INDECENT TRAFFIC: SHIFTING UNDERSTANDING OF THE U.S. COMMERCE CLAUSE

by

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Dedication

I would like to dedicate this work to my family. Thank you to my mom, dad, brother, Grandpa Rick, Memere Pat, and all those who have encouraged me and supported me along this journey. I will forever cherish your guidance, support, care, and love. I am forever grateful for the love of my family as one of my many blessings from God. Love you all.

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Abstract

This paper focuses on the Commerce Clause of the U.S. Constitution and explores how its scope has expanded throughout history. This paper, organized chronologically, evaluates the alterations to the scope of the Commerce Clause through the American Industrial Revolution, anti-vice and purity movements. With westward expansion and the construction boom of the railroads, the Supreme Court enacted legislation that expanded the scope of the Commerce Clause over interstate railroads. The Interstate Commerce Act created new national regulations. Anti-vice and purity movements sprouted and desired to regulate illegitimate commerce by the usage of the Commerce Clause. These efforts aspired to abolish the lottery and campaigned against prostitution. These movements paved the way for the introduction of the White Slave Traffic Act (the Mann Act of 1910). The support for constitutionality of the Mann Act of 1910 originated with the Congressional debates and are further discussed in Supreme Court cases mentioned in this paper. The court cases dealing with the Mann Act and the Commerce Clause include: *Athanasaw v. United States (1913), United States v. Holte (1915), Caminetti v. United States (1917), Gebardi v. United States (1932), Cleveland v. United States 1946),* and *Bell v. United States (1955)* in which each of these cases taken together show their significance in expanding the scope of the Commerce Clause through the Expansion of the Mann Act.

Debating the Commerce Clause

The Commerce Clause is meant to regulate interstate commerce and with the inclusion of the Mann Act, the scope expanded to encompass the sexual policing by Congress that, on occasion, oversteps into individual rights and state policing powers.

The central question of this paper is to focus on how the Commerce Clause has been manipulated throughout history. The expansion of the Commerce Clause's scope originated with Supreme Court Case debates, the installation of new legislative policies and commission as well as through the influence of societal motivations and goals to regulate and abolish illegitimate trade. The expansion of the Commerce Clause's scope allowed for stricter and looser interpretations by the Supreme Court Chief Justices over the decades. Society has warped the original meaning of the Commerce Clause to fit the social agendas of each new time period in order to regulate trade that would have never been considered regulatable commerce by the founding fathers.

With the inclusion of the Commerce Clause of the U.S. Constitution, Congress' powers helped to limit the implied powers of individual states. Section eight clause three of the U.S. Constitution declares "The Congress shall have Power… To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[1] This clause of the constitution states clearly the role of Congress as a regulator of trade amongst international and interstate entities, as well as with indigenous sovereignties. This clause's usage of the term "commerce" allows for a broad interpretation of what is incorporated in the term "commerce". The definitions of "commerce" range from sexual intercourse to "converse with God, with spirits, passions, thoughts, etc."[2] The origins of this word stem from the Latin term *commercium* meaning trade and trafficking. For the writers of the United States Constitution, the meaning of

1. U.S. Const. art. I, § 8, cl. 3

2. "commerce, n.". OED Online. September 2021. Oxford University Press. https://www-oed com.libproxy.txstate.edu/view/Entry/37073?rskey=ZhDJip&result=1&isAdvanced=false (accessed September 21, 2021).

"commerce" as an "exchange between men of the products of nature or art; buying and selling together; trading; exchanging of merchandise, esp. As conducted on a large scale between different countries or districts; including the whole of the transactions, arrangements, etc., therein involved" provided the correct interpretation of commerce's definition.[3] There have been so many debates about what actually acceptable commerce for Congress is to regulate over the powers of individuals and of individual states based on this word alone. Randy Barnett, the Constitutional law professor at Georgetown University and lawyer, argued that the Commerce Clause gave Congress the power to "specify rules to govern the manner by which people may exchange or trade goods from one state to another, to remove obstructions to domestic trade erected by states, and to both regulate and restrict the flow of goods to and from other nations (and the Indian tribes) for the purpose of promoting the domestic economy and foreign trade."[4] However, the debates between Federalists and Anti-Federalists that produced the U.S. Constitution reveals the founders' intentions behind the Commerce Clause. The *Federalist Papers* outline the debates that led to the creation of the United States Constitution and that vested in the federal government the authority to oversee interstate trade.

The founding fathers met at the Constitutional Convention from May 1787 to September 1787 to debate the New Jersey Plan and the Virginia Plan. The New Jersey Plan, introduced by William Patterson, consisted of nine solutions to establish an equal

3. "commerce, n.". OED Online. September 2021. Oxford University Press. (accessed September 21, 2021).

4. Randy E. Barnett. "The Original Meaning of the Commerce Clause." The University of Chicago Law Review 68, no. 1 (January 1, 2001): 101, https://www.jstor.org/stable/1600443.

vote in Congress between the states and desired a unicameral legislature. Meanwhile, James Madison introduced the Virginia Plan at the Constitutional Convention, which proposed for a bicameral legislature and three branches of government.[5] The Federalist Papers—anonymous political debates providing arguments for and against ratification—took place between October 1787 to May of 1788 as an effort to urge the New York populus to ratify the United States Constitution.[6] This resulted with a total of 85 essays published. Members of the Federalist Party consisted of individuals such as Alexander Hamilton, James Madison, and John Jay, who wrote under the alias Publius. They argued for a strong national government with checks and balances to protect the rights of the United States citizens. The Anti-Federalists consisted of individuals such as Robert Yates as "Brutus", George Clinton as "Cato", and Samuel Bryan as "Centinel." They advocated for a weak central government out of fear of tyranny. The Federalist Papers illuminates the original understanding and intent to the Constitutional clauses and amendments

5. "The Virginia Plan." U.S. Senate: The Virginia Plan, June 3, 2019. https://www.senate.gov/civics/common/generic/Virginia_Plan_item.htm#:~:text=Introduced%20to%20the%20Constitutional%20Convention,of%20Representatives)%20with%20proportional%20representation. The New Jersey Plan consisted of the 3/5ths Compromise. The Constitutional Convention adopted resolutions from both and this became known as the Connecticut Compromise.

6. Hamilton, Alexander. "The Federalists Papers: No. 1 General Introduction." The Avalon Project: Federalists No. 1. Lillian Goldman Law Library. Accessed September 26, 2021. https://avalon.law.yale.edu/18th_century/fed01.asp. Hamilton writes about the purpose of publishing the Federalist Papers to let the American people "deliberate" about the new Constitution in the first Federalist Paper to be published. Hamilton introduces the topics he'll discuss "The utility of the union to your political prosperity the insufficiency of the present confederation to preserve that union the necessity of a government at least equally energetic with the one proposed, to the attainment of this object the conformity of the proposed constitution to the true principles of republican government its analogy to your own state constitution and lastly, the additional security which tis adoption will afford to the preservation of that species of government, to liberty and to property."

themselves. Chief Justice James Kent of the New York Supreme Court Judicature (from 1804 to 1814) believed the Federalist papers showed "opinions [that] may be regarded as the best evidence of the sense of the authors of that instrument, the best test of its principles, and the most accurate contemporary exposition to which we can recur.[7] Understanding what the founders argued in supporting the Constitution and specifically the Commerce Clause, allows for the recognition of the original and intended usage of the Commerce Clause. The Federalists Papers also allow for a clearer interpretation of how to apply the Commerce Clause within the original scope when the powers of Congress overstep are in need of reform.

Alexander Hamilton believed that a unified federal government would illustrate an image of success, unity, and trust for those interested in trade with the United States. Hamilton wrote Federalist No. 11 which argued for a unified federal government supported with the regulation of interstate and international commerce as it would benefit the U.S. The unified government of the United States would facilitate not only international trade, but also trade between states. Hamilton supported this claim by providing an example of how interstate commerce benefited the states. Hamilton described how "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. Commercial enterprises will

7. "Article 1, Section 8, Clause 3 (Commerce): Livingston v. Van Ingen," (The Founders' Constitution), accessed October 2, 2021, https://press-pubs.uchicago.edu/founders/documents/a1_8_3_commerces13.html.

have much greater scope, from the diversity in the productions of different States."[8] Ultimately, unified governments who leave states to trade commerce promotes a healthy economy and builds connections amongst the states and international trade opportunities.

Other authors of the Federalist Papers provided useful arguments for the ratification of the constitution. As an active writer of the Federalist Papers, James Madison explained why the confederacy could not maintain success in regard to interstate and foreign commerce and management of the country's debt. In *Federalist Paper No. 42*, Madison argued that the confederacy, without the Constitution, had failed at protecting the states in terms of commerce and that there was evidence of this failure with the past where states had levied taxes and tariffs on each other unfairly. Madison argued that the states would be able to discover methods to "load the article of import and export… with duties which would fall on the makers of the latter, and the consumers of the former. We may be assured by past experience that such a practice would be introduced by future contrivances; and both by that and a common knowledge of human affairs, that it would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility."[9] Without the power to regulate interstate commerce, there were no means to prevent these animosities from flourishing. Madison asserted that without including the Commerce Clause in the Constitution, then the "trade

8. Hamilton, Alexander. "The Federalists Papers: No. 11: The Utility of the Union in Respect to Commercial Relations and a Navy." The Avalon Project: Federalist no. 11 Lillian Goldman Law Library. Accessed September 26, 2021. https://avalon.law.yale.edu/18th_century/fed11.asp

9. James Madison, "James Madison, Federalist, No. 42, 283-85," ed. Jacob E. Cooke, Article 1, Section 8, clause 3 (The Founders' Constitution), accessed October 1, 2021, https://press-pubs.uchicago.edu/founders/documents/a1_8_3_commerces9.html.

with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible."[10] In this situation, Madison critiqued the ability of the Articles of Confederation's impossible promises and criticized the article's tendency to harvest "partial sovereignty in the Union."[11]

Alexander Hamilton addressed the ways that competition between the states might encourage unacceptable commerce if the federal government failed to regulate interstate commerce. Federalist No. 12 defined commerce and taxation of the American people as unacceptable commerce to be conducted between the states as a "mutual jealousy" that had the potential to negatively impact each other by the many possible lines of communication.[12] Hamilton stated that "the relative situation of these States; the number of rivers with which they are intersected, and of bays that wash there shores; the facility of communication in every direction; the affinity of language and manners; the familiar habits of intercourse; --all these are circumstances that would conspire to render an illicit trade between them a matter of little difficulty, and would insure frequent evasions of the commercial regulations of each other. The separate States or confederacies would be necessitated by mutual jealousy to avoid the temptations to that

10. James Madison, "James Madison, Federalist, No. 42, 283-85," (The Founders' Constitution), accessed October 1, 2021.

11. James Madison, "James Madison, Federalist, No. 42, 283-85," (The Founders' Constitution), accessed October 1, 2021.

12. James Madison converses with James Monroe (fifth president and antifederalist) about the regulation of Commerce prior to the ratification of the Constitution. Madison warned that a "want of a general power over Commerce led to an exercise of this power separately, by the States, which not only proved abortive, but engendered rival, conflicting and angry regulations." is necessary to prevent dangerous and biased regulations.

kind of trade by the lowness of their duties."[13] And in order to avoid these acts of "illicit trade", the federal government should have the right to regulate these communications and forms of commerce between the states/ confederacies. The Commerce Clause would allow for the states to trade but any levies, taxes, etc. placed on those means of interstate and foreign trade must be regulated by Congress. Also, any state laws constructed that interfere with interstate commerce would have to be struck down due to the Supremacy Clause of the U.S. Constitution prohibiting these illicit trades since the Supremacy Clause established that "the Laws of the United States…shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[14] Hamilton discussed the argument of regulating interstate and foreign trade further in Federalist Paper No. 32.

Since the U.S. Constitution had been successfully ratified on June 21, 1788 by the New York citizens at the close of the federalist papers, Alexander Hamilton succeeded in his goals of securing the U.S. Constitution and the country accepted a centralized government.[15] With the assistance of these documents, the intent of the founding fathers has been understood through the rebuttal of Hamilton, Madison, and Jay. Utilizing these

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13. Hamilton, Alexander. "The Federalists Papers: No. 12: The Utility of the Union in Respect to Revenue." The Avalon Project: Federalist no 12. Lillian Goldman Law Library. Accessed September 26, 2021. https://avalon.law.yale.edu/18th_century/fed12.asp

14. U.S. Const. art. VI, cl. 2

15. "The Federalist Papers." Constitutional Rights Foundation. Constitutional Rights Foundation, 2002. https://www.crf-usa.org/foundations-of-our-constitution/the-federalist-papers.html#:~:text=The%2085%20essays%20succeeded%20by,amazing%20document%20200%20years%20ago.

documents, it has been made possible to enact laws that are not favorable but also, has allowed for necessary laws as technology adapts and the country grows. Within the initial landmark cases of *Livingston v. Van Ingen* and *Gibbons v. Ogden*, the Supreme Court Justices practiced citing the federalist papers for support of their decisions.

Testing the Waters: Determining the Initial Scope of the Commerce Clause

Livingston v. Van Ingen 1812 was the first case to test the scope of the Commerce Clause and questions related to intrastate and interstate commerce. Wishing to capitalize on the invention of the steamboat, Chancellor Robert Livingston in 1798 proposed to the New York Legislature that he could introduce a new form of public transportation. He sought in return for the launch of the steamboat ferry for total monopoly over steam navigation in New York waters. In 1802, Livingston hired Robert Fulton to construct the *North River* Steamboat. The legislature had officially enacted a statute in 1808 granting a total monopoly to Livingston and Fulton for thirty years. In this legislation, Livingston and Fulton defined the monopoly and made it so any steamboat operating on New York waters had to obtain a license from them or forfeit their "unlicensed vessel" to them. An Albany attorney named James Van Ingen partly owned the *Hope* and *Perseverance*, two ferry steamboats. These steamboats in 1812 went against the licensing policy and navigated the Hudson River and when Van Ingen did not obtain licensing from the monopoly resulting in the initial injunction against Van Ingen in the U.S. Circuit Court. Justice Brockholst Livingston decided the federal court had lacked jurisdiction in New York and demanded the statute to be followed and for Van Ingen to forfeit the vessels to

the monopoly.[16] When Van Ingen refused, the case went to the Court of Chancery where New York Attorney General Thomas Addis Emmet appealed to the New York Court for the Correction of Errors.[17] Chancellor John Lansing favored the monopoly and the case advanced to the Supreme Court of the United States. Justices Joseph Yates, Smith Thompson, and James Kent wrote against Lansing's favored opinion to Livingston and Fulton. Kent wrote that the States had the right to regulate interstate commerce as long as they stayed within the scope of state powers and not those vested in the federal government. In this case, the New York legislature had passed laws to regulate New York-based commerce in New York waters.

