

GROUNDS OF AFFIRMATIVE ACTION

ABSTRACT

On what grounds is affirmative action permissible? The apex courts of two of the world's largest democracies have recently answered this question in seemingly diametrically opposite ways. In the case of India, the Supreme Court expanded the list of grounds of affirmative action to include economic status. In the case of the United States of America, the Supreme Court retracted its support for affirmative action based on race. Despite what may seem like contradictory positions, both courts undid affirmative action as a remedy for discrimination. The article explores how the courts' fundamental misunderstanding of the meaning of grounds contributed to this. In particular, it interrogates the understanding of grounds such as caste and race exclusively in terms of social status and as divorced from material deprivation. Instead, the article argues that a better appreciation of grounds as 'multivalent' is important in addressing not only a broad range of disadvantages through affirmative action but also in justifying affirmative action itself as a transformative remedy.

KEYWORDS

grounds, caste, race, economic status, affirmative action

1. INTRODUCTION

On 7 November 2022, the Supreme Court of India upheld the constitutional validity of affirmative action *only* for 'economically weaker sections' (EWS) to the exclusion of those

disadvantaged by their caste.¹ Since those disadvantaged by caste (‘Scheduled Castes’ (SCs), ‘Scheduled Tribes’ (STs) and ‘Other Backward Classes’ (OBCs)) were already entitled to reservations² under the constitution, the majority refused to extend to them ‘yet another benefit’³ by giving them ‘extra or excessive benefit’ owing to their economic disadvantage.⁴ Caste and economic status were thus separable for the majority such that affirmative action based on one to the exclusion of the other was constitutionally permissible.

Similarly, on 29 June 2023, the US Supreme Court held that race could not be considered *a* factor in college admissions, undoing decades of affirmative action which permitted race to be considered ‘as *one* factor of *many* in the context of holistic review’⁵ of college applications.⁶ Isolating race as somehow ‘determinative’ in college admissions—something on which decisions ‘turned’—the majority barred the use of race not only on its own but also amongst other factors.⁷ Thus, according to the majority, affirmative action could be based neither on race alone nor on race combined with other factors, including economic status or class.

The two apex courts thus converged on limiting affirmative action based on caste and race. This article explores how the construction of the meaning of caste and race may have contributed to this result. In particular, it zooms in on a peculiar construction of grounds as ‘univalent’,⁸ that is, as capable of representing only status-based disadvantage. It shows that

¹ *Janit Abhiyan v Union of India* Writ Petition (Civil) No. 55 of 2019 (07.11.2022) [hereafter *Janhit*].

² See the Constitution of India 1950, arts 15(4), 15(5) and 16(4). The article uses the terminology of ‘reservations’ in the case of India where affirmative action under the constitution refers to a quota system for backward classes.

³ *Janhit* (n 1) [78.2].

⁴ *ibid* [80].

⁵ *Fisher v University of Texas* (2016) 579 US 365, 375 (emphasis supplied).

⁶ *Students for Fair Admissions v President and Fellows of Harvard College*, No. 20-1199 (29 June 2023) [hereafter *SFFA*].

⁷ Except for Roberts CJ’s allowance for consideration of race in admissions which is discussed later in section 2.2 and section 3.

⁸ The term is derived from Nancy Fraser’s account of ‘bivalent collectivities’ as it appears in *Justice Interruptus: Critical Reflections on the Postsocialist Condition* (Routledge 1997) and is discussed in section 3 below. The term ‘valence’ in its combined form in Oxford English Dictionary is defined in reference to chemistry as: ‘Forming nouns denoting types of valency as specified by the first element; esp. denoting the property of an element, ion, radical, etc., of forming a particular type of chemical bond, as electrovalence n., quadrivalence n., etc. Frequently corresponding to adjectives in -valent comb. form.’ Correspondingly, outside of chemistry, and in the way Fraser

this construction underestimates what affirmative action does not only in specific cases such as *Janhit Abhiyan v Union of Indian (Janhit)* and *Students for Fair Admissions v President and Fellows of Harvard College (SFFA)*, but also more broadly as a transformative remedy in discrimination law. Although these landmark cases can be examined from myriad perspectives,⁹ this article is solely a meditation on the meaning of caste and race as expounded in these cases. The focus is justified because grounds are the key to unlocking affirmative action, in the sense that, it is on the basis of grounds that affirmative action is ultimately made available or denied. The article thus brings into focus the very basis on which affirmative action takes place, viz. caste and race. It contributes to clarifying the juridical and normative conceptions of caste and race in affirmative action jurisprudence.

The article proceeds as follows. Section 2 shows how the courts in *Janhit* and *SFFA* formed a univalent view of grounds. Section 3 shows that grounds are instead ‘multivalent’ in nature, that is, defined both by: (i) a range of disadvantages including social, economic, political and cultural; and (ii) intersecting disadvantages associated with other grounds such as race, caste, class, gender, religion etc. Section 4 argues that a univalent view of grounds does not allay the fears relayed by courts of affirmative action operating as either: *privileging* disadvantaged groups such as SCs, STs, OBCs and Black people or *reifying* their status subordination. In fact, in excluding SCs, STs and OBCs from affirmative action based on

has used the idea, valence may be understood as denoting the type and number of disadvantages which represent a category like caste, race, gender, sexuality, age, disability etc in discrimination law—as univalent (representing just one type of disadvantage); bivalent (representing two types of disadvantages); or multivalent (representing many disadvantages). See ‘Valence’ (Combining Form), Oxford English Dictionary <https://www.oed.com/dictionary/valence_combform?tab=meaning_and_use#11460624> last accessed 18 May 2024.

⁹ *Janhit* and *SFFA* can be analysed from a range of perspectives, including the impact of affirmative action on public versus private institutions, test for validity of constitutional amendments, the legitimate upper limit of quotas or preferences or the time limit for affirmative action policies. See for more comprehensive comparative reviews of affirmative action in India and the US, TW Weisskopf, *Affirmative Action in the United States and India: A Comparative Perspective* (Routledge 2004); Ashwini Deshpande, ‘Affirmative Action in India and the United States’, Background Paper, Equity & Development, World Development Report 2006. See for a wider comparative review of affirmative action, Thomas Sowell, *Affirmative Action Around the World: An Empirical Study* (Yale University Press 2004).

economic status and in limiting affirmative action based on race, courts actively discriminated against the most disadvantaged groups. In response, the final section shows how affirmative action can be conceived as a transformative remedy which can both redress a broad range of disadvantages as well as dismantle the very statuses which form the basis of disadvantage.

2. GROUNDS AS UNIVALENT

How do courts understand grounds of affirmative action? This section examines the reasoning in *Janhit* and *SFFA* and reveals a univalent and isolated construction of caste and race defined exclusively in terms of social status and as severed from both their material implications and their relationship with other grounds. Affirmative action based on caste and race is thus distorted into that which benefits only those who are relatively privileged.

