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# **Government Imprudence and Judicial Decisions in Domicile Reservations: A Comparative Analysis between India and the United States**

*Tania Sebastian\**

## INTRODUCTION

The labyrinth of anachronism relating to the concept of ownership of resources by the state that can be used by its own residents, the resulting burden on interstate commerce, accompanied by the rationale of reducing unemployment in the state, the impediments that affect the free flow of labor, and the constitutional defects in the state's role and its function in the local hiring plan, are all issues that courts have to remedy.

This Article compares the hiring practices and preferences of local residents in the United States of America (U.S.) with India. Such analysis is relevant as level playing field doctrines have been used indefinitely to justify specific reservations in employment. While reservations for backward communities come within the constitutional scheme of India, this Article probes into the acceptance and constitutionality of reservations in employment. Further, this Article looks into the constitutionality of vertical reservations and justifications given by states for these types of reservations. The continued litigation in this area, even with decisions of the Supreme Court of India striking down unjustifiable vertical reservations for domicile preferences, speaks volumes about governments' imprudence relating to notifications for resident-based hires and domicile preferences given to residents. The Supreme Court of India has also been riddled with the calculations and implementation of horizontal reservations. Various state high courts in India have shown indecisiveness in their judgments with contradictory positions. These observations are made in light of the U.S. Constitution's Commerce Clause and Privileges and Immunities Clause. In short, the United States' justifications

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\* Assistant Professor of Law, School of Law, VIT Chennai Campus. Author can be contacted at: [sebastianantania1@gmail.com](mailto:sebastianantania1@gmail.com). The author would like to acknowledge the research assistance of Ms. Gabriela Michael, third-year student of VITSOL, on this Article.

and court decisions can be examined and contrasted with the Indian jurisprudence as a learning experience for both nations.

Both nations have set legislative boundaries stipulating what is and what is not acceptable as a hiring preference depending upon the use of local human resources and natural resources, which are then tested by the judiciary for validity. In examining the need to uphold local hiring principles, courts have tested these hiring preferences using constitutional and statutory principles. On the other hand, the main legislative aim is to reduce unemployment in the respective states.

This Article restricts its analysis to the Alaska Hire doctrine and looks at an aspect that deals more with employment rather than control over natural resources,<sup>1</sup> so that a comparison with India can be explored. This analytical restriction is necessary as the comparative system of India primarily focuses on employment under the analogous resident hire principle envisaged as an exception to Article 16 of the Constitution of India.<sup>2</sup> The limitation of this Article lies in the difference in the structure of governance of both nations, with the U.S. government functioning as a federal form of government and India as a combination of federal and unitary.<sup>3</sup> The difference in the division of powers results in states behaving differently and having varying rationales in judgments across the two jurisdictions. In spite of these differences, the regulation of interstate commerce and interstate movement in the two legal regimes are scrutinized in this Article.

## I. INDIA

### A. Affirmative Action and Vertical Reservation in the Indian Framework

Local hiring preferences cannot be discussed in a vacuum without the background of affirmative action. The history of discrimination and subjugation is sought to be remedied by affirmative action. Affirmative action is a remedy to past discrimination faced by minorities and is utilized to ensure that there is a better position to place them in this compassionate scheme of the Constitution of India.<sup>4</sup> It is designed to remedy the systematic unfairness that ran through centuries and

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1 See *Hicklin v. Orbeck*, 565 P.2d 159, 172–73 (Alaska 1977).

2 See INDIA CONST. art. 16.

3 See CONSTITUENT ASSEMBLY DEBATES, 11 THE CONSTITUENT ASSEMBLY OF INDIA 617–18 (Nov. 17, 1949) (stating that the Constitution of India does not present itself as federal or unitary, but a peculiar combination of both).

4 See M. Varn Chandola, *Affirmative Action in India and the United States: the Untouchable and Black Experience*, 3 IND. INT'L & COMP. L. REV. 101, 101–02 (1992).

generations.<sup>5</sup> These minorities were predominately based on gender, caste, and religion.

Courts in India (and the U.S.) have upheld the constitutional mandates of affirmative action,<sup>6</sup> with the simple logic of treating all citizens as equal,<sup>7</sup> while recognizing that unequals cannot be treated equally.<sup>8</sup> The Indian Constitution, in fact, expressly provides for affirmative action and “reservations,” or quotas.<sup>9</sup> These reservations are for backward classes of citizens, and include, as part of the constitutional scheme, Schedule Castes, Schedule Tribes, and Other Backward Castes.<sup>10</sup> These groups are bound together by the terminology of vertical reservation. Horizontal reservations are for categories of persons with disabilities, women, and ex-servicemen; vertical reservation encompasses domicile-based reservation.<sup>11</sup> Various cases discussed in the forthcoming parts of this Article have understood that horizontal reservation cuts across vertical reservation and that the most effective manner in which both vertical and horizontal reservations can co-exist is through inter-locking reservation.<sup>12</sup> Candidates selected against the quota for horizontal reservation will be placed within the vertical reservation in the appropriate category. This appropriate category depends upon their original category to which they belong in the roster meant for reservation of Schedule Castes, Schedule Tribes, and Other Backward Castes.

## B. The Beginning: Horizontal Reservations in India

Horizontal reservation is a reservation for women and persons with physical handicaps under Article 16 of the Constitution of India.<sup>13</sup> Article 16(1) of the Constitution of India states that in matters of public employment, “[t]here shall be equality of opportunity for all citizens.”<sup>14</sup> Article 16(3) mentions an exception to this rule:

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

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<sup>5</sup> *See id.* at 101.

<sup>6</sup> *See, e.g.,* Akhil Bharatiya Soshit Karmachari Sangh v. Union of India, 1981 AIR 298 (India); State of Kerala v. N.M. Thomas, 1976 AIR 490 (India).

<sup>7</sup> *See* INDIA CONST. art. 14.

<sup>8</sup> *See* Chandola, *supra* note 4, at 107.

<sup>9</sup> *Id.* at 105–06.

<sup>10</sup> *See id.* at 106.

<sup>11</sup> *What is Vertical Reservation and Horizontal Reservation?*, GOVTSTAFFNEWS, <http://govtstaffnews.in/what-is-vertical-reservation-and-horizontal-reservation/> [<http://perma.cc/RD5L-7DLB>].

<sup>12</sup> *See* Indra Sawhney v. Union of India, AIR 1993 SC 477, para. 95 (India).

<sup>13</sup> INDIA CONST. art. 16.

<sup>14</sup> INDIA CONST. art. 16, § 1.

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.<sup>15</sup>

As one of the two types of reservation, horizontal reservation is named as such for simplifying the types of reservation and affirmative action envisaged under the Constitution of India.

