

TIGHTENING INDIA'S "GOLDEN STRAITJACKET": HOW PULLING THE STRAPS OF INDIA'S JOB RESERVATION SCHEME REFLECTS PRUDENT ECONOMIC POLICY

INTRODUCTION

The "Golden Straitjacket,"¹ a set of free market policies implemented by national governments, is golden because it attracts foreign investment, and is a straitjacket because deviation from it will repel foreign investment. A country adorns the Golden Straitjacket when it transforms to a democracy and opens its economy. Manmohan Singh, India's Prime Minister, was the Finance Minister when India decided, in 1991, to abandon "quasi-socialist economics"² and don the Golden Straitjacket. Despite the fact that "the tighter you wear it, the more gold it produces,"³ India has not snugly embraced the Golden Straitjacket to date.

The Golden Straitjacket is tightened when, among other measures, a country deregulates its domestic economy to facilitate higher efficiency and profits.⁴ Instead of deregulating its domestic economy, India has steadily broadened the reach of its constitutionally-enshrined job reservation scheme. Most worrisome for the Indian economy is the recent debate over making the leap from implementing purely public sector job reservations to also implementing private sector reservations. Therefore, rather than tightening its Golden Straitjacket in preparation for the intensifying globalization season, India is loosening this necessary garment.

This Note recognizes India's competing interests to promote employment equality for historically disadvantaged populations by broadening the job reservation scheme, on one hand, and to attract foreign investment by limiting its job reservation scheme, on the other. Part I of this Note analyzes India's historical disparities to gain an understanding of the need for employment-equalizing initiatives. Part II examines the constitutional provisions utilized to further employment equality. Part III

1. Thomas L. Friedman coined the term "Golden Straitjacket." See THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 89 (1999).

2. *Id.*

3. *Id.* at 88.

4. Economic regulation consists of government rules or market initiatives designed to control the price, sale, entry, exit, or production decisions of firms. PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 345 (17th ed. 2001).

tracks how political pressures, legislative policies, and broad judicial interpretation have expanded the scope of India's job reservation scheme in four directions since its inception. This Part notes the worrisome recent trend of the extension of the job reservation scheme to private sector employment. Part IV argues that India should not embark on a policy of private sector job reservations for three reasons. First, in line with the Golden Straitjacket hypothesis, India will repel foreign investment if it extends job reservations to the private sector. Second, reasoning that public sector job reservations have been more detrimental than beneficial, this Part submits that extending reservations to the private sector will only magnify the reach of an injurious scheme. Third, the magnitudinal insignificance of employment in the private sector means that reservations in the private sector will be largely inconsequential. Part V suggests a two-fold solution to resolve the competing interests of promoting employment equality for historically disadvantaged populations and to attract foreign investment by limiting the job reservation scheme. First, consistent with the historically neoliberal economic policies of the U.S. executive and judiciary, India must adopt constitutional reforms to reflect a policy of economic deregulation that attracts foreign investment. Second, to alleviate the plight of historically disadvantaged populations, India, like South Africa, should provide incentives to private actors for promoting national employment equality objectives.

I. THE NEED FOR REMEDIAL MEASURES IN EMPLOYMENT

Since the landmark case of *Kerala v. Thomas*,⁵ decisions of the Supreme Court of India have recognized the need for remedial employment measures to “redress systemic inequality.”⁶ This systemic inequality stems from a causal chain dating back to the establishment of the caste system.⁷ Even today, the sustained social, psychological, and

5. A.I.R. 1976 S.C. 490.

6. C.D. Cunningham, *Affirmative Action: Comparative Policies and Controversies*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 210, 211 (Neil J. Smelser & Paul B. Baltes eds. 2004), available at <http://law.gsu.edu/Equality/EncyclopediaArticle.pdf>.

7. Inequality in India stems from a history of exclusion and the subsequent economic, political, and societal inequalities that arose from it. On the whole, “Indian society is characterized by a high degree of structural inequalities based on the institutions of caste and ethnicity.” Sukhadeo Thorat, *Affirmative Action Policy in India: Dimensions, Progress and Issues* 2 (July 11, 2005) (unpublished paper prepared for Inter-Regional Inequality Facility “Addressing Inequality: Policies for Inclusive Development” workshop at U.N. Econ. Comm’n for Afr. in Addis Ababa, Ethiopia, July 11–12, 2005). The caste system, a hierarchical ordering of Hindu society, bestows unequal civil, economic, and political rights upon different groups of individuals. The origins of the caste system are traced back to the Indo-Aryan migration. Some interpretations of this migration suggest that the incoming Aryans

 economic discrimination of Scheduled Castes ("SCs")⁸ and Scheduled

established a caste system and reserved the higher positions for themselves, while relegating the darker-skinned Dravidian natives to the lower end of the caste spectrum. A more modern theory of the origins of the caste system paints a less hostile picture, hypothesizing that the Aryans did not establish the caste system, but merely preserved and expanded on the pre-existing Dravidian caste system. Although normally linked to Hinduism, the caste system is also apparent in other major religions in India, "leading to the hypothesis that perhaps caste was a system of social stratification in pre-modern India." Ashwini Deshpande, *Affirmative Action in India & the United States* 2 (Jan. 2005) (background paper for World Development Report 2006), available at http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Affirmative_Action_in_India_and_the_United_States.pdf. Estimated to be over twenty-five hundred years old, the caste system has historically divided Indian society along occupational lines. In this hierarchical system, where each profession corresponds to a particular caste, there have customarily been four, and later five, "mutually exclusive, endogamous, hereditary" basic castes, known as *varnas*. *Id.* at 1. The *Brahmins*, the priests and teachers, are considered the apex of society. Priya Sridharan, *Representations of Disadvantage: Evolving Definitions of Disadvantage in India's Reservation Policy and United States' Affirmative Action Policy*, 6 *ASIAN L.J.* 102 (1999). The *Brahmins* are followed by the warriors and rulers, the *Ksatriyas*. The *Vaisyas*, comprised of farmers, merchants, and artisans, occupy the third rung. The foot of this social system is reserved for the *Sudras*, the servants and laborers. *Id.* Within each *varna* there are literally millions of sub-castes, known as *jatis*, each of which corresponds to specific occupations. See generally Thorat, *supra*, at 1. Inequality is perpetuated between generations in the caste system because individuals' *varnas* are pre-determined by their familial history, not by their actual occupations.

These artificial partitions in society created a climate conducive to widespread discrimination. The caste system has created two separate paradigms of inequality along caste and ethnic lines. Although historically a certain degree of inequality has existed amongst the four *varnas*, groups barred from the caste system suffer the greatest level of economic, political, and social estrangement. For the two primary groups excluded from the caste system, the Scheduled Castes ("SCs") and the Scheduled Tribes ("STs"), "exploitation has occurred at all levels, including, social, psychological, and most obviously material." Satish Kumar Jhunjhunwala, *Job Reservation in the Private Sector*, in *RESERVATION AND PRIVATE SECTOR* 242, 242 (Sukhadeo Thorat, Aryama & Prashant Negi eds., 2005).

8. The *Ati-Sudras*, considered inferior to the *Sudras*, technically do not have a *varna*, and are thus excluded from the caste system; they are "out-castes." See generally ANDRÉ BÉTEILLE, *CASTE INEQUALITY AND AFFIRMATIVE ACTION* 10 (2002), <http://www.ilo.org/public/english/bureau/inst/download/andre.pdf>; Deshpande, *supra* note 7, at 1. This class of people who engage in activities perceived as ritually impure, such as the handling of dead bodies or human feces, were traditionally deemed untouchable. Jayashree B. Gokhale, *The Sociopolitical Effects of Ideological Changes: The Buddhist Conversion of Maharshtrian Untouchable*, 45 *J. ASIAN STUD.* 269, 270 (1986). Such labeling has historically forced *Ati-Sudras* into inferior economic, political, and social positions. Barbara R. Joshi, "Ex-Untouchable": *Problems, Progress, and Policies in Indian Social Change*, 53 *PAC. AFF.* 193, 195 (1980). After noticing this gaping caste divide in Hindu society, the colonial British regime drafted a schedule listing all the castes it observed as being underprivileged with the intention of uplifting these downtrodden groups. Since 1935, due to their listing on government rosters and schedules, the "Untouchables" have been given the literal title of SCs. Deshpande, *supra* note 7, at 2. During India's struggle for freedom, Gandhi, furthering the British efforts to alleviate the situation of certain disadvantaged castes, set the abolition of untouchability as one of the India National Congress's priorities. Although today seen as patronizing, Gandhi had affectionately coined the term *Harijans* (children of God) during his campaign against untouchability. *Id.* In modern India, SCs, colloquially referred to as *Dalits* (oppressed people), constitute roughly seventeen percent of the population. Sukhadeo Thorat & Motilal Mahamallik, *Persistent Poverty—Why Do Scheduled Castes and Scheduled Tribes Stay Chronically Poor* 5, paper presented at CPRC-IIPA Seminar on "Chronic

Tribes (“STs”)⁹ manifests itself as tangible discrimination in the employment environment.¹⁰ Such inequity in the labor market, in turn, creates stark economic disparities.¹¹ Due to their inferior economic

Poverty: Emerging Policy Options and Issues,” Sept. 29–30, 2005, available at [http://www.chronicpoverty.org/pdfs/IIPA-CPRC2005Seminar/Thorat_Mahamallik\(SCSTs\).pdf](http://www.chronicpoverty.org/pdfs/IIPA-CPRC2005Seminar/Thorat_Mahamallik(SCSTs).pdf).

