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## I. INTRODUCTION

Awash with hortatory declarations and resolutions, international human rights law is often criticized as too "soft," as lacking "teeth."[3] Indeed, even the "hardest" human rights standards, the binding multi-lateral treaties, include little means of enforcement beyond international scrutiny, which would exist even without human rights law.[4] For this reason, human rights norms embedded in national legislation take on an even more important character, and there are few places where international human rights law enters the domestic sphere so directly, and potently, as with affirmative action.[5] As the name implies, affirmative action is an active,

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[1] Hutchins Hall is the main academic building at the University of Michigan Law School, whose affirmative action admissions policy is currently under constitutional scrutiny by the United States Supreme Court. 2002 U.S. LEXIS 8677 (Dec. 2, 2002).

[2] Hyderabad, India, was the sight of a forty-person massacre by extremist supporters of the reservation policy who set an entire train carriage on fire. E.J. Prior, *Constitutional Fairness or Fraud on the Constitution? Compensatory Discrimination in India*, 28 CASE W. RES. J. INT'L L. 63 (1996).

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[3] *See* DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 7-11 (2001) (noting and criticizing the perceptions that international law generally is all theory and no practice, that it is not "real" law, and that nobody obeys international law).

[4] Although two treaty bodies now have a Rapporteur on follow-up to Concluding Observations, the power given to this Rapporteur is dubious. *See Follow-Up to Concluding Observations of the Committee Against Torture*, UN Doc. CERD/C/61/Misc.10 (Aug. 23, 2002, 61st CERD session document); *Follow-up to Concluding Observations of the Human Rights Committee*, UN Doc.: CERD/C/61/Misc.11 (Aug. 23, 2002, 61st CERD session document). Many commentators have emphasized the need for stronger enforcement mechanisms. *See* C. Heyns & F. Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* 26 (2002) ("In many instances it is clear that concluding observations are being ignored"); Elizabeth Evatt, *Ensuring Effective Supervisory Procedures: The Need for Resources, in* THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 461 (Philip Alston & James Crawford eds., 2000); Philip Alston, *Beyond 'Them' and 'Us': Putting Treaty Body Reform into Perspective, in Id.* at 501; *Strengthening Support to and Enhancing the Effectiveness of the Treaty Bodies, Informal Note on the Deliberations of the Commission on Human Rights at its Fifty-Eighth Session on Agenda Item 18(a) Entitled "Effective Functioning of the Human Rights Mechanisms: Treaty Bodies,"* UN Doc. HRI/MC/2002/Misc.1 (June 14, 2002).

[5] A comparative law paper on affirmative action would not be complete without at least some discussion of the terminology. Often, papers comparing Europe and the United States will choose consistent usage of either "affirmative action" or "positive action." *See* Christopher McCrudden, *Rethinking Positive*

dynamic force. This force strikes at the heart of social power structures–taken to the extreme, affirmative action is a powerful tool for badly-needed redistribution of social wealth.[6] In a world where human rights norms are mostly declaring or recommending, affirmative action is acting.

Here at the University of Michigan, no topic is currently more charged or more debated than affirmative action. Recently, the Supreme Court of the United States granted certiorari to *Grutter v. Bollinger*,[7] the affirmative action case arising out of the law school's admissions program, and *Gratz v. Bollinger*,[8] the companion case in undergraduate admissions. The campus is alive with daily organizational meetings for a march on Washington DC during the Supreme Court's consideration of the case this spring.[9] A coalition of minority law student groups is working non-stop to submit an amicus brief to the United States Supreme Court. CNN has called the cases "the most significant civil right cases the Supreme Court will have decided in the last quarter century."[10] At the University of Michigan, and in the United States, the time is now to talk about affirmative action.

The potential for comparative studies of affirmative action programs is enormous. Not only is the issue present in multiple jurisdictions on multiple continents, but it is always extremely politically charged and

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*Action*, 15 INDUS. L. J. 219, 220-21 (1986) (discussing the terms "affirmative action" and "positive action" at length and deciding not to distinguish between the two terms because "there is no real difference in substance between them"). Because I am writing in the United States, I will consistently employ the term "affirmative action" to designate both "affirmative action" and "positive action." Yet, it stands to be said that the extent to which the two terms are synonymous is dependant upon the level of generalization one chooses to adopt in defining them. The terms are synonymous if one considers the meaning of the two terms generally, to denote positive measures undertaken by the state "to enable or to facilitate the exercise of certain human rights by specific groups of citizens," Louise Mulder, *How Positive can Equality Measures Be? in* NON-DISCIRIMINATION LAW: COMPARATIVE PERSPECTIVES 65 (Titia Loenen & Peter R. Rodrigues eds., 1999). If one includes within the meaning of the terms the myriad different ways, tests, and standards in which the two jurisdictions attempt to reach that end, the two terms differ significantly. In this paper, I attempt to expose those similarities and differences, as well as the many similarities and differences offered by Indian reservation policy. Some commentators have argued that the Indian term "compensatory discrimination" is also synonymous with affirmative action. Samuel M. Witten, *Comment, "Compensatory Discrimination" in India: Affirmative Action as a Means of Combating Class Inequality*, 21 COLUM. J. TRANSNAT'L L. 353, n.2 (1983). I refuse to take this step. For me, the absolute, restrictive quotas (see discussion of quotas, *infra* section IIIA) that are integral to the Indian reservation system merit a separate term, despite other common areas. I will therefore refer to the India system as "reservations."

[6] McCrudden, *supra* note 5, at 238-39 (explaining the rationales for affirmative action based on distributive justice and social utility).

[7] Grutter v. Bollinger, 2002 U.S. LEXIS 8677 (Dec. 2, 2002).

[8] Gratz v. Bollinger, 2002 U.S. LEXIS 8681 (Dec. 2, 2002).

[9] Email sent to students by the Coalition to Defend Affirmative Action & Integration and Fight for Equality By Any Means Necessary (BAMN), Dec. 2, 2002 (on file with the author). A major conference on affirmative action was also hosted at the University of Michigan on Jan. 20-26, 2003. See schedule at http://www.bamn.com/doc/2002/0301-summit.txt.

[10] William Mears, *Affirmative Action Case Awaits Supreme Court Review*, CNN, Dec. 2, 2002, *available at* http://www.cnn.com.

jurisprudentially complicated. Indeed, many commentators have analyzed the United States' approach as compared to either Europe or India. Yet, very little has been written comparing Europe and India, where many of the most interesting questions lie, and a comparative analysis of all three jurisdictions has not been attempted to my knowledge. This paper aims to fill that gap. I will generally address affirmative action in the United States with respect to race, in Europe with respect to gender, and in India with respect to caste. I will address United States affirmative action programs with respect to gender in certain limited sections of this paper, because the parallel to Europe is so ripe for comparison. I will also address India's gender-based reservation policy in part VI, but to a lesser extent, since it is significantly less developed than caste-based reservations.

In this paper, I frame the affirmative action question in India, Europe, and the United States as three concentric circles: The largest circle, that of India, represents the most liberal, expanded approach to affirmative action. Within the largest Indian circle, lies a more restrictive European circle. Within this circle, lies the most restrictive jurisdiction: the United States. All three jurisdictions share common themes, thus all three circles overlap, but the main goal of this paper is to highlight the subtle ways in which they differ. A study of all three jurisdictions allows for a depth of analysis which is not possible when comparing only two jurisdictions. We will see, for example, that one of the most complex issues, equality, is best understood by examining the gray area that separates the European circle from the larger Indian circle and the smaller American one. In most areas, such as the notion of equality and the meaning of quotas, I will argue that European policies are closer to their United States than their Indian counterparts. However, I will also examine specific areas, such as the general remedial rationale, the creamy layer concept, and the size of quotas (or quota-like sums), where Europe is more similar to India. Synthesizing these arguments, it is clear that affirmative action programs are not all alike: Just as many forces play on Europe to pull it outwards towards India or inwards towards the United States, these same forces also pull and push on the Indian and American circles. The paper concludes with an analysis of the universalist/cultural relativist question raised by the multiple jurisdictional differences I will expose.

## II. EQUALITY

All three jurisdictions have equal protection clauses that are strikingly similar upon initial examination:

A) "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."
   - Indian Constitution[11]

B) "[T]here shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status."
   - Equal Treatment Directive of the European Communities[12]

C) "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.
   - Constitution of the United States[13]

In addition, Europe and India also both have exceptions clauses allowing affirmative action measures in some situations:

A) "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."
   - Indian Constitution[14]

B) "This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1)."
   - Equal Treatment Directive of the European Communities[15]

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[11] INDIAN CONST. art. XIV.
[12] Equal Treatment Directive, art. II, § 1, Council Directive 76/207, 1976 O.J. (L 39/40) (hereinafter the Equal Treatment Directive). Admittedly, the Equal Treatment Directive differs in that it is limited to sex. This does not create a significant distinction in this paper, however, since I am comparing affirmative action programs in their specific areas of emphasis. *See supra* Part I.
[13] U.S. CONST. amend. XIV, § 1.
[14] INDIAN CONST. art. XV, § 4. *See also* INDIAN CONST. art. XVI, § 4 (a similar exceptions clause relating to equality of opportunity in public employment which specifically allows reservations for backwards classes); INDIAN CONST. art. VCVI ("The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.") (non-binding Directive Principle of State Policy).
[15] Equal Treatment Directive, art. II, § 1, Council Directive 76/207, 1976 O.J. (L 39/40).

Faced with this juridical background, one is likely to make two assumptions: First, that all three jurisdictions will be bound by a similar notion of equality. Second, because of their exceptions clauses, that Europe and India will be relatively less constrained by their respective equal protection clauses than the United States. In this section, I investigate the ways in which the reality proves more complicated than both of these assumptions. Instead of a consistent notion of equality, I will examine two theoretical divides in the concept of equality, both of which are present in the jurisdictions under study.[16] In part A, I compare the three jurisdictions by examining the concept of equality adopting the theoretical divide between individual-regarding equality and group-regarding equality. Rather than the divide coming between Europe/India on the one hand and the United States on the other hand, the equality divide comes between India on the one hand and Europe/USA on the other. In Part B, I examine the divide between formal equality and substantive equality. I will argue that although it has been commonly argued that this divide does come between Europe/USA on the one hand and India on the other, there is much evidence to suggest that Europe is gradually adopting a substantive notion of equality, expanding away from the inner American circle and towards the outer Indian one.

### *A. Individual-Regarding Equality vs. Group-Regarding Equality*

In the 1970s, Douglas Rae and his colleagues at Yale embarked on ground-breaking work studying the notion of equality. In their analysis, Rae et al. developed the dichotomy between "individual-regarding equality," which defines a class of individuals and demands they be treated equally, and "group-regarding equality," which seeks equality between groups, but not necessarily within each group.[17] This distinction is key in comparing affirmative action to reservations. Although the language of equality figures prominently in all three jurisdictions, it is not always the same equality in Rae's dichotomy. Both Europe and the United States are more solidly grounded in an individual-regarding equality assumption. In *Adarand Constructors v. Pena* (hereinafter *Adarand*), the United States Supreme Court has made clear that "the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups."[18] Similarly, in Europe, Klaartje

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[16] For an even more complete investigation of concept of equality, distinguishing four separate notions of equality, see Anne Peters, *The Many Meanings of Equality and Positive Action in Favour of Women under European Community Law -- A Conceptual Analysis*, 2 EUR. L. J. 177 (1996).

[17] *See generally* DOUGLAS RAE ET AL., EQUALITIES (1981).

