste, Gender, College Quality, and Academic Success in India," 106 *American Economic Review* 1495–1521 (2016).

¹⁰ Erica Oosterhout, "University Scholarships in the Shadow of SFFA," 174 *University of Pennsylvania Law Review* 871 (2026).

¹¹ The Constitution (First Amendment) Act, 1951 inserted Article 15(4) in response to *State of Madras v.*

Indra Sawhney v. Union of India is still considered the judicial high watermark of this jurisprudence, where a Bench of nine judges of the Supreme Court, considering the recommendation of 27 per cent reservation made by the Mandal Commission in favor of socially and educationally backward classes, approved the caste-based reservation policy with important structural restrictions, including the imposition of a ceiling of 50 per cent on all reservations except under extraordinary situations, barring the "creamy layer" from any benefits of being backwards, and banning reservations in promotions.¹² However, these limitations were further restricted reservation in promotion of Scheduled Castes and Scheduled Tribes was restored through Article 16(4A) of the Constitution (Seventy-Seventh Amendment) Act, 1995, and was approved subject to certain conditions in *M. Nagaraj v. Union of India*.¹³

Two such developments bear directly upon the current inquiry. The first is the Constitution (Ninety-Third Amendment) Act, 2005, which amended Article 15(5) and enabled the State to implement the reservation of admission to private educational institutions, aided or unaided, excepting only minority institutions falling within the ambit of Article 30(1). Such an amendment became necessary owing to the three judgments delivered by the Supreme Court in *T.M.A. Pai Foundation v. State of Karnataka*, *Islamic Academy of Education v. State of Karnataka* and *P.A. Inamdar v. State of Maharashtra*, according to which the State could not make it mandatory for unaided private and non-minority institutions to provide a certain quota of admissions for backward classes since it would be violative of their right to conduct any trade under Article 19(1)(g).¹⁴ Article 15(5) assumes significance precisely for this reason, which is that even the introduction of reservation in the private sector required a specific amendment to the Constitution; it did not automatically subjugate the private sector to Article 15.

Second, the Constitution (One Hundred and Third Amendment) Act, 2019 inserted Articles 15(6) and 16(6), introducing a 10 per cent reservation for Economically Weaker Sections that, notably, applies *also* to private unaided educational institutions other than minority institutions. In *Janhit Abhiyan v. Union of India*, a five-judge Bench of the Supreme Court upheld the amendment by a 3:2 majority, holding that economic criteria alone could validly found a

Champakam Dorairajan, AIR 1951 SC 226, which had struck down a communal government order on the ground that Article 15(1) did not then contain an enabling exception comparable to Article 16(4).

¹² *Indra Sawhney v. Union of India*, AIR 1993 SC 477.

¹³ *M. Nagaraj v. Union of India*, (2006) 8 SCC 212.

¹⁴ *T.M.A. Pai Foundation v. State of Karnataka*, (2002) 8 SCC 481; *P.A. Inamdar v. State of Maharashtra*, (2005) 6 SCC 537.

reservation classification and that the 50 per cent ceiling laid down in Indra Sawhney was not an inviolable constitutional rule.¹⁵ What is critical for present purposes is that in each of these instances Article 15(5) and Articles 15(6)/16(6) the extension of affirmative action into the private domain was accomplished through *State-mandated reservation*, not through independent private choice. The Constitution regulates the State's power to compel private institutions to reserve seats; it says nothing directly about a private donor's own voluntary decision to fund a scholarship along identity lines. This is the doctrinal gap at the centre of this paper.

7.2 The American Framework: From the Diversity Rationale to Students for Fair Admissions

The American constitutional beginning is opposite to the Indian one. The Equal Protection Clause of the Fourteenth Amendment does not allow the government to use affirmative action; instead, it was intended to prevent racial discrimination from the side of the state. Consequently, any policy of affirmative action has been regarded as always presumptively suspect and thus subjected to the strict scrutiny test.¹⁶ In *Grutter v. Bollinger*, the Supreme Court decided that narrowly tailored consideration of the race as one of the factors in admission to a law school for achieving the educational benefits of diversity would survive the strict scrutiny test only for a limited period of time.¹⁷

Such justification of diversity was rejected definitively on 29 June 2023 in the case of *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, which included a consolidated case regarding the University of North Carolina.¹⁸ In the opinion of the Court issued in a 6-3 decision, race-conscious programs of admission of applicants in both educational establishments violated the principles of equal protection as they lacked concrete goals, were based on racial stereotypes, and there was no logical limit to them.¹⁹ The Court's ruling did not formally overrule the case of *Grutter*; nevertheless, in practice, it precludes any racial classification in admission, while allowing an applicant to present the effect of his or her

¹⁵Janhit Abhiyan v. Union of India, 2022 SCC OnLine SC 1540.