About ten years later, the *Gibbons v. Ogden* case nullified the *Livingston v. Van Ingen* case. In *Livingston v. Van Ingen,* any other individual interested in navigating New York waters had to seek approval and licensing from the monopoly. Livingston and Fulton's ultimate monopoly over any body of water from Pennsylvania into New York brought about the concern of navigation and regulation in *Gibbons v. Ogden*. During the *Livingston* case, Chief Justice Kent discussed the concern that "what powers are retained

16. "Henry Brockholst Livingston." Oyez. Accessed November 16, 2021. https://www.oyez.org/justices/brockholst_livingston. Associate Justice of the Supreme Court of the United States, Justice Brockholst Livingston was appointed by Thomas Jefferson in 1806 and was a known anti-Federalist.

17. "Thomas Addis Emmet," Historical Society of the New York Courts, January 25, 2019, https://history.nycourts.gov/figure/thomas-addis-emmet/. Thomas Addis Emmet was the Attorney General of New York in 1812. It is recorded that he "argued over 300 cases before the New York Court of Chancery, the New York Court of Jurisdicture and the New York Court for the Correction of Errors, including the *John Van Ness Yates cases, Livingston v. Van Ingen, Livingston v. Mayor of New York, In re Waldron* and *Gibbons v. Ogden*. "'Legal History Matters,'" Livingston v. Van Ingen | New York Steamboat Monopoly (The Historical Society of the New York Courts), accessed October 29, 2021, https://nycourts.gov/history/legal-history-new-york/legal-history-eras-02/history-new-york-legal-eras-livingston-van-ingen.html.

by this, and, particularly, whether the states have absolutely parted with their original power of granting such an exclusive privilege… It does not follow, that because a given power is granted to congress, the states cannot exercise a similar power."[18] New York made the error of allowing a monopoly to dictate navigation of all New York waterways, and consequently the waterways that also bordered the state of New Jersey. The constitutional question within this case revolved around whether the monopolizing statute interfered with interstate commerce. The statute granting the monopoly to Livingston regulated the internal commerce of New York, and thus, the Supreme Court ruled that it was constitutional. The court ruled that any future commercial regulations that a state legislature creates cannot be intervened by Congress as Congress does not have "any direct jurisdiction over our interior commerce or waters. [The] Hudson river was the property of the people of this state, and the legislature have the same jurisdiction over it that they have over the land, or over any of our public highways, or over the waters of any of our rivers or lakes."[19] In *Livingston v. Van Ingen*, it was clarified that internal commerce involves the regulation of sales, implementation of internal transportation, granting of licenses and the damaging impact of monopolies on internal commerce and individual rights.

The argument utilized to justify New York's legislative decision presides in the tenth amendment of the U.S. Constitution. The tenth amendment states, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States are

18. "Article 1, Section 8, Clause 3 (Commerce): Livingston v. Van Ingen," (The Founders' Constitution), accessed October 2, 2021, https://press-pubs.uchicago.edu/founders/documents/a1_8_3_commerces13.html.

19. Article 1, Section 8, Clause 3 (Commerce): Livingston v. Van Ingen," (The Founders' Constitution), accessed October 2, 2021.

reserved to the States respectively, or to the people."[20] Alexander Hamilton explained, "that all the authorities of which the states are not explicitly divested, remain with them in full vigor, and that in all cases in which it was deemed improper that a like authority with that granted to the union should reside in the states, there was the most pointed care in the constitution to insert negative clauses."[21] With Federalist paper No. 32, Hamilton expressed Congress must interfere with the State's sovereignty when the law itself goes outside the scope of authority the States possesses. Hamilton defined three possible cases in which the States could overstep into federal government authority. Hamilton's second case example concentrated on the placing of taxes on imports and exports. In Hamilton's opinion, levying taxes by the states would be dangerous and unnecessary. In this situation, New York did not clearly propose an unconstitutional regulation as (at that time) it did not interfere with interstate commerce as a part of public works. In other words, the *Livingston v. Van Ingen* case ruled the statute constitutional and under the scope of policing powers. With the *Gibbons v. Ogden* case, this view of the statute as constitutional and part of the state's power became identified as an intrusion into interstate commerce.

Debates about the regulation of trade by New York's legislature emerged with the *Gibbons v. Ogden* case in 1824. This case involved the same New York statute that awarded Livingston and Fulton their monopoly and turned the tides on opinion of the statute itself. The law that established the Livingston and Fulton Monopoly prevented Aaron Ogden from navigating between Elizabethtown, New Jersey, and other cities in

20. "U.S. Const.," amend. X.

21. "Article 1, Section 8, Clause 3 (Commerce): Livingston v. Van Ingen," (The Founders' Constitution), accessed October 2, 2021.

New York which violated the terms of Ogden's employment. *Livingston v. Van Ingen* brought about *Gibbons v. Ogden* which began as an appeal from the Court for the Trial of Impeachments and Correction of Errors of the State of New-York after Aaron Ogden filed his bill in the Court of Chancery.[22] The licensing requirement became a legal issue due to two conflicting laws between New York, Connecticut, and New Jersey. New York had made it so, "no one can navigate the bay of New-York, the North River, the Sound, the lakes, or any of the waters of that State by steam vessels, *without a license from the grantees of New-York,* under penalty of forfeiture of the vessel," meanwhile in Connecticut, "no one can enter her waters with a steam vessel *having such a license*."[23] And in New Jersey, "if any citizen of that State shall be restrained, under the New-York law, from using steam boats between the ancient shores of New-Jersey and New-York, he shall be entitled to an action for damage… with trebel costs against the party who thus restrains or impedes him *under the law of New York!"*[24] These conflicting laws represented the exact fear of interstate laws inciting conflict as Madison and Hamilton voiced previously, and led to the case of *Gibbons v. Ogden* with New York and New Jersey laws at odds with one another.

Gibbons v. Ogden made the Supreme Court justices explore the question if the Commerce Clause included the power to regulate interstate navigation as a power of Congress. Chief Justice John Marshall argued that the founding fathers intended the

22. Aaron Ogden became closely affiliated with Thomas Gibbons who operated a steamboat line between New Jersey and New York under a federal coastal license. Their ties broke after three years into their partnership because Gibbons used one of Ogden's steamboats on another New York route.

23. Gibbons v. Ogden, 22 U.S. 1, 5 (1824)

24. Gibbons v. Ogden, 22 U.S. 1, 5 (1824)

Commerce Clause to include the "power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it."[25] Justice Marshall's depiction of the scope of the Commerce Clause, incorporated navigation capabilities as a commercially regulated activity. Marshall continued his explanation through expressing the necessity of understanding that the federal government's power to impose embargoes are "united in that construction which comprehends navigation in the word commerce."[26] *Gibbons v. Ogden* connected navigation to commerce and allowed for the regulation of commerce conducted via navigation of rivers.[27] The expansion of the Commerce Clause's scope to regulate by waterways broadened the reach of Congress's power to regulate commerce.

Both cases played significant roles in defining the scope of the Commerce Clause. The *Livingston v. Van Ingen* case established a distinction between policing powers and interstate commerce, whereas *Gibbons v. Ogden* broadened the scope of the Commerce Clause to encompass navigation of waters as regulatable via Congress. *Gibbons v. Ogden* "prevented local or state monopolies - or tariffs- from impeding the flow of goods, people

25. John Marshall, "Gibbons v. Ogden," Article 1, Section 8, clause 3 (Commerce): Gibbons v. Ogden, accessed October 6, 2021, https://press-pubs.uchicago.edu/founders/documents/a1_8_3_commerces16.html.

26. John Marshall, "Gibbons v. Ogden," Article 1, Section 8, clause 3 (Commerce): Gibbons v. Ogden, accessed October 6, 2021.

27. "Navigation, n.". OED Online. September 2021. Oxford University Press. https://www-oed-com.libproxy.txstate.edu/view/Entry/125477?redirectedFrom=navigation (accessed October 09, 2021). The incorporation of "navigation" with the Commerce Clause includes the connotation that congress could regulate based off of "the action or practice of travelling on water in a ship or other vessel; sailing; rowing."

and news across the nation."[28] Both cases carried significant changes in opinion on the distinction of powers of the state and powers of Congress. One developed a greater distinction while the other included a new method of transportation into the interpretation of the Commerce Clause.

With the conclusion of *Gibbons v. Ogden,* the case confirmed that, according to Chief Justice Marshall, "the power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several States, or with the Indian tribes.'"[29] With the unanimous decision to favor Gibbons, the Supreme Court established this landmark case as the one in which affirmed the powers of Congress to regulate interstate commerce and established usage in conjunction with the Supremacy Clause. This case, ultimately, Justice Johnson said, "instruct[ed] courts to assess whether the measure is commercial or municipal in nature… whether it was adopted to protect the health, safety, or welfare of the people or to promote some commercial interest" when considering the constitutionality of a statute.[30]

In later years with the Jackson administration and introduction into the Taney Court, the Commerce Clause weakened. President Jackson appointed Roger B. Taney in an effort to undermine "the constitutional jurisprudence of Chief Justice John Marshall. The manipulation of the Supreme Court appointment of President Jackson illustrated how

28. Edwards, Rebecca, Eric Hinderaker, Robert O. Self, and James A. Henretta. "Chapter 8: Economic Transformation." In *America's History*, Ninth Editioned., 239. Boston, MA: Bedford/St. Martin's, 2018.

29. John Marshall, "Gibbons v. Ogden," Article 1, Section 8, clause 3 (Commerce): Gibbons v. Ogden, accessed October 6, 2021.

30. 49 St. Louis U. L.J. 817

intent by political leaders impacts the interpretation of laws and, in this situation, the Commerce Clause to achieve the goals of singular individuals and/or political parties.[31]

The introduction of monopolies and the railroad construction boom associated with westward expansion furthered complicated transportation regulation. The irony of the connection between the wave of monopolies and the expansion of transportation stemmed back to when Cornelius Vanderbilt served as the steamboat captain employed by Thomas Gibbons prior to *Gibbons v. Ogden*. Vanderbilt soon became the leading railroad mogul in the U.S. as well as international trade morphed and increased exponentially. The introduction of railroads not only fueled westward expansion, but it also fueled a new industrialized economy for the United States. The requirements and costs of building as well as maintaining railroads demanded regulation and government assistance to combat the costs. These railways easily monopolized and introduced the "reign of the giants."

National Commerce and the Railroads: The Commerce Clause and Federal Regulation

The first train tracks in the United States began construction about 200 years ago. When Richard Trevithick invented the first steam engine railway in 1803, the United

31. Edwards, Rebecca, Eric Hinderaker, Robert O. Self, and James A. Henretta. "Chapter 9: A Democratic Revolution." In *America's History*, Ninth Editioned., 284. It is expressed that "The Taney Court also limited Marshall's nationalistic interpretation of the commerce clause by enhancing the regulatory role of state governments. For example, in *Mayor of New York v. Miln* (1837), the Taney Court ruled that New York State could use it 'police power' to inspect the health of arriving immigrants."

States utilized his invention and contracted the first U.S. railroad in 1827.[32] With the transportation and market revolution in full swing, the U.S. provided state funding to privately-owned businesses "whose projects would improve the general welfare."[33] The production of new methods of transportation such as canals, turnpikes and railroads combined with the creation of the new banking system resulted in an economic boom classified as the Market Revolution. The financing system of using tax-payer moneys to support privately-owned transportation businesses allowed for Americans to accumulate financial liquidity and capital as well as increased the ability to trade products over long distances more than ever before.

The creation of the first railroad began with the Baltimore & Ohio Railroad on February 28th, 1827, stretched only thirteen miles long upon the first track's completion in 1830.[34] The railroad construction took off and brought about not only a new way to travel and faster method of transportation, but it also allowed for more settlement across the country as the lines continued to extend westward. By 1838, the railroads had become post roads and the completion of the New York-Chicago line furthered progress in 1853.[35] As the railroads penetrated the west, the funds for the railroad construction

32. Richard Trevithick, a British Engineer who first discovered how to "harness high-pressure steam" and developed the first steam railway. Rolt, L.. "Richard Trevithick." Encyclopedia Britannica, June 22, 2021. https://www.britannica.com/biography/Richard-Trevithick.

33. Edwards, Rebecca, Eric Hinderaker, Robert O. Self, and James A. Henretta. "Chapter 8: Economic Transformation." In *America's History*, 235.

34. First U.S. Railway Chartered to Transport Freight and Passengers. America's Story from America's Library. Accessed September 27, 2021. http://www.americaslibrary.gov/jb/nation/jb_nation_train_1.html.

35. Robert Edgar Riegel, The Story of the Western Railroads from 1852 through the Reign of the Giants (Lincoln: Univ. of Nebraska Pr, 1977),

slowly depleted. The unequal disbursement of wealth early in the expansion "meant that all money raising schemes depended for their ultimate success upon interesting eastern capital."[36]

The completion of the transcontinental railroad in 1869 had been funded by federal grants and subsidies. The west became the image of the "railroad enterprise" in which government involvement increased through providing public lands, loans, and even funded private companies in the construction of railroads. States and localities frequently offered financial assistance and they purchased railroad bonds.[37] The importance of the railroads stemmed from how they transformed American capitalism through the development into corporations which allowed for the railroad companies to raise private capital in outrageous quantities. Beginning with the Jacksonian Era, the acceptance of laissez- faire principles grew and transformed the political landscape of the United States. The American System and Commonwealth System lost favor to a limited government presence in the U.S. economy during the Jackson administration. Especially after the Civil War, the public favored and assisted private railroad companies. Consequences arose from the vast expansion of railroads such as the new creation of railroad monopolies. According to John Howard Brown, the associate professor at

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https://books.google.com/books?hl=en&lr=&id=uBjpXSzF8b8C&oi=fnd&pg=PA1&dq=railroads+influence+on+trade&ots=7XiF4ylM8a&sig=GIvjWw_AdxSYOa8-MIfsBdhdAZw#v=onepage&q=railroads%20influence%20on%20trade&f=false, 4.

36. Robert Edgar Riegel, *The Story of the Western Railroads from 1852 through the Reign of the Giants* (Lincoln: Univ. of Nebraska Pr, 1977).

37. Edwards, Rebecca, Eric Hinderaker, Robert O. Self, and James A. Henretta. "Chapter 15: Conquering a Continent." In *America's History*, Ninth Editioned., 443–73. Boston, MA: Bedford/St. Martin's, 2018.

Georgia Southern University in the Economics department, the regulation of these railroads became a gateway to "industrial monopoly… where the business interests of the parties concerned make competition practically impossible, even when there is neither law nor natural obstacle to hinder it."[38] The newly flowered economy boomed, and the monopoly giants wrought all the benefits.