[18] Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995). *See also* Donald W. Jackson, *Affirmative Action in Comparative Perspective: India and the United States, in* NON-DISCIRIMINATION LAW:

Wentholt argues that the EC Equal Treatment Directive of 1976 (hereinafter The Equal Treatment Directive) is based on a "presumption of sameness"[19] which recognizes "the right of each individual to be treated equally."[20] In contrast to this individual-regarding equality, reservations in India are based on group-regarding equality. Priya Sridharan characterizes the importance of group-regarding equality in India:

> The Constitution charges the government with promoting these groups' interests, and explicitly permits the use of reservations or other preferences to repeal the negative consequences of membership in a "backward class." Therefore, the Indian government, including the judiciary, need not debate whether equality must always entail ignoring potentially salient group membership, or whether group membership can, in fact, be ignored. Similarly, attempts to justify caste-based assistance need not work around a vague or inflexible mandate for equality. In fact, arguments for preferential treatment marshal the Constitution strongly in their favor. Instead, debate inheres in attempting to define "backward classes" - those who have suffered the kind of disadvantage that calls for the remedy of reservations. Thus, in India, debates turn on which group memberships are, in fact, salient.[21]

Thus, reservation policies differ from affirmative action because the fundamental underlying assumptions are different. While the United States and Europe practice an individual-regarding equality, India's reservation policy is based on group-regarding equality.[22]

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COMPARATIVE PERSPECTIVES 249 (Titia Loenen & Peter R. Rodrigues eds., 1999) ("The United States is the quintessential home of individual-regarding equality. The deceptively simple idea that all human beings are equal and ought to be treated alike–as individuals–continues its appeal to many Americans, even if its appeal is only at a reflexive level of understanding."). Jackson also notes that individual-regarding equality is so ingrained in the American psyche that, in the *Bakke* case, "the notion of 'group-regarding equality' was not specifically raised by any of the briefs that supported the position of the University of California." *Id.* at 252.

[19] Klaartje Wentholt, *Formal and Substantive Equal Treatment: The Limitations and the Potential of the Legal Concept of Equality, in* NON-DISCIRIMINATION LAW: COMPARATIVE PERSPECTIVES 53, 55 (Titia Loenen & Peter R. Rodrigues eds., 1999).

[20] *Id.* at 60.

[21] Priya Sridharan, *COMMENT: Representations of Disadvantage: Evolving Definitions of Disadvantage in India's Reservation Policy and United States' Affirmative Action Policy,* 6 ASIAN L.J. 99, 108 (1999).

[22] *But see* Griggs v. Duke Power Co., 401 U.S. 424 (1970). In that case, the United States Supreme Court "shifted civil rights policy to a group-rights, equality-of-result rationale that made the social consequences of employment practices, rather than their purposes, intent or motivation, the decisive consideration in determining their lawfulness." HERMAN BELZ, EQUALITY TRANSFORMED 51 (1991). Although the case has been distinguished and criticized by literally hundreds of Supreme Court majority opinions, it is still an interesting read–the similarities to later Indian cases is uncanny.

It is tempting to argue that India's "creamy layer"[23] test puts the emphasis in India on group-regarding equality into question. One might reason that, if India were truly concerned only with group rights, it would not be necessary to institute the "creamy layer" test to separate out individuals who, because of privileged situations, should not qualify for the group benefit. By this line of reasoning, the "creamy layer" test, in essence, is an individual test, making the final decision in India more an individual one than a group one. I believe this reasoning is incorrect, however. In the United States/European context, the "individualizing" of affirmative action focuses the attention on the individual who would be *denied* something because of the operation of an affirmative action program. In India, the "creamy layer" test invokes an entirely different individual enquiry, that of the individual who would *benefit* from the reservation policy, and whether their individual characteristics should preclude them from benefiting for a reservation meant for a particular group.[24] Sridharan notes that "While the creamy layer test individualizes some members of the group, it does so only in service of maintaining the efficacy and/or fairness of the group status as a proxy for disadvantage."[25] "The creamy layer test simply expels, as individuals, those people whose individual situation characterizes them as inconsistent with the group. The starting point of calculating disadvantage is still the group."[26] Thus, what looks like an increased emphasis on individuals is actually a tool to maintain the emphasis on the groups, by keeping the groups meaningfully distinct in terms of level of disadvantage.

Nevertheless, it is fair to say that the line between individual-regarding equality and group-regarding equality is not a clear one in any of the jurisdictions under study. In India, while the preference is on groups, it would certainly be an oversimplification of the issue to claim the absence of individual-regarding equality or some level of importance of the individual:

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[23] The "creamy layer" test is an economic means test designed to limit the possibility of advanced backward class members profiting from the reservation schemes. *See* description *infra* section V and in Indra Sawhney v. Union of India, A.I.R. 1993 S.C. 477, at ¶ 86.

[24] Sridharan, *supra* note 21, at 112 ("In the U.S., the permissibility of an individual to benefit from affirmative action based partly on her group membership is weighed against the right of a nonbeneficiary individual to receive the position in contention, or the injury he suffers by losing the position in part because he is not a member of the beneficiary group. In India, however, the counterweight to a benefit garnered by someone solely because of group membership is his socioeconomic status - a measure of whether he, in fact, suffers disadvantage consistent with the claimed group membership, and is thereby entitled to the remedial benefits accruing to that group. Thus, even the counterweights to granting reservations operate to maintain the primacy of the group as the unit of remedy.") (footnotes omitted).

[25] Sridharan, *supra* note 21, at 120.

[26] Sridharan, *supra* note 21, at 146 (emphasis added) (adding that "Just as the U.S. uses group membership to determine individual qualifications, India uses individual characteristics to maintain the salience of the group as the primary organizing variable").

> India was self-consciously a nation comprised not just of atomized individuals, but of several societies in which these individuals were grouped. Individuals were avowedly locations for the residence of complexes and compendiums of these many group identities. Thus, while championing the individual's right to equality, the Constituent Assembly could not ignore the group as a fundamental organizational unit. The Indian Constitution reflected these tensions, creating flexibility for the interpretation and adjudication of the conflicts between individual and group rights.[27]

The same could be said about Europe and the United States. While both of those jurisdictions clearly favor individual-regarding equality, the very fact that an affirmative action debate exists is strong evidence of some understanding of group-regarding equality. For example, Donald W. Jackson argues that "programs which provide for affirmative action for members of traditionally disadvantaged groups [are] based on group-regarding equality."[28] Thus, while India can clearly be distinguished from Europe and the United States in terms of its level of group-regarding equality, it would be an oversimplification to claim that either individual-regarding equality or group-regarding equality is absent from any one of the three jurisdictions.

### *B. Formal Equality vs. Substantive Equality*

The concept of equality can also be divided into the two separate notions of formal equality and substantive equality. Much has been written about the distinction between formal and substantive equality, particularly by commentators in Europe.[29] Simplifying the distinction to its core, formal equality aims at equal opportunity as opposed to substantive equality, which aims at equal results by considering societal structures in which equal results would not necessarily follow from equal opportunity.[30] Paul Hodapp,

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[27] Sridharan, *supra* note 21, at 106 (citations omitted).

[28] Jackson, *supra* note 18, at 249. Similarly, after the recent decision in Hopwood v. State of Texas 78 F.2d 932 (5th Cir. 1996), Jackson explained the diametrically opposing views among the law faculty at the University of Texas Law School as "having little to do with legal analysis, but rather represent[ing] . . . fundamentally different understandings of equality." *Id.* at 255-56

[29] *See* Mulder, *supra* note 5; Wentholt, *supra*, note 19.

[30] Paul Hodapp, Thomas Trelogan, & Steve Mazurana, *Positive Action and European Union Law in the Year2000*, 8 ANN. SURV. INT'L & COMP. L. 33, 36 (2002). Note that this article is not to be confused with Steve Mazurana, Thomas Trelogan, & Paul Hodapp, *International Decision:* Badeck, Abrahamsson v. Fogelqvist, Schnorbus v. Land Hessen, 96 A.J.I.L. 453 (2002). Although this second article has identical authorship, it is an entirely different article with some different information. I will refer to the former as "Hodapp et al." and the latter as "Mazurana et al."

Thomas Trelogan, and Steve Mazurana recently argued that the ECJ "has accepted formal or competitive positive action as the only permissible means to achieve gender equality."[31] Similarly, in her excellent work on equality, Klaartje Wentholt argues that the legal notion of equality in Europe has been generally limited to the formal component, and advocates for a greater incorporation of substantive equality into the legal notion of equality in Europe. [32] In this sub-section, I will first argue that India has firmly embraced the notion of substantive equality. I will then explore this notion in the context of the United States and Europe, arguing that while the United States remains solidly grounded in formal equality, Europe has already adopted a greater level of substantive equality than any of the above commentators admit. In this way, the European circle is expanding away from the American circle towards the Indian circle.

In her work, Wentholt exposes the connection between the individual-regarding equality/group-regarding equality paradigm and the formal equality/substantive equality paradigm:

> In [a formal approach to equality], affirmative action infringes the right of each individual to be treated equally. Therefore, derogations should be interpreted strictly. In such an approach it is difficult to justify affirmative action, for affirmative action does not take individual characteristics but rather group characteristics into account (being a woman, a member of an ethnic minority group etcetera). So, [affirmative action] is contradictory to the condition of not infringing an individual right. . . . In a substantive approach affirmative action is not seen as an exception to the concept of discrimination but as a component of the principle of equality that forces the establishment of equality as a result.[33]

Given this connection between group-regarding equality and substantive equality, and given my discussion of India's recognition of group-regarding equality supra, one would expect India to adopt a substantive approach to equality, and this is in fact the case. Wentholt argues that a substantive approach is more likely to treat affirmative action not as an exception to equal treatment but as a necessary component of it, and several important Indian decisions argue this precise point. In *State of Kerala v.*

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[31] *Id.* *But see id.* at 34-35 ("A new paragraph 4 of Article 119 of the Treaty of Rome (now 141 of the Treaty of Amsterdam) . . . permits the use of positive action not only as a means to formal or competitive equality but also as a means to substantive equality for women.").

[32] Wentholt, *supra* note 19, at 53 (distinguishing "equality as an abstract, more *theoretical* principle [from] equality as a concrete *legal* norm").

[33] *Id.* at 60.

*Thomas*, the Supreme Court argues that Article 16(4) of the Indian Constitution is not an exception to Article 16(1) to be interpreted narrowly but rather clarifies and explains that classifications based on backwardness are permissible under Article 16(1)).[34] The *Thomas* Court concludes that "[t]he quality and concept of equality is that if persons are dissimilarly placed they cannot be made equal by having the same treatment."[35] In *Indra Sawhney v. Union of India*, the Court holds that Article 16(4) of the Indian Constitution was not an exception to 16(1) but rather merely an explicit statement of classifications and provisions for backward classes that were already implicitly stated in Article 16(1).[36] By interpreting affirmative action not as the exception to equal treatment but as part of equal treatment itself, India has adopted a substantive notion of equality.

I now turn to the question of substantive equality in the United States and Europe. Although in other sections I address the highly relevant race affirmative action programs in the United States, in this section I attempt to facilitate comparison by focusing on affirmative action programs based on gender. Because different levels of United States Constitutional scrutiny develop in substantively different areas such as race and gender,[37] a comparison between affirmative action programs is more accurate if limited to one area. Whereas the United States debate has a race and gender component, the affirmative action debate in Europe is focused almost exclusively on gender. Therefore, the common ground for comparison, which I will adopt in this section, is with respect to gender.[38]

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[34] State of Kerala v. Thomas, 63 A.I.R. (S.C.) at 499.

[35] *Thomas*, *supra* note 34, at 502 ¶ 45. *See also id.* at 499 ¶ 31 ("The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. . . . Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality.").

[36] Indra Sawhney v. Union of India, 80 A.I.R. (S.C.) at 477, 539 (overruling *Balaji* and *Devadasan*, *infra* note 62, on this point). The Court also notes that "We . . . firmly believe that given an opportunity, members of these classes are bound to overcome their initial disadvantages and would compete with–and may, in some cases, excel–members of open competitor candidates. It is undeniable that nature has endowed upon members of backward classes as much as it has endowed upon members of other classes and that what is required is an opportunity to prove it. It may not, therefore, be said that reservations are antimeritarian." *Id.* at 574-75, *cited in* Jackson, *supra* note 18, at 261.

[37] In the United States, distinctions based on gender receive intermediate scrutiny, whereas distinctions based on race receive strict scrutiny. *Compare* United States v. Virginia, 518 U.S. 515 (1996) (subjecting gender-based classifications to intermediate scrutiny), *with* Adarand Constructors v. Pena, 515 U.S. 200, 235 (1995) (requiring strict scrutiny for any race-based classifications imposed by government actor).

