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THE CREAMY LAYER DOCTRINE: CONSTITUTIONAL FOUNDATIONS, JUDICIAL EVOLUTION AND THE PURSUIT OF SUBSTANTIVE EQUALITY IN INDIA

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Abstract

The creamy layer doctrine occupies a singular place in Indian equality jurisprudence. Conceived as a device to ensure that the constitutional promise of compensatory protection reaches those for whom it was intended, the doctrine obliges the State to exclude the socially advanced members of a backward class from the benefit of reservation. This article traces the constitutional foundations of the doctrine in Articles 14, 15 and 16 of the Constitution, locates its genesis in the nine judge decision in *Indra Sawhney v Union of India*, and follows its contested migration from the Other Backward Classes to the Scheduled Castes and Scheduled Tribes across *M Nagaraj*, *Jarnail Singh* and, most recently, the seven judge decision in *State of Punjab v Davinder Singh*. It argues that the doctrine is best understood not as a dilution of reservation but as an instrument of substantive equality operating within protected groups, securing intra group justice where formal membership alone would entrench advantage. The analysis sets the doctrine against the economic criterion of the economically weaker sections introduced by the One Hundred and Third Amendment and upheld in *Janhit Abhiyan*, showing that the two devices invert one another. It concludes that the future coherence of the doctrine turns on three unresolved tensions, namely the persistent data deficit in identifying advancement, the inertia of the income ceiling, and the conceptual difficulty of applying an economic filter to groups defined historically by untouchability.

Keywords: *creamy layer; substantive equality; reservation; Articles 15 and 16; Scheduled Castes; affirmative action.*

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1. Introduction

Reservation in India is a group based remedy. It proceeds from the recognition that the equality promised by the Constitution³ cannot be achieved by treating unequals alike, and that historical disadvantage attached to caste must be answered by positive measures rather than by neutrality alone. Yet a remedy directed at a group carries a structural risk. If membership of the group is the only qualification, the benefit tends to be captured by those within the group who are already best placed to use it, leaving the worst off no nearer to genuine equality. The creamy layer doctrine is the judicial answer to that risk. It requires that the advanced members of a backward class, those who have risen socially and economically to the point where they no longer share the disadvantage that defines the class, be excluded so that the protection reaches the rest.

The doctrine was articulated for the Other Backward Classes by a nine judge Bench in *Indra Sawhney v Union of India*⁴, and it has since travelled, by a route that has been anything but smooth, towards the Scheduled Castes and Scheduled Tribes. This article examines that journey. It first establishes the constitutional foundations of qualitative exclusion in the equality code. It then follows the doctrine through its genesis, its consolidation in the educational sphere, its contested extension to reservation in promotion, and the watershed reached in 2024 when a seven judge Bench, while upholding sub-classification within the Scheduled Castes, divided on whether a creamy layer principle should apply to them at all. The final sections argue that the doctrine is an instrument of substantive equality, contrast it with the economic criterion of the economically weaker sections, and identify the tensions that its continued use must confront.

2. Constitutional Foundations of Qualitative Exclusion

2.1 The equality code

The equality code of the Constitution is built around Article 14, which guarantees equality before the law and the equal protection of the laws,⁵ and Articles 15 and 16, which forbid discrimination and guarantee equality of opportunity in public employment while expressly permitting special provisions for the disadvantaged.⁶ Article 15(4), which empowers the State to make special provisions for the advancement of socially and educationally backward classes

³Constitution of India, Preamble.

⁴*Indra Sawhney v Union of India* 1992 Supp (3) SCC 217.

⁵Constitution of India, art 14.

