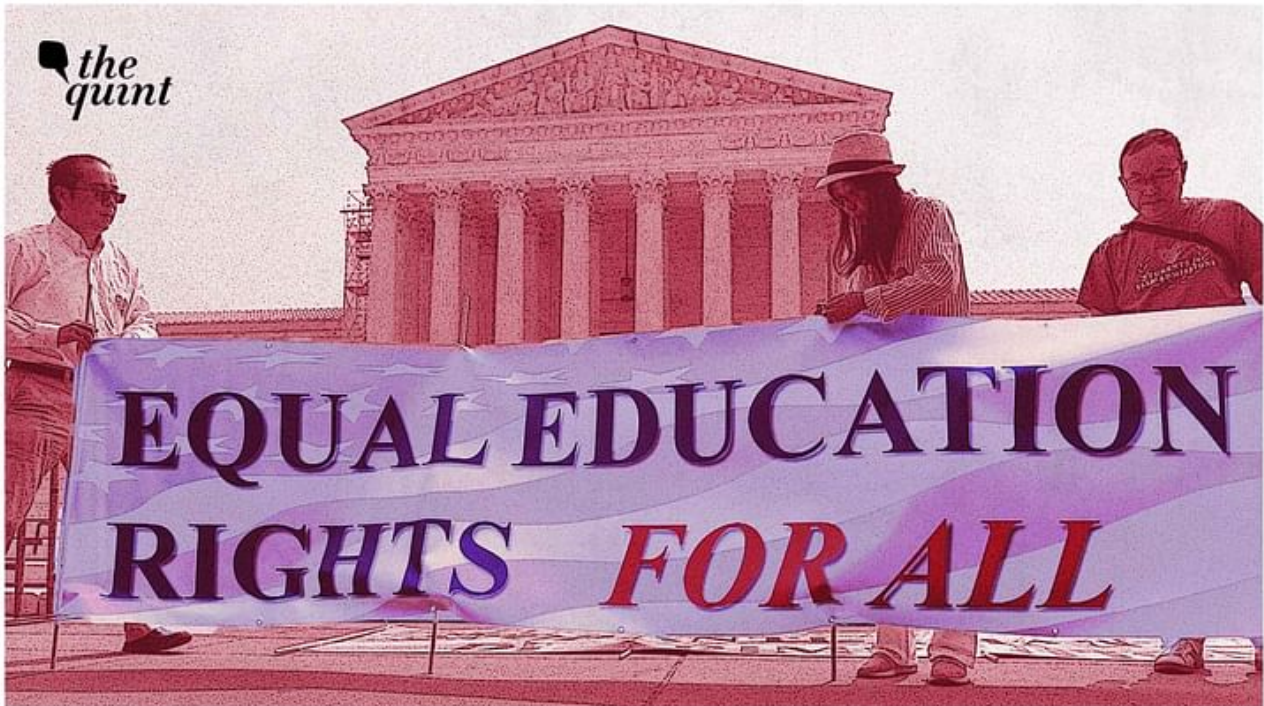


Democratic Conservatism in India & US Resistance Against Affirmative Action| OPINION

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The United States Supreme Court passed two significant judgments this week that may have major implications on America's socioeconomic, and political landscape in the near future.

First, in striking down affirmative action in higher education, the Supreme Court's conservative majority said it did so because the Constitution forbids any form of racial distinction. That single opinion has made the SC justices overturn decades of precedents that upheld race-sensitive admission policies, found to be consistent with the 14th Amendment's 'equal protection clause'.

Second, a day after, the Court also rejected US President Joe Biden's executive plan to cancel 'all student loan debt' –a major campaign promise with which Biden was elected to power. While the latter may find the President to pursue alternative executive measures, I will seek to reflect more on the first decision and its implications here.

Also Read

[Affirmative Action Nixed in US Colleges: What Did The Divided Supreme Court Say?](#)



Drastic Decline in Enrolment of Black Communities

Biden, in response to the two judgments, recognised himself that this is "not a normal court". It's the same apex court that also turned Roe vs Wade last year, attacking women's reproductive rights.

As Justice Sonia Sotomayor wrote in her recent dissent too, the decision (to strike down affirmative action in higher education) cemented "a superficial rule of colour blindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter."

The effects of this decision will naturally be felt nationwide soon. The US states that already banned affirmative action in higher education have seen a drastic decline in the percentage of black students admitted to these institutions over the last few years. At the University of Michigan, for example, black enrollment was 4% in 2021, down from 7% in 2006. In California too, the story remains the same in terms of decreasing enrolment of students from black communities across institutions.

Noam Scheiber observes the strong possibility of the recent SC decision applicable to higher education institutions, to lead more corporate companies for altering recruitment and promotion practices to pre-empt further legal challenges.

Beyond government contractors, affirmative action policies in the private sector are largely voluntary and governed by state and federal civil rights law. These laws prohibit employers from basing hiring or promotion decisions on a characteristic like race or gender, whether in favor of a candidate or against, argues Scheiber.

Randall Kennedy recently argued how many Black Americans despite different affirmative action measures find it difficult to 'get ahead'. She argues how every major step undertaken to advance African Americans and to redress the consequences of racial subordination has been met with charges of "reverse discrimination" and unfair "preference".

