

Affirmative Action in India via Horizontal and Vertical Reservations

Tayfun Sönmez
Boston College

M. Bumin Yenmez
Boston College

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 - ② public universities

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 - ② Other Backward Classes, Economically Weaker Section (2019—Supreme Court Case pending)

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 - ① Scheduled Castes, Scheduled Tribes (original beneficiaries)
 - ② Other Backward Classes, Economically Weaker Section (2019—Supreme Court Case pending)
- Lower level provisions
 - ① Disabled candidates, women, ex-servicemen, etc.

Indra Sawhney and others v. Union of India (1992)

A little clarification is in order at this juncture: all 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 reservation in favour of scheduled castes, scheduled tribes and other backward 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 interlocking reservations.

Indra Sawnhey (1992): Vertical & Horizontal Reservations

Vertical (or social) reservations

- 1 Intended for members of backward classes SC, ST, and OBC.
- 2 To be earmarked in the form of a **set aside**: Positions secured on the basis of merit only **do not count** against vertically reserved positions.
- 3 Cannot exceed 50% of the positions.

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Horizontal (or special) reservations

- 1 Intended for other disadvantaged groups such as disabled candidates, women, etc.
- 2 Provided as a **minimum guarantee**: Positions secured on the basis of merit only still **do count** against horizontally reserved positions.

Anil Kumar Gupta v. State of U.P. (1995)

The proper and correct course is to first fill up the O.C. quota (50%) on the basis of merit: then fill up each of the social reservation quotas, i.e., S.C., S.T. and B.C; 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 over-all 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.

Our Contributions

- ① We Identify two critical shortcomings of the Supreme Court-mandated choice rule given in *Anil Kumar Gupta (1995)*
- ② Document numerous court cases related to these shortcomings
- ③ Propose an alternative choice rule that resolves these shortcomings
- ④ Introduce and analyze a new model on Affirmative Action with Multidimensional Reserves

Literature

- **Controlled School Choice:** Abdulkadiroğlu & Sönmez (2003), Kojima (2012), ...
- **Design of Choice Rules for Affirmative Action:** Hafalır, Yenmez, & Yıldırım (2013), Ehlers, Hafalır, Yenmez & Yıldırım (2014), Echenique & Yenmez (2015), Dur, Pathak & Sönmez (2016), Aygün & Bó (2016), Dur, Kominers, Pathak & Sönmez (2018), ...
- **Affirmative Action in India with Vertical Reservations Only:** Aygün & Turhan (2016, 2017), Thakur (2018), ...
- **Others:** Westkamp (2013), Kominers & Sönmez (2016), Fragiadakis & Troyan (2017), ...

Primitives

Notation.

- q : # of identical positions
- \mathcal{I} : set of individuals
- \mathcal{C} : set of categories
- \mathcal{T} : set of traits

Ex: SC, ST, OBC

Ex: Women, Disabled

Vertical Reservations Only

Straightforward: First fill open positions based on merit, and next do the same for each reserved category.

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Definition

A set of individuals $I' \subseteq I$ **satisfies trait- t reservations for I** , if,

- either I' includes at least r_t individuals with trait t , or
- it includes all trait- t individuals in I .

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Definition

A set of individuals $I' \subseteq I$ **satisfies the horizontal reservations for I** , if I' satisfies trait- t reservations for I for every trait $t \in \mathcal{T}$.

Choice Rule C^{hor}

Step 1: Consider all subsets of the set of applicants I that satisfy the horizontal reservations for I . Choose the individual with the highest merit score included in any of these subsets.

Let I_1 denote the set including only this individual.

Step k ($k \in [2, q]$): Consider all subsets of I that include I_{k-1} and satisfy the horizontal reservations for I . If the only such subset is I_{k-1} , then stop and return this set. Otherwise, from $I \setminus I_{k-1}$, choose the individual with the highest merit score included in any of these subsets.

Let I_k denote the set of individuals chosen so far.

Proposition

Suppose each individual has at most one trait. Then C^{hor} is equivalent to the following choice rule.

Choice Rule C^{mg}

Step 1: *For each trait $t \in \mathcal{T}$,*

- *choose r_t of the highest merit individuals with trait t if there are more trait- t individuals than r_t , and*
- *choose all trait- t individuals otherwise.*

Step 2: *Fill the rest of the positions with remaining individuals of highest merit scores.*

Vertical & Horizontal Reservations

Notation.

- r_t^c : # of trait- t horizontal reservations within
vertically reserved category- c positions
- r_t^o : # of trait- t horizontal reservations within
open-category positions

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- r_t^c : # of trait- t horizontal reservations within
vertically reserved category- c positions
- r_t^o : # of trait- t horizontal reservations within
open-category positions
- We are ready to formulate the choice function given in *Anil Kumar Gupta (1995)*, and mandated throughout India.

SCI-VHR Choice Rule

Choice Rule C^{SCI}

Step 1(i): *Tentatively choose individuals with r^o highest merit scores for open-category positions.*

Step 1(ii): *For each trait t with unsatisfied open-category horizontal reservations, replace*

- *the lowest merit score exposed individual who has a tentative open-category position from Step 1(i) with*
- *the highest merit score unchosen general-category trait- t individual, and*

repeat Step 1(ii) until all open-category horizontal reservations are satisfied, finalizing the allocation of open-category positions.

Step 2(i): For each social category $c \in \mathcal{C}$, tentatively choose r^c of the remaining highest merit-score category- c individuals.

Step 2(ii): For each social category $c \in \mathcal{C}$ and trait t with unsatisfied category- c horizontal reservations, replace

- the lowest merit score exposed individual who has a tentative category- c position from Step 2(i) with
- the highest merit score unchosen individual from category- c with trait- t ,

and repeat Step 2(ii) until all horizontal reservations are satisfied at all categories.

- Supreme Court-mandated choice rule given in *Anil Kumar Gupta (1995)* is **not well-defined**, if individuals can have multiple traits.

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Proposition

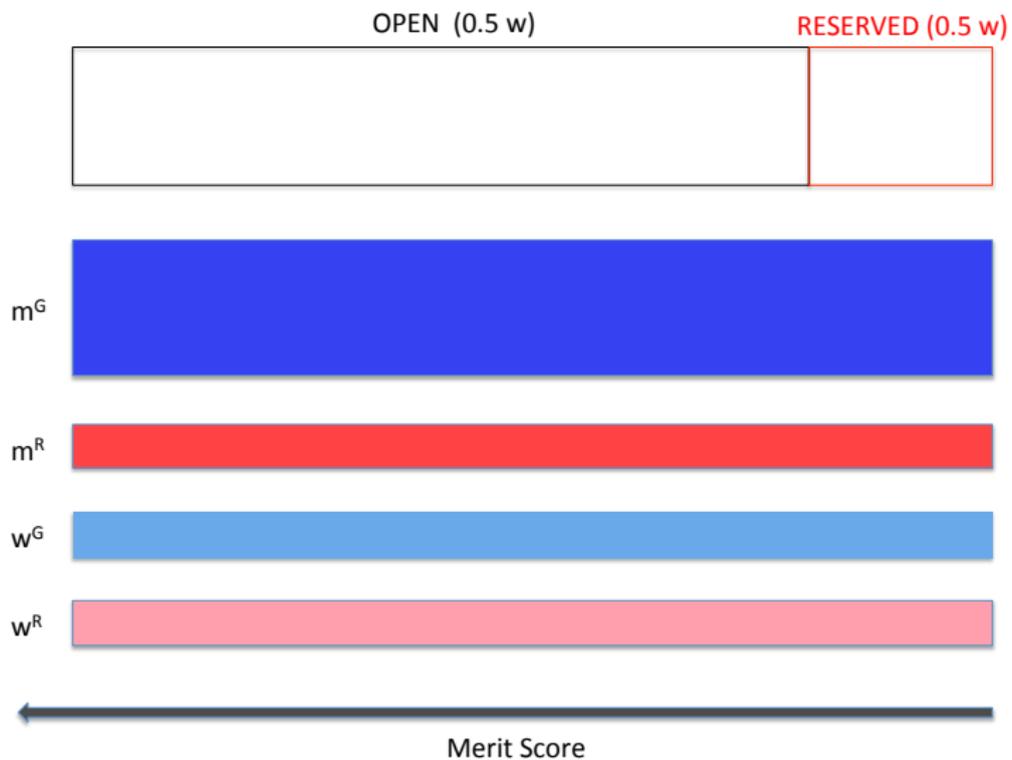
Choice rule C^{SCI} is equivalent to the following rule, when each individual has at most one trait.

