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Let Sleeping Dogs Lie: A Comparative Analysis of the Dormant Commerce Clause and Internal Trade Barrier Mitigation

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LET SLEEPING DOGS LIE: A COMPARATIVE ANALYSIS OF THE DORMANT COMMERCE CLAUSE AND INTERNAL TRADE BARRIER MITIGATION

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Abstract: The Dormant Commerce Clause jurisprudence of the United States has been one of the most widely criticized doctrines of American constitutional law. However, most of these criticisms fail to consider the economic implications of the Dormant Commerce Clause, namely the benefits this doctrine has provided in facilitating internal free trade amongst the states. This Comment argues that the Dormant Commerce Clause has given American courts an effective tool to promote interstate free trade by removing state regulations that create non-tariff barriers to trade. To support this assertion, this Comment utilizes a comparative constitutional analysis to examine how the constitutional systems of the United States and Canada promote internal free trade. Under their constitutional system, Canadian courts have been unable to remove interprovincial barriers to trade, leading to billions in lost revenue and increased costs for businesses and consumers. In contrast, courts in the United States have been able to remove barriers to trade using the Dormant Commerce Clause, decreasing costs to consumers and businesses. Therefore, the Dormant Commerce Clause has allowed courts to establish more robust internal free trade. Thus, the Supreme Court of the United States must be wary of displacing the Dormant Commerce Clause from American constitutional jurisprudence because of its positive impact on interstate free trade.

> *"[A] student of . . . [interstate free trade] might understandably 'close[] his notebook, sell[] his lawbooks, and resolve[] to take up some easy study, like nuclear physics or higher mathematics.'"*
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> *Cole v. Whitfield, High Court of Australia*[1]

INTRODUCTION

The creation of robust internal free trade is foundational for many federal entities. In the United States, this need for a federal market helped

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1. *Cole v Whitfield* (1988) 165 CLR 360, ¶ 20 (Austl.) (internal citations omitted) (referencing *Australian Constitution* s 92, which governs free trade within the country).

drive the development of the Constitution.[2] Under the Articles of Confederation, Congress lacked the authority to regulate interstate commerce.[3] Consequently, many states enacted protectionist laws,[4] which caused "[f]riction between states . . . as these protective laws raised costs of importing, shipping, and selling goods for American merchants."[5] In the *Federalist Papers*, many of the Framers of the Constitution argued that such state protectionism could result in interstate conflict and that a free national market would provide substantial benefits.[6] The Supreme Court developed the Dormant Commerce Clause[7] doctrine as a judicial mechanism to limit such protectionist state legislation and address the concerns and goals of various Framers.[8]

Yet, the Dormant Commerce Clause remains one of the most controversial doctrines of American constitutionalism. Law students, lawyers, academics, and Supreme Court Justices alike have criticized the doctrine.[9] The most common critique of the Dormant Commerce Clause,

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2. Hughes v. Oklahoma, 441 U.S. 322, 325 (1979) (emphasizing as the "central concern of the Framers . . . the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation").

3. THE FEDERALIST NO. 42 (James Madison) (noting the "defect of power in the existing Confederacy to regulate the commerce between its several members" as a reason for promoting interstate free trade).

4. Protectionist laws by states included tariffs on international trade goods, import tariffs, and tonnage requirements for ships and other means of transport, as well as tariffs targeting goods coming from specific states. *See* Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37, 45–48 (2005) (discussing the Confederation-Era interstate trade barriers).

5. Denning, *supra* note 4, at 47.

6. *See* THE FEDERALIST NO. 11 (Alexander Hamilton) ("An unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished, and will acquire additional motion and vigor from a free circulation of the commodities of every part."); THE FEDERALIST NO. 42, *supra* note 3 (stating that if states regulate interstate trade "it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former" and that state regulation of interstate trade "would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility").

7. See *infra* Part III for a discussion and definition of the Dormant Commerce Clause.

8. Denning, *supra* note 4, at 39.

9. *See, e.g.*, Note, *The Dormant Commerce Clause and Moral Complicity in a National Marketplace*, 137 HARV. L. REV. 980, 980 (2024) (arguing "the Court should limit the dormant commerce inquiry to the question of whether a sufficient moral interest exists"); Paul E. McGreal, *The Flawed Economics of the Dormant Commerce Clause*, 39 WM. & MARY L. REV. 1191, 1194 (1998) (arguing that the Supreme Court's application of the antidiscrimination test of the Dormant Commerce Clause doctrine conflicts with the Commerce Clause's underlying principle of

as the name of the doctrine itself suggests, is that it is *dormant*, lacking a textual foundation in the Constitution.[10] Since the Dormant Commerce Clause is not explicitly mentioned in the Constitution, but rather was read into the Commerce Clause,[11] many have argued that the doctrine should not exist in American constitutionalism.[12] Some critics have gone further, arguing that the doctrine is "[l]ike the sound of a tree falling in a deserted forest," where commentators are unsure of whether it exists in the first place.[13] Even if there is some indication that the doctrine exists—that there is some authority to remove state regulations that burden interstate commerce—critics argue that the authority to make economic and regulatory decisions belongs to Congress, not the courts.[14] As such, critics have deemed this doctrine a "stepchild," arguing that "for constitutional lawyers, it is too much trade law; for trade lawyers, it is too much constitutional law."[15]

While some of this criticism may be well-founded, commentators have often neglected to evaluate the positive economic impact of the Dormant Commerce Clause. On their own, states have economic and social incentives to enact protectionist legislation, which may burden interstate commerce.[16] Such regulations may create non-tariff barriers

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"protect[ing] the national economic market from opportunistic behavior by the states"); Comptroller of the Treasury of Md. v. Wynne, 575 U.S. 542, 572 (2015) (Scalia, J., dissenting) (calling the Dormant Commerce Clause doctrine "judicial fraud").

10. *See* Csongor István Nagy, *The Dormant Commerce Clause's Unfulfilled Constitutional Promise to Rule Out Protectionism: Proposal for a New Doctrine*, 57 IND. L. REV. 313, 315 (2023); *see also* United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 349 (2007) (Thomas, J., concurring) (noting that "[t]he negative Commerce Clause has no basis in the Constitution").

11. *See infra* note 58 and accompanying text for a discussion of the textual interpretation of the Commerce Clause to infer the existence of a Dormant Commerce Clause.

12. *See, e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 612 (1997) (Thomas, J., dissenting) (stating that the Dormant Commerce Clause is an "exercise of judicial power in an area for which there is no textual basis"); McGreal, *supra* note 9, at 1194 (arguing that the Supreme Court's application of the antidiscrimination test of the Dormant Commerce Clause doctrine conflicts with the Commerce Clause's underlying principle of "protect[ing] the national economic market from opportunistic behavior by the states"); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 617 (calling the Dormant Commerce Clause a "figment of the Supreme Court's imagination").

13. McGreal, *supra* note 9, at 1191 (noting state governments believe that the doctrine exists and will subjugate them, "like people who claim to have seen UFOs").

14. *See infra* notes 101–02 and accompanying text for a discussion of whether the courts have authority to engage in this inquiry.

15. Nagy, *supra* note 10, at 315.

16. Larry E. Ribstein & Bruce H. Kobayashi, *The Economics of Federalism* 9–10 (Ill. L. & Econ. Working Papers Series, Working Paper No. LE06-001, 2006).

(NTBs) to trade[17] that inhibit the free flow of trade.[18] These regulations significantly burden trade, increase operational costs for businesses, and raise prices for consumers.[19] Federal governments must remove such internal barriers to trade and promote the free flow of commerce within the nation. In the United States, the Dormant Commerce Clause fulfills this function. By its very nature, the Dormant Commerce Clause aims to remove protectionist regulations enacted by states, which substantially burden interstate commerce.[20] Thus, equipped with this doctrinal tool, courts can effectively remove state regulations that impose a barrier to internal trade.

This Comment utilizes a comparative constitutional approach to contrast the American and Canadian court systems' differing approaches to managing internal NTBs. In the United States, the Dormant Commerce Clause allows courts to eliminate NTBs enacted by states. By removing state legislation that unduly burdens interstate commerce, the Dormant Commerce Clause prohibits states from enacting NTBs that hamper free trade among the states.[21] On the other hand, Canadian jurisprudence places no such independent bar on the provinces.[22] Canadian courts have interpreted Article 91(2) and Article 121 of the Canadian Constitution, which address trade and the movement of goods within the country, to allow provinces to enact measures that incidentally burden interprovincial trade.[23] This has led to vastly different outcomes in the neighboring nations.[24] Exploring the impacts of the United States' and Canada's differing jurisprudence on internal economic regulation demonstrates the benefits of the Dormant Commerce Clause and the American approach.

This Comment proceeds as follows. Part I discusses the benefits of engaging in a comparative constitutional analysis and explains why the constitutional systems of the United States and Canada are comparable. Part II defines the concept of trade barriers, specifically NTBs, and the impact of such barriers on internal free trade within a country.

17. *See infra* notes 38–42 and accompanying text for a definition of non-tariff barriers.

18. Jared Carlberg, *Interprovincial Trade Barriers in Canada: Options for Moving Forward*, SCH. PUB. POL'Y PUBL'NS, Oct. 2021, at 1.

19. *See infra* Part II for a discussion of the negative impacts of NTBs.

20. *See infra* note 59 and accompanying text.

21. *See infra* section III.C for a discussion of the impact of the Dormant Commerce Clause on removing NTBs enacted by states.

22. *See infra* sections IV.A and B (highlighting various sections of the Canadian constitution that govern internal trade and the interpretation of those sections).

23. *See infra* Part IV for a discussion of Canadian jurisprudence and its impacts on interprovincial NTBs.

24. *See infra* section V.B.

Sections III.A and B provide an overview of the Dormant Commerce Clause's evolution. Section III.C then discusses how the Dormant Commerce Clause positively impacts the economy by eliminating NTBs. Thereafter, sections IV.A and B provide an overview of the Canadian constitutional structure and constitutional measures that could be used to remove NTBs between the provinces. Section IV.C explores the impact of such measures on NTBs. Section V.A then critically evaluates the differences between the Dormant Commerce Clause in the United States and its constitutional counterparts in Canada. Sections V.B and C argue that in light of such differences, American courts are much better equipped to remove NTBs between states than their Canadian counterparts. This difference has a positive impact on the United States's economy.[25] Ultimately, this Comment concludes that the Dormant Commerce Clause has facilitated more robust internal free trade. As such, the Supreme Court should be wary of displacing it from American jurisprudence.