The Indian judicial trend in deciding cases under Article 16(3) includes the Supreme Court and the High Court decisions of various states. For example, a Uttarakhand High Court decision in March 2018 dealt with a ten percent horizontal reservation as advertised by the government that was ultimately declared unconstitutional.<sup>16</sup> The government's stance and notification were scrutinized under Article 16.<sup>17</sup> The contention was that the Government Order (G.O.) dated August 11, 2004, provided persons who are domiciled in the State of Uttarakhand and are identified as "andolankaris" (those who had participated in the Uttarakhand movement and have sustained injury during that movement and remained in jail for seven days or more) with horizontal reservation.<sup>18</sup> However, the G.O. was never a Government Order. Instead, it was a Circular issued by the Principal Secretary, Government of Uttarakhand, that was not notified in the State Gazette, and had been held unconstitutional in an earlier case.<sup>19</sup>

Nevertheless, the Government of Uttarakhand issued Circulars from time to time for appointment of "andolankaris" for Group "C" and Group "D" posts<sup>20</sup>—an action that the court found arbitrary. Pointing out the government's imprudence, Justice Lokpal stated that such a provision that flows from the G.O. "does not come within the ambit of provisions of Article 16(4) of the Constitution of India" that speaks about "provision[s] for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not

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<sup>15</sup> *Id.* at art. 16, § 3.

<sup>16</sup> *See* In the matter of appointments of activists on Group 'C' and Group 'D' posts under the Uttarakhand Rajya Andolan Ke Ghayal/Jail Gaye Andolankariyon Ki Sewayojan Niyamawali, 2010 v. State of Uttarakhand, WP No. 67 of 2011, paras. 22, 26 (Uttaranchal HC, Mar. 7, 2018) (India), <https://indiankanoon.org/doc/52637647/> [<http://perma.cc/3KZ6-VUCK>] (following a divided opinion on appeal by a division bench comprising of Justices Sudhanshu Dhulia and U.C. Dhyani this case was heard by a single bench).

<sup>17</sup> *See id.* at paras. 19–22.

<sup>18</sup> *See id.* at para. 4.

<sup>19</sup> *See id.* at para. 6. Later in the judgment, more clarity is provided on the fate of the Circulars: "It is worth mentioning here that the Circular Letter dated 11.08.2004 was quashed by learned Single Judge of this Court, vide judgment and order dated 11.05.2010, passed in Writ Petition no. 945 (S/S) of 2007 and connected writ petition, holding the said Government Order as violative of Article 14 and 16 of the Constitution of India." *Id.* at para. 26.

<sup>20</sup> *See id.* at paras. 4–5.

adequately represented in the services under the State.”<sup>21</sup> Further, the callous nature of the government in determining the type of reservation is also reflected in the fact that no data was collected before issuing the Circulars giving appointments to “andolankaris.”<sup>22</sup> Justice Lokpal also noted that the reservations were to be given without holding any competitive examination amongst them<sup>23</sup> which is in itself a clear violation of Articles 14 and 16(1) of the Constitution of India. Justice Lokpal goes on to state that “this is not even a reservation, but a form of gratuitous or compassionate appointment, which is clear violation of Article[s] 14 and 16 of the Constitution of India.”<sup>24</sup> And further that “the classification of ‘andolankaris’ is not based on any intelligible differentia which can distinguish ‘andolankaris’ from the many left out of the group and secondly the classification has no rational relation with the object sought to be achieved.”<sup>25</sup>

### C. The Analogous Concept of Resident Hire Principle in India: An Example

In December 2016, a controversial draft amendment to the Karnataka Industrial Employment (Standing Orders) Rules of 1961 was announced by the Government of Karnataka with the aim of providing a one hundred percent reservation for the local residents (known as “Kannadigas”) in private sector industries (except the Information Technology and Biotechnology sectors).<sup>26</sup> This amendment was to be applied across the state for certain categories of jobs that had obtained government concessions based on land, electricity, water, tax rebate, or deferment of tax as per Industrial Policy. A subsequent violation of the draft amendment would cancel these government concessions, hence compelling the private sector to implement the draft amendment. When announced to the public, a host of issues were discussed, most of all, the issue of loss of revenue by closing down options of hire from other states and its negative impact on labor mobility

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<sup>21</sup> *Id.* at paras. 20(4), 22.

<sup>22</sup> *Id.* at para. 23.

<sup>23</sup> *Id.* at paras. 6–7 (citing C.L. no. 1269 of 2004).

<sup>24</sup> *Id.* at para. 30.

<sup>25</sup> *Id.*

<sup>26</sup> See generally Karnataka Industrial Employment (Standing Orders) Rules (1961) (India) (demonstrating a lack of reservation for local residents in private sector industries); see also *Insights into Editorial: Karnataka’s Dangerous New Reservation Policy*, INSIGHTSIAS (Dec. 26, 2016) (showing that these private sectors have not been covered by the Karnataka Industrial Employment (Standing Orders) Rules of 1961 for a period of five years beginning in 2014, hence they were not affected by the draft amendment), <http://www.insightsonindia.com/2016/12/26/insights-editorial-karnatakas-dangerous-new-reservation-policy/> [<http://perma.cc/MT84-Y7NG>].

were brought to the forefront. In India, with mobility enshrined in the constitution, statistics show that inter-country mobility for job seekers is high.<sup>27</sup> This is in consonance with Article 19 of the Constitution of India that states that “all citizens shall have the right to move freely throughout the territory of India and to reside and settle in any part of the territory of India.”<sup>28</sup> Other than the fundamental right, Article 301 of the Constitution of India states that there shall be “[f]reedom of trade, commerce and intercourse [s]ubject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.”<sup>29</sup> Interestingly, this draft amendment was not pushed forward and the draft itself was made unavailable.<sup>30</sup>

#### D. The Resident Preference Dilemma Examined: Articles 15 and 16 of the Constitution of India

Article 15(2) of the Constitution of India bars discrimination on “grounds only of religion, race, caste or sex and place of birth . . . .”<sup>31</sup> The reasonableness under Article 15 is maintained by flexibility given to make special provisions for women and children, and to make “any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes,” should the state feel the need to do so.<sup>32</sup> Equality of opportunity in matter of public employment is found under Article 16 of the Constitution of India, which advocates a non-discriminatory policy. Article 16(2) provides that “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 or, any employment or office under the State.”<sup>33</sup> Nevertheless, Article 16(3) states that:

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

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<sup>27</sup> See LAVEESH BHANDARI & PAYAL MALIK, INDIA’S BORDERLESS WORKFORCE: A MANPOWER INDIA WHITE PAPER 8 (2018), <https://www.manpower.com/wps/wcm/connect/ec7b7b30-b9c3-4684-afc4-750fdb5e94a8/Indias+Borderless+Workforce.pdf?MOD=AJPERES> [http://perma.cc/W2VL-KDGG].