⁶Constitution of India, arts 15 and 16.

and for the Scheduled Castes and Scheduled Tribes, was inserted by the First Amendment in 1951 in response to an early decision that had struck down community based reservation in education.⁷ Article 16(4) permits reservation of appointments in favour of any backward class of citizens that, in the opinion of the State, is not adequately represented in the services of the State.⁸

2.2 From formal to substantive equality

The early jurisprudence treated these provisions as exceptions to a general rule of formal equality, and it was in that frame that the Court first fixed an outer limit on reservation. In *M R Balaji v State of Mysore*, the Court struck down a scheme that reserved sixty-eight per cent of seats, held that the special provision under Article 15(4) should ordinarily be confined to less than half, and warned that class for the purposes of the Article is not the same as caste.⁹ The conceptual shift came with *State of Kerala v N M Thomas*, where a majority reconceived Article 16(4) not as an exception to the equality of opportunity guaranteed by Article 16(1) but as an emphatic statement of it.¹⁰ On this view, treating the unequal differently is not a departure from equality but its fulfilment, and reservation becomes a means to substantive rather than merely formal equality.¹¹

2.3 Qualitative exclusion as a logical entailment

Once equality is understood substantively, the creamy layer follows as a matter of logic rather than of grace. The justification for the special provision is the backwardness of the class. Where a section of the class has ceased to be backward, the connecting thread between that section and the rest of the class snaps, and the constitutional basis for extending the protection to it disappears. To continue to favour the advanced is to convert a remedy for disadvantage into a privilege for those who no longer suffer it, and to do so at the expense of the disadvantaged members of the same class. Qualitative exclusion is therefore not a concession wrung from the protected groups but a condition of the protection itself, and it is on this footing that the doctrine entered the law.

⁷Constitution of India, art 15(4), inserted by the Constitution (First Amendment) Act 1951, which followed the decision in *State of Madras v Champakam Dorairajan*.

⁸Constitution of India, art 16(4).

⁹*M R Balaji v State of Mysore* AIR 1963 SC 649; 1963 Supp (1) SCR 439.

¹⁰*State of Kerala v N M Thomas* (1976) 2 SCC 310.

¹¹*ibid* (the view that art 16(4) is a facet, and not an exception, to the equality guaranteed by art 16(1)).

3. The Genesis of the Doctrine: Indra Sawhney

3.1 The Mandal context

The doctrine was born out of the controversy over the Mandal Commission. The Commission, constituted in 1979 and reporting in 1980, identified the socially and educationally backward classes and recommended reservation of twenty-seven per cent of central posts in their favour.¹² When the recommendation was implemented by executive order in 1990,¹³ it provoked widespread protest and a constitutional challenge that brought the entire edifice of reservation before a nine judge Bench.

3.2 The reasoning of the majority

The Court upheld the twenty-seven per cent reservation for the Other Backward Classes, reaffirmed that total reservation should not ordinarily exceed half of the available posts, and held that reservation could not extend to promotion.¹⁴ Its most enduring contribution, for present purposes, was the insistence that the advanced members of a backward class be excluded. The Court reasoned that persons who have attained a certain level of social advancement, the children of high officials being the clearest example, must be treated as having left the backward class, and that their exclusion is not optional but a constitutional requirement implicit in the very definition of backwardness.¹⁵ The prohibition on reservation in promotion was undone by the legislature within three years through the Seventy-seventh Amendment,¹⁶ but the creamy layer survived and became the organising principle of the doctrine.

3.3 Administrative operationalisation

A principle requires a measure, and the executive supplied one. The Office Memorandum of 8 September 1993 translated the doctrine into administrable categories, excluding the children of constitutional functionaries and senior officials, and fixing an income ceiling, initially one lakh rupees a year, above which a family was treated as belonging to the creamy layer.¹⁷ The ceiling

¹²Report of the Backward Classes Commission (Government of India 1980) (the Mandal Commission Report).

¹³Office Memorandum dated 13 August 1990 of the Government of India implementing the recommendation of 27 per cent reservation for the Other Backward Classes in central services.

¹⁴*Indra Sawhney* (n 2). The leading opinion was delivered by Jeevan Reddy J for the majority of a nine judge Bench.

¹⁵*ibid*. The Court held that the exclusion of the creamy layer is not a concession but a constitutional requirement flowing from the very definition of a backward class.