A. Janhit Abhiyan v Union of India

Janhit concerned a constitutional challenge to the validity of the Constitution (One Hundred and Third Amendment) Act, 2019. The amendment added new clauses to articles 15 and 16 of the constitution enabling the state to provide up to 10% reserved spots to ‘economically weaker sections’ (EWS) in education and employment. The amendment was challenged, inter alia, on grounds that: (i) reservations based on economic criteria were impermissible under the constitution; (ii) and in any case, the exclusion of socially and educationally backward classes (‘Scheduled Castes’ (SCs), ‘Scheduled Tribes’ (STs) and ‘Other Backward Classes’ (OBCs) from reservations for EWS was discriminatory.¹⁰

¹⁰ Two other issues raised in this case but omitted from consideration in this article included: (i) the application of reservations to private unaided institutions; and (ii) the 50% ceiling for reservations set in previous caselaw.

Key to both the challenges was the contention that the amendment violated not only the ‘equality code’ contained in articles 14-17 but also the ‘basic structure’ of the constitution—that is, not only the explicit provisions of the constitution but also features of the constitution which are deemed inviolable and hence ‘unamendable’.¹¹ Thus, according to the petitioners, first, the amendment was beyond the plain text of the constitution which did not envisage reservations based on economic criteria. Secondly, the rationale for reservations under the constitution applied only to ‘backward’ classes—defined in reference to the historic discrimination suffered on the basis of caste—and could not be extended to reservations on the basis of economic criteria.¹² The petitioners contended that ‘backwardness’ was to be understood in terms of social, educational, political, as well as, economic disadvantage.¹³ But in isolating economic disadvantage from caste, the amendment had violated the basic structure of the constitution.¹⁴

The petitioners were thus emphatic that ‘no one criterion such as caste could be the sole basis for grant of reservation’.¹⁵ For them, the criteria for reservation under the constitution had to be manifold and cumulative.

Lastly, the petitioners argued that even if economic status were to be treated as the sole criterion for reservations, ‘the amendment fail[ed] to address as to how the poverty of the forward class is different from that of the SCs, STs and OBCs’.¹⁶ Excluding SCs, STs and OBCs from reservations based on economic backwardness when they were in fact some of the poorest sections of the population was inexplicable. In that sense, the argument – that their exclusion

¹¹ Sudhir Krishnaswamy argues that in order identify a basic feature, the court looks for ‘features’ of the constitution reflected through various provision of the constitution which may be regarded as moral and political principles at the normative core of the constitution. Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (Oxford University Press 2009) 146.

¹² *Janhit* (n 1) [7.1].

¹³ *ibid* [7.6] [10.2].

¹⁴ *ibid* [7.4].

¹⁵ *ibid* [8.2] [12].

¹⁶ *ibid* [10.5].

was justified on the basis that they were included elsewhere for reservation – *too* was inexplicable because it did not explain how reservations based on economic backwardness could exclude those most economically backward.

The Supreme Court rejected the petitioners' arguments and upheld the constitutional amendment. The decision for the majority was delivered by Maheshwari J. He acknowledged that the Parliament could not change the 'basic structure' or 'identity' of the constitution. But held that the impugned amendment did no such thing anyway. He cited a host of constitutional provisions including the preamble and the directive principles of state policy directed at economic justice.¹⁷ These, to him, indicated that the redressal of economic deprivation and disadvantage were important constitutional goals.¹⁸ Thus, in respect of the first question whether reservations based on economic criteria were permissible, he held that 'the economic backwardness of citizens can [be] the sole ground for providing reservation by affirmative action.'¹⁹

On evidence before the Court though was an unbroken line of authority going back to 1992 which had held that economic criterion *alone* could not be the basis of affirmative action under the constitution.²⁰ Maheshwari J found a convenient way to bypass this precedent:

On a contextual reading, it could reasonably be culled out that the observations, wherever occurring in the decisions of this Court, to the effect that reservation cannot be availed only on economic criteria, were to convey the principle that to avail the benefit of this affirmative action under Articles 15(4) and/or 15(5) and/or 16(4), as the case may be, the class concerned ought to be carrying some other disadvantage too and

¹⁷ Constitution of India 1950, pmb1, arts 38, 43, 46 and 47.

¹⁸ *Janhit* (n 1) [57]–[67].

¹⁹ *ibid* [65].

²⁰ *Indra Sawhney v Union of India* (1992) Supp (3) SCC 2178; *State of Kerala v NM Thomas* (1976) 2 SCC 3107, *MR Balaji v State of Mysore* AIR 1963 SC 649. See also Marc Galanter, 'Law and Caste in Modern India' (1963) 3 *Asian Survey* 544, 554.

not the economic disadvantage alone. The said decisions cannot be read to mean that if any class or section other than those covered by Articles 15(4) and/or 15(5) and/or 16(4) is suffering from disadvantage only due to economic conditions, the State can never take affirmative action qua that class or section...the observations of this Court in the past decisions that reservations cannot be claimed only on the economic criteria, apply only to class or classes covered by or seeking coverage under Articles 15(4) and/or 15(5) and/or 16(4); and else, this Court has not put a blanket ban on providing reservation for other sections who are disadvantaged due to economic conditions.²¹

The reasoning reveals two problems with the majority's understanding of grounds. First, the reasoning *assumes* rather than *justifies* that affirmative action under the constitution is open-ended in principle and could include affirmative action based on grounds not mentioned in the constitution. But until the impugned amendment was passed, there was no other form of affirmative action recognised in the text of the constitution other than affirmative action based on caste. The question whether a wholly new form of affirmative action based on economic status – a ground not listed under the equality code – could be conjured up by the Parliament was thus answered entirely in reference to the Parliament's presumed formal authority to do so and not substantive constitutional principles.

Second, the finding that reservations based on economic status *were* permissible under the constitution did not answer the question whether economic status could be the *sole* ground for affirmative action. In fact, the majority judgment overlooked the central claim advanced by the petitioners that the constitutional rationale for affirmative action was manifold and cumulative—based on social, educational, political and economic disadvantage. Instead, Maheshwari J read the existing case law to this effect as restricted to reservations based on

²¹ *Janhit* (n 1) [72]–[73].

caste. This allowed him to adopt a univalent view of reservations based on economic status as being about economic disadvantage alone.

In respect of the second question on the constitutional validity of the exclusion of SCs, STs and OBCs from the reservations for EWS, the finding was similarly brief and formal:

if the Parliament has considered it proper not to extend those classes covered by the existing clauses of Articles 15(4), 15(5) and 16(4) another benefit in terms of affirmative action of reservation carved out for other economically weaker sections, there is no reason to question this judgment of the Parliament. Obviously, for the reason that those classes are already provided with affirmative action in terms of reservation, in the wisdom of the Parliament, there was no need to extend them or any of their constituents yet another benefit in the affirmative action of reservation carved out for other economically weaker sections.²²

It could easily be seen that but for this exclusion, the entire balance of the general principles of equality and compensatory discrimination would be disturbed, with extra or excessive advantage being given to the classes already availing the benefit under Articles 15(4), 15(5) and 16(4).²³

if the classes for whom affirmative action is already in place are not excluded, the present exercise itself would be of unjustified discrimination.²⁴

²² *ibid* [78.2].

²³ *ibid* [80].

²⁴ *ibid* [81].

