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Freedom of Trade: A Comparative Study of the Law and Policy in India & USA

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ABSTRACT

This Paper discusses the provisions pertaining to Freedom of Trade in India and United States. It embarks on a comparative analysis of the two regimes in the field of Freedom of Trade. A comparative approach to the law of different systems has several advantages. It may be advantageous to assist domestic legal systems facing hardship in identifying guiding principles or legal rules. There are apparent similarities between India and the US which make a comparison of their respective legal systems appropriate. However, there is no reason to suggest that the resemblance among these systems will enlighten one any less than the differences that exist among them. The paper concludes by highlighting the similarities that exist between the two jurisdictions and the lessons to be learned from the enforcement of the free trade clauses.

Keywords: *Freedom of Trade, Trade, Constitution of India, Commerce Clause.*

I. INTRODUCTION

Traditionally, free trade has meant the lowering and eventual elimination of barriers to trade between nations.[2] The term 'free trade' has been referred to as the unrestricted purchase and sale of goods and services between countries without the imposition of constraints such as tariffs, duties, and quotas.[3] It may also be defined as the international buying and selling of goods, without limits on the amount of goods that one country can sell to another and without special taxes on the goods bought from a foreign country.[4]

No federal country has an even economy. Some of its constituent units may be agricultural,

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[2] Daniel Griswold, "Free Trade, Free Markets Rating the 108th Congress", *available at:* http://object.cato.org/sites/cato.org/files/pubs/pdf/tpa-028.pdf (accessed on May 30, 2015). Also see David M. Driesen, "What is Free Trade?: The Real Issue Lurking Behind the Trade and Environment Debate", *available at:* http://www.researchgate.net/profile/David_Driesen/publication/46320658_What_is_Free_Trade_The_Real_Issue_Lurking_Behind_the_Trade_and_Environment_Debate/links/00463527d1fabd0766000000.pdf, (accessed on June 1, 2019).

[3] Investopedia, "Free Trade", *available at*: http://www.investopedia.com/terms/f/free-trade.asp, (accessed on June 1, 2019).

[4] Cambridge Advanced Learner's Dictionary, 571, Cambridge University Press *available at:* http://dictionary.cambridge.org/dictionary/british/free-trade, (accessed on June 1, 2019).

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while others may be industrial. Some States may produce raw materials while the processing and manufacturing industries may be located in other states because of several favorable factors, like the availability of cheap labour or electric energy. This circumstance creates the possibility that the constituent units which have legislative powers of their own may, to serve their own narrow and parochial interests, seek to create trade barriers by restricting the flow of commodities either from outside or to other units.[5]

The creation of such regional trade barriers may prejudicially affect national interests as it may hamper the economic growth of the country as a whole, and this would be disadvantageous to all the units in the long run. Besides, the resources and industries of the units may be complementary to each other. Free flow of trade, commerce, and intercourse within a federal country having a two-tier polity is a prerequisite for promoting the economic unity of the country. An attempt has, therefore, been made in all federations, through adopting of suitable constitutional formulae, to create and preserve a national economic fabric, transcending state boundaries, minimize the possibility of the emergence of local economic barriers, to remove impediments in the way of inter-state trade and commerce and thus help in welding the whole country into one single economic unit so that the economic resources of all the various regions may be exploited, harnessed and pooled to the common advantage and prosperity of the country as a whole.[6]

The process of comparison itself serves to elucidate what concepts and values truly shape our own laws[7], which is why insofar as "there are . . . areas of law which have attracted a comparative treatment . . . The topics are often chosen because they represent an area where either of the legal systems is experiencing difficulty".[8] The point is that "it is interesting to see how other nations than India have their constitutional problems, and to see how they may be led to deal with them according to the special requirements of the time".[9]

The significant problem of any federal structure is to prevent the growth of local and regional interests, which are not conducive to the interest of the nation as a whole. To avoid commercial rivalries and jealousies among the units, the framers of federal constitutions considered it absolutely necessary to incorporate a free trade clause that would ensure economic unity within

[5] M.P.Jain, *Indian Constitutional Law*, Vol.2, 803 (2010).
[6] Bowie, *Studies in Federalism*, 296-357 (1954)
[7] S. Kiefel, "English, European and Australian law: Convergence or Divergence?", 79 *Australian Law Journal*, 227 (2005).
[8] *Ibid.*
[9] Lord Wright, "Section 92 – A Problem Piece", 1 *Sydney Law Review* 145, 151 (1954).

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the country.[10] Since the freedom of trade, commerce & intercourse is inextricable to the concept of federalism, it's worthy to note, at the outset, similar laws in two of the most federal countries in the world-India and the USA.

II. FREEDOM OF TRADE IN INDIA

Prior to the integration of India and framing of the Constitution, there were in existence a large number of the Indian States which, in the exercise of their sovereign power, had erected custom barriers between themselves and the rest of India, thus hindering the free flow of trade. Moreover, since no federal country has an even economy, some of its constituent units may be agricultural while others may be industrial. Some States may produce some raw materials while processing and manufacturing industries may be located in other States because of several favourable factors, like availability of cheap labour or electrical energy, etc. This circumstance creates the possibility that the constituent units which have legislative powers of their own may, to serve their own narrow and parochial interests, seek to create trade barriers by restricting the flow of commodities either from outside or to other units. The creation of such regional barriers may prejudicially affect national interests. Therefore, to prevent the growth of local and regional interests, which are not conducive to the interests of the nation as a whole, the framers of the Constitution of India considered it absolutely necessary to incorporate a free trade clause that would ensure the economic unity within the country. In fact, it is the economic unity and integrity of the country which is the main sustaining force for the stability and progress of the political and cultural unity of a federal polity. "Freedom of trade, commerce and intercourse throughout the territory of India", subject to other provisions of Part XIII, is assured and declared by Article 301 of the Constitution of India.