<sup>28</sup> INDIA CONST. art. 19.

<sup>29</sup> *Id.* at art. 301.

<sup>30</sup> See *Insights into Editorial: Karnataka’s Dangerous New Reservation Policy*, INSIGHTSIAS (Dec. 26, 2016), <http://www.insightsonindia.com/2016/12/26/insights-editorial-karnatakas-dangerous-new-reservation-policy/> [http://perma.cc/MT84-Y7NG].

<sup>31</sup> INDIA CONST. art. 15, § 2.

<sup>32</sup> *Id.* at art. 15, § 4.

<sup>33</sup> *Id.* at art. 16, § 2.

to residence within that State or Union territory prior to such employment or appointment.<sup>34</sup>

This provision enables the Parliament to carve out an exception to Article 16's non-discrimination mandate based on residence. However, state governments have in the past enacted laws without parliamentary authorization and/or in the absence of a parliamentary enactment permitting them to do so, pursuing policies of localism. The Parliament has exercised very little control over these policies. Parliament enacted the Public Employment (Requirement as to Residence) Act, 1957 that abolished all existing residence requirements in various states and provided for exceptions only in the case of the special instances of Andhra Pradesh, Manipur, Tripura, and Himachal Pradesh.<sup>35</sup> This means that the central government has only given the aforementioned states the right to issue directions for setting residence requirements. Yet, as Justice P.N. Bhagwati of the Supreme Court of India has rightly pointed out,

[S]ome of the states are adopting "sons of the soil" policies prescribing reservation or preference based on domicile or residence requirement for employment or appointment to an office under the government of a State or any local or other authority or public sector corporation or any other corporation which is an instrumentality or agency of the State.<sup>36</sup>

In *State of Jammu & Kashmir v. Triloki Nath Khosa & Ors*,<sup>37</sup> the court held that equality of opportunity under Article 16 for any office under the state is done by meeting the necessary qualifications and further, based on capability. This does not act as an impediment to the state prescribing necessary qualifications and tests for selection and recruitment for government services. Also, the Article applies to employment and offices under the state (and subordinates to the state). The state is also an authority to lay down conditions of appointment that include "mental excellence, . . . physical fitness, sense of discipline, moral integrity and loyalty to state."<sup>38</sup>

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<sup>34</sup> *Id.* at art. 16, § 3.

<sup>35</sup> See generally Public Employment Act, No. 44 of 1957 (India), <https://indiankanon.org/doc/67961/> [<http://perma.cc/5HGS-XND8>].

<sup>36</sup> Dr. Pradeep Jain v. Union of India, (1984) 3 SCR 932, 956–57 (India).

<sup>37</sup> State of Jammu & Kashmir v. Triloki Nath Khosa, (1974) 1 SCR 771, 790 (1973) (India).

<sup>38</sup> Dipti Khatri, *Equality of Opportunity in Public Employment*, ACADEMIKE (Jan. 12, 2015), [https://www.lawctopus.com/academike/equality-opportunity-public-employment/#\\_edn4](https://www.lawctopus.com/academike/equality-opportunity-public-employment/#_edn4) [<http://perma.cc/TUB2-6L34>]; see generally MAHENDRA P. SINGH, V. N. SHUKLA'S CONSTITUTION OF INDIA (11th ed. 2008).



### 1. Concerns before the Supreme Court of India

The foremost concern before the Supreme Court of India was determining the correct method of the allocation requirement of the reserve category based on the respective state rule. However, since the pertinent issue here is the validity of basing employment opportunities on domicile, relevant Indian Supreme Court cases will be analyzed. In *Kailash Chand Sharma v. State of Rajasthan And Others*,<sup>39</sup> the concern emerged regarding the advantage in public employment based on the rural/urban divide. This case was brought before the Supreme Court of India with a challenge against a Circular dated June 10, 1998, issued by the Department of Rural Development and Panchayat Raj dealing with the procedure to be followed for appointment of teachers during the years 1993 to 1999 by way of direct recruitment and is as follows:

| Fixation of Bonus Marks for Domiciles <sup>40</sup> |          |
|---|----------|
| Domiciles of Rajasthan                              | 10 Marks |
| Resident of District                                | 10 Marks |
| Resident of Rural Area of District                  | 5 Marks  |

It is relevant that the relaxation of marks was in the Higher Secondary School and had an impact on the candidates as there was no written examination and selection was based on an interview.<sup>41</sup>

The contentions by the state government were based on geographical classification and the socio-economic backwardness of the area.<sup>42</sup> The state government argued that residence of a district or rural area would be a good classification for selection in public employment.<sup>43</sup> The state reasoned that villages and towns are backward educationally and economically and that teachers recruited from urban or forward districts are not desirous of teaching in rural areas and relatively backward districts.<sup>44</sup> Concerns about teacher absenteeism, a pressing issue in Indian government school, was also put forth as a reason for giving preference to persons living in the same area to be recruited as teachers.<sup>45</sup> The court noted that none of the

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<sup>39</sup> *Kailash Chand Sharma v. State of Rajasthan And Ors.*, AIR 2002 SC 2877, para. 33 (India).

<sup>40</sup> *Id.* at paras. 4–5.

<sup>41</sup> *Id.* at para. 6.

<sup>42</sup> *Id.* at para. 14.

<sup>43</sup> *Id.* at para. 35.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

assumptions by the state government were based upon concrete material or data, and that it cannot be presumed that all states, villages, and towns are backward educationally or economically.<sup>46</sup> The court did not find strength in the argument that the differentia based on domicile was to encourage vernacular language that was to be taught by the teachers at the primary level to students and that a teacher from a village having the same dialect will be able to teach the students of the same district better.<sup>47</sup> The court found that:

[U]ndue accent is being laid on the dialect theory without factual foundation. The assertion that dialect and nuances of the spoken language varies from district to district is not based upon empirical study or survey conducted by the State. Not even specific particulars are given in this regard. The stand in the counter-affidavit . . . is that “each zone has its distinct language.”<sup>48</sup>

The court correctly emphasized that if the state government wanted to remedy these defects, steps should have been taken to notify a language requirement for candidates to apply and not make categorization based on domicile. The court stated that this notification has “overtones of parochialism [and] is liable to be rejected on the plain terms of Article 16(2) and in the light of Article 16(3).”<sup>49</sup> The court went on to further state that “[a]n argument of this nature flies in the face of the peremptory language of Article 16(2) and runs counter to our constitutional ethos founded on unity and integrity of the nation.”<sup>50</sup>

The correct interpretation of Article 16 was mentioned in *Jagdish Negi v. State of U.P.*, wherein the hill and Uttarakhand areas in the State of Uttar Pradesh were taken to be correct instances of socially and educationally backward classes of citizens, and thereby received a twenty-seven percent reservation benefit.<sup>51</sup> The court upheld this reservation benefit under Article 16 because the state reservations were reasonable based on all legitimate claims and relevant factors.<sup>52</sup>

In *State of Maharashtra v. Raj Kumar*, the State of Maharashtra promulgated a rule with a residential condition for employment within the state.<sup>53</sup> To be given the advantage of a “rural candidate,” the examinee must be from a town or village

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<sup>46</sup> *Id.* at para. 37.