9. Tribals in India, commonly known as *Adivasis* (original inhabitants), are the indigenous people who occupied pockets of land in the Indus Valley before the Indo-Aryan migration. Although a small number of tribals are sprinkled throughout the majority of Indian states, there are two major concentrations, both of which exist in the northern half of the country. The first belt of tribal habitation extends along the Himalayas, from Jammu and Kashmir in the north, to Uttaranchal in the northeast, and finally tapering off in the eastern states of Assam and Arunachal Pradesh. The second one stretches through central India from Madhyapradesh to Orissa. The tribals’ occupation of isolated areas has restricted their access to governmental resources and infrastructure, resulting in their exclusion from the mainstream Indian economy. Thorat & Mahamallik, *supra* note 8. *Adivasis* have traditionally been involved in subsistence activities, such as hunting, gathering, and small-scale farming, while occasionally trading necessities with local Hindu craftsmen. This economic marginalization has led to them sharing a position of economic backwardness with SCs. *See generally* Thorat, *supra* note 7, at 2. Based upon this societal reality, a redressive provision for tribals was included in the Indian Constitution. Schedule five identifies indigenous groups that would be regarded as STs and would thus qualify for compensatory measures listed in other sections of the Indian Constitution. The contentious procedure used to determine “tribalness” involves reviewing a population group’s religious affiliation, language, location of settlement, economic activity, and social organization. Today, STs form approximately 8.2% of India’s population. Thorat, *supra* note 7, at 2.

10. In modern India, the social stigma attached to SCs and STs often limits their employment prospects. This is clearly evident in the elevated unemployment rate of 9.60% amongst SCs, as compared to 7.32% for the rest of the population. Although at first glance, with an unemployment rate of just 5.30%, STs seem to be in a firmer economic position than the rest of the population, this conclusion is likely false because it does not factor in the quality of employment—STs are often restricted to subsistence economic activity in their tribal lands. GOV’T OF INDIA PLANNING COMM’N, REPORT OF THE SPECIAL GROUP ON TARGETING TEN MILLION EMPLOYMENT OPPORTUNITIES PER YEAR OVER THE TENTH PLAN PERIOD 1, 134 (2002).

TABLE 1: SC AND ST EMPLOYMENT

Employment Indicators	SC	ST	Non-SC/ST*	All
Unemployment Rate on Current Daily Basis (CDS) (%), (1999–2000)	9.60	5.30	7.07	7.32
Proportion self-employed in urban areas (%), (1999–2000)	27.3	21.6	36.6	34.4
Proportion self-employed in rural areas (%), (1999–2000)	28.4	41.3	53.0	46.1

* Extrapolated from population proportions. MINISTRY OF STATISTICS & PROGRAMME IMPLEMENTATION, EMPLOYMENT AND UNEMPLOYMENT SITUATION AMONG SOCIAL GROUPS IN INDIA, REPORT NO. 469, at A259–60 tbls. 98R, 98U (NSS 55th Round 1999–2000).

Economic and Unemployment Scenario in India, ECON. & POL. WKLY. (May 24, 2003), at 2003; In this Note, both Current Daily Status (“CDS”) and Usual Principal and Subsidiary Status (“UPSS”) will be used for employment data.

11. The inferior employment situation of SCs and STs relative to the majority of the population gives rise to obvious economic inequalities in Indian society. In both rural and urban areas, the incidence of poverty is significantly higher amongst SC (urban 38%; rural 36%) and ST (urban 35%; rural 46%) populations than it is amongst the remainder of the Indian population (urban 21%; rural 21%). This statistic is further supported by the rural and urban monthly per capita expenditure figures, with regard to which SCs (urban Rs. 609; rural Rs. 419) and STs (urban Rs. 691; rural Rs. 388) lag far behind the non-SC/ST population (urban Rs. 933; rural Rs. 513) with average expenditures of just 75% as much as the rest of the population. The value of average urban and rural household assets suggests an even more dire picture: in both rural and urban areas, the value of average SC (urban Rs. 57,908;

situation, SCs' and STs' access to public resources is limited,¹² thereby impeding their ability to break free from this restrictive cycle. The enduring backward economic position of SCs and STs subsequently

rural Rs. 49,189) and ST (urban Rs. 68,763; rural Rs. 52,660) household assets amounts to under 40% of non SC/ST assets (urban Rs. 159,745; rural Rs. 134,500).

TABLE 2: SC AND ST MONETARY INDICATORS

Monetary Indicators	SC	ST	Non-SC/ST	All
Poverty				
Proportion of urban population in poverty (%), (2000)	38	35	21	24
Proportion of rural population in poverty (%), (2000)	36	46	21	27
Standard of Living				
Urban monthly per capita expenditure (Rupees), (1999–2000)	609	691	933*	855
Rural monthly per capita expenditure (Rupees), (1999–2000)	419	388	513*	486
Value of average urban household assets (Rupees), (1991)	57,908	68,763	159,745	144,330
Value of average rural household assets (Rupees), (1991)	49,189	52,660	134,500	107,007
Average urban household debt (Rupees), (1991)	2,513	1,570	3,859	3,618
Average rural household debt (Rupees), (1991)	1,394	838	2,249	1,908

* Extrapolated from population proportions.

† Derived from NSS data.

MINISTRY OF PLANNING & PROGRAMME IMPLEMENTATION HOUSEHOLD ASSETS AND INDEBTEDNESS OF SOCIAL GROUPS ON 30.6.91, REPORT No. 432, at 21–32 tbs.5, 14, 15 (1992); MINISTRY OF STATISTICS & PROGRAMME IMPLEMENTATION, DIFFERENCES IN LEVEL OF CONSUMPTION AMONG SOCIO-ECONOMIC GROUPS, REPORT No. 472 at 21 (1999–2000) (Statement 4, Statement 13); Thorat & Mahamallik, *supra* note 8, at 13 tbl.1.

12. The inter-group monetary disparities have a direct impact on the quality of life led by individuals from these groups. Literacy rates amongst SCs are 68.12% and 51.16% in urban and rural areas respectively, and are 69.09% and 45.02%, respectively, amongst STs. The rest of the population is significantly better off in this regard, recording an urban literacy rate of 81.80% and a rural literacy rate of 62.55%. As inferable by the relatively low child mortality rates of the non-SC/ST population (22.0%) and elevated rates among the SC (39.0%) and ST (46.0%) populations, SCs and STs are also deprived of access to adequate healthcare. Similarly, SCs and STs have significantly less access to basic public amenities. The proportion of non SC/ST households with toilet facilities is 28.63%, while SCs and STs lag far behind at 11.16% and 7.22%, respectively. The proportion of households with electricity connections closely mirrors the ratio of households with toilet facilities: 28.10% of SCs, 22.80% of STs, and 48.06% of non-SC/ST. Although there is comparatively greater equality between SCs (63.60%) and STs (43.21%) and the rest of the population (64.10%) with regard to access to potable water, non-SC/ST households still fare marginally better.