The emergence of the Republican Party in 1855 and their elevation to the White House in 1860 prompted the outbreak of the Civil War on the one hand, and an increase in Government investment in infrastructure, on the other hand. By 1862, to mobilize the economy again, Congress enacted government-assisted programs that imposed high tariffs of about 40 percent on miscellaneous foreign goods to encourage domestic industries.[39] The protective tariff assisted U.S. manufacturers with the competition. An important action taken by Congress included the creation of "an integrated network of national banks and implemented Henry Clay's program for a nationally financed transportation system, chartering the Union Pacific and Central Pacific companies to build a transcontinental railroad and granting them substantial land subsidies to complete the difficult work."[40] The year 1869 marked the completion of the first transcontinental railroad because of support by United States taxpayer funds as approved by the

38. John Howard Brown, and John Howard Brown. "The 'Railroad Problem' and the Interstate Commerce Act." Review of Industrial Organization 43, no. 1/2 (August 1, 2013): 7–19. https://search-ebscohost-com.libproxy.txstate.edu/login.aspx?direct=true&db=edsjsr&AN=edsjsr.43550419&site=eds-live&scope=site.

39. Edwards, Rebecca, Eric Hinderaker, Robert O. Self, and James A. Henretta. "Chapter 13: Bloody Ground: The Civil War." In *America's History*, Ninth Editioned., 395. Boston, MA: Bedford/St. Martin's, 2018.

40. Edwards, Rebecca, Eric Hinderaker, Robert O. Self, and James A. Henretta. "Chapter 13: Bloody Ground: The Civil War." In *America's History*, 395.

enactment of the Pacific Railway Act of 1862. After the influx of western settlement during the 1850s, it became necessary that a railroad stretch all the way to the Pacific coast.[41] Through Congress's commissioned topographical surveyors such as John Wesley Powell, the Northern state legislatures (after the Southern states seceded from the union) agreed to allow the usage of federal lands "to subsidize the construction of a railroad and telegraph line."[42] The Pacific Railway Act of 1862 incentivized men to assist in constructing the first transcontinental rail line and the act permitted the Union and Central Pacific railroad companies to construct the lines and employ immigrant workers. The first Pacific Railway Act in 1862 also "granted 10 alternate sections of public domain land per mile on both sides of the railway, and it provided loan bonds for each mile of track laid. The loans were repayable in 30 years, and the dollars per mile escalated in accord with the difficulty of terrain."[43] Two years after the Pacific Railway Act of 1862, Congress enacted a second Pacific Railway Act in 1864 which doubled the amount of land granted and allowed for the railroads to sell their own railroad bonds.[44]

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41. The Central Pacific Railroad company, founded in 1861 by Collis P. Huntington, Leland Stanford, Mark Hopkins, and Charles Crocker. The Union Pacific Railroad Company

42. "Landmark Legislation: The Pacific Railway Act of 1862." (U.S. Senate), January 12, 2017. https://www.senate.gov/artandhistory/history/common/generic/PacificRailwayActof1862.htm#:~:text=The%20Pacific%20Railway%20Act%2C%20which,nation's%20first%20transcontinental%20rail%20line.

43. "Pacific Railway Acts." Encyclopædia Britannica. (Encyclopædia Britannica, inc). Accessed October 29, 2021. https://www.britannica.com/event/Pacific-Railway-Acts.

44. "Pacific Railway Acts." Encyclopædia Britannica. (Encyclopædia Britannica, inc). Accessed October 29, 2021.

Stiff Competition, Monopoly, and Price Discrimination

State legislatures supported transportation projects which ultimately led to state support of monopolies. The State legislatures would grant charters such as with the creation of turnpikes in which the charters gave these private companies "special legal status and often included monopoly rights to a transportation route."[45] The enlargement of resources accessible to far reaching customers made possible by increased transportation capabilities allowed for farmers and merchants to expand their markets. The rapid spread of transportation and increased transportation capabilities harvested a new social order. With innovations in farming, textiles, and the invention of the cotton gin, class systems transformed and there became a large presence of elites in the North. The urbanization of the North with the Industrial Revolution "altered the older agrarian social order…the richest 10 percent of the nation's families owned about 40 percent of the wealth; by 1860, they held nearly 70 percent."[46] New problems arose with state and local governments favoring the wealthy with taxation new policies.

The new technologies launched by the creation of the railroads provided for new manufacturing processes and products and called for huge factories and the unfettered growth of monopolies. The birth of the "modern corporation" required new avenues of business such as railroad corporations selling shares to railroad investors. This solution brought about other challenges for the railroad corporations like managing the newest and

45. Edwards, Rebecca, Eric Hinderaker, Robert O. Self, and James A. Henretta. "Chapter 8: Economic Transformation." *America's History*, 235.

46. Edwards, Rebecca, Eric Hinderaker, Robert O. Self, and James A. Henretta. "Chapter 8: Economic Transformation." *America's History*, 259.

most complex enterprise of its time.[47]A monopoly is considered a corporation where there is "exclusive ownership through legal privilege, command of supply, or concerted action" and the company/corporation must be controlled by one party in order to be considered a monopoly.[48] The public viewed monopolies as individual businessmen whom they assisted in establishing the monopolies economic position. What identified monopoly holders included what they epitomized such as "Andrew Carnegie epitomized big steel; John D. Rockefeller, big oil; and Cornelius Vanderbilt, railroads."[49]

With the conglomerates stockpiling the wealth, individuals and those who tried to compete against the monopoly machines began to voice their concerns. These individuals became "distressed by the development of near monopolies, reformers began to denounce 'the trusts,' a term that in popular usage referred to any large corporation that seemed to wield excessive power."[50] Publications against these monopoly moguls sprouted everywhere such as with Henry Demarest Lloyd's investigation of Rockefeller's Standard Oil in 1881. Lloyd's findings revealed Standard Oil's business practices consisted of fraud, intimidation, and political bribery.[51]

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47. Michael Schaller et al., "Chapter 17: A New Industrial and Labor Order," *American Horizons: U.S. History in a Global Context with Sources* (New York, NY: Oxford University Press, 2016), pp. 577-612.

48. Merriam-Webster.com Dictionary, s.v. "monopoly," accessed November 16, 2021, https://www.merriam-webster.com/dictionary/monopoly.

49. Michael Schaller et al., "Chapter 17: A New Industrial and Labor Order," in *American Horizons: U.S. History in a Global Context with Sources*, 580.

50. Edwards, Rebecca, Eric Hinderaker, Robert O. Self, and James A. Henretta. *America's History*, 478.

51. Michael Schaller et al., "Chapter 17: A New Industrial and Labor Order," in *American Horizons: U.S. History in a Global Context with Sources*, 577-612.

With the creation of local railways in rural towns and suburban areas, big business conquered the other competition and the money flowed greater for the growing monopolies. The creation of railroads appealed to the growing population but, lines created in inconvenient areas increased the unequal distribution of wealth in the production of railroads. Small companies struggled to obtain funding while the larger railroad companies flourished with state and federal funding/support. This imbalance resulted in a lack of adequate funding to keep the railroads functioning with cut throat competition.[52] To stay afloat, the railroads engaged in price discrimination. Price discrimination began around the 1870s with the increased usage of the railways for transportation of commercial goods. The term "price discrimination" means "the action or practice of charging different prices to different customers for the same goods or services."[53] Price discrimination enraged many of the U.S. citizens who had been subjected to the high prices by the harsh competition cultivated by railroad monopolies. Monopolies' control and burden on citizens infected the economy and John Howard Brown explained that "the citizens of localities recognized their vulnerability to monopoly pricing where a single railroad was their sole transportation supplier."[54]

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52. John Howard Brown. "The 'Railroad Problem' and the Interstate Commerce Act." Review of Industrial Organization 43, no. 1/2 (August 1, 2013): 7–19. https://search-ebscohost-com.libproxy.txstate.edu/login.aspx?direct=true&db=edsjsr&AN=edsjsr.43550419&site=eds-live&scope=site.

53. "Price discrimination, n.". OED Online. September 2021. Oxford University Press. https://www-oed-com.libproxy.txstate.edu/view/Entry/151135?redirectedFrom=price+discrimination (accessed September 27, 2021)

54. John Howard Brown. "The 'Railroad Problem' and the Interstate Commerce Act.", 16.

The forms of price discrimination these individuals faced included, "discrimination between the rates per mile charged for long distance shipments and shipments carried for shorter distances…. Localities without effective rail competition paid much higher rates than similar communities where competition was present. Price discrimination influenced the attempts to regulate the railroads that emerged in the 1870s."[55] These forms of price discrimination had multiple influences such as rate wars, favoritism, and "cartelization arrangements as an alternative to endemic price warfare caused by overbuilding of competing rail lines."[56] With all of this aggressive competition, zombie lines began popping up where no more funding flowed resulting in closure of the lines.[57]

Political groups such as the National Grange for the Patrons of Husbandry absorbed the frustrations and fights of the farmers as motivations in the group's political endeavors. Early members of the Grange joined "out of a shared and growing concern over lost profits due to the exorbitant fees they were being charged by monopolistic railroads and grain elevators - often owned by the railroads - to transport and store their crops and other agricultural products."[58] Many farmers believed that "public money had been used to build giant railroad companies that turned around and exploited ordinary

55. John Howard Brown. "The 'Railroad Problem' and the Interstate Commerce Act.", 11.

56. John Howard Brown. "The 'Railroad Problem' and the Interstate Commerce Act.", 13.

57. "Zombie lines" are railroad lines that stopped being operated on and have the potential to be revived and reutilized.

58. Longley, Robert. "The Granger Laws and the Granger Movement." ThoughtCo. https://www.thoughtco.com/the-grange-4135940 (accessed November 1, 2021).

people."[59] The National Grange group, founded in 1867, gained prominence during the postwar decades. The Grange movement had been influential in bringing the *Munn v. Illinois* case as well as the *Wabash v. Illinois* case. The Grange became popular amongst farmers and the group even organized its own banks, insurance companies and grain elevators. The movement ran politically under multiple names such as the Greenback-Labor Party. The Greenback-Labor Party, founded in the 1870s by the Grangers, "advocated laws to regulate corporations and enforce an eight-hour workday to reduce long, grueling work hours. They called for the federal government to print more greenback dollars and increase the amount of money in circulation".[60] Grangers advocated for Granger Laws which worked towards creating economic regulatory action. The Greenbacks supported and pressured for the creation of Granger laws where eventually states such as Minnesota, Iowa, Wisconsin, and Illinois enacted Granger laws. The Granger laws regulated "rapidly rising crop transport and storage fees railroads and grain elevator companies charged farmers."[61] With the help of the Grangers and Greenbacks political efforts, the 1880s saw nearly thirty states with railroad commissions created to supervise railroad rates and policies.[62]

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59. Edwards, Rebecca, Eric Hinderaker, Robert O. Self, and James A. Henretta. "Chapter 16: Industrial America: Corporations and Conflicts." *America's History*, 489.

60. Edwards, Rebecca, Eric Hinderaker, Robert O. Self, and James A. Henretta. "Chapter 16: Industrial America: Corporations and Conflicts." *America's History*, 490.

61. Longley, Robert. "The Granger Laws and the Granger Movement." ThoughtCo. (Accessed November 1, 2021).

62. Edwards, Rebecca, Eric Hinderaker, Robert O. Self, and James A. Henretta. "Chapter 16: Industrial America: Corporations and Conflicts." *America's History*, 474-97.

Beginning in 1871, the Grange's lobbying efforts resulted in Illinois passing a law that regulated the "railroads and grain storage companies by setting maximum rates they could charge farmers for their services."[63] Minnesota, Wisconsin and Iowa also accepted the law. This led to the *Munn v. Illinois* case in 1877 which dealt with the question of if the rates that the state had imposed on the Munn and Scott Warehouse Company denied the company their fourteenth amendment rights of equal protection and due process.

Munn v. Illinois (1877)

The efforts of the National Grange and Greenbacks resulted in not only Grange laws, but also raised questions about the constitutionality of these laws' attempts to regulate railroads at the state level. This is specifically seen with *Munn v. Illinois* in 1877. In 1871 the National Grange pushed for the Illinois legislature to enact a maximum rate for grain storage and by 1872, Munn and Scott had set rates for their services as higher than the maximum deemed by the Grange laws.[64] The Chicago grain warehouse of Munn and Scott had been brought to court and found guilty of their violation. In response, Munn and Scott appealed on the grounds that the state of Illinois had "illegally interfered with their private business."[65]

The tenth amendment and the newest fourteenth amendment became questionable reasons for the unconstitutionality of the Illinois Grange law. The reasoning of questions

63. Longley, Robert. "The Granger Laws and the Granger Movement." ThoughtCo. (Accessed November 1, 2021).

64. Elianna Spitzer, "Munn v. Illinois: Supreme Court Case, Arguments, Impact," ThoughtCo (ThoughtCo, January 31, 2020), https://www.thoughtco.com/munn-v-illinois-supreme-court-case-4783274.

65. Elianna Spitzer, "Munn v. Illinois: Supreme Court Case, Arguments, Impact," ThoughtCo.

against the Illinois Grange laws stemmed from the amendments expansion and restriction of state powers. The fourteenth amendment prevented the states from depriving citizens of their rights to life, liberty, property, and due process while the tenth amendment allowed for any power not delegated by the constitution to either the federal or state governments, then the powers would be granted to the states. The most prominent question dealt with if the tenth amendment had been practiced under the proper scope as powers delegated to the states and if it was applicable to apply the fourteenth amendment's clause on property rights to Munn and Scott's grain warehouse. Chief Justice Morrison Remick Waite delivered the seven-to-two decision. The court ruled that the state's regulations were constitutional. Chief Justice Waite ruled that the state's police powers constitutionally applied to the situation and that the legality of regulation of private property no longer posed a concern "when such regulation becomes necessary for the public good."[66] The Supreme Court relied on the Due Process Clause to justify state regulation of "key businesses such as railroads and grain elevators, that were "'clothed in the public interest.'"[67] This case expanded the understanding of interstate commerce regulation and how the railroads played a huge role in the interpretation of the Commerce Clause to assist in regulation. When considering the influence of the warehouse as "property" that impacts the public good, Chief Justice Waite supported the final decision by weighing the impact on interstate commerce. Chief Justice Waite stated that with the case, the influence did not reach to interstate commerce but that if it did, then the State

66. "Munn v. Illinois." Oyez. Accessed October 30, 2021. https://www.oyez.org/cases/1850-1900/94us113.

67. Edwards, Rebecca, Eric Hinderaker, Robert O. Self, and James A. Henretta. "Chapter 15: Conquering a Continent." In *America's History*, 448.

would have encroached on Congress' power to regulate.[68] This distinction between state and Congress's power to regulate became impactful especially after the Supreme Court overturned Munn *v. Illinois* a few years later with the conclusion of the *Wabash v. Illinois* case in order to allow states to regulate railroads.[69]

Shortly after the *Munn v. Illinois* decision in 1877, the Great Railroad Strike of 1877 occurred. This infamous railroad laborer's strike occurred because of the twice reduced wage cuts by the Baltimore and Ohio Railroad Company in the midst of another depression. The strike resulted in fifty deaths and over about $40 million in damages mostly to the railroads. A negative result from the strikes included "many railroad workers [being] fired and blacklisted: railroad companies circulated their names on a 'do not hire' list to prevent them from getting any work in the industry."[70] After the strike, the optimism in the impact of railroads lessened. Henry George published *Progress and Poverty* in 1879 and described the impact of the railroads as a permanent ensurer of poverty. George also believed that industrialization promoted the wealthy and degraded the poor to dangerous levels of poverty and labor conditions. George's views touched rural individuals and farmers who found themselves at the mercy of large corporations.

