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# The Origin and Development of the Interstate Commerce Commission and Its Impact on the Origination of Independent Regulatory Commissions in the American Legal System: A Historical Perspective

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A Thesis in the Field of History

for the Degree of Master of Liberal Arts in Extension Studies

Harvard University

March 2016

## Abstract

The early history of the Interstate Commerce Commission is usually presented as the Congressional response to the oppressed American farmers and small commercial shippers due to the exorbitant rates and exploitation by the railroads. Later it is seen as an example of how powerful industrial interests have shaped and dominated government agencies. The results of the research reported in the current thesis indicates that both of these representations are gross over simplifications that require reconsideration.

# Dedication

Dedicated to Judi, my helpmate in all things.

Acknowledgements

I would like to acknowledge the help of Professor Donald Ostrowski for his patience through multiple revisions.

I would like to acknowledge Professor John Stilgoe for reading multiple copies of a work in progress and for his kind and encouraging comments.

Additionally, I would like to thank Paul Kelly and Linda Perrotto for their patience in helping me deal with my “Word” issues.

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# I

## Introduction

The first independent federal commission was the Interstate Commerce Commission (ICC), which was formed in 1887. This event, argumentatively, represents a watershed in the relationships between the federal government and state governments, and between the federal government and business.[1] For many the establishment of the ICC marked the "dawn of modern government"—the start of a major surge in growth of the federal government.[2] Since their inception commissions have grown and have been widely accepted as a major part of the U.S. government.[3]

The importance of commissions is based on the fact that modern society and government are maintained on the basis of "rules." The sources of these rules and the mechanisms and agencies through which they originate have evolved over time. Many of these rules are laws. The traditional sources of law include: common law, religious revelation, statutory law, equity, and executive fiat. Starting in the latter half of the 19th

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[1] Bollard C. Campbell, *The Growth of American Government: Governance from the Cleveland Era to the Present* (Bloomington: Indiana University Press, 1995), 1, 27. William J. Novak, "A Revisionist History of Regulatory Capture," 12, 14. Accessed from http://www.tobinproject.org/sites/tobinproject.org/files/assests/Novik History of Regulatory Capture(1.13).pdf. Robert E. Cushman, *The Independent Regulatory Commission* (New York: Octagon Books, 1972), 19.

[2] Campbell, *The Growth of American Government*, 28.

[3] Marver H. Bernstein, *Regulating Business by Independent Commissions* (Princeton: Princeton University Press, 1966), 3.

century, another source for rules of governance came into being in the United State of America—the regulation. While a regulation is not law, it serves a similar function. Regulations begin when groups of interested parties in a specific industry, profession, business association, or sector need to interact with the government; these interactions often lead to specialized commissions or agencies. Commissions have even been called the fourth branch of government as they play a major role in creating the rules. As a part of the central government's regulatory apparatus, commissions have shaped government and society.[4] Therefore, it is important to appreciate how and why commissions came into being and how they have evolved.

It is the intent of this research to gain insight into the growth of commissions by focusing on the development of the ICC and focusing on its place within American history. An underlying presupposition of the thesis is that, while the ICC shaped governance, the ICC was itself shaped by the events of American industrial, societal, political, and judicial history. As a consequence the history of the ICC must be viewed in the context of the history of the United States. Therefore, the starting point of the research and this thesis is not the ICC. The question being asked is not "How did the ICC come to be what it was at a particular time?" (In the opinion of this author, this leads to doing history in reverse.) Rather the question for this thesis is "How did the ICC development in the context and within the course of history?

Another important consideration is the author's view that, unlike the case in scientific research where the research is the background for a proposed experiment that

[4] Akhill R. Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* (New York: Basic Books, 2012), 382.

then provides the data for the conclusions, in historical study it is the research itself that provides the data from which conclusions are eventually developed.