TABLE 3: SC AND ST QUALITY OF LIFE

Quality of Life Indicators	SC	ST	Non-SC/ST	All
Health & Education				
Urban literacy rate (%), (2001)	68.12	69.09	81.80	79.92
Rural literacy rate (%), (2001)	51.16	45.02	62.55	58.74
Child mortality (%), (2000)	39.0	46.0	22.0	26.7*
Access to public amenities				
Proportion of households with toilet facilities (%), (1991)	11.16	7.22	28.63	24.07*
Proportion of households with access to potable water (%), (1991)	63.60	43.21	64.10	62.35*
Proportion of households with electricity connection (%), (1991)	28.10	22.80	48.06	42.79*

* Extrapolated from population proportions.

GOV'T OF INDIA PLANNING COMM'N, NATIONAL HUMAN DEVELOPMENT REPORT (2002) (tbs.3.5, 3.7, 3.12 & 5.9); Thorat, *supra* note 7, at 13.

exacerbates the social prejudice they suffer. A causal chain, by which exclusivist social practices create economic inequalities, which in turn increase social isolation, maintains a traditional hierarchy that restricts SCs and STs to the base of Indian society.

In *Thomas*, the Supreme Court adopted the “vertical perspective” to justify remedial employment measures to overcome the inequality perpetuated by the caste system.¹³ According to this view, “the present is seen as a transition from a past of inequality to a desired future of substantive equality; the purpose of compensatory discrimination is to promote equalization by offsetting historically accumulated inequality.”¹⁴ In line with *Thomas*, Justice Hedge concluded in *Viswanath v. Government of Mysore* that “the nation’s interest will be best served . . . if the backward classes are helped to march forward and take their places in a line with the advanced sections of the people.”¹⁵

II. CONSTITUTIONAL PROMOTION OF EMPLOYMENT EQUALITY

The economic upliftment of SCs and STs was viewed as such a pressing concern at the time of India’s independence that employment-related guarantees for SCs and STs are enshrined in the Constitution of India (“Indian Constitution”). Dr. Bhimrao Ramji Ambedkar, an exponent of the SC cause, was the chief architect of the Indian Constitution. Ambedkar’s central belief that “[d]iscrimination against citizens by government officers in public administration or by private employers in factories and commercial concerns on the grounds of race or creed or social status should be treated as offenses”¹⁶ became the cornerstone of the Indian Constitution’s job reservation policy.

The centrality of SC and ST economic welfare to the Indian Constitution is established with the preamble’s pledge of equality.¹⁷ In the

13. MARC GALANTER, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA* 380 (1984).

14. *Id.*

15. *See id.* (citing *Viswanath v. Government of Mysore*, 85 A.I.R. 1964 (Mys.) 132, 136).

16. Sukhadeo Thorat et al., *Debate on Reservation in Private Sector*, in *RESERVATION AND PRIVATE SECTOR*, *supra* note 7, at 17.

17.

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity;

employment realm, equality is promoted through two channels: "equality in law" and "equality in fact."¹⁸

Article 16 of the Indian Constitution seeks to ensure the fundamental employment rights for so-called backward classes of citizens generally.¹⁹

and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation.

INDIA CONST. pmb1.

18. Sridharan, *supra* note 7, at 108 (1999).

The Indian Constitution houses both the notion of equal treatment of individuals and the notion that members of a group who have suffered from hierarchical subordination and structuralized inequality may face unique obstacles to advancement that facial equal treatment cannot obviate. The [Indian] Constitution charges the government with promoting these groups' interests, and explicitly permits the use of reservations or other preferences to repeal the negative consequences of membership in a 'backward class.' Therefore, the Indian government, including the judiciary, need not debate whether equality must always entail ignoring potentially salient group membership, or whether group membership can, in fact, be ignored. Similarly, attempts to justify caste-based assistance need not work around a vague or inflexible mandate for equality. In fact, arguments for preferential treatment marshal the Constitution strongly in their favor.

Id.

19. The article states:

Equality of opportunity in matters of public employment.

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent. reservation on total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

By codifying that there shall be equality of opportunity for all citizens and by further prohibiting discrimination in public sector employment, articles 16(1) and 16(2) provide equality in law. On the other hand, articles 16(4), 16(4a), and 16(4b), in granting state and national governments the authority to increase the presence and prominence of backward class individuals in public sector employment, tacitly further equality in fact.

Article 46²⁰ of the Indian Constitution, a directive principle, places a broad responsibility on the state and national governments to promote the “educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and Scheduled Tribes.”²¹ In placing this affirmative, albeit vague, duty upon governments to promote the economic interests of SCs and STs, article 46 is the germination point of a job reservation policy geared towards SCs and STs.

Article 335,²² a provision aimed directly at SCs and STs, brings to fruition Ambedkar’s longstanding conviction of making public sector job reservations for SCs and STs.²³ The pressing priority to implement public

INDIA CONST. art. 16.

20. The article states:

Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.

The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

INDIA CONST. art. 46.

21. *Id.*

22. The article states:

Claims of Scheduled Castes and Scheduled Tribes to services and posts.

The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State:

Provided that nothing in this article shall prevent in making of any provision in favor of the members of the Scheduled Castes and the Scheduled Tribes for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.

INDIA CONST. art. 335.

23. B.R. AMBEDKAR, *THE ESSENTIAL WRITINGS OF B.R. AMBEDKAR* 376–77 (Valerian Rodrigues ed., 2002).

The Depressed Classes have suffered enormously at the hands of the high caste officers who have monopolized the Public Services by abusing the Law or by misusing the discretion vested in them in administering it to the prejudice of the Depressed Classes and to the advantage of the caste Hindus without any regard to justice, equity or good conscience. This mischief can only be avoided by destroying the monopoly of caste Hindus in the Public Services and by regulating the recruitment to them in such a manner that all communities including the Depressed Classes will have an adequate share in them. For this purpose the

sector reservations is highlighted by article 335's rule that claims of SCs and STs to government positions shall be taken into consideration consistent with the maintenance of efficiency of administration,

“[p]rovided that nothing in this article shall prevent in making of any provision in favor of the members of the Scheduled Castes and the Scheduled Tribes . . . for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.”²⁴

Article 335's stance makes clear that reservations and promotions of SCs and STs in public sector jobs take priority over “efficiency of administration.”²⁵

Article 335's call to establish a public sector job reservation policy for SCs and STs was realized through a 1950 Ministry of Home Affairs resolution.²⁶ The resolution reserved 12.5% of vacancies in central

Depressed Classes have to make the following proposals for statutory enactment as part of the constitutional law:

(1) There shall be established in India and in each Province in India a Public Service Commission to undertake the recruitment and control of the Public Services.

(2) No member of the Public Service Commission shall be removed except by a resolution passed by the Legislature nor shall he be appointed to any office under the Crown after his retirement.

(3) It shall be the duty of the Public Service Commission subject to the tests of efficiency as may be prescribed—(a) to recruit the Services in such a manner as will secure due and adequate representation of all communities, and (b) to regulate from time to time priority in employment in accordance with the existing extent of the representation of the various communities in any particular service concerned.

Id.

24. INDIA CONST. art. 335.

25. *Id.*

26. Ministry of Home Affairs, Resolution No. 42/21/49-NGS (Sept. 13, 1950).

The Government of India [has] now reviewed their policy in this regard in the light of the provisions of the Constitution of India which lay down *inter alia* that with certain exceptions no discrimination shall be made in the matter of appointments to the Services under the State on grounds of race, religion, caste, etc. The exceptions are that special provision shall be made for Scheduled Castes and Scheduled Tribes in all Services and for Anglo-Indians in those services in which they had special reservations on the 14th August 1947. Pending the determination of the figures of population at the Census of 1951 the Government of India have decided to make the following reservations in recruitment to posts and services under them:

(a) *Scheduled Castes*—The existing reservation of 12 1/2% of vacancies filled by direct recruitment in favour of the Scheduled Castes will continue in the case of recruitment to posts and services made, on an all-India basis, by open competition, *i.e.*, through the Union Public Service Commission or by means of open competitive tests held by any other authority. Where recruitment is made otherwise than by open competition the reservation for Scheduled Castes will be 16 2/3% as present.

government positions for SCs and 5% for STs.²⁷ Similar reservation schemes exist at the state level, with reservations ranging from 5% to 25% for SCs and 3% to 80% for STs.²⁸

III. THE BROADENING REACH OF JOB RESERVATIONS

Political pressures, legislative policies, and broad judicial interpretation have expanded the scope of India's job reservation scheme in four directions. First, a legislative adjustment increased the quotas for SCs and STs in central government positions. Second, judicial interpretation of the Indian Constitution has allowed for the application of job reservations at the state level to backward classes. Third, this flexible judicial interpretation of extending job reservation beyond SCs and STs was crystallized with a legislative extension of reservations to Other Backward Classes ("OBCs"). Fourth, a relatively modern movement advocating private sector reservations has sought to lengthen the applicable reach of job reservations.