68. "Munn v. Illinois, 94 U.S. 113 (1876)." Justia Law. Accessed October 30, 2021. https://supreme.justia.com/cases/federal/us/94/113/#tab-opinion-1969236.

69. "The Supreme Court Strikes Down Railroad Regulation." History Matters - The U.S. Survey Course on the Web. Accessed October 30, 2021. http://historymatters.gmu.edu/d/5746/.

70. Edwards, Rebecca, Eric Hinderaker, Robert O. Self, and James A. Henretta. "Chapter 16: Industrial America: Corporations and Conflicts." In *America's History*, 489.

The farmers "blamed railroad companies for taking government grants and subsidies to build but then charging unequal rates that privileged big manufacturers.[71]

Wabash, St. Louis & Pacific Railway Company v. Illinois 1886

The Grange laws reappeared in the Supreme Court with the *Wabash, St. Louis & Pacific Railway Company v. Illinois* case in 1886 when the Supreme Court ruled the Granger law "as it applied to the railroads to be unconstitutional since it sought to control interstate commerce, a power reserved to the federal government by the Tenth Amendment."[72] The impact of this 1886 court case allowed for influence on the interpretation of the dormant Commerce Clause and how it can justifiably be utilized when involving the railways. The Granger law that had come under fire in the Supreme Court case, Ch. 114 Rev. Stat. Illinois, § 126 explained:

> it is there enacted that if any railroad corporation shall charge, collect, or receive for the transportation of any passenger or freight of any description upon its railroad, for any distance within the State, the same or greater amount of toll or compensation than is at the same time charged, collected, or received for the transportation in the same direction of any passenger or like quantity of freight of the same class over a greater distance of the same road, all such discriminating rates, charges, collections, or receipts, whether made directly or by means of rebate, drawback, or other shift or evasion, shall be deemed and taken against any such railroad corporation as prima facie evidence of unjust discrimination prohibited by the provisions of this act.[73]

The national Grange set up this law against monopolies and those cohorting with railroad monopolies and in protection of farmers. The case was raised to the Supreme Court after the defendant "made such discrimination in regard to goods transported over the same

71. Edwards, Rebecca, Eric Hinderaker, Robert O. Self, and James A. Henretta. 489.

72. Longley, Robert. "The Granger Laws and the Granger Movement." ThoughtCo. (Accessed November 1, 2021).

73. Wabash, St. L. & PR Co. v. Illinois, 118 US 557 - Supreme Court 1886.

road or roads from Peoria in Illinois and from Gilman in Illinois to New York, charging more for the same class of goods carried from Gilman than from Peoria."[74] The Supreme Court's goal to ensure protection against extortion and discrimination of the transportation of goods or passengers held priority. With this act coming to light with the Supreme Court case, evaluations, and judgements of other laws' level of constitutionality and impact on states such as New York with interstate commerce. This Supreme Court case had "severely restricted the scope of state regulation by asserting federal jurisdiction when a rail journey had any interstate component."[75]

In *Wabash v. Illinois,* "when its [Congress'] full power to regulate commerce should be brought into activity, and as to the regulations and sanctions which should be provided; and that, until the dormant power of the Constitution is awakened and made effective by appropriate legislation" became the key questions asked during the case.[76] Chief Justice Samuel Freeman Miller delivered the court's opinion. He concluded that "'There can be no doubt but that exclusive power has been conferred upon Congress in respect to the regulation of commerce among the several States. The difficulty has never been as to the existence of this power, but as to what is to be deemed an encroachment upon it.'"[77] The final decision ruled that acceptable actions of the state must possess a domestic concern and must not interfere with interstate commerce. The concerns of interstate commerce decided by the U.S. Congress cannot be decided by an individual

74. Wabash, St. L. & PR Co. v. Illinois, 118 US 557 - Supreme Court 1886.

75. John Howard Brown."The 'Railroad Problem' and the Interstate Commerce Act." 17.

76. Wabash, St. L. & PR Co. v. Illinois, 118 US 557 - Supreme Court 1886.

77. Wabash, St. L. & PR Co. v. Illinois, 118 US 557 - Supreme Court 1886.

state's legislature as it is the U.S. Legislature's jurisdiction to decide how actions impact upon all or some of the states.

In conclusion, the "*Wabash* case barred states from regulating interstate commerce, asserting that only the federal government could do so. In 1887, Congress passed the Interstate Commerce Act, which railroad barons found more appealing than the more restrictive state law."[78] The *Wabash* case ruled that Illinois could not regulate the Wabash Railroad as it interfered with interstate commerce. According to John Howard Brown, there "continued [to be] public anger over unfair railroad rates [which] prompted Illinois Senator Shelby M. Cullom held the hearings that led to the enactment of the Interstate Commerce Act" because of the result of the *Wabash* case and the concerns of the public.[79] The Interstate Commerce Act clearly defined the parameters in which Congress had the power to regulate commerce through differentiating legal for the state to regulate versus legal for the federal government to regulate. Because of the Interstate Commerce Act of 1887, the railroads became the "first American industry subject to federal regulations and were required to inform the federal government of their rates. In addition, the act banned the railroads from charging different haul rates based on

78. "The Supreme Court Strikes down Railroad Regulation." History Matters - The U.S. Survey Course on the Web. (Accessed October 30, 2021).

79. The United States Senate. "The Interstate Commerce Act Is Passed." (U.S. Senate), December 12, 2019. https://www.senate.gov/artandhistory/history/minute/Interstate_Commerce_Act_Is_Passed.htm#:~:text=On%20February%204%2C%201887%2C%20both,%E2%80%9D%E2%80%94to%20regulating%20railroad%20rates.

distance."[80] In order to enforce the new regulation, the Interstate Commerce Act also created the Interstate Commerce Commission.

Interstate Commerce Act of 1887

As a means to respond to the pressures by the American public and especially the Greenbacks/ National Grange, President Grover Cleveland and Congress signed the Interstate Commerce Act in 1877. The Interstate Commerce Act created the Interstate Commerce Commission (ICC) as well. When Congress passed the Interstate Commerce Act, it utilized the Commerce Clause to grant Congress the power to regulate railroad rates. The creation of the Interstate Commerce Act and the Interstate Commerce Commission (ICC) acted as "the first halting steps towards coping with the monopoly power that was a consequence of the Second Industrial revolution."[81] The Interstate Commerce Act resulted from years of complaints upon states adoption of their own railroad regulations. The Interstate Commerce Act gave power to the Interstate Commerce Commission in an attempt to control and oversee the railroad rates charged. The Interstate Commerce Act's creation was an effort to prevent monopolies and to promote healthy competition by outlawing discriminatory rate-setting as described above.

The Creation of the Interstate Commerce Commission (ICC)

The Interstate Commerce Commission had been commissioned in order to investigate interstate shipping "forcing railroads to make their rates public, and suing in

80. Longley, Robert. "The Granger Laws and the Granger Movement." (Accessed November 1, 2021).

81. John Howard Brown. "The 'Railroad Problem' and the Interstate Commerce Act." 7.

court when necessary to make companies reduce 'unjust or unreasonable rates.'"[82]According to the Federal Register, the Interstate Commerce Commission "established as a result of mounting public indignation in the 1880s against railroad malpractices and abuses."[83] The ICC evolved with the times to not only include the railroads but also airplanes, and it acted with the intent to "broaden Supreme Court interpretations of the Commerce Clause."[84] With the creation of the ICC, the Senate passed the Cullom Bill in 1886 for the creation of the commission. The original powers granted to the ICC included the ability to "investigate the alleged railroad abuses and develop policies to ameliorate them along the lines of the Massachusetts commission."[85]

The Interstate Commerce Commission can arguably be viewed as possessing delegated powers by Congress with regulatory powers granted to the commission with the intent for its performance to establish "concrete" practice of statutory standards of commercial trade regulations. The ICC's powers were a "delegation of legislative authority and the exercise of mixed governmental functions" strengthened the ICCs

82. Edwards, Rebecca, Eric Hinderaker, Robert O. Self, and James A. Henretta. "Chapter 16: Industrial America: Corporations and Conflicts." In *America's History*, 493.

83. "Federal Register: Agencies - Interstate Commerce Commission," Federal Register: The Daily Journal of the United States Government, accessed October 9, 2021, https://www.federalregister.gov/agencies/interstate-commerce-commission.

84. "Federal Register: Agencies - Interstate Commerce Commission," Federal Register: The Daily Journal of the United States Government, accessed October 9, 2021.

85. John Howard Brown. "The 'Railroad Problem' and the Interstate Commerce Act." 17.

powers and scope.[86] The ICC has been described as "a regulatory tribunal, with respect to both the statutory basis of its authority and the character of its administrative performance" in which the agency itself was an unprecedented creation.[87] As an administrative law quality, the ICC possessed unprecedented administrative power with its purpose in assisting with regulation of the railroads and other methods of transportation to attempt to prevent monopolies and price discrimination. The powers of the ICC as an administrative agency had been made possible through the "traditional legal processes grounded in the supremacy of the courts" and has assisted in the creation of other administrative agencies.[88]

The passage of the Interstate Commerce Act allowed for Congress to strengthen control over interstate commerce via railroad practices being regulated by the ICC. Not only did it allow for Congress to become more involved with the regulation of the railroads but it illuminated the possibilities of expanding the powers of the Commerce Clause to more national crises. With the growth of the country, the U.S. Senate recalls that, "the national economy grew much more integrated, making almost all commerce interstate and international. The nation rather than the Constitution had changed. The development turned the Commerce Clause into a powerful legislative tool for addressing

86. Sharfman, I. L. "The Interstate Commerce Commission: An Appraisal." *The Yale Law Journal* 46, no. 6 (1937): pg. 919. https://doi.org/10.2307/792048.

87. Sharfman, I. L. "The Interstate Commerce Commission: An Appraisal." *The Yale Law Journal* 46, no. 6 (1937): 915.

88. Sharfman, I. L. "The Interstate Commerce Commission: An Appraisal." *The Yale Law Journal* 46, no. 6 (1937): 919.

national problems."[89] The creation of this act reflects the turning point in our country's history on its growing wealth, growing land, growing prosperity. This act transformed the usage of the Commerce Clause from a dormant clause to a massively employed tool on national issues. The Interstate Commerce Clause ultimately strengthened the usage of the Commerce Clause as it "showed that Congress could apply the Commerce Clause more expansively to national issues if they involved commerce across state lines."[90]

Progressive Era: Anti-Trust to Anti-Vice

The Progressive Era, a time of great social and political reform in the United States that took place from 1890 to 1920. The entry into the Progressive Era transformed the United States as it shifted away from the frontier and into "a predominantly urban, centralized, multi-ethnic, consumption-oriented, secular, and relativist society… the Protestant values of thrift and austerity were undermined by the new forces of advertising, consumerism, and commercialism."[91]

In this era, the Commerce Clause's scope adjusts with the motives of regulating indecent commerce. Since the Commerce Clause's application expanded in interpretation, the scope also expanded. The motives of political leaders and social goals for the country influenced the interpretation of the Commerce Clause differently in order

89. "The Interstate Commerce Act Is Passed." (U.S. Senate), December 12, 2019. https://www.senate.gov/artandhistory/history/minute/Interstate_Commerce_Act_Is_Passed.htm#:~:text=On%20February%204%2C%201887%2C%20both,%E2%80%9D%E2%80%94to%20regulating%20railroad%20rates.&text=The%20bill%20passed%20the%20House%2C%20but%20not%20the%20Senate.

90. "The Interstate Commerce Act Is Passed." U.S. Senate: The Interstate Commerce Act Is Passed, December 12, 2019.

91. Mark Thomas Connelly, *The Response to Prostitution in the Progressive Era* (Chapel Hill, North Carolina: University of North Carolina Press, 2012).

to regulate “anti-vice" which does not remain limited to just legitimate commerce, but also illegitimate commerce defined as vice by anti-vice movements. The emergence of the Anti-Vice movement coincided with the desire to regulate railroads and to ensure social purity. Commerce’s definition transforms throughout time, however, the Commerce Clause should not reach outside of the original scope to include sexual policing through legislation to expand the scope of the Commerce Clause. With the regulation of commerce, it took a turn in regulation of alcohol, sex work, and more.

Anti-vice reformers responded to the growing sporting culture that celebrated male conviviality via drinking alcohol, prostitution, and gambling. The very first “specialized” anti-prostitution organization sprouted in the mid-1820s called “The American Society for the Prevention of Licentiousness and Vice and the Promotion of Morality imitated the organizational structure of the American Temperance Society… illustrating the tacitly understood relation of prostitution and temperance.”[92]Just like the temperance movement, the American Society for the Prevention of Licentiousness and Vice and the Promotion of Morality had been widely supported and headed by mostly religious groups. These organizations believed that success should be achieved through modeling as twin forces of “social purity and temperance movements, with their common institutional origins, related alcohol and prostitution as ‘twin evils.’ Temperance and social purity were twin forces to combat evil.”[93] The strong efforts of these purity reformers which geared towards altering the function of the government to accommodate

92. David J. Pivar, “The Genesis of Purity Reform,” in *Purity Crusade: Sexual Morality and Social Control, 1868-1900* (Westport, Connecticut: Greenwood Press, 1973), 25.

93. David J. Pivar, “The Genesis of Purity Reform,” in *Purity Crusade: Sexual Morality and Social Control, 1868-1900,* pp. 25.

for the reformer's goals to purify the American polity. Reformers argued on the morality of the actions which they fight against have been plagues to society and need to be eradicated through passing legislation to support their effort of purifying society. Connecting with the temperance movement, antivice movements argued that "private interests must be subservient to the general interests of the community' and necessitated action 'to prevent the moral diseases which lead to misery and crime."[94] Chief among their targets was the trade in interstate gambling—the lotteries.

As early as 1812, lottery ticket sales by the states had been identified as a power of the states that may impact interstate commerce which allowed the lottery to be declared unlawful. In *Livingston v. Van Ingen,* the topic of the lottery included with the argument by Chief Justice Kent stated that "the [state] legislature may declare that it shall be unlawful to vend lottery tickets, unless they be tickets of lotteries authorized by a law of this state, and who will question the validity of the provision? But supposed Congress should deem it expedient to establish a national lottery, and should authorize persons in each state to vend the tickets, this would so far control the state prohibition, and leave it in full force as to all other lotteries."[95] The *Livingston* case utilized the lottery example in order to establish a comparison of national and state laws and how it can be resolved with comparison to the steamboat situation in New York. Lotteries became a focal point of concern with the religious revivalism of the Second Great Awakening and the

94. Richard F. Hamm, *Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity, 1880-1920,* version Google Books (Chapel Hill, North Carolina: University of North Carolina Press, 1995).