This thesis will specifically address the following questions:

1) Why did Congress establish the ICC? Were there legitimate issues in the interactions between society and the railroads that led to the ICC? Did the ICC originate out of the government's need to fill a "gap" in the Constitution or from the governmental lack of expertise, or was there a need for expansion and delegation of powers—processes that are rooted in the chartering of the first and second Banks of America?[5] Was the commission formed to correct the perceived wrongs or actual "evils," or did it serve the purposes of powerful interest groups in agriculture, in the transportation of raw material or finished products? Was it formed in the interest of the railroads; was the ICC the start of "governmental solutions" to social issues that has led to "Obamacare?" Did the ICC come into being for purely political reasons, to appease the public, simply to save Congress "from having to make difficult regulations which would undoubtedly cause dissatisfaction in many of the groups being regulated?"[6]

2) What were The ICC's initial goals? How was the ICC organized to attain these goals and were these goals attained?

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[5] Bernstein, *Regulating Business,* 21. Lewis G. Vander Velde, "Thomas M. Cooley," in *Michigan and the Cleveland Era: Sketches of University of Michigan Staff Members and Alumni who Severed the Cleveland Administrations, 1885-89, 1893-93,* Earl D. Babst and Lewis G. Vander Velde, Eds. (Ann Arbor: University of Michigan Press, 1948), 98.

[6] Peter Woll, *American Bureaucracy* (New York: W. W. Norton, 1963), 6-7.

3) How did the original structure of the ICC evolve to become the antithesis of the tripartite structure of American government, and develop to become the foundation on which other commissions were based? How independent was the commission in shaping issues of control of the transportation system at the turn of the 20th century or did the events and politics of the era shape the Commission?

4) Why did an agency that was and is universally seen as a failure (by virtually every historian of the "Gilded Age" as well as economists, historians of the railroads, and people as diverse as Louis Brandeis and Milton Friedman) become the model for the "fourth branch of government?"

The significance of this research is that it leads to a better understanding of how this organ for the origination of regulations came into being in the latter part of the 19th century; how the increase in the complexity of society led to the creation of increasingly complex governmental solutions, which in turn led to increases in government size and complexity that impacted on the structure of modern governmental agencies. Understanding this process provides insights into how to create new agencies and modify those in existence. These are efforts of importance given the continued development of new agencies and the delegation of power to them. In the area of transportation it is important to understand how over-regulation almost destroyed rail transport, especially

in view of the revival of railway freight transport and the renewed interest in passenger rail traffic with the need to provide new, non-toxic regulation[7]

[7] John R. Stilgoe, *Train Time* (Charlottesville: University of Virginia Press, 2007), 5, 217-219.

## II

## Definition of Terms

*Administrative agencies, regulatory agencies, independent regulatory authorities, independent agencies and commissions* are terms for specialized government departments. "An Independent Regulatory Commission [also Board or Agency] or a Commission is a community authority or government agency…employed with autonomous authority over a few areas of human activities in a regulatory or supervisory capacity." [8] In the Federal government, at the current time, there are numerous *commissions* and *agencies*. They are established by the Legislative branch in statutes called enabling acts.[9] *Commissions* are the independent agencies of government. They are established by Congress to operate in a limited area with designated missions as specified by Congress. Within this limited area they have the authority (granted by Congress) to make rules that have the force of law. Commissions are not independent of the Constitution or the president and are considered to be executive bodies. Commissions often have a tripartite structure or a quasi-tripartite structure, which includes executive, legislative, and judicial functions. They are headed by committee commissioners who are

[8] Cited from Independent Regulatory Commission in "Ask.com." Accessed from http://www.ask.com/1question/what-is-a-independent-regulatory-commission.

[9] Frank A. Schubert, *Introduction to Law,* 10th ed. (Boston: Wadsworth Cengage Learning, 2012), 476.

nominated by the president and approved by the Senate. Once appointed the President's power to remove a commissioner may be limited; they cannot be removed except for cause. Often the independent agencies must be bipartisan by law.[10] On the other hand, regulatory *agencies* are also a part of the Executive branch. Agencies are headed by cabinet secretaries or chief administrators who serve at the pleasure of the president.[11]

*Block signaling or the signaling block system* is a system designed to increase railroad safety. It controls the operations of trains between the stations by various means using physical equipment including: telegraphs, timetables, signal lights and/or signalmen. The line is divided into blocks and entrance into a block requires the appropriate signal.[12]

*Common carriers/public roads* are ruled by common law, which places special obligations on them. They are to be open to all and must provide services at reasonable and nondiscriminatory prices. There was much debate on the status of railroads, whether are not they were common carriers and therefore to be ruled and regulated by common law.[13]

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[10] Amar, *America's Unwritten Constitution,* 381-386, 409-410. "Federal Agencies and Commissions." Accessed from http://whitehouse.gov/our-government/federal-agencies-and-commissions.