Again, the reasoning uses three assumptions to justify the exclusion of SCs, STs and OBCs that: (i) they are included elsewhere for reservation; (ii) including them in EWS would lead to extra or excessive advantage; and (iii) including them would be discriminatory. However, the Court did not engage with the evidence cited by the petitioners which showed that the poorest sections of the society are indeed SCs, STs and OBCs. It thus could not explain how being included in one type of reservation (on the basis of caste) perforce negated the eligibility of these classes from reservation of a different type (on the basis of economic status) or indeed made such inclusion discriminatory. The majority's reasoning essentially siloed caste and economic status into watertight categories which did not interact with one another; and whose interaction, if permitted, would give excessive advantage to those whose disadvantage was defined both by their caste and economic status.

In Bhat J's dissent he readily agreed with the majority on the first question but vociferously disagreed on the second. From the outset, Bhat J was clear that: 'the addition, or insertion of the 'economic criteria' for affirmative action in aid of the section of population who face deprivation due to poverty, in furtherance of Article 46, does not per se stray from the Constitutional principles, so as to alter, violate, or destroy its basic structure.'²⁵ But Bhat J did not directly answer the question whether economic criteria *alone* could be the basis of affirmative action under the constitution. Instead, he focussed primarily whether reservations based on economic status could *exclude* those who were covered by reservations based on caste.

Bhat J held that the exclusion was against (i) the prohibition of caste discrimination under article 15(1) of the constitution; (ii) protective discrimination based on caste under articles 15(4), 15(5) and 16(4); and (iii) protective discrimination for EWS under the newly minted articles 15(6) and 16(6) because they excluded the poorest and weakest amongst EWS.

²⁵ *ibid* [2] (Bhat J, dissenting).

He concluded that: ‘by excluding a large section of equally poor and destitute individuals – based on their social backwardness and legally acknowledged caste stigmatization – from the benefit of the new opportunities created for the poor, the amendment *practices* constitutionally prohibited forms of discrimination.’²⁶ There were no reasonable grounds for justifying such discrimination either. According to Bhat J, the fact that SCs, STs and OBCs were provided reservation elsewhere in the constitution did not answer the question why SCs, STs and OBCs, who comprised the poorest sections of the society, should be excluded from reservation meant for the poor.²⁷ Furthermore, materials on record contained no evidence:

that existing reservation policies have yielded such significant results, that a majority of [SCs, STs and OBCs] have risen above the circumstances which resulted in, or exacerbate, their marginalization and poverty. There is nothing to suggest, how, keeping out those who qualify for the benefit of this economic-criteria reservation, but belong to this large segment constituting 82% of the country’s population (SC, ST and OBC together), will advance the object of economically weaker sections of society.

The critical difference between the majority and the minority judgments in *Janhit* can be understood by contrasting their respective approaches to caste and economic status.

In the majority’s view, caste, was primarily social status. This was so because of the historical Hindu caste system which till today continues to divide people hierarchically and bestows privileges to those on the top and adversely affects those down the hierarchy, namely, and as the constitution identifies: ‘socially and educationally backward classes of citizens’ or ‘the Scheduled Castes and the Scheduled Tribes’ or simply ‘backward classes’.²⁸ Those at the

²⁶ *ibid* [101] (Bhat J, dissenting).

²⁷ *ibid* [171].

²⁸ Constitution of India 1950, arts 15(4), 15(5) and 16(4).

bottom or outside of the caste system suffer severe forms of ostracisation, marginalisation, stigmatisation, prejudice and stereotyping. According to the majority, these harms accrue because of the caste ‘identity’ or caste ‘status’ possessed by a person—one over which the person has no control since caste is passed at birth.

What the majority missed however was that material disadvantage suffered by the socially backward classes is also central to their caste status. That is, poverty or economic disadvantage is a feature of caste disadvantage in its own right—distinct from but related to social status. This is because in reality, the position of SCs, STs and OBCs is characterised by rampant extreme poverty.²⁹ Nearly half (44.4%) of the STs, one-third (29.2%) of the SCs and one-fourth (24.5%) of the OBCs are considered ‘multidimensionally poor’ as compared to 14.9% of the other population.³⁰

The majority in *Janhit* however failed to grasp the nature of caste as centrally mediated by economic status. On the flip side, *Janhit* also misinterpreted the nature of economic status as existing independent of caste. This univalent and siloed understanding of both caste and economic status led to the view that SCs, STs and OBCs when entitled to reservations on the basis of caste could be excluded from reservations on the basis of economic status. It was this exclusion that led to Bhat J declaring in his dissent that: ‘this Court has for the first time, in the seven decades of the republic, sanctioned an avowedly exclusionary and discriminatory principle.’³¹

B. SFFA v Harvard

²⁹ UNDP, Global Multidimensional Poverty Index (2021) <<https://hdr.undp.org/content/2021-global-multidimensional-poverty-index-mpi#/indicies/MPI>> last accessed 18 May 2024.

³⁰ *ibid.*

³¹ *Janhit* (n 1) [328] (Bhat J, dissenting).

SFFA involved a constitutional challenge to the race-based admissions policies of Harvard College and University of North Carolina on grounds that they violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.

For Harvard, race was a factor throughout the four-step admissions process alongside other considerations including academic, extracurricular, athletic, school support, and personal profile, such that it operated as ‘a determinative tip for’ a significant percentage ‘of all admitted African American and Hispanic applicants.’³² For UNC, race was considered ‘a factor’ in its three-step admissions process such that when an applicant is recommended they may be given ‘a substantial “plus” depending on the applicant’s race’.³³ Thus, in line with previous constitutional decisions, Harvard and UNC were using race neither wholesale as the only factor nor as a quota-system for admitting members of a preferred ethnic group.³⁴ Race was instead being used holistically as one factor amongst many.³⁵

Yet, according to the majority, race-based admissions failed constitutional scrutiny for four reasons. First, they did not pass the two-step constitutional strict scrutiny for race-based distinctions which asks (i) whether the racial classification is used to ‘further compelling governmental interests’ and (ii) whether the government’s use of race is ‘narrowly tailored’ or necessary to achieve that interest.³⁶ Second, race-based admissions stereotyped members of different ethnic groups. Third, race-based admissions operated as a ‘negative’ to disadvantage members of some ethnic groups. Fourth, race-based admissions had gone on for too long when they should have ended by now.

³² *SFFA* (n 6).

³³ *ibid.*

³⁴ *Grutter v Bollinger* (2003) 539 US 306, 315–318.

³⁵ *ibid* 317.

³⁶ *ibid* 326; *Adarand Constructors, Inc v Peña* (1995) 515 US 200, 227; *Fisher v University of Texas at Austin* (2016) 570 US 297, 311–312.

With this the majority overturned almost fifty years strong acceptance of ‘diversity’ as a compelling interest for justifying race-based affirmative action.³⁷ Diversity—the characteristic of a student body comprising a wide demographic and a range of perspectives—was deemed to be too incoherent and elusive to be put through strict scrutiny. In the words of the majority, there was no way of measuring ‘how a particular mix of minority students’ produced ‘engaged and productive citizens’ or effective ‘future leaders’.³⁸ The goals a diverse student body served were thus, as Robert CJ put it, ‘standardless’³⁹ or ‘inescapably imponderable’.⁴⁰

Furthermore, the Court found little connection between the means employed to achieve a racially diverse student body because the racial categories the admissions relied on were overbroad (‘Asians’ which showed little regard for the difference between ‘South Asians’ versus ‘East Asians’), arbitrary (‘Hispanic’) and underinclusive (to the exclusion of those from the Middle East). The Court thus considered that the admissions process inevitably ended up stereotyping members of some ethnic groups such as African-Americans (deemed to be underprivileged and homogenous) while disadvantaging others such as Asian-Americans (deemed to be too privileged and hence losing out to African-Americans in college admissions).