A. Increased Quotas for SCs and STs

First, SC and ST reservation quotas were raised to 15% for SCs and 7.5% for STs in 1970.²⁹ Largely a result of increased advocacy, the quota extension is attributable primarily to a growth in awareness of SCs' and STs' disproportionately inferior representation in the workforce.

(b) *Scheduled Tribes*—Both in recruitment by open competition and in recruitment made otherwise than by open competition there will be a reservation in favour of members of Scheduled Tribes of 5% of the vacancies filled by direct recruitment.

(c) *Anglo-Indians*—The reservations which were in force in favour of Anglo-Indians, in the Railway Services, the Posts and Telegraphs Department and the Customs Department on the 14th August, 1947, will be continued subject to the provisions of Article 336 of the Constitution.

Id.

27. *Id.* Since most public sector recruitment occurs through open competition, the quoted figures refer to reservations only for positions for which recruitment occurs through open competition. In the case of positions for which recruitment is not made through open competition, reservations of 16.5% for SCs and 5% for STs were made. *Id.*

28. GALANTER, *supra* note 13, at 87. See Maharashtra State Public Services (Reservation for Scheduled Castes, Scheduled Tribes, De-notified Tribes (*Vimukta Jatis*), Nomadic Tribes, Special Backward Category and Other Backward Classes) Act 2001 (Mah. Act No. 8 of 2004). See also The Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of Appointments or Posts in the Services Under the State) Act, 1993 (Tamil Nadu Act No. 45 of 1994), art. 31B.

29. GALANTER, *supra* note 13, at 86. Reservations for STs of positions for which recruitment occurs through means other than open competition were also increased to 7.5% in 1970. *Id.*

B. Extending Job Reservations to Backward Classes of Citizens at the State Level

Second, the Indian Supreme Court interpreted article 15 of the Indian Constitution³⁰ to permit the extension of job reservations to backward classes of individuals.³¹ In *Balaji v. State of Mysore*,³² the Supreme Court held that article 15, section 1's stipulation that "[t]he State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them"³³ is not violated when a state makes a "special provision for the advancement of any socially and educationally backward classes of citizens"³⁴ pursuant to article 15, section 4.³⁵ The court reasoned that reservations³⁶ for backward classes were valid under article 15, because by looking after the interests of the weaker elements in society, article 15, section 4 accomplishes its objectives of advancing the interests of society as a whole.³⁷ The court elaborated that "though castes in relation to Hindus may be a relevant factor to consider in determining the social backwardness of . . . classes of citizens,"³⁸ backwardness under

30. The article states:

Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

INDIA CONST. art 15.

31. *Balaji v. State of Mysore*, A.I.R. 1963 S.C. 649, 660.

32. *Id.*

33. INDIA CONST. art. 15 § 1.

34. *Id.* § 4.

35. A.I.R. 1963 S.C. 649 at 657. "Article 15(4) authorises the State to make special provision for the advancement of socially and educationally backward classes of citizens, as distinguished from the Scheduled Castes and Scheduled Tribes." *Id.* at 658.

36. The reservations at issue in *Balaji* were educational reservations, rather than employment reservations. *Id.* at 650. Nevertheless, the analysis of which individuals can be provided special provisions by a state remains constant in either context.

37. *Id.* at 661.

38. *Id.* at 461. "There are certain sections of Indian society such as Christians, Jains, Muslims, etc., who do not believe in caste system, and the test of caste does not apply to them." *Id.* at 441.

article 15, section 4 must ultimately be “both social and educational”³⁹ backwardness. Therefore, the court’s holding in *Balaji* opened the door for individual state reservation policies in favor of backward classes of citizens who are “comparable to Scheduled Castes and Scheduled Tribes.”⁴⁰

C. Extending Job Reservations to OBCs at the Central Government Level

Third, in lieu of the judicial broadening of the reservation scheme, the Janata Government appointed a new Backward Classes Commission (“Commission”) in February 1978 pursuant to its electoral promise.⁴¹ Under the chairmanship of B.P. Mandal, the five-person commission was charged with:

- (i) determin[ing] the criteria for defining the socially and educationally backward classes; (ii) recommend[ing] steps to be taken for the advancement of the socially and educationally backward classes of citizens so identified; (iii) examining the desirability or otherwise of making provision for the reservation of appointments or posts in favor of such backward classes which are not inadequately represented in the services of both the Central and State Government; and (iv) present[ing] a report setting out the facts as found by them and making such recommendations as they think proper.⁴²

Consistent with *Balaji*, the Commission “accorded significant weight to caste as the *rod* by which to measure inclusion in a list of backward classes.”⁴³ Accordingly, the Commission recommended a twenty-seven

39. *Id.* at 655. “In short, *Balaji* appears to leave intact caste or communal units as the things to be measured, while confining the role of caste as the measuring rod.” MAMTA RAJAWAT, ENCYCLOPAEDIA OF DALITS IN INDIA 93 (2004).

40. A.I.R. 1963 S.C. 649 at 658.

41. GALANTER, *supra* note 13, at 186–87 n.141.

The 1977 election manifesto of the Janata party called for an end to caste distinctions and promised the establishment of an independent and autonomous civil rights commission “competent to ensure that the minorities, scheduled castes and tribes, and other backward classes do not suffer from discrimination or inequality.” It promised a radical reduction of disparities by a “policy of special treatment” in favor of the “weaker sections of our society.” In connection with the provision of “preferential opportunities for education and self-employment to these sections” the party promised to “reserve between 25 and 33 per cent of all appointments to Government service for backward classes.”

Id.

42. *Id.* at 187 n.142.

43. Sridharan, *supra* note 7, at 114.

percent⁴⁴ reservation in government employment for OBCs⁴⁵ in its 1980 report. The report's recommendation of twenty-seven percent reservations in government employment for OBCs was implemented ten years later in August 1990.⁴⁶

In *Sawhney v. Union of India*,⁴⁷ the Supreme Court validated the Commission's report and its recommendation of a twenty-seven percent reservation for OBCs.⁴⁸ Consistent with *Balaji*, the *Sawhney* court reasoned that caste can be a vital consideration in compiling a list of socially and educationally backward classes, as long as the caste is socially and educationally backward, as determined by empirical evidence.⁴⁹ Thus, the ultimate inquiry into backwardness continues to focus on educational and social backwardness; caste remains only a factor, albeit a vital one, in determining backwardness. *Sawhney*, an extension of *Balaji*, effectively imported *Balaji's* provisions of state-level reservations for backward classes of citizens to central government employment.⁵⁰

D. A Call for Private Sector Reservations

Fourth, the latest push to broaden India's job reservation scheme has come from state officials who favor private sector job reservations.⁵¹ The

44. *Id.* While, according to the Commission, the OBCs totalled 52% of the Indian population, the Commission limited its recommendation of reservations for OBCs to 27%. The Commission did so to ensure that the totality of reservations, 27% for OBCs and 22.5% for SCs and STs, would be in compliance with the *Balaji* holding that reservations in the central government not exceed 50%. *Id.* at 114 n.94.

45. The OBCs are collections of several ethnic, religious, and caste groups that are seen as historically disadvantaged. A major group included under this newly formed category are the *Sudras*. Although not the victims of untouchability and social stigma at the level suffered by SCs, *Sudras* share a similar position of economic backwardness with *Ati-Sudras*. See generally GALANTER, *supra* note 13, at 154–58. For this reason, the government of India decided to officially classify *Sudras* under the category of OBCs and make them eligible to reap the benefits of pro-equality incentives. Despite their access to government benefits, OBCs' benefits are not constitutionally guaranteed; the state is afforded flexibility in determining which groups shall constitute "other backward classes." *Id.*

46. Sridharan, *supra* note 7, at 115–16.

[I]n August 1990, Prime Minister V.P. Singh, who "looked likely to fall in the face of multiple political crises", announced that he would implement the Report's recommendation of 27% reservations in government employment for Other Backward Classes. Many observers characterized Singh as a political opportunist . . . calculating that his announcement [would earn him a hefty portion of the rural electorate].