[11] "USA.gov Inquiry: Ask how government works (#1647560)." Personal communication, 12/22/14, https://bay174.mail.live.com/?tid=cm6kUT9RmK5BG8DdidZ1x5. Frank A. Schubert, *Introduction to Law and the Legal System* (Boston, MASS: Wadsworth Cengage Learning, 2012), 472.

[12] J. B. Calvert, "Manual Block in the United States." Accessed from http;//mysite.du.edu/-etuttle/rail/manual.html.

[13] James W. Ely, Jr., *Railroads and American Law* (Lawrence: University Press of Kansas, 2001), 17, 71-77.

The *Dormant Commerce Clause* is attributed to John Marshall. It is not found in the Constitution. The "clause" prevents states from passing laws in an area in which they would conflict or impede a federal law (expressed preemption) or objectives (implied preemption).[14]

The power of the *executive branch* is vested in the head of state. This head of state is responsible for implementing and enforcing law. The President is the Chief Executive of the United State.[15]

*Fast-freight lines* were lines, nominally independent stock companies, that offered shippers faster and more reliable service than the railroad freight services. They owned their rolling stock that could be operated over the tracks of different rail lines. As a result the lines were required to cooperate in an administrative pool. Railroad officials and corporations were commonly financially involved in the fast-freight lines. These lines drew off a high volume of the higher-rate traffic. As they were not originally controlled under the ICC, their economic impact is not regularly mentioned.[16]

There are many candidates for the title of the *fourth branch of government* (since the term itself is poorly defined). The term is usually applied to the various non-elected,

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[14] Michael Arnheim, *U. S. Constitution for Dummies* (Hoboken, NJ: Wiley Publishing, 2009), 103-105. "The Dormant Commerce Clause," from *National Paralegal College.* Accessed from http://nationalparalegal.edu/conLawCrimProc_Public/Congressional/Powers/DormantCommerce Clause.asp.

[15] "Executive Branch." Accessed from http://whitehouse.gov/our-government/executive-branch.

[16] Albro Martin, *Railroads Triumphant: The Growth, Rejection and Rebirth of a Vital American Force* (New York: Oxford University Press, 1992), 203-204. John F. Stover, *American Railroads,* 2nd ed. (Chicago: University of Chicago Press), 1997), 139-140.

but sometimes appointed groups that can exert significant and lasting power on the central or local governments. Candidates for the fourth branch include: the press, the people, the special interest groups and administrative agencies (independent regulatory authorities or commissions).[17]

The *Grange* or *The National Grange of the Order of Husbandry* was established in 1868 by Oliver Hudson Kelly as a fraternal organization for farmers. Its focus was on the welfare of farmers. One of its earliest concerns was the cost of shipping agricultural produce by railroad and the pricing involved. This perceived abuse of the farmers by the carriers is one of the major factors that some historians of the 19th century feel ultimately led to the formation of the ICC. The Grange movement led to early state laws to regulate the pricing of the rail carriers. As a political organization the Grange lost its power by the late 1870s.[18]

*Internal improvements* are centrally funded public works for purposes of creating a transportation infrastructure. Initially, they were part of the "American System." Internal improvements include: roads, harbors, and canals.[19]

The *Interstate Commerce Commission* (ICC) was established by the Interstate Commerce Act of 1887. Its provisions applied to "the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are

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[17] Vander Velde, "Thomas M. Cooley," 98.

[18] Stewart H. Holbrook, *The Story of American Railroads* (New York: Legacy Press, 1947), 236-241.

[19] Tom Downey, review of John Lauritz Larson, *Internal Improvement: National Public Works and the Promise of Popular Government in the Early United States.* H-Pol, H-Net Reviews. Accessed from http://www.h-net.org/reviews/showrev.php?id=6907.

used."[20] The ICC was (argumentatively) the first independent federal commission to be established. Its history and early development will be considered in detail in this thesis.