Three distinct ways in which race was characterised led the Court to draw unwarranted conclusions about the operation of race in Harvard and UNC’s admissions programmes.

First, race was understood objectively and categorically as skin-colour or national or ethnic origin and as signifying different ‘races’ or ethnic groups—each of which had to be

³⁷ *Regents of the University of California v Bakke* (1978) 438 US 265. Though it has been argued that in effect there will be little impact on college admissions policies and that ‘with very slight alterations, colleges can continue to admit students exactly as they have since at least the 1990s’. Peter Salib and Gua Krishnamurthi, ‘The Goose and the Gander: How Conservative Precedents Will Save Campus Affirmative Action’ (2023) 102 Texas Law Review 123.

³⁸ *SFFA* (n 6) (Roberts CJ).

³⁹ *ibid*.

⁴⁰ *ibid* [74].

considered as distinct from the other and accounted for in college admissions on its own. According to the majority, ‘Asians’ were treated without distinction as to ‘South Asians’ and ‘East Asians’ and without further regard to the many national and ethnic origins which comprised each category such as Indian, Pakistani and Bangladeshi on the one hand and Japanese, Koreans and Chinese on the other hand. This indicated to the majority that race in admissions was being used as a stereotype, ignoring Asians as indistinguishable and more privileged, and ultimately in no need of affirmative action. Likewise, the lack of any reference to Middle Eastern students indicated a less than thorough reference to race when some races were patently absent from consideration.

Most of all, the majority found that Black students, who were the main beneficiaries of affirmative action, were themselves stereotyped as a homogenous category irrespective of regional and economic differences. As Thomas J stated in his concurring opinion: ‘A black person from rural Alabama surely has different experiences than a black person from Manhattan or a black first-generation immigrant from Nigeria, in the same way that a white person from rural Vermont has a different perspective than a white person from Houston, Texas’.⁴¹ The majority however thought that the affirmative action programmes at Harvard and UNC had assumed that members of a racial group shared ‘the exact same experiences and viewpoints’.⁴²

But there was little evidence that the admissions programmes treated race as a homogenising factor based on skin colour at the expense of other relevant factors.⁴³ There was no evidence to show that each candidate for whom race was considered a relevant factor was treated as necessarily having *the* experience or viewpoint which coincided with others of the same racial group. The majority’s assumption about the admissions programmes thus seems to

⁴¹ *SFFA* (n 6) 48 (Thomas J, concurring).

⁴² *ibid.*

⁴³ On the historical and continued use of assumptions rather than fact or evidence in affirmative action jurisprudence, see Meera E Deo, ‘Affirmative Action Assumptions’ (2019) 52 UC Davis Law Review 2407.

be based on *its own* categorical thinking about race where race manifested as objective racial categories and signified nothing more.

More importantly, beyond being objectively determined by criteria such as colour or national or ethnic origin, to the majority, racial categories did not signify any racial disadvantage or discrimination at the group level.⁴⁴ In fact, the majority bypassed the question of racial disadvantage or discrimination entirely and operated within a liberal paradigm where the ground of race determined objective characteristics of an individual such as colour, national or ethnic origin, but said nothing about the position of social groups signified by those racial grounds.

Second, and consequently, race was understood as an individual characteristic rather than as a characteristic which attached to individuals as members of racialised groups. According to the majority, race was purely an individual matter where racialised experience was to be understood through ‘that student’s courage and determination’.⁴⁵ Students were thus to be assessed based on ‘the touchstone of an individual’s identity [that is] challenges bested, skills built, or lessons learned’ and through ‘his or her experiences as an individual—not on the basis of race.’⁴⁶ Experiences of race or racial discrimination were thus isolated from the historical, economic, social, cultural and political context in which they exist; and where race is a tool for dominating racialised groups based on characteristics such as skin colour or national or ethnic origin. An individual’s response to such group-based discrimination is thus framed by historical, economic, social, cultural and political context in which group-based domination and subordination is located.⁴⁷ For the majority however, there was no such thing

⁴⁴ Darren Lenard Hutchinson, ‘Progressive Race Blindness?: Individual Identity, Group Politics, and Reform’ (2001) 49 *UCLA Law Review* 1455; Richard T Ford, ‘Race As Culture? Why Not?’ (2000) 47 *UCLA Law Review* 1803; K Anthony Appiah, ‘Race, Culture, Identity: Misunderstood Connections’ in K Anthony Appiah and Amy Gutman, *Color Consciousness: The Political Morality of Race* (Princeton University Press 1996).

⁴⁵ *SFFA* (n 6) 39–40 (Roberts CJ).

⁴⁶ *ibid.*

⁴⁷ In particular, Thomas J, in his concurring opinion, rejected the notion of ‘antisubordination’ as underlying the Fourteenth Amendment in favour of colourblindness. *SFFA* (n 6) 17 (Thomas J, concurring).

as group-based domination and subordination at a structural level. Race and racial discrimination were instead characteristics and experiences which operated entirely at an individual level. They could thus be overcome by individuals with courage and determination; and by institutions with a commitment to ‘colourblindness’ which demands wilfully turning a blind eye to how race transpires in reality as racism or racial discrimination.

Third, the majority considered race as ‘determinative’⁴⁸ in college admissions or as Roberts CJ described, what decisions ‘turned on’⁴⁹ or as Gorsuch J described, what colleges ‘routinely discriminate on’.⁵⁰ The majority clearly overestimated the role race played in admissions. The Court had before itself evidence that applications were considered ‘holistically’.⁵¹ A checkbox for a particular race was thus *not* determinative in a decision. A reported checkbox for a particular race was considered alongside a range of factors including economic and regional profiles of the candidates to make sense of the whole application. Race as an identity or social status with which people self-identified by ticking a checkbox in an application was thus not being isolated as such in applications; there was no evidence that in a single admissions decision, race was the only or the main factor on the basis of which the decision was made. The majority however was convinced that it *was* race alone that was dictating some admissions decisions.

The categorical, individual and determinative characterisation of race in *SFFA* reduced race to one thing: an objective characteristic possessed by an individual whose response to that characteristic determined them entirely. The only ‘valency’ or disadvantage that attached to race was thus at an individual not group level and such disadvantage was primarily one of status where an individual was judged poorly because of their status determined by a personal

⁴⁸ *SFFA* (n 6) 28.

⁴⁹ *ibid* 16.

⁵⁰ *ibid* 2 (Gorsuch J, concurring).

⁵¹ *ibid* 47–48 (Sotomayor J, dissenting).

characteristic. There was no trace of such disadvantage being considered economic or political and as accruing to racialised groups as a whole.