<sup>47</sup> *Id.* at para. 36.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at para. 14.

<sup>50</sup> *Id.*

<sup>51</sup> *Jagdish Negi v. State of U.P.*, AIR 1997 SC 3505, para. 15 (India).

<sup>52</sup> *Id.* at para. 16.

<sup>53</sup> AIR 1982 SC 1301, 1301 (India).

having type “C” municipality so that knowledge of rural life and its problems are known to the candidate and hence the candidate will be more suitable for the job that entails work in rural areas. The court struck down this rule and held it to be violative of Articles 14 and 16 of the Constitution of India.<sup>54</sup> The court stated that there was “no nexus between the classification” that the state government made and “the object that [was] sought to be achieved . . . [since] as the Rule stands any person who may not have lived in a village at all can appear for S.S.C. Examination . . . [and] become eligible for selection . . . .”<sup>55</sup>

In *A.V.S. Narasimha Rao v. State of Andhra Pradesh*,<sup>56</sup> a constitutional bench of the Supreme Court of India looked into a law enacted by the Parliament under Article 16(3) of the Constitution of India and the enabling power under Section 3 of the Public Employment Act.<sup>57</sup> Domicile preference in public employment was provided to the Telengana region of the State of Andhra Pradesh.<sup>58</sup> A fifteen-year continuous residency was required.<sup>59</sup> The court held the Act was ultra vires of the Constitution of India by stating that even if enacted by the Parliament, the court must follow the constitution’s vision of equality in employment, and that unless advancements are to be made for less developed states, the structure provided under Article 16 cannot be disturbed.<sup>60</sup>

Many of the Supreme Court of India’s cases analyzing the issue of domicile preference in public employment deal with a peculiar scenario—the state governments have repeatedly faltered in deciphering a way to calculate the intricacies of deriving how many seats make up the reservation scheme. The Supreme Court of India discussed the allocation in cases based on women that was to be applicable to issues relating to horizontal reservation. In this regard, the Supreme Court of India in *Indra Sawhney v. Union of India*, discussed all constitutional provisions pertaining to reservations;<sup>61</sup> it also discussed the principle of horizontal reservation, stating:

[A]ll reservations are not of the same nature. There are two types of reservations, which may, for the sake of convenience, be referred to as “vertical reservations” and “horizontal reservations”. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> (1970) 1 SCR 115, 117 (India).

<sup>57</sup> *Id.* at 119.

<sup>58</sup> *Id.* at 116.

<sup>59</sup> *Id.* at 118.

<sup>60</sup> *Id.* at 121.

<sup>61</sup> AIR 1993 SC 477, 556 (India).

classes (under Article 16(4) may be called vertical reservations whereas reservations in favour of physically handicapped (under clause (1) of Article 16) can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations — what is called inter-locking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to clause (1) of Article 16. The persons selected against this quota . . . will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (O.C.) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains — and should remain — the same.<sup>62</sup>

In *Anil Kumar Gupta v. State of U. P.*, the Supreme Court of India examined the question of distribution of seats under the concept of horizontal reservation and went on to clarify the proper procedure for determination of horizontal reservation:<sup>63</sup>

Now, coming to the correctness of the procedure prescribed by the revised notification for filling up the seats, it was wrong to direct the fifteen per cent special reservation seats to be filled up first and then take up the OC (merit) quota (followed by filling of OBC, SC and ST quotas). The proper and correct course is to first fill up the OC quota (50%) on the basis of merit; then fill up each of the social reservation quotas, i.e., SC, ST and BC; the third step would be to find out how many candidates belonging to special reservations have been selected on the above basis. If the quota fixed for horizontal reservations is already satisfied — in case it is an overall horizontal reservation — no further question arises. But if it is not so satisfied, the requisite number of special reservation candidates shall have to be taken and adjusted/accommodated against their respective social reservation categories by deleting the corresponding number of candidates therefrom. (If, however, it is a case of compartmentalised horizontal reservation, then the process of verification and adjustment/accommodation as stated above should be applied separately to each of the vertical reservations. In such a case, the reservation of fifteen percent in favour of special categories, overall, may be satisfied or may not be satisfied.)<sup>64</sup>

This judgment has been followed in *Rajesh Kumar Daria v. Rajasthan Public Service Commission*,<sup>65</sup> where the court looked into the different modes of calculating horizontal and vertical reservation and held that persons belonging to a reserved category and appointed to non-reserved posts on their own merit cannot be counted against the reserved quota in the case of vertical

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<sup>62</sup> *Id.*

<sup>63</sup> *Anil Kumar Gupta v. State of U.P.*, (1995) 5 SCC 173, 185 (India).

<sup>64</sup> *Id.* at 185.

<sup>65</sup> AIR 2007 SC 3127, 3129–30 (India).

reservation.<sup>66</sup> This case further elucidated that the principle would not be applicable for horizontal reservation and observed:

The second relates to the difference between the nature of vertical reservation and horizontal reservation. Social reservations in favour of SC, ST and OBC under Art[icle] 16(4) are “vertical reservations”. Special reservations in favour of physically handicapped, women, etc., under Art[icle] 16(1) or 15(3) are “horizontal reservations”. Where a vertical reservation is made in favour of a backward class under Art[icle] 16(4), the candidates belonging to such backward class, may compete for non-reserved posts and if they are appointed to the non-reserved posts on their own merit, their numbers will not be counted against the quota reserved for respective backward class. Therefore, if the number of SC candidates, who by their own merit, get selected to open competition vacancies, equals or even exceeds the percentage of posts reserved for SC candidates, it cannot be said that the reservation quota for SCs has been filled. The entire reservation quota will be intact and available in addition to those selected under Open Competition category. But the aforesaid principle applicable to vertical (social) reservations will not apply to horizontal (special) reservations. Where a special reservation for women is provided within the social reservation for Scheduled Castes, the proper procedure is to first to fill up the quota for Scheduled Castes in order of merit and then find out the number of candidates among them who belong to the special reservation group of “Scheduled Castes-Women”. If the number of women in such list is equal to or more than the number of special reservation quota, then there is no need for further selection towards the special reservation quota. Only if there is any shortfall, the requisite number of Scheduled Caste women shall have to be taken by deleting the corresponding number of candidates from the bottom of the list relating to Scheduled Castes. To this extent, horizontal (special) reservation differs from vertical (social) reservation. Thus women selected on merit within the vertical reservation quota will be counted against the horizontal reservation for women.<sup>67</sup>

The Supreme Court of India, while examining the state government notification on horizontal reservation, went on to clarify the percentage of reservation in favor of this reserved class. As mentioned above, in *Indra Sawhney*, the Supreme Court of India stated that the total person recruited should not exceed fifty percent of the reservation.<sup>68</sup> This also applies to horizontal reservation. Hence, candidates under horizontal reservation under Article 16(4) of the Constitution of India

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<sup>66</sup> *Id.* at 3130.