According to the Constitution, the *judiciary branch* is the sole power that can interpret law and determine the constitutionality of law. It also has the authority to apply law in specific cases. Courts can also compel testimony and evidence, and define and order punishment or consequences for violating the law.[21] Citing Justice Holmes, the courts deal "under laws already supposed to exist."[22]

*Laws* are the rules of conduct of an organized society that are made, accepted, and enforced by that society under the threat of punishment by that society. Definitions of law often include the multiple sources of laws. The sources that are most often mentioned are common law and civil law.[23]

The *legislative branch* is the sole division of government with the authority to enact legislation. According to Justice Holmes, "legislation … looks to the future and changes existing conditions by making a new rule."[24] Legislation is the origination of laws, or set of laws made by a government.[25] In the USA the legislative branch was

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[20] "Transcript of the Interstate Commerce Act (1887)." Accessed from http://www.ourdocumentsds.gov/doc.php?flash=true&doc=49&doc=49&page=transcrpt.

[21] "Judicial Branch." Accessed from http://whitehouse.gov/our-government/judicial-branch.

[22] Friedman, "A Word about Commissions," 707.

[23] "Law and Legal Definition," in USLEGAL.com. Accessed from www.uslegal.com/l/law.

[24] Cited from Friedman, "A Word about Commissions," 707.

[25] "Legislative Branch." Accessed from http://whitehouse.gov/our-government/legislative-branch.

established by Article One of the Constitution. In the USA the legislative branch is the Congress, which consists of the House of Representatives and the Senate. The legislative branch can delegate the authority to make laws (regulations) to the agencies or a commission of the government.

*"Long-short haul"* rates applies to the practice of charging shippers more per mile for freight hauled over short distances than long distances. Long-short haul rates are discriminatory. They were justified on the grounds that it was less expensive per mile to ship for longer distances then for short distances. Special circumstances were sometimes used to justify the rates.[26]

*Pools or divisions of traffic* were arrangements among groups of railroads that operated in geographical areas. Pools divided up business and/or traffic and set rates to avoid disastrous competition.[27]

*Private cars* (see also *fast-freight lines* above) covers the cars that were not directly owned by a railroad but which operated on tracks owned by railways. They were hauled either as a part of a train or exclusively by a locomotive belonging to a specific line. Examples include cars privately owned by wealthy individuals or more commonly cars owned by a business or producer designated for specialized usage (e.g., oil tankers, circus trains, or refrigeration cars).[28]

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[26] Robert W. Cherny, *American Politics in the Gilded Age: 1868-1900* (Wheeling, IL: Harlan Davidson, 1997), 78-79.

[27] Cherny, *American Politics,* 79.

[28] Martin, *Railroads Triumphant*, 204. Stover, *American Railroads,* 153, 155.

*Rebates* covers reduced rates or refunds given to major shippers by railways in return for their business. They were often discriminatory in nature.[29]

*Regulations* are rules, orders or requirements that must be fulfilled and that have the force of law. Regulations are applied to those who are under the control of the specific authority.[30] They are issued by the agencies or the commissions (under executive control) that have been given a mandate to carry out the intent of Congress, often with input from the concerned parties and the legal profession.[31] Regulations derive their legal authority through the legislature.

*Regulatory capture* is the process in which, over time, an industry comes to dominate the commission or agency that had been set up to regulate it.[32]

A *tripartite government* is a government that is comprised of three divisions each with its own defined independent powers and responsibilities, based on the ideas expounded by Montesquieu in *The Spirit of Laws.* Tripartite governments are divided into an executive branch, a legislative branch, and a judicial branch. The government of the USA is typically represented as a tripartite government.

*Value-of-service rates* are rates based on the value of an item and the amount the shipper is willing to pay to have it transported. This was a method of charging shippers

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[29] Cherny, *American Politics,* 79.

[30] "Regulation," *The Free Dictionary.* Accessed from http://legal-dictionary.thefreedictionary.co/regulation.

[31] James Q. Wilson, *Bureaucracy* (New York: Basic Books, 2000), 284-285.

[32] "Regulatory Capture," from *Economics A-Z terms: The Economist.* Accessed from http://www.economist.com/economics-a-to-z/r#node-21529846.

where monopolies existed and the exact shipping cost was difficult to calculate.[33]

*Watering* of stock was the specialty of Daniel Drew (the pious cattle drover turned stock trader). Watering is a fraud in which a company inflates the values of its stock shares over the value of its assets.[34] Through watering, a company accumulates excess capital illegally, but has to pay a return based on an inflated value (e.g., the movie and Broadway show, *The Producers*).