95. Article 1, Section 8, Clause 3: Livingston v. Van Ingen," (The Founders' Constitution), accessed October 2, 2021.

antigambling movement promoting the "abolition of lotteries."[96] The early lotteries in America became widespread and with that

> fraud and corruption became a problem; some prizes were considerably less than what was promised, and in some cases, there were no prizes awarded at all. Religious leaders objected to lotteries because of their general stance against all forms of gambling, and the anti-lottery sentiment became part of the movement toward general social reform that also called for temperance, women's rights, education reform, prison reform, and the abolition of slavery. By the mid-1800s, most states had abolished lotteries.[97]

Around 1840, states had begun to "refuse licenses to new lotteries and then to ban them… twelve states prohibited lotteries and the movement put them on the defensive."[98] Louisiana has one of the most well-known lotteries because of its reputation for corruption. Created in 1868, the Louisiana State Lottery Company "became a powerhouse in that state's government and widely engaged in its trade in other states."[99] The lottery had been identified as the powerhouse in 1868 and it returned in 1880 where it brought back problems of the past with corruption and fraud. This prompted Congress to take action. Congress "banned the mailing of lottery materials in 1890, and five years

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96. Britannica, T. Editors of Encyclopedia. "Second Great Awakening." Encyclopedia Britannica, May 8, 2019. https://www.britannica.com/topic/Second-Great-Awakening. The Second Great Awakening brought about many efforts to squash vice in the U.S. It took place from 1795 to about 1835 and was of Protestant religious revival which influenced "moral and philanthropic reforms, including temperance and the emancipation of women."

97. Randy Bobbitt, "Pie in the Sky," *Lottery Wars: Case Studies in Bible Belt Politics, 1986-2005* (Lanham, Maryland: Lexington Books, 2007), 2.

98. Richard F. Hamm, *Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity, 1880-1920*, version Google Books (Chapel Hill, North Carolina: University of North Carolina Press, 1995), 21.

99. Richard F. Hamm, *Shaping the Eighteenth Amendment: Temperance Reform, Legal Culture, and the Polity, 1880-1920*, version Google Books (Chapel Hill, North Carolina: University of North Carolina Press, 1995), 21.

later it banned the interstate transportation of lottery tickets."[100] The significance of this action by Congress rests on the fact that Congress interpreted the lottery material sales as items impacting interstate commerce by the methods the lottery tickets had been transported. Through Congress' application of the Commerce Clause, Congress had the power through interpretation over all state's lotteries.

The Federal Lottery Act of 1895 prohibited lottery ticket sales and sending of lottery tickets across state lines.[101] The case *Champion v. Ames* in 1903 commenced when Charles Champion violated the Federal Lottery Act of 1895 through his transportation of lottery tickets across state lines when he violated section 5440 of the statute which stated that "'if two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object o the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand

100. Randy Bobbitt, "Pie in the Sky," *Lottery Wars: Case Studies in Bible Belt Politics, 1986-2005*, 2.

101. 28 Stat. 963 The Federal Lottery Act of 1895 stated that "'An Act for the Suppression of Lottery Traffic through National and Interstate Commerce and the Postal Service, Subject to the Jurisdiction and Laws of the United States.'" The first section of the act 1895, upon which the indictment gained its power goes as follows: "§ 1. That any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one state to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one state to another in the same, shall be punishable in [for] the first offense by imprisonment for not more than two years, or by a fine of not more than one thousand dollars, or both, and in the second and after offenses by such imprisonment only."

dollars and not more than ten thousand dollars, and to imprisonment not more than two years."[102] He had carried lottery tickets from Dallas, TX to Fresno, CA and offered prizes through the drawing of Pan-American Lottery Company lottery tickets from Asuncion, Paraguay. The question debated by the Supreme Court concerned the transportation of lottery tickets by "independent carriers" and if lottery tickets could be considered commerce that may be regulated by Congress under the Commerce Clause.[103] The Justices who ruled over the case consisted of Chief Justice Melville Fuller who dissented along with Justice David Josiah Brewer, Justice George Shiras, and Justice Rufus Wheeler Peckham. The results of the vote ended with a five-to-four vote. The majority consisted of Justice Marshall Harlan I, Justice Henry Billings Brown, and Justice Edward Douglass White.

In the 1903 case *Champion v. Ames*, lottery tickets became considered "subjects of traffic" in which the Court decided that lottery tickets may be regulated under the Commerce Clause. The Court ruled that "lottery tickets are subjects of traffic among those who choose to buy and sell them, and their carriage by independent carriers from one state to another is therefore interstate commerce which Congress may prohibit under its power to regulate commerce among the several states."[104] The case escalated as an appeal to the Supreme Court to call into question the constitutionality of the Federal Lottery Act of 1895 had been used to prosecute Mr. Champion. Within this case, the Supreme Court relied upon *Gibbons v. Ogden* as the precedent case defining the scope

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102. Champion v. Ames, 188 U.S. 321, 321 (1903)

103. "Champion v. Ames." Oyez. Accessed November 1, 2021. https://www.oyez.org/cases/1900-1940/188us321.

104. Champion v. Ames, 188 U.S. 321, 321 (1903)

and meaning of the Commerce Clause of the constitution. Justice Harlan quoted Chief Justice Marshall when Marshall stated that

> the subject to be regulated is commerce, and our Constitution being, as aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. To counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation… Commerce, undoubtedly, is traffic, but it is something more; it is intercourse…. The subject to which the power is next applied is to commerce 'among the several states… commerce among the states cannot stop at the external boundary line of each state but may be introduced into the interior."[105]

The usage of *Gibbons v. Ogden* portrayed the interpretation of the court of how the Commerce Clause may be properly used. Congress had suffered criticism for the creation of the Federal Lottery Act of 1895 where it was believed the act had been used to prosecute in favor of the agendas of the state. The Supreme Court also cited *Brown v. Maryland* in 1954 strengthened the argument for the constitutionality of their actions which demonstrated a deeper awareness of how the Commerce Clause changed from the original interpretation of the Constitution. Where the Supreme Court discussed the Commerce Clause as the ability of Congress to regulate commerce, it did not discuss "the power to prohibit." Legal scholars Barry Friedman and Genevieve Lakier argued the Supreme Court "simply countered a federal regulatory ban on the interstate shipment of lottery tickets in a situation in which all states already had banned the lottery. The federal statute at issue in *Champion* [consisted of] a 'helper' law [that facilitated] state choices, not barring them."[106]

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105. Champion v. Ames, 188 U.S. 321, 321 (1903).

106. Barry Friedman and Genevieve Lakier, "'To Regulate," Not 'to Prohibit': Limiting the Commerce Power: The Supreme Court Review: Vol 2012," The

The Commerce Clause also experienced adjustments in scope stemming from ulterior motives of politicians influenced by purity movement groups that resulted in different interpretations of written laws and with the constitution itself. Adrian Vermeule, the John H. Watson Professor of Law at Harvard Law School stated that "once a constitution is in place, actors will propose competing master principles of constitutional interpretation. Among the possible principles, some will take a precautionary form, urging that the constitution be 'strictly' or 'narrowly' construed to prevent political risks. In the history of American constitutionalism, precautionary master principles have taken two main forms: one based on federalism, the other on individual rights."[107] The Commerce Clause's interpretation adjusts to best fit the topic desired to be considered regulated "commerce." The presence of this flexible interpretation of the Constitution concept can be identified throughout history. For example Norman Williams, the Assistant Professor of Law at Willamette University College of Law, stated that as "the Supreme Court has applied a virtually fatal form of strict scrutiny to state laws that discriminate against interstate commerce and a more forgiving balancing test that practically rubber-stamps other laws that only incidentally affect interstate commerce."[108] The doctrine of commerce originally weighed the validity of the Commerce Clause's enforcement against a state law by whether the state fabricated a commercial regulation or if the state simply employed police powers. With ideology like the precautionary

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Supreme Court Review, January 1, 1970, pp. 257. https://www.journals.uchicago.edu/doi/abs/10.1086/670798.

107. Adrian Vermeule, Precautionary Principles in Constitutional Law, 4 J. Legal Analysis 181, 188 (2012)

108. Norman R. Williams, The Dormant Commerce Clause: Why Gibbons v. Ogden Should be Restored to the Canon, 49 St. Louis U. L.J. (2005).

principle, employing the principle to Commerce Clause becomes beneficial with determining "the probability of the harm occurring, as opposed to the consequences of its occurrence."[109]This ideology practiced with the creation of the Constitution and also with the implementation and interpretation of the Commerce Clause have benefits and drawbacks such as the expansion of scope to encompass regulation against illegitimate commerce.

Taking Aim at Prostitution

Historically, the definition of prostitution has not changed much but, it varies based off of the sexual orientation of the individual. The Oxford English Dictionary provides the definition dating back as far as the 1500s defining "...the action of prostituting or condition of being prostituted; the practice or occupation of engaging in sexual activity with someone for payment; (in early use also more generally) licentiousness, lewdness, harlotry."[110] Prostitution's presence viewed by society as the "staple of Anglo society" especially with examples of "New Orleans's Storyville" which gained "an international reputation by the 1890s as the premier sex tourism destination with bordellos of every type that catered to the desire for interracial sex."[111] The belief that prostitution and alcohol as vices held prevalence which increased corruption and degraded America's morality. The motivation to enter prostitution, if not already a sex

109. Adrian Vermeule, Precautionary Principles in Constitutional Law, Journal of Legal Analysis, 185.

110. "Prostitution, n.". OED Online. September 2021. Oxford University Press. https://www-oed-com.libproxy.txstate.edu/view/Entry/153086?redirectedFrom=prostitution (accessed October 11, 2021).

111. Jessica R. Pliley, *Policing Sexuality: The Mann Act and the Making of the FBI* (Cambridge, Massachusetts: Harvard University Press, 2014), pp. 11.

worker, included the desire to obtain financial stability with the economic precarity of the nineteenth and early twentieth centuries. In “the rowdy world of Gold Rush San Francisco. Women’s limited economic opportunities and low wages made prostitution an important survival strategy for those caught in the vicissitudes of nineteenth-century life that was characterized by extreme economic fluctuations.”[112] The prominence of prostitution’s roots being seated in the economic turbulence of the time period can be shown through the statistic that “between 5 and 10 percent of all women between the ages of fifteen and thirty years old in nineteenth-century New York are estimated to have been engaged in prostitution at one point or another.”[113]

Some anti-vice reformers worried that some women were forced into prostitution, a concept called “white slavery” at the time. Ruth Rosen explains this issue perfectly when stating “the idea of white slavery also served, however, to deflect attention away from the very real social and economic factors that led women into prostitution.”[114] Society avoided recognition of the reasons for which women became sex workers such as economic factors, became the breadwinner of the family by loss of a relative, and other paths that lead to this career decision. The monetary benefits outweighed the benefits of female factory workers and other job pay rates.

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112. Jessica R. Pliley, *Policing Sexuality: The Mann Act and the Making of the FBI*, 11.

113. Jessica R. Pliley, *Policing Sexuality: The Mann Act and the Making of the FBI*,11.

114. Rosen, Ruth. 1982. *The Lost Sisterhood : Prostitution in America, 1900-1918*. Johns Hopkins University Press. https://search-ebscohost-com.libproxy.txstate.edu/login.aspx?direct=true&db=cat00022a&AN=txi.b1256291&site=eds-live&scope=site.

Prostitution became the focus of the anti-vice movements while the temperance and later the prohibition movement fixated on alcohol. The focal point of blame placed on prostitution originated with the belief that prostitution acted as "the general corruption of social life" and reformers sought its eradication.[115] Prostitution became known as a social evil, illegitimate commerce, and a form of illegitimate labor that needed to be prohibited. Anti-vice supporters offered multiple arguments to fight prostitution. Anti-vice arguments and efforts gained strength from health and medical professionals' support. Reformers at the beginning of the 20th century "represented the Social Evil as a moral contagion: an 'infectious disease' and a 'curse', which is more blasting than any plague or epidemic. Venereal disease was wholly identified with prostitution and feared with an intensity disproportionate to its probable incidence."[116] Some connected health with morality like Elizabeth Blackwell where "she preached that morality and physical fitness produced in man physical and moral perfection, but because she was less fanatical and more sophisticated than [Sylvester] Graham, her secular language was more acceptable to the medical profession."[117] The connection of health with morality pairs with anti-vice and then influenced through the medical background in eradicating prostitution through health examinations and the research dedicated to the spread of venereal diseases by prostitutes and especially to "honorable" men.

115. David J. Pivar, "The Genesis of Purity Reform," in *Purity Crusade: Sexual Morality and Social Control, 1868-1900*, 34.

116. Ruth Rosen, *The Lost Sisterhood: Prostitution in America, 1900-1918*, Johns Hopkins University Press.

117. David J. Pivar, "The Genesis of Purity Reform," in *Purity Crusade: Sexual Morality and Social Control, 1868-1900*, 39.

These social hygiene efforts led the creation of the American Society of Sanitary and Moral Prophylaxis in 1905 which "was dedicated to 'preventing or diminishing the spread of diseases which have their origin in Social Evil."[118] The organization's prominence grew to include over 700 members by 1910 and established multiple branches around the country in cities like: Baltimore, Chicago, Detroit, Indianapolis, Milwaukee, Philadelphia, Pittsburgh, Portland, Oregon, and St. Louis. It even achieved state level branches with California, Connecticut, Indiana, New Jersey, Texas, and West Virginia. The Progressive Era's rigorous efforts to crack down on prostitution from multiple angles also led to the new idea of depicting red-light districts as marketplaces in order to define them in the economic sphere. White slavery writers attacked not only the vice itself but the businessmen associated with these "marketplaces" who had been profiting off of the "degradation of women" and "by emphasizing commercialization over commodification, and focusing on profiteers instead of patrons, white slavery writers dismissed the consumer's critical place in the district economy.[119] Within the 1890s, municipal politicians had created vice districts and eventually the creation of [fears of a] Vice Trust bloomed which included "anyone who enabled prostitution's commercial production."[120] Beginning with the entrance into the Progressive Era, the new narrative formulated posed an economic attack on vice.

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118. Mark Thomas Connelly, *The Response to Prostitution in the Progressive Era* (Chapel Hill, North Carolina: University of North Carolina Press, 2012).

119. Keire, Mara L. "The Vice Trust: A Reinterpretation of the White Slavery Scare in the United States, 1907-1917." *Journal of Social History* 35, no. 1 (2001): 5–41. http://www.jstor.org/stable/3789262.

120. Keire, Mara L. "The Vice Trust: A Reinterpretation of the White Slavery Scare in the United States, 1907-1917." *Journal of Social History*.