¹⁶The Constitution (Seventy-seventh Amendment) Act 1995 inserted art 16(4-A) to restore reservation in promotion for the Scheduled Castes and Scheduled Tribes after *Indra Sawhney*.

¹⁷Government of India, Department of Personnel and Training, Office Memorandum No 36012/22/93-Estt(SCT)

has been revised at intervals since, as Table 1 sets out, though never indexed to inflation in any systematic way.

Table 1. Evolution of the income ceiling for the Other Backward Classes creamy layer, 1993 to 2017

Year	Governing instrument	Income ceiling (Rs per annum)
1993	DoPT Office Memorandum dated 8 September 1993	1,00,000
2004	DoPT Office Memorandum (2004 revision)	2,50,000
2008	DoPT Office Memorandum (2008 revision)	4,50,000
2013	DoPT Office Memorandum (2013 revision)	6,00,000
2017	DoPT Office Memorandum dated 13 September 2017	8,00,000

*Source: Office Memoranda of the Department of Personnel and Training, Government of India.*¹⁸

4. Consolidation in the Educational Sphere

The income criterion was tested and approved soon after the doctrine was settled. In *Ashoka Kumar Thakur v State of Bihar*, the Court examined State attempts to fix unrealistically high thresholds that would have defeated the exclusion, and affirmed that the categories identified in the central memorandum represented a reasonable working out of the principle.¹⁹ The doctrine then crossed from employment into education. The Ninety-third Amendment introduced Article 15(5) to enable reservation in educational institutions,²⁰ and the resulting scheme of twenty-seven per cent reservation for the Other Backward Classes in central educational institutions was challenged in *Ashoka Kumar Thakur v Union of India*.²¹

The Court upheld the scheme but made its validity conditional on the exclusion of the creamy layer, reading that exclusion into the enabling statute as an essential safeguard against the capture of educational opportunity by the advanced.²² By this point the doctrine had a stable

(8 September 1993).

¹⁸Compiled from the successive Office Memoranda of the Department of Personnel and Training, Government of India, revising the income criterion between 1993 and 2017.

¹⁹*Ashoka Kumar Thakur v State of Bihar* (1995) 5 SCC 403.

²⁰The Constitution (Ninety-third Amendment) Act 2005 inserted art 15(5), enabling special provisions for the advancement of backward classes in educational institutions, including private institutions.

²¹*Ashoka Kumar Thakur v Union of India* (2008) 6 SCC 1.

²²*ibid*. The Court read the exclusion of the creamy layer into the Central Educational Institutions (Reservation in Admission) Act 2006 as an essential condition of its validity.

shape for the Other Backward Classes. It rested on a constitutional rationale, it operated in both employment and education, and it was given content by an income and status test that the executive administered and the Court supervised. The harder question, whether the same logic applied to the Scheduled Castes and Scheduled Tribes, was approaching.

5. The Contested Extension to the Scheduled Castes and Tribes

5.1 Reservation in promotion and Nagaraj

The legislative response to *Indra Sawhney* restored reservation in promotion for the Scheduled Castes and Scheduled Tribes through a series of amendments, the validity of which was tested in *M Nagaraj v Union of India*.²³ The Court upheld the amendments that introduced reservation in promotion, the carrying forward of unfilled vacancies, consequential seniority and the relaxation of qualifying standards,²⁴ but it subjected their exercise to conditions. A State seeking to reserve in promotion had to satisfy itself of the backwardness of the class, of its inadequate representation, and of the impact on the overall efficiency of administration, and it had to respect the ceiling and the exclusion of the creamy layer as facets of the equality that the amendments were upheld for not violating.²⁵

5.2 Jarnail Singh and the migration of the principle

Whether the creamy layer principle could properly be applied to the Scheduled Castes and Scheduled Tribes at all was squarely raised in *Jarnail Singh v Lachhmi Narain Gupta*.²⁶ A five judge Bench declined to refer *Nagaraj* to a larger Bench, but it corrected one aspect of that decision. It held that the requirement of fresh quantifiable data to prove the backwardness of the Scheduled Castes and Scheduled Tribes could not stand, because the nine judge Bench in *Indra Sawhney* had treated these communities as the most backward among the backward and as presumptively so by virtue of their notification.²⁷ At the same time the Court affirmed that the exclusion of the creamy layer applied to the Scheduled Castes and Scheduled Tribes in the context of promotion, so that the affluent among them would not corner the benefit. The principle had migrated.