[33] Ari Hoogenboom and Olive Hoogenboom, *A History of the ICC: From Panacea to Palliative* (New York: W. W. Norton, 1976), 8. Gabriel Kolko, *Railroads and Regulations: 1877-1916* (New York: W. W. Norton and Company, 1965), 1-6.

[34] H. W. Brands, *American Colossus; The Triumph of Capitalism* (New York: Anchor Books, 2010), 17-20. Christian Wolmar, *The Great Railroad Revolution: The History of Trains in America* (New York: Public Affairs, 2012), 239.

# III

## The Origin of the Interstate Commerce Commission

In the United States the laws made by legislative bodies are only one way in which society is maintained and regulated. Regulations promulgated by state and federal agencies or commissions are another way. To gain insight into the origin of the independent commissions, which are the sources of these regulations, it is important to understand the history of the Interstate Commerce Commission (ICC)—the first independent commission. Moreover, it is also important to understand that the ICC is important not only as the first independent commission, but also as the first attempt by the federal government to regulate any industry.[35] This history can be approached in various ways. Typically the origin of the ICC has been approached by looking at the close relationship of the ICC to the development of the railroad system. This is an approach that is validated by the fact that from the beginning the ICA was not about interstate commerce but about the control of railroads (see definition of the Interstate Commerce Commission). This approach focuses particularly on four groups: the farmers, the merchants, small independent oil producers, and the railroad men and their role in the origin of the ICC.[36] Theories supporting the primacy of each of these groups in the origin

[35] "Interstate Commerce Act," from WGBH. Accessed from http://www.pbs.org/wgbh/american experience/features/general-article/streamliners-commerce/.

[36] Woll, *American Bureaucracy*, 38-40. Hoogenboom, *A History of the ICC*, 8.

of the ICC have both supporters and critics. In addition to these approaches, the ICC has also been frequently addressed in terms of the history of railroads. In the current thesis several approaches will be used in the hope that the result will lead to a more complete and nuanced understanding of the origins of the Commission. While this approach may lead to some redundancy, it stems from the observation that history varies depending on perspective and context; this thesis will attempt to show the discrepancies that exist among the approaches that have been used, and to reconcile them when possible. First the origin of the ICC will be examined in the light of the evolution of the railroads. Then, the origination of the ICC will be approached as reflected in the "original" intent of the founders of the Republic as expressed in the U. S. Constitution and affirmed in cases of the Supreme Court of the United States. Also, as the ICC was the work of multiple individuals, their understanding and goals for the commission, which led to the passage of the Interstate Commerce Act, will be examined, especially focusing in the contributions of Thomas H. Reagan and Shelby Cullom. Financial and managerial issues in the establishment of the railways and their implication for the origin of the ICC will then be reviewed. Finally, the development of the ICC will be reexamined as a part the historical evolution of state and federal bureaucracies and governmental agencies. In no case will history be viewed retrospectively to explain or justify a development in the origination of the ICC.

## The Origin of the Interstate Commerce Commission: The Railroads, Social and Political Issues in 19th-Century America

The early history of the railroads in the United States is a story of conflicts: interrelations between the railroads, interstate commerce, the demands of American society, agricultural interests, and labor and industry, as well as the issue of the balance of power between the states and the federal government were all factors that contributed to the passage of the Interstate Commerce Act of 1887 (ICA) and the formation of the ICC. Therefore, it is important to understand the history of these relationships. The story of the railroads is connected to the early history of the ICA and therefore particularly important to the understanding of the origin of the ICC.[37]

Early in the development of the United States the need for better internal transportation, both for purposes of communication and for the movement of raw material and finished goods, was recognized as vital for the growth of the country. It was felt this would provide financial benefits and lead to the interconnection and interdependence of regions within the country. Opposition came from those who perceived the promotion of "internal improvements" (a centrally financed transportation system and infrastructure) as a threat to state sovereignty—a fear of strengthening a centralized power; in particular there was a southern fear that a strengthened federal government dominated by the northern states would threaten their peculiar institution. There was also opposition to taxing one region of the country or of the population to