White Slave Traffic Act (the Mann Act): Using the Commerce Clause to Combat Vice

State legislatures began passing legislation against prostitution. But the concern continued to grow with the fears of sex trafficking and the impression that it would become an international concern. Prostitution's visibility spread across the United States which carried the White Slavery narrative further. The term 'white slavery' became "a term that evoked racialized understandings of female vulnerability, prompted vigorous debates about prostitution, rampant sexuality, and urban life, and conjured a particular set of conceptions that rendered women as both victims and as subjects of sexual surveillance."[121] According to Jessica Pliley's *Policing Sexuality*, the white slavery narrative "assert[s] -in various forms- that vicious procurers seduced, coerced, lured, tricked, or forced girls and young white women into brothels far from their homes and the protections those homes offered."[122] This narrative rejected the possibility that there exists a societal problem propelling women into prostitution and instead displays a nightmarescape of sexual slavery, thereby prompting widespread support against the depicted evil of white slavery. This depiction peaked between 1910 and 1913. With this new era blanketing the United States, passions from the past gain momentum and power with the times of progress. The fears of the prominence of prostitution and vice gained

121. Jessica R. Pliley. *Policing Sexuality*. Cambridge, Massachusetts: Harvard University Press, 2014. https://search-ebscohost-com.libproxy.txstate.edu/login.aspx?direct=true&db=nlebk&AN=781904&site=eds-live&scope=site.

122. Jessica R. Pliley. *Policing Sexuality*. Cambridge, Massachusetts: Harvard University Press, 2014.

federal level attraction in the early 1900s and especially at the genesis of the Mann Act and the power of the Commerce Clause to regulate interstate trade.

In the early 1900s until the New Deal Era, Congress' powers with interstate commerce had been very limited compared to today. Back in the 1910s many "doubted that Congress could invoke the Commerce Clause of the Constitution to interfere with the traditional police functions of the states."[123] The separation between federal and state governments still divided heavily without the overlap of the federal legislature's power to impact and regulate interstate commerce. However, the Lottery cases convinced some that Congress could regulate immoral traffic or commerce.

Illinois Representative James Mann introduced the White Slave Traffic Act, also known as the Mann Act, into Congress in 1909. He helped lobby for white slave traffic acts as well as pandering laws for both the federal and local levels of government.[124] James Mann "invoked the Commerce Clause to felonize the use of interstate or foreign commerce to transport women for immoral purposes" in which its main concerns consisted of prostitution, human trafficking, and regulating immorality.[125] James Mann intentionally framed the Mann Act of 1910 within the Commerce Clause. Mann wanted to incorporate prostitution like the lottery and "like other corporate combinations,

123. William Seagle. "The Twilight of the Mann Act." *American Bar Association Journal* 55, no. 7 (1969): 652. https://search-ebscohost-com.libproxy.txstate.edu/login.aspx?direct=true&db=edsjsr&AN=edsjsr.25724839&site=eds-live&scope=site.

124. "Pandering Legal Definition," Merriam-Webster (Merriam-Webster), accessed October 2021, https://www.merriam-webster.com/legal/pandering. Pandering laws defined "the act or crime of recruiting prostitutes or of arranging a situation for another to practice prostitution."

125. "Mann Act," Legal Information Institute (Legal Information Institute), accessed October 2021, https://www.law.cornell.edu/wex/mann_act.

commercialized vice was an organized and interconnected business that was national in scope and exceeded the jurisdiction of local police powers."[126]

The Mann Act of 1910, also known as the White Slave Traffic Act, under Title 18 Chapter 117 of the United State Code Annotated § 2421 states that "whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individuals engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both".[127]

The federal government had been forced to consider what would happen if they did not act upon the white slavery hysteria and the possibility of jeopardizing the safety of the American people. In this situation, Congress reviewed the Commerce Clause with the precautionary principle " as to have a limited domain, applying to particular classes of problems or controversies, to particular clauses of the written constitution, or to particular governmental powers."[128]

Mann Act Introduced to Congress: Congressional Debate About the Constitutionality

126. Keire, Mara L. "The Vice Trust: A Reinterpretation of the White Slavery Scare in the United States, 1907-1917." *Journal of Social History*.

127. 18 U.S.C.A. § 2421 (West)

128. Adrian Vermeule, Precautionary Principles in Constitutional Law, 4 J. Legal Analysis 181, 190.

The introduction of the Mann Act to Congress in 1909 triggered debate about the constitutionality of the proposed bill. James Mann and his allies argued that the Commerce Clause empowered Congress to prohibit interstate immoral trade James Mann countered by saying that he opposed the white-slave trade and believed prostitution to be an evil that "must be eradicated under the police powers, and those powers are amply conferred upon the States. The Congress ought not to assume jurisdiction of this subject by broadening the scope, which included all persons, and then attempt to bring the subject under the interstate-commerce clause of the Federal Constitution."[129] During this debate, Mr. Bartlett spoke deeply on the topic and the efforts to protect against the immigration of immoral acting individuals a paramount aim to protect the health and safety of the nation. Mr. Bartlett reflected on the original intent of the Commerce Clause established by Chief Justice Marshall from mentioning "for under the construction given to commerce and the commerce clause of the Constitution, under the views so frequently expressed by Chief Justice Marshall, under no decision of that court can you bring this provision within the power of Congress to enact" as the actions outlined by the new provision Mr. Bartlett believed it to be granted as policing power strictly to the states.[130] Not only did he cite Chief Justice Marshall here but also again when he quoted Marshall from the decision in *Gibbons v. Ogden*. He quoted Chief Justice Marshall when he said that "immorality, vice, pauperism, crime, [should] not [be] things to be regulated by the

129. Congress. "45 Cong. Rec. (Bound) - House of Representatives: January 11, 1910". Government. U.S. Government Publishing Office, January 24, 1910. https://www.govinfo.gov/app/details/GPO-CRECB-1910-pt1-v45/GPO-CRECB-1910-pt1-v45-17-2

130. Congress. "45 Cong. Rec. (Bound) - House of Representatives: January 11, 1910". Government. U.S. Government Publishing Office, January 24, 1910.

United States, but…things to be prohibited by the power having jurisdiction to prohibit and punish them."[131] Not only did Mr. Bartlett draw from Chief Justice Marshall, but he called upon previous decisions made during the lottery cases where Justice Harlan delivered that the "lottery tickets were subjects of interstate traffic, and that Congress may prohibit their carriage from State to State" in order to convey the difference between subjects of interstate traffic from "the power to prohibit the transportation of diseased animals and infected goods over railroads or in steamboats is an entirely different thing, because they would in themselves be injurious to the transaction of interstate commerce, and are especially commercial in their nature."[132] Mr. Bartlett's quotations of Justice Marshall continued on throughout his speech and he also cited multiple passages to cases such as *New York v. Miln*, the *Passenger* cases, and the Lottery cases.[133]

Opposition to the Mann Act focused on the ways the proposed law would infringe on the policing power of states. Of those who voiced dissent against the bill on this date, Mr. Charles Bartlett of Georgia vocalized his objections to the parameters set by the bill's new provisions the most. Mr. Bartlett of Georgia voiced the concern that the newest provisions in section three (the white slave traffic provision) unconstitutionality grounded on the separation of police powers. Mr. Bartlett stated that if he were to support the bill (as is), then he would have gone "beyond the jurisdiction of this committee or to aid Congress to violate the provisions of the Constitution and assume the police powers of

131. Congress. "45 Cong. Rec. (Bound) - House of Representatives: January 11, 1910". Government. U.S. Government Publishing Office, January 24, 1910.

132. Congress. "45 Cong. Rec. (Bound) - House of Representatives: January 11, 1910". Government. U.S. Government Publishing Office, January 24, 1910.

133. Mr. Bartlett carried on for pages detailing the risks of Congress assuming the policing powers and he cited dozens of cases to support his objections.

the States."[134] Another vocal objection came from Mr. William Emmanuel Richardson (U.S. House member from Pennsylvania) because of the fundamental principles of the bill and argued that the bill sought to exercise police powers. Mr. Richardson voiced trust in the American society on upholding women's chastity and sanctity. Mr. Richardson even detailed the example of a man purchasing a railroad ticket to let a woman from another state travel to another and viewed the action as harmless. Mr. Richardson states that "I ask how many different acts of citizens may induce that woman to take the cars and leave her state? Is the federal statute to punish all these citizens for helping to obstruct traffic and commerce between the States?"[135] Mr. Richardson voiced his dissent on the bill and named previous cases that established policing powers granted to the States.

The verbiage of the Mann Act of 1910 has been altered many times since its creation in order to allow for more straightforward statutory interpretation and to lessen the scope of prosecution. The original wording to this Act prompted prosecution of "interstate and foreign commerce 'for the purpose of prostitution or debauchery, or for any other immoral purpose'" and believed "the language of the statute… has been popularly assumed to reach every conceivable form of sexual immorality which can be committed in or following interstate transit."[136] The diction of this act continued to be very vague which allowed for the prosecution of many different cases ranging from

134. Congress. "45 Cong. Rec. (Bound) - House of Representatives: January 11, 1910". Government. U.S. Government Publishing Office, January 24, 1910.

135. Congress. "45 Cong. Rec. (Bound) - House of Representatives: January 11, 1910". Government. U.S. Government Publishing Office, January 24, 1910.

136. William Seagle. "The Twilight of the Mann Act." *American Bar Association Journal* 55, no. 7 (1969): 641.

sexual escapades over state lines, the transport of women for the intentions of prostitution, and sex trafficking. Vague terms mentioned in the act such as “debauchery” which meant “vicious indulgence in sensual pleasures” or “seduction from duty, integrity, or virtue; corruption”.[137]

The Mann Act is a problem for those who have been prosecuted under the statute improperly as the intent of the Act’s creation was to eliminate the risk of sex trafficking and deter/ eliminate prostitution. The vague verbiage of the scope allowed for this misapplication and for a broad scope to be applied with case discretion. The act exemplified a failure in implementation by altering the interpretation of the law to fit desired results on a case-by-case basis for the prosecution of different races, supposed illegal activity such as regulating “commercialized vice”, and “immoral” sexual activity. The evidence of this failure becomes visible with the application of the interstate commerce aspects to the law to characterize transportation of “any individual in interstate or foreign commerce, or in any Territory or Possession of the United States…” then queuing the interpreted definitions of what the court then considers “debauchery,” “prostitution,” and what the court considers “any other immoral purpose.” This, the aspect of “immoral purpose”, being especially ambiguous provides for leeway of interpretation to prosecute anything the court deems an immoral purpose of transportation.

Passed in 1910, this law has become one of the most widely known by citizens and highly disliked especially within the 1920s as it became “a symbol of sexual

137. "Debauchery, n.". OED Online. September 2020. Oxford University Press. https://www-oed-com.libproxy.txstate.edu/view/Entry/47861?redirectedFrom=debauchery (accessed November 22, 2020).

oppression, and [used] to attack it was a sure sign of sexual emancipation."[138] A huge criticism of the act stemmed from the belief that Congress's intentions aimed at criminalizing travel with the purpose of taking a sexual getaway and further evidenced by the fact that unmarried couples could be prosecuted under the new law.[139]

Sexual Policing: Utilizing the Mann Act

The enforcement of the Mann Act against transgressions against marriage had been supported through the Department of Justice because "the demands of ordinary American citizens who wanted the federal government to protect women, family, and the home, and to encourage male respectability and responsibility."[140] Those who supported this act highly supported the white slavery narrative. The act had been promoted by Americans who, according to historian Kelli McCoy "felt threatened and were appalled by the trends of commercialization, dehumanization, and moral corruption in American society… Those who felt increasingly dominated by corrupt political machines and faceless industrial trusts may have identified with the white slave as a passive victim of uncontrollable and sinister forces."[141] Actions of anti-vice organizations became the

138. William Seagle. "The Twilight of the Mann Act." *American Bar Association Journal* 55, no. 7 (1969): 641.

139. William Seagle. "The Twilight of the Mann Act." *American Bar Association Journal* 55, no. 7 (1969): 641.

140. McCoy, K. (2010). "Claiming Victims: the Mann Act, Gender, and Class in the American West", 1910-1930s. *UC San Diego*. ProQuest ID: McCoy_ucsd_0033D_11007. Merritt ID: ark:/20775/bb9864803d. Retrieved from https://escholarship.org/uc/item/8f60q9gt

141. McCoy, K. (2010). "Claiming Victims: the Mann Act, Gender, and Class in the American West", 1910-1930s.

response to these fears and the organization's efforts geared towards exterminating threats to American morality.

Enforcement of the Mann Act has produced thousands of federal cases. The multiple sections of the Mann Act allow for various criminal offenses to be prosecuted. At the early years of the enactment, prostitution, and the obtaining of prostitution by crossing state lines heavily punished violators. For instance, with the notorious Jack Johnson case, understanding the language of the Mann Act had been very ambiguous and allowed for easy convictions with the phrase "any other immoral purpose." Circuit Judge Francis Baker stated in the opinion in the *Johnson* case how "by noting current history we may be aware that the act, when applied to merely unlawful sexual intercourse, has been used as an instrument for blackmail or other oppressions".[142] The grounds in which Jack Johnson had been prosecuted for "commercialized vice" fell under the Mann Act with "the importation of women 'for the purpose of prostitution or any other immoral purpose.'"[143] However, in the years after the Johnson case, much of the cases where prosecuting included "transgressions against the institution of marriage."[144]

***Hoke v. United States* (1913)**

The question of the Mann Act's constitutionality originated in *Hoke v. United States* in 1913 and was properly cited as evidence within the *Athanasaw case*. The *Hoke* case was brought on after the defendants Effie Hoke and Basile Economides were charged under the Mann Act for "enticing women to go from Louisiana to Texas in

142. *Johnson v. U.S.*, 215 F. 679 (7th Cir. 1914)

143. *Johnson v. U.S.*, 215 F. 679 (7th Cir. 1914)

144. McCoy, K. (2010). "Claiming Victims: the Mann Act, Gender, and Class in the American West", 1910-1930s.

interstate commerce for the purpose of prostitution."[145] The arguments of the defendants included questioning whether the Mann Act was constitutional. The *Hoke case* decided that "commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons as well as property" and that the powers granted to the states are required to "promote the general welfare, material and moral."[146] The rationale to this opinion explained that women, though not "articles of merchandise, the power of Congress to regulate their transportation in interstate commerce is the same, and it may prohibit such transportation if for immoral purposes."[147] This logic solidified the constitutionality of the Mann Act of 1910 as a method of regulating interstate commerce to promote a healthy general welfare and moral society.