3. GROUNDS AS MULTIVALENT

Why does the construction of grounds as univalent matter? This section shows that construing caste and race as univalent, that is, embodying one type of disadvantage to do with status and status alone, misconstrues the reality that caste and race are categories equally defined by material disadvantage.

In Nancy Fraser's work she examines how social movements today are defined by the 'politics of difference' or the 'struggle for recognition' where group identities have supplanted class interest.⁵² She shows how social or cultural differences in respect of 'axes of injustice'⁵³ such as gender and race are ridden by material inequality and proves that this dichotomy between status and class inequality is unsustainable. Instead, Fraser sees gender and race as paradigmatic 'bivalent collectivities' which are understood as 'differentiated as collectivities by virtue of both the political-economic structure and the cultural-valuational structure of society. When oppressed or subordinated, therefore, they suffer injustices that are traceable to both political economy and culture simultaneously'.⁵⁴ Thus, according to her, justice requires both redistribution and recognition which in turn requires theorising 'the ways in which economic disadvantage and cultural disrespect are currently entwined with and support one another.'⁵⁵

⁵² Fraser, *Justice Interruptus* (n 8) 11.

⁵³ *ibid* 12.

⁵⁴ *ibid* 19.

⁵⁵ *ibid* 12.

Other theories of justice by John Rawls,⁵⁶ Amartya Sen,⁵⁷ and Martha Nussbaum⁵⁸ also reject the either/or framing of disadvantage as either social or material but not both. In Iris Marion Young's work in particular, she expands the bivalent framing of disadvantage to include three other categories, including marginalisation, powerlessness and violence.⁵⁹ Young thus prefers 'a plural explication of the concept of oppression'⁶⁰ since according to her 'it is not possible to define a single set of criteria that describe the condition of oppression of all [oppressed] groups.'⁶¹ Young's expansion of bivalence can be characterised as a preference for 'multivalence' in understanding the disadvantage/oppression suffered on the basis of grounds.

Theories of discrimination law reflect this multivalent view of grounds.⁶² In her seminal work, Sandra Fredman poses the question whether there is a unifying principle for identifying 'grounds' in discrimination law.⁶³ She shows that the recognition of paradigmatic grounds such as race and gender across jurisdictions has resulted from the 'creative tension' between 'political activism, constitutional instruments, statutes, judicial interpretation and international and regional instruments.'⁶⁴ This creative tension has in turn generated, what Fredman calls, 'a constellation of factors, which include immutability, or lack of autonomy, political exclusion, denial of dignity, and history of disadvantage' which help identify a ground in principle.⁶⁵ Thus, according to Fredman 'ultimately, there is no single element that can give a definitive answer to whether a characteristic should be within the inner circle of specially protected characteristics.'⁶⁶ For example, while race has been recognised as a ground for its immutability,

⁵⁶ John Rawls, *A Theory of Justice* (1st edn, Oxford University Press 1971).

⁵⁷ Amartya Sen, *Inequality Reexamined* (Clarendon Press 1992); Amartya Sen, *Development as Freedom* (Oxford University Press 1999).

⁵⁸ Martha Nussbaum, *Women and Human Development* (Cambridge University Press 2001).

⁵⁹ Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 1990).

⁶⁰ *ibid* 42.

⁶¹ *ibid* 40.

⁶² See Sujit Choudhry, 'Distribution vs. Recognition: The Case of Anti-Discrimination Laws' (2000) 9 *George Mason Law Review* 145; Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press 2015).

⁶³ Sandra Fredman, *Discrimination Law* (3rd edn, Oxford University Press 2022) 168–232.

⁶⁴ *ibid* 170.

⁶⁵ *ibid* 206.

⁶⁶ *ibid* 218.

religion is not immutable but has been considered so because of the loss of autonomy in having to change one's chosen religion. In contrast, disability may be mutable as it is considered an 'evolving concept'⁶⁷ but it is yet considered a ground for the political exclusion, denial of dignity and history of disadvantage associated with it.

What is clear is that grounds are not chosen *as grounds* because they signify one particular type of disadvantage (to do with social status) alone. Each ground may be construed as embodying a range of disadvantages which include social, cultural, economic, political, educational disadvantages which manifest in different kinds of harms—stereotyping, prejudice, loss of autonomy or dignity, social exclusion, violence etc. It is in this sense that grounds may be considered multivalent or as representing a whole range of disadvantages.

Grounds may also be multivalent in another sense where each ground operates not as a silo but as intersecting with other grounds such that the disadvantages associated with a particular ground interact with disadvantages of other grounds.⁶⁸ For example, the economic maldistribution at the heart of class or economic status as a ground may interact with economic maldistribution in gender; but also, that economic maldistribution of class or economic status would be interacting with and exacerbating other gendered disadvantages such as sexual harassment, domestic violence, stereotypes, prejudice, lack of voice etc.⁶⁹

Grounds are thus multivalent in two ways—first, as embodying a range of disadvantages simultaneously; and second, as intersecting with a range of disadvantages associated with other grounds.

This layered multivalence of grounds is what the courts missed in *Janhit* and *SFFA*.

⁶⁷ United Nations Convention on the Rights of Persons with Disabilities, adopted by General Assembly on 24 January 2007 (A/RES/61/106), pmb1 (e).

⁶⁸ Iyiola Solanke, 'Infusing the Silos in the Equality Act 2010 with Synergy' (2011) 40 *Industrial Law Journal* 336; Iyiola Solanke, 'Putting Race and Gender Together: A New Approach to Intersectionality' (2009) 72 *Modern Law Review* 723.

⁶⁹ Shreya Atrey, *Intersectional Discrimination* (Oxford University Press 2019) ch 2.

In *Janhit*, as the previous section showed, the majority considered caste and economic status as distinct grounds of affirmative action, thus making an apparent distinction between caste as being about social status and economic status as being about materiality. This implicit conceptual segregation of disadvantage underlying each ground led to the majority approving the exclusion of those disadvantaged by caste from affirmative action based on economic status.

This thinking ignores how caste and economic status are implicated with one another.⁷⁰ Statistics are key in understanding this point. In Khalid Khan's forensic exposition, he uses indicators from higher education and employment (sectors to which EWS reservations apply) to show the precise relationship between poverty and caste status and in particular, the concentration of poverty amongst SCs, STs and OBCs.⁷¹ Khan uses data from the 75th national sample survey which divides the population into quintiles or five equal groups, each comprising 20% of the population, based on monthly per capita consumer expenditure (MPCE). He takes the example of higher education degrees as a measure to test how each quintile fares. He finds that while 8% of India's total population has a higher education degree, only 2.5% belong to the lowest quintile versus 27% belonging to the top quintile. In the lowest quintile, only 0.92% of STs, 1.9% of SCs and 2.8% of Hindu other backward classes (HOBCs) have higher education degrees. In comparison, 6.8% of Hindu high-castes (HHCs) have a higher education degree in the lowest quintile. He finds that the percentage of people with a higher education degree is highest amongst HHCs in every quintile while SCs, STs and Muslims lie at the bottom of all.