<sup>67</sup> *Id.* (internal citations omitted).

<sup>68</sup> *Id.* at para. 5.

should not exceed the fifty percent reservation.<sup>69</sup> The foray of regionalism in India, the emergence of parochial loyalties with the rise and growth of numerous regional political parties, and the advantages that these political parties want to gain for themselves are influencing governments to make campaign commitments for quota based on domicile and have found inroads via these state government notifications. The Supreme Court of India observed that these parties utilize domicile reservations with a “view to gaining advantage for themselves,”<sup>70</sup> and that this results in “a serious threat . . . to the unity and integrity of the nation and [puts] the . . . concept of India as a nation . . . in peril.”<sup>71</sup> The court emphasized that the spirit of nationhood and the “sons of the soil” are not populist demands and are not appeals to be made that are

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<sup>69</sup> See Hon. Mr. J. S. Nagamuthu, *K.R. Shanthy v. Sec’y to Gov’t*, MADRAS HIGH COURT, para. 14 (Oct. 1, 2012) (India), <http://indiankanoon.org/doc/41866200> [<http://perma.cc/LQ32-NU56>]. The High Court laid out the process to be used:

First Step:

- (i) As against the number of vacancies identified for open quota, irrespective of caste, sex, physically challenged, etc., everyone should be allowed to compete based on merits.
- (ii) The meritorious candidates should be first selected as against the above vacancies under open quota.

Second Step:

- (iii) After completing the first step, moving on to the vertical reservation categories, selection has to be made for each category from amongst the remaining candidates belonging to the particular reserved category (vertical) based on merits.

Third Step:

- (iv) After completing the second step, horizontal reservation which cuts across the vertical reservation has to be verified as to whether the required number of candidates who are otherwise entitled to be appointed under the horizontal reservation have been selected under the vertical reservation.
- (v) On such verification, if it is found that sufficient number of candidates to satisfy the special reservation (horizontal reservation) have not been selected, then required corresponding number of special reservation candidates shall have to be taken and adjusted/accommodated as against social reservation categories by deleting the corresponding number of candidates therefrom.
- (vi) Even while filling up the vacancies in the vertical reservation, if, sufficient number of candidates falling under the horizontal reservation have been appointed, then, there will be no more appointment exclusively under the horizontal reservation.

Caution:

- (vii) At any rate, the candidates who were selected as against a post under open quota shall not be adjusted against the reserved quota under vertical reservations.

*Id.*; see also CAV Order at para. 19, High Court of Chhattisgarh, Bilaspur (2015) (W.P.(S) Nos. 869/2015, 870/2015, 871/2015 & 1477/2015) (India), <http://cghighcourt.nic.in/Afr/courtJudgementandAFR/2016/Jan/wps869of2015.pdf> [<http://perma.cc/X3KA-459B>]; J. Venkatesan, *Quota should not exceed 50%, says Supreme Court*, THE HINDU (last updated Oct. 9, 2016), <https://www.thehindu.com/todays-paper/tp-national/Quota-should-not-exceed-50-says-Supreme-Court/article15210960.ece> [<http://perma.cc/FS5A-JDVL>].

<sup>70</sup> *Dr. Pradeep Jain v. Union of India*, (1984) 3 SCR 942, 955 (India).

<sup>71</sup> *Id.*

contrary to the constitution.<sup>72</sup> The Supreme Court of India has also warned that special treatment on the basis of residence is not to be utilized as a populist appeal by the political parties that can break “the unity and integrity of the nation by fostering and strengthening narrow parochial loyalties based on language and residence within a state.”<sup>73</sup>

Hence, a permanent resident in a state should not entertain the feeling of a preferential claim for appointment opportunity into the state government as against another person who is deemed to be an outsider, especially irrespective of merit.<sup>74</sup> The Supreme Court of India has rightfully stated that this “is a dangerous feeling [and] if allowed to grow . . . might one day break up the country into fragments,”<sup>75</sup> reasonable preferential policy based on rationale, notwithstanding.

The Constituent Assembly Debates (CAD) peaks a similar tone by mentioning that India offers only one citizenship, thereby making no distinction between residents of various states, and hence there should be an “unfettered right and privilege of employment” in any part of the country.<sup>76</sup> The members present at the CAD, however, expressed concern that persons from any state should not be allowed to come from one province to another, “as mere birds of passage without any roots, without any connection with that particular province, just to come, apply for posts and, so to say, take the plums and walk away.”<sup>77</sup> And that there should be certain limitations that are necessary. The CAD also addressed the issue of giving Parliament the power of bringing about uniformity to the residential limits in the states.

On a side note, in Indian cases involving educational institutions and admissions to higher educational institutions, the domicile privilege is abundant. However, the recent jurisprudence in super specialized courses has changed by not allowing domicile reservations.<sup>78</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *See id.*

<sup>75</sup> *Id.*

<sup>76</sup> CONSTITUENT ASSEMBLY DEBATES, 7 THE CONSTITUENT ASSEMBLY OF INDIA 676 (Nov. 30, 1949).

<sup>77</sup> *Id.* at 700.

<sup>78</sup> *See Dr. Pradeep Jain*, 3 SCR at 951; *see also* Mukesh Kumar Umar v. State of Madhya Pradesh, WP No. 2377/2018, para. 4 (Madhya Pradesh HC, Mar. 7, 2018) (India), <https://indiankanoon.org/doc/165550674/> [<http://perma.cc/D7KK-GX3F>] (contending that there “cannot be any discrimination on the basis of place of birth or residence for a [sic] public employment but place of residence can be considered for admission to the professional colleges”).