²³*M Nagaraj v Union of India* (2006) 8 SCC 212.

²⁴The Constitution (Seventy-seventh Amendment) Act 1995, the Constitution (Eighty-first Amendment) Act 2000, the Constitution (Eighty-second Amendment) Act 2000 and the Constitution (Eighty-fifth Amendment) Act 2001 respectively introduced art 16(4-A), art 16(4-B), the proviso to art 335 and consequential seniority.

²⁵*Nagaraj* (n 21).

²⁶*Jarnail Singh v Lachhmi Narain Gupta* (2018) 10 SCC 396.

²⁷*ibid*. The Court declined to refer *Nagaraj* to a larger Bench but held that the requirement of fresh quantifiable data on the backwardness of the Scheduled Castes and Scheduled Tribes was contrary to the nine judge holding in *Indra Sawhney*.

5.3 The presumption of backwardness

The migration sat uneasily with the constitutional architecture. The Scheduled Castes and Scheduled Tribes are not identified by a test of social and educational backwardness applied case by case; they are the castes and tribes notified by the President under Articles 341 and 342.²⁸ The disadvantage that defines them is the disability of untouchability and the exclusion that followed from it, a disadvantage that is social and historical rather than merely economic. To apply to them a filter designed to detect the loss of backwardness in groups defined by backwardness raises a real question, namely whether economic advancement removes the specific disadvantage that the notification was meant to address. That question was left for another day, and it arrived in 2024.

6. The 2024 Turn: Davinder Singh

6.1 Sub-classification and the overruling of Chinnaiah

The immediate question in *State of Punjab v Davinder Singh* was not the creamy layer but sub-classification, that is, whether a State may give preference within the Scheduled Caste quota to those castes that are the most disadvantaged among the Scheduled Castes. An earlier Constitution Bench in *E V Chinnaiah v State of Andhra Pradesh* had held that the Scheduled Castes form a single homogeneous class that the State may not divide.²⁹ A seven judge Bench revisited that holding.³⁰ By a majority of six to one it held that sub-classification is constitutionally permissible, that the Scheduled Castes are not a homogeneous monolith, and that a State may, on the basis of empirical evidence of relative backwardness and inadequate representation, fix a preference for the most backward castes within the quota. *Chinnaiah* was overruled.³¹

6.2 The plurality on the creamy layer

Although the creamy layer was not the question referred, several members of the majority addressed it, and their observations have given the doctrine its most contested frontier. A plurality took the view that the State should evolve a policy to identify and exclude the advanced among the Scheduled Castes and Scheduled Tribes, so that the benefit of reservation

²⁸Constitution of India, arts 341 and 342, under which the President notifies the Scheduled Castes and Scheduled Tribes.

²⁹*E V Chinnaiah v State of Andhra Pradesh* (2005) 1 SCC 394.