Id.

47. A.I.R. 1993 S.C. 477.

48. *Id.* at 516.

49. *Id.* at 554.

50. *Id.* at 563–74.

51. Calls for extending job reservations to the private sector are "so loud." *Untouchable and Unthinkable*, ECONOMIST, Oct. 4, 2007, at 15.

reasons for establishing private sector job reservations are clear. First, the greatest threat to the effective future functioning of India's job reservation system is arguably the unrelenting fall in public sector employment.⁵² The contractionary pressure of liberalization and privatization on public sector employment has prompted many pro-SC/ST activists to call for private

52. Although it is widely agreed that the employment reservation policy has fulfilled the immediate aim of creating more proportional representation of backward classes in the public sector, the fulfilment of this narrow objective has not translated into a significant impact on Indian economic and societal equity concerns as a whole.

The first cause of this failure is that public sector employment accounts for only a fraction of the Indian workforce (total employment). Public sector jobs, depending on the method of measurement, have consistently represented between just 5% and 6% of total employment from 1993 to 2001. Consequently, irrespective of the program's efficiency, a public sector job reservation policy can only have a limited impact on promoting employment equality. *See infra* tbl.8.

The second reason public sector job reservations are faltering is that while the quotas remain pegged at 15% for SCs and 7.5% for STs, SC and ST participation in the labor force has gone up from 16.3% and 8.7% in 1993–1994 to 18.3% and 9.5% in 1999–2000, respectively. *See infra* tbl.4. Consequently, the outdated quotas no longer adequately reflect the proportions of these groups in the nation's labor force. The ever increasing gap between the quotas and the composition of the labor force in India result in further political pressure from pro-SC/ST advocates.

TABLE 4: VALIDITY OF QUOTAS—COMPARATIVE SIZE OF LABOR FORCE (MILLIONS) BY SOCIAL GROUPS

Year	SC	ST	Other	All	SC%	ST%
1993–1994	54.84	29.56	251.57	335.97	16.3	8.7
1999–2000	66.57	34.80	261.96	363.33	18.3	9.5

Employment and Unemployment Scenario in India, supra note 10.

The problem of the growing SC/ST labor force is compounded by the decline in employment in India's public sector. India's path to economic liberalization, which entails privatization of parastatal entities, has brought a decline in public sector employment. This, in turn, reduces the absolute number of reservations for SCs and STs. While the proportion of SCs and STs in the labor force has grown by 3.56% and 2.95%, respectively, between 1993 and 1999, public sector employment suffered a slight decrease, shrinking by 0.08%. This period of stagnation was followed by a period of greater decline as employment slipped by a further 0.39%. After stagnating in the mid-1990s while the Indian economy started becoming integrated with global markets, employment in the public sector is now in rapid decline as the effects of globalization, liberalization, and privatization are becoming fully visible. As India's liberalist policies come into full effect, public sector employment, and thus job reservation, are bound to keep dwindling. Although this phenomenon, independent of the growing proportion of SCs and STs in the labor force, does not call the validity of the size of the quotas into question, it does significantly reduce the realm of control that the already limited reservation policy wields upon the economy. It therefore makes the case for the implementation of a broader pro-equality program.

TABLE 5: LABOR FORCE VERSUS JOBS IN PUBLIC SECTOR

Year	Labor Force				Public Sector Employment	
	SC (million)	SC Avg. Annual Growth from 1993 (%)	ST (million)	ST Avg. Annual Growth from 1993 (%)	No. Employed (million)	Avg. Annual Growth from 1993 (%)
1993	54.84	-	29.56	-	19.326	-
1999	66.57	3.38	34.80	2.75	19.415	0.08
2003	-	-	-	-	18.580	-0.39

Economic and Unemployment Scenario in India, supra note 10.

sector job reservations. Second, as many observers of India's employment system would quickly point out, "hiring on bases other than merit, such as caste, community, language and regional affiliation, has been a common phenomenon."⁵³ Several economic surveys indicate that discrimination in hiring and the hiring of SCs and STs for low-wage jobs⁵⁴ are rampant in the Indian private sector. To compensate for falling public sector reservations and systemic discrimination in the private sector, SC and ST advocates are calling for private sector reservations.

IV. REJECTING THE CALLS FOR PRIVATE SECTOR RESERVATIONS

Despite the existence of these two adverse factors facing SCs and STs in the employment realm, India should not embark on a policy of private sector job reservations for three reasons. First, India will repel foreign investment if it extends job reservations to the private sector. Second, given that public sector job reservations have been more detrimental than beneficial to the interests of SCs and STs, extending reservations to the private sector will only magnify the reach of an injurious scheme. Third, notwithstanding the first two points, the magnitudinal insignificance of employment in the private sector means that reservations in the private sector will be largely inconsequential.

A. *Private Sector Job Reservations Will Repel Foreign Investment*

In today's economic environment, "the free market is the only ideological alternative left."⁵⁵ Furthermore, the Golden Straitjacket, a set of free market policies⁵⁶ implemented by national governments, "is the defining political-economic garment of this globalization era."⁵⁷ Adorning

53. T.S. Papola, *Social Exclusion and Discrimination in Hiring Practices*, in RESERVATION AND PRIVATE SECTOR, *supra* note 7, at 101, 102.

54. Sukhadeo Thorat, *Caste System and Economic Discrimination*, in RESERVATION AND PRIVATE SECTOR, *supra* note 7, at 66, 75–76.

55. FRIEDMAN, *supra* note 1, at 86.

56. *Id.* Friedman lists the following golden rules:

making the private sector the primary engine of its economic growth, maintaining a low rate of inflation and price stability, shrinking the size of its state bureaucracy, maintaining as close to a balanced budget as possible, if not a surplus, eliminating and lowering tariffs on imported goods, removing restrictions on foreign investment, getting rid of quotas and domestic monopolies, increasing exports, privatizing state-owned industries and utilities, deregulating capital markets, making its currency convertible, opening its industries, stock, and bond markets to direct foreign ownership and investment, deregulating its economy to promote as much domestic competition as possible.

Id. at 86–87.

57. *Id.* at 86.

the Golden Straitjacket requires a transformation to democracy and an opening of the economy.⁵⁸ On one hand, wearing the Golden Straitjacket has the advantage of attracting foreign investment⁵⁹—“the tighter you wear it, the more gold it produces.”⁶⁰ Tightening the Golden Straitjacket requires deregulation of domestic economies so as to facilitate higher profits. On the other hand, deviation from the Golden Straitjacket, which India risks by further regulating its labor market with private sector reservations, will repel foreign investors.⁶¹

As evident from the negative stance of Indian business towards potential implementation of private sector reservations,⁶² this further regulation of the domestic market risks repelling foreign investors. The desire to implement employment quotas in the private sector has been met by stiff resistance from Indian businesses, who fear that such programs would have a two-fold effect of hindering economic efficiency. First, relying on a basic economics rationale, Indian entrepreneurs argue that “by making it hard to fire workers, [the quotas] discourage investment and job-creation.”⁶³ Depressed investment and job-creation will hurt the entire Indian economy, including the SCs and STs. Second, members of the private sector fear that hiring by quotas will lead to a sub-standard workforce, thereby reducing the efficiency of output.⁶⁴ The divide between India’s entrepreneurs and many social activists concerning the issue of private sector job reservations has been highlighted in Maharashtra, one of India’s leading commercial states, where legislation to implement a fifty-two percent private sector employment reservation for backward classes was framed in 2004.⁶⁵ Although the Maharashtra act mandates that compulsory reservations only apply to “government-aided institutions”⁶⁶

58. *Id.* at 88–89.

59. *Id.* at 88. Friedman refers to foreign investors as “The Electronic Herd.” *Id.* at 90. The Electronic Herd is composed of two groups. First, “short-horn cattle” are short-term investors, such as currency traders, mutual and pension funds, hedge funds, insurance companies, bank trading rooms, and individual investors. *Id.* at 95. Second, “long-horn cattle,” such as multinational companies, are involved in foreign direct investment. *Id.*

60. *Id.* at 88.

61. *Id.*

62. *Untouchable and Unthinkable*, *supra* note 51.

63. *A Backward Cast of Mind?*, *ECONOMIST*, Nov. 13, 2004, at 47.