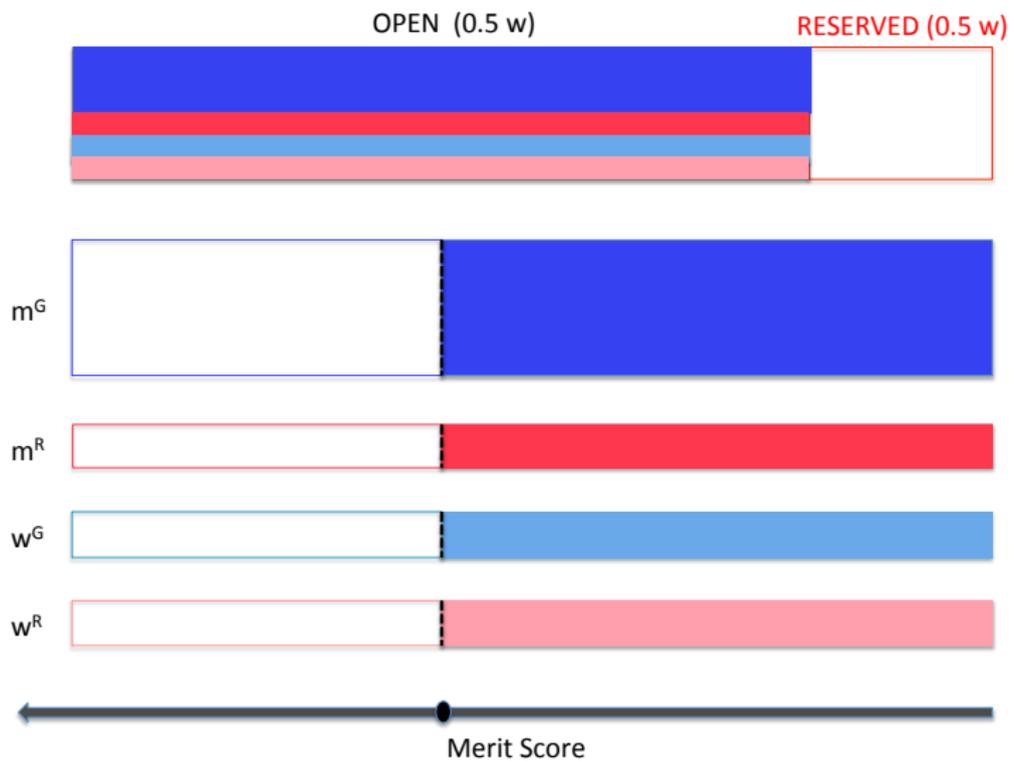
Choice Rule C_{1h}^{SCI}

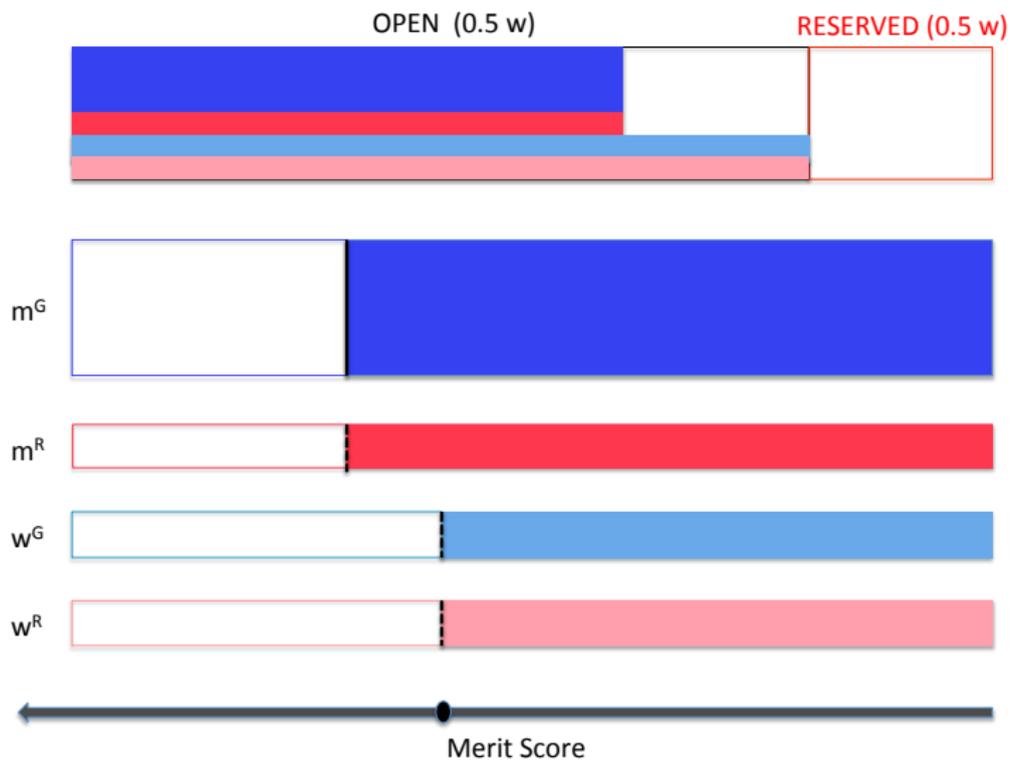
Step 0: *Construct the set of **open-category eligible individuals** I_1 as the union of the set of individuals with r^o highest merit scores and the set of general-category individuals.*

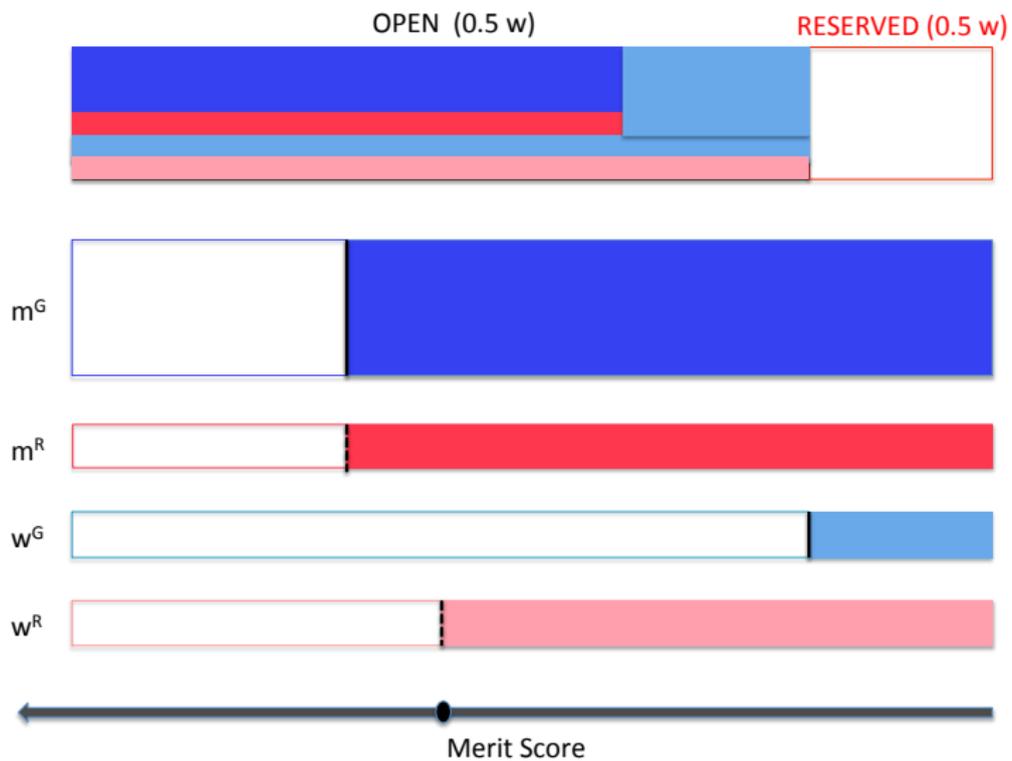
Step 1: *Choose $C^{hor}(I_1)$ for the open-category positions.*