***Athanasaw & Sampson v. United States* (1913)**

In the same year as the *Hoke* case, another example of Supreme Court attention to the constitutionality of the Mann Act was *Athanasaw & Sampson v. United States.* Through the vague language of the Mann Act, specifically the phrases prohibiting immorality empowered by the Commerce Clause, the terms "debauchery", "prostitution", and "any other immoral purpose" strengthened the ability to prosecute and drew constitutional scrutiny. The violation occurred in early October 1911 when Louis Athanasaw, owner of the Imperial, employed Agnes Couch and instructed her to dress in

145. Hoke v. United States - 227 U.S. 308, 33 S. Ct. 281 (1913) https://www.lexisnexis.com/community/casebrief/p/casebrief-hoke-v-united-states.

146. "Hoke v. United States, 227 U.S. 308 (1913)." Justia Law. Accessed November 16, 2021. https://supreme.justia.com/cases/federal/us/227/308/.

147. "Hoke v. United States, 227 U.S. 308 (1913)." Justia Law. Accessed November 16, 2021.

costume and engage with customers flirtatiously.[148] The defendants, Louis Athanasaw and Mitchell Sampson, violated the Mann act after transporting "or caused to be transported, or aided in the transportation of, a girl by the name of Agnes Couch, from Atlanta, Georgia, to Tampa, Florida, for the purpose of debauchery."[149] As a testimonial witness, Agnes gave a compelling account of how Louis Athanasaw tried to pass her off and make money off of her sex acts with other men established evidence of Athanasaw's actions as a procurer.[150] The outcome of Athanasaw and Sampson's prosecution occured because he "induced or influenced her to enter into a life or condition of debauchery 'to induce or compel her to give herself up to debauchery'."[151] Agnes Couch exemplified the perfect victim of "white slavery" as a young seventeen-year-old white girl who had been lured to Florida on a false advertisement to join the "Imperial Muscial Company at the Imperial Theater."[152] After the conviction of Athanasaw and Sampson, the lawyers of the defendants appealed the case by arguing that the term "debauchery" was far too vague. Thus, as the case reached the Supreme Court it clarified the definition of debauchery in the legal sense to understand the prosecution of Louis Athanasaw.

The *Athanasaw & Sampson v. United States* case, generated numerous questions that concerned the constitutionality of the Mann Act. Justice McKenna delivered the

148. Pliley, Jessica R. 2014. Policing Sexuality: The Mann Act and the Making of the FBI. Harvard University Press.

149. Athanasaw v. United States, 227 U.S. 326, 328, 33 S. Ct. 285, 286, 57 L. Ed. 528 (1913)

150. "Athanasaw & Sampson v. United States, 227 U.S. 326 (1913)." *Justia Law*, Accessed Nov. 16, 2021, supreme.justia.com/cases/federal/us/227/326/.

151. "Athanasaw & Sampson v. United States, 227 U.S. 326 (1913)." *Justia Law*.

152. "Athanasaw & Sampson v. United States, 227 U.S. 326 (1913)," Justia Law.

opinion of the court during this case. He argued that the term 'debauchery' implied 'sexual intercourse.' The *Athanasaw case,* the language of the Mann Act had stirred questions of the act's constitutionality with certain phrases seen as unclear or vague. The *Athansaw* decision clarified the legal definition of "debauchery," while also affirming the constitutionality of the law. The prosecution of Athanasaw and Sampson resulted from the court's decision that transportation played a role in establishing the proof of intent to commit debaucherous activity and therefore, the proper application of the Mann Act necessitated prosecution.

United States v. Holte **(1915)**

In the *United States v. Holte case* of 1915, one man (Laudenschlefer) and one woman (Holte) were not considered victims of trafficking but rather, violators of the Mann Act. Laudenschlefer conspired with Clara Holte to transport Holte from Illinois to Wisconsin with the intent of prostitution with Clara Holte. Holte attempted to claim innocence as a victim and even stated that "although the offense could not be committed without her, she was no party to it, but only the victim."[153] The questions presented in this case dealt with whether "a woman assisting in her own illegal transportation can be prosecuted for conspiracy" and if the decision that "although the offense could not be committed without her, she was no party to it, but only a victim" was the correct ruling.[154] This appeal was rejected due to the penal code established on March 4th, of 1909 defining the word "conspire" to establish intent and justify the action of the lower courts. Justice Oliver Wendell Holmes delivered the court's opinion, saying, "suppose,

153. United States v. Holte, 236 U.S. 140, 35 S. Ct. 271, 59 L. Ed. 504 (1915)

154. "United States v. Holte, 236 U.S. 140 (1915)." Justia Law. Accessed December 3, 2021. https://supreme.justia.com/cases/federal/us/236/140/.

for instance that a professional prostitute, as well able to look out for herself as was the man, should suggest and carry out a journey within the act of 1910 in the hope of black-mailing the man, and should buy the railroad tickets, or should pay the fare from Jersey City to New York."[155] Holmes suggested that women are not always the victims in these situations or in life.

Justice Lamar dissented against the majority opinion and stated that "I dissent from the conclusion that a woman can be guilty of conspiring to have herself unlawfully transported in interstate commerce for the purpose of prostitution. Congress had no power to punish immorality, and certainly did not intend by this Act of June 25, 1910 (36 Stat. 825), to make fornication or adultery, which was a state misdemeanor, a federal felony, punishable by $5,000 fine and five years' imprisonment."[156]The dissent by Justice Lamar provided a clear definition of how legislative interpretation can be manipulated outside of the original scope for the goals of society to be achieved.

In conclusion, the final decision found the defendant's guilty as "the words of the statute punish the transportation of a woman for the purpose of prostitution even if she were the first to suggest the crime."[157] The *Holte* case established that a woman could be considered a co-conspirator in her own transportation when the transportation violated

155."United States v. Holte, 236 U.S. 140 (1915)." Justia Law. Accessed November 17, 2021.

156. "United States v. Holte, 236 U.S. 140 (1915)." Justia Law. Accessed November 17, 2021.

157."United States v. Holte, 236 U.S. 140 (1915)." Justia Law. Accessed November 17, 2021.

the provisions of the Mann Act.[158] The result of the *Holte* case recognized that women could also be considered guilty parties when a violation of the Mann Act occurred which revolutionized the interpretation of the Mann Act to include more prosecutable individuals. The *Holte case* was later contradicted by the *Gebardi v. United States (1932)* decision.

Caminetti v. United States (1917)

The Supreme Court case, *Caminetti v. United States 1917,* settled the scope of the phrase "any other immoral purpose." It involved Farley Drew Caminetti, Maury Diggs, and L.T. Hays who had taken their teenage mistresses on a weekend vacation that crossed state lines. There was no commercial element to the case; meaning the case has no connection to prostitution. The violations of the Mann Act took place in the Northern District of California where each individual faced a trial that resulted in one singular opinion out of the Caminetti case. The two main men involved were Drew Caminetti (related to Anthony Caminetti who had been the Commissioner of Immigration) and Maury Diggs.[159] The indictment had been brought on also through the belief "that the aforesaid woman should be and become his mistress and concubine."[160] This affair and case gained serious media coverage as Drew Caminetti's relation to a political family involved in the Democratic Party. This affair consisted of "the seduction of two girls of Sacramento, California, aged respectively 19 and 20, by two married men who apparently

158. "2027. Mann Act." The United States Department of Justice, January 17, 2020. https://www.justice.gov/archives/jm/criminal-resource-manual-2027-mann-act.

159. William Seagle. "The Twilight of the Mann Act." *American Bar Association Journal* 55, no. 7 (1969): 652.

160. Caminetti v. United States, 242 U.S. 470, 483, 37 S. Ct. 192, 193, 61 L. Ed. 442 (1917).

had concealed their matrimonial state, as well as their fatherhood, from the objects of passion."[161] The women involved had been convinced by the men to leave Sacramento with them in order to flee the wrath of their wives when they discovered the truth.

The *Caminetti case* further affirmed the Mann Act's constitutionality and focused mainly on the section about "any other immoral purpose." This decision's support was delivered by Justice William Day where he stated, "the power of congress under the commerce clause, including as it does authority to regulate the interstate transportation of passengers and to keep the channels of interstate commerce free from immoral and injurious uses, enables it to forbid the interstate transportation of women and girls for the immoral purposes of which the petitioners were convicted."[162] The question of if the Mann Act was properly applied to the *Caminetti case* involved whether the counts of prostitution were the only reasons for prosecution. The Mann Act's application to the cases had support with the conclusion of the case's application of the plain meaning rule.[163] Justice Day stated that "where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion."[164] The dissenting opinion came from Justice McKenna where he argued that with the phrase "any other immoral purpose", "the words

161. William Seagle. "The Twilight of the Mann Act." *American Bar Association Journal* 55, no. 7 (1969): 652.

162. "Caminetti v. United States, 242 U.S. 470 (1917)." Justia Law. Accessed November 17, 2021. https://supreme.justia.com/cases/federal/us/242/470/.

163. "Plain Meaning Rule." Ballotpedia. Accessed November 17, 2021. https://ballotpedia.org/Plain_Meaning_Rule.

164. "Caminetti v. United States, 242 U.S. 470 (1917)." Justia Law. Accessed November 17, 2021.

are clear enough as general descriptions; they fail in particular designation; they are class words, not specifications."[165] Justice McKenna's dissent cited the Congressional debates in order to establish the original intent of the act introduced by James Mann. Justice McKenna argued that "the legislation is needed to put a stop to a villainous interstate and international traffic in women and girls…not to regulate the practice of voluntary prostitution, but aims solely to prevent panderers and procurers from compelling thousands of women and girls against their will and desire to enter and continue in a life of prostitution."[166] The dissenting opinion of Justice Mckenna had rational roots but in the end, the dissent was completely disregarded and the original opinion stood.

The final rule of the Caminetti case, written by Justice Day, and those who had dissented included Chief Justice White, Justice Clark, and Justice McKenna. The defendants faced indictment and on four counts each. The first count "was found guilty and sentenced to imprisonment for eighteen months and to pay a fine of $1,500" for Caminetti.[167] Both Diggs and Caminetti were indicted with six counts with only two no verdict was drawn for. By the end of the charges, Diggs faced four counts and to two years in prison where he then had to pay a 2,000 dollar fine. The prosecution of married men continues with other cases where the scope focused on reforming the actions of men to resemble respectable, gentlemanly, virtuous men. In conclusion to this case, the final

165. "Caminetti v. United States, 242 U.S. 470 (1917)." Justia Law. Accessed November 17, 2021. https://supreme.justia.com/cases/federal/us/242/470/.

166. "Caminetti v. United States, 242 U.S. 470 (1917)." Justia Law. Accessed November 17, 2021.

167. Caminetti v. United States, 242 U.S. 470, 483, 37 S. Ct. 192, 193, 61 L. Ed. 442 (1917)

decision determined that consensual "extramarital" sex may be defined under the category of "immoral sex" and subject to regulation under the Commerce Clause.

Gebardi v. United States (1932)

The Supreme Court reassessed the question of women's legal liability as Mann Act conspirators, as set out in *Holte v. United States,* in 1932. Jack Gebardi, convicted of conspiring "to violate the Mann Act" brought about the next case of *Gebardi v. United States*.[168] In this case, it appeared that the courts attempted to punish premarital sex. Support for this claim came from the fact that "Gebardi took his future wife to another state before their marriage so that they could have sexual intercourse."[169] The defendants had been convicted in Illinois "for conspiring together, and with others not named, to transport the woman from one state to another for the purpose of engaging in sexual intercourse with the man."[170] The defendants had not been married yet and the mere word "conspired" allowed for prosecution. The *Holte case* which established the precedent to attempt to convict a woman involved in her own transportation was not included in the final decision. The result was the case was reversed and the Gebardi Principle was born. The Gebardi Principle established two methods of application of the principle itself. The Columbia law journal described the Gebardi Principle in two parts where "The first form is narrower and more in line with the Court's articulation of the principle in *Gebardi v. United States*—creating an exception to conspiratorial and accomplice liability where the

168. Gebardi v. United States, 287 U.S. 112, 116, 53 S. Ct. 35, 35, 77 L. Ed. 206 (1932)

169. "Gebardi v. United States, 287 U.S. 112 (1932)." *Justia Law*, supreme.justia.com/cases/federal/us/287/112/.

170. "Gebardi v. United States, 287 U.S. 112 (1932)." *Justia Law*.

words of the statute fail to punish a party necessary to the commission of the underlying criminal conduct. The second form, however, is broader. It is not pegged to the structure itself but instead allows courts to apply the Gebardi principle based on the courts' determination of legislative intent."[171] This principle continues to be discussed and debated by legal theorists and whether or not the principle should be utilized.

Justice Stone delivered the opinion of the court which convicted Gebardi for the "conspiracy to violate the Mann Act" and Justice Stone proposed the question of whether "within the principles announced in [*United States v. Holte*], the evidence was sufficient to support the conviction."[172] Justice Stone compared the circumstances of the *Gebardi case* to those of the *Holte case* and established that the situation for the women was not similar. Through the majority opinion, Justice Stone described the reasoning behind the decision with citing previous cases such as *Hoke v. United States* to establish that the "transportation of a woman or girl whether with or without her consent, or causing or aiding it, or furthering it in any of the specific ways, are the acts punished when done with a purpose which is immoral within the meaning of the law."[173] So, since the law itself doesn't punish a woman for her involvement in the transportation for immoral purposes, then the court decided the legality of prosecuting her would not be justified. By the citation of *Caminetti v. United States*, Justice Stone encouraged the question of

171. Wee, Shu-en. "The Gebardi 'Principles.'" Columbia Law Review, 2017. https://columbialawreview.org/content/the-gebardi-principles/#:~:text=In%20the%201932%20case%20Gebardi,to%20leave%20such%20party%20unpunished.

172. "Gebardi v. United States, 287 U.S. 112 (1932)." Justia Law. Accessed November 17, 2021.

173. "Gebardi v. United States, 287 U.S. 112 (1932)." Justia Law. Accessed November 17, 2021.

whether the unmarried woman's consent to transportation could be defined as a guilty offense to the parameters of the Mann Act. Justice Stone received support from Justice Cardozo with the decision that "on the evidence before us, the woman petitioner has not violated the Mann Act, and we hold, is not guilty of a conspiracy to do so. As there is no proof that the man conspired with anyone else to bring about the transportation, the convictions of both petitioners must be reversed."[174] This case, unlike the others, had no dissenting opinions presented to the decision of the case.

The final decision in the case ruled that "a woman who is the willing object of such transportation, but who does not aid or assist otherwise than by her consent, is not guilty of the offense."[175] The decision of this case reversed the *Holte* decision and the Gebardi case ultimately decided that a woman can be involved in the violation but also not be found guilty of the abstraction of the law. Justice Stone delivered, "in this case, we are concerned with something more than an agreement between two persons for one of them to commit an offense which the other cannot commit…we perceive in the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent, evidence of an affirmative legislative policy to leave her acquiescence unpunished."[176] What Justice Stone meant by "affirmative legislative policy" was that the court decided to leave an individual involved in a crime unpunished since the individual was not the primary actor that violated the act. The defendants were

174. "Gebardi v. United States, 287 U.S. 112 (1932)." Justia Law. Accessed November 17, 2021.