To ascertain the activities protected by Article 301, the words 'trade, commerce, and intercourse throughout the territory of India' should be read as one composite expression because Article 301 protects only those activities of Trade, Commerce, and Intercourse which bear the characteristic of being throughout the territory of India that is, involve movement. The word "throughout" in Article 301 serves a double purpose. On the one hand, it eliminates the distinction of inter-state, intra-state, and foreign trade for the purpose of that Article; on the other hand, it limits the application of that Article only to the movement aspect of trade.[11]

The question concerning the evolution of provisions of the Constitution of India dealing with

[10] Faisal Fasih, "Freedom of Trade and Commerce", available at http://www.legalservicesindia.com/article/article/freedom-of-trade-&-commerce-148-1.html (Accessed on July 2, 2013).

[11] M.P.Singh, *Freedom of Trade and Commerce in India*, 89 (1985)

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the Freedom of Trade needs to be investigated from two angles. In the first place, whether any conscious effort was made by the draftsmen or the framers to emulate any foreign Constitution on this matter, and in the second, whether the scheme we have adopted is, in fact, very same as or very close to the scheme of another Constitution.

Apart from Article 301, there are other provisions of the Constitution that guarantee freedom of trade, occupation, and intercourse. Article 19(1)(g) gives every citizen the right to practice any profession or to carry on any occupation, trade, or business, subject to Clause (6). Sub-clause(1) of clause (6) states that any law imposing reasonable restriction is in the interest of the general public, and sub-clause(2) states that a law relating to " (i) the professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business, or (ii) the carrying on by the state, or by a corporation owned or controlled by the State, of any trade, business, industrial service, whether to the exclusion, complete or partial, of citizens or otherwise." Article 19(1)(d) guarantees to Indian citizens the right to move freely throughout the territory of India "subject to any law imposing reasonable restrictions in the interest of the general public or for the protection of the interest of any Scheduled Tribe".[12] The power to legislate on the freedom of Trade, Commerce, and Intercourse is restricted not only by the provisions of Articles 302 to 306 but is also restricted by the provisions of Article 19(1)(g).[13] Therefore, a restriction on trade and commerce can be challenged under these Constitutional provisions. However, Article 301 covers many interferences with Trade and Commerce, which may not ordinarily come within Article 19(1)(g) as a levy of octroi. Freedom of Trade and Commerce is a wider concept than that of an individual's freedom to trade guaranteed under Article 19(1)(g).[14]

(A) Restrictions imposed on the Freedom

Article 301, which reads – Freedom of Trade, Commerce, and Intercourse – subject to the other provisions of this part, trade, commerce, and intercourse throughout the territory of India shall be free. Article 301, in the opening words, makes it clear that subject to the subsequent provisions in Articles 302, 303(2), 304, and 305, any measure which restricts the freedom of trade and commerce is void. Article 302 enables Parliament to impose such restrictions on the Freedom of Trade, Commerce, and Intercourse between one state and another or within any part of the territory of India as may be required in the public interest. Article 304(a) enables the legislature of a state to impose non-discriminatory taxes on goods imported from other

[12] Manjushree Mishra, *Freedom of Trade and Commerce and Taxation in India*, 61 (1999).
[13] H.M.Seervai, *Constitution of India*, Vol.3, 2592 (2010)
[14] M.P.Jain, *Indian Constitutional Law*, Vol.2, 808 (2010).

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states and goods produced inside the state. Article 304(b) allows the state legislature to impose such reasonable restrictions on the freedom of trade, commerce, or intercourse with or within that state as may be required in the public interest. However, the proviso to Article 304(b) provides that any Bill or amendment for the purposes of clause (b) is to be introduced or moved in the legislatures of a state only on obtaining the previous sanction of the President.[15]

Article 303(1) prohibits both the Parliament and the Legislatures of the States to make any law giving or authorizing the giving of any preference to one state over another or making or authorizing the making of any discrimination between one state and another by virtue of any entry relating to trade and commerce in any of the lists in Seventh Schedule. However, clause (2) of Article 303 enables Parliament to give preference or make discrimination for the purpose of dealing with the situation arising from scarcity of goods in any part of the territory of India. Article 305, as stood before 1955, reads: "Nothing in Articles 301 and 303 shall affect the provisions of any existing law except in so far as the President may by order or otherwise provide."[16]

The comment of the Supreme Court in *Saghir Ahmed v. State of U.P.* that state monopoly in any trade could be challenged under Article 301 led Parliament to enact the Constitution(Fourth Amendment) Act, 1955, which enlarged the scope of Article 305. It provided that total or partial state monopoly in any trade or business is not affected by anything contained in Article 301. Article 306, which authorized Part B states to continue to levy and collect import and export duties on their borders, was finally repealed by the Constitution(Seventh Amendment) Act, 1956. Lastly, Article 307 empowered Parliament to appoint such authority as it considers appropriate for carrying out the purpose of Articles 301-304.[17]