I. COMPARATIVE ANALYSIS OF CONSTITUTIONAL SYSTEMS

This Comment utilizes a comparative approach to understand the benefits of the Dormant Commerce Clause in maintaining interstate free trade. Legal studies often benefit from comparative analyses generally, with comparative constitutional analyses being especially insightful.[26] Comparative constitutional law provides numerous benefits, such as demonstrating "how different constitutional systems handle the same or related questions."[27] Furthermore, a comparative approach facilitates the study of American constitutionalism by allowing scholars to critically evaluate constitutional systems and structures.[28] Specifically, the perspective gained from engaging in a comparative analysis "provide[s] critical standards for reviewing the work of the U.S. Supreme Court."[29] In light of the benefits of comparative constitutional analysis, this Comment compares the United States and Canada's constitutional approaches in

25. *See infra* Part V.C.

26. NORMAN DORSEN, MICHEL ROSENFELD, ANDRÁS SAJÓ & SUSANNE BAER, COMPARATIVE CONSTITUTIONALISM CASES AND MATERIALS 1 (2d ed. 2010).

27. VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 142 (Robert C. Clark et al. eds., 2d ed. 2006).

28. Donald P. Kommers, *The Value of Comparative Constitutional Law*, 9 JOHN MARSHALL J. PRAC. & PROC. 685, 692 (1976).

29. *Id.*

dealing with internal NTBs and the efficacy of such approaches in promoting internal free trade.

Canada provides an interesting point of comparison with the United States due to the countries' geographical proximity and shared legal and political histories. Both the United States and Canada have written constitutions.[30] Furthermore, as former British colonies, both countries have inherited common law constitutionalism.[31] Both countries have a national government composed of a bicameral legislature and a national Supreme Court.[32] More importantly, both the United States and Canada have constituent subnational units—states and provinces, respectively—which have their own legislatures and court systems.[33] In each federal system, both the national and the subnational governments have law-making powers.[34] Although there are some key differences between the two constitutional systems,[35] both counties are "organized for governmental activity in much the same way."[36] As such, engaging in a comparative analysis of how the United States' and Canada's constitutional schemes impact NTBs helps clarify the benefits of the

30. Unlike the Constitution of the United States, which is primarily a single document, the Constitution of Canada comprises a variety of sources. THE CONSTITUTIONAL LAW GROUP, CANADIAN CONSTITUTIONAL LAW 5 (Patrick Macklem et al. eds., 4th ed. 2010). Some of the most significant documents that are a part of the Canadian constitutional regime include the Royal Proclamation of 1763, the Quebec Act of 1774, and the British North America Act of 1867. *Id.* at 56. The British North America Act, also known as the Constitution Act, of 1867 created the new country of Canada, uniting the colonies of New Brunswick, Nova Scotia, and Canada (comprising Quebec and Ontario at the time). *Id.* at 6; Constitution Act 1867, 30 & 31 Vict. c. 3, pmbl. (U.K.) ("An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith.").

31. Michael Hail & Stephen Lange, *Federalism and Representation in the Theory of the Founding Fathers: A Comparative Study of U.S. and Canadian Constitutional Thought*, 40 PUBLIUS 366, 366–67 (2010).

32. Bora Laskin, *The Constitutional Systems of Canada and the United States: Some Comparisons*, 16 BUFF. L. REV. 591, 591 (1967).

33. *Id.*

34. *Id.*

35. The most important difference is that the United States is a republic democracy, while Canada is a parliamentary monarchy under the sovereignty of the British Crown. *See generally* David Mills, *Comparative Constitutional Law of the United States and Canada*, 7 AM. LAW. 190 (1899) (discussing the differences between the American and Canadian constitutional law systems at the time). Moreover, while the residuary powers are left to the states in the United States, the residuary powers in Canada are held by the national government. *Compare* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."), *with* Constitution Act 1867, 30 & 31 Vict. c. 3, § 91 (U.K.) (allowing the national government to "make Laws for the Peace, Order, and good Government of Canada"), *and* JACKSON & TUSHNET, *supra* note 27, at 933 n.2 (noting that the Peace, Order, and Good Government clause allows the national government of Canada to "legislate generally for the public health, safety, welfare, and morals").

36. Laskin, *supra* note 32, at 591.

Dormant Commerce Clause. The following Part further defines NTBs and explores their impact on interstate free trade.

II. NON-TARIFF BARRIERS AND THEIR ECONOMIC IMPACT ON FREE TRADE

Trade barriers have a substantial impact on economic interactions. Generally, trade barriers are defined as government laws or regulations that prevent or impede the trade of goods or services, protect domestic goods or services from competition, or restrain the flow of goods or services.[37]

Trade barriers can largely be divided into two groups: tariff barriers and non-tariff barriers (NTBs). Tariffs are customs or duties imposed on the exchange of goods or services.[38] NTBs, on the other hand, are more broadly defined. NTBs, while broadly defined, generally encompass barriers or obstacles that obstruct the free flow of trade.[39] NTBs can be natural and may include geographic barriers such as lakes, rivers, mountain ranges, or geographic distances between locations that inhibit the flow of trade.[40] However, they may be non-natural as well. Such non-natural NTBs, or non-tariff measures,[41] are mandatory legal requirements, rules, and regulations that impose informational, compliance-related, or procedural costs that impact the flow of trade or commerce.[42] In this Comment, NTBs will refer only to non-natural barriers.[43]

NTBs originally referred to national protectionist measures that hampered international trade; however, that conception has broadened in

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37. KATHERINE C. TAI, OFF. OF THE U.S. TRADE REPRESENTATIVE, 2023 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 1 (2023).

38. *Tariffs*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/tariffs_e/tariffs_e.htm [https://perma.cc/JBT8-E4EX].

39. Carlberg, *supra* note 18, at 1.

40. *Id.*

41. While there is some discourse of the difference between the terms non-tariff barriers and non-tariff measures, the terms will be used interchangeably herein. For more information on the difference between non-tariff barriers and non-tariff measures, see U.N. CONF. ON TRADE & DEV., GUIDELINES FOR THE COLLECTION OF DATA ON OFFICIAL NON-TARIFF MEASURES 2 (2023) ("The concept of non-tariff measures is neutral and does not imply a direction of impact or legal judgment. They are defined as 'policy measures, other than customs tariffs, that can potentially have an economic effect on international trade in goods, changing quantities traded, or prices or both'. Non-tariff barriers (NTBs) are a subset of the measures, implying a negative impact on trade.") (footnote omitted).

42. Andres B. Schwarzenberg, CONG. RSCH. SERV., IF12528, *Non-Tariff Measures (NTMs): An Overview*, https://crsreports.congress.gov/product/pdf/IF/IF12528 [https://perma.cc/8TP2-JFZ6].

43. Natural barriers to trade are often non-human barriers, such as lakes, mountain ranges, or physical distances between locations. As a result of their non-human origin, governments have no control over whether such barriers exist, and judicial intervention can do little to remove them. As such, this Comment will not focus on natural barriers to trade.

recent times. Following World War II, NTBs became increasingly prevalent.[44] Initially, they operated as protectionist measures enacted by governments that impacted international trade.[45] In recent decades, however, the umbrella of NTBs has extended beyond national measures that encumber international trade; they can also encompass state and local laws and regulations that have a similar impact.[46] Such internal trade barriers may aim to protect internal economic interests or raise revenues at the expense of consumers of imported goods, or they may arise unintentionally out of everyday governance.[47] As a result, NTBs include both regulations enacted to impact trade, as well as regulations relating to health, safety, and the environment that happen to impede the free flow of trade.[48]

Regardless of their origin, NTBs pose a significant threat to trade and economic unity. NTBs substantially impede trade by increasing information, compliance, and procedural costs.[49] Regulations can increase exporting costs, especially where they vary significantly between the export and import locations.[50] Moreover, businesses may face information costs,[51] specification costs,[52] and conformity assessment costs.[53] These

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44. Edward John Ray, *Changing Patterns of Protectionism: The Fall in Tariffs and the Rise in Non-Tariff Barriers*, 8 NW. J. INT'L L. & BUS. 285, 302 (1987).

45. *Id.* There were several factors that led to the rise of NTBs. *Id.* Firstly, the enactment of comprehensive income tax schemes in industrialized nations made them less reliant on tariffs as a source of income. *Id.* at 303. Secondly, special interest organizations were much more effective in persuading governments to enact NTBs since tariff barriers were much more prone to public scrutiny. *Id.* Finally, industrialized countries found it politically beneficial to use NTBs to support special interest organizations since it was more difficult to assess gains and losses. *Id.* For an in-depth exploration of the rise of NTBs after World War II, see Ray, *supra* note 44.

46. F. Eugene Melder, *Trade Barriers Between States*, 207 ANNALS AM. ACAD. POL. & SOC. SCI. 54, 54 (1940).

47. F. Eugene Melder, *The Economics of Trade Barriers*, 16 IND. L.J. 127, 130 (1940). NTBs within states arise naturally when new industries and practices arise, requiring the states to regulate such industries and practices for the public interest. *Id.* at 131. However, after some time, when the new industries or practices have grown significantly, the state regulations may present a hinderance to interstate commerce, thus leading to the gradual rise of NTBs. *Id.*

48. Timothy Meyer & Ganesh Sitaraman, *Trade and the Separation of Powers*, 107 CALIF. L. REV. 583, 627 (2019). For an example of regulation aimed at protecting health and safety, which created an NTB, see *infra* note 57.

49. *Non-Tariff Measures (NTMs)*, U.N. CONF. ON TRADE & DEV., https://unctad.org/topic/trade-analysis/non-tariff-measures [https://perma.cc/4MYY-HZ7T].

50. Schwarzenberg, *supra* note 42.

51. *Id.* (defining information costs as "costs related to identifying and processing information on relevant requirements in the target market").

52. *Id.* (defining specification costs as costs related to "adjusting the product or production process to the requirements of the importing [entity]").

53. *Id.* (defining conformity assessment costs as costs related to "proving that [the companies] have met [regulatory] requirements").

additional compliance costs can discourage trade or investment in that area because the costs of doing business may become too high or because the regulations result in economic protectionism, where domestic products replace imports.[54] Thus, it may be in the best interest of an economic unit to decrease NTBs and their associated costs to better promote trade and economic growth.[55]

International mechanisms that discourage the enactment of NTBs are quite robust, yet such robust mechanisms are often lacking on the subnational level. On the international level, there are several treaties that bind members, prohibiting the enactment of NTBs.[56] Countries may also bring suits against one another for the enactment of NTBs that hamper international trade.[57] However, at the subnational level, national legislation or judicial decision-making governs such mechanisms. In the United States, this function is carried out in part by the Dormant Commerce Clause, which the following Part further explores.