⁷⁰ The Mandal Commission or the Socially and Educationally Backward Classes Commission, Report (vol I, 1979) <<https://www.ncbc.nic.in/Writereaddata/Mandal%20Commission%20Report%20of%20the%201st%20Part%20English635228715105764974.pdf>> last accessed 18 May 2024. See generally Anupama Rao, *The Caste Question: Dalits and the Politics of Modern India* (University of California Press 2009); Anand Teltumbde, *The Persistence of Caste* (Zed Books 2010); Surinder Jodhka, *Caste in Contemporary India* (2nd edn, Routledge 2017); Andre Beteille, *Caste, Class and Power* (3rd edn, Oxford India Paperbacks 2012); Kancha Illiah Shepherd, *Why I am Not a Hindu* (Sage 2019); Annapurna Waughray, 'Caste Discrimination and Minority Rights: The Case of India's Dalits' (2010) 17 *International Journal on Minority and Group Rights* 327.

⁷¹ Khalid Khan, 'EWS Quota: Why Poverty Alone Can't Be a Basis for Reservation' (18 Nov 2022) *The Wire*.

These statistics make it plain that caste status and poverty are deeply intertwined. Specifically, with respect to affirmative action, the statistics show that: (i) any measure of poverty or economic status which fails to account for caste status fails to identify *who* is actually poor for the purposes of affirmative action; and (ii) that worse still is a measure which explicitly excludes SCs, STs and OBCs who are the most economically deprived sections in India.

Additionally, there is a threshold issue with the ground of economic status. The government's current threshold for EWS is so high that it fails to be a measure of 'poverty' or being 'economically weak' in any meaningful way. EWS have been defined in terms of criteria such as annual family income of less than \$10,000 (800,000 rupees) a year or agricultural landholding of less than two hectares (five acres). Economists like Ashwini Deshpande estimate that only about 2% households in India have an annual family income above this threshold.⁷² This means nearly 98% of the country's households are eligible for reservations for being 'economically weak'. A 'quota' for 98% however makes no sense. And if there is such a quota, there are good reasons to predict that it will work to the benefit of the most advantaged sections. The EWS reservation is thus rightly seen as a solipsistic move on the part of the current government to pander to their voting base of upper-castes middle-class Indians by giving them more of what they already have: social, educational, economic and political privilege.⁷³ The result is that affirmative action on the basis of economic status has essentially become affirmative action for high caste Hindus, who are, in reality, neither economically nor socially disadvantaged—a result perhaps more perverse than not having affirmative action based on economic status all together.

⁷² Shreehari Paliath, 'EWS Reservation Is Very Much A Caste-Based Quota' (10 November 2022) <<https://www.indiaspend.com/indiaspend-interviews/ews-reservation-is-very-much-a-caste-based-quota-841902>> last accessed 18 May 2024.

⁷³ Faraz Ahmad, 'Is EWS Reservation an Appeasement of Upper Caste?' (12 November 2022) 60 Mainstream <<https://www.mainstreamweekly.net/article12866.html>> last accessed 18 May 2024.

These issues are mirrored in *SFFA* with its univalent view of race.

First, the majority's view of race, as described in the previous section, was categorical or simply about the division of the demographic into racial categories such as Asian, Arab, Hispanic, African American, Caucasian etc. This, 'simple criterial view'⁷⁴ ignored how race could instead be accounted for as a social construct and as a historical and continuing system of disadvantage, especially material disadvantage.⁷⁵ In fact, the majority made no reference to economic, educational or political disadvantage associated with race at all and instead adopted, what Sotomayor J in her dissent called, 'policy preferences about what race in America should be like, but is not'.⁷⁶ In contrast, Sotomayor J, understood race as being defined by 'interlocking' disadvantages.⁷⁷

Jackson J, the sole Black woman on the bench, too adopted a multivalent understanding of race in her dissent explicitly. From the outset, she premised her analysis not on racial categories but on 'race-based disadvantage' or 'race-based gaps' between Americans.⁷⁸ Moreover, race-based disadvantage for her was 'intergenerational' and spanned across all major indicators of wealth, income, home ownership, educational qualifications, employment levels, health and life expectancy.⁷⁹ Jackson J thus insisted on focussing on this multivalent 'racial disparity unblinkingly'⁸⁰ and expounded upon 'the universal benefits of considering race' in affirmative action programmes. The majority however chose racial blindness because it considered race simply as racial categories and found that racial categories in admissions seemed to do little but stereotype people. But it was not admissions that stereotyped people; it

⁷⁴ K Anthony Appiah, 'Race, Culture, Identity: Misunderstood Connections' (1994) Tanner Lectures on Human Values.

⁷⁵ Ian F Haney Lopez, 'The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice' (1994) 1 Harvard Civil Rights-Civil Liberties Law Review 29; Robert S Chang, 'Critiquing "Race" and Its Uses: Critical Race Theory's Uncompleted Argument' in Francisco Valdes, Jerome McCristal Culp and Angela P Harris (eds), *Crossroads, Directions, and a New Critical Race Theory* (Temple University Press 2002).

⁷⁶ *SFFA* (n 6) 38 (Sotomayor J, dissenting).

⁷⁷ *ibid* 19–20 (Sotomayor J, dissenting).

⁷⁸ *ibid* 1, 21, 26 (Jackson J, dissenting).

⁷⁹ *ibid* 11–14 (Jackson J, dissenting).

⁸⁰ *ibid* 26 (Jackson J, dissenting).

was the majority's assumption that race was indeed racial categories. Its flawed understanding of what race is thus led to a flawed understanding of what it did in affirmative action programmes (address status not material disadvantages suffered by racialised groups). The minority's understanding of race as signifying multivalent disadvantage instead led to an understanding of race-based affirmative action as addressing multivalent disadvantage.

Second, in trying to prohibit the use of race as a stereotype the majority allowed race to be considered as an individual characteristic vulnerable to stereotyping all the same. This is most obvious in Roberts CJ's majority opinion where he stated that 'nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.'⁸¹ This suggestion though carried with it greater risk of stereotyping than the majority's estimation of stereotyping in the impugned affirmative action programmes. While Harvard and UNC's affirmative action programmes allowed for race to be considered one amongst many factors in college admissions, Robert CJ almost compels individuals to write college applications through a racialised lens, thereby stereotyping themselves in the hope of admission.

On the other hand, the minority's allowance to admissions programmes to continue using race via self-reporting through a check box carried minimal risk of stereotyping either by students themselves or by colleges. This was because race according to the minority was to be considered not in terms of its status alone, i.e. in terms of socio-cultural significance of self-reported racial categories, but in terms of the material disadvantages associated with race. Thus, the only way to make sense of race for a particular candidate was to assess not only the candidate, but also, race itself holistically. Such subjective analysis would have avoided compelling students to self-racialise themselves to tell an individualised and essentialised story of their race, which is now an inevitable and unfortunate result of Robert CJ's use of race.

⁸¹ *ibid* 39 (Roberts CJ).

Finally, the majority's view of race as 'determinative'⁸² and the minority's view of race as 'only one factor out of many'⁸³ in affirmative action programmes, too maps onto the univalent-multivalent binary squarely. Race, according to the majority, was performing a determinative role in college admissions only because it was considered in this rigid way of being reduced to an objective and individual characteristic which could in turn perform a determinative role. If it were not considered in this way, it could not have been considered to play a determinative role in admissions. The alternative, preferred by Harvard, UNC and the minority, of construing race holistically, in a 'limited way'⁸⁴ and as alongside 'a multitude of dimensions'⁸⁵ perforce excluded a determinative role of racial categories. The difference between the views on the role of race in college admissions thus rests on the meaning of race and whether it is considered as reflecting racial categories or as representing a range of disadvantages that attach to racialised groups.