It is submitted that Part XIII, while guaranteeing the Freedom, Trade, and Intercourse in wide terms under Article 301, has, in fact, curtailed it to a great extent through other Articles of the same part, like restrictions may be imposed by the Parliament in the public interest and preferences can be given, and discriminations may be made under Article 303(2) and 304(b).[18]

III. FREEDOM OF TRADE IN THE UNITED STATES

Concern over internal trade barriers began early in the case of the United States. In 1787, the framers of the United States Constitution were determined to create a strong domestic economy

[15] *Id.*, at 59-60. Hence, the absence of this prior sanction would not affect its validity if it receives assent of the President of India – See *Article 255 of the Constitution of India*
[16] *Ibid.*
[17] *Ibid*
[18] *Ibid*

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since independence put the original 13 states at risk of losing their trade ties with Britain. The desire to create a large integrated market to attract Britain's attention or, failing that, to at least sustain itself was much in the mind of the founding fathers of the United States Constitution.

(A) The Commerce Clause

The Commerce Clause[19] of the U.S. Constitution provides that Congress shall have the power to regulate commerce with foreign nations, among the several states, and with the Indian tribes. The Courts and commentators have tended to discuss each of these three areas of commerce as a separate power granted to Congress.[20] It is common to see the individual components of the Commerce Clause referred to under specific terms: The Foreign Commerce Clause, the Interstate Commerce Clause,[21] and the Indian Commerce Clause.[22] The Interstate Commerce Clause, particularly compared to the Foreign Commerce Clause, has been widely litigated, and numerous scholars have written about it.[23] It has recently received even more attention[24] given that Congress's power under the Interstate Commerce Clause was one of the main issues that deeply divided the Court in the *National Federation of Independent Business* v. *Sebelius*,[25] the Obamacare case.[26]

The United States Constitution enumerates certain powers for the federal government. The Tenth Amendment provides that any powers that are not enumerated in the Constitution are reserved for the States. Congress has often used the Commerce Clause to justify exercising legislative power over the activities of States and their citizens, leading to significant and

[19] Article 1, Section, 8 Clause 3 in the United States Constitution is referred to as Commerce Clause. The clause states that the United States Congress shall have power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes".

[20] Miller and Cross, *The Legal Environment Today*, (5th Edition, 2007).

[21] *United States* v. *Lopez*, 514 U.S. 549 (1995).

[22] *Available at:* https://en.wikipedia.org/wiki/Commerce_Clause.

[23] Akhil Reed Amar, *America's Constitution*, 107–87 (2005). Also see Grant S. Nelson & Robert J. Pushaw, Jr., "Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues", 85 *IOWA L. REV*. 1, 9–42 (1999).

[24] Adam Liptak, "Supreme Court Upholds Health Care Law in Victory for Obama", *N.Y. TIMES*, 5-4 (June 28, 2012) *available at:* http://www.nytimes.com /2012/06/29/us/supreme-court-letshealth-law-largely-stand.html?page wanted=all; Matt Negrin & Ariane de Vogue, "Supreme Court Health Care Ruling: The Mandate Can Stay", *OTUS NEWS*, (June 28, 2012), *available at:* http://abcnews.go.com/Politics/OTUS/supreme-court-announces-decision-obamas-health-carelaw/story?id=16663839&page=2#.UCF9Ixy1l0s.

[25] *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566 (2012). The Court was unable to come to any consensus concerning the analysis of the Interstate Commerce Clause issue, although a majority of Justices (Roberts, Scalia, Kennedy, Thomas, and Alito) concluded that Congress exceeded its Commerce Clause power in enacting the individual mandate which required purchase of health care insurance. *Id.*, at 2593, 2644–50.

[26] Naomi Harlin Goodno, "When the Commerce Clause Goes International: A Proposed Legal Framework for the Foreign Commerce Clause", 65 *Fla. L. Rev*. 1139 (2013), *available at:* http://scholarship.law.ufl.edu/flr/vol65/iss4/3, (accessed on May 25, 2015).

ongoing controversy regarding the balance of power between the federal government and the States.[27]

The Commerce Clause has historically been viewed as both a grant of congressional authority and as a restriction on states' powers to regulate. It essentially lists the power of Congress, which by necessary implication has been interpreted to have robbed the states of their power to tax interstate commerce.

(B) Dormant Commerce Clause

The term 'dormant Commerce' refers to the prohibition, implied in the Commerce Clause, against states passing legislation that discriminates against or excessively burdens interstate commerce. The "dormant commerce" clause is a legal doctrine inferred from Article 1 and refined over many years of Supreme Court decisions. It prohibits state or local laws that are discriminatory against commerce among the states except in situations of compelling health or welfare reasons.[28] Over the years, the Supreme Court has struck down many state measures that discriminate against out-of-state suppliers.[29]

The meaning of the word 'commerce' is a source of substantial controversy. The Constitution does not explicitly define the word. Some argue that it refers simply to trade or exchange, while others claim that the founders intended to describe more broadly commercial and social intercourse between citizens of different states. Thus, the interpretation of 'commerce' affects the appropriate dividing line between federal and state power.[30] However, for many years, the Supreme Court insisted that production or manufacture was not part of commerce. This was to preserve the position of the States.[31] Legislation seeking to deal with anti-competitive practices

[27]Cornell University Law School, "Commerce Clause", *available at*: https://www.law.cornell.edu/wex/commerce_clause, (accessed on June 10, 2015).