54. *Id.*

55. Of course, it must be acknowledged that economic efficiency is not the sole criterion for determining whether certain policies or regulations are beneficial. Some regulations, which may not be economically efficient, may nevertheless have social and moral benefits. *See, e.g.*, Vanessa E. Quince, Racism by Design: The Role of Race and Ethnicity in the Design of International Trade Agreements 39 (2018) (Ph.D. dissertation, University of Washington) (on file with the Suzzallo and Allen Libraries, University of Washington) (arguing that the neoliberal presumption of post-racial, efficient policy is misplaced and requires an understanding of the impact of race on trade terms). This Comment leaves for future authorship to explore the social impacts of the Dormant Commerce Clause in light of its economic impact.

56. *See, e.g.*, General Agreement on Tariffs and Trade art. 3, ¶ 2, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 187 [hereinafter GATT] ("The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use."); Agreement on Technical Barriers to Trade art. 2, ¶ 2.2, Apr. 15, 1994, 1868 U.N.T.S. 120 ("Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.").

57. The Family Smoke Prevention Tobacco Control Act of 2009, passed by the U.S. Congress, prevented the production and sale of cigarettes with certain additives, like cloves. Meyer & Sitaraman, *supra* note 48, at 627. The Act was passed to reduce youth smoking. *Id.* However, the Act carved out an exception for menthol cigarettes, which are largely produced in the United States. *Id.* Indonesia successfully challenged the Act at the World Trade Organization, arguing that the exception for menthol cigarettes, produced in the United States, discriminated against clove cigarettes, largely produced in Indonesia. Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc. WT/DS406/AB/R (adopted Apr. 4, 2012), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds406_e.htm [https://perma.cc/NV26-J5Z7].

III. THE DORMANT COMMERCE CLAUSE AND STATE JURISDICTION OVER INTERSTATE COMMERCE

The Dormant Commerce Clause plays an important role in American federalism as a judicial principle that deems unconstitutional state and local laws that place an undue burden on interstate commerce.[58] Although there is no constitutional provision that expressly declares that states may not unduly burden interstate commerce, the Supreme Court has inferred this from the Constitution's grant of power to Congress to "regulate Commerce . . . among the several States."[59] The Dormant Commerce Clause is also known as one of the three essential elements of modern American federalism.[60]

To better understand the role of the Dormant Commerce Clause in preventing the rise of internal NTBs in the United States, it is important to examine its evolution, criticisms, and benefits. This Part delves into the evolution of the Dormant Commerce Clause jurisprudence in the United States. After understanding its development and application, this Part explores the doctrine's economic impact and its success in preventing the rise of NTBs.

A. Early Developments of the Dormant Commerce Clause Doctrine

The jurisprudential history of the Dormant Commerce Clause begins with Justice Marshall's decision in *Gibbons v. Ogden*.[61] In *Gibbons*, the Supreme Court considered whether the state of New York could grant a monopoly for operating a steamboat in its waters, preventing individuals

58. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 462 (6th ed. 2019).

59. U.S. CONST. art. I, § 8. *See also* CHEMERINSKY, *supra* note 58, at 462. It is also important to note that while the Dormant Commerce Clause attempts to remove state burdens on interstate commerce, it is not the only way to achieve such means. If a state or local government discriminates against an out-of-state resident with regard to a fundamental right or economic activity, there may be a constitutional claim under the Privileges and Immunities Clause of Article IV. *See generally*, Chester James Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1 (1967) (tracing the development of privileges and immunities clause jurisprudence and criticizing the Supreme Court's decision in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869). Laws that discriminate against out-of-state actors can also be challenged under the Equal Protection Clause of the Fourteenth Amendment. *See, e.g.*, Matthew J. Zinn & Steven Reed, *Equal Protection and State Taxation of Interstate Business*, 41 TAX LAW. 83, 84 (1987) ("Although it is unlikely that equal protection claims will supplant discrimination claims under either the commerce clause or the privileges and immunities clause, recent case law has breathed new life into the equal protection clause in the state tax area.").

60. David S. Day, *The Rehnquist Court and the Dormant Commerce Clause Doctrine: The Potential Unsettling of the "Well-Settled Principles,"* 22 U. TOL. L. REV. 675, 676 (1991).

61. 22 U.S. (9 Wheat.) 1 (1824).

with a federal license from operating steamboats in the state.[62] Invoking the Commerce Clause, Justice Marshall reasoned that the power to regulate commerce gives Congress the power to regulate all commercial activities "among the several [s]tates."[63] This meant that the Constitution granted Congress the ability to regulate all commercial activities except those "completely internal" to the states.[64]

However, Justice Marshall further explained that the Commerce Clause may pose an independent limit on states' ability to enact protectionist regulations. The Court noted that "when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do."[65] Despite this, state regulations in some areas, such as inspection laws, may be constitutional even if they burden interstate commerce because states are exercising their police powers when enacting such laws.[66] Many cases following *Gibbons* used Justice Marshall's approach in evaluating state laws under the Commerce Clause—where laws enacted pursuant to the state's police power were valid and laws intending to regulate commerce were not.[67] However, *Gibbons* left unresolved the question of what would occur if "state laws, including those adopted under the police power, violate the dormant commerce clause because they unduly burden interstate commerce."[68]

Twenty-seven years later, in *Cooley v. Board of Wardens*,[69] the Court attempted to resolve the issue of whether state laws enacted pursuant to their police power could violate the Dormant Commerce Clause. The case concerned a Pennsylvania law that required all ships arriving or leaving

62. *Id.* at 1.

63. *Id.* at 195–96.

64. *Id.* at 194.

65. *Id.* at 199–200.

66. *Id.* at 203–04 ("[Inspection laws] form a portion of that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, [et]c., are component parts of this mass.").

67. *See, e.g.*, Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 252 (1829) (holding that a state's construction of a dam that obstructed interstate waters not "repugnant" to Congress's commerce clause powers since it implicated the state's general police powers); Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 132 (1837) (holding that a New York statute requiring passenger identification for all ships entering from other states or nations was constitutional since the act "is not a regulation of commerce, but of police").

68. CHEMERINSKY, *supra* note 58, at 468.

69. 53 U.S. (12 How.) 299 (1851).

the Port of Philadelphia to use a local pilot or pay a fine.[70] Upholding the law, the Court noted that the true question is whether the subject of the state regulation is such that it requires uniform legislation nationally or diverse regulation locally.[71] The Court explained that due to the diverse nature of commerce, some subjects require Congress to enact one "single uniform rule" to create unity.[72] On the other hand, some subjects require state governments to enact particularized regulations that are diverse in nature.[73] Although attempting to resolve issues left open by *Gibbons*, this new *Cooley* test posed a new challenge before the Court: determining when a subject matter is national, requiring uniform legislation, or local, requiring diverse legislation.[74] Nevertheless, the Court continued to apply the *Cooley* test throughout the nineteenth century.[75]

The Court again attempted to define a test for the Dormant Commerce Clause in *Di Santo v. Pennsylvania*,[76] where a Pennsylvania state law required a state-issued license to sell tickets for foreign travel.[77] Here, the Court differentiated between invalid state laws that directly burdened interstate commerce and valid state laws that indirectly burdened interstate commerce.[78] The Court noted that if a state statute directly interferes with interstate commerce, it is prohibited, regardless of its intended purpose.[79] Thus, in *Di Santo*, the Court created

70. *Id.* at 311–12.

71. *Id.* at 319 ("Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.")

72. *Id.*

73. *Id.*

74. CHEMERINSKY, *supra* note 58, at 469.

75. During this time, the Supreme Court invalidated several state laws which they deemed required national, uniform regulations. *See, e.g.*, Welton v. Missouri, 91 U.S. 275, 280 (1875) (holding that a Missouri law requiring only out-of-state peddlers to pay a tax and obtain a license is invalid because "transportation and exchange of commodities is of national importance, and . . . requires uniformity of regulation"); Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557, 589 (1886) (holding that a state law regulating goods brought to and from other states was invalid because such regulations pose a "burdens upon the commerce itself, and come fairly within the exclusive prerogatives of Congress"). However, the Court also upheld state laws which they deemed required local, diverse regulation. *See e.g.*, Smith v. Alabama, 124 U.S. 465, 482 (1888) (holding that an Alabama law requiring all locomotive engineers operating within the state to be licensed by a state board of examiners "is not, considered in its own nature, a regulation of interstate commerce"); Erb v. Morasch, 177 U.S. 584, 585 (1900) (holding that a city's regulation of train speeds, even of interstate trains, within the city limits "is within the power of the State").

76. 273 U.S. 34 (1927).

77. *Id.* at 35.

78. *Id.* at 37.

79. *Id.*

the direct/indirect effects test to determine when a state statute violates the Dormant Commerce Clause.[80]

During the early development of the Dormant Commerce Clause doctrine, the Court attempted to draw rigid lines between when state laws could regulate commerce and when only the federal government could do so. These early approaches—the police power/commerce power approach of *Gibbons*, the local/national subject matter of *Cooley*, and the direct/indirect effects test of *Di Santo*—attempted to create categorical approaches to the Dormant Commerce Clause. However, the Court soon moved away from such rigid line-drawing and turned towards a balancing test for determining if state regulation of commerce was valid.

B. Modern Interpretations of the Dormant Commerce Clause Doctrine

Although the Court previously relied on rigid tests to determine when a law violates the Dormant Commerce Clause, the Court moved away from these approaches beginning with *South Carolina State Highway Department v. Barnwell Bros., Inc.*[81] and *Southern Pacific Co. v. Arizona ex rel Sullivan*.[82] However, vestiges of the earlier tests remain since the Court has never expressly overruled the earlier precedents. [83]

Barnwell and *Southern Pacific* marked the beginning of the Court's shift away from rigid line drawing. In *Barnwell*, the Court was confronted with a South Carolina law that imposed a weight and width requirement on trucks operating within the state.[84] In upholding the state law as constitutional, the Court noted that states have the ability to "build and maintain [their] own highways, canals, and railroads, and that in the absence of Congressional action their regulation is peculiarly within [the states'] competence, even though interstate commerce is materially affected."[85] Conversely, in *Southern Pacific*, the Court found a state law

80. *Id.* ("A state statute which by its necessary operation directly interferes with or burdens foreign commerce is a prohibited regulation and invalid, regardless of the purpose with which it was passed.").

81. 303 U.S. 177 (1938).

82. 325 U.S. 761 (1945).

83. *See, e.g.*, Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 578–79, 582 (1986) (employing the direct/indirect effects test to invalidate a New York statute that regulated the price of alcoholic beverages and disadvantaged out-of-state consumers); California v. Zook, 336 U.S. 725, 728 (1949) (using the national/local subject matter test and noting "[a]bsent congressional action, the familiar test is that of uniformity versus locality").

84. *Barnwell Bros.*, 303 U.S. at 180.