## 2. Concerns before Various High Courts

In *Mukesh Kumar Umar v. State of Madhya Pradesh*<sup>79</sup> a division bench decision of the High Court of Madhya Pradesh examined a government notification for the recruitment of assistant professors that had a substantial upper age requirement relaxation for candidates domiciled within the state of Madhya Pradesh.<sup>80</sup> The upper age limit for candidates domiciled in Madhya Pradesh was forty-years old, whereas for candidates domiciled outside Madhya Pradesh, the upper age limit was between twenty-one to twenty-eight years.<sup>81</sup> In the return filed, the state has referred to Madhya Pradesh Educational Service (Collegiate Branch) Recruitment Rules, 1990 subsequently amended, whereby the upper age limit was contemplated to be as admissible in accordance with the directions/instructions issued by the General Administration Department of the state government from time to time.<sup>82</sup> The notification specifically stated that the relaxation in the maximum age limit shall not be granted to candidates from outside the state.<sup>83</sup> The rationale was that there were no recruitments that could take place in the state since the year 1993 and hence the residents of the State of Madhya Pradesh would be at a disadvantage if the posts were kept open to competition from candidates from all over India.<sup>84</sup> The court held that there cannot be different age limits based only on place of birth or place of residence, and that the fault lay with the Government of Madhya Pradesh for not conducting timely appointments without prolonged gaps in time.<sup>85</sup> The court found that the state government's rationale for the regulation had no genesis in the constitution.<sup>86</sup> The court went on to further reason that if the state is unable to make appointments for a number of years then it is the state alone, which has to be blamed.<sup>87</sup> The court found:

[T]he Constitutional mandate of providing equality of opportunity and no discrimination on the basis of place of residence or place of birth cannot be permitted to be given a go-bye only for the reason that the State was not able to conclude the employment process in the State for large number of years.<sup>88</sup>

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<sup>79</sup> *Mukesh Kumar Umar*, WP No. 2377/2018 at paras. 3–4.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at paras. 1, 3 (“As per Circular No. C 3-8/2016/3-1, May 12, 2017, General Administration Department.”).

<sup>82</sup> *Id.* at para. 2.

<sup>83</sup> *Id.* at para. 3.

<sup>84</sup> *Id.* at para. 8.

<sup>85</sup> *Id.* at para. 13.

<sup>86</sup> *Id.* at paras. 12–13.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at para. 13.



In *Smt. Prabha Ranjan Gupta v. The State Of Jharkhand And Ors*, the court had to determine the selection of candidates, considering that as part of the same advertisement a few years before the initiation of a new advertisement, few candidates were appointed.<sup>89</sup> Hence, the 0.06% percent reservation—though accepted by an earlier Supreme Court of India decision as equivalent to one post—was held not applicable in this case as certain candidates were already appointed earlier.<sup>90</sup> Also, the court pointed out the role of domicile in the five percent reservation for women is applicable only for domiciles of the State of Jharkhand.<sup>91</sup> This appeal was dismissed eventually, as the Petitioner had obtained only the minimum qualifying marks, which cannot create any right of appointment upon the candidate.<sup>92</sup> In *Hemanand Mani Tripathi v. State of Chhattisgarh*,<sup>93</sup> age relaxation provided to candidates of the State of Chhattisgarh was asked to be reconsidered by the Petitioners. The State of Chhattisgarh argued that the relaxation to candidates of Chhattisgarh for recruitment to the State Civil Services was based, not only on residence, but on a host of categories.<sup>94</sup> The court held that candidates from other states were not barred from writing the examination and are eligible to apply for the posts advertised, provided they conform to the eligibility criteria prescribed under the Examination Rules.<sup>95</sup> So while the age relaxation was not interfered with, the court, nevertheless, directed the state to consider all those candidates who become ineligible because of age limit in the next recruitment process, with the liberty to choose other remedies.<sup>96</sup>

In other cases, different concerns have been added to the domicile question. The Union Territory of Pondicherry adopted a policy of the central government where all Scheduled Castes or Scheduled Tribes, are eligible for posts reserved for Scheduled Castes/Scheduled Tribes candidates, irrespective of their domiciled state which was upheld by the court.<sup>97</sup> The court held that “no legal infirmity can be ascribed to such a policy and the same cannot be held to be contrary to any provision of law.”<sup>98</sup>

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<sup>89</sup> *Smt. Prabha Ranjan Gupta v. The State Of Jharkhand & Ors.*, (2014) 3 J.L.J.R. 204, para. 3 (India).

<sup>90</sup> *See id.*

<sup>91</sup> *Id.* at para. 16 (basing its analysis in view of the letter No. 5448 dated 12.9.2011 of Personnel, Administrative Reforms and Official Languages Department).

<sup>92</sup> *See generally id.*

<sup>93</sup> W.P. (S) No. 40856/2009, Chhattisgarh High Court (2010), [https://www.keralapsc.gov.in/index.php?option=com\\_docman&task=doc\\_view&gid=20470&Itemid=15](https://www.keralapsc.gov.in/index.php?option=com_docman&task=doc_view&gid=20470&Itemid=15) [<http://perma.cc/Ez38-KCK6>].

<sup>94</sup> *See generally id.*

<sup>95</sup> *See generally id.*

<sup>96</sup> *See generally id.*

<sup>97</sup> *S. Pushpa v. Sivachanmugavelu*, AIR 2005 SC 1038, 1038 (India).

<sup>98</sup> *Id.*

A similar question presented itself before a full bench at the Delhi High Court, where the court examined whether in Union Territories, notifications for government employment can include Scheduled Castes from other states.<sup>99</sup> The court based its decision on an important observation that, “unlike in the case of States, Union Territories are within the administrative control of the Union Government.”<sup>100</sup> It follows that any Scheduled Caste or Scheduled Tribe notified by the president, based on the description, would be entitled to the benefit of reservation in all Union Territories.<sup>101</sup> However, as mentioned in the Constitution of India, states have a different administrative arrangement, and hence the position as mentioned for the Union Territories would not apply and migrations between states would disentitle a person from applying to a government position (if tested for constitutional validity).<sup>102</sup> The court allowed Scheduled Caste and Scheduled Tribe candidates from other states to avail relevant reservation benefits for jobs in Delhi.<sup>103</sup>

## II. THE UNITED STATES

In the United States, the principle of equality in employment is followed, except in the case of public contracts that have sought concessions from the government. This distinction is relevant for this Article as the capitalist regime in the U.S. supports outsourcing all public works, which differs from the socialistic nature of the Constitution of India reflected in its economy. Further, the Privileges and Immunities Clause of Article IV, Section 2, Clause 1 of the U.S. Constitution provides that “the citizens of each state shall be entitled to all Privileges and Immunities of citizens in the several states.”<sup>104</sup> Also known as the interstate privileges and immunities clause, this provision ensures to “a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.”<sup>105</sup> In a federal structure of government, the Privileges and Immunities Clause helps “fuse into one Nation a collection of independent, sovereign States.”<sup>106</sup>

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<sup>99</sup> Deepak Kumar v. District and Sessions Judge, Delhi (2013) 1, Part 2 I.L.R. 519, 524 (2012) (India).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 547–48.