[28] The 2005 case of *Granholm* v. *Heald* illustrates the Court's interpretation of the dormant commerce clause. The court ruled that limitations on the ability of out-of-state wineries to ship directly to customers violated the commerce clause. Interestingly, it concluded that states must treat both in and out-of-state purchasers the same. If a state allows winery shipments within the state, it must extend the same treatment to out-of-state buyers. However, states are permitted to deny shipments to both. Following the court judgment, the State of Michigan contemplating changing its laws to ban all direct sales of wine.

[29] Kathleen Macmillan, *A Comparison of Internal Trade Regimes: Lessons for Canada*, (May 29, 2013), *available at*: http://www.ppforum.ca/sites/default /files/Macmillan%20-%20A%20comparison%20of%20internal%20trade%20regimes %20-%20lessons%20for%20Canada. pdf, (accessed on June 2, 2019).

[30]Cornell University Law School, "Commerce Clause", *available at*: https://www.law.cornell.edu/wex/commerce_clause, (accessed on June 10, 2019).

[31] For example in *Kidd* v. *Pearson,* (1888) 128 US 1, 21 'if it be held that the term commerce includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that if would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate . . . every branch of human activity . . . a situation more paralysing of the state governments, and more provocative of conflicts between the general government and the States … would be difficult to imagine'

relating to sugar refineries and legislation prohibiting the shipment of goods produced contrary to child labour laws were struck down based on this principle.[32] Some saw these cases as a product of their times when laissez-faire economics was in vogue and regulation of the market was frowned upon.[33] Arguments that legislation that affected production also indirectly affected commerce did not initially succeed because the Court required that the effect on commerce had to be direct.[34] The direct/indirect distinction was a means to limit Congress's power over commerce and reserve an area of legislative responsibility for the states.[35]

In *Wickard* v. *Filburn,*[36] the Court, abandoning the direct/indirect test, overturned the past distinction between commerce and manufacture/production. The limit of the Court's power of judicial review was to consider whether there was a rational basis for the view of Congress that the thing being regulated affected interstate commerce.[37] It was not for the court to substitute its view of the merits of the law or to seek to achieve other ends by invalidating such legislation. Links have been made between these legal developments and changes in the United States.[38]

(C) Interpretation of the Commerce Clause[39]

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[32] *Hammer* v. *Dagenhart,* (1918) 247 US 251.

[33] Justice Souter in *United States* v. *Morrison,* (2000) 529 US 598, 644.

[34] *Diamond Glue Co.* v. *United States Glue Co.,* (1903) 187 US 611; *Superior Oil Co* v. *Mississippi,* (1929) 280 US 390.

[35] On this basis, Congress could not require increased wages for employees of a poultry slaughterhouse; although most of the poultry came from interstate, the commerce 'stream' had come to an end. The effect of the law on interstate commerce was found to be indirect and insufficient: *Schechter Poultry Corp* v. *United States* (1935) 295 US 495. Graglia dismisses the direct/indirect distinction as a 'standard approach to the problem of confining the scope of a rule that threatens to be all embracing – proves in practice to be almost entirely subjective': Lino Graglia, "*United States* v. *Lopez*: Judicial Review under the Commerce Clause", 74 *Texas Law Review* 719, 731 (1996). Readers may draw parallels with the High Court's past use of the direct/indirect distinction in interpreting the s92 freedom of trade, commerce and intercourse section, for example in *Commonwealth* v. *Bank of New South Wales,* (1949) 79 CLR 497; *Grannall* v. *Marrickville Margarine Pty Ltd.,* (1955) 93 CLR 55; *Wragg* v. *New South Wales,* (1953) 88 CLR 353.

[36] (1942) 317 US 124-125.

[37] Anthony Gray, "Reinterpreting the Trade and Commerce Power", Vol. 36(1) *Australian Business Law Review,* (2008), *available at*: https://eprints.usq.edu.au/3973/1/Gray_Aust_Bus_Law_Review_v36n1.pdf, (accessed on May 13, 2015).

[38] Joseph Kallenbach in *Federal Cooperation with the States Under the Commerce Clause,* (1968) notes that 'powerful economic forces . . . industrialisation and improvement in transportation facilities, with an accompanying extension of trade horizons, demanded the freedom from state regulation of commerce . . . . the effect was to cause the grant of power to be interpreted as generally exclusive by the Supreme Court' (31); and Barry Cushman, "Formalism and Realism in Commerce Clause Jurisprudence", 67 *University of Chicago Law Review,* 1089, 1101 (2000): "as the national economy became increasingly integrated in the years following the Civil War, the Court began a conscious and increasingly aggressive campaign to break down local barriers to interstate trade through a 'free-trade' construction of the dormant Commerce Clause". Also see *Ibid.*

[39] There is an extensive literature, including Richard Friedman, "The Sometimes Bumpy Stream of Commerce Clause Doctrine", 55 *Arkansas Law Review,* 981 (2003); Barry Cushman, "Continuing and Change in Commerce Clause Jurisprudence", 55 *Arkansas Law Review,* 1009 (2003); Grant Nelson and Robert Pushaw, "Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations But Preserve State Control Over Social Issues" 85 *Iowa Law Review,* 1 (1999); Jesse Choper, "Taming Congress' Power Under the Commerce Clause: What Does the Near Future

The classic early statement of Congress' power over commerce appears in the judgment of Chief Justice Marshall in *Gibbons* v. *Ogden*,[40] where he said:

> Congress could act to all the external concerns of the nation and to those internal concerns which affect the States generally; but not to those which are completely within a particular state; which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the (Federal) Government.