85. *Id.* at 187.

regulating the length of trains to be unconstitutional.[86] Expressly articulating a balancing test, the Court noted that it is important to weigh the "nature and extent of the burden" of the state regulation on interstate commerce against the "state and national interests involved."[87]

The diverging rulings in *Barnwell* and *Southern Pacific* demonstrate the central question in the Court's approach to Dormant Commerce Clause cases. The difference between the Court's decision in *Barnwell* and *Southern Pacific* was that in the former, the Court determined that the statute's benefits for road safety within the state outweighed its burdens on interstate commerce, while in the latter, the burdens on interstate commerce outweighed the benefits of transportation safety within the state. Thus, the central question in Dormant Commerce Clause cases became whether the benefits granted by the state law outweigh the burdens of such a law on interstate commerce.[88]

Over time, the Court has created additional inquiries when determining if a state statute may be upheld under the Dormant Commerce Clause. One such consideration is whether the statute "discriminates against out-of-staters, or whether it treats in-staters and out-of-staters alike."[89] This inquiry may be determinative, as state laws that facially discriminate against out-of-staters are almost always found to be invalid.[90] However, if a law is facially neutral, meaning it does not plainly discriminate against out-of-staters, the Court may consider whether the purpose or impact of

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86. *S. Pac. Co.*, 325 U.S. at 781–82 ("[State] regulation of train lengths, admittedly obstructive to interstate train operation, and having a seriously adverse effect on transportation efficiency and economy, passes beyond what is plainly essential for safety since it does not appear that it will lessen rather than increase the danger of accident.").

87. *Id.* at 770–71.

88. CHEMERINSKY, *supra* note 58, at 471. It must be noted, however, that such a test grants courts "enormous discretion because it is attempting to weigh and compare two completely different things: burdens on interstate commerce and the benefits to a state or local government." *Id.*

89. *Id.* at 473–74.

90. *See, e.g.*, Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 42 (1980) (holding that a Florida statute that prevented out-of-state banks from owning or controlling a bank or trust company within the state is unconstitutional because it puts up barriers against companies with "principal operations *outside* Florida"); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 521–22 (1935) (holding that a New York statute restricting the price of milk produced outside of the state and preventing it from being sold at a price lower than in-state milk was unconstitutional); Bendix Autolite Corp. v. Midwesco Enter., Inc., 486 U.S. 888, 894 (1988) (holding that a state law allowing a longer tolling period for statute of limitations for suits against out-of-staters was unconstitutional because it "imposes a greater burden on out-of-state companies than it does on Ohio companies"); City of Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978) (holding that a New Jersey law that prevented the importation of waste was unconstitutional because of its "obvious effort to saddle those outside the State with the entire burden of slowing the flow of refuse into New Jersey's remaining landfill sites"); Great Atl. & Pac. Tea Co., v. Cottrell, 424 U.S. 366, 381 (1976) (holding that reciprocity agreements, where a state provides benefits to another state on the condition that such other state provide benefits in return, "unduly burden[] the free flow of interstate commerce").

the law is to discriminate.[91] This inquiry, however, has resulted in mixed outcomes.[92]

Ultimately, if the Court determines that a state law is not discriminatory, either facially or by its purpose and impact, the Court will employ a balancing test that was first enumerated in *Pike v. Bruce Church, Inc.*[93] Justice Stewart, writing for the Court, noted that a state statute will be upheld if it "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[94] Due to this approach, a law that discriminates against out-of-staters will almost always be declared unconstitutional, even if it does not discriminate facially or have a discriminatory purpose.[95]

However, in a recent case, the Supreme Court has reduced this broad scope. Heralded as one of the most important developments in Dormant Commerce Clause jurisprudence,[96] the Supreme Court's notice

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91. CHEMERINSKY, *supra* note 58, at 476.

92. *See, e.g.*, C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 383 (1994) (noting that while a state statute's "immediate effect is to direct local transport of solid waste to a designated site within the local jurisdiction, its economic effects are interstate in reach" and it is thus unconstitutional); Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 350 (1977) (holding a state statute requiring apple containers to contain no grading other than U.S. standards to be unconstitutional because it has "the practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them"). *But see, e.g.*, Exxon Corp. v. Governor of Md., 437 U.S. 117, 126 (1978) (noting that even though a Maryland statute severely discriminated against out-of-state gas companies, the law was constitutional because it "create[d] no barriers whatsoever against interstate independent dealers; it [did] not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market"); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 460, 471 (1981) (finding that even though the purpose of the statute "was to promote the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests of other segments of the dairy industry and the plastics industry," the act was constitutional because it did not "effect 'simple protectionism,' but 'regulate[d] evenhandedly'").

93. 397 U.S. 137 (1970). *See generally*, David S. Day, *Revisiting* Pike. *The Origins of the Nondiscrimination Tier of the Dormant Commerce Clause Doctrine*, 27 HAMLINE L. REV. 45 (2004) (discussing the origins of the balancing test in *Pike*).

94. *Pike*, 397 U.S. at 142.

95. CHEMERINSKY, *supra* note 58, at 492. *See* Hughes v. Oklahoma, 441 U.S. 322, 337 (1979) ("[F]acial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives."); Granholm v. Heald, 544 U.S. 460, 476 (2005) (quoting City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) ("State laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity.'")).

96. *See* Linda Coberly & Spencer Churchill, *Supreme Court Limits Challenges to State Laws and Regulatory Authority Under Dormant Commerce Clause Doctrine*, WINSTON & STRAWN (June 5, 2023), https://www.winston.com/en/insights-news/supreme-court-limits-challenges-to-state-laws-and-regulatory-authority-under-dormant-commerce-clause-doctrine [https://perma.cc/X46P-9ZFD];

in *National Pork Producers Council v. Ross*[97] was quite clear: courts should employ "extreme caution" in invalidating state laws under the Dormant Commerce Clause doctrine.[98] The Court was faced with a California law that prohibited the in-state sale of pork meat from pigs confined in cruel manners.[99] Upholding the statute, the Court concluded that there is no *per se* rule of "forbidding enforcement of state laws that have the practical effect of controlling commerce outside the State," even if there is no discriminatory purpose.[100] Ultimately, this set an outer boundary to the Dormant Commerce Clause inquiry so that state laws that had large economic impacts outside of the state would not be deemed *per se* invalid.

Even though the Dormant Commerce Clause has evolved considerably over time, it has been subject to vast criticism. Critics argue that the doctrine lacks a textual foundation.[101] They reason that even if the doctrine does exist, the authority to engage in such an inquiry should lie with Congress, not the courts.[102] However, there is considerable evidence indicating that the Framers, in fact, intended for the courts to have the authority to invalidate state laws that unduly burdened interstate commerce.[103] The fact that the doctrine has been "untouched by

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Jimmy Slaughter, Jamie Auslander & Nessa Coppinger, *Supreme Court Narrows Dormant Commerce Clause Protections Against Regulation of Business in Decision Affirming California Pork Law*, BEVERIDGE & DIAMOND (May 17, 2023), https://www.bdlaw.com/publications/supreme-court-narrows-dormant-commerce-clause-protections-against-regulation-of-business-in-decision-affirming-california-pork-law/ [https://perma.cc/H3E4-W2BN].

97. 598 U.S. __, 143 S. Ct. 1142 (2023).

98. *Id.* at 1165.

99. *Id.* at 1149–1151.

100. *Id*. at 1154 (internal quotations omitted).

101. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) (arguing that "[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application").

102. United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 349 (2007) (Thomas, J., concurring) ("The language of the [Commerce] Clause allows Congress not only to regulate interstate commerce but also to prevent state regulation of interstate commerce."); Richard D. Friedman, *Putting the Dormancy Doctrine Out of its Misery*, 12 CARDOZO L. REV. 1745, 1746 (1991) (noting that the correct inquiry is not whether there is authority to invalidate state economic laws that burden interstate commerce, but rather *who* should be vested with such authority).

103. While this Comment does not explore in depth this critique of the Dormant Commerce Clause, there is considerable evidence indicating that the Framers intended for "judicial power rather than congressional action to invalidate impermissible state legislation." Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 VA. L. REV. 1877, 1897, 1903–38 (2011) (discussing the historical understanding of the commerce power and concluding that the Dormant Commerce Clause is within the federal courts' authority); s*ee also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 28 (Max Farrand ed., 1911),

Congress"—which "counts for something" in the American constitutional system—provides further legitimacy to the doctrine.[104] Thus, there is reason to believe that despite the criticism indicating otherwise, courts in the United States are empowered to strike down state regulations that unduly burden interstate commerce. Having established the authority of the courts to engage in such an inquiry, it is now possible to examine the impacts of the Dormant Commerce Clause on interstate free trade within the United States.

C. Economic Impacts of the Dormant Commerce Clause Doctrine on NTBs

By its very nature, the Dormant Commerce Clause prohibits states from enacting regulations that unduly burden or inhibit interstate commerce.[105] The Supreme Court determined that if a state statute is facially discriminatory, has a discriminatory purpose, or burdens interstate commerce in a manner that outweighs any potential local benefits, the state statute crosses the threshold of becoming unduly burdensome on interstate commerce.[106] The impact of this inquiry is decreased state protectionism and reduced presence of NTBs in the United States.

State protectionism results in increased trade barriers, which negatively impact the economy and consumers. States tend to act in what they perceive is their best interest, which may be inconsistent with the national interest.[107] As such, states may enact trade barriers to protect their markets from competitors.[108] Reducing the number of competitors permits in-staters to charge higher prices to consumers, allowing such in-state firms to receive higher profits.[109] The presence of such regulations means that producers have more restricted markets because of the costs associated with compliance, which results in higher consumer prices in the end.[110]

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https://www.loc.gov/resource/llscdam.llfr002/ [https://perma.cc/E37G-4XP7] (noting that during the Philadelphia Convention, Gouverneur Morris stated "A law that ought to be negatived will be set aside in the Judiciary departmt. and if that security should fail; may be repealed by a Nationl. Law"). Moreover, it must be acknowledged that there is no mention of judicial enforcement of other parts of the Constitution either, such as the Privileges and Immunities Clause or Article I, Section 10; yet the Court and critics have largely been silent on this inconsistency. Denning, *supra* note 4, at 98–99.

104. Friedman & Deacon, *supra* note 103, at 1938.

105. CHEMERINSKY, *supra* note 58, at 462.

106. *See supra* sections III.A–B (discussing the evolution of and various tests comprising the Dormant Commerce Clause doctrine).