[38] *See also* Part VI, *infra*, noting that employing a similar technique with respect to India causes many of the distinctions drawn in this paper to significantly diminish. Despite this fact, I do not focus on gender-based affirmative action in India both because its case law is less developed and because it certainly cannot be said to generally represent the ideology of Indian reservation policy as perceived in India and elsewhere.

The seminal case regarding affirmative action based on gender in the United States, particularly "tie break" schemes comparable to those in the European context, is *Johnson v. Transportation Agency of Santa Clara County*.[39] In that case, the Supreme Court held that considering gender in promotion decisions as one factor in a "moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's work force" was "fully consistent with Title VII."[40] To reach this decision, the Court employed a three-part standard it had established in *United States Steelworkers of America v. Weber*[41] for race-based affirmative action and applied it to gender based affirmative action.[42] According to the *Weber* standard, an affirmative action program must meet three essential requirements: 1) It must be implemented in response to an underrepresentation in the workforce, 2) It must not infringe upon the rights of those not within the underrepresented class, and 3) It must serve only as a mechanism to reach a balanced workforce, not to perpetuate that newly attained balanced workforce.[43]

The European companion case to *Johnson* is *Marschall*,[44] which set standards for affirmative action programs after the ambiguous *Kalanke* decision.[45] In contrast to *Johnson*'s three-part standard, the ECJ in *Marschall* creates a two-part standard that upholds affirmative action programs which: 1) guarantee each equally-qualified male candidate "an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of

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[39] Johnson v. Transp. Agency of Santa Clara County, 480 U.S. 616 (1987).

[40] *Id.* at 642 (referring to Title VII of the Civil Rights Act of 1964, the major statutory basis for civil rights law in the United States).

[41] U.S. Steelworkers of America v. Weber, 443 U.S. 193 (1979).

[42] *Johnson*, 480 U.S. at 634-39.

[43] Amie Needham, Comment, *Leveling the Playing Field - Affirmative Action in the European Union: A Comparison of* Marschall v. Land Nordrhein-Westfalen *and* Johnson v. Transportation Agency of Santa Clara County, 19 N.Y.L. SCH. J. INT'L & COMP. L. 479, 490-91 (2000).

[44] C-409/95, Marschall v. Land Nordrhein-Westfalen, All ER (EC) 865 (1997) (hereinafter *Marschall*).

[45] In a Comment, written before *Badeck, Abrahammsson,* and *Lommers*, Amie Needham engages in a detailed comparison of *Johnson* to *Marschall,* arguing that "[o]n its face, the *Johnson* decision looks quite similar to the ECJ's holding in *Marschall.* However, upon greater scrutiny, it becomes evident that the ECJ has made it much easier for women to benefit from voluntary gender-based affirmative action programs than has the United States Supreme Court." Needham, *supra* note 43, at 481. For a critique on just how ambiguous and unsatisfactory the *Kalanke* decision was, see Katherine Cox, *Positive Action in the European Union: From* Kalanke *to* Marschall, 8 COLUM. J. GENDER & L. 101, 123-28 (1998) (referring to Case C-450/93, Eckhard Kalanke v. Freie Hansestadt-Bremen, All ER (EC) 66, 1 C.M.L.R. 175 (1996)).

the male candidate" and 2) does not include criteria which discriminate against female candidates.[46]

Differences between *Johnson*'s three-part standard and *Marschall*'s two-part standard exemplify the differing directions of the United States and European debate on gender-based affirmative action. The United States Supreme Court's focus is on numerical equality, as evidenced by *Johnson*'s first and third prongs, requiring proof of underrepresentation in the workforce and cessation of the program upon parity.[47] In focusing on numerical equality rather than underlying prejudices, the first and third prongs of the *Johnson* standard are geared towards formal equality. For the European Court, striving for substantive equality, the focus of the standard is on underlying prejudices. It stresses plans that "counteract the . . . effects on female candidates of"[48] "prejudices and stereotypes concerning the role and capacities of women in working life."[49] In *Marschall*, it therefore upheld a national law which noted that "where qualifications are equal, employers tend to promote men rather than women because they apply traditional promotion criteria which in practice put women at a disadvantage, such as age, seniority and the fact that a male candidate is a head of household and sole breadwinner for the household."[50] The *Marschall* Court held that "the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances."[51] [52] Needham notes the

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[46] *Marschall, supra* note 44, at ¶ 35.

[47] In fairness, I am primarily comparing the *standards* in *Johnson* and *Marschall* in this section. At points, if one compares every detail of the two cases, some of the distinctions I draw are diminished. For example, Cox argues that achieving formal gender balance was in fact a requirement for the legitimacy of the plan in *Marschall* even if not embodied in the standard. Cox, *supra* note 45, at 136. Nevertheless, I justify a narrower comparison limited to the standards because the main principles which a court chooses to sum up in a standard and embody in the holding, are those it considers the most significant.

[48] *Marschall, supra* note 44, at ¶ 31.

[49] *Id.* ¶ 29. The Court also quotes Council Recommendation (EEC) 84/635 on this point, which reads "existing legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities unless parallel action is taken by governments, both sides of industry and other bodies concerned, to counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures." *Id.* ¶ 28.

[50] *Id.* ¶ 4, *cited in* Eva Brems, Comment, Hellmut Marschall v. Nordrhein-Westfalen, 4 COLUM J. EUR. L. 668, 674, 669 (1998). The Court also demands "recognition of the child-raising experience, care of families and elder persons, and unpaid social work as qualifications for most jobs, or as factors upon which a decision not to hire may not be based." Julie A. Mertus, Marschall v. Land Nordrhein-Westfalen, AM. J. INT'L L. 296, 300 (1997). *See also* Needham, *supra* note 43, at 495 ("Experts in the study of affirmative action have become increasingly convinced that the underrepresentation of women in many professional occupations is due to 'structural elements which are extremely difficult to tackle using only traditional anti-discrimination legislation.'") (citing Brems, *supra,* at 674).

[51] *Marschall, supra* note 44, at ¶ 30.

[52] The *Marschall* standard also takes another additional step beyond the *Johnson* approach. In its second prong, the *Marschall* standard aims to eliminate pretextual discrimination. Needham, *supra* note 43, at 494. This is an important addition, as it represents a shift in focus, an appropriate shift towards the very

ECJ's increasing acceptance of substantive equality, stating that the European approach "goes much further in promoting women in the workplace than the 'strictly formal discrimination concepts' adhered to by the Supreme Court."[53] Thus, while both jurisdictions still adhere to the principles of formal equality more than substantive equality, Europe is increasingly willing to consider the issue of substantive equality, marking a shift, where the European circle expands away from the United States and closer to the circle of India.

Developments subsequent to *Marschall* only solidify the increasing importance of substantive equality in the European approach. The 1999 amendments to the Treaty of Amsterdam include a provision specifically allowing for affirmative action programs based on substantive equality.[54] In *Badeck v. Hessischer Ministerpräsident*, Advocate General Saggio argues that because of these changes to the EC Treaty, Article 2(4) of the Equal Treatment Directive should no longer be strictly construed as an exception to the fundamental right of equal treatment, and that "the principles of formal and substantive equality are not completely at odds" except where arbitrary or disproportionate to the needs of the disadvantaged group, paralleling the Indian Supreme Court's reasoning almost perfectly.[55] The ECJ in *Badeck* approves of the national statutory requirements, which it says are "manifestly intended to lead to an equality which is substantive rather than formal, by reducing the inequalities which may occur in practice in social life."[56] Finally, in *Lommers v. Minister van Landbouw, Natuurbeheer en Visserij*, the Court specifically addresses the equality of opportunity/substantive equality issue, holding that a plan which aims to achieve substantive equality by reserving spaces in subsidized nursery facilities is consistent with Community law.[57] The Court stated that "it is settled case-law that Article 2(4) is specifically and exclusively designed to authorize measures which, although discriminatory in appearance, are in fact intended to eliminate or

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group affirmative that action is meant to protect. Thus, while the United States standard remains focused on the rights of the majority group in its second standard, the European standard shifts the focus entirely towards added emphasis on rights of the minority group.

[53] Needham, *supra* note 43, at 496 (citing Brems, *supra* note 50 at 674).

[54] TREATY OF AMSTERDAM (formerly Treaty of Rome) Art. 141(4), 4 Eur. Union L. Rep. (CCH) para. 25,500 at 10526-7 (ratified May 1, 1999).

[55] Case C-158/97, Lommers v. Minister van Landbouw, Natuurbeheer en Visserij, E.C.I 2000 Page I-01875, ¶¶ 26-30 (Mar. 28, 2000) (opinion of the A-G Saggio).

[56] *Id.* ¶ 32. *But see* Hodapp et al., *supra* note 30, at 36 (The "[c]ourt, unlike this AG, has accepted formal or competitive positive action as the only permissible means to achieve gender equality, understood in terms of the goal of removing obstacles to equal opportunity for women. The Court appears to believe that its position is a compromise between permitting no gender discrimination whatsoever and promoting substantive equality for women."). In light of ¶ 32, which is quite explicit, I believe the Court recognizes more substantive equality than the Hodapp article admits. Furthermore, the Court overwhelmingly accepts preferential treatment, even quotas, in decisions up to the final employment decision.

[57] Case C-476/99, E.C.I. 2002 Page I-02891, ¶ 50 (Mar. 19, 2002).

reduce actual instances of inequality which may exist in the reality of social life."[58]

Thus, in comparing the standards employed in *Johnson* and *Marschall*, I have attempted in this section to present *Marschall* as the beginning of a line of cases which move towards an emphasis on substantive equality, like that present in India, while *Johnson* focuses on formal equality. Although supporters of affirmative action would certainly favor the *Marschall* approach to the *Johnson* approach, some commentators have argued that *Marschall* is considerably less powerful than I portray it. Katherine Cox argues that *Marschall* relies on a superficial distinction in the savings clause, which does not help to clarify Community law after the ambiguous Kalanke judgment.[59] She concludes that "[f]or this reason *Marschall* must be regarded as very unsatisfactory, for it has failed to "clear up the problem of how to resolve the clash between the basic legislation on equal treatment and the creation of positive measures for the under-represented sex."[60] In the end, however, even Cox agrees that, "[a]lthough the ECJ failed to tackle the equality of results issue head on, it nevertheless has substituted a broader view of equal opportunity for a narrow one. It has realized, without explicitly stating so, the merits of positive action in tackling the real barriers that women face."[61] This "broader view" Cox notes is the

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[58] *Id.* ¶ 32. It should be emphasized that I argue only that the European approach tends towards substantive equality, *not* that it is already providing full substantive equality. Yet, even with this compromised position, several commentators would disagree, such as Klaartje Wentholt, whom I have relied on extensively for the theoretical basis for this section. Writing before *Badeck, Lommers,* and the changes to the Treaty of Amsterdam, Wentholt argues that the *Marschall* court's approach is still completely formal. Wentholt, *supra* note 19, at 60. For Wentholt, true substantive equality does not merely *allow* the exception's clause to be viewed as part of the equal treatment rule, but *requires* that it be viewed as such. *Id.* at 55. Wentholt argues that because the Equal Treatment Directive allows affirmative action as an exception to equal treatment (rather than requiring it), plans based upon it will be formal and not substantive. Still other commentators are rather non-committal in their perception of the ECJ's stance on substantive equality. *Compare* Cox, *supra* note 45, at 138 ("Apart from a glimpse of the equality issues surrounding positive action (one which belies the complexity of the concept of equality) the Court did not even hint that it was aware of the equality of results/opportunity dichotomy. For this reason *Marschall* must be regarded as very unsatisfactory."), *with id.* at 139 ("In Marschall, however, the Court realized, at least implicitly, that giving equal opportunities, in the narrow sense of ensuring equal starting points, was not enough to counteract inequalities between men and women in the employment arena. It recognized that an equally qualified man and woman do not necessarily have the same opportunity to achieve equal results because of the stereotypes and prejudices which burden women.").