The focus on whether the legislation was conducive to a trade and commerce purpose[41] is evident in decisions upholding legislation removing barriers to the use of a river for interstate commerce,[42] legislation creating a bank,[43] and regulations making interstate trade and commerce (as well as other trade and commerce) safer.[44] Congress' removal of a State-introduced financial advantage given to intrastate commerce over interstate commerce was also validated in the *Shreveport Rates Cases*:[45]

> "Congressional power . . . . embraces the right to control (interstate carriers' operations) in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service (emphasis added), and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance.

The above quote endorses the 'effects' test from *Ogden*[46] and notes the importance of economic arguments in assessing the Federal Government's power to regulate intrastate commerce.[47] Modern American constitutional law on the commerce clause began in 1937 with the New Deal and the "switch in time" by the Court, and more specifically by Justice Roberts, in that year.[48]

Portend?", 55 *Arkansas Law Review,* 731 (2003); Ronald Rotunda, "The Implications of the New Commerce Clause Jurisprudence: An Evolutionary or Revolutionary Court?", 55 *Arkansas Law Review,* 795 (2003).

[40] (1824) 22 US 1.

[41] Greg Taylor, "The Commerce Clause – Commonwealth Comparisons", 24 *Boston International and Comparative Law Review,* 235 (2001).

[42] *The Daniel Ball*, (1871) 77 US 557.

[43] *McCullough* v. *Maryland*, (1819) 17 US 316.

[44] *Southern Railway Co* v. *United States*, (1911) 222 US 20.

[45] (1914) 234 US 342

[46] *Gibbons* v. *Ogden*, 22 U.S. 1 (1824).

[47] *Supra* note 40.

[48] William Lasser, "Justice Roberts and the Constitutional Revolution of 1937-Has There a "Switch In Time"?", 78 *Tex. L. Rev*., 1347 (2000); Mark Tushnet, "The New Deal Constitutional Revolution: Law, Politics, or What?", 66 *U. CHI. L. Rev*., 1061 (1999) (reviewing Barry Cushman, Rethinking The New Deal Court (1998). Significant earlier contributions to the debate have been made by Felix Frankfurter, "Mr

The Commerce Clause has been used to justify the use of federal laws in matters that do not, on their face, implicate interstate trade or exchange. Early on, the Supreme Court ruled that the power to regulate interstate commerce encompassed the power to regulate interstate navigation.[49] In 1905, the Court used the Commerce Clause to halt price-fixing in the Chicago meat industry when it ruled that Congress had the authority to regulate the local meat market under the Sherman Anti-Trust Act. It found that business done even at a purely local level could become part of a continuous "current" of commerce that involved the interstate movement of goods and services.[50] Despite these decisions, the Commerce Clause could still effectively be used to limit the federal government's power, as the early years of the New Deal demonstrated.[51]

With the advent of the New Deal, the powers of the federal government expanded into realms—such as regulation of in-state industrial production and working hours and wages—that would not necessarily be considered "commerce" under the definition set forth in *Gibbons*[52]. As a result, before 1937, the Court exercised its power to strike down New Deal legislation as applied to certain plaintiffs. It was found in *Schechter Poultry Corp.* v. the *US* that the National Industrial Recovery Act was unconstitutional as applied to a poultry seller who bought and sold chicken only within the state of New York. The Court also found the Bituminous Coal Conservation Act unconstitutional.[53] Following his reelection, President Roosevelt responded to these attacks on his legislation by proposing what is known as the "Court-packing plan", which would have expanded the size of the Supreme Court from nine to up to fifteen justices. Although the plan was defeated and the composition of the Court soon changed, the proposal was credited with changing the Court's view on New Deal legislation. Beginning with the landmark case of *NLRB* v. *Jones & Laughlin Steel Corp.*,[54] the Court recognized broader grounds upon which the Commerce Clause could be used to regulate state activity—most importantly, that activity was commerce if it had a "substantial economic effect" on interstate

Justice Roberts", 104 *U. PA. L. Rev*. 311, 314 (1955); William E. Leuchtenberg, "The Origins of RD. Roosevelt's "Court-Packing" Plan", *SUP. CT. Rev*. 347, 381 (1966); Samuel I. Rosenman, *Working With Roosevelt*, 156 (1952); Robert L. Stern, "The Commerce Clause and the National Economy", 1933-1946, 59 *HARV. L. Rev*., 645, 681 (1946); Arthur E. Sutherland, *Constitutionalism In America: Origin And Evolution Of Its Fundamental Ideas*, 495-97, 499 (1965); Laurence H. Tribe, God Save This Honourable Court 67 (1985).

[49] *Supra* note 49.

[50] *Swift and Company* v. *United States*, 196 U.S. 375 (1905).

[51] *Supra* note 31.

[52] *Supra* note 49.

[53] *Carter* v. *Carter Coal Corp*., 298 U.S. 238 (1936).