175. "Gebardi v. United States, 287 U.S. 112 (1932)." Justia Law. Accessed November 17, 2021.

176. "Gebardi v. United States, 287 U.S. 112 (1932)." Justia Law. Accessed November 17, 2021.

engaged but went on a sexual getaway which influenced the Supreme Court's decision. They were not prostituting, transporting potential prostitutes to brothels, kidnapping, coercing or anything in that manner. The *Gebardi* case illustrated that the Supreme Court shifted their understanding of the Mann Act within this case to include a new loophole where a woman involved with transportation conspiracies is not at fault for violating the Mann Act which went against the *Holte* decision.

Cleveland v. United States **(1946)**

Though the *Gebardi* case seemed to narrow the scope of the Mann Act back to purely commercial interstate sex, the "any other immoral purpose" clause could still be used against sexual minorities—in this case, polygamists. The *Cleveland v. United States* case in 1946 originated from the violation of the Mann Act by the following defendants: Heber Kimball Cleveland, David Brigham Darger, Vergel Y. Jessop, Thermal Ray Dockstader, L.R. Stubbs, and Follis Gardner Petty. These individuals practice polygamy and had been found guilty of the violation of the Mann Act after they had "each transported at least one plural wife across state lines either for the purpose of cohabiting with her, or for the purpose of aiding another member of the cult in such a project."[177]

The constitutional question behind the *Cleveland* case hinged on whether the application of the Mann Act could be applied to instances of polygamy. The violation of transportation across state lines allowed for the prosecution under the Mann Act. The Supreme Court utilized the *Caminetti* case as an important precedent example of how the transportation of women for "immoral purpose" had been deemed constitutional.

177. Cleveland v. United States, 329 U.S. 14, 16, 67 S. Ct. 13, 14, 91 L. Ed. 12 (1946)

Because the *Caminetti* case posed an issue for the ability to prosecute polygamy, the court decided that the scope of the Mann Act must expand. To discredit the outcome of the *Caminetti* case, the court expressed that the issues faced within the *Cleveland* case contained a greater issue than the small "isolated transgressions" of the *Caminetti* case. [178]The court justified this expansion by arguing the Mann Act had always included issues not pertaining to simply white slave traffic because of the language of "any other immoral purpose" and since the view of society has "outlawed" polygamy. The support for this opinion had been supported by *Mormon Church v. United States.*[179] Justice Douglas had support from Justice Wiley B. Rutledge with the inclusion of the *Caminetti* case.

The complexity of this case furthered with multiple dissenting opinions. Justice Murphy's dissent stated that "a chapter [has been] written in terms that misapply the statutory language and that disregard the intention of the legislative framers. It results in the imprisonment of individuals whose actions have none of the earmarks of white slavery, whatever else may be said of their conduct… Such reasoning [the majority opinion] ignores reality, and results in an unfair application of the statutory words."[180] Even with the strength of Justice Murphy's dissent, the courts still ruled guilty. Justice

178. "Cleveland v. United States, 329 U.S. 14 (1946)." Justia Law. Accessed November 20, 2021. https://supreme.justia.com/cases/federal/us/329/14/.

179. "Cleveland v. United States, 329 U.S. 14 (1946)." Justia Law. Accessed November 20, 2021. *Cleveland* cited the *Mormon Church v. United States* with "'The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity, and of the civilization which Christianity has produced in the western world.'"

180. "Cleveland v. United States, 329 U.S. 14 (1946)." Justia Law. Accessed November 20, 2021.

Murphy even countered the arguments against polygamy as a social evil to establish that even with society's rejection of polygamy hasn't always been that way. Justice Murphy pointed out that "marriage, even when it occurs in a form of which we disapprove, is not to be compared with prostitution or debauchery, or other immoralities of that character. The Court's failure to recognize this vital distinction, and its insistence that polygyny is 'in the same genus' as prostitution and debauchery, do violence to the anthropological factor involved."[181]

By the expansion of the Mann Act to classify polygamy as a violation of law enabled Congress to regulate polygamy that crosses state lines. The unconstitutional prosecution of this case is supported by Justice Murphy as he recognized that "the result here reached is but another consequence of this Court's long continued failure to recognize that the White Slave Traffic Act, as its title indicates, is aimed solely at the diabolical interstate and international trade in white slaves."[182] Justice Murphy even touched on the court's insertion of the *Caminetti* case. Justice Murphy illustrated the *Caminetti* case as another case of corruption where the dissenting opinion had been ignored and the scope of the Mann Act was expanded (wrongfully) to work for the goals of the current Congress. Justice Murphy stated that just as with the *Caminetti* case, the justices "closed [their] eyes to the obvious and interpreted the broad words of the statute without regard to the express wishes of Congress…the principle of interpreting and applying the White Slave Traffic Act in disregard of the specific problem with which

181. "Cleveland v. United States, 329 U.S. 14 (1946)." Justia Law. Accessed November 20, 2021.

182. "Cleveland v. United States, 329 U.S. 14 (1946)." Justia Law. Accessed November 20, 2021.

Congress was concerned."[183] Justice Murphy went as far as to say that the Caminetti case should be overruled and supported this claim by classifying the case as a wrong committed that shouldn't be perpetuated. Justice Murphy had not been alone in his opinion either. Justice Hugo Black and Justice Robert Jackson disagreed as well especially with inclusion of the *Caminetti* case.

The conclusion of the *Cleveland case* "upheld application of the Mann Act of 1910 to a fundamentalist group of polygamous Mormons, including Cleveland, who had transported their multiple wives across state lines for the purpose of cohabitation."[184] The fact that religious belief did not affect the decision prompts the question: how could the courts rule this a constitutional decision? Justice Douglas delivered that "the fact that the regulation of marriage is a state matter does not, of course, make the Mann Act an unconstitutional interference by Congress with the police powers of the State. The power of Congress over the instrumentalities of interstate commerce is plenary; it may be used to defeat what are deemed to be immoral practices, and the fact that the means used may have 'the quality of police regulations' is not consequential" where he also cited *Hoke,* and *Athanasaw* to support this conclusion.[185]The courts decided that "while the Act was aimed primarily at the use of interstate commerce for the conduct of commercialized prostitution, it is not limited to that, and a profit motive is not a sine qua non to its

183. "Cleveland v. United States, 329 U.S. 14 (1946)." Justia Law. Accessed November 20, 2021.

184. Vile, John R. Edited by John Seigenthaler. Cleveland v. United States. The First American Encyclopedia, 2009. https://www.mtsu.edu/first-amendment/article/490/cleveland-v-united-states.

185. "Cleveland v. United States, 329 U.S. 14 (1946)." Justia Law. Accessed November 20, 2021.

application. *Caminetti v. United States…* it expressly applies to transportation for purposes of debauchery, which may be motivated solely by lust."[186] The aspect of "for any other immoral purpose" was defined narrowly by the law to include practices viewed by society immoral as prosecutable by violation of the Mann Act. Since polygamy's reputation by society has been deemed an immoral practice, Justice Douglas categorized the practice as a violation regulatable through the Mann Act. The *Cleveland* case established a broader scope for the Mann Act and expanded the powers of the act on the basis of the Commerce Clause's involvement with interstate commerce. This expansion reaches outside of the scope into regulation of society's view of immoral activity rather than simply on interstate commerce and the protection against sex trafficking, prostitution, and "white slavery."

Bell v. United States **(1955)**

The next Mann Act case to appear in front of the Supreme Court centered on the question of whether a perpetrator can be convicted of multiple Mann Act violations that stemmed from one instance. Robert Cecil Bell had been convicted of violating the Mann Act on two occasions. Bell pled guilty to both accounts which involved two different women after he had "transport[ed] two women on the same trip and in the same vehicle."[187] Prior to the appeal, Bell was sentenced to five years in total. As a means to appeal, the eighth amendment's scope was called into question. The result of this appeal was that the charges were reversed.

186. "Cleveland v. United States, 329 U.S. 14 (1946)." Justia Law. Accessed November 20, 2021.
187. Bell v. United States, 349 U.S. 81, 75 S. Ct. 620, 99 L. Ed. 905 (1955)

The question presented to the court of appeals was if Congress counted "the simultaneous transportation of more than one woman" as separate violations of the Mann Act.[188]Justice Frankfurter provided the court's opinion that reversed the appellate court's judgement on the grounds that the Supreme Court did not believe Congress had not established that the simultaneous transportation constituted two accounts. As cited in previous cases discussed, *Hoke v. United States* assisted with the decision as it established "the power was exercised in aid of social morality."[189] This case also consisted of dissenting opinions. Justice Milton, the Chief Justice and Mr. Justice Reed dissented on the decision of the *Bell* case. The dissenting opinion believed that the statute did establish that "to transport one or more women or girls in commerce constitutes a separate offense as to each one."[190] Justice Milton delivered that Congress possessed the power to protect each individual woman from exploitation less than with the concern of transportation.

The conclusion of the case resulted in the court ruling that Bell committed one guilty offense and "was not subject to cumulative punishment under the two counts."[191] So, the reasoning behind the punishment is for the aspects of crossing state lines and commerce. The reasoning behind this reversal pertains to the fact that "if Congress does

188. "Bell v. United States, 349 U.S. 81 (1955)." Justia Law. Accessed November 20, 2021. https://supreme.justia.com/cases/federal/us/349/81/.

189. "Bell v. United States, 349 U.S. 81 (1955)." Justia Law. Accessed November 20, 2021.

190. "Bell v. United States, 349 U.S. 81 (1955)." Justia Law. Accessed November 20, 2021.

191. "Bell v. United States, 349 U.S. 81 (1955)." Justia Law. Accessed November 20, 2021.

not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses."[192] The court's utilization of the rule of lenity was the best decision to conclude the appeal.[193] The conclusion of this case held importance as the ruling did not prosecute two counts and therefore changed how Congress may prosecute in situations where there are multiple women/individuals being transported for "any other immoral purposes."

Mann Act Cases: Importance to the Commerce Clause

To combine all the Mann Act cases evaluated, the Mann Act's creation expanded the Commerce Clauses' scope of jurisdiction. As stated at the beginning of this paper, the Commerce Clause is meant to regulate interstate commerce and with the inclusion of the Mann Act, the scope expanded to encompass the sexual policing by Congress that, on occasion, oversteps into individual rights and state policing powers. With the *Cleveland* case, the religious rights of individuals and of groups had been violated by the court's decision. Religion no longer posed an applicable explanation to the actions taken by the individuals involved especially involving polygamy. The application of the law increased with the strength of the Commerce Clause and aspects of crossing state lines to constitute regulated trade. When evaluating the scope of the Commerce Clause and the scope of the Mann Act, there are visible differences as the Mann Act is strengthened with connection

192. "Bell v. United States, 349 U.S. 81 (1955)." Justia Law. Accessed November 20, 2021.

193. "Rule Of Lenity Legal Definition." Merriam-Webster. Merriam-Webster. Accessed December 11, 2020. https://www.merriam-webster.com/legal/rule of lenity. A rule of lenity, as explained in the Miriam-Webster Law dictionary states that "a rule requiring that those ambiguities in a criminal statute relating to prohibitions and penalties be resolved in favor of the defendant when to do so would not be contrary to legislative intent."

of the Commerce Clause. The Mann Act's primary concern had been intended to prevent the trafficking of women and girls through incorporating the aspect of interstate "trade". Ultimately, as seen with the previous case analyses, the Mann Act expanded to regulate not only "social evils" of prostitution, but to also regulate against actions that society deems impure and immoral such as polygamy or pre-marital sexual intercourse. The exercise of power stretched to extreme measures and allowed for defined commerce to encompass sexual and debaucherous activity as regulated activities.

Conclusion

To conclude, the Commerce Clause of the Constitution expanded the scope vastly over the course of nearly two hundred years. What the United States Founding Fathers intended with the creation of the Constitution clearly is defined by the usage of the Federalist Papers but, the meaning has expanded over time and with the changes in social and political agendas. What increased the scope of the Commerce Clause included the expansion of the country with the transportation evolution, the development of the capitalist society, the morals carried over from the second great awakening, and the efforts of multiple political groups to regulate commerce and "illegitimate" commerce. Over time, the country necessitated regulation of trade and protection from monopolies which sprouted various political groups such as the National Grange and the Greenbacks. The result of legal cases such as the *Wabash* case allowed for an expansion of regulation through the Interstate Commerce Act and the Interstate Commerce Commission. Motivations during the Jacksonian Era resulted with new Justices on the Supreme Court that had intentions to counteract the previous judges. Also, with the motivations of purity

movements against the lottery, prostitution, and alcohol, legislation increased to regulate and exterminate these vices.

To comment on the paper itself, I organized the paper in chronological order in order to demonstrate how the interpretation of the Commerce Clause evolved and expanded as the country grew, new problems presented themselves to Congress, and as court cases resulted in greater regulation. Organizing chronologically assisted in understanding the importance and influences of the Court's decisions especially with understanding the societal goals and social reform efforts of the time periods. Historical analysis assisted with the comprehension of the decided decisions and the motivations for the actions taken in situations such as with the creation of the Mann Act. Understanding the background history that goes into these court decisions and legislative actions is what established a clear view of what Congress attempted to create or avoid interaction with.

Through the Mann Act's influences of white slavery hysteria with the purpose to regulate illegal/ commercialized sex has been twisted to fit the case for years. The hysteria surrounding White Slavery was highlighted through the Mann Act of 1910's enactment especially with the influences from immigration fears. The culmination of court cases over the years has allowed precedents to be set, alterations to the original language of the Mann Act to be made and, it provides an understanding to how not just sex trafficking, prostitution, and procuring/ pimping are punished under the Mann Act. It offers a overview of ordinary, everyday people are prosecuted for non-sex trafficking related travel. The cases reveal how race is involved (Jack Johnson's case), the view of how women can be prosecuted, that polygamy isn't legal and that the scope was set too broad to punish under the *Caminetti* case.

The Anti-Trust cases and the altered interpretation of the Commerce Clause not only illustrated the possible interpretations of the Commerce Clause's scope, but it also illuminated the changing opinions and interpretations of the Supreme Court Justices in charge of these prominent cases. Shifting what is understood to be commerce to disclude manufacturing and production of commercialized goods weakens Congress's powers and shows a shift in favor of governmental strength and allows for the flexibility of the Constitution to live on.

The lottery cases allow for the deeper inspection of what is considered interstate commerce through the movement of commerce across state lines. This is furthered with the Mann Act's direct ties to the Commerce Clause in which the manipulation of the Commerce Clause allows for social pressures to influence Congressional legislation. Not only the influence of social pressures but the desire for a broadened or stricter scope for Congress to enact legislation and the Supreme Court to support the legislation as promoting wellbeing for the country through its enactment such as with the "protective" guidelines established with the White Slave Traffic Act.

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