107. Steven G. Craig & Joel W. Sailors, *Interstate Trade Barriers and the Constitution*, 6 CATO J. 819, 820 (1987).

108. *Id.*

109. *Id.*

110. *Id.*

However, the Dormant Commerce Clause aims to alleviate such issues by deeming "[p]rotectionist legislation [] unconstitutional under the Commerce Clause, even if the burdens and benefits are related to safety rather than economics."[111]

Even though there is no recent data showing the economic impact of NTBs on interstate commerce, it is still possible to see the impact of the Dormant Commerce Clause on NTBs. Discussions on interstate trade barriers were quite prevalent in academic discourse from the 1930s to the 1980s.[112] However, there seems to be little discussion on the impact of NTBs on interstate trade in recent times.[113] In spite of the lack of data, the impact of the Supreme Court's rulings on some industries is quite illuminating. One such industry where the Court has attempted to remove NTBs is the alcohol industry.[114] The alcohol industry provides an interesting insight into the courts' role in creating internal free trade and removing NTBs because, per the Twenty-first Amendment, Congress does not have much regulatory authority in this area.[115] Thus, it is up to the courts to determine when state alcohol regulation poses an excessive burden on interstate commerce and remove such regulation.[116]

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111. Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 680 (1981) (Brennan, J., concurring).

112. *See, e.g.*, Craig & Sailors, *supra* note 107, at 822–25 (discussing the costs of interstate trade barriers in the agricultural sector, labor certification and licensing, banking, and insurance industry); Frank Bane, *Interstate Trade Barriers: General Introduction*, 16 IND. L.J. 121, 124–25 (1940) (discussing state efforts to remove trade barriers, specifically exploring interstate trade barriers in the sale and transportation of liquor); Melder, *supra* note 46, at 54 (providing a list of several trade barriers enacted pursuant to the states' constitutional powers).

113. Perhaps the lack of discussion of NTBs may be attributable to the Dormant Commerce Clause's success in American jurisprudence. This Comment leaves to future scholarship the discussion of whether the Dormant Commerce Clause serves as a prophylactic measure at reducing NTBs and whether the increased invocation of the Dormant Commerce Clause has deemed discussions of NTBs moot.

114. *See* Granholm v. Heald, 544 U.S. 460, 484–85 (2005) ("The aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time."); Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 588 U.S __, 139 S.Ct. 2449, 2456–58 (2019) (holding that a Tennessee statute that required individuals to establish a two year residency in the state prior to obtaining a retail license in the sale of alcohol was invalid under the Dormant Commerce Clause because it "blatantly favor[ed] the State's residents").

115. U.S. CONST. amend. XXI, § 2 (recognizing that states have the ability to enact regulations on the importation and use of liquor).

116. The role of the federal government in the sale and distribution of alcohol has been quite limited, and it was the Supreme Court that provided oversight to state regulations. *See* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980) ("The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial

The Court did just that in *Granholm v. Heald*.[117] Prior to *Granholm*, several states prohibited the direct shipment of wine to consumers.[118] A report by the Federal Trade Commission (FTC) found that 15% of sample wines found online could not be found in nearby retail stores.[119] Consumer spending on the direct shipment of wine constituted approximately $500 million, or about three percent of all wine sales.[120] As a result, state laws that banned interstate direct shipment of wine seriously limited consumers' access to thousands of labels from smaller wineries.[121] The FTC study found that "[s]tate bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine."[122] In *Granholm*, the Supreme Court struck down two state laws inhibiting the direct shipment of wine because those laws violated the Dormant Commerce Clause.[123] Removing this barrier to trade allowed consumers to save "8 to 13 percent on wines costing more than $20 per bottle and an average of 20 to 21 percent on wines costing more than $40 per bottle."[124] Today, 47 states allow the direct shipment of wine, where any winery, whether in- or out-of-state, may obtain a permit for direct sales to consumers.[125]

Even where specific data on the impacts of the Dormant Commerce Clause is unavailable, it is not difficult to infer how the doctrine could positively impact a given industry by eliminating NTBs. The trucking industry is one such example of where the Court attempted to remove NTBs and facilitate the free movement of trucks across state lines.[126] Non-uniform laws in certain areas may impose

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discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations.").

117. 544 U.S. 460 (2005).

118. U.S. DEP'T OF TREASURY, COMPETITION IN THE MARKETS FOR BEER, WINE, AND SPIRITS 18 (2022).

119. FTC, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 18 (2003).

120. *Id.* at 5.

121. *See id.* at 21–22.

122. *Id.* at 3.

123. Granholm v. Heald, 544 U.S. 460, 493 (2005).

124. U.S. DEP'T OF TREASURY, *supra* note 118, at 17.

125. U.S. DEP'T OF TREASURY, *supra* note 118, at 18.

126. *See* Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 671 (1981) (finding an Iowa statute that established specific length requirements for trucks passing through the state to unduly burden interstate commerce); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 447 (1978) (finding a Wisconsin statute that established specific length requirements for trucks passing through the state to pose a "substantial burden on interstate commerce"); S. Pac. Co. v. Arizona *ex rel* Sullivan, 325 U.S. 761, 781–82 (1945) (holding that an Arizona statute regulating the length of trains violated the Dormant Commerce Clause because it had a "seriously adverse effect on transportation efficiency and economy").

compliance costs that are so severe that it would be economically impossible for firms to engage in interstate trade and comply with a patchwork of regulations.[127] By safeguarding the "free flow of commerce from state to state," the courts have been able to promote "national uniformity."[128] The Court has aggressively used this economic rationale to eliminate state laws that create barriers to efficient transportation.[129] As a result, the Dormant Commerce Clause has allowed courts to remove protectionist state regulations and eliminate NTBs, positively impacting the economy by decreasing the costs associated with such protectionism.

With this background of American jurisprudence, it is now possible to turn to Canada and evaluate Canadian constitutional jurisprudence relating to interprovincial NTBs.

IV. ECONOMIC REGULATION AND PROVINCIAL JURISDICTION OVER INTERPROVINCIAL COMMERCE IN CANADA

Several clauses of the Canadian Constitution provide the federal and provincial governments with the power to regulate the economy.[130] Section 91(2) outlines the federal power to regulate trade and commerce; Section 92(13) outlines the provincial power to regulate property and civil rights; and Section 121 protects the free movement of goods across provincial borders.[131] These sections provide the basis for economic regulations in Canada.[132] The power of the federal government to regulate interprovincial trade under Section 91(2) has been limited in light of Section 92(13), which ultimately grants considerable autonomy to the provinces to regulate the economy. This broad grant has combined with

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127. Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause* 19 (U. Chi. John M. Olin L. & Econ., Working Paper No. 105, 2000).

128. *S. Pac. Co.*, 325 U.S. at 767; *see also* Goldsmith & Sykes, *supra* note 127, at 18–19 (offering an economic explanation of the Court's rationale of eliminating inconsistent regulations in pursuit of national uniformity).

129. Goldsmith & Sykes, *supra* note 127, at 19.

130. Unlike the U.S. Constitution, the Canadian Constitution explicitly delineates the specific powers of the federal government and the provincial governments. *Compare* Constitution Act, 1867, 30 & 31 Vict., c. 3, § 91 (U.K.) (listing "[c]lasses of [s]ubjects" which are within the "exclusive Legislative Authority of the Parliament of *Canada*"), *with id.* § 92 ("In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated.").

131. THE CONSTITUTIONAL LAW GROUP, *supra* note 30, at 349.

132. It is important to note that there are, of course, other provisions of the Canadian Constitution which contain the distribution of powers that impact economic policy, such as taxation, control of natural resources, banking, copyrights, and criminal law. *See* Constitution Act, 1867, 30 & 31 Vict., c. 3, §§ 91–92 (U.K.).

the very limited reading of Section 121, which only prohibits tariffs on interprovincial trade, and resulted in considerable deference to provincial regulations.[133] The upcoming discussions further explore the intricacies of these rulings and their impact on the Canadian economy.

A. Section 91(2) and the Trade and Commerce Clause

Section 91(2) of the Canadian Constitution provides that "the exclusive Legislative Authority of the Parliament of Canada extends to . . . The Regulation of Trade and Commerce."[134] Thus, the federal government has the ability to regulate trade and commerce. Over time, decisions from the Privy Council[135] and the Supreme Court of Canada have severely limited the scope of the federal government's power while granting provincial governments substantial latitude to enact regulations that burden interprovincial commerce.[136] The following sections discuss Section 91(2) jurisprudence for the federal and provincial governments. Ultimately, the provincial governments have substantial authority to regulate trade and commerce without infringing on the federal government's grant of power.[137]

1. The Federal Powers to Regulate Trade and Commerce Under Section 91(2)

The first case to explicitly deal with Section 91(2) and the federal regulation of trade and commerce was *Parsons v. Citizens' Insurance Co. of Canada* in 1881.[138] In that case, the Privy Council was confronted with determining whether an Ontario law regulating the province's insurance industry was a valid exercise of its powers under Section 92(13),[139] or whether the legislation was related to trade and commerce, and thus an

133. See *infra* Part IV.C. for a discussion on how the relevant constitutional provisions have manifested to increase provincial protectionism.

134. Constitution Act, 1867, 30 & 31 Vict., c. 3, § 91 (U.K.); *id.* §91(2).

135. The Judicial Committee of the Privy Council, a British court, had appellate jurisdiction over all Canadian cases, including those decided by the Supreme Court of Canada. To assert Canada's independence and remove the vestiges of colonialism, the appellate jurisdiction of the Privy Council was removed in 1949, and the Supreme Court of Canada became the highest court in the country. THE CONSTITUTIONAL LAW GROUP, *supra* note 30, at 6–7.

136. *See infra* sections IV.A and B.

137. Patrick Monahan, *Canadian Federalism and Its Impact on Cross-Border Trade*, 27 CAN.-U.S. L.J. 19, 24 (2001) (finding that because of the constitutional structure, provinces are "major economic regulators," and the federal government lacks the authority to regulate major economic activity).

138. [1881] 7 App. Cas. 96 (PC) (appeal taken from S.C.C.).

139. Section 92(13) grants provinces the power to regulate property and civil rights. Constitution Act 1867, 30 & 31 Vict., c. 3, § 92(13) (U.K.).

invalid invasion of the federal Parliament's jurisdiction.[140] The Privy Council concluded that the provinces had vast power to regulate economic activity under Section 92(13), and federal regulation of trade and commerce simply concerned inter-provincial commerce or commerce that impacted the whole of Canada.[141]

The decision in *Parsons* continues to set the standard for federal trade and commerce powers. Subsequent decisions by Lord Haldane[142] further reduced the scope of this power, rendering the trade and commerce clause available only "in aid of" another federal enumeration.[143] However, after the departure of the Privy Council from the Canadian judicial system, Canadian courts began to broaden this narrow reading of the trade and commerce clause. In *Caloil Inc. v. Canada*,[144] the Supreme Court of Canada upheld a federal law that imposed restrictions on the transportation of oil across a line running north-south through Ontario and Quebec.[145] In its decision, the Court held that provincial regulatory authority over a certain trade inside the province is not the only criterion for determining whether the federal government may also regulate that trade or not.[146] Rather, if the law is an "integral part of a scheme for the regulation of international or interprovincial trade," then the Court will uphold it.[147]

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140. *Parsons*, [1881] 7 App. Cas. at [¶ 17].