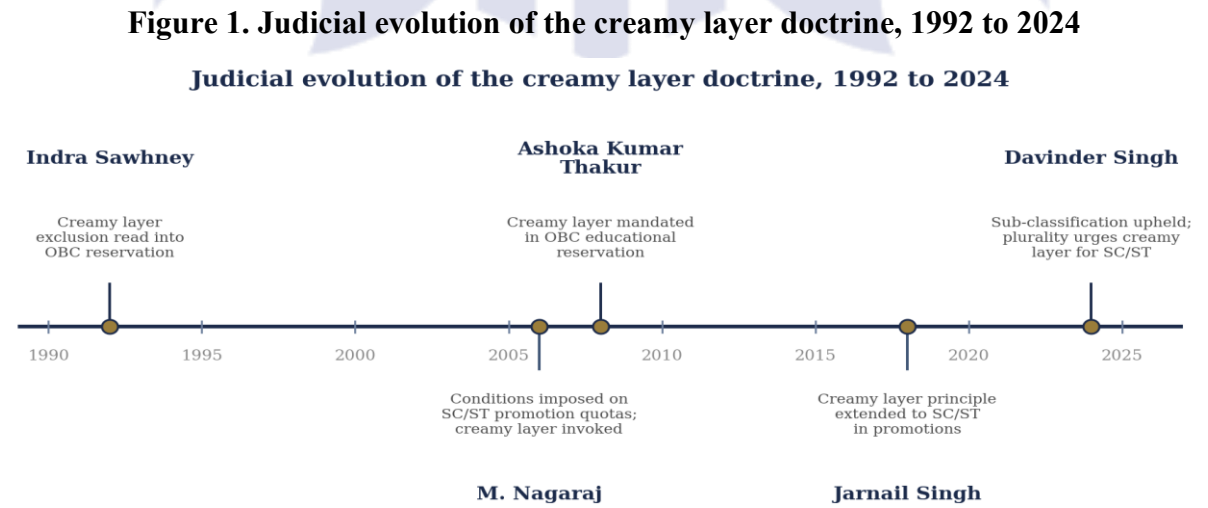
³⁰*State of Punjab v Davinder Singh* 2024 INSC 562.

³¹*ibid*. The seven judge Bench, by a majority of six to one, held that sub-classification within the Scheduled Castes is constitutionally permissible and overruled *Chinnaiah*.

reaches the genuinely disadvantaged within these communities, while cautioning that the criteria for such exclusion must differ from those applied to the Other Backward Classes.³² The plurality was careful to insist that no notified caste could be ousted from the quota altogether, so that the device would operate to redistribute the benefit within the protected group rather than to shrink the group itself. The result is a doctrine that is now urged, though not yet mandated, for the Scheduled Castes and Scheduled Tribes on terms deliberately left undefined.

6.3 The dissent

The single dissent resisted both the sub-classification and the drift towards a creamy layer. It held that a Scheduled Caste, once notified by the President, constitutes a homogeneous class that the Constitution treats as a unit, that only Parliament may add to or subtract from the list, and that a State which sub-classifies or excludes is in substance tampering with a presidential notification.³³ On this view *Chinnaiah* was correctly decided, and the protection conferred by notification ought not to be diluted by judicially devised filters. The disagreement is not merely doctrinal. It reflects two competing accounts of what the reservation for the Scheduled Castes is for, whether it answers a present and measurable backwardness that advancement can erase, or a historical and symbolic exclusion that it cannot. Figure 1 sets out the arc along which this disagreement has developed.



Source: author's compilation from the decisions discussed.³⁴

³²ibid (the opinions endorsing the application of a creamy layer principle to the Scheduled Castes and Scheduled Tribes, with the criteria differing from those used for the Other Backward Classes).
³³ibid (the dissent, holding that a notified Scheduled Caste constitutes a homogeneous class and that only Parliament may alter the list under art 341).
³⁴Prepared by the author from the decisions discussed in this article.

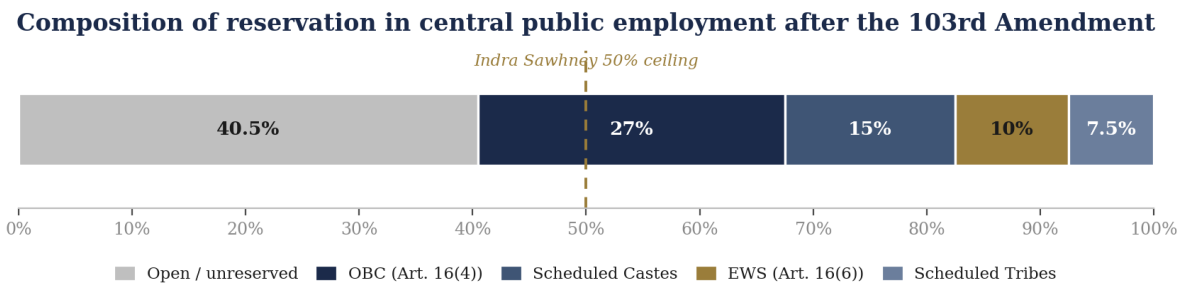
7. The Doctrine and the Architecture of Substantive Equality