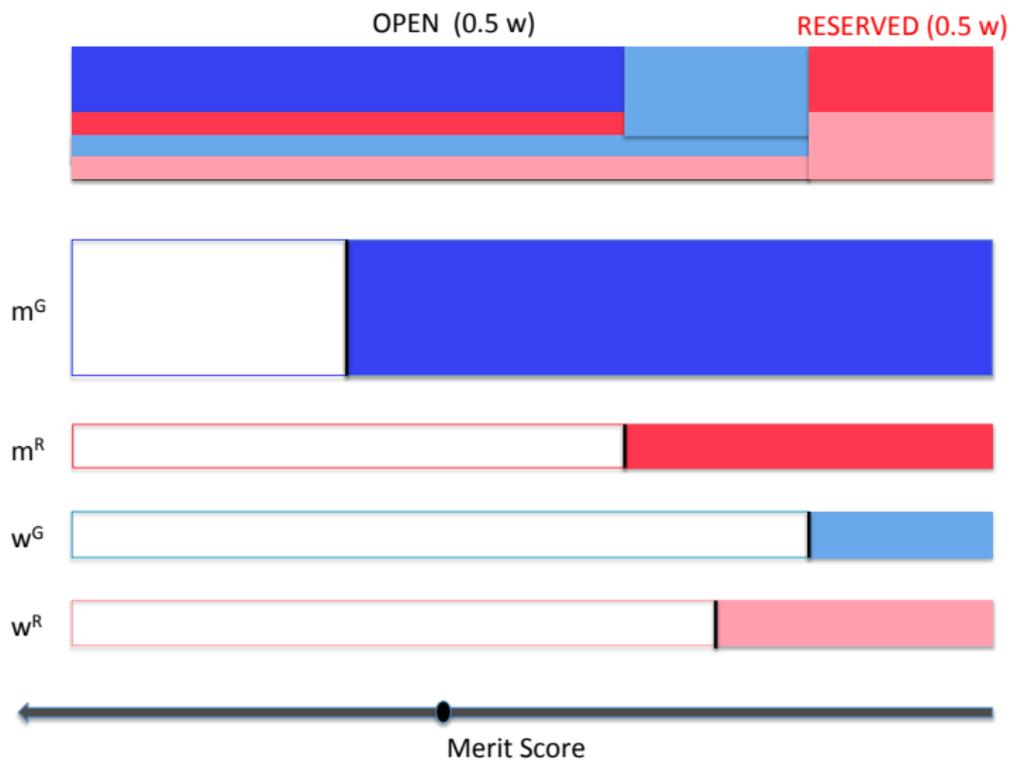
Step 2: *For each social category $c \in \mathcal{C}$, apply $C^{hor}(\cdot)$ to remaining individuals of category c , and choose its outcome for category- c positions.*

C^{SCI} 



C^{SCI} 

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Desideratum: Elimination of Justified Envy

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Definition

Choice rule C **eliminates justified envy** if, for any $I \subseteq \mathcal{I}$ and $i, j \in I$ with

1. $\rho(i) \subseteq \rho(j)$,
2. $\tau(i) \subseteq \tau(j)$, and
3. $\sigma(i) \leq \sigma(j)$,

$$i \in C(I) \implies j \in C(I).$$

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$$i \in C(I) \implies j \in C(I).$$

- This desiderata fails in the previous example: The cutoff score for general-category women (light blue) is lower than the cutoff score for reserved-category women (pink).

Desideratum: Incentive Compatibility

Definition

An individual **withholds some of her reserve-eligible privileges** if she does not declare either her backward category membership, or some of her traits, (or both).

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- The following desiderata is introduced in Aygün and Bó (2016).

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A choice rule C is **incentive compatible** if, for every $I \subseteq \mathcal{I}$ and $i \in I$, whenever i is chosen from I by withholding some of her reserve-eligible privileges, she is also chosen declaring all her reserve-eligible privileges.

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- Also fails in the example.

Easy Fix

Choice Rule C_{2s}^{hor}

Step 1: Apply $C^{hor}(\cdot)$ to the set of *all* individuals to allocate the open-category positions.

Step 2: For each social category $c \in \mathcal{C}$, apply $C^{hor}(\cdot)$ to remaining individuals of category c , choosing its outcome to allocate category- c positions.

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Remark

Only the red part above differs from C_{1h}^{SCI}

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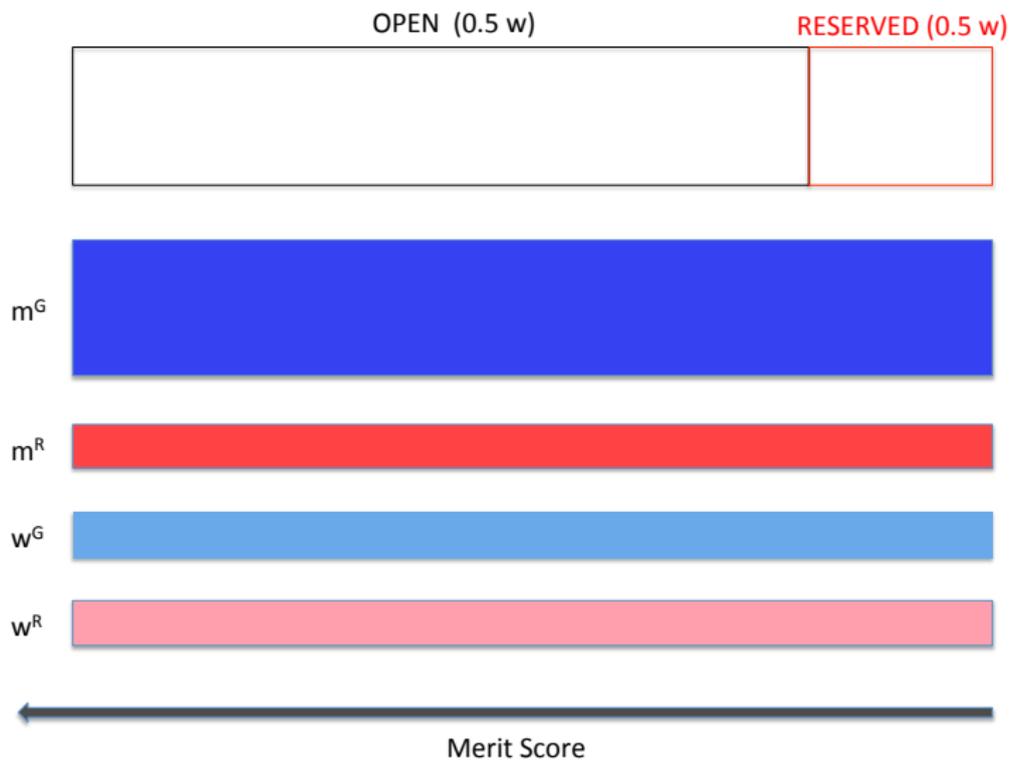
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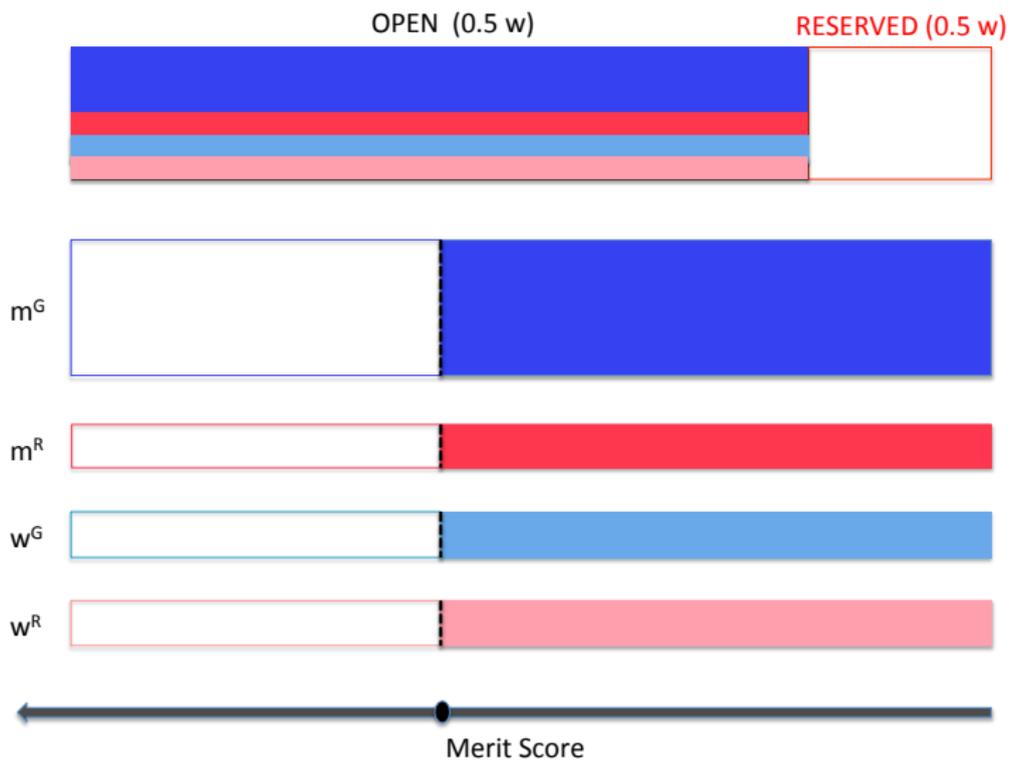
Remark