141. *Id.* at [¶ 26] (noting that regulation of trade and commerce by the federal government includes only "regulation of trade in matters of inter-provincial concern, and . . . general regulation of trade affecting the whole Dominion").

142. *See* R.B. Haldane, *Lord Watson*, 11 JURID. REV. 278, 279–81 (1899) (recounting Lord Haldane's impressions of Lord Watson and how Lord Haldane was inspired by Lord Watson's jurisprudence on Canadian constitutional federalism).

143. Toronto Elec. Comm'rs v. Snider [1925] AC 396 (PC) [¶ 22] (appeal taken from Ont.) ("It is, in their Lordships' opinion, now clear that, excepting so far as the power can be invoked *in aid of* capacity conferred independently under other words in sec. 91, the power to regulate trade and commerce cannot be relied on as enabling the Dominion Parliament to regulate civil rights in the provinces.") (emphasis added). *See, e.g.*, *In re* The Bd. of Com. Act and The Combines and Fair Prices Act [1921] AC 191 (PC) [¶ 10] (appeal taken from S.C.C.) ("[T]he authority of the Dominion Parliament to legislate for the regulation of trade and commerce did not, by itself, enable interference with particular trades in which Canadians would, apart from any right of interference conferred by these words above, be free to engage in the provinces."); Fort Frances Pulp & Paper Co. v. Man. Free Press Co. [1923] AC 695 (PC) [¶ 18] (appeal taken from Ont.) ("Their Lordships, therefore, entertain no doubt that however the wording of secs. 91 and 92 may have laid down a framework under which, as a general principle, the Dominion Parliament is to be excluded from trenching on property and civil rights in the Provinces of Canada, yet in a sufficiently great emergency such as that arising out of war, there is implied the power to deal adequately with that emergency for the safety of the Dominion as a whole.").

144. [1971] S.C.R. 543 (Can.).

145. *Id.* at 545, 551.

146. *Id.* at 550.

147. *Id.*

Ultimately, the development of the trade and commerce clause demonstrates that Canadian courts have narrowly construed the authority of the federal government over commercial regulation.[148] For regulation to be within the scope of federal trade and commerce powers, it must attempt to regulate international or interprovincial trade.[149] Unlike in the United States, this power to regulate trade is not all-encompassing, and the jurisprudential history of this clause demonstrates a lack of overbroad interpretations.[150]

2. The Provincial Powers to Regulate Trade and Commerce Under Section 91(2)

With this brief overview of the federal trade and commerce power, this section now explores provincial powers over economic regulations and how such powers have developed over time. Due to the structure of the Canadian Constitution, and the judicial interpretation of the federal trade and commerce power, provinces may impose barriers on the "free flow of goods, capital, services, and labour between the provinces."[151] Provinces have enacted measures that burden interprovincial trade and commerce pursuant to Section 92(13), which empowers provinces to regulate property and civil rights.[152]

The first case to explore whether provincial legislation was so broad as to infringe on the federal trade and commerce power was *Carnation Co. v. Quebec Agricultural Marketing Board.*[153] Central to this case is the Quebec Agricultural Marketing Board, created by the Quebec Agricultural Marketing Act, which approved marketing plans and resolved disputes regarding agricultural products in Quebec.[154] The Board set prices for milk, a majority of which was to be shipped outside of Quebec.[155] The appellant argued that the Board's actions constituted the regulation of trade and commerce, infringing on the federal government's

148. Monahan, *supra* note 137, at 22 (noting that the jurisprudential development of Section 91(2) has "limited the federal power to regulate trade effectively").

149. *See id.* ("The federal government is often forced to focus on inter provincial and international trade because they cannot regulate purely local trade.").

150. *See infra* section IV.A.2 (discussing the interpretation of provincial authority in relation to Section 91(2)).

151. THE CONSTITUTIONAL LAW GROUP, *supra* note 30, at 356.

152. Constitution Act, 1867, 30 & 31 Vict., c. 3, § 92(13) (U.K.). *See also* THE CONSTITUTIONAL LAW GROUP, *supra* note 30, at 356.

153. [1968] S.C.R. 238 (Can.).

154. *Id.* at 241.

155. *Id.* at 243.

power to regulate trade and commerce pursuant to Section 91(2).[156] Upholding the statute, the Supreme Court of Canada stated that provincial acts that impact interprovincial trade are not necessarily invalid *per se*.[157] Rather, provincial acts must aim at "regulation of trade in matters of interprovincial concern" for them to be beyond the scope of provincial power.[158] Thus, provincial regulations that "incidentally [have] some effect upon a company engaged in interprovincial trade" do not infringe upon the federal trade and commerce power.[159]

The test explained by the Court in *Carnation* was used again in *AG Manitoba v. Manitoba Egg and Poultry Ass'n*.[160] In response to legislation regulating egg production in other provinces, [161] Manitoba passed a statute seeking to control the marketing of all eggs in the province regardless of where the eggs were produced.[162] Finding that the provincial statute infringed on the federal trade and commerce power, the Court held that the statute not only affected interprovincial trade, but sought to regulate it outright.[163] The Court noted that the Manitoba regulation was "designed to restrict or limit the free flow of trade between provinces," and as a result, "it constitutes an invasion of the exclusive legislative authority of the Parliament of Canada over the matter of the regulation of trade and commerce."[164] Thus, the *Manitoba* Court upheld the standard originally enumerated in *Carnation*: provinces may pass legislation that happens to affect interprovincial commerce, but such legislation infringes on the federal trade and commerce power when it seeks to outright regulate interprovincial commerce.[165]

Egg regulation again came to the forefront of provincial legislative authority in *Reference re Agricultural Products Marketing Act.*[166] Here,

156. *Id.*

157. *Id.* at 253.

158. *Id.*

159. *Id.*

160. Att'y Gen. Man. v. Man. Egg & Poultry Ass'n [1971] S.C.R. 689 (Can.).

161. Interestingly, the *Manitoba Egg Case*, as it is known, was a key battleground in the interprovincial chicken and egg war. The conflict began when Quebec restricted the prices, grading, and sale of eggs coming from other provinces, especially Ontario. The Ontario legislature responded by restricting the prices, grading, and sale of chickens coming from other provinces, especially Quebec. This chicken and egg war had adverse impacts on provinces like Manitoba, which were largely agricultural and relied on other provinces to generate export revenue. For a more thorough discussion of the interprovincial chicken and egg war, see Jodey Nurse & Bruce Muirhead, *A Crisis of National Unity?: The Chicken and Egg War, 1970–1971*, 56 J. CAN. STUD. 124 (2022).

162. *The Manitoba Egg Case*, [1971] S.C.R. at 697–99.

163. *Id.* at 703.

164. *Id.*

165. *Id.*

166. [1978] 2 S.C.R. 1198 (Can.).

the legislation at issue was a federal act that aimed to resolve the problems surrounding the regulation of agricultural products that gave rise to the *Manitoba Egg* case.[167] The federal government partnered with provincial governments to determine a quota for the marketing of eggs.[168] Ontario went further by putting an internal quota on the marketing of eggs and hens, which egg producers in Ontario challenged as infringing on interprovincial trade.[169] Holding that the Ontario legislation was a valid exercise of provincial authority, Justice Pigeon noted that "[i]n so far as [the legislation] affects [interprovincial] trade, it is only complementary to the regulations established under federal authority."[170] He further explained that such use of provincial legislative authority was "perfectly legitimate" because it permitted "federal-provincial cooperative action."[171] Thus, the Supreme Court determined that provincial legislation, though it may impact interprovincial trade, is permitted when it is a manifestation of the cooperation between the federal government and the provinces.

Ultimately, courts have interpreted the Canadian Constitution to allow both the federal and provincial governments to exercise legislative authority over economic regulations, though the latter enjoys considerably more authority.[172]

B. Section 121 and the Free Flow of Goods Between Provinces

Beyond the trade and commerce clause, Section 121 of the Canadian Constitution also provides an independent basis for regulating economic activity. Section 121 states that "All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces."[173] While this section may seem to essentially eliminate provinces' authority to burden interprovincial trade much more effectively than the implied limitations of the trade and commerce clause, courts have interpreted this Section much more narrowly.

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167. *Id.* at 1214.

168. *Id.*

169. *Id.* at 1216.

170. *Id.* at 1296.

171. *Id.*

172. *See* Monahan, *supra* note 137, at 24–25 ("[T]he federal system in Canada is significantly more decentralized than the federal system in the U.S. The provinces are major economic regulators in Canada and the federal government has a limited power to effectively regulate local trade. Regulation of inter-provincial or international trade is sometimes limited in Canada.").

173. Constitution Act, 1867, 30 & 31 Vict., c. 3, § 121 (U.K.).

Canadian courts have consistently interpreted Section 121 to prohibit only provincial taxes on interprovincial trade. In *Gold Seal Ltd. v. Dominion Express Co.*,[174] the Supreme Court of Canada held that Section 121 only bars the levying of taxes or duties on goods being transported interprovincially.[175] In coming to this conclusion, the Court explained that the purpose of Section 121 was not to mandate the admission of all goods into a province but rather to ensure that such goods would be admitted "without any tax or duty imposed as a condition of their admission."[176] The Court again upheld the notion that the flow of goods between the provinces could not be taxed in *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*.[177] In that case, the Court considered a British Columbia law that imposed levies on fruits and vegetables produced in the province and required shippers to obtain licenses to sell their products anywhere in Canada.[178] While the majority[179] stated that the federal trade and commerce clause precluded this legislation,[180] Justice Cannon, in his concurring opinion, explained that the act was an attempt at indirect taxation on the free flow of goods and, as a result, inhibited trade between the provinces in violation of Section 121.[181]

Currently, the *Gold Seal* decision continues to set the standard for interpreting Section 121, yet there has been widespread criticism of the Court's limited reading of Section 121.[182] In 2016, a test case challenged

174. [1921] 62 S.C.R. 424 (Can.).

175. *Id.* at 470.

176. *Id.*

177. (1930), [1931] S.C.R. 357 (Can.).

178. *Id.* at 373 (Cannon, J., concurring).

179. The Supreme Court comprises nine judges, consisting of one Chief Justice and eight puisne judges. Supreme Court Act, R.S.C. 1895, c S-26, s. 4(1) (Can.). A majority consists of five judges. *Id.* at s. 26(2).