Also Read

US Supreme Court Rules Against Race-Based Admissions in Universities



Juxtaposition With India's Judicial Stand

Zealous opponents of affirmative action have extended their attacks not only to programs that explicitly list racial criteria in efforts to admit greater numbers of black and brown students; they are also challenging so-called race-neutral programs because of their race-conscious aims.

Our future may disclose a “horrifying prescience that may reveal a serious effort to delegitimize all efforts toward racial integration, diversity, reparations and antidiscrimination because any such effort is inescapably race-conscious.”

But there is also an interesting equivalence attached to how the juridical disposition of the American Supreme Court explicitly working under a conservative ideological majority now can be juxtaposed with what’s happening in India within a broader, more 'executivised' Indian judiciary that doesn't fall short of taking conservative positions on issues-whether on issues of affirmative action, same-sex marriage, freedom to practice one's religion for minorities (offering namaz), etc to name a few.

Practicing 'Idi Amin Jurisprudence'

Gautam Bhatia, in a recent [column](#), explained how the Indian Judiciary has increasingly been adopting an 'Idi Amin Jurisprudential Model' in its line of thinking, while emerging to work for the 'executive', promoting its policies and political ideology, while doing little to either put the 'executive/legislature' and its power in check while upholding basic rights, or constitutional values.

The Ugandan President-Dictator, Idi Amin had once famously said, "there is freedom of speech, but I cannot guarantee freedom after speech." In Bhatia's words, Idi Amin's Jurisprudential reasoning follows from this quote: “there is freedom to come to court-or even challenge the state executive-but we cannot guarantee freedom after you have come to court”.

On affirmative action too, the Supreme Court in November 2022 upheld the 103rd Constitution Amendment Act, granting 10% reservation to the Economically Weaker Sections (EWS) among the upper castes in a 3:2 constitutional decision.

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India's Affirmative Action Policy

This author, at the time, argued how the Court's reasoning and decision muddied the pre-existing, complex, cocktail layer of affirmative action policies in India. The verdict, then, raised a fundamental question on the constitutional provisions of previously safeguarded affirmative action, particularly for SCs/STs and other listed communities with a history of social, economic discrimination and who were envisaged to be protected for reservation as per the founding fathers of the Indian Constitution.

Secondly, constitutionally, the verdict also raised a big question mark in front of the SC on whether its own verdict in this case may violate the "basic structure of the Constitution", a "structure", that the Court itself considered sacrosanct since the 1973 landmark judgment of the SC in the Kesavananda Bharati v. State of Kerala. And, thirdly, from a socio-economic perspective, it became pertinent to analyse to what extent such a cocktail recipe of affirmative action — now with another 10% quota for the EWS (Economically Weaker Section) category, will impact the already existing fault lines of a deeply stratified, broken socio-labour scenario.

Also Read

50 Years of Kesavananda Bharati: Remembering Justice Khanna and Nani Palkhivala



Two Democracies' Colourblindness Towards 'Race' and 'Caste' ?

One can observe a broader convergence in both democracies' juridical, ideological, and elitist views on issues of affirmative action, reflecting an attitude of colorblindness towards the need to address 'race' and 'caste-based' discrimination.

From a South Asian perspective, this colorblindness or elitist view is centered on a belief that there is no case for 'caste-consciousness' in social-policy thought, or that 'caste-based discrimination doesn't matter/happen in India' (or was something that happened in the past).

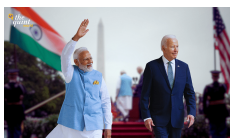
One can see this attitude prevalent with the higher education institutions in India. N Sukumar argues something similar in the context of higher education in *Caste Discrimination and Exclusion in Indian Universities: A Critical Reflection*. The 2022 book shows how 'caste' endures even in progressive spaces. Sukumar locates caste discrimination in multiple spaces, including in classrooms, hostels, and cultural forums by interviewing 600 Scheduled Caste (SC) students from select central and state universities.

I teach at an elite private institution myself and having closely observed the process of admissions that take place across private institutions, there is no doubt that there exists a widespread denial of the caste-class homogeneity that prevails in the (cap)ability of student applicants to enter/gain admission at such institutions.

For symbolic reasons, certain institutions may offer 'preferential treatment' (via bursaries, scholarships) for admitting students who require financial assistance but it is hardly part of any collectivised institutional measure.

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With an institutional culture of democratic backsliding finding more resonance/majoritarian acceptance in industrially developed and developing democracies, it is sad to see courts, justices, and judiciary abdicating their duties to protect the constitutional values that shape the core of the democratic consciousness.

In Justice Sotomayor's words, are now acting to promote 'a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race-and caste (in India's case) has always mattered and continues to matter'.

Not every opponent of affirmative action is racist or indifferent to racism. Nor does this history offer a rebuttal to critiques of affirmative action that are weighty and ought to prompt a desire to reform existing programs. Yet, the alacrity, consistency, and intensity with which programs aimed at helping Black (and/or Dalit) people have been assailed, however, should give pause to all participants in the debate, including the justices of the Supreme Court.

*(Deepanshu Mohan is Professor of Economics, and Director, Centre for New Economics Studies (CNES), O.P. Jindal Global University (JGU). This is an opinion article and the views expressed are the author's own. **The Quint** neither endorses nor is responsible for them.)*

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