<sup>103</sup> Jayant Sriram, *SC/ST from other states eligible for Delhi govt job quota: HC*, INDIAN EXPRESS (Sept. 14, 2012, 12:33 AM), <https://indianexpress.com/article/india/india-others/sc-st-from-other-states-eligible-for-delhi-govt-job-quota-hc/> [http://perma.cc/7GF9-X5CG].

<sup>104</sup> U.S. CONST. art. IV, § 2, cl. 1.

<sup>105</sup> Toomer v. Witsell, 334 U.S. 385, 395 (1948).

<sup>106</sup> *Id.*

The U.S. Constitution also contains the Commerce Clause, which gives the federal government the power “[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes. . .”<sup>107</sup> Additionally, the dormant Commerce Clause, a judicial construction read into the Commerce Clause, prohibits discrimination or excessive burdens on interstate commerce. The Privileges and Immunities Clause and the Commerce Clause both lend themselves to the analysis of employment and interstate regulation, as discussed below.

The first issue to be addressed by the Court regarding employment equality was whether the movement of persons is “commerce” under the interstate Commerce Clause, which was confirmed in multiple cases, such as *Gloucester Ferry Co. v. Pennsylvania*<sup>108</sup> and *Edwards v. California*.<sup>109</sup> Subsequently, *Brown v. Anderson* noted that a state regulation that adversely restricts the interstate flow of labor burdens commerce and may violate the Commerce Clause and the Privileges and Immunities Clause.<sup>110</sup> In short, the movement of commerce and any restriction therein may become a burden on commerce, and once shown to exist, the next question to be looked at is whether it is constitutionally tolerable to take on the local interest.<sup>111</sup> To survive constitutional scrutiny, it is not enough for the state to show that it is advancing its own economic interest.

Another case, *Hicklin v. Orberk*,<sup>112</sup> dealt with Alaska’s local hiring plan (Alaska Local Hire Act), which infringed on nonresidents’ right to work. The central argument in the case was that such infringement went against the fundamentals of the Privileges and Immunities Clause.<sup>113</sup> The state responded that the Privileges and Immunities Clause does not apply to the right to work, especially when the resources and property of the state were utilized, and that the Alaska Local Hire Act did not violate the Clause under the appropriate standard of review.<sup>114</sup> The Supreme Court unanimously held that the Alaska Local Hire Act violated the Constitution.<sup>115</sup> Analyzing past decisions, Justice Brennan stated that the Alaska Local Hire Act does not meet the strict standards of the Privileges and Immunities Clause,

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<sup>107</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>108</sup> 114 U.S. 196, 203 (1885).

<sup>109</sup> 314 U.S. 160, 172 (1941) (“[I]t is settled beyond question that the transportation of persons is ‘commerce’, within the meaning of [the Commerce Clause].”).

<sup>110</sup> 202 F. Supp. 96, 101–03 (D. Alaska 1962).

<sup>111</sup> *See id.* at 102–03.

<sup>112</sup> 437 U.S. 518, 520 (1978).

<sup>113</sup> *Id.* at 520–21, 523.

<sup>114</sup> *Id.* at 528.

<sup>115</sup> *See id.* at 534.

especially since there was no evidence of non-citizens being a peculiar source of evil or a major cause of state unemployment.<sup>116</sup>

*Hicklin* is not the first case to deal with these issues. For example, *Corfield v. Coryell* dealt with a New Jersey regulation limiting the right to fish from New Jersey water to its own citizens.<sup>117</sup> The court agreed with the legislation, resting its argument on New Jersey's need to protect its depleting natural resources and ensure that its supply of shell fish was available to New Jersey citizens for their benefit.<sup>118</sup> In *McCready v. Virginia*, a nonresident challenged Virginia legislation that denied him the right to plant oysters in the state.<sup>119</sup> The Court upheld the legislation and based its argument on the fact that the citizens of Virginia and its government owned the land and hence, had the power to dispose of those areas vested with them.<sup>120</sup> Further, the Court stated that the ownership of property in a state, held in common by all the citizens of a particular state was:

[N]ot a privilege and immunity of general [citizenship] but of special citizenship. It does "not belong of right to the citizens of all free governments," but only to the citizens of Virginia, on account of the peculiar circumstances in which they are placed. . . . They owned it, not by virtue of citizenship merely, but of citizenship and domicile united; that is to say by virtue of a citizenship confined to that particular locality.<sup>121</sup>

In the landmark case of *Toomer v. Witsell*,<sup>122</sup> the Court set forth what has become the modern Privileges and Immunities doctrine. *Toomer* involved a South Carolina statute that discriminated against nonresident commercial shrimp fishermen by imposing a license fee 100 times greater than that charged to residents.<sup>123</sup> The Court declared the statute invalid and violative of the Privileges and Immunities Clause by stating that "[t]he whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource."<sup>124</sup> Furthermore, the Court reasoned, "[b]y that statute, South Carolina plainly and frankly discriminates against non-residents, and the record leaves little doubt but what the discrimination is so great that its practical effect is virtually

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<sup>116</sup> *Id.* at 527–28.

<sup>117</sup> *See Corfield v. Coryell*, 6 F. Cas. 546, 549 (C.C.E.D. Pa. 1823) (No. 3230).

<sup>118</sup> *See id.* at 552.

<sup>119</sup> *McCready v. Virginia*, 94 U.S. 391, 392 (1876).

<sup>120</sup> *See id.* at 395–96.

<sup>121</sup> *Id.* at 396.

<sup>122</sup> 334 U.S. 385, 395–403 (1948).

<sup>123</sup> *Id.* at 395.

<sup>124</sup> *Id.* at 402.

exclusionary.”<sup>125</sup> Expanding on *Toomer*, a later court stated that “the [C]ause seeks to prevent discrimination against nonresidents, to further the concept of federalism, and to create a national economic unit.”<sup>126</sup>

The Court in *Toomer* emphasized that each state had to accord substantial equality of treatment to the citizens of the other, and developed a two-prong test, which prohibited a state from discriminating against nonresidents unless (1) there is substantial reason for the difference in treatment, and (2) the discriminatory remedy bears a close relation to the state’s objective.<sup>127</sup>

This is not to say that all kind of restrictions are unconstitutional and objectionable. Some of the restrictions for bona fide residence requirements for state or municipal employment might be acceptable. However, serious objections arise when a domicile preference expands into the private sector. This is where the *Toomer* Privileges and Immunities Clause test would come into play to raise objections to the unnecessary relegation of nonresidents to last in hiring priority.