[59] Cox, *supra* note 45, at 136-40 (arguing that "[t]he extent to which a saving clause actually changes the nature of a quota system is debatable and thus the ECJ's characterization of the clause as a distinguishing feature of the legislation is dubious"). Cox concludes that "while Marschall endorses the use of preferential schemes to address gender inequalities in some instances, the overall future development of positive action in Europe remains uncertain and unpredictable." *Id.* at 104.

[60] *Id.* at 138-39 (quoting Vogel-Polsky, *Disagreements About How to Interpret* Marschall *Judgment*, EUR. INFO. SERV., EUR. REP (Jan. 28, 1998).

[61] *Id.* at 140.

increasing acceptance of substantive equality that I have described in this section. Europe's middle circle is expanding once again.

## III. QUOTAS

### *A. Type of Quota*

In 1963, the Indian Supreme Court held that reservations for backwards classes could meet but not exceed 50% of available seats.[62] The 1979 Mandal Commission report therefore recommended combined reservations totaling 49.5%.[63] The Supreme Court has generally continued to follow the 50% limit.[64] In this jurisdiction, reservations are quotas in the dictionary sense: they are a proportion of seats that are reserved for a certain group, to which another group is absolutely prevented access.[65] In this section, I will first distinguish Europe/USA from India, arguing that in those jurisdictions strict dictionary-definition quotas are definitely forbidden, and even some "softer" quotas are also forbidden. I will then distinguish between the European and American cases, arguing that the European approach is slightly more flexible than the American one, placing Europe once again between the United States and Indian spheres.

In the United States, there is no question that quotas in the Indian, dictionary sense are absolutely prohibited. In *Regents of the University of California v. Bakke*, Justice Powell, writing the judgment of the Court, distinguished the University of California Davis Medical School's strict quota of sixteen seats from the admissions plan at Harvard College, which makes race a plus in an applicant's admissions file, leading to no strict quotas.[66] Although the narrowest-grounds holding of *Bakke* is one of the most debated points in United States constitutional law,[67] there is solid

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[62] Balaji v. State of Mysore, 50 A.I.R. (S.C.) 649, 663 (1963) (holding that the total percentage of reservations permissible under Article 15(4) of the Indian Constitution generally should be less than 50%); Devadasan v. Union of India, 1 A.I.R. (S.C.) 179 (1964) (holding that unused reservations of a previous year can not be carried forward and added to the reservations in a subsequent year if the total number of reservations available in the subsequent year then exceeds 50%).

[63] REPORT OF THE MANDAL COMMISSION, summarized in Prior, *supra* note 2, at 84-85. This included a new 27% reservation of government positions for Other Backward Classes, in addition to the previously existing quota reserving 22.5% of government positions for Scheduled Castes and Scheduled Tribes. *Id.*

[64] Indra Sawhney v. Union of India, 80 A.I.R. (S.C.) 477 at ¶ 94A (1993); Rajkumar v. Gulbarga Univ., 77 A.I.R. (Kant.) 320, 332 (1990) (also following the 50% limit established in *Balaji*).

[65] MERRIAM WEBSTER ONLINE DICTIONARY (20003), *available at* http://www.m-w.com (defininng "quota" as "[t]he share or proportion assigned to each in a division or to each member of a body).

[66] Regents of the University of California v. Bakke, 438 U.S. 265, 315-20 (1978) (Powell J. plurality).

[67] Only a narrowest-grounds holding of the Supreme Court creates U.S. Constitutional law. Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single

agreement that Justice Powell's opinion certainly stood for the proposition that a dictionary-like quota reserving 16 of 100 seats for applicants from "economically and-or educationally disadvantaged backgrounds"[68] is unlawful: In the current case of *Grutter v. Bollinger*, Michigan's plan was designed specifically to avoid the quotas that were fatal in *Bakke*,[69] and although innumerable points are debated between the majority and minority in the 86-page opinion of the *Grutter* Circuit Court, the unconstitutionality of strict quotas is accepted by the majority,[70] the dissent,[71] and both of the substantive concurrences.[72] [73]

But, beyond this dictionary-definition of quota, quota is also used in the United States to designate another phenomenon, which will also render a plan unconstitutional: absolute tie breaks. Even in the absence of a dictionary-definition quota reserving a certain percentage of seats, many

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rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (interpreting Memoirs v. Massachusetts, 383 U.S. 413 (1966)). *Bakke* is highly debated because the court split three ways, involving both a split over the approval of affirmative action and a split over the rationale for affirmative action. The two splits do not parallel each other. Justice Powell struck down the affirmative action plan on a diversity rationale. He was joined by Justices Stevens, Rehnquist, Burger, and Stewart, who argued against affirmative action generally and thus concurred in the judgment insofar as it struck down the plan. At the same time, Justice Powell was also joined by Justices Brennan, White, Marshall, and Blackmun, who concurred in the judgment that a properly designed admissions program would have been lawful, based on a remedial rationale.

[68] *Bakke*, 438 U.S. at 273.

[69] Grutter v. Bollinger, 288 F.3d 732, 736 (6th Cir. 2002).

[70] The majority held that "Justice Powell's opinion [in *Bakke*] sets forth two guidelines regarding race-conscious admissions policies - (1) segregated, dual-track admissions systems utilizing quotas for under-represented minorities are unconstitutional; and (2) an admissions policy modeled on the Harvard plan, where race and ethnicity are considered a 'plus,' does not offend the Equal Protection Clause." *Id.* at 745-46. The majority thus upheld the constitutionality of the Michigan plan precisely because it lacked a strict quota system. *Id.* at 748 ("[W]e simply cannot conclude that the Law School is using the 'functional equivalent' of the Davis Medical School quota struck down in *Bakke*.").

[71] Although the Dissent devotes 14 pages to arguing that the holding of *Bakke* should be limited to the narrow facts at issue in 1978, *Grutter*, 288 F.3d at 775-89, it nevertheless still generalizes upon the *Bakke* holding for the proposition that "all plans that absolutely reserve a specific number of seats for the racially favored . . . [are] unconstitutional." *Id.* at 777.

[72] Clay's concurrence upholding the Michigan plan reasons that "the balance certainly tips in favor of the law school's representation that it does not employ a quota in the absence of any evidence to the contrary." *Id.* at 770. Gilman, concurring with the dissent, holds that "the primary problem with the law School's admissions policy is that the 'critical mass' of minority students that it seeks to enroll is functionally indistinguishable from a quota." *Id.* at 816. The three other concurrences in this case related to a procedural issue of the court, as well as the ethics of Judge Boggs's "Procedural Appendix" to the dissent, addressing that issue. *Id.* at 752-58, 815.

[73] It is interesting to note that the distaste for fixed quotas in the United States also creates some problems in the law school's reasoning: Whereas the law school attempts to define a "critical mass of minority applicants" vague enough so that it does not constitute a quota, it must nevertheless define it precisely enough so as to meet narrow-tailoring analysis of United States Constitutional law. An insufficiently defined "critical mass" was one of the reasons leading the District Court to conclude that the policy was not narrowly tailored and therefore unconstitutional under strict scrutiny. Grutter v. Bollinger, 137 F. Supp. 2d 821, 851 (E.D. Mich. 2001) ("Narrow tailoring is difficult, if not impossible, to achieve when the contours of the interest being served are so ill-defined.").

United States lawyers and judges view tie break schemes and absolute preferences as creating a quota of one seat (the one in question) and therefore as unconstitutional. Only when protected group status is one of many factors is affirmative action constitutional.[74]

Europe, the middle circle, has characteristics that tend towards both the Indian and American extremes. Like the United States, Europe maintains a strong distaste for the kinds of dictionary-definition strict quota systems that are permissible in India.[75] In Europe, this is expressed under the language of "fixed preference systems" or "inflexible quotas."[76] Also like the United States, the ECJ's general stance is that fixed preferences and absolute entitlements are also unlawful quotas, even if not quotas in the dictionary sense.[77] Interestingly, not only does India differ from the United States/Europe in its stance on fixed quotas, but it also differs in the direction in which the dialogue is moving. Whereas Europe and the United States continuously attempt to invent a system which creates a preference for a disadvantaged group member without creating a fixed quota for that member, India has reversed the debate: In India, some form of fixed quota for disadvantaged classes has existed since the 1947 Constitution,[78] and even

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[74] Needham, *supra* note 43, at 495.

[75] Brems, *supra* note 50, at 674 (noting that "fixed women's quotas" (*starre Frauenquote* in German) are still prohibited under Community law (citing Dagmar Schiek, *Positive Action in Community Law*, 25 INDUSTRIAL L. J. 239, 241 (1996))). Amie Needham states that a "common theme delivered by both the ECJ and the U.S. Supreme Court is that automatic quotas will not pass muster under either of the tests enunciated." Needham, *supra* note 43, at 495. *See also* Abrahamsson v. Fogelqvist, E.C.I. 2000 Page I-05539 (July 6, 2000) (second question addressed by the Court). *But see* Brems, *supra* note 50, at 672 ("The Court implicitly rejects the line of reasoning which excludes all systems of quotas and goals from the definition of measures to promote equality of opportunity.").

[76] *Compare Kalanke, supra* note 45 (holding that National measures guaranteeing women absolute and unconditional priority for appointment or promotion are not consistent with Art. 2(4) of the Equal Treatment Directive), *with Marschall, supra* note 44 (distinguishing *Kalanke* on the grounds that national measure in the present case contained a "savings clause," so that the preferential system was not "absolute and unconditional").

[77] Albertine G. Veldman, *Preferential Treatment in European Community Law: Current Legal Developments and the impact on National Practices*, *in* NON-DISCIRIMINATION LAW: COMPARATIVE PERSPECTIVES 279, 288 (Titia Loenen & Peter R. Rodrigues eds., 1999) (arguing that, like the United States Supreme Court, "the ECJ also requires that all are able to have their qualifications weighted against those of other applicants"); *Abrahamsson, supra* note 75, Judgment at ¶ 56, 59, 62 (holding that a national law requiring an absolute preference for women is contrary to EC law, but continuing to distinguish flexible preferences for women that include other objective criteria, which are consistent with EC law). *See also* European Commission's proposed amendments to the Equal Treatment Directive (June 7, 2000), *available at* http://eiro.eurofound.ie/2000/06/Feature/EU0006255F.html (restating case law of the ECJ as holding that "automatic priority to women regarding access to employment or promotion in sectors where they are under-represented cannot be justified").

[78] Prior, *supra* note 2, at 75-76 (describing reservations for members of Scheduled Castes or Scheduled Tribes in state legislatures and the House of the People).

before during British colonial rule.[79] It was not until the *Indra Sawhney* case, however, that the Supreme Court began discussing other less extreme methods for favoring disadvantaged groups, including concessions, exemptions, and other relaxations, ruling that such additional provisions would fall within the broad scope of reservations.[80] Thus, whereas Europe and the United States begin with the less extreme options in order to avoid the absolute quota, India began with the absolute quota, only recently holding that less extreme measures would also be acceptable.

On the other hand, European flexibility on fixed quotas looks very different than the United States (and more like India) in several ways. First, the ECJ has shown some movement in terms of redefining what constitutes an "inflexible" quota. For example, against the opinion of the Advocate General, the Court upheld an ostensibly inflexible 50% quota for appointments to administrative and supervisory bodies, holding that the provision establishing the quota does not create an inflexible quota but rather a non-mandatory goal, full implementation of which would still require amendment to the relative law.[81]

Second, the ECJ has also compromised its otherwise strict distaste for quotas when the measure in question applies in areas prior or ancillary to the hiring decision itself. For example, in *Badeck*, the Court upheld a fixed quota on training positions, but emphasized that the "provision at issue in the main proceedings forms part of a restricted concept of equality of opportunity. It is not places in employment which are reserved for women but places in training."[82] Similarly, the *Badeck* court held that a provision guaranteeing that equally-qualified female candidates will receive an interview in sectors where they are underrepresented is consistent with Community law because it "does not attempt to achieve a final result appointment or promotion."[83] Most recently, the Court in *Lommers v. Minister van Landbouw, Natuurbeheer en Visserij* held that a national policy reserving a fixed number of subsidized nursery spaces for children of female employees, rebuttable only in the case of an emergency situation for a male,

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[79] *Id.* at 72-73 (describing reservations "in public service posts for Muslims, Christians, Anglo-Indians, and other communal groups . . . aimed at adjusting the political balance among different caste and religious groups and improving the plight of the disadvantaged").