¹⁶Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

¹⁷Grutter v. Bollinger, 539 U.S. 306 (2003).

¹⁸Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181 (2023).

¹⁹Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181 (2023); Littler Mendelson, "U.S. Supreme Court Strikes Down Race-Conscious Admissions" (2023).

race on personal experience.

Even though the SFFA decision pertained only to admissions, the effects on scholarships came quickly. For example, some universities and state attorneys general especially Missouri, where the Attorney General directed public and private universities to stop taking race into account in “admissions, scholarships, and programs” interpreted the decision to include race-conscious financial aid and ended up discontinuing any racially based scholarships altogether.²⁰ This shows an important comparison between the two systems: a shift in constitutional doctrine regarding state actors (such as state universities, or private universities that acted as state actors due to receiving federal money) in the U.S. had an immediate effect on scholarship practices through private actors, out of fear of litigation and losing federal funding.

Regarding the purely private scholarships, the direct precedent would be not *Students for Fair Admissions, Inc. v. Fisher*, but *American Alliance for Equal Rights v. Fearless Fund Management, LLC*, handed down by the Eleventh Circuit Court of Appeals on 3 June 2024.²¹ In that case, Fearless Fund, a venture capital foundation, conducted a grant competition for USD 20,000 and mentoring for Black female business owners only. American Alliance for Equal Rights, claiming on behalf of non-Black entrants, sued Fearless Fund under 42 U.S.C. Section 1981 – a Reconstruction Era law, codified as part of the Civil Rights Act of 1866, that bans private discrimination on the grounds of race in making and enforcing contractual relations.²²

A divided panel of the Eleventh Circuit Court of Appeals found that the grant contest would likely be a “contract” under Section 1981, that Alliance members, as potential contractors, had standing to bring suit notwithstanding their lack of participation in the contest, and that the contest could not be protected under the First Amendment as expressive activity because discriminating against non-Black applicants in connection with a racially selective grant process is discriminatory action, not speech.²³ A preliminary injunction issued from the Eleventh Circuit, and the parties eventually reached settlement in September of 2024, resulting in the permanent shutdown of the contest by Fearless Fund. The Eleventh Circuit's decision is

²⁰ AccessLex Institute, “How the Supreme Court's Ruling on Affirmative Action is Impacting Race-Conscious Scholarships” (2024).

²¹ *American Alliance for Equal Rights v. Fearless Fund Management, LLC*, 103 F.4th 765 (11th Cir. 2024).

²² 42 U.S.C. § 1981 (Civil Rights Act of 1866).

²³ Council on Foundations, “Summary of 11th Circuit Ruling in *American Alliance for Equal Rights v. Fearless Fund*” (2024).

binding only on the Eleventh Circuit (Alabama, Florida, and Georgia) and does not provide national precedent, but the case has already chilled racially conscious grant-making by corporations and foundations across the country, since Section 1981, unlike the Fourteenth Amendment, applies to private conduct without any state-action component.²⁴

7.3 Locating Private Diversity Scholarships Within India's Constitutional Text

Transplanting the American analysis onto Indian law requires care, because the two constitutional texts allocate the burden of non-discrimination very differently. Article 15(2) of the Indian Constitution is the closest analogue to Section 1981 insofar as it regulates private conduct, but its scope is textually confined: it prohibits discrimination in access to shops, public restaurants, hotels, places of public entertainment, and the use of wells, tanks, bathing ghats, roads, and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.²⁵ A privately funded scholarship a contractual or quasi-contractual grant of money from a donor to a selected beneficiary does not naturally fall within any of these enumerated categories. Unlike Section 1981, Article 15(2) contains no general prohibition on private discrimination in the making of contracts; it is a narrow, enumerated list, and Indian courts have historically declined to read fundamental rights horizontally beyond such express textual anchors, treating Part III as primarily a set of restraints upon the State as defined in Article 12.

This textual gap means that, as matters presently stand, a private company or trust in India that funds a scholarship reserved exclusively for, say, Scheduled Caste students, Muslim students, or women in STEM, faces no direct constitutional prohibition analogous to Section 1981. Such a donor could, in principle, invoke its own freedom to carry on any occupation, trade, or business under Article 19(1)(g), and its liberty of contract, as the doctrinal basis for structuring eligibility criteria as it chooses, subject only to ordinary contract law and any applicable anti-discrimination legislation specific to employment, education access under the Right of Children to Free and Compulsory Education Act, 2009, or the Rights of Persons with Disabilities Act, 2016 none of which squarely regulates identity-based eligibility for privately funded scholarships as such.