Hence, the investigation that a court has to make in each case is whether reasons exist for establishing discriminatory policies, and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the states should have considerable leeway in analyzing local evils and in prescribing appropriate cures. “Although the Commerce Clause speaks only in broad terms of giving Congress authority to ‘regulate commerce . . . among the several states’, the Supreme Court has often invoked the [C]ause to strike down state legislation that unreasonably impedes the flow of commerce across state lines.”<sup>128</sup> In other words, the Court has applied the Commerce Clause to state and municipal enactments that unreasonably burdened interstate commerce.<sup>129</sup>

Observing the argument put forth by the states in these cases, which revolves around the “common property” of the state, it can seem to be illusionary since it is more the case of preserving employment by closing the same opportunities to nonresidents. In the context of the state, regardless of whether the ingredient of employment—for example, fishing—can constitute the common

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<sup>125</sup> *Id.* at 397.

<sup>126</sup> *Sheley v. Alaska Bar Ass’n*, 620 P.2d 640, 642 (Alaska 1980).

<sup>127</sup> *See Toomer*, 334 U.S. at 398–99.

<sup>128</sup> *United Bldg. & Constr. Trades Council v. Camden*, 88 N.J. 317, 338 (1982) (citing U.S. CONST. art. I, § 8).

<sup>129</sup> *See Dean Milk Co. v. Madison*, 340 U.S. 349, 350, 353 (1951).

property of the state, it is not an acceptable argument to say that a state can “own” any employment. Hence, the restriction analyzed in *McCready*, for example, rightfully lacks a justifying rationale when a state attempts to limit employment to its own citizens.

With the passage of time, interpretations continue to lean towards invalidating statutes that are prohibitive and restrictive of the Privileges and Immunities Clause and the Commerce Clause. For example, in *Douglas v. Seacoast Products, Inc.*,<sup>130</sup> the Court—while looking at a Virginia law prohibiting vessels owned by nonresidents from fishing in Chesapeake Bay—held that “it [was] pure fantasy to talk of ‘owning’ wild fish, birds, or animals . . . [u]nder modern analysis, the question is simply whether the State ha[d] exercised its police power in conformity with the federal laws and Constitution.”<sup>131</sup> Interestingly, it was not the right to purchase, but the right to plant—as in the case of Virginia—and not the right to buy, but to extract that was being challenged in the aforementioned cases.

Like in India, there are cases in the United States that look at the Privileges and Immunities Clause and the Commerce Clause in a different light. In *Hughes v. Alexandria Scrap*, the United States Supreme Court determined that “[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.”<sup>132</sup> Similarly, in *Reeves, Inc. v. Stake*,<sup>133</sup> the Court held that the South Dakota Cement Commission did not violate the Commerce Clause through its decision to give state buyers an absolute preference in fulfilling their requirements for cement in times of shortage. “Restraint in this area is also counseled by considerations of state sovereignty, the role of each State ‘as guardian and trustee for its people,’ and ‘the long recognized right of trader or manufacturer . . . to exercise his own independent discretion as to parties with whom he will deal.’”<sup>134</sup> The Court said that the principle of the state, as a market participant, has the freedom to favor its own citizens and choose the parties with whom it will deal. Other courts have also “noted that a state’s ‘purchase of goods and materials for its own end use . . . is not subject to the usual Commerce Clause restrictions.’”<sup>135</sup> However, “[t]he mere

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<sup>130</sup> 431 U.S. 265, 284–85 (1977).

<sup>131</sup> *Id.*

<sup>132</sup> *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976).

<sup>133</sup> 447 U.S. 429, 446–47 (1980).

<sup>134</sup> *Id.* at 436, 438 (citing *Heim v. McCall*, 239 U.S. 175, 191 (1915); quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

<sup>135</sup> *United Bldg. & Constr. Trades Council v. Camden*, 88 N.J. 317, 339 (1982) (citing *K.S.B. Tech. Sales v. N. Jersey Dist. Water Supply*, 75 N.J. 272 (1977)).

fact that it was through its leasing power that Alaska infringed the [P]rivileges and [I]mmunities and [I]nterstate [C]ommerce [C]lauses does not save the Alaska Hire Act from its constitutional infirmities.”<sup>136</sup>

Another relevant point here is that the Alaska Local Hire Act did not apply to private employment or all sectors of oil and gas employment, and, thus, the Act has a small impact on the nation’s labor pool. Attention has to be drawn to the fact that the Act reaches only oil and gas work on state-leased property or jobs that are directly related. It might be further argued that the domicile status that is available to anyone willing to establish it depends on the duration of residence and intention to stay. However, one must establish this domicile, which is not burden-free. More so, the nonresident migrant has to forfeit benefits of citizenship of the former state. Then the questions of intent remain: Does he intend to make his new residence his permanent residence? It is in this light that a residency preference might restrict the flow of labor to the extent that persons might be so deterred that even the most qualified among them might look elsewhere for jobs, thereby interfering with maximization of productivity of the state that enacted these restrictions. This would, in turn, impact the economy of the concerned state, and eventually discourage investment. Thus, these principles of restrictive hire place a burden on interstate commerce. The question then becomes this: Whether local interests outweigh this burden.<sup>137</sup>

### CONCLUSION

The past cases show the need to engage in conversations about a valid reason for encouraging a type of state discrimination that will not encroach upon the strict scrutiny required under the Equal Protection Clause, and can remain exclusively under the Court’s Privileges and Immunities and Commerce Clause jurisprudence.

As with most constitutional guarantees, the Privileges and Immunities Clause and the Commerce Clause are not absolute. States may continue to distinguish between citizens and non-citizens so long as there is a valid and substantial reason for so doing. This principle has also been upheld in Indian courts. Judicial intervention is necessary to make sure that any extreme use of local hiring by a state is not practiced in a manner that would result in its interference—especially in today’s time—in the

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<sup>136</sup> Carl J. Schuman, *Domicile Preferences in Employment: The Case of Alaska Hire*, DUKE L.J. 1069, 1092 (1978).

<sup>137</sup> *Id.* at 1085–89.

private sector. Such a result might be a retaliatory use of local hiring preferences, producing a “Balkanization of interstate commercial activity which the Constitution was intended to prevent,”<sup>138</sup> an ideal contrary to the constitutional vision of the forms of government. This is in consonance with what the United States Supreme Court and the Supreme Court of India have stressed: A division on state lines so as to destroy the unified fabric of a state, and the values of nationalism and comity are not welcome, as these polarize a state and give its citizens an advantage which infringes upon the nation as an entity.

Various remedies of providing manpower programs as an alternative means to the local residents and limiting hiring preferences to unemployed persons seem logical. This has to be done and developed, keeping in mind the need to balance the respective state and national interests, and the greater national importance of the commodity.

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<sup>138</sup> *Hicklin v. Orbeck*, 565 P.2d 159, 172–73 n.13 (Alaska 1977) (quoting *Douglas v. Seacoast Prods. Inc.*, 431 U.S. 265 (1977)).