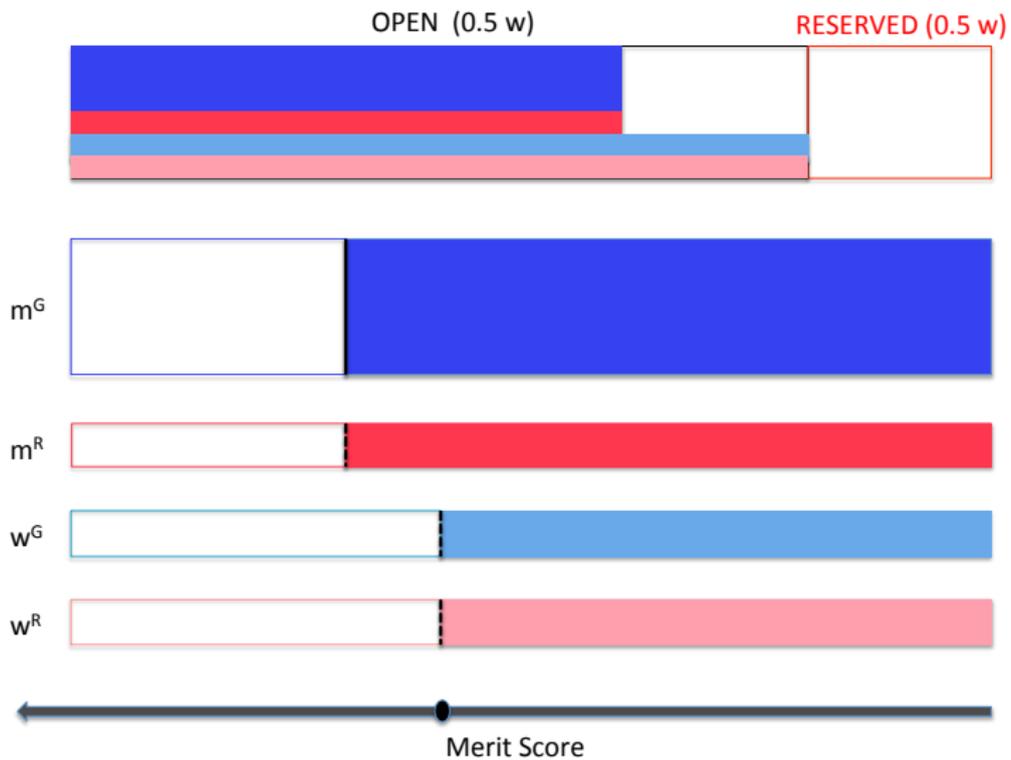
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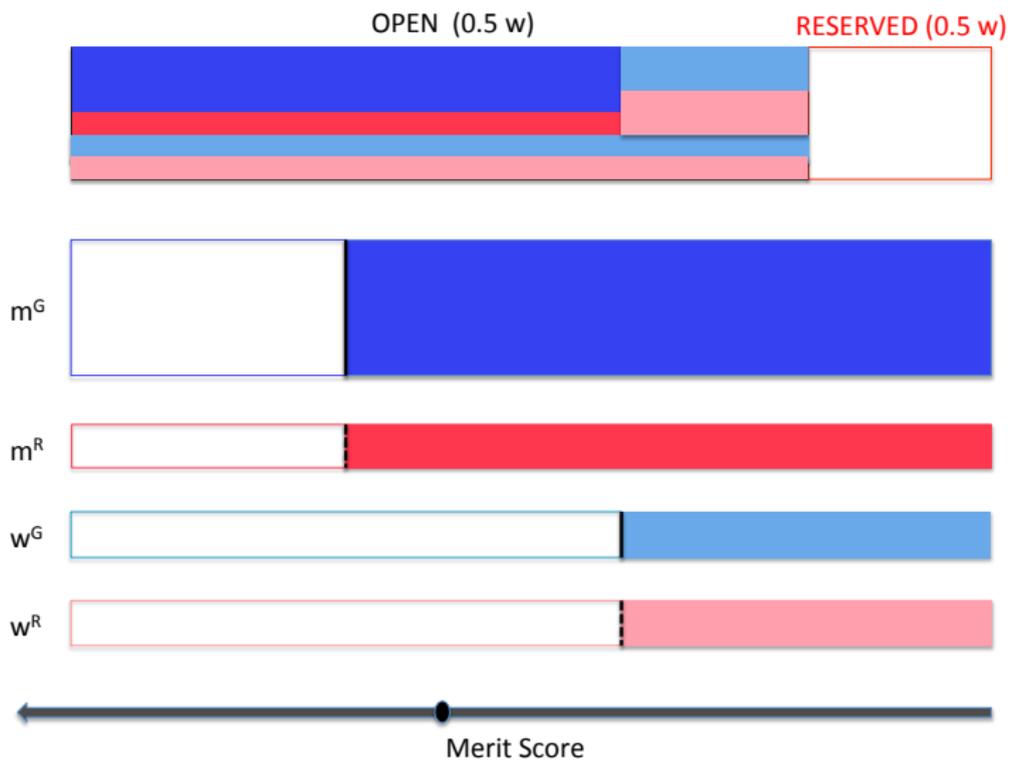
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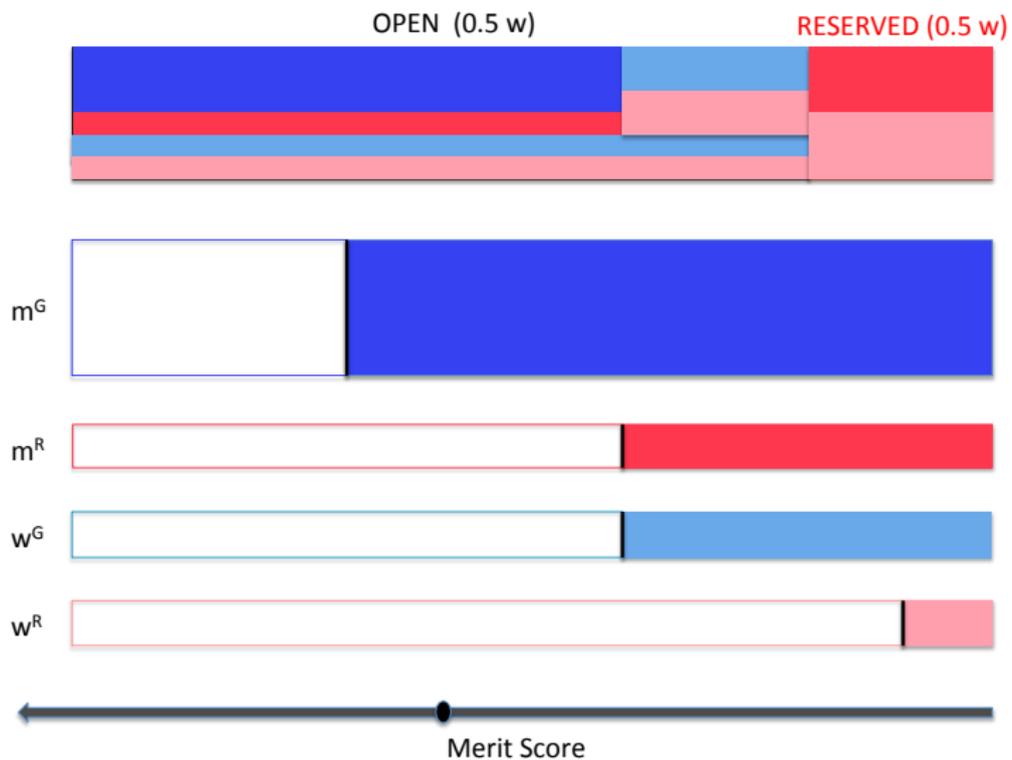
Choice rule C_{2s}^{hor} eliminates justified envy, and it is incentive compatible.