64. *Untouchable and Unthinkable*, *supra* note 51. Azim Premji, head of one of India’s leading software companies, explains that if the private sector is to remain internationally competitive, it has “no alternative but to hire the best talent available.” *Caste and Cash*, *ECONOMIST*, Apr. 29, 2006, at 46. Rahul Bajaj, a leading industrialist, echoes this sentiment with his caution that “industry survives on the quality of its output,” and “cannot afford to have a culture of entitlements.” Rahul Bajaj, *Reservations*, in *RESERVATION AND PRIVATE SECTOR*, *supra* note 7, at 248, 248–49.

65. *Id.*

66. *Id.*

and are purely voluntary for the private sector, several private businesses have already threatened to desert the economically vibrant state. The situation in Maharashtra, many experts predict, is a microcosm of the national environment. Initially, Singh had taken mild steps to avoid the potentially explosive situation of pushing for stringent private sector reservation legislation by opting to urge members of the private sector to "commit themselves, voluntarily, to broadening their workforce" instead.⁶⁷ Reacting to the private sector's irresponsiveness to his initial plea, Singh has warned that "strong measures" will be taken if companies do not voluntarily implement employment equalizing schemes.⁶⁸ In an effort to preempt Singh's threat, businesses are reluctantly beginning to implement their own employment equalizing initiatives.⁶⁹ Nevertheless, loosening India's Golden Straitjacket in accord with Singh's threat is likely to repel current investors and deter future investors from entering India.

B. Extending Reservations to the Private Sector Will Magnify the Reach of the Flawed Public Sector Reservation Scheme

Public sector reservations in India have formalized the hierarchical caste system.⁷⁰ This unintended result arises from the fact that reservations have limited SCs and STs to menial occupations in the Class C and D employment categories. As evident in Table 6, SCs and STs occupy a disproportionately higher percentage of jobs in Classes C and D, the low employment categories.⁷¹ Conversely, SCs and STs occupy a disproportionately lower percentage of jobs in Classes A and B, the high employment categories. In fact, SC and ST employment in Class A and B jobs continues to fall short of their respective reservation quotas of 15% and 7.5%.

For purposes of this clause the expression Government aided institutions shall also include institutions or industries which have been given either prior to coming into force of this Act or thereafter, aid in the form of Government land at concessional rates or any other monetary concessions by Government, or is recognised, licenced, supervised, or controlled by Government

Id.

67. *Caste and Cash*, *supra* note 64.

68. *With Reservations*, *ECONOMIST*, Oct. 6, 2007, at 81.

69. *Id.* at 82.

70. See Christophe Jafferlot, *The Impact of Affirmative Action in India: More Political Than Socioeconomic*, 5 *INDIA REV.* 173, 176–77 (2006).

71. For example, Class D includes mainly sanitation workers. *Id.* at 176.

TABLE 6: PERCENTAGE SHARE OF SC, ST, AND NON-SC/ST TO TOTAL EMPLOYEES IN GOVERNMENT JOBS⁷²

	SC				ST				Non-SC/ST			
	A	B	C	D	A	B	C	D	A	B	C	D
1991	9.09	11.82	15.65	21.24	2.53	2.35	4.98	6.82	88.37	85.83	79.36	71.94
1993	9.80	12.17	15.91	20.73	3.06	2.35	5.43	6.87	87.13	85.48	78.66	72.39
1996	11.51	12.30	15.45	20.27	3.57	2.81	5.65	6.07	84.93	84.89	78.90	73.67
1999	11.29	12.68	15.78	20.00	3.39	3.35	6.07	7.00	85.32	83.98	78.15	73.00
2002	11.09	14.08	16.12	20.07	3.97	4.18	5.93	7.13	84.94	81.74	77.94	72.80
2003	11.93	14.32	16.29	17.98	4.18	4.32	6.54	6.96	83.88	81.36	77.17	75.06

The inability of SCs and STs to fill reservation quotas in the higher employment categories results from two conditions. First, there is a lack of qualified SC and ST candidates to fill the reservation quotas in the high employment categories.⁷³ In *Balaji*, the Supreme Court recognized that efficiency concerns set limits upon reservations in promotion. The Court warned that care should “be taken not to provide for unreasonable, excessive or extravagant reservation, for that would, by eliminating general competition in a large field and by creating wide-spread dissatisfaction amongst the employees, materially affect efficiency.”⁷⁴ Accordingly, the Court concluded that forcing reservations in promotions “beyond the permissible and legitimate limits is a fraud on the Constitution.”⁷⁵ Therefore, in *Balaji*, the Supreme Court “gave notice that it would carefully scrutinize the reasonableness of reservations in the area of promotions.”⁷⁶ Thus, only qualified SCs and STs are eligible for reservations in high employment categories. The lack of qualified SC and ST candidates means that reservations in high employment categories remain unfulfilled. Second, a lack of political will has prevented SCs and STs from occupying more high employment categories. In fact, some scholars speculate that the public sector reservation scheme only earned

72. Thorat, *supra* note 7, tbls.8, 9, 10.

73. The small number of qualified SCs and STs results from the government’s lack of efforts to improve the quality of higher education. See Devesh Kapur & Pratab Bhanu Mehta, Indian Higher Education Reform: From Half-Baked Socialism to Half-Baked Capitalism 10 (Ctr. for Int’l Dev. at Harvard Univ., Working Paper No. 108, 2004), available at <http://www.cid.harvard.edu/cidwp/pdf/108.pdf>. Political pressure regarding higher education in India “has been largely expressed as a demand for more seats rather than as a demand for higher quality.” *Id.* Since the best middle-class graduates can seek education abroad or privately, the government faces less pressure to reform quality. Thus, unlike their middle-class counterparts, SC and ST students are restricted to inferior higher educational institutions. Consequently, there is a smaller proportion of skilled SC and ST graduates.

74. *Balaji v. State of Mysore*, A.I.R. 1963 S.C. 649, 664.

75. *Id.*

76. GALANTER, *supra* note 13, at 371.

widespread acceptance from political elites at its inception due to the prevailing belief that SCs and STs could never "challenge" them.⁷⁷

By effectively restricting SCs and STs to the low employment categories, the public sector job reservation scheme becomes reminiscent of the hierarchical caste system it seeks to dismantle. Under the public sector reservation scheme, SCs and STs continue to perform the menial tasks historically assigned to them under the caste system; "now they simply wear a government uniform and enjoy civil servant status."⁷⁸ Thus, extending an identical reservation scheme to the private sector will merely formally reserve a set of menial jobs that are already informally reserved for SCs and STs. Furthermore, extending an identical reservation policy to the private sector will have the detrimental effect of further sanctioning the informal hierarchy inherent in the caste system.

*C. The Magnitudinal Insignificance of Private Sector Employment
Renders Private Sector Reservations Inconsequential*

Due to the private sector's minimal share of employment, private sector job reservations in India show little promise of making a significant contribution to employment equality. Although employment in the private sector, unlike in the public sector, posted a positive average annual growth rate between 1993 and 1999 (1.78%), it is still increasing at a slower pace than the SC (3.28%) and ST (2.75%) labor forces.⁷⁹ The gap widens between 1999 and 2003, with private sector employment falling⁸⁰ at an average rate of 0.80% per year,⁸¹ while SC/ST numbers in the labor force are hypothesized to be still rising.⁸² Given the progression of the divide between the growth rates of SCs and STs in the labor force and the total employment in the private sector, it is foreseeable that private sector reservations will become further inept at promoting employment equality.

77. See, e.g., Jafferlot, *supra* note 70, at 177.

78. *Id.*

79. See *infra* tbl.7.

80. The counter-intuitive reduction in private sector employment as India liberalizes may be caused by the implementation of more efficient capital-intensive technologies and techniques imported from the global economy.

81. See *infra* tbl.7.

82. It is not possible to get recent figures of SCs and STs in the labor force, as no statistical survey has analyzed employment along SC and ST membership since 1999.