[80] *Indra Sawhney, supra* note 23, at 540.

[81] *Badeck, supra* note 55, at ¶ 65. In addition, note generally the added flexibility the Court gives in the case of measures containing a savings clause beginning with the *Marschall* ruling, discussed *supra* note 76.

[82] *Badeck, supra* note 55, at ¶¶ 52-55.

[83] *Id.* ¶¶ 56-63.

is consistent with Community law because the measure is of the type "designed to limit the causes of women's reduced opportunities."[84]

Third, there is a subtle difference between the European and American approaches to absolute entitlements. Like the United States, an absolute preference for a protected group in a tie-break scheme is unlawful in Europe.[85] But, unlike the United States, a tie can be broken in Europe by membership in a protected group when protected group membership is the last factor considered among many factors that otherwise leave two candidates equal.[86] In this sense, the European notion of a "fatal quota" falls somewhere in between the American notion and the Indian notion: While the United States Supreme Court still mandates that gender can be only one factor in the decision, the ECJ allows programs requiring the hiring of a woman when all other factors are equal.[87] Commentators are quick to point out that, because of the savings clause, the *Marschall* standard is not an "absolute entitlement" sensu stricto.[88] Nevertheless, the *Marschall* ruling goes farther than the United States Supreme court was willing to go in *Johnson*. If two candidates are equally qualified with all savings clause considerations taken in to account,[89] it is acceptable in Europe for a person's gender alone to tip the scales,[90] whereas the United States Supreme Court emphasizes that sex can be only one factor in the hiring decision.[91] Therefore, while neither plan provides an absolute entitlement, European law comes closer than United States law.

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[84] *Lommers, supra* note 57, at ¶¶ 32-33, 38, 50 (2002) (citing the training ruling in *Badeck*).

[85] *Abrahamsson, supra* note 75 (first question addressed by the Court).

[86] Needham, *supra* note 43, at 495.

[87] *Id.* at 495; Mertus, *supra* note 50, at 300 (ruling that "positive action will not be appropriate when the male candidate is more qualified than the female candidate"); *Abrahamsson, supra* note 75 (rejecting an absolute preference for a female candidate who is qualified but lacks qualifications equal to those of a male candidate).

[88] *See* Brems, *supra* note 50, at 673 (noting that the "Court maintains its position that such measures cannot guarantee absolute and unconditional priority for women").

[89] Cox argues that taking the "savings clause into account may not even be that difficult. She maintains that "[c]omparatively speaking, the saving clause does render the preferential scheme more flexible. . . . [A]lthough at some point a preference can still be thought to "kick in," its operation cannot be regarded as a foregone conclusion." Cox, *supra* note 45, at 137-38. In other words, the basic rule, according to Cox, is one in which preference is awarded based on gender. The savings clause, although providing the technical difference to distinguish *Marschall* from *Kalanke*, does not change this, and operates only occasionally.

[90] Advocate General Jacob's opinion in *Marschall*, which was rejected by the Court, clarifies this notion. He argues that "[i]t is axiomatic that there is no equal opportunity for men and women in an individual case if, where all else is equal, one is appointed or promoted in preference to the other solely by virtue of his or her sex." *Marschall, supra* note 44, at ¶ 32 (opinion of Advocate General Jacobs). Jacobs' reasoning parallel's the United States Supreme Court's analysis of the second prong of the *Johnson, supra* note 39, at 637-39. By rejecting that reasoning, the ECJ allows for cases in which sex does become the final determinative factor.

[91] Needham, *supra* note 43, at 495.

Examining this very subtle difference between the American and European approaches exposes a weak element in the American logic: In cases where the disadvantaged group factor was in fact the decisive factor,[92] why does it matter that it was one of many factors? The United States focus on the aggregate of factors tipping the scale ignores the fact that, in some cases, it will indeed be this specific factor that makes the aggregate of factors tip the scales.[93] In this way, the United States "aggregate tips the scales" requirement is very slippery, and only clouds good legal reasoning: It is illogical that a jurisdiction that accepts affirmative action would not accept that, sometimes, this affirmative action will operate. It would appear that United States law seeks a standard by which disadvantage can "tip the scales" as long as it does so ambiguously enough so that one cannot prove decisively that a seat was awarded based on disadvantage. In the words of Justice Brennan in *Bakke*, "there is no basis for preferring a particular preference program simply because in achieving the same goals [as a quota system], it proceeds in a manner that is not immediately apparent to the public."[94] I am not trying to argue against affirmative action in the United States, which I support; rather, I wish only to point out that the European standard, by which disadvantage alone can "tip the scales" as long as it is one of many factors, is more workable, and more honest, than the United States "let the aggregate tip the scales" standard, since, within the United States standard lies the European standard: regardless of whether the aggregate is tipping the scales, at times it is the specific factor of disadvantage which is causing that aggregate to do so. If a jurisdiction is going to practice affirmative action, it cannot and should not deny that, in some cases, affirmative action will "tip the scales," no matter how controversial this may be.[95]

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[92] Admittedly, a lot turns on whether one can *ever* state with confidence that protected group status was the decisive factor in the United States. See my discussion of the "causation fallacy" *infra* Part IIIB. Also, see the debate between Judge Boggs and Judge Clay in *Grutter*. *Compare* Grutter v. Bollinger, 288 F.3d 732, 796-801 (6th Cir. 2002) (Judge Boggs frames the facts in such a way that it appears Barbara Grutter had absolutely no chance of acceptance, whereas a black woman of equal qualifications would have an almost 100% chance of success), *with id.* at 766-69 (Judge Clay frames the facts in an equally convincing way in which it appears that a borderline applicant has almost no chance of admission regardless of the affirmative action plan).

[93] This is, indeed, the focus of endless anti-affirmative action court opinions. *See, e.g.*, Grutter v. Bollinger, 288 F.3d 732, 800-03 (6th Cir. 2002) (arguing that there is no functional difference between "tipping the scales" and a strict quota).

[94] Regents of the University of California v. Bakke, 438 U.S. 265, 397 (1978), *cited in Grutter*, 288 F.3d at 802.

[95] The United States refusal to recognize that affirmative action can in fact tip the scales so as to redistribute social wealth more equitably is also evident in the strong United States reliance on the diversity rationale, discussed *infra* part IV.

### *B. Number of People Affected*

The reservations policy in India unquestionably affects many more applicants than affirmative action in the United States. As explained *supra* section A, the Indian Supreme Court held that reservations for backwards classes cannot exceed 50% of available seats,[96] and the 1979 Mandal Commission report followed this limit by recommending combined reservations totaling 49.5%,[97] which were upheld by the court.[98] The seats ultimately awarded to minority applicants based on affirmative action in the United States are far fewer. In *Bakke*, 16% of the seats were reserved for "economically and/or educationally disadvantaged applicants."[99] In *Grutter*, the "critical mass" sought by the law school was sometimes as small as 10%, and never exceeded 20.1% between 1987 and 1998.[100]

One interesting result of the application of affirmative action to such diametrically opposite numerical patterns is the complete reversal of the "causation fallacy," a concept recently coined by Goodwin Liu.[101] According to the "causation fallacy," it is fallacious for a denied white applicant such as *Bakke* to blame affirmative action: although affirmative action programs often increase minority applicants chances of admission significantly, they only decrease a non-disadvantaged applicant's chances of admission in a very minimal way, often less than one percent.[102] For example, *Bakke* was one of 3109 non-disadvantaged applicants to the University of California Davis Medical School. With 16 reserved seats, non-

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[96] *Balaji, supra* note 62 (holding that the total percentage of reservations permissible under Article 15(4) of the Indian Constitution generally should be less than 50%); *Devadasan, supra* note 62 (holding that unused reservations of a previous year can not be carried forward and added to the reservations in a subsequent year if the total number of reservations available in the subsequent year then exceeds 50%).

[97] REPORT OF THE MANDAL COMMISSION, summarized in Prior, *supra* note 2, at 84-85. This included a new 27% reservation of government positions for Other Backward Classes, in addition to the previously existing quota reserving 22.5% of government positions for Scheduled Castes and Scheduled Tribes. *Id.*

[98] *Indra Sawhney, supra* note 23, at ¶ 94A; Rajkumar v. Gulbarga Univ., 77 A.I.R. (Kant.) 320, 332 (1990) (also following the 50% limit established in *Balaji*).

[99] Regents of the University of California v. Bakke, 438 U.S. 265, 274-75 (1978).

[100] Grutter v. Bollinger, 288 F.3d 732, 747-48 (6th Cir. 2002).

[101] Goodwin Liu, *The Causation Fallacy:* Bakke *and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045 (2002); Liu, *The Myth & Math of Affirmative Action*, WASH. POST, April 14, 2002, at B01.

[102] Liu, *The Myth & Math of Affirmative Action, supra* note 101. Liu argues that by focusing on the minority applicant's improved chances instead of one's own diminished chances, normal applicants place too much blame in affirmative action for their own rejection. *But see* Liu, *The Causation Fallacy:* Bakke *and the Basic Arithmetic of Selective Admissions, supra* note 101, at 1049-50 (arguing also that "absent the causation fallacy, white applicants have legitimate grounds for claiming that affirmative action prevents them from competing on an equal footing with minority applicants").

disadvantaged applicants chance of admission was 2.7% (84 divided by 3109). Without the affirmative action program, any non-disadvantaged applicant would have a chance of admission of 3.2% (100 divided by 3109), an increase of only half a percent.[103] By focusing on the comparatively larger improved percentage chance of admission for disadvantaged applicants instead of this miniscule diminished chance of admission for non-disadvantaged applicants, opponents of affirmative action commit the causation fallacy. This reality is the mathematical result of an affirmative action program that only benefits a small minority of applicants.[104]

The situation in India is different in two critical ways: First, the affirmative action program reserves half the seats, instead of a small minority.[105] Second, the disadvantaged group represents a majority (74.5%) of the population instead of a minority.[106] Consequently, the causation fallacy is flipped on its head: Whereas in the United States, Liu showed that the denied white applicant, after accepting the causation fallacy, is statistically hardly denied any of his/her chance of admission (since s/he is a small fish in a big pond irrespective of the affirmative action program), in India the advantaged applicant is denied a statistically large chance of admission, since the reservations make 50% of the seats inaccessible to that applicant, who belongs to a group comprising only 25.5%[107] of the population.[108] Thus, the Indian reality is the United States fallacy: If the United States majority white applicant were only to go to India and become an Indian advantaged applicant, his/her argument would cease to be fallacious. In this way, the difference between the United States situation and the Indian situation aptly illustrates the "causation fallacy," and in turn the "causation fallacy," which is fallacious in one jurisdiction and not in the other, helps to illustrate just how different the two jurisdictions are.

Whereas in most other areas, I argue that the European case falls between the United States and Indian models, but still generally closer to the United States, this is one case where Europe may more closely replicate India. Just as 50% of seats in India may be reserved for backwards classes,

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[103] Grutter v. Bollinger, 288 F.3d 732, 767-68 (6th Cir. 2002) (Clay, J., concurring).

[104] *Id.* at 767-68 (Clay, J., concurring) ("Because the number of black applicants to selective institutions is relatively small, admitting them a [sic] higher rates does not significantly lower the chance of admission for the average individual in the relatively large sea of white applicants.") (citing Liu, *The Myth & Math of Affirmative Action*, *supra* note 101).

[105] REPORT OF THE MANDAL COMMISSION, *supra* note 63 (reserving 49.5% of the seats for backward classes, scheduled castes, and scheduled tribes).

[106] Prior, *supra* note 2, at 84.