C_{2s}^{hor} 

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Better Fix

Choice Rule C_{ite}^{hor}

Steps 0-2: Same as C_{1h}^{SCI}

Step 2k-1, $k > 1$: Apply $C^{hor}(\cdot)$ to the union of the set of individuals who are tentatively chosen for the open-category positions and the set of individuals without a position.

Step 2k, $k > 1$: For each social category $c \in \mathcal{C}$, apply $C^{hor}(\cdot)$ to the category- c individuals who are not assigned an open-category position in Step 2k - 1.

Better Fix

Choice Rule C_{ite}^{hor}

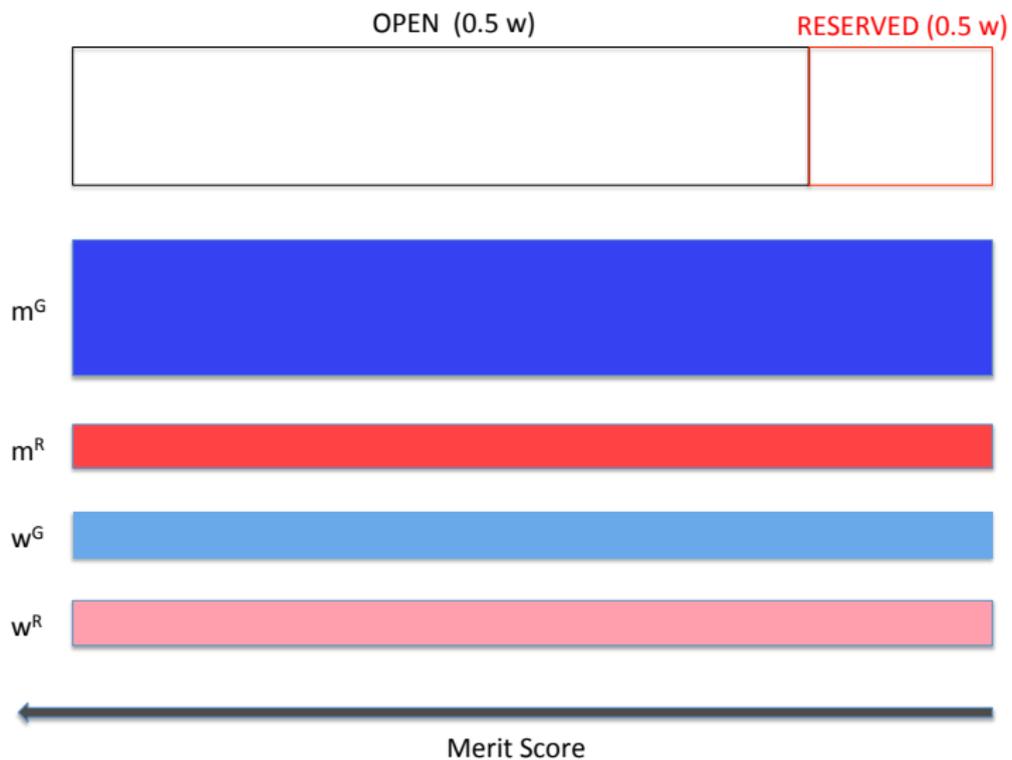