TABLE 7: LABOR FORCE VERSUS JOBS IN PRIVATE SECTOR⁸³

Year	Labor Force				Private Sector Employment	
	SC (million)	SC Avg. Annual Growth from 1993 (%)	ST (million)	ST Avg. Annual Growth from 1993 (%)	Number Employed (million)	Avg. Annual Growth from 1993 (%)
1993	54.84	-	29.56	-	78.51	-
1999	66.57	3.28	34.80	2.75	86.98	1.78
2003	-	-	-	-	84.21	0.73

The ongoing shrinkage of labor force employed in the private sector merely exacerbates an impracticality that a private sector reservation program in India would nevertheless encounter. Even if the private sector reservation program is framed and implemented perfectly, given the fact that it accounted for only 2.5% of the entire workforce in 2001, its scope will be extremely limited, far narrower than that of the current public sector reservation policy. With the private sector employing such a small portion of the working population, “even if the entire organised private sector is reserved for the SC/ST/OBC[,] the gains from employment will be very meagre.”⁸⁴ Consequently, when combined with public sector reservations, private sector reservation will make a minimal contribution to promoting employment equality in the nation.

TABLE 8: INDIAN SECTORAL EMPLOYMENT PROFILE⁸⁵

Year	Organized Sector (millions)			Unorganized Sector (millions)		Workforce (millions)	
	Public	Private	Total	Total (CDS)	Total (UPSS)	Total (CDS)	Total (UPSS)
1990	18.772	7.582	26.353	-	-	-	-
1993	19.326	7.851	27.177	288.66*	347.27 ⁺	315.84	374.45
1996	19.429	8.512	27.941	-	-	-	-
1999	19.415	8.698	28.113	308.64*	368.89 ⁺	336.75	397.00
2001	19.138	8.652	27.789	315.57*	-	343.36	-
2003	18.580	8.421	27.000	-	-	-	-

* Extrapolated from the difference between total workforce (“CDS”) and total employment in organized sector.

⁺ Extrapolated from the difference between total workforce (“UPSS”) and total employment in organized sector.

83. *Employment and Unemployment Scenario in India*, *supra* note 10; UNION BUDGET & ECONOMIC SURVEY: ECONOMIC SURVEY 2004–2005, MINISTRY OF FINANCE, GOVERNMENT OF INDIA tbl.3.3 (2004–2005), <http://indiabudget.nic.in/es2004-05/esmain.htm>.

84. R. Vaidyanathan, *Make Them Entrepreneurs Instead*, in RESERVATION AND PRIVATE SECTOR, *supra* note 7, at 356, 358.

85. *Employment and Unemployment Scenario in India*, *supra* note 10; GOVERNMENT OF INDIA MINISTRY OF FINANCE, *supra* note 83; GOVERNMENT OF INDIA PLANNING COMMISSION, *supra* note 10, at 139 tbl.4.

TABLE 9: SELECTED RATIOS OF SECTORAL EMPLOYMENT⁸⁶

Year	Private/ Public	Private/ Organized	Public/ Organized	Organized/ Unorganized	Private/ Unorganized	Public/ Unorganized	Organized/ Workforce	Private/ Workforce	Public/ Workforce	Unorganized/ Workforce
1990	0.404	0.288	0.712	-	-	-	-	-	-	-
1993	0.406	0.289	0.711	0.094*	0.027*	0.067*	0.086*	0.025*	0.061*	0.914*
1996	0.438	0.305	0.695	0.078 ⁺	0.023 ⁺	0.056 ⁺	0.073 ⁺	0.021 ⁺	0.052 ⁺	0.927 ⁺
1999	0.448	0.309	0.691	0.091*	0.028*	0.063*	0.083*	0.026*	0.058*	0.917*
2001	0.452	0.311	0.689	0.076 ⁺	0.024 ⁺	0.053 ⁺	0.071 ⁺	0.022 ⁺	0.049 ⁺	0.929 ⁺
2003	0.453	0.312	0.688	0.088*	0.027*	0.061*	0.081*	0.025*	0.056*	0.919*

* Based on CDS figures

⁺ Based on UPSS figures

V. A TWO-FOLD SOLUTION

This Note suggests a two-fold solution to resolving India's competing interests to promote employment equality for historically disadvantaged populations and to attract foreign investment by limiting its job reservation scheme. First, to attract foreign investment, India should adorn the Golden Straitjacket and adopt constitutional reforms to reflect a policy of economic deregulation. Second, to alleviate the plight of historically disadvantaged populations, India should provide incentives to private actors who promote national employment equality objectives.⁸⁷

A. Constitutional Reform

To attract foreign investment, India should design the job reservation scheme within the confines of the Golden Straitjacket. This economically liberal proposal for designing India's job reservation scheme is empirically supported by the United States' design of its affirmative action scheme in the employment sector. In the United States, the affirmative action scheme was designed within the confines of the Golden Straitjacket through judicial decisions and executive stances that reflect neoliberal economic ideals. In India, however, designing the job reservation scheme within the confines of the Golden Straitjacket requires constitutional reform.

86. *Employment and Unemployment Scenario in India*, *supra* note 10; GOVERNMENT OF INDIA MINISTRY OF FINANCE, *supra* note 83.

87. Promoting employment equality through the provision of incentives to private actors is not an untested approach. The South African affirmative action program is characterized as a system of incentives. See Sumeet Jain, *Affirmative Action: An Evolving Remedy*, in MONEY AND MORALITY, 44, 47 (Susan Brown ed., 2006).

*1. Designing an Affirmative Action Scheme in the Employment Sector
Within the Confines of the Golden Straitjacket in the United States*

In its application or omission of race-based affirmative action steps, the United States has promoted a deregulated business-friendly environment. The United States' aim of creating a business-friendly environment is evident both in executive stances and judicial opinions.

As racial tensions engulfed the United States in the 1960s, President John F. Kennedy arranged private, unpublicized meetings with a variety of leaders, specifically encouraging business leaders to utilize affirmative action methods to desegregate and hire more black workers.⁸⁸ Kennedy's utilitarian caution to the business leaders was that the nascent racial tensions, if left unattended, would harm their businesses.⁸⁹ Kennedy's propagation of affirmative action was, therefore, a pragmatic approach rooted in a sense of promoting business growth and economic productivity. President Lyndon Johnson "continued the promotion of affirmative action programs and justified them as buffers against burgeoning crisis."⁹⁰

However, as the nationwide racial crisis that enshrouded the United States in the 1960s melted away, an anti-affirmative action political agenda began to develop. Interestingly, this contrasting agenda also had its roots in business productivity and economic growth. President Ronald Reagan has been accused of "turning back the clock" of civil rights enforcement. Stemming from his belief in economic deregulation⁹¹ as a means of promoting economic growth, opposition to racial affirmative action policies "was a priority item on the Reagan administration's ideological agenda."⁹²

88. Sridharan, *supra* note 7, at 123 ("Unsure that his modest proposal for a version of the Civil Rights Act of 1964 would suffice 'to manage the coming nationwide crisis,' he urged these leaders to emulate the many efforts private businesses had already made to hire and train African Americans.").

89. *Id.* ("By hinting at an affirmative action model under the banner of staving off imminent violence, Kennedy moved closer to the implementation of affirmative action through the utilitarian logic of crisis management.").

90. *Id.* at 124.

91. *The Reagan Restoration*, WALL ST. J., June 7, 2004, at A20.

Mr. Reagan's domestic achievements were every bit as important to American revival. His agenda of tax cuts and deregulation ignited the boom that restored U.S. confidence and also forced Soviet leaders to confront the reality of their own weakness. By 1990 the U.S. economy had grown by a third, or roughly the size of Germany. The troubled economy of the 1970s would never have been able to finance the military buildup that helped to break Communism's back.

Id.

92. Joel L. Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong*, 1985 U.

Under this political backdrop, the judiciary significantly curtailed the reach of affirmative action during the Reagan era. The judiciary's mandate of restricting affirmative action so as to facilitate the broader objective of creating a deregulated, business-friendly environment is characterized by the decision in *Johnson v. Transportation Agency*.⁹³ The *Johnson* Court held that affirmative action on the part of an employer is only valid when it is implemented to "eliminate a manifest racial imbalance."⁹⁴ However, to the "great comfort [of] those concerned with American productivity,"⁹⁵ the court qualified its holding by limiting it in two ways. First, the Court's holding precluded selection of "utterly unqualified" candidates⁹⁶ solely on the basis of race. Second, the Court reduced the temporal scope of economic regulation relating to affirmative action in holding that affirmative action programs may only be temporary.⁹⁷ The Court's dual qualification in *Johnson* makes apparent the U.S. judiciary's emphasis on economic growth and productivity over societal regulation.