[107] *Id.*

[108] However, this would not hold true in the case that, despite being a minority in the society, regular applicants are nevertheless a majority of applicants.

scheduled castes, and scheduled tribes,[109] the ECJ has also approved national legislation under which, "whenever there are fewer women than men '[I]n a pay, remuneration or salary bracket in a career group,' the authorities must adopt an advancement plan."[110] This plan is valid for two years, after which time every further appointment or promotion of a male candidate would undergo strict review if the 50% quota had not been met, leading Advocate General Saggio to note that "[d]espite the temporary nature of the advancement plan, it is therefore clear that the requirement to give priority to women does not lapse after two years but only when women represent 50% of the employees in every sector and grade in a career group."[111] Similarly, the plan upheld by the *Badeck* court also mandated that at least half of the training places[112] and appointments to administrative and supervisory bodies[113] be awarded to women. It is even theoretically possible, under the legislation upheld in *Badeck*, that certain of these flexible quotas could go beyond 50%, thus surpassing India. For example, the legislation upheld by the Court prescribed binding targets for temporary and assistant academic service positions that are "at least equal to the percentage of women among graduates, holders of higher degrees, and students in each discipline."[114] Although unlikely, it is theoretically possible that this number could exceed 50%, as the case of United States law schools shows, in which female law students now outnumber males.[115]

Thus, whereas affirmative action programs in the United States benefit a small number of people, almost always less than 20%, up to 50% of seats can be set aside under Indian reservation policy. While I generally portray the European case as falling between the United States and India, this represents one area in which Europe is much more closely aligned with India, and may even exceed Indian limits in certain restricted cases.

## IV. RATIONALE

Another difference between affirmative action in the United States on the one hand and Europe/India on the other is the rationale behind that affirmative action. In both Europe and India, the common rationale for

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[109] *Indra Sawhney, supra* note 23, at ¶ 94A.
[110] *Badeck, supra* note 55, at ¶ 34 (A-G's opinion), ¶ 38 (Court's opinion).
[111] *Id.* ¶ 34 (A-G's opinion).
[112] *Id.* ¶ 55 (Court's opinion).
[113] *Id.* ¶ 66 (Court's opinion).
[114] *Id.* ¶ 44 (Court's opinion).
[115] DIVERSIFIED COMMUNICATIONS GROUP, INC., LAW SCHOOL ENROLLMENT SHOWS WOMEN LEADING (2002), *available at* http://www.idcg.net/quicknotes.shtml.

affirmative action is remedying societal discrimination. The European Commission has stated that "[t]he concept of positive action embraces all measures which aim to counter the effects of past discrimination, to eliminate existing discrimination and to promote equality of opportunity between women and men, particularly in relation to types or levels of jobs where members of one sex are significantly under-represented."[116] The remedial rationale behind affirmative action in Europe is also evident in the provision of the Equal Treatment Directive on which affirmative action is based: "This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1)."[117] Thus, affirmative action programs attempt to remedy existing or past discrimination which prevents women from attaining the level of equality espoused in the rest of the Directive.

India's reservation policy is also based on a remedial rationale.[118] United States Supreme Court Justice Ruth Bader Ginsburg characterized the remedial rationale in India, stating that "[f]ew citizens of India deny either a long history of overt discrimination against disfavored castes or the persistence of deep-seated bias against those groups. Perhaps that public recognition explains, in part, why 'reservations' beyond any set-asides tolerable in the United States have survived in India."[119] Professor Marc Galanter, a specialist on the Indian legal system, has also noted that "historical restitution or reparation to offset the systematic and cumulative deprivations suffered by lower castes in the past . . . are the basis for which the policy of 'compensatory discrimination' and its implementation exist."[120]

The United States rationale, on the other hand, differs from Europe and India in two respects. First, whereas general discrimination (as opposed to specific institutional discrimination) is an acceptable rationale in the European[121] and Indian[122] context, it is generally not considered acceptable in

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[116] Commission of the European Communities, *Communication by the Commission to the Council and the European Parliament on the Interpretation of the Judgment of the European Court of Justice on 17 October 1995 in Case C-450/93*, Kalanke v. Freie Hansestadt Bremen, COM (96) 88, *cited in* Cox, *supra* note 45, at 105.

[117] Equal Treatment Directive, *supra* note 12, at Art. 2(4) (emphasis added).

[118] Prior, *supra* note 2, at 65-66 ("India's affirmative action program, referred to as compensatory discrimination by most scholars, is a daring attempt to *remedy past injustices suffered* by those who are at the lower levels of India's four-tier caste hierarchy.") (emphasis added).

[119] Ruth Bader Ginsburg & Deborah Jones Merritt, *Fifty First Cardozo Memorial Lecture–Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 276 (1999).

[120] MARC GALANTER, COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA 1 (1984).

[121] Cox, *supra* note 45, at 106.

the United States.[123] Second, the United States debate on affirmative action in educational admissions provides an additional rationale not advanced in Europe, India,[124] or in other United States contexts:[125] the diversity rationale. In fact, the *Grutter* majority devotes its entire argument to the diversity rationale, noting that "[b]ecause we hold that the Law School has a compelling interest in achieving a diverse student body, we do not address whether the Intervenors' proffered interest–an interest in remedying past discrimination–is sufficiently compelling for equal protection purposes."[126] The District Court, on the other hand, attempts (like the circuit court dissent) to narrow the holding of *Bakke* to its original facts specifically in an attempt to kill the diversity rationale by arguing that intervening Supreme Court precedent provides only a remedial basis for affirmative action.[127] Even the Circuit Court dissent, which refuses to accept the District Court's logic despite its yielding what it views as a correct result,[128] still frames the debate

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[122] Jackson, *supra* note 18, at 262 ("*Thomas* and *Indra Sawhney*, to the contrary, sustain affirmative action even when the discrimination may have been entirely outside the domain of the current practice or policy.").

[123] Richmond v. J. A. Croson Co., 488 U.S. 469, 498 (1989), (rejecting any racial classifications based on remediation of general past discrimination, as opposed to specific institutional discrimination); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (rejecting the societal discrimination justification for a race-conscious lay-off policy, holding that under the Equal Protection clause of the Fourteenth Amendment, "societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy" ); United States v. Paradise, 480 U.S. 149 (1987) (upholding race-based hiring or promotion programs when necessary to correct a racial imbalance caused by documented racial discrimination by a particular agency or employer); Grutter v. Bollinger, 288 F.3d 732, 809 (6th Cir. 2002) (rejecting all affirmative action based on general "societal ills," citing *Richmond*); Grutter v. Bollinger, 137 F. Supp. 2d 821, 847-49 (6th Cir. 2002) (Boggs, J., dissenting) (arguing that the only compelling interest recognized by the Supreme Court for affirmative action is remedying specific instances of discrimination; *see also Grutter*, 288 F.3d at 739 (Boggs, J., dissenting) (reformulating the district court in these distinct terms); Franks v. Bowman Transp. Co., 424 U.S. 747, (1976). *See also* Ginsburg & Merritt, *supra* note 119, at 267 ("State and local attempts to remedy "societal discrimination" have not survived Court scrutiny, despite empirical evidence documenting persistent racial discrimination in education, employment, housing, and consumer transactions."); *but see id.* at 271 (noting that the United States Supreme Court in Califano v. Webster, 430 U.S. 313 (1977), "endorsed a societal discrimination rationale resembling the remedial justification it was not willing to embrace, the next year, in the more divisive setting of race and medical school admissions").

[124] I cannot say with confidence that the diversity rationale is *never* advanced in the two jurisdictions. I can say that it is not a major rationale in any of the main cases, and certainly is never the focus of the debate to the extent it is in the higher education context in the United States.

[125] Hopwood v. State of Texas, 78 F.3d 932, 965 n.21 (5th Cir. 1996) (Wiener, J., concurring) ("This unique context, first identified by Justice Powell, differs from the employment context, differs from the minority business set aside context, and differs from the re-districting context; it comprises only the public education context and implicates the uneasy marriage of the First and Fourteenth Amendments."). *See also* Grutter v. Bollinger, 288 F.3d 732, 749 (6th Cir. 2002) (arguing that consideration of race in educational admissions "differs materially from the government contracting context) (citing *Hopwood*).

[126] *Grutter*, 288 F.3d at 739 n.4.

[127] Grutter v. Bollinger, 137 F. Supp. 2d 821, 849 (E.D. Mich. 2001) (citing Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995); Richmond v. J. A. Croson Co., 488 U.S. 469, 493 (1989)).

[128] *Grutter*, 288 F.3d at 788 (Boggs, J., dissenting) ("While I find persuasive the district court's attempt to derive from the Supreme Court's *Adarand* and *Croson* decisions a holding that diversity is not a

entirely in terms of diversity in its *Bakke*-free reconsideration of the facts "on the merits."[129] Thus, while affirmative action cannot be based on a general remedial rationale in the United States, the affirmative action question is largely kept alive by the debate over the diversity rationale.[130] This debate is markedly different from Europe and India, which do accept that affirmative action is at least partly based on the need to correct for general past discrimination or present stereotyping.

## V. CREAMY LAYER

In a monstrous 300 page opinion, the Indian Supreme Court in *Indra Sawhney* upheld the Mandal Commission report, recommending a 27% reservation for Other Backwards Classes (those who are still subordinated even if ranked hierarchically above the scheduled castes and tribes).[131] Key to the Court's argument was the elaboration of the "creamy layer" test, which creates a number of disqualifiers for Backwards Class status. In addition to the imposition of an income limit,[132] the test "addresses intergenerational transmission of status by disallowing children whose parents have achieved high-ranking positions in the government or military from claiming reserved positions, . . . prescribes income criteria for people engaged in professional employment and trade/commerce, develops various calculations of wealth derived from agricultural landholdings."[133] In general, the test operates so as to eliminate those who, although members of a backwards class, live a social and economic reality which distinguishes them from members of that class. In this section, I examine affirmative action in the United States and Europe through the lens of India's creamy layer concept. I conclude that Europe has

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permissible rationale, it would be somewhat disingenuous of me to fault the majority of this court for divining a firm and binding holding from *Bakke* while urging the court to do the same from *Adarand* and *Croson*.").

[129] *Id.* at 788-808.

[130] Although the diversity debate is alive, it is far from decided. The circuit split on this issue, enveloping at least five of the circuits, provides a major justification for Certiorari by the Supreme Court. *Compare* Smith v. University of Wash. Law Sch., 233 F.3d 1188, 1200-1201 (9th Cir. 2000) (arguing that diversity is a compelling state interest for affirmative action); Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002) (upholding Michigan's affirmative action plan based on a diversity rationale); *with* Hopwood v. State of Texas 78 F.2d 944-45 (5th Cir. 1996) (arguing that diversity is not a compelling state interest for affirmative action). Still other circuits decline to decide the issue. *See* Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 130 (4th Cir. 1999) (arguing that "whether diversity is a compelling governmental interest remains unresolved, and in this case, we also choose to leave it unresolved"); Wessmann v. Gittens, 160 F.3d 790, 796 (1st Cir. 1998) (stating that "we need not definitively resolve this conundrum today").

[131] Sridharan, *supra* note 21, at 114-16.

[132] *Id.* at 116 (citing *Indra Sawhney, supra* note 23).

[133] *Id.*

been more willing than the United States to accept a rationale similar to the Indian "creamy layer" argument.

The European approach adopts a mechanism that is very much like the Indian "creamy layer" in the savings clause, the critical difference that distinguishes *Marschall* from *Kalanke*. Both the "creamy layer" test and the savings clause aim at doing the same thing: addressing those people who defy the line drawn by the affirmative action test adopted. In the case of the "creamy layer," the people defying the line are elite/rich disadvantaged class members who would normally benefit from reservations, creating an unfair situation in the eyes of the Court. The "creamy layer" test operates to restore fairness to the system, denying the benefits of the reservation policy to those who are disadvantaged in name only. In the case of the savings clause, the people defying the line are atypical men, who although disadvantaged in some unique way, would not benefit from affirmative action, creating an equally unfair situation in the eyes of that court. Acting in the opposite direction, the savings clause test also operates to restore fairness to the system, providing those who are not disadvantaged in name but are disadvantaged in substance with the benefits of affirmative action.

Similarly, in *Lommers*, the Court's reservation of spaces in subsidized nursing facilities for the children of female employees is subject to the caveat that it applies "only in so far, in particular, as the said exception in favour of male officials is construed as allowing those of them who take care of their children by themselves to have access to that nursery places [sic] on the same conditions as female officials."[134] This is interesting because interruption to career due to household and family duties is one of the very factors that the ECJ had previously determined to make women disadvantaged.[135] The caveat in the *Lommers* case thus assures that those who are, for the purposes of the ECJ test, men in name but women in substance, are not unfairly treated like men and denied the benefits of affirmative action. Like the savings clause and the "creamy layer" test, it is designed to account for exceptions to the rule, so as to create a fairer test.