[54] 301 U.S. 1 (1937).

commerce or if the "cumulative effect" of one-act could have an effect on such commerce.[55]

The Civil Rights Act of 1964, which outlawed segregation and prohibited discrimination against African-Americans, was passed under the Commerce Clause in order to allow the federal government to charge non-state actors with Equal Protection violations, which it had not been able to do up to that point because of the limited application of the Fourteenth Amendment[56] to state actors. In the case of *Heart of Atlanta Motel* v. *the United States,*[57] the Supreme Court found that Congress had the authority to regulate a business that served mostly interstate travelers. In another case,[58] it also ruled that the federal civil rights legislation could be used to regulate a restaurant, Ollie's Barbeque, a family-owned restaurant in Birmingham, Alabama because although most of Ollie's customers were local, the restaurant served food that had previously crossed state lines.[59]

The jurisprudential history of the Commerce Clause includes a variety of doctrinal trends that have moved in and out of prominence under varying administrations and social conditions. Some recent cases have indicated the outer limits of the 'effect' or 'substantial effect' test, though it should be noted that the decisions also strongly re-affirm the test.[60] In 1995, the Rehnquist Court again restricted the interpretation of the Commerce Clause.[61] In *Lopez* v. *the United States,*[62] the defendant, who was charged with carrying a handgun to school in violation of the federal Gun-Free School Zones Act of 1990, argued that the federal government had no authority to regulate firearms in local schools, while the government claimed that this fell under the Commerce Clause since possession of a firearm in a school zone would lead to violent crime, thereby affecting general economic conditions. The Chief Justice rejected this argument and held that Congress only has the power to regulate the channels of commerce, the instrumentalities of commerce, and action that substantially affects interstate commerce. He declined to further expand the Commerce Clause, writing that:

> to do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated and that there never will be a distinction between what is truly national

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[55] *Supra* note 31.

[56] For a detailed discussion on the Fourteenth Amendment, *available at:* http://www.14thamendment.us/amendment/14th_amendment.html. Also *available at:* https://www.loc.gov/rr/program/bib/ourdocs/14thamendment.html.

[57] 379 U.S. 241 (1964).

[58] *Katzenbach* v. *McClung,* 379 U.S. 274 (1964).

[59] *Supra* note 31.

[60] Only Justice Thomas would reject the continuing applicability of the test.

[61] *United States* v. *Lopez,* 514 U.S. 549 (1995).

[62] *Ibid.*

> and what is truly local. This we are unwilling to do.[63]

Therefore, it was held that the Act did not regulate commercial activity; there was no demonstrable link between guns and interstate commerce.[64] It was observed:

> Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law, for example. Under these theories, it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education, where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.

In the instant case, the Court identified three broad categories of constitutional use of the commerce power:

(a) Congress could regulate the use of the channels of interstate commerce;

(b) Congress could regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, although the threat may come only from intrastate activity; and

(c) Congress could regulate those activities substantially related to interstate commerce.

Further, four controlling factors were mentioned as being relevant to the substantial effect test:

(a) whether the statute regulates commerce or any sort of economic enterprise;

(b) whether the statute contains any express jurisdictional element that might limit its reach to a discrete set of cases;

(c) whether the statute or its history contains express congressional findings that the regulated activity affects interstate commerce; and

(d) whether the link between the regulated activity and a substantial effect on interstate commerce is attenuated.[65]

It was further held:

Just as the old formalism had value in the service of an economic conception (*laissez-faire*),

[63] *Supra* note 31.

[64] Later, the legislation was re-drafted to confine its operation to guns that had crossed a state border; this legislation was upheld in *United States* v. *Danks,* 221 F 3d 1037 (8th Cir); cert den (2000) 528 US 1091.

[65] *United States* v. *Lopez*, 514 U.S. 612 (1995).

the new one is useful in serving a conception of federalism. It is the instrument by which assertions of national power are to be limited in favour of preserving a supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual states see fit.[66]

Breyer J. dismissed the supposed distinction between economic activity and non-economic activity as random, creating fine distinctions which did little to further the federalist interests that called it into being in the first place.[67] The minority was willing to defer to the judgment of Congress as to the need for the law and that there was a reasonable basis for linking it with constitutional commerce.[68]

The dissentients argued that gun possession could impose costs, increasing insurance (which was commerce) costs. Violent crime could lessen the interstate movement of citizens; it might impede education, thereby affecting commerce. Similar issues arose for the Supreme Court in *United States* v. *Morrison,*[69] involving the constitutionality of a law conferring a civil remedy on the victim of domestic violence, i.e., the Violence Against Women Act. In this case, the federal government's power was restricted by the Court by a majority of 5-4, and for similar reasons as the *Lopez*[70] decision, it struck down § 13981 of the Violence Against Women Act and ostensibly eliminated congressional commerce authority over any intrastate, non-economic activity.[71]. The majority confined commerce clause regulation to economic activity, and it was held that gender-motivated violence was not economic activity. Although Congress, in this case, had attempted to justify its use of the commerce power,[72] this did not make unconstitutional laws somehow valid.[73] The Court reviewed a similar statute in *Solid Waste Agency* v. *United States Army Corps of Engineers,*[74] but avoided applying *Morrison*[75] by