The concept of economic growth and business productivity has pervaded the judicial and political policy-making of affirmative action in the United States. The United States' quest to tighten its Golden Straitjacket has caused economic deregulation through stringent limitations on affirmative action. Furthermore, in situations where affirmative action has been permitted, political actors and the judiciary have tepidly restricted the application of affirmative action only to situations in which doing so would ultimately contribute to a more business-friendly environment.

2. *Designing a Job Reservation Scheme Within the Confines of the Golden Straitjacket in India*

Like the United States, India must adopt policies reflecting economic deregulation. Since India's job reservation scheme originates from its constitution, economic deregulation relating to job reservations consistent

ILL. L. REV. 785, 823.

93. 480 U.S. 616 (1987).

94. *Id.* at 630 (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979)).

95. *Id.* at 675 (Scalia, J., dissenting).

96. *Id.* ("The requirement that the employer 'take distinctions in qualifications into account' thus turns out to be an assurance, not that candidates' comparative merits will always be considered, but only that none of the successful candidates selected over the others solely on the basis of their race or sex will be utterly unqualified.")

97. *Id.* at 630. An affirmative action plan must not be "designed to maintain racial balance, but to 'eliminate a manifest racial imbalance.'" *Id.* (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979)).

with the Golden Straitjacket principle will require constitutional reform. Judicial interpretation that article 15, section 1's stipulation that "the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them"⁹⁸ is not violated when a state makes a "special provision for the advancement of any socially and educationally backward classes of citizens"⁹⁹ opens the door for state-sponsored initiatives.¹⁰⁰ Article 46 further directs the state to "promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes."¹⁰¹ This provision, in opposition to the Golden Straitjacket's principle of economic deregulation, compels the state to take measures, such as the implementation of job reservation schemes in the private sector, that promote the economic interests of weaker sections of the people.

Instead, the Indian Constitution should seek to explicitly disallow the imposition of mandatory regimes upon the private sector. Simply disallowing the imposition of mandatory schemes upon the private sector, while creating an environment of economic deregulation that foreign investors find attractive, leaves the door open for corrective measures to take the shape of volitional incentives.¹⁰²

B. A System of Incentives for Private Employers

To alleviate the employment position of historically disadvantaged populations without deterring foreign investment, India should provide incentives to private actors for promoting national employment equality objectives. Promoting employment equality through the provision of incentives to private actors is not an untested approach. The South African affirmative action program is characterized as a system of incentives. India, too, should adopt such a scheme.

98. INDIA CONST. art. 15, § 1.

99. *Id.* § 4.

100. *Balaji v. State of Mysore*, A.I.R. 1963 S.C. 649, 661.

101. INDIA CONST. art. 46.

102. Volitional incentives will not have a severe negative effect upon international investors, because businesses can decide, upon their individual cost-benefit analysis, whether or not to employ the measure. If the cost of the measure outweighs the benefit of the incentive, businesses may simply decline to employ the measure. If, however, the benefit of the incentive outweighs the cost of employing the measure, businesses will gladly implement the measure.

1. *A System of Incentives in South Africa*

The South African scheme promoting employment equality, Black Economic Empowerment ("BEE"), is a system of incentives.¹⁰³ Under BEE, private businesses bidding for government tenders receive additional points for undertaking initiatives equalizing employment for historically disadvantaged racial groups. Thus, the BEE initiative awards private businesses with points for improving the employment condition of "blacks"¹⁰⁴ by (i) hiring black managers, (ii) hiring black employees, and (iii) developing the skills of black employees.¹⁰⁵ Critically, however, the BEE initiative is not restricted to private businesses directly bidding for government tenders. To promote BEE among businesses not bidding for government tenders, a private business bidding for a government tender receives additional points for (i) procuring materials and services from businesses that are BEE-compliant, or (ii) investing in companies that are BEE-compliant.¹⁰⁶ Thus, a trickle-down effect ensures that a wide spectrum of private businesses have an incentive to be BEE-compliant.

2. *A System of Incentives in India*

In the Indian employment landscape it is especially beneficial for India to adopt the South African system of incentives. A system of incentives is the only practicable means of promoting employment equality objectives in India's vast unorganized sector. Characterized by low levels of regulation and subsequently high levels of cost-efficiency,¹⁰⁷ India's unorganized sector has consistently accounted for between ninety-one and ninety-three percent of the workforce in the 1990s and 2000s.¹⁰⁸ Due to the nature of businesses involved in the unorganized sector, primarily self-employed individuals and small partnerships,¹⁰⁹ the government has found it difficult to implement and enforce legislation, especially labor regulations, over this vibrant underground economy. It would therefore be impractical to assume that the government would be able to apply job reservations to the unorganized sector.

103. Jain, *supra* note 87, at 47.

104. It is important to note "that 'black people' in this Act is a generic term, encompassing African, coloured and Indian individuals." *Id.*

105. *Id.* at 48.

106. *Id.*

107. See generally S. Sakhtivel & Pinaki Joddar, *Unorganized Sector Workforce in India: Trends, Patterns and Social Security Coverage*, 4 ECON. & POL. WKLY. 2107 (2006).

108. See *supra* tbl.8.

109. Small partnerships are businesses with under ten employees.

With the growth of the unorganized sector, the need to promote employment equality objectives through a system of incentives grows. As India continues to globalize, the incentive—the multiplied financial gains from increased cost-efficiency and subsequent greater competitiveness in the international economy—for firms to leave the formal private sector in favor of the unorganized sector is escalating. Therefore, it is predicted that “the unorganized sector will expand further in years to come”¹¹⁰ and consequently account for an even greater proportion of the overall workforce. This prediction is already being realized in the fact that while the total number of laborers involved in the organized sector has grown at a rate of only 0.57% per annum between 1993 and 1999, unorganized sector employment has grown at approximately double the pace, recording an average annual growth rate of 1.15% for the same period.¹¹¹ With the ongoing greater growth of the unorganized sector workforce relative to that of the organized sector, the potential realm of control of a job reservation scheme will continue to shrink.

Given India’s economic reality, it is clear that a system that encourages participation by providing incentives will function better than one that imposes legal prescriptions. A system, such as a job reservation program, that further regulates business activity will create a stronger incentive for entrepreneurs to defect to the unorganized sector. In contrast, a system of incentives, such as tax breaks, subsidies, or some other form of preferential treatment, would not create such an incentive. In fact, since inclusion in the organized sector would be a prerequisite to attaining these benefits, such incentives could possibly encourage movement in the opposite direction, from the unorganized to the organized sector, thereby resulting in a two-fold benefit of promoting employment equality amongst a far greater cross-section of Indian businesses while also legitimizing a large portion of previously unrecorded and unregulated business activity.

CONCLUSION

Indeed, India faces two sets of competing interests. On one hand, the systemic historical discrimination faced by SCs and STs requires correction through the promotion of employment equality. On the other hand, as an emerging economy positioning itself to become attractive to

110. Social Sec. Div., Ministry of Labour & Employment, *Informal Sector in India; Approaches for Social Security*, available at <http://labour.nic.in/ss/INFORMALSECTORININDIA-ApproachesforSocialSecutiry.pdf> (last visited May 26, 2009).

111. *See supra* tbl.7.

foreign investors, it is imperative for India to adopt free market policies. Accordingly, this Note is critical of the previous expansions in the scope of India's job reservation scheme. More crucially, this Note warns that extending the job reservation scheme to the private sector does not reflect prudent economic policy. First, consistent with the Golden Straitjacket hypothesis, this Note contends that India will repel foreign investment if it extends job reservations to the private sector. Second, reasoning that public sector job reservations have been more detrimental than beneficial to the interests of SCs and STs, this Note submits that extending reservations to the private sector will only magnify the reach of an injurious scheme. Third, notwithstanding the first two points, the magnitudinal insignificance of employment in the private sector means that reservations in the private sector will be largely inconsequential. However, this opposition to private sector reservations is not indicative of insensitivity towards the need to level the employment playing field for SCs and STs. Accordingly, this Note proposes a two-fold solution for resolving India's competing interests to promote employment equality for historically disadvantaged populations and to attract foreign investment by limiting its job reservation scheme. To attract foreign investment, India, like the United States, should tighten its Golden Straitjacket by engaging in economic deregulation relating to job reservations. Nevertheless, India should still implement strategies to promote employment equality that fit inside its tight Golden Straitjacket. One such solution, as executed in South Africa, is the provision of an incentives system for private employers that would further employment equalization objectives.

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