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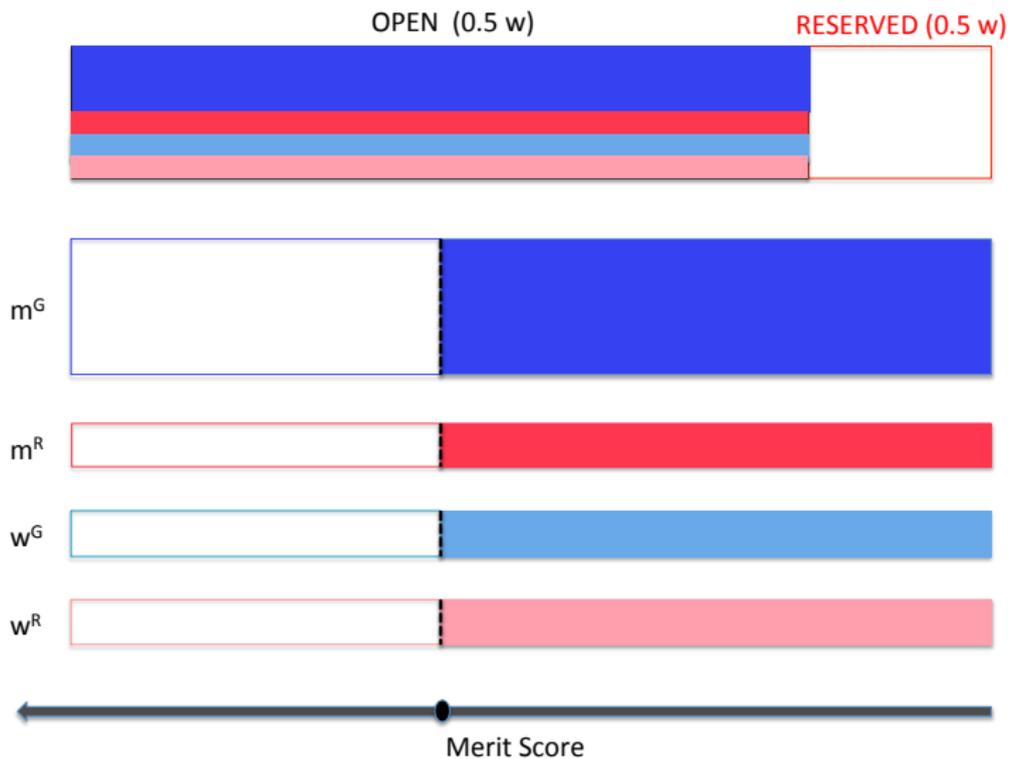
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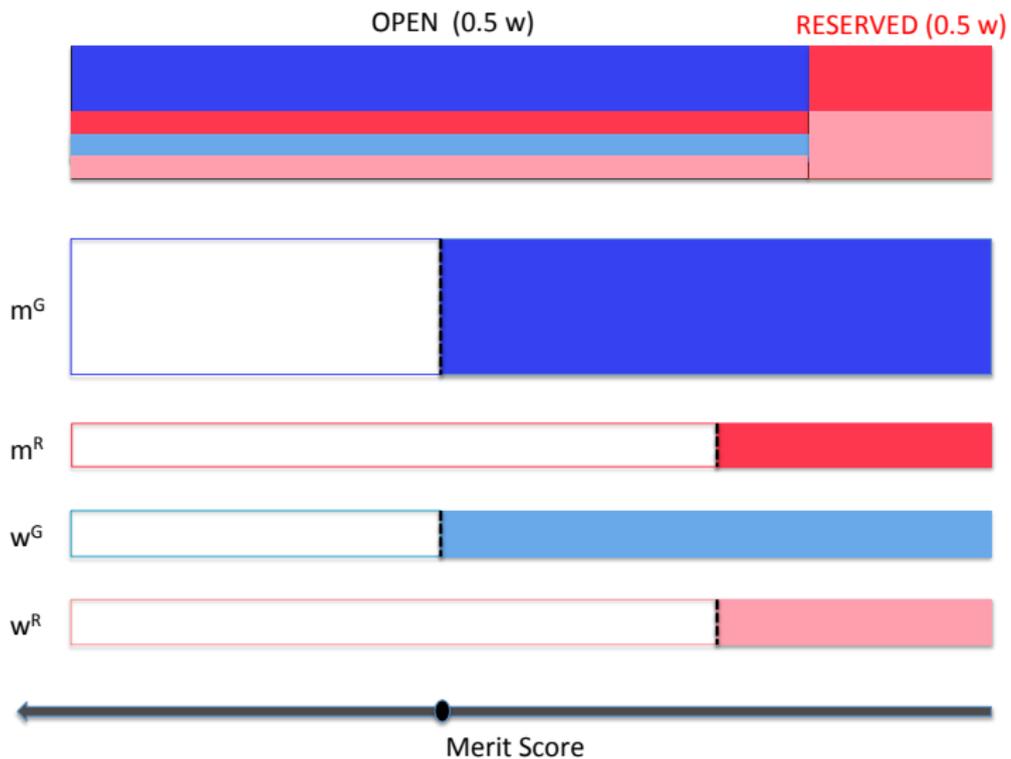
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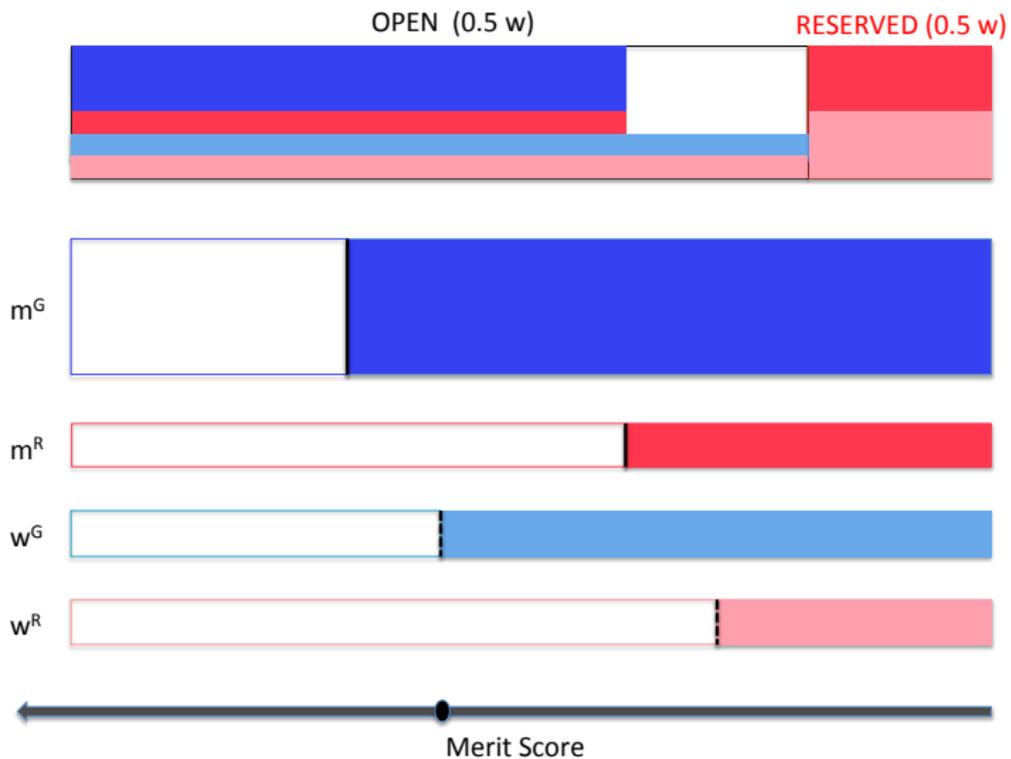
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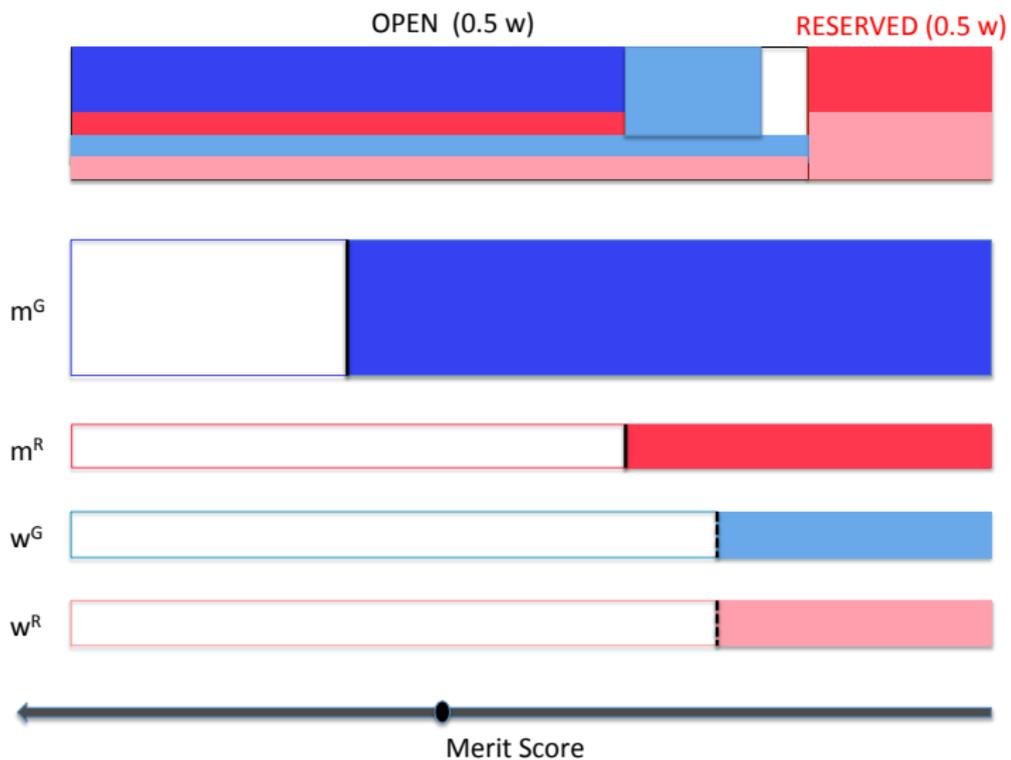
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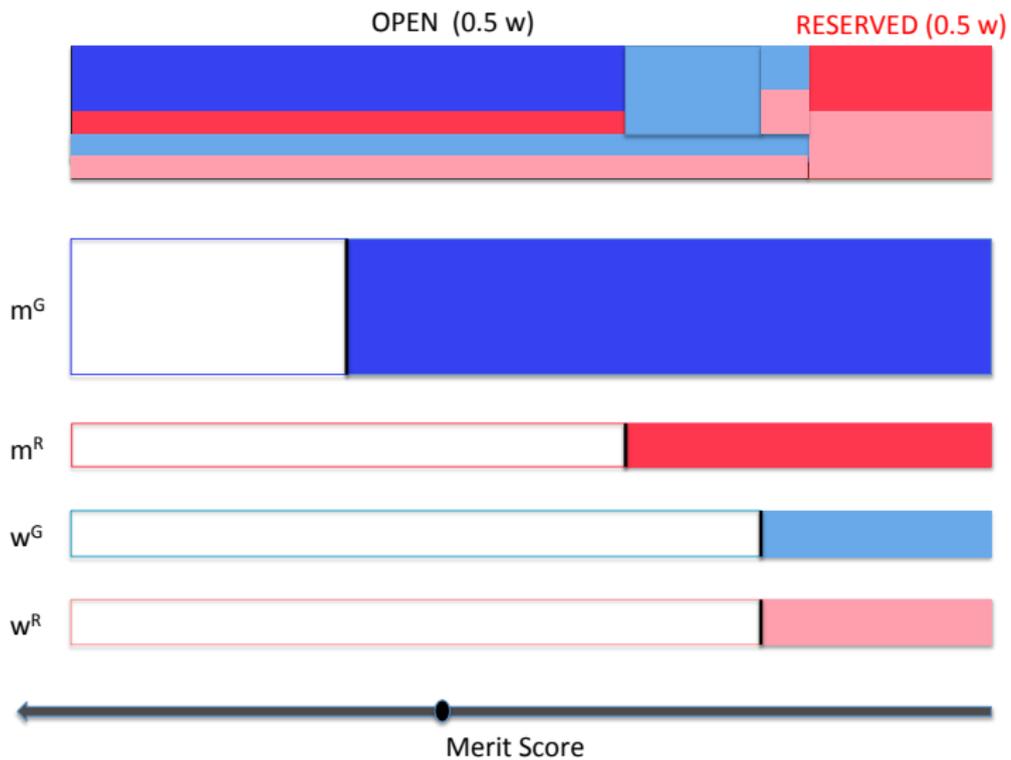
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Relating Selected Groups Under C^{SCI} , C_{2s}^{hor} and C_{ite}^{hor}