[66] *Id.* at 644-645.
[67] *Id.* at 659.
[68] *Supra* note 40.
[69] 529 U.S. 598(2000).
[70] *Supra* note 22.
[71] Louis J. Virelli III and David S. Leibowitz, "Federalism Whether They Want It or Not: The New Commerce Clause Doctrine and the Future of Federal Civil Rights Legislation after *United States* v. *Morrison*", 3 *U.Pa.J.Const. L.*, 926 (2001) also *available at:* https://www.law.upenn.edu/journals/conlaw/articles/volume3/issue3/Virelli3U.Pa.J.Const.L.926(2001).pdf.
[72] It argued that gender-motivated violence affected interstate commerce by deterring potential victims from travelling interstate, from engaging in interstate business, and from transacting with business, and in places involved in interstate commerce, by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.
[73] *Supra* note 40.
[74] 121 S. Ct. 675 (2001).
[75] *United States* v. *Morrison*, 529 U.S. 598 (2000).

resolving the case on non-constitutional grounds. It similarly avoided interpreting *Morrison*[76] by denying certiorari in *Gibbs.*[77]

Taken together, *Lopez* and *Morrison* have made clear that while the Court is still willing to recognize a broad interpretation of the Commerce Clause if it does not find activity substantial enough to constitute interstate commerce, it will not accept Congress's stated reason for federal regulation.[78]

The Court remains faced, therefore, with an essential question regarding the future of federal civil rights legislation: do federal civil rights statutes interfere in areas of law traditionally reserved for the state in ways other federal regulations of non-economic activity do not? Answering this question in the affirmative will single out civil rights laws as being uniquely beyond the scope of Congress's commerce power, thereby making it virtually impossible to enact such legislation without explicitly overturning *Morrison.*[79] Alternatively, if the Court finds that all federal regulations of non-economic activity are equally precluded by the Constitution's limitations on congressional power, then such a decision would so violate social expectations and needs that it would likely require the Court to turn to a different approach to define the commerce power in a way consistent with the four corners of the Constitution and the pressing needs of a growing national and international society.[80]

Therefore, under the Commerce Clause doctrine today, Congress may regulate (1) "the use of the channels of interstate commerce", (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities", and (3) "those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce".[81] Thus, the term "regulate" in the Commerce Clause should be interpreted in such a way that congressional regulation does not violate the natural rights of persons to engage in free commercial activity.[82]

Hence, Congress was found to be able to regulate minimum wages of a largely intrastate

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[76] *Ibid.*

[77] *Gibbs* v. *Babbitt*, 214 F.3d 483 (4th Cir. 1999).

[78] *Supra* note 31.

[79] Louis J. Virelli III and David S. Leibowitz, "Federalism Whether They Want It or Not: The New Commerce Clause Doctrine and the Future of Federal Civil Rights Legislation after *United States* v. *Morrison*", 3 *U.Pa.J.Const. L.*, 926 (2001).

[80] *Ibid.*

[81] *Supra* note 22 at 558–59.

[82] Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*, 317-18 (2004). Also see Scott Boykin, "The Commerce Clause, American Democracy, and the Affordable Care Act", *available at*:http://www.law.georgetown.edu/academics/lawjournals/gjlpp/upload/zs800112000089.pdf, (accessed on May 27, 2015).

manufacturer because otherwise, interstate commerce competition might be harmed by differential wages in different states.[83] It could even regulate the hours and wages of employees of schools and hospitals because these institutions made purchases from other states.[84] Congress could regulate the use of land for production because it affected commerce.[85] An exercise of the commerce power could include the prohibition of an activity.[86] The Court accepted the principle of aggregation so that it could look at the general impact of the particular conduct on interstate commerce if it were allowed; rather than the impact of the particular conduct of the person who was challenging the law. In this way, Congress was able to regulate wheat consumed by a farmer on the farm under the commerce power – because these acts of private consumption had the ability to affect wheat prices generally.[87] Similarly, if discrimination were allowed in restaurants or motels,[88] it might affect interstate commerce in relation to employees traveling from one state to another or travelers generally. Congress could also regulate extortionate credit transactions because loan sharking could lead to organised crime across state lines.[89]

To conclude, the "switch in time" of 1937, together with the case-law of the 1940s-most notably, the celebrated[90] case of *Wickard* v. *Filburn,*[91] gave the commerce clause a potential for expansion that seemed unlimited. This expansion was confirmed by the civil-rights cases of the 1960s,[92] which opened up vast new possibilities for congressional regulation of commerce in order to achieve non-commercial aims. The seemingly limitless possibilities, however, now have been limited by the Supreme Court's decisions in *Lopez* and *Morrison,* which, over the strong dissents of four Justices, reveal that the reach of the commerce clause is not unbounded and, more broadly, that judicial review of federal statutes to ensure that they fall within Congress's enumerated powers is not dead, as some had thought it might be.[93] These

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[83] *United States* v. *Darby* (1941) 312 US 100.

[84] *Maryland* v. *Wirtz,* (1968) 392 US 183; however a challenge to such regulation on the ground that it breached principles of intergovernmental immunity was successful in *National League of Cities* v. *Usery,* (1976) 426 US 833, though this case was itself overruled in *Garcia* v. *San Antonio Metropolitan Transit Authority,* (1985) 469 US 528; refer also to *New York* v. *United States,* (1992) 505 US 144.

[85] *Hodel* v. *Virginia Surface Mining and Reclamation Association,* (1981) 452 US 264.

[86] *Champion* v. *Ames,* (1903) 188 US 321; similar to *Murphyores* v. *Cth,* (1976) 136 CLR 1.