7.1 The creamy layer as intra group justice

Seen against the equality code, the creamy layer is the mechanism by which reservation keeps faith with its substantive purpose. Reservation distributes a scarce public good, namely seats and posts, among groups defined by disadvantage. Without an internal filter, the distribution within each group is left to the ordinary play of advantage, and the advantaged win. The creamy layer interrupts that play. It is a device of intra group justice, ensuring that the good reaches the disadvantaged members of the disadvantaged group rather than the advantaged members who would otherwise monopolise it. It is best understood, therefore, not as a limit on reservation imposed from outside in the interest of the unreserved, but as a refinement of reservation imposed from within in the interest of the worst off.

This framing also explains why the doctrine fits comfortably within the fifty per cent ceiling rather than competing with it. The ceiling regulates the size of the reserved space as against the open space; the creamy layer regulates the distribution of the reserved space among the members of the protected groups. Figure 2 shows the composition of reservation in central public employment after the One Hundred and Third Amendment, and locates the ceiling against which both devices operate.

Figure 2. Composition of reservation in central public employment after the One Hundred and Third Amendment



Source: author's compilation from the Constitution and the reservation framework of the Government of India.³⁵

7.2 The economic comparator: the economically weaker sections

The relationship between the creamy layer and economic criteria has been thrown into relief by the most recent addition to the reservation architecture. The One Hundred and Third

³⁵Prepared by the author from the Constitution of India and the reservation framework administered by the Government of India following the Constitution (One Hundred and Third Amendment) Act 2019.

Amendment introduced a reservation of up to ten per cent for the economically weaker sections among citizens who do not belong to the Scheduled Castes, the Scheduled Tribes or the Other Backward Classes.³⁶ In *Janhit Abhiyan v Union of India*, a five judge Bench upheld the amendment by a narrow majority, holding that an economic criterion may by itself justify a special provision and that the fifty per cent limit, being a rule of prudence rather than an inviolable part of the basic structure, may be exceeded.³⁷

The two devices are mirror images. The creamy layer uses an economic measure to exclude the advantaged from a group defined by social backwardness; the economically weaker sections criterion uses an economic measure to include the disadvantaged from sections defined by their distance from social backwardness. The first subtracts the affluent from the protected; the second adds the poor from the unprotected. Reading them together exposes a deeper instability in the law, namely the uncertain status of economic deprivation as a ground of affirmative action. If poverty alone can found a reservation, as *Janhit Abhiyan* holds, then the use of an income threshold to define advancement within the backward classes is on firm conceptual ground; but the same logic strains when applied to the Scheduled Castes, whose disadvantage the Constitution does not define in economic terms at all. Table 2 sets out the three devices side by side.

Table 2. Three constitutional devices of qualitative differentiation compared

Feature	Creamy layer exclusion	Sub-classification	EWS criterion
Constitutional basis	Arts 15(4) and 16(4) read with art 14	Arts 15(4) and 16(4) (judicially recognised)	Arts 15(6) and 16(6)
Operative logic	Excludes the advanced from within a backward class	Prioritises the most backward within a notified group	Includes the economically weak from outside the backward classes
Governing criterion	Social advancement, measured partly by income and status	Relative backwardness and inadequate representation	Economic deprivation alone
Principal	OBC (mandatory); SC	Scheduled Castes and	Citizens outside the SC,

³⁶The Constitution (One Hundred and Third Amendment) Act 2019 inserted arts 15(6) and 16(6), enabling up to 10 per cent reservation for the economically weaker sections.