180. *Lawson*, [1931] S.C.R. at 371 ("It is sufficient for our present purposes that . . . [the legislation] aims at control of trade 'in matters of interprovincial concern,' in such degree as to exclude it from the category of legislation in respect of matters local in the provincial sense.").

181. *Id.* at 373 (Cannon, J., concurring) ("I, therefore, reach the conclusion that this legislation is an attempt to impose by indirect taxation and regulations an obstacle to one of the main purposes of Confederation, which was, ultimately, to form an economic unit of all the provinces in British North America with absolute freedom of trade between its constituent parts.").

182. *See, e.g.*, Ian Blue, *On the Rocks? Section 121 of the Constitution Act, 1867, and the Constitutionality of the Importation of Intoxicating Liquors Act*, 35 ADVOCS.' Q. 306, 333 (2009) (arguing that the Supreme Court's interpretations of Section 121 do not reflect a proper application of the purposive interpretation doctrine); Andrew Smith, *The Historical Origins of Section 121 of the* Constitution Act, 1867*: A Study of Confederation's Political, Social, and Economic Context*, 61 CAN. BUS. L.J. 205, 226 (2018) (arguing that the historical development of the Constitution Act suggests that the "Fathers of Confederation wished to eliminate a wide range of government-created impediments to inter-provincial trade," not just duties and imposts on trade).

the longstanding precedent of *Gold Seal*.[183] The case concerned a New Brunswick law that prohibited individuals from purchasing liquor from any source other than a provincial authority.[184] Gérard Comeau purchased liquor from Québec, and was subsequently charged for purchasing liquor from a source outside of New Brunswick.[185] In holding that the law violated Section 121, the trial court noted "that the *Gold Seal* case was wrongly decided" because Section 121 not only prohibited taxes on interprovincial trade but also required the dissolution of other non-tariff barriers.[186] However, the Supreme Court swiftly reversed this judgment.[187] Holding that Section 121 was not as broadly defined as the trial court insisted, the majority concluded that Section 121 "prohibits laws that in essence and purpose impede the passage of goods across provincial borders" and, as a result, "does not prohibit laws that yield only incidental effects on interprovincial trade."[188] Thus, the *Gold Seal* standard—which prohibits provinces from levying taxes on interprovincial trade but permits other forms of regulations that impede interprovincial trade—remains good law.

Ultimately, the federal government's limited jurisdiction in regulating interprovincial commerce under Section 91(2), supplemented by the vesting of vast authority in the provinces to regulate commerce under their Section 92(13) powers, has allowed for greater provincial regulation of interprovincial commerce.[189] Furthermore, the limited reading of Section 121 to only prohibit tariffs on the interprovincial flow of goods has further bolstered provincial authority in regulating interprovincial commerce.[190] As a result, provinces have had substantial latitude in enacting legislation that serves as non-tariff barriers (NTBs) to trade.

C. Impacts of Section 91(2) and Section 121 Jurisprudence on Interprovincial Commerce

Canadian jurisprudence, developed from interpretations of Section 91(2) and Section 121 of the Constitution, has augmented provincial jurisdiction over internal economic regulation and given rise to

183. R. v. Comeau (2016), 448 N.B.R. 2d 1 (Can.), *rev'd*, [2018] 1 S.C.R. 342 (Can.).

184. *Id.* at 4.

185. *Id.* at 3.

186. *Id.* at 84–85.

187. R. v. Comeau, [2018] 1 S.C.R. 342, 353 (Can.) ("We conclude that the trial judge erred in departing from previous decisions of this Court.").

188. *Id.*

189. *See supra* section IV.A (discussing the interpretations of Section 91(2) and the impact of those interpretations on federal and provincial legislative authority).

190. *See supra* section IV.B (discussing the interpretations of Section 121 and *Gold Seal*).

NTBs. Courts have interpreted Section 121 to only prohibit provinces from imposing tariffs on goods moving in interprovincial commerce.[191] A broader reading of Section 91(2), the federal trade and commerce clause, could have rectified the narrow interpretation of Section 121.[192] However, the Privy Council's limited interpretations of Section 91(2) in light of Section 92(13), the provincial authority to regulate property and civil rights, resulted in substantial provincial autonomy.[193] Even though provinces cannot enact discriminatory trade barriers,[194] there is no limit on "provincial policies that inhibit either the inflow of factors of production from other provinces, or the outflow of factors of production to other provinces."[195]

Federalism, specifically the way it has been interpreted by the courts in Canada, is one of the leading drivers of interprovincial trade barriers.[196] If a province enacts protectionist legislation that limits competition in its territory, "the distribution of economic benefits [is] constrained," and "overall economic welfare is likely not maximized."[197] As a result, provincial regulations have diverged dramatically, which has resulted in the enactment of NTBs.[198] Differing provincial regulations in various industries—including dairy quotas, trucking requirements, alcohol regulation, and professional licensure—have had important macroeconomic impacts, such as "hinder[ing] labor mobility, limit[ing] choice for consumers, fragment[ing] markets, stifl[ing] competition, and limit[ing] the effective scale of production thereby lowering productivity growth."[199] Such provincial NTBs, however, have largely been unsanctioned under the current constitutional regime.[200]

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191. *See supra* section IV.B; Sujit Choudhry, *The* Agreement on Internal Trade, *Economic Mobility, and the* Charter, 2 ASPER REV. INT'L BUS. & TRADE L. 261, 261 (2002).

192. Choudhry, *supra* note 191, at 262.

193. *Id.*

194. *See* Att'y Gen. Man. v. Man. Egg & Poultry Ass'n, [1971] S.C.R. 689, 703 (Can.) ("It is my opinion that the Plan now in issue not only affects inter-provincial trade in eggs, but that it aims at the regulation of such trade. It is an essential part of this scheme, the purpose of which is to obtain for Manitoba producers the most advantageous marketing conditions for eggs, specifically to control and regulate the sale in Manitoba of imported eggs. It is designed to restrict or limit the free flow of trade between provinces as such. Because of that, it constitutes an invasion of the exclusive legislative authority of the Parliament of Canada over the matter of the regulation of trade and commerce.").

195. Choudhry, *supra* note 191, at 262.

196. Carlberg, *supra* note 18, at 4.

197. *Id.*

198. For a definition and background on NTBs, see *supra* Part II.

199. Jorge Alvarez, Ivo Krznar & Trevor Tombe, *Internal Trade in Canada: Case for Liberalization* 4 (Int'l Monetary Fund, Working Paper No. WP/19/158, 2019).

200. *See supra* sections IV.A and B (noting that courts have largely been unable to remove provincial regulations that pose as NTBs).

The permeation of these NTBs has led to significant negative impacts on internal trade and on the Canadian economy in general. For example, it is estimated that provincial regulations on interprovincial trade impose the equivalent of a 6.9% tariff on goods crossing provincial lines.[201] In 2015, the average tariff-equivalent of NTBs was 21%.[202] In 2017, NTBs added an estimated 7% to the costs of goods and services in the country.[203] A Senate committee report indicated that such internal NTBs reduced Canada's GDP by between $50 billion and $130 billion.[204]

With such high costs, the benefits of eliminating NTBs would be substantial. Removing such NTBs would result in a 3.8% increase in Canada's real GDP,[205] equivalent to a more than $80 billion increase.[206] NTB elimination would result in a 9.1% increase in real GDP per capita.[207] Furthermore, the elimination of NTBs would increase wages by 5.5%, "resulting in a 5% increase in household income and more than $2,100 in real GDP per person."[208] Additionally, government revenues would increase overall, with the federal government seeing a 6.1% increase and the provincial governments seeing an approximately 4% increase.[209] Thus, it is evident that Canada's constitutional jurisprudence has granted provinces substantial latitude in enacting NTBs, which negatively impact the Canadian economy. Removing these NTBs would markedly improve the free flow of goods within Canada and result in positive economic development.

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201. DELOITTE, THE CASE FOR LIBERALIZING INTERPROVINCIAL TRADE IN CANADA 2 (2021), https://www2.deloitte.com/content/dam/Deloitte/ca/Documents/finance/ca-en-the-case-for-liberalizing-interprovincial-trade-in-canada-aoda.pdf [https://perma.cc/R274-GYPW].

202. Alvarez et al., *supra* note 199, at 11.

203. Krystle Wittevrongel & Gabriel Giguère, *The High Cost of Interprovincial Trade Restrictions in Canada*, MONTREAL ECON. INST. (Dec. 27, 2023), https://www.iedm.org/the-high-cost-of-interprovincial-trade-restrictions-in-canada [https://perma.cc/7QQH-Z2JZ].

204. STANDING S. COMM. BANKING, TRADE & COM., TEAR DOWN THESE WALLS: DISMANTLING CANADA'S INTERNAL TRADE BARRIERS 3 (2016) (providing the findings of a Canadian Senate Committee on removing trade barriers).

205. Alvarez et al., *supra* note 199, at 24.

206. DELOITTE, *supra* note 201, at 3.

207. Alvarez et al., *supra* note 199, at 24.

208. DELOITTE, *supra* note 201, at 5.

209. *Id.*

V. COMPARATIVE ANALYSIS OF THE IMPACTS OF THE DORMANT COMMERCE CLAUSE AND CANADIAN JURISPRUDENCE

Against the backdrop of the intricate and thorough jurisprudences of both the United States and Canada, this Part critically evaluates the comparative costs and benefits of the systems. This Part begins with a brief summary of the differences between the jurisprudence of the United States and Canada. Thereafter, this Comment demonstrates that the Dormant Commerce Clause's impact is much more profound in eliminating NTBs than its Canadian counterpart. As a result, the Dormant Commerce Clause provides an economic benefit that current Canadian jurisprudence does not confer. Ultimately, this difference has material benefits on the internal economic harmony of the United States, and eliminating the Dormant Commerce Clause would result in substantial harm. Thus, in comparison to Canada, the Dormant Commerce Clause of the United States is much better suited to eliminate NTBs and provides a mechanism for reducing internal trade barriers within the country.

A. Differences Between the Dormant Commerce Clause and Canadian Jurisprudence

There are several key differences between the Dormant Commerce Clause and Canadian jurisprudence, namely that the former is much more effective at eliminating state protectionism and promoting the free flow of trade between states. The Dormant Commerce Clause was designed to prohibit state protectionism.[210] State laws that facially discriminate against interstate commerce may be invalid.[211] Even if the state laws do not facially discriminate against interstate commerce, they may still be invalid if they have a discriminatory purpose, or if they impose a burden on interstate commerce that is clearly excessive in light of the putative local benefits.[212] Thus, courts have invalidated many state laws that were discriminatory in nature, purpose, or impact.[213]

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210. *See* Day, *supra* note 60, at 678. *See also*, Nat'l Pork Producers Council v. Ross, 598 U.S. __, 143 S. Ct. 1142, 1152–53 (2023).