[87] *Wickard* v. *Filburn,* (1942) 317 US 111.

[88] *Heart of Atlanta Motel Inc* v. *United States,* (1964) 379 US 241.

[89] *Perez* v. *United States,* (1971) 402 US 146.

[90] Deborah Jones Merritt, "Commerce!", 94 *MICH. L. Rev*., 674, 674 (1995).

[91] 317 U.S. III (1942).

[92] *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Daniel* v. *Paul*, 395 U.S. 298 (1969); See also *Perez* v. *United States*, 402 U.S. 146 (1971).

[93] Most notably, Professor Bruce Ackerman famously has asserted that the events of 1937 amended the Constitution. See also Elizabeth C. Price, "Constitutional Fidelity and the Commrrce Clause: A Reply to Professor Ackelman", 48 *SYRACUSE L. Rev*., 139 (1998). For a re-assertion of antijudicial review reasoning, *see* Larry D. Kramer, "Putting the Politics Back Into the Political Safeguards of Federalism", 100 *Colum. L.*

cases, of course, have touched off a great deal of discussion in the United States about the meaning and extent of the newly discovered limitations.[94]

As a ray of hope to foster market integration, the states have made some progress in addressing differences in standards and regulations through inter-governmental cooperation. One important example is the Uniform Commercial Code, first instituted in 1952, which promotes similar laws governing sales and commercial agreements across states. Some states have also agreed to harmonize or reciprocally recognize certain licensing or standards. These initiatives are voluntary in nature, however, and not enforceable.[95]

IV. COMPARATIVE ANALYSIS

Although similar problems justify similar solutions, ultimately, the utility of comparative studies depends on their capacity to discover differences.[96] Otherwise, the comparative analysis of distinct legal systems would not "renew and refresh the study of national law, which suffers from confining itself to the interpretation of positive rules and neglecting broad principles in favour of tiny points of doctrine".[97] An analysis of the American trade regime discussed suggests a number of observations relevant to India. Before embarking upon a discussion on the differences in the various regimes, it is essential to consider their similarities *inter se*. The basic architecture of the American legal regime provides some indications of similarity with the position in India. Both the jurisdictions rely to a greater extent on judicial review to enforce constitutional provisions governing market integration. Under both the jurisdictions examined, individuals and businesses have direct access to courts or tribunals whose task it is to determine whether a measure is incompatible with constitutional requirements for free internal trade. The decisions of these courts and tribunals are final and enforceable. In the United States, the Commerce clause has been used to challenge the constitutionality of numerous measures

Rev., 215 (2000); and *cf* Benjamin W. Roberson, "Abortion as Commerce: The Impact of *U.S*. v. *Lopez* on the Freedom of Access to Clinic Entrances Act of 1994, 50 *VAND. L. Rev*., 239, 247- 49 (1997); Candice Hoke, "Arendt, Tushnet and Lopez: The Philosophical Challenge Behind Ackrrman's Theory of Constitutional Mommts", 47 *CASE W. Res. L. Rev*., 903 (1994); Robert F. Nagel, "Federalism as a Fundamental Value: National Lr'ague of Cities in Perspective", SUP. CT. Rev.. 81 (1981); Mark Tushnet, "Living in a Constitutional Moment?: Lopez and Constitutional Theory", *46 CASE W. REs. L. Rev*. 845 (1996) (and the papers following his reprinted in the same journal); John C. Yoo, "The Judicial Safeguards of Federalism", 70 *S. CAL. L. Rev*., 13ll (1997).

[94] The two symposia on *Lopez* at 94 *MICH. L. Rev*., 533-831 (1995); 46 *CASE W. Res. L. Rev*., 633-959 (1996). Also see Greg Taylor, "The Commerce Clause – Commonwealth Comparisons", 24 *B.C. Int'l & Comp. L. Rev.*, 235 (2001), *available at:* http://lawdigitalcommons.bc.edu/iclr/vol24/iss2/2, (accessed on June 8, 2015).

[95] *Supra* note 18.

[96] Gonzalo Villalta Puig, "The Constitutionalisation of Free Trade in Federal Jurisdictions", Working Paper 4, *Centro de Estudios Políticos y Constitucionales*, (Madrid, Spain, 2011), *available at*: http://www.cepc.gob.es/docs/working-papers/working_paper4.pdf?sfvrsn=4, (accessed on June 5, 2015).

[97] T. Weir, K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, Vol. 1, 3 (1998).

affecting interstate commerce.

The United States Constitution provides Congress the power to address barriers that interfere with the internal market. While legislators have generally been reluctant to use this authority in a systematic way to fashion a single integrated market, as has been attempted in Europe and Australia, the passage of national economic legislation has dismantled distortionary barriers in the financial, transportation, and energy sectors indirectly. In addition, Court judgments have overturned a number of discriminatory state practices impeding the movement of goods.[98]

The US was driven by a desire to forge a strong political union through closer economic integration. The United States readily achieved both economic and political supremacy. Its interest in internal market integration has been irregular while that of Europe has grown steadily.

Of all the reasons for further comparative analyses, one is particularly important from a practical point of view. India is emerging as one of the largest players in world trade today, with the window of opportunity for exporters becoming ever larger and more transparent. It is obviously in the interests of those traders and of India as a whole to ensure that obstructions to the free movement of goods and services within India are kept to a minimum.

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[98] *Supra* note 18.

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