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- I^R : set of individuals in I with a backward class

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Proposition

Suppose that each individual has at most one trait. For every $I \subseteq \mathcal{I}$,

$$C^{SCI}(I) \cap I^G \supseteq C_{ite}^{hor}(I) \cap I^G \supseteq C_{2s}^{hor}(I) \cap I^G$$

and

$$|C^{SCI}(I) \cap I^R| \leq |C_{ite}^{hor}(I) \cap I^R| \leq |C_{2s}^{hor}(I) \cap I^R|$$

C_{ite}^{hor} is a “Minimal” Reform

Theorem

Suppose each individual has at most one trait, and let I be a set of individuals such that $C^{SCI}(I)$ satisfies open-category horizontal reservations for I . Then

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Suppose each individual has at most one trait, and let I be a set of individuals such that $C^{SCI}(I)$ satisfies open-category horizontal reservations for I . Then

- 1 if $C^{SCI}(I)$ eliminates justified envy, then $C_{ite}^{hor}(I) = C^{SCI}(I)$,

C_{ite}^{hor} is a “Minimal” Reform

Theorem

Suppose each individual has at most one trait, and let I be a set of individuals such that $C^{SCI}(I)$ satisfies open-category horizontal reservations for I . Then

- ① if $C^{SCI}(I)$ eliminates justified envy, then $C_{ite}^{hor}(I) = C^{SCI}(I)$,
- ② if $C^{SCI}(I)$ fails to eliminate justified envy, assuming there are sufficiently many individuals to fill the positions at each vertical category and that there is only one horizontal trait, we have

$$|C^{SCI}(I) \setminus C_{ite}^{hor}(I)| \leq |C^{SCI}(I) \setminus C(I)|$$

for every choice rule $C(\cdot)$ that eliminates justified envy.

Litigations that Relate to Elimination of Justified Envy

In numerous cases, a public institution that allows members of reserved classes to benefit from horizontal reservation for open-category positions faces litigation from general-category candidates who are not selected due to their lower merit scores.

1. *Rajeshwari vs State (2013)*, Rajasthan High Court.
 - Large scale litigation with 120 petitions against the State of Rajasthan.
 - State allows reserve category women to benefit from open-category horizontally reserved positions for women.
 - High Court **properly** rules that the State is at fault, and orders the State to adopt the Supreme Court-mandated procedure.

2. *Ashish Kumar Pandey (2016)*, Allahabad High Court.

- Case mimics *Rajeshwari vs State (2013)*: 25 petitioners litigate against the State of Uttar Pradesh for allowing reserve category women to benefit from open-category horizontally reserved positions.
- **Polarizing case**: The counsel for petitioners argue that the error is intentional:

*The action of the Board is not only motivated, but purports to take forward the **unwritten agenda** of the State Government to accommodate as many number of OBC/SC candidates in the open category.*

- The judge of the case **properly** rules that the State must correct their erroneous application of horizontal reservations, emphasizing that the State has played foul:

*There is merit in the submission of the learned counsel for the petitioners that the conduct of the members of the Board appears not only mischievous but motivated to achieve a **calculated agenda** by deliberately keeping meritorious candidates out of the select list...*

*I am constrained to hold that both the State and the Board have played **fraud** on the principles enshrined in the Constitution with regard to public appointment.*

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- Remarkably, the State appeals the judgement!
- Perhaps not surprisingly, the State loses the appeal as well.

3. *Smt. Megha Shetty (2013)*, Rajasthan High Court.

- Case similar to earlier cases: A petitioner litigates against the State of Rajasthan for allowing reserve category women to benefit from open-category horizontally reserved positions.
- A judge of the High Court **erroneously** dismisses the case.
- The petitioner appeals the decision, bringing the case to a larger bench of the High Court.
- The appeal is also dismissed!

As apparent from the court proceedings, the judges have difficulty perceiving that the Supreme Court-mandated procedure could possibly allow for justified envy:

The outstanding and important feature to be noticed is that it is not the case of the appellant-petitioner that she has obtained more marks than those 8 OBC (Woman) candidates...

4. *Asha Ramnath Gholap (2016)*, Bombay High Court.

- Following the law, State uses the Supreme Court-mandated choice rule, which results in an instance of justified envy.
- The petitioner (who is a member of SC) brings the case to the High Court, in a lawsuit that has no merit.
- In an **erroneous** decision, the judges grant the petition stating that a candidate cannot be denied a position from the open category based on her backward class membership.

Wrongful Implementation & Possible Misconduct

While applicants are entitled to declare their social categories or traits, they are not required to. Withholding this information may make sense, since the Supreme Court-mandated choice rule is not incentive compatible.

5. *Shilpa Sahebrao Kadam (2019)*, Bombay High Court.
 - Several candidates withhold their reserve-eligible categories, so they can benefit from open-category horizontal reservation.
 - Information is requested by authorities to identify their backward-class status, and their applications are evaluated as if they claimed the benefits of vertical reservation for their respective backward classes.
 - The candidates were **discriminated against** due to their (undisclosed) backward-class status, and they were all denied positions despite having higher merit scores than their general-category counterparts who benefitted from horizontal reservation. So they went to court.