²⁴ American Alliance for Equal Rights, Press Release, "American Alliance for Equal Rights Concludes Lawsuit against the Fearless Fund's Black-Only 'Strivers Grant Contest'" (11 September 2024).

²⁵ Constitution of India, 1950, art. 15(2).

At the same time, this absence of restraint should not be mistaken for settled affirmative permission. The Supreme Court's expanding conception of Article 21 encompassing dignity, and its instrumentalization to import positive obligations against private discrimination in isolated contexts such as workplace sexual harassment in *Vishaka v. State of Rajasthan*, or its extension of equality norms to horizontal relationships in matters of essential services leaves open the theoretical possibility that a sufficiently motivated litigant, excluded from a private scholarship on grounds of caste, sex, or religion, could frame a public-interest challenge invoking Articles 14 and 21, particularly if the donor entity is a public sector undertaking, a body substantially financed by the State, or an entity performing a function of public importance that could attract the expanding definition of "State" or "other authority" under Article 12.²⁶ The outcome of such litigation is, however, genuinely unpredictable under existing doctrine, precisely because no reported Indian decision has yet tested the constitutionality of a purely private, non-State diversity scholarship on its own terms.

A further complicating layer is the University Grants Commission's regulatory oversight of scholarships administered *through* higher-education institutions, and the Ministry of Social Justice and Empowerment's own extensive scheme of privately co-funded, State-recognised scholarships for Scheduled Caste, Scheduled Tribe, Other Backward Class, and minority students. Where private funds are routed through State-recognised or State-administered scholarship schemes, they arguably absorb some colour of "State action" and become more amenable to constitutional review than a wholly private, independently administered corporate or trust scholarship. India's regulatory landscape is therefore best described not as permissive or prohibitive, but as bifurcated and incomplete: comprehensively regulated where private money flows through State channels, and almost entirely unregulated where it does not.

7.4 Critical Analysis and Findings

First, the two constitutions allocate constitutional risk in opposite directions. In the United States, the default constitutional position is hostility to race-conscious classification, and affirmative action public or private survives only as a narrow, judicially or statutorily tolerated exception that is now visibly shrinking after SFFA and Fearless Fund. In India, the default constitutional position is closer to the reverse: the State is affirmatively empowered to engage in compensatory classification, and this permissive orientation has, historically, been assumed

²⁶*Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.

(without ever being squarely tested) to extend informally to private philanthropic replication of the same categories. The result is that India's comparative "unreadiness" is not a deficiency of restrictive doctrine, as it might first appear, but a deficiency of any settled doctrine at all permissive or restrictive governing purely private diversity scholarships.

Second, India lacks a statutory equivalent to Section 1981. The single most important structural difference exposed by the Fearless Fund litigation is that Section 1981 is a *statute*, not a constitutional clause, and it binds private contracting parties directly, without any state-action requirement. India has no comparable general statute prohibiting private discrimination in the making of contracts on grounds of caste, religion, or sex the closest instruments, such as the Protection of Civil Rights Act, 1955 and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, are framed to protect historically disadvantaged groups against discriminatory exclusion and humiliation, not to protect dominant or general-category applicants from being excluded by an inclusive scholarship. Even if an Indian court wished to import Fearless Fund-style reasoning, there is no statutory vehicle through which it could do so; any remedy would have to be fashioned directly out of Articles 14, 15, and 21, an exercise Indian courts have so far shown little appetite for in the specific context of private philanthropic grant-making.

Third, the asymmetry cuts in India's practical favour but at the cost of legal certainty. Because Indian constitutional law does not straightforwardly reach private diversity scholarships, such schemes are, for now, comparatively insulated from the kind of successful reverse-discrimination challenge that felled Fearless Fund's grant contest. This is arguably a socially desirable outcome, given India's demonstrably persistent caste-based and gender-based disadvantage, and given that private CSR-funded and trust-funded scholarships for Scheduled Caste, Scheduled Tribe, and minority students meaningfully supplement chronically underfunded State scholarship schemes. However, the same absence of doctrine that protects such schemes today offers them no durable assurance for tomorrow: without express statutory or regulatory recognition, private diversity scholarships in India rest on an accident of textual silence rather than an affirmed constitutional value, leaving them vulnerable to future doctrinal shifts, ad hoc litigation, or regulatory overreach exercised in the name of "merit" or "reverse discrimination", a rhetoric that has already gained currency in Indian public discourse around the Economically Weaker Sections quota and the Maratha reservation controversy.