What this means is that there are no pure statuses or identity categories called caste and race. The Supreme Court of India and the Supreme Court of the United States however conceived of caste and race respectively as status and status alone. They thus removed caste and race from their material implications, as if caste and race as statuses are not saturated by material disadvantage especially economic and political disadvantages, and also disadvantages related to a range of other indicators such as education, employment, health, security etc, as well as other grounds such as gender, religion, sexuality, disability, age etc.

4. AFFIRMATIVE ACTION AS A TRANSFORMATIVE REMEDY

⁸² *ibid* (Roberts CJ).

⁸³ *ibid* 14 (Sotomayor J, dissenting).

⁸⁴ *ibid* 31, 44, 48 (Sotomayor J, dissenting).

⁸⁵ *ibid* 44 (Sotomayor J, dissenting).

In both *Janhit* and *SFFA* the courts expressed that: (i) affirmative action had run its course, that in fact, affirmative action had gone on for too long and needed to be either stopped or overhauled,⁸⁶ because (ii) affirmative action programmes on the basis of caste and race only reified caste and race making them more permanent than before.⁸⁷

This fear is shared by theorists who consider affirmative action to be reinforcing the very identities or grounds which are the basis of discrimination and disadvantage.⁸⁸ The fear is vocalised most forcefully by Fraser, according to whom, affirmative action does not *dedifferentiate* sufficiently the identities or grounds on which it is based.⁸⁹ Fraser thus considers affirmative action a limited remedy, one which is not capable of transformation—i.e. changing the very conditions which give rise to disadvantage or discrimination based on grounds. For her, affirmative action is restricted to its redistributive role—of redistributing resources and as incapable of dismantling the social and class-based statuses which underlie redistributive misallocation.

Fraser however underestimates affirmative action's transformative potential. In particular, her understanding of affirmative action sits uncomfortably with her notion of injustice as being about redistribution and recognition both. She considers injustice or disadvantage as analytically indistinct in that redistribution and recognition are seen as co-existing for grounds such as race and gender. Yet, Fraser considers affirmative action to be

⁸⁶ *Janhit* (n 1) (Bela Trivedi J, concurring); *SFFA* (n 6) (Thomas J, concurring).

⁸⁷ *Janhit* (n 1) (Paridawala J, concurring); *SFFA* (n 6) (Thomas J, concurring).

⁸⁸ Smitha Narula, 'Equal by Law, Unequal by Caste: The Untouchable Condition in Critical Race Perspective' (2008) 26 Wisconsin International Law Journal 255, 336; Zoya Hassan, *Politics of Inclusion: Caste, Minorities and Affirmative Action* (OUP 2011) 38; Alan D Freeman, 'Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine' (1978) 62 Minnesota Law Review 1049.

⁸⁹ Nancy Fraser, 'Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation' (1996) The Tanner Lectures on Human Values, at 45. See also a similar but distinct critique of affirmative action as feeding into a rigid and misguided system of merit and thus lacking transformative potential: Susan Sturm and Lani Guinier, 'The Future of Affirmative Action: Reclaiming the Innovative Ideal' (1996) 84 California Law Review 953. This fear is also expressed sometimes as a fear of 'balkanisation'. See Robert C Post, 'The Supreme Court, 2002 Term-Foreword: Fashioning the Legal Constitution: Culture, Courts, and the Law' (2003) 117 Harvard Law Review 4; Reva B Siegel, 'From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases' (2011) 120 Yale Law Journal 1278.

servicing an analytically distinct aim of redistribution and as incapable of addressing status-based disadvantage. Once having made a case for not treating disadvantages associated with grounds as analytically distinct, her retreat to univalence in analysing affirmative action based on grounds as addressing only one particular type of disadvantage is unconvincing.

Thus, it is not affirmative action per se, but Fraser's unexpected retreat to univalence that feeds into affirmative action itself being construed as normatively limited in what it does. As we saw in the previous section, a univalent view of grounds makes affirmative action also univalent, that is, capable of addressing just one kind of discrimination or disadvantage at a time. In the case of India, the Supreme Court used a univalent understanding of economic status as pertaining to economic, but not caste, disadvantage to exclude those disadvantaged by their caste-status from affirmative action based on economic status. In the case of the US, the Supreme Court used a univalent understanding of race as objective racial categories divorced from their social, historical and material dimensions, to do away with affirmative action based on race (save for the individualised consideration of race in college admissions). In both cases then, a univalent view of grounds as either status or class but not both, fed into delimiting affirmative action as a remedy which addressed either status or class at a time.

This though is a misunderstanding of affirmative action as it is capable of addressing a range of disadvantages including both status and class-based disadvantages.

It is true that affirmative action programmes whether in the form of reservations/quotas or in the form of allowance for consideration of grounds in decision-making such as in tie-break situations or in composing a diverse student body or workforce, are first and foremost, redistributive in nature. That is, they seek to reallocate resources from one social group to another by providing a benefit to those belonging to a disadvantaged social group. In doing so, affirmative action programmes seek to change class relations by minimising or eliminating the

advantage gaps between social groups.⁹⁰ For example, by enabling those previously excluded or marginalised from full-time employment to participate in the economy, affirmative action programmes redistribute misallocated resources of income and wealth between social groups. This reallocation of resources can in turn enhance mental and physical wellbeing when people are able to take care of their material needs and feel secure in doing so. Material wellbeing thus also enables autonomy and self-worth in allowing people to pursue a good life of their own making and on their own terms.

In addressing material inequality this way, affirmative action activates greater social recognition given the correlation between class and status.⁹¹ For example, affirmative action programmes which target education and employment dismantle the hierarchies of status between different racial groups, genders, castes etc—where the privileged groups are considered superior to disadvantaged groups *because* they have better education qualifications or employment opportunities.⁹² Reallocation of opportunities thus directly affects status-based discrimination when the latter is derived from misallocation. Evidence that members of disadvantaged groups served by affirmative action programmes perform better or on par with members of the dominant groups also helps upturn the stereotypes associated with oppressed groups such as being unmeritorious and hence undeserving of affirmative action.⁹³ Likewise, evidence suggests that affirmative action programmes do not feed into ‘internalisation’ of

⁹⁰ There is clear evidence that affirmative action does what it intends to do in this respect in that without affirmative action the opportunities meant to be reallocated continue to be allocated to and concentrated amongst privileged social groups. Richard Brooks, Kyle Rozema and Sarath Sanga, ‘Affirmative Action and Racial Diversity in US Law Schools, 1980-2021’ (2023) Northwestern Public Law Research Paper No 23-50.

⁹¹ Ashwini Deshpande, ‘The 10% Quota: Is Caste Still an Indicator of Backwardness?’ (2019) 54 *Economic and Political Weekly*.

⁹² Zoya Hassan, *Politics of Inclusion: Caste, Minorities and Affirmative Action* (OUP 2011) 337.