211. *See supra* note 90 and accompanying text.

212. *See supra* notes 91–100 and accompanying text.

213. *See supra* section III.B, and the footnotes therein, for a discussion of state laws that were in invalidated for their discriminatory nature, purpose, or impact.

However, in Canada, provincial laws have much more latitude. Courts have interpreted Section 91(2) of the Canadian Constitution to grant provinces substantial autonomy in enacting laws that may burden interprovincial commerce.[214] While provinces, like their counterparts in the United States, cannot enact laws that pose discriminatory barriers to trade, Canadian jurisprudence does allow provinces to impose barriers on the inflow of "factors of production" from other provinces or the outflow of such factors of production to other provinces.[215] Thus, where a state law that prevented the importation of out-of-state alcohol would violate the Dormant Commerce Clause, such a provincial law would be upheld in Canada.[216] As a result, while the Dormant Commerce Clause has attempted to remove state protectionism, Canadian jurisprudence has allowed provinces to enact protectionist policies.

Moreover, the Dormant Commerce Clause has promoted the free flow of goods in interstate commerce, while the Canadian courts' limited interpretation of Section 121 has resulted in more barriers to the free flow of goods. In the United States, under the Dormant Commerce Clause, states may not "materially restrict the free flow of commerce across state lines."[217] Interestingly, the Canadian Constitution has an explicit provision in Section 121 that promotes free trade while the United States does not.[218] However, Canadian courts have consistently interpreted this clause to only restrict provinces from imposing taxes on goods from other provinces.[219] Any cases that aimed to expand the scope of this clause were swiftly reversed, and the limited reading of Section 121 continues to be applicable.[220] Thus, while the Dormant Commerce Clause has aimed to eliminate state laws that pose a barrier to the free flow of commerce between the states, courts have repeatedly interpreted Section 121 of the

214. *See supra* sections IV.A.1 and IV.A.2.

215. Choudhry, *supra* note 191, at 262.

216. *Compare* Granholm v. Heald, 544 U.S. 460, 484–85 (2005) (holding that state laws that discriminated against out-of-state sellers of wine directly to consumers were invalid because the "[Twenty-first] Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time"), *with* R. v. Comeau, [2018] 1 S.C.R. 342, 353 (Can.) (finding that a provincial law that prohibited the importation of alcohol by individuals did not violate Section 121).

217. S. Pac. Co. v. Arizona, 325 U.S. 761, 770 (1945). This language of free flow has also been invoked recently by the Supreme Court. *See* Nat'l Pork Producers Council v. Ross, 598 U.S. __, 143 S. Ct. 1142, 1158 n. 2 (2023) (stating that the Court did "not face a law that impedes the flow of commerce" in deciding whether a California statute regulating pork living conditions violated the Dormant Commerce Clause).

218. *See supra* note 173 and accompanying text.

219. *See supra* section IV.B.

220. *See supra* notes 183–88 and accompanying text.

Canadian Constitution very narrowly to allow provinces to impose barriers on the free flow of goods.

With a brief summary of the differences between the American and Canadian jurisprudence, the next section explores the impact of these differences on internal NTBs.

B. Comparative Analysis of the Impact of Differing Jurisprudences on NTBs

The differences between American and Canadian jurisprudence are quite remarkable and have impacted the internal economies of both nations. Internal NTBs have become quite prevalent in Canada, while in the United States, courts have frequently removed NTBs, promoting internal free trade.[221] Exploring two areas where the courts have actively removed or permitted NTBs—alcohol regulations and trucking requirements—facilitates a comparative analysis of the impact of each regime on its country's economy.

Alcohol-related costs in the United States have decreased considerably in comparison to Canada. In the United States, the Supreme Court has largely eliminated NTBs related to alcohol; in Canada, however, the courts have permitted provincial regulations enacting NTBs related to alcohol. One key issue that both countries faced was the direct-to-consumer shipment of wine. In the United States, the Supreme Court invalidated state statutes that forbade direct-to-consumer shipments, taking into consideration the impact of such statutes on businesses.[222] However, in Canada, only three provinces permit direct-to-consumer shipment of wine; the remainder have passed regulations prohibiting such shipments.[223] A federal report has estimated that by permitting such direct-to-consumer shipment, American consumers had the ability to save "8 to 13 percent on wines costing more than $20 per bottle and an average of 20 to 21 percent on wines costing more than $40 per bottle."[224] In contrast, in Canada, alcohol prices vary dramatically between provinces and have also negatively impacted the hotel and restaurant industries.[225] Thus, the Dormant Commerce Clause in the United States has decreased alcohol-related costs for consumers.

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221. For an example of how NTBs have been removed by courts in the United States, see *supra* section III.C.

222. Granholm v. Heald, 544 U.S. 460, 467 (2005).

223. MARK MILKE & PETER ST. ONGE, MONTREAL ECON. INST., INTERNAL TRADE PROVINCIAL LEADERSHIP INDEX 14 (2019).

224. U.S. DEP'T OF TREASURY, *supra* note 118, at 17.

225. DELOITTE, *supra* note 201, at 7.

A similar result can be seen in the trucking industry. The United States Supreme Court has considered many cases dealing with trucking regulations.[226] However, provincial regulations in the trucking industry in Canada continue to seriously threaten trade. For example, certain truck configurations may only be driven at night in British Columbia and only during the day in the neighboring province of Alberta.[227] Moreover, provinces permit certain truck configurations to operate within their jurisdictions that may not be permitted in other provinces.[228] Similarly, certain provinces impose weight limits on tires, meaning that drivers must change tires when crossing certain provincial borders.[229] Such varying regulations cause inefficiencies in transportation and create "extra compliance costs for business."[230] In the United States, the Supreme Court has struck down several state laws that attempted to impose similar weight and size requirements for trucks, eliminating the potential inefficiency and compliance costs.[231] Thus, American courts have used the Dormant Commerce Clause doctrine to eliminate NTBs related to varying state trucking regulations, whereas such regulations continue to abound in Canada. Comparatively, such regulations have increased operational costs to Canadian businesses and decreased efficiency in the movement of goods via the trucking industry.

Alcohol and trucking regulations are simply two examples of sectors where the approach of the United States differed from that of Canada. The lack of a Dormant Commerce Clause, and the judiciary's broad interpretation of provincial powers, has resulted in increased provincial regulations inhibiting internal trade. Such internal NTBs in Canada have resulted in the loss of billions in real GDP and increased costs for consumers.[232] While internal NTBs continue to exist in the United States, the Dormant Commerce Clause better equips American courts to invalidate such internal NTBs and facilitate internal trade than their Canadian counterparts. Ultimately, this differing constitutional interpretation has resulted in vastly disparate economic outcomes in the two countries.

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226. *See supra* notes 84–85 and accompanying text; *see also supra* note 126.

227. MILKE & ONGE, *supra* note 223, at 9.

228. STANDING S. COMM. BANKING, TRADE & COM., *supra* note 204, at 28.

229. MILKE & ONGE, *supra* note 223, at 9.

230. STANDING S. COMM. BANKING, TRADE & COM., *supra* note 204, at 18.

231. *See supra* note 126.

232. *See supra* notes 205–08 and accompanying text.

C. The Dormant Commerce Clause Is More Efficient and Better Suited to Remove Internal NTBs

Compared to its Canadian counterpart, the United States' Dormant Commerce Clause doctrine is more efficient at removing internal NTBs that inhibit free trade between the states. The Dormant Commerce Clause's purpose has been to prevent states from enacting regulations that unduly burden interstate commerce.[233] Thus, by its very nature, the Dormant Commerce Clause attempts to remove internal NTBs to promote free trade among the states. However, judicial and academic critics have long called for the abolition of the Dormant Commerce Clause doctrine entirely.[234] Moreover, the United States Supreme Court has recently begun to limit the Dormant Commerce Clause.[235] Removing this doctrine, or even substantially limiting it, would allow states to enact protectionist policies that substantially hinder the free flow of trade. This would inadvertently lead to increased internal NTBs between the states, and courts would not have the judicial mechanism to limit their impact. One need not look far to see what the economic impact of such a removal or limitation would be.

In Canada, the constitutional regime has granted substantial discretion to the provinces to enact regulations that hinder the interprovincial free flow of trade and commerce.[236] The result has been a rise in protectionist policies that have increased the costs of trade within the country. The costs of internal NTBs in Canada are quite remarkable, and the economic impacts of such NTBs are equally shocking.[237] These internal NTBs have been estimated to cost billions in real GDP, and removing such barriers would increase wages and reduce consumer costs.[238] In light of these considerations, it is all the more necessary for courts to be equipped to remove NTBs where possible. The Canadian constitutional system has not provided their courts a judicial mechanism to remove such NTBs, resulting in the aforementioned harms.

It is quite possible that the removal or limitation of the Dormant Commerce Clause would add such costs to the American

233. CHEMERINSKY, *supra* note 58, at 462.

234. *See supra* notes 9–15 and accompanying text; *see also supra* notes 101–02 and accompanying text.

235. *See supra* notes 96–100 and accompanying text.

236. *See supra* section IV.A.2 for a discussion of provincial authority to enact regulations that interfere with interprovincial commerce.

237. *See supra* notes 201–04 and accompanying text.

238. *See supra* notes 205–08 and accompanying text.

economy. Allowing states to enact NTBs without the courts being equipped to strike them down could cost the American economy billions in lost GDP and would inadvertently increase costs to consumers. Learning from the Canadian example and considering the positive economic impact of the doctrine in the United States, the Supreme Court must be wary of limiting the scope of the Dormant Commerce Clause because doing so would grant the states more independence to enact protectionist policies.

CONCLUSION

The Dormant Commerce Clause is one of the most criticized doctrines of American constitutional law. Many of these criticisms arise from the lack of a textual foundation for the doctrine, the improper use of the doctrine by the courts to strike state laws, or its sometimes-confusing mix of trade law and constitutional law. However, much of this criticism has failed to account for the positive impact of the doctrine on the economy of the United States. American courts' ability to strike down state regulations that pose an undue burden on interstate commerce has allowed for the removal of NTBs. This has, in turn, reduced the costs of goods for consumers and operational costs for businesses.

In comparison, Canadian courts have largely been powerless in removing provincial regulations that burden interprovincial commerce. Under Canada's constitutional scheme, provinces have much more latitude in enacting policies that pose a burden on interprovincial commerce. The result has caused billions in lost revenue and imposed high costs on businesses and consumers. This comparative analysis provides a unique insight into the impact of the Dormant Commerce Clause on internal free trade. It is likely that removing the doctrine would result in increased state protectionism and a rise in internal NTBs. Thus, the Supreme Court of the United States must consider the experience of its northern neighbors and be wary of displacing the Dormant Commerce Clause from American jurisprudence.