In this way, the importance of the savings clause in *Marschall* and the caveat in Lommers both operate like "creamy layer" in reverse: instead of creating an exception for the cream of the underprivileged group, the European exceptions create one for the oil[136] of the privileged group.

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[134] *Lommers, supra* note 57, at ¶ 50.

[135] *Marschall, supra* note 44, at ¶ 29.

[136] Drawing a new metaphor from an oil and water mixture, in which the oil goes to the bottom. In this sense, the European approach is similar to the additional 10% set aside proposed by Prime Minister P.V. Narasimha Rao's Congress party for individuals who are poor despite being from an upper caste or no

Regardless of the reverse operation of the exceptions in the two jurisdictions, it remains true that exceptions are nevertheless created in both cases, and the rationale is the same in each: to fine-tune the test so as to improve its fairness.

In the United States, a "creamy layer" argument is forwarded, *but rejected*, by the Dissent in *Grutter*.[137] The Dissent argued that "[a]n African-American who comes to the Law School by way of Choate and Harvard may well have quite a different experience of discrimination than one from a rural public school."[138] Similarly, the Dissent argues that "[n]ext door neighbors in Grosse Pointe [an affluent Detroit suburb], separated only by 30 yards and the color of their skin, would not necessarily be significantly different from each other."[139] In effect, by arguing against Michigan's plan because a minority from elite or affluent backgrounds could benefit from it, the Dissent is bringing the "creamy layer" argument to Michigan. Judge Clay, concurring with the majority, rejects this attempt, arguing that membership in an elite class should not trump race: "[I]t is naïve to believe that because an African American lives in an affluent neighborhood, he or she has not known or been the victim of discrimination such that he or she cannot relate the same life experiences as the impoverished black person."[140] Thus, the creamy layer argument has been rejected by the majority on its practical merits.

Clearly, because the diversity rationale is before the court in *Grutter*,[141] both Judge Boggs (supporting the "creamy layer" rationale) and Judge Clay (refuting it), couch their arguments firmly in the language of diversity.[142] This may lead the astute reader to distinguish them from the Indian and European "creamy layer" in their ends: Whereas the "creamy

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caste at all (non-Hindu). Prior, *supra* note 2, at 69. The 10% Indian set-aside, however, was struck down by the Supreme Court in *Indra Sawhney*, *supra* note 23, at 578.

[137] All references to *Grutter* are to the Circuit Court decision unless otherwise indicated.

[138] Grutter v. Bollinger, 288 F.3d 732, 791 (6th Cir. 2002) (footnotes omitted) (Boggs, J., dissenting).

[139] *Id.* at 807 (Boggs, J., dissenting).

[140] *Id.* at 764-65 (Clay, J. concurring). *See also* Deborah C. Malamud, *Affirmative Action: Diversity of Opinions: Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939 (1997) (arguing that race-based economic inequality is not limited solely to the poor, but effects all classes).

[141] *See* my discussion of the diversity rationale *supra* section V.

[142] For the "creamy layer," Judge Boggs argues that "it is not at all clear how true diversity is served by giving massive preference to a student whose parents or grandparents came from an upper-class suburb or Buenos Aires, over those whose grandparents immigrated from similar areas of Paris, Munich, or Tokyo. *Grutter*, 288 F.3d at 791 (Boggs, J., dissenting). Against creamy layer, Judge Clay argues "[n]otwithstanding the fact that the black applicant may be similarly situated financially to the affluent white candidates, this black applicant may very well bring to the student body life experiences rich in the African-American traditions emulating the struggle the black race has endure in order for the black applicant even to have the opportunities and privileges to learn." *Id.* at 764 (Clay, J., concurring). *See also id.* at 766 ("[C]ontrary to the dissent's assertion, a minority member of wealthy means may bring to the educational environment the same 'life experiences' that a minority member of impoverished means may bring because the 'societal ills' experienced by both transcend economic status.").

layer" argument is based on moral desert in both India (the applicant does not "deserve" the seat because s/he is not truly disadvantaged) and Europe (that applicant does deserve the seat because he is truly disadvantaged), Judge Clay's argument is diversity-based (the applicant should not get the seat because his/her elite/rich status would trump race in an attempt to create diversity). But, regardless of the different ends (diversity in the United States context, remedying past or present discrimination in India or Europe), the fact remains that the acceptable means vary between the United States on the one hand and India/Europe on the other. Whereas India invented creamy layer, and Europe is replicating it in a unique way, it is rejected in the *Grutter* case.[143]

## VI. THE QUESTION OF CULTURAL RELATIVISM

I have spent the past pages categorizing differences. Whether the line is drawn between India and Europe/USA or between India/Europe and United States, it is safe to conclude that the differences are numerous. Affirmative action is a controversial human rights issue, and in the various ways discussed it is handled differently by the three different jurisdictions. This lands United States squarely in the debate over the cultural relativism of human rights. In this final section, I will address this issue, arguing that the various differences I have exposed between jurisdictions do not bolster the case for cultural relativism. In fact, in several respects affirmative action as portrayed in these three jurisdictions supports the notion that human rights are universal.

In questioning the universality of human rights, the first point to be made is that, although the cultures and political climates of India, Europe, and the United States differ significantly, the very fact that affirmative actions exists in all three jurisdictions offers proof that human rights are universal. Cultural relativism is most convincing in cases where a right in one jurisdiction appears completely inapplicable in another jurisdiction. The most common example of this is the potential conflict between human rights standards upholding equality of the sexes[144] and Islamic personal status laws,

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[143] In this subsection, I have compared the United States and Europe employing the language/model of India. At least one commentator has directly addressed the absence of the European "savings clause" in United States gender affirmative action policy. Needham, *supra* note 43, at 497 (arguing that by "allowing for a "savings clause" type of rule, the United States Supreme Court could make even greater progress toward leveling the playing field for women in the United States").

[144] *See, e.g., Convention on the Elimination of All Forms of Discrimination Against Women*, arts. 1-16, Dec. 18, 1979 (entered into force Sept. 3, 1981) 1249 U.N.T.S. 13. (1981) ("States Parties . . . agree to . . . embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the

which appear in some cases to disregard Western notions of gender equality.[145] But, even in this case, commentators are highly divided on the cultural relativist question.[146] In the case of affirmative action, however, this "right" to promote disadvantaged groups has been recognized in some form in all three of the jurisdictions examined.

Furthermore, all three jurisdictions often struggle with similar issues within their respective affirmative action debates. To provide only one such example, all the jurisdictions continue to debate the ability of membership in an identifiable group to serve as a proxy for a broader concept, be it economic disadvantage or diversity. For example, in the United States, a racial classification can only survive strict scrutiny if there is no "race neutral" means to meet the compelling state interest.[147] While the search for an alternative "experiential diversity" permeates Judge Boggs's dissent in *Grutter*,[148] this approach was rejected by the majority, arguing that "as the dissent essentially acknowledges, this proposed alternative could not possibly achieve the same robust academic diversity currently sought and obtained by the Law School."[149] In India, also, debates abound whether

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practical realization of this principle."); *International Covenant on Civil and Political Rights*, art. 3, Dec. 19 1966 (entered into force Mar. 23, 1976) 999 U.N.T.S. 171(1976) ("The States Parties to the present Covenant undertake to ensure the equal right of men and women.").

[145] *See, e.g.*, *Human Rights Committee: Third Periodic Report of Yemen*, ¶ 141, UN Doc.; CCPR/C/YEM/2001/3 (Oct. 18, 2001) ("A husband has a right to his wife's obedience in matters affecting the family's interests, particularly with regard to the following: She must . . . permit him to live with her and enjoy access to her, . . . permit him to have licit intercourse with her, . . . obey his orders without obstinacy and perform her work in the conjugal home, . . . not leave the conjugal home without his permission.").

[146] *See, e.g.*, Abdullahi Ahmed An-Na'im, *The Rights of Women and International Law in the Muslim Context*, 9 WHITTIER L. REV. 491 (1987); Ann Elizabeth Mayer, *Universal Verses Islamic Human Rights: A Clash of Cultures or a Clash With a Construct?* 15 MICH. J. INT'L L. 307 (1994) (arguing a universalist line that Islam is compatible with international human rights norms, partly because personal status laws represent a more complex system of rights and obligations which nevertheless leaves the sexes equal); *Compare Is Islam Compatible With Democracy and Human Rights*, INST. FOR THE SECULARIZATION OF ISLAMIC SOC., *available at* http://www.secularislam.org/humanrights/compatible.htm (directly refuting Mayer's contentions and arguing that Islam can never be consistent with international human rights norms).

[147] Richmond v. J. A. Croson Co., 488 U.S. 469, 507 (1989); United States v. Paradise, 480 U.S. 149, 171 (1987); Associated Gen. Contractors of Ohio, Inc. v. Drabik, 214 F.3d 730, 736 (6th Cir. 2000).

[148] Grutter v. Bollinger, 288 F.3d 732, 792 (6th Cir. 2002) (arguing that "a system . . . seeking experiential diversity would be unlikely to raise significant constitutional problems, . . . [and t]he law school cannot plausibly maintain that the system would be impractical, especially because, as they elsewhere remind United States for purposes of distinguishing its preference from a quota, only one admissions officer reads all applications, makes all decisions, and therefore is capable of considering candidates individually. The possibility of an experientially based admissions system and the Law School's apparent disinterest in such a system, indicate that the Law School grants preference to race, not as a proxy for a unique set of experiences, but as *a proxy for race itself*") (emphasis in original).

[149] *Id.* at 750 (reasoning that "by reducing the range of experiences the Law School can consider–namely, the experience of being an African American, Hispanic or native American in a society where race matters–the dissent proposes only a narrowed and inferior version of the academic diversity currently sought by the Law School"). *But see* Jacques Steinberg, *Using Synonyms for Race, College Strives For*

caste can be a proxy for backwardness.[150] Similarly, in Europe, the legality of affirmative action plans in *Marschall* and Lommers hinges on a savings clause which attempts to correct for individual cases in which gender is not an effective proxy for disadvantage.[151] Moreover, in all three jurisdictions, the use of such a proxy is highly debated but ultimately accepted in some form.[152]

I have attempted in this paper to show that the United States has the most restrictive program of the three jurisdictions; it represents the inner circle of three concentric circles of affirmative action. Yet, the very presence of affirmative action in the United States is strong proof of the universal nature of human rights. Human rights can be conceptualized in several ways. The most common divide is between civil and political rights and economic, social, and cultural rights.[153] Commentators also distinguish negative rights (which impose a hands-off duty of non-interference upon the state, such as freedom from torture),[154] and positive rights (which impose

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*Diversity*, N.Y. TIMES, Dec. 8, 2002 (describing new policies at Rice University adopted in response to the *Hopwood* decision, which aim to consider experiential instead of racial diversity).

[150] *See Indra Sawhney*, *supra* note 23, at ¶¶ 61-66 (discussing the variety of commentators both for and against the use of caste as a proxy for level of disadvantage). The Court reasoned that the Constitution did not use the word "caste" not because it was not an accurate proxy for disadvantage, but rather because it did not apply to all religions in India. Thus, the Court held that even though the word caste is not specifically written in Article 16(4), it may still be used as a criterion for determining backwardness. *Id.* ¶ 88A ("Since caste represents an existing, identifiable social group/class encompassing an overwhelming majority of the country's population, one can well begin with it and then go to other groups, sections and classes."). Inasmuch as *Balaji* and *Devadasan* can be applied to article 16(4), the Court overruled them as to the appropriateness of using caste as a proxy for disadvantaged class. Prior, *supra* note 2, at 91-92 (noting that "[t]he Court emphatically stated that it was neither encouraging nor advocating the legitimacy of caste distinction"). *See also* V. Narayana Rao v. A.P., 74 A.I.R. (A.P.) 53 (1987) (stating that too much reliance on caste in identifying the "backward" is undesirable); B. Sivaramayya, *Protective Discrimination and Ethnic Mobilization*, 22 J. INDIAN L. INST. 480, 495 (1980) (arguing that reservations should not be set solely on the basis of caste, but rather based on multiple factors such as income, actual occupation, level of literacy, etc.).