⁹³ Adam Chilton et al, ‘Assessing Affirmative Action’s Diversity Rationale’ (2021) 122 *Columbia Law Review* 331; Surendrakumar Bagde, Dennis Epple and Lowell Taylor, ‘Does Affirmative Action Work? Caste, Gender, College Quality, and Academic Success in India’ (2016) 106 *American Economic Review* 1495. Cf Richard H Sander, ‘A Systemic Analysis of Affirmative Action in American Law Schools’ (2004) 57 *Stanford Law Review* 36.

stereotypes attached to social groups by its beneficiaries.⁹⁴ This is not to deny that affirmative action policies can leave its actual and potential beneficiaries vulnerable to stigmatisation and mistreatment.⁹⁵ But these costs, may ‘in the long run’⁹⁶ or ‘on balance’⁹⁷ tip in the favour of destigmatising the statuses subject of affirmative action precisely *because* of the change in the material conditions which underlie these statuses. By doing so, affirmative action programmes chip away at the salience of the statuses associated with grounds. As Jackson J put it in *SFFA*:

[affirmative action] programs also reflect universities’ clear-eyed optimism that, one day, race will no longer matter... Once trained, those UNC students who have thrived in the university’s diverse learning environment are well equipped to make lasting contributions in a variety of realms and with a variety of colleagues, which, in turn, will steadily decrease the salience of race for future generations.⁹⁸

It is in this sense that affirmative action programmes, ‘carry with them the seeds of their own destruction’.⁹⁹ That is, affirmative action is capable of destabilising the very statuses which give rise to its need and hence ultimately dismantling itself. Far from taking race or caste *too* seriously as identities or statuses, affirmative action policies take race and caste only seriously *enough*, treating them as basis for redressing redistributive disadvantage and through that opening up transformative possibilities for destabilising statuses themselves.

A multivalent view regards both the redistributive as well as the class-based status implications of materiality seriously. It provides a link between the redistributive /

⁹⁴ Ashwini Deshpande, ‘Double Jeopardy? Stigma of Identity and Affirmative Action’ (2019) 46 *The Review of Black Political Economy* 38.

⁹⁵ *ibid*; Angela Onwuachi-Willig, Emily Hough and Mary Campbell, ‘Which Came First—Stigma or Affirmative Action?’ (2008) 96 *California Law Review* 1299.

⁹⁶ Marc Galanter, *Competing Equalities: Law and the Backward Classes in India* (OUP 1991).

⁹⁷ Randall Kennedy, *For Discrimination: Race, Affirmative Action and the Law* (Patheon Books 2013).

⁹⁸ *SFFA* (n 6) 24 (Jackson J, dissenting).

⁹⁹ *ibid* 22 (Jackson J, dissenting).

reallocational aspects of affirmative action, class-based status issues, and redistributive and status-based issues related to race and caste, all at the same time. It is this link which is missed by Fraser who ultimately concluded that affirmative action policies only reify statuses.¹⁰⁰ In missing this link, quite surprisingly, Fraser forgot how status-based classifications such as race and caste operate as systems of economic oppression. The historical roots of race in slavery and segregation in the US, and the employment-related understanding of caste in India where Dalits perform the most menial and lowest-paid labour in India, are fundamentally tangled with economic exploitation.¹⁰¹ That economic exploitation of racialised and lower caste groups formed the basis of their status-subordination and vice versa needs no rehearsing. Yet, the material conditions of racialised and lower caste groups are somehow segregated from status-based considerations to mistakenly lend to the idea that affirmative action which addresses material conditions reifies rather than effaces racial or caste-based statuses.¹⁰² This is unintelligible because in addressing the underlining material conditions which give rise to status-based differences, affirmative action cannot just leave status-based differences intact. Affirmative action instead must be seen as ‘reducing the correlation between race and class’.¹⁰³

This does not mean that affirmative action alone is sufficient for transformative change.¹⁰⁴ That would be denying the necessity of other remedies targeting broader political

¹⁰⁰ Though this charge may also be levelled at those who deem affirmative action as entirely justified through an ‘instrumental’ or ‘non-remedial’ lens such as diversity which does not take seriously historical and existing socio-economic and political inequalities between groups. See Paul Frymer and John D Skrentny, ‘The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America’ (2004) 36 Connecticut Law Review 67.

¹⁰¹ Ruth Bader Ginsburg and Deborah Jones Merritt, ‘Affirmative Action: An International Human Rights Dialogue’ (1999) 21 Cardozo Law Review 253, 254.

¹⁰² How much affirmative action does so in reality is an empirical question dependent on the specific contours of affirmative action programmes. This article argues against the *a priori* view that affirmative action is incapable of doing so at all.

¹⁰³ Daniel Sabbagh, ‘The Paradox of Decategorization: Deinstitutionalizing Race Through Race-Based Affirmative Action in the United States’ in Mathias Möschel, Costanza Hermanin and Michele Grigolo (eds), *Fighting Discrimination in Europe: The Case for a Race-Conscious Approach* (Routledge 2013).

¹⁰⁴ Transformative change through affirmative action is especially possible, as Daniel Sabbagh argues, ‘in countries where the beneficiaries are numerical majorities, affirmative action programs are more extensive and their transformative purpose is unusually explicit.’ Daniel Sabbagh, ‘Affirmative Action: The U.S. Experience in Comparative Perspective’ (2011) 140 Daedalus 109.

economy, modes of production, personal taxation, immigration policy etc.¹⁰⁵ Equally, that would be denying the need for targeted measures against stigmatisation, stereotyping, prejudices etc—disadvantages or harms which may continue to operate based on the subjective belief of inferiority of one racial, ethnic or caste group over another, even when broader political economy transforms. The point is that affirmative action exists alongside other remedies which act collectively to address multivalent disadvantage and that it is futile to draw analytical distinctions between types of remedies given that remedies do not act in an environment where the disadvantages they attack exist in silos. When disadvantage is multivalent, remedies, including affirmative action, attack disadvantage in a multivalent sense.

5. CONCLUSION

While courts had hitherto ‘been sophisticated in unpacking the notion of relative group disadvantage [recognising] that disadvantage may be political, socio-cultural, material—more often, a complex combination of these different facets of disadvantage’;¹⁰⁶ recent affirmative action jurisprudence has adopted ‘a blinkered view of disadvantage’.¹⁰⁷

This article has shown that this blinkered view lies in a univalent understanding of grounds, that makes affirmative action in turn univalent. It has argued that affirmative action *is* transformative and capable of addressing a wide range of disadvantages to do with social status, class status, material deprivation, political exclusion, educational attainment etc, *if*, the grounds that it is based on are understood as representing this wide range of disadvantage. The understanding of grounds is thus fundamental to both theorising and adjudicating on affirmative action. The key is thus in asking what do grounds represent? Understood as

¹⁰⁵ See for e.g. Yuvraj Joshi, ‘Affirmative Action as Transitional Justice’ [2020] *Wisconsin Law Review* 1.

¹⁰⁶ Khaitan (n 63) 51.

¹⁰⁷ *ibid.*

representing a range of co-constituted disadvantages—a multivalent understanding of grounds starts to open ways of conceiving the remedies for addressing disadvantage too broadly.