- In an **erroneous** judgement, the petitioners lost their case despite the “faulty” implementation of the Supreme Court-mandated choice rule!
- Indeed, the faulty implementation has been **systematic** and completely **intentional** as the court proceedings reveal.

According to Respondent - Maharashtra Public Service Commission, in view of the Circular dated 13.08.2014, only the candidates belonging to open (Non-reserved) category can be considered for open horizontally reserved posts meaning thereby, the reserved category candidates cannot be considered for open horizontally reserved post. Reference is made to a communication issued by the Additional Chief Secretary (Service) of the State of Maharashtra dated 26.07.2017, whereunder it is prescribed that a female candidate belonging to any reserved category, even if tenders application form seeking employment as an open category candidate, the name of such candidate shall not be recommended for employment against a open category seat.

Loss of Access to Open-Category Horizontal Reservations, Despite Lack of Access to Vertical Reservations

6. *Tejaswini Raghunath Galande (2019)*, Bombay High Court.
- The petitioner declares her backward class status, despite the lack of vertically reserved positions for her category.
 - She loses her access to open-category horizontal reservation, which in turn results in an instance of justified envy.
 - Prior to bringing her case to the High Court, she files a petition to a lower court. Her case is dismissed.
 - Subsequently she appeals at the High Court, which is granted.
 - There are similar petitions, that have been dismissed.

How Many Lawsuits Are There?



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horizontal reservation doctypes: supremecourt,scorders,hig Search

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bombay

jharkhand

orissa

uttaranchal

Authors

A Bhushan

[Anil Kumar Gupta, Etc vs State Of Uttar Pradesh And Ors on 28 July, 1995](#)

directed to say clarifying the Govt. policy that **horizontal reservation** be granted in all medical colleges on total seats ... reservations and not vertical reservations. The corrigendum stated: ".....following **Horizontal reservation** has been provided on the total seats
[Supreme Court of India - Cites 8 - Cited by 132 - Full Document](#)

[Smt. Megha Shetty vs State Of Raj. & Anr on 26 July, 2013](#)

other 3 similar matters) being allotted as per the **horizontal reservation** provided for Woman (General) and 4 women candidates ... fact, the controversy related to the operation of **horizontal reservation** provided to woman and not the vertical reservations provided
[Rajasthan High Court - Jodhpur - Cites 18 - Cited by 78 - Full Document](#)

[Public Service ... vs Mamta Bisht And Ors on 3 June, 2010](#)

reservation in favour of SC/ST/OBC and **horizontal reservation** in favour of handicapped, and women etc. belonging to Uttaranchal ... category while others had been given the benefit of **horizontal reservation** being resident of Uttaranchal. Respondent No.1, being aggrieved
[Supreme Court of India - Cites 3 - Cited by 43 - Full Document](#)

[Rajesh Kumar Daria vs Rajasthan Public Service ... on 18 July, 2007](#)

Rules. They contended that though the Rules provided for **horizontal reservation** of 20% for women categorywise, RPSC while preparing ... subsequent year and the **reservation** treated as **horizontal reservation**, i.e. the **reservation** of women candidates shall be adjusted proportionately
[Supreme Court of India - Cites 7 - Cited by 59 - Full Document](#)

[Dr. Ravindra Kumar Pandey Son Of ... vs State Of U.P. Through Secretary ... on 3 July, 2006](#)

ground that the Commission has not provided **horizontal reservation** to physically handicapped candidates and if such **reservation** would have been ... senior counsel for the petitioner has urged that 3% **horizontal reservation** exists for the physically handicapped candidates, the quota
[Allahabad High Court - Cites 12 - Cited by 7 - Full Document](#)

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According to petitioners herein, in case of compartmentalized **horizontal reservation**, no **migration** from one category to another category is permissible ... **migration** is not applicable in compartmentalized **horizontal reservation** and if **migration** is allowed in compartmentalized **horizontal reservation**, then there will

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[Priyanka Sharma And Ors vs State \(Panchayati Raj Dep \) Ors on 15 March, 2013](#)

these writ petitions is as to whether **horizontal reservation** permits inter transferability/**migration** of candidates from one category to another ... indicated between social **reservation** and special **reservation**. First **reservation** is vertical and other to be **horizontal**. Further reference of following

[Rajasthan High Court - Cites 14 - Cited by 29 - Full Document](#)

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article 16

women reservation

article 16(2)

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article 4

Interruptions in Recruitment Due to Litigations

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THE TIMES OF INDIA

General seat vacated by quota candidate remains general: High Court

TNN | Mar 16, 2017, 04:00 AM IST



AHMEDABAD: Gujarat high court on Wednesday ruled that only a general category candidate can be appointed to a seat in open category in a government job, once it is vacated by a candidate from a reserved category.

In the instant case, a meritorious candidate from SC/ST category had first opted for appointment as a candidate in general category. But later, the candidate decided to vacate the seat after securing his/her seat in the concerned reserved category. The question arose whether the vacant seat should be filled with a candidate from reserved category or general category.

The HC has said that such a seat should be filled by a candidate of general category only, said advocate Dimple Thaker who represented the candidates.

In holding so, a bench of Chief Justice R S Reddy and Justice V M Pancholi has said that the Supreme Court's order in Jitendra Kumar Singh v/s the state of Uttar Pradesh cannot be made applicable in Gujarat. This is because the order was based on rules prevailing in UP, whereas Gujarat has different rules.

This issue has further complicated the recruitment process being undertaken by the Gujarat Public Service Commission (GPSC) for the posts of assistant conservator of forest (ACF) and range forest officer (RFO).

Interestingly, the forest department is recruiting on these posts after a long gap of 26 years. The advertisement was issued in 2010 and recruitment took place in 2016 amid too many litigations over the issue of reservation. A major issue, that of women reservation, is yet to be decided by the court.

With the recent observation by the HC, the merit list will now be changed for the third time. Those already selected and at present under training might lose their jobs, and half a dozen new candidates might find their names on the new list. However, all appointments have been made by the HC conditionally and subject to final outcome of these multiple litigations.

Discord Between 2019 Constitution Amendment and C^{SCI}

- In a highly debated reform on the reservation system, the *103 Amendment of the Constitution of India* provides 10% reservation to the economically weaker sections (EWS) in the general category.
- A follow up government memo specifies it as vertical reservation.
- Prior to reform, about 75% of the India population qualified for vertical reservation: The “old” general category was about 25% of the population.

- More than 80% of the old general category qualifies for EWS reservation: After the reform, more than 95% of the population qualifies for vertical reservation.

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Quotas for all

Almost all Indians will soon qualify for affirmative action in India

All but the richest will have access to job reservations

- More than 80% of the old general category qualifies for EWS reservation: After the reform, more than 95% of the population qualifies for vertical reservation.



Quotas for all

Almost all Indians will soon qualify for affirmative action in India

All but the richest will have access to job reservations

- **Unintended Consequence:** Only the remaining 5% of the population, i.e. the “new” general category, remains qualified for open-category horizontal reservations!
- Potentially devastating impact on women and disabled.
- Litigation due to instances of justified envy can be expected to increase significantly.

Conclusion

- Several petitions have challenged the constitutionality of the 103rd Amendment of the Constitution of India, in a pending Supreme Court case *Youth for Equality v. Union of India*.
- Main arguments of the petitions are all based on its failure to comply with principles laid down in *Indra Sawhney (1992)*, such as
 - vertical reservations are exclusively intended for members of backward classes SC, ST, and OBC, and
 - they cannot exceed 50% of the positions.
- As some of the basic principles of reservation policy are being evaluated in India, this lawsuit provides an opportunity to also address the shortcomings of the Supreme Court-mandated choice function.