Taken together, these findings suggest that India's constitutional framework is not simply unready for private diversity scholarships in the sense of being hostile to them, as the post-SFFA American framework increasingly is; it is unready in the more fundamental sense of never having been asked to address them at all. The doctrinal machinery built around Articles 15(4), 15(5), and 16(4) is calibrated exclusively to regulate the State's own reservation power and its extension into private unaided institutions through express constitutional amendment; it was never designed to, and does not currently, answer the distinct question of whether a private donor may voluntarily allocate scholarship money using identity criteria of its own choosing.

8. CONCLUSION

This paper set out to examine whether India's constitutional framework is doctrinally prepared for the emergence of private diversity scholarships, using the more mature and now rapidly evolving American experience as a comparative lens. The analysis demonstrates that the two jurisdictions have travelled in nearly opposite directions: the United States has moved from a cautiously tolerated diversity rationale in *Grutter v. Bollinger* to an emphatic rejection of race-conscious admissions in *Students for Fair Admissions v. Harvard*, and further, through *American Alliance for Equal Rights v. Fearless Fund Management, LLC*, to the direct application of a Reconstruction-era civil rights statute against purely private, race-exclusive grant-making. India, by contrast, has continued to expand affirmative action, most recently through the Economically Weaker Sections quota upheld in *Janhit Abhiyan v. Union of India*, but has done so entirely within the register of State-directed reservation, leaving the distinct question of private, voluntary, identity-based philanthropy almost completely untouched by constitutional doctrine.

The central conclusion of this study is that India's constitutional framework is not so much unready as it is silent a silence that currently operates protectively, by insulating private diversity scholarships from the kind of successful legal challenge that ended Fearless Fund's grant contest in the United States, but a silence that cannot be relied upon indefinitely as a substitute for considered legal policy. As India's private philanthropic and corporate social responsibility sector continues to expand its role in higher-education financing, and as global discourse on affirmative action becomes increasingly contested and litigious, the absence of any dedicated constitutional, statutory, or regulatory framework for private diversity

scholarships represents a genuine and growing gap in Indian law one that this paper argues ought to be addressed proactively, before it is forced into being through adversarial litigation, as happened in the United States.

9. SUGGESTIONS

- The Ministry of Corporate Affairs and the Ministry of Education should jointly issue interpretive guidance clarifying that identity-conscious eligibility criteria in privately funded, CSR-linked, or trust-administered scholarships where designed to benefit constitutionally recognised disadvantaged groups (Scheduled Castes, Scheduled Tribes, socially and educationally backward classes, women, and persons with disabilities) are consistent with, and indeed further, the substantive equality goals underlying Articles 15 and 46 of the Constitution, thereby giving such schemes a stable interpretive anchor rather than leaving them in constitutional limbo.
- Parliament may consider a narrowly framed statutory provision, distinct from the Protection of Civil Rights Act, 1955, that expressly protects the validity of privately funded scholarships benefiting historically disadvantaged groups from constitutional or civil challenge by non-beneficiary applicants, subject to reasonable safeguards such as transparent eligibility criteria and proportionate scope, thereby pre-empting India's own future "Fearless Fund moment."
- Simultaneously, to guard against potential misuse of the diversity rationale to mask arbitrary or majoritarian exclusion, any such statutory protection should be calibrated to apply only to schemes benefiting groups recognised under Articles 15(4), 15(5), 15(6), 16(4), and 16(6), rather than being extended to open-ended or self-defined "diversity" categories that could otherwise be exploited to entrench, rather than remedy, disadvantage.
- The University Grants Commission and All India Council for Technical Education should maintain a public, disaggregated registry of privately funded scholarships operating through recognised institutions, distinguishing State-linked and purely private schemes, to enable evidence-based policymaking and to bring a degree of transparency and accountability presently absent from this sector.

- Indian legal scholarship and law school curricula should engage more directly with the doctrinal question of horizontal application of the equality code to private philanthropic and contractual conduct, drawing lessons from the American Section 1981 jurisprudence without uncritically importing its adversarial, litigation-first character, which risks discouraging beneficial private philanthropy rather than channelling it responsibly.
- Indian corporate and philanthropic donors should proactively adopt transparent, defensible eligibility frameworks for diversity scholarships grounding them explicitly in constitutionally recognised categories of disadvantage rather than loosely defined identity markers so as to minimise future legal vulnerability regardless of how Indian doctrine eventually develops.

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