³⁷*Janhit Abhiyan v Union of India* 2022 SCC OnLine SC 1540. The five judge Bench upheld the amendment by a majority of three to two, holding that an economic criterion may form the sole basis of a special provision and that the 50 per cent limit is not an inviolable part of the basic structure.

beneficiaries affected	and ST (contested)	Tribes	ST and OBC
Relation to the 50 per cent ceiling	Operates within the ceiling	Operates within an existing group quota	Permitted to exceed the ceiling
Leading authority	Indra Sawhney (1992)	Davinder Singh (2024)	Janhit Abhiyan (2022)

Source: author's analysis of the decisions and provisions discussed in this article.

8. Unresolved Tensions

8.1 The data deficit

The doctrine assumes that advancement can be measured, but the State has never built the apparatus to measure it well. Identification of the creamy layer depends on reliable, current data on the income, occupation and status of families within each backward class, and that data has been chronically absent. The exclusion has therefore rested on a coarse income threshold supplemented by status categories, applied to populations whose composition is itself imperfectly known. The plurality in *Davinder Singh* called for empirical evidence of relative backwardness as the foundation of sub-classification, and the same demand applies with greater force to any creamy layer among the Scheduled Castes, yet the evidentiary infrastructure to meet it does not exist in most States. Until it is built, the doctrine will continue to operate on proxies that are easy to administer and easy to criticise.

8.2 The inertia of the income ceiling

The income ceiling for the Other Backward Classes was last revised in 2017, when it was fixed at eight lakh rupees a year.³⁸ A ceiling that is not indexed loses meaning as incomes and prices rise, so that the real threshold for exclusion falls year by year even as the nominal figure stays constant. The effect is to expand the creamy layer in real terms without any decision to do so, narrowing the pool of eligible beneficiaries by inflation rather than by policy. A doctrine that depends on a monetary line must keep that line current, and the failure to revise it for an extended period is a failure of administration that undermines the doctrine from within.

³⁸Government of India, Department of Personnel and Training, Office Memorandum No 36033/1/2013-Estt(Res) (13 September 2017), revising the income ceiling to Rs 8,00,000 per annum.

8.3 The social and the economic

The deepest tension is conceptual. For the Other Backward Classes, whose backwardness is social and educational and is correlated with economic standing, an income filter is a defensible proxy for the loss of backwardness. For the Scheduled Castes, whose disadvantage is rooted in untouchability, the proxy is far weaker, because the social disabilities associated with caste do not dissolve on the acquisition of wealth or office. To apply an undifferentiated economic creamy layer to the Scheduled Castes risks treating two different kinds of disadvantage as though they were the same. The plurality in *Davinder Singh* anticipated the difficulty when it insisted that the criteria for the Scheduled Castes must differ from those used for the Other Backward Classes, and that no caste may be wholly excluded. Translating that caution into a workable standard, one that captures genuine advancement without assuming that money erases the legacy of untouchability, is the central task that the doctrine now faces.

9. Conclusion

The creamy layer doctrine is not, as it is sometimes portrayed, an attack on reservation. It is a condition of reservation's integrity. By excluding the advanced from within the protected groups, it keeps the remedy directed at the disadvantage that justifies it, and in doing so it expresses the substantive conception of equality that the Constitution embodies. The journey of the doctrine, from its articulation for the Other Backward Classes in *Indra Sawhney*, through its consolidation in education, to its contested approach to the Scheduled Castes in *Davinder Singh*, is the story of a single idea being tested against ever harder cases. The idea has held, but its application has not yet been settled where it matters most. Three tasks remain, namely the construction of the data infrastructure that identification requires, the maintenance of an income threshold that keeps pace with economic reality, and the development of a criterion for the Scheduled Castes that respects the difference between social and economic disadvantage. Whether the doctrine fulfils its promise of substantive equality, or whether it becomes a blunt instrument that mistakes the measurable for the meaningful, will depend on how those tasks are discharged.

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