[151] See discussion and references *supra* Part V.

[152] *See* United States v. Virginia, 518 U.S. 515 (1996) (subjecting gender-based classifications to intermediate scrutiny); Adarand Constructors v. Pena, 515 U.S. 200, 235 (1995) (requiring strict scrutiny for any race-based classifications imposed by government actor); Mertus, *supra* note 50, at 296 (describing the *Marschall* case in similar language as determining that "a narrowly tailored positive action program for women is permissible under the . . . Equal Treatment Directive"); T.C.A. Sangeetha, *Women's Bill-Judgment Reserved*, BUSINESS LINE (Aug. 3, 1998) (describing the Indian "Doctrine of Reasonable Classification," which determines a reasonable classification by a two part standard: 1) it must be founded on an intelligible differentiation which distinguishes persons or things that are grouped together from others left out of the group; and 2) it must have a *rational relation* to the object sought to be achieved by the law in question).

[153] For a description of this divide and the resultant drafting of two separate human rights Covenants to account for it, see *Comment on Historical Origins of Economic and Social Rights*, *in* INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 242, 244-45 (Henry J. Steiner & Philip Alston eds., 2000).

[154] *Comment on Types of State Duties Imposed by Human Rights Treaties*, *in* INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 180, 181 (Henry J. Steiner & Philip Alston eds., 2000). This distinction has been somewhat eliminated, as commentators have subsequently

positive duties upon the state, as is the case with most economic and social rights). Still others attempt to combine both of these distinctions, and more, by speaking of "generations" of human rights: First generation rights concern individuals and are generally relegated to civil and political negative rights; second generation rights, such as economic, social, and cultural rights, are generally positive rights, and bridge the gap between individual rights and group rights; third generation rights are collective group rights such as the right to self-determination and the rights to development.[155] In the United States, the vast majority of accepted human rights are negative, first generation civil and political rights of individuals.[156] For example, the United States has not ratified the International Covenant on Economic, Social, and Cultural Rights.[157] Nevertheless, affirmative action works to protect economic, social and cultural rights such as the right to work[158] and the right to education.[159] Furthermore, as a human right, affirmative action accomplishes this protection in the form of a positive duty on a government and it protects group rights.[160] Rather than viewing the varying approaches to affirmative action as challenging the universality of human rights, one should view the very existence of affirmative action in the United States as strongly supporting the universality of human rights: it is evidence of a second generation, positive state duty to promote economic, social, and

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argued that any ostensibly "negative" right involves positive duties upon the state. For example, protecting the negative right not to be tortured creates positive rights on the state to create and maintain a court system, and train and educate law enforcement officers. *See* STEPHEN HOLEMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 1 (1999) (arguing that "[a]ll rights are positive rights").

[155] *See* Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U.L. REV. 1, 32-62 (1982)

[156] *See* DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 97 (2001) (arguing that "some . . . nations, particularly the United States, [are] wary of the 'second generation' economic, social and cultural rights . . . [because i]n the constitutional culture of the United States, the prevailing attitude was (and still is) that the purpose of rights is to insulate and protect people from government power. The only right that makes sense is one that places restrictions on government action against individuals"). Of the six primary human rights treaties, the three ratified by the United States all deal almost exclusively with first-generation, civil and political rights. *See* International Covenant on Civil and Political Rights, Dec. 19 1966 (entered into force Mar. 23, 1976) 999 U.N.T.S. 171; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 1(1), 1465 U.N.T.S. 113, 113 (entered into force June 26, 1987); Convention on the Elimination of All forms of Racial Discrimination, Dec. 21, 1965 (entered into force Jan. 4, 1969), 1249 U.N.T.S. 13.

[157] Official Record of UN Human Rights Treaty Ratifications, http://www.unhchr.ch/pdf/report.pdf.

[158] International Covenant on Economic, Social, and Cultural Rights, Art. 6 (hereinafter ICESCR) Dec. 16, 1966 (entered into force Jan. 3, 1976), 993 U.N.T.S. 3.

[159] *Id.* at art. 13.

[160] Mulder, *supra* note 5, at 65. Although the rhetoric of the affirmative action debate in the United States is couched in terms of individual rights, and although I have distinguished the United States from India because the United States adopts an individual-regarding equality approach to affirmative action, Mulder argues that, by its very nature, affirmative action represents some willingness to acknowledge group rights no matter what the jurisdiction.

cultural rights in a country which usually only ratifies first generation rights, negative, civil and political rights.

A universalist argument can also be made by looking at the outer circle of India. I have attempted to show, and other commentators agree, that "India's program is . . . the boldest effort by any country at reverse discrimination."[161] Yet, just because India has a very liberal affirmative action plan in its reservation system does not represent a different cultural acceptance for the idea of reverse discrimination. Quite the contrary, reservations appear to be more controversial in India than either of the other two jurisdictions. When Prime Minister V.P. Singh announced the implementation of the Mandal Commission Report, thousands of students in India rose up in protest, boycotting classes, blocking traffic, hijacking busses, smashing car windshields, and hurling stones at police.[162] In 1990, Rajeev Goswami, a twenty-year old Brahmin university student in Delhi soaked himself in gasoline and lit himself on fire in front of friends and classmates to protest Prime Minister V.P. Singh's implementation of the Mandal Commission Report.[163] While he was burning, he said his intention was to "reignite a movement that would have died without his sacrifice."[164] While doctors eventually saved Goswami,[165] others were not so lucky, as a wave of suicides by self-immolation,[166] hanging, and swallowing insecticide[167] swept the nation. One student even "left a suicide note donating her eyes to Prime Minister V.P. Singh so that he could see for himself the misery that the Mandal Commission Report had brought upon the student community."[168] There were also murders, such as the fourteen year old school girl from Delhi who was soaked in gasoline and burned to death.[169] The very same day, protesters set a train carriage on fire in Hyderabad, killing forty people. The fact that India, with the most liberal of the three affirmative action programs, has also been the scene of the most vehement protest, is strong proof of the universal nature of human rights. The universality of human rights means that everyone, across cultures, shares some notion of what should be a protected right and what should not. The

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[161] Prior, *supra* note 2, at 66 n.14.
[162] *Id.* at 64, 64 n.8.
[163] *Id.* at 63.
[164] *Id.* at 63 n.3.
[165] *Id.* (reporting that "Goswami was hospitalized with severe burns on over 50% of his body" but later "was elected president of the Delhi University Students' Union and renewed his drive to end caste-based job reservations").
[166] *Id.* at 63 n.4.
[167] *Id.* at 64 n.9.
[168] *Id.*
[169] *Id.* at 64-65.

fact that, across the three jurisdictions, public protests increase as affirmative action rights are strengthened indicates that a universal shared consciousness does exist, and that an ideal, universally acceptable affirmative action plan may fall somewhat short of Indian reservations.

Finally, the Indian model looks significantly more similar to Europe and the United States when one considers gender-based reservations in India instead of caste-based reservations. Although the Indian Constitution specifically allows for affirmative action based on sex,[170] and the Supreme Court has upheld some affirmative action measures intended to benefit women,[171] gender-based reservations are drastically less advanced than caste-based reservations in two ways. First, a bill seeking to reserve a third of the seats in Parliament and State Assemblies for women has been indefinitely postponed in the lower house of Parliament.[172] Thus, gender-based reservations have garnered nowhere near the level of national support and attention as caste-based reservations as was evidenced through the Mandal Commission and corresponding Supreme Court decisions. Second, court decisions upholding gender-based reservations look much more like their European and American counterparts, holding that affirmative action based on gender is acceptable only if it is a "tip the scales" and not "absolute" type of preference.[173]

The combined effect of these similarities outweighs the differences I have outlined in the approaches to affirmative action in the United States, Europe, and India. Consequently, affirmative action poses no significant threat to the universality of human rights.

## VII. CONCLUSION

I have argued in this paper that the respective politics of affirmative action programs in the United States, Europe, and India can be seen as a set of concentric circles: The United States has the most restrictive policies and thus represents the smallest circle; Europe represents a middle circle, whose policies are generally less restrictive than the United States; and the most liberal policies are found in India. In most, but not all, areas, however,

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[170] INDIAN CONST. art. 15 § 3.

[171] Yusuf Abdul Aziz v. State of Bombay A.I.R. 1954 S.C. 321 (Vol. 41, C. N. 77) (upholding Dattatraya v. State of Bombay, 1953 A.I.R. 40 (Bom.) 311 (approving reservations for women on elected municipal council)).

[172] Sumita Ray, Note and Comment: *The Women's Reservation Bill of India: A Political Movement Towards Equality for Women*, 13 TEMP. INT'L & COMP. L.J. 53, 59 (1999). Ray notes that, interestingly, the Bill was blocked by parliamentarians representing Other Backward Classes, who demanded that 27% of the 33% quota for women be reserved for Other Backward Class women. *Id.* at 65.

[173] *Id.* at 64 (citing *Dattatraya, supra* note 171, at 313-14).

European policies are closer to their United States than their Indian counterparts. Dividing the concept of equality into individual-regarding equality and group-regarding equality, India is closer to group-regarding equality while both Europe and the United States favor individual-regarding equality. Dividing equality into formal and substantive equality, India is closer to substantive equality while the United States is closer to formal equality. Europe, between these two extremes, has been adopting a more substantive notion of equality, moving it away from the United States and closer to India. Discussion of the meaning of quotas, also, is characterized by a general situation in which Europe/US contrast from a more liberal Indian approach; but, a more nuanced view shows the European approach to still be somewhat more liberal than the American one.

While the United States and India consistently represent the respective liberal and conservative approaches to affirmative action, there are several areas in which policies in Europe tend more towards those in India than the United States. Both Europe and India adopt a general remedial rationale which is not accepted in the states. European policy also adopts a test similar to the Indian creamy layer concept, which has been rejected in the United States. Finally, there is even one area in which Europe could potentially exceed the liberal Indian policies: while United States affirmative action affects relatively low percentages of seats and Indian reservations can legally control half of the seats, it is legally possible that affirmative action in Europe could meet or exceed this 50% threshold.

Although this paper focuses on distinguishing the different approaches to affirmative action, and many differences have been identified, affirmative action does not pose a substantial threat to the universality of human rights. First, the very presence of affirmative action in all three jurisdictions adds strength to the universalist case. Second, the respective debates often center around similar issues. Third, affirmative action is an example of a second generation, positive state duty to promote economic, social, and cultural rights in the United States, a country which usually only ratifies first generation rights, negative, civil and political rights. Its very presence in the United States thus further strengthens the universalist argument. Fourth, there appears to be some logical correlation between the breadth of the policy adopted and the level of controversy it creates, suggesting that there is some level of affirmative action that is more universally acceptable. Finally, affirmative action programs look significantly more similar when "like is compared with like," namely when the affirmative action under comparison in all three jurisdictions is based on gender.

While affirmative action will certainly remain controversial in all the jurisdictions under study, I hope this paper can add in some way to a better understanding of the issues that all jurisdictions consider when formulating an affirmative action program. Affirmative action is one of those complex areas of human rights in which one right is at tension with another; in this case, affirmative action on behalf of an individual based on their group membership is in tension with standard equal protection of the individual, which holds all individuals absolutely equal. In the United States and Europe, this is a legal tension; in India, which legally accepts group-regarding equality, this tension is nevertheless present in the streets of Hyderabad. But, we should not believe this conflict is insurmountable, as opponents of affirmative action contend. Nor is affirmative action the only place in which human rights come in to conflict. These are just the sorts of areas where we stand to benefit the most from a comparative approach to legal understanding. Thoroughly examining the way in which several jurisdictions deal with the tensions affirmative action creates can help all jurisdictions create the most fair, equitable, and thorough plan possible. In an area as important as affirmative action, which has such potential to protect human rights directly, efficiently, and locally, we should not accept anything less than the most thorough, comparative examination.