[37] Joshua Bernhardt, *The Interstate Commerce Commission: Its History, Activities and Organization* (Baltimore: Johns Hopkins University Press, 1923), (Reprinted New York: AMS Press, 1974).

benefit another, or taxing a sector of the economy to the benefit another; there was no plan that satisfied all parties.[38] However, this need became critical after the War of 1812 and was a part of the "American System" as advocated by Henry Clay, John C. Calhoun, and the National Republicans (in addition to internal improvements the National Republicans were the advocates of protective tariffs and a national bank). The movement for a centrally financed internal transportation system was ended when President James Madison vetoed the Bonus Bill of 1817, which would have financed and brought a national transportation network into being, on constitutional grounds. With the death of the Bonus Bill and the limited success of the National (Cumberland) Road and canals, the burden of internal improvements fell on the states who proved unable to fulfill their constituents needs for a multitude of financial and political reasons.[39] As a consequence of the inability and the failure of the state and federal governments there was "no transportation network [with]in the United States" in the early 18th century.[40] The need for a national transportation network and the lack of government interest or ability became the impetus to build the railroads came from private entrepreneurs who built the lines to make a profit. They were subsidized by local and less commonly state governments.[41] From the start the railways were operated under state charters.

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[38] John L. Larson, *Internal Improvements: National Public Works and the Promise of Popular Government in the Early United States* (Chapel Hill: University of North Carolina Press, 2001), 50.

[39] Ely, *Railroads and American Law,* 1-4.

[40] Richard D. Stone, *The Interstate Commerce Commission and the Railroad Industry: A History of Regulatory Policy* (New York: Praeger Publishers, 1991), 1.

[41] Downey, "Review of John Lauritz."

The first functioning steam-driven trains on rails were developed in Wales for use in hauling freight in 1804. Great Britain's and the world's first passenger carrying rail line, the Stockton and Darlington Railway, was incorporated in 1825 (originally it consisted of wagons that were pulled by horses and only later by steam locomotives). The first true railroad was the Liverpool and Manchester, which opened in 1830. Maryland chartered the Baltimore and Ohio in 1827 and construction started on the line in 1828. In America, passenger service was initiated with the first American-made locomotive to pull a train, *The Best Friend of Charleston,* which ran on the Charleston and Hamburg Railroad in December of 1830 in South Carolina, and the British made *John Bull* on the Camden and Amboy Railroad of Pennsylvania in 1831.[42]

At its beginning, the American rail network was not conceived as a nationwide system, rather it started in numerous locally built and financed small lines that connected two points to promote local commerce. Often the very existence of a town (especially later in the West) depended on proximity to a railway; these railways were often weapons in the wars for economic survival and commercial supremacy between the towns. As the lines consolidated, towns were later to become the captives to the lines they built.[43]

Among the first opponents of the railroads were their competitors, those whose livelihood the rail carriers threatened the most. These groups included the people who ran the canals and turnpikes and those dependent on the canals and turnpikes for a living (including the towns on the right of way, barge owners, inns, laborers who loaded and unloaded barges, and suppliers of horses and wagons among others). The consequences

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[42] Wolmar, *The Great Train Revolution,* 20.

[43] Stone, *The Interstate Commerce Commission,* 2-3.

were the earliest anti-rail legislation and a series of law suits.[44] It is probable that some legislators saw this conflict as a highly profitable opportunity, and fostered or threatened laws that restricted the railways. The lines responded with attempts to influence legislators. It was been stated that the legislators who supported early construction were rewarded liberally.[45] The most visible and widespread response on the part of the railroads were the free passes given by the railroad lines to local officials, legislators, clergy, and various other categories of important notables, their families and friends, all in an attempt to shape the public's opinions and legislation.[46] Over time these passes came to be expected by their recipients.

Conflicts along the right of way were another source of early problems for the lines. Sparks from the trains set fires to the fields, and the trains frightened and killed livestock (giving rise to the American invention of the cowcatcher); they sprayed clean laundry with cinders and soot. These were issues that were probably of more concern to the average person than the numerous accidents and equipment failures that were taking place.[47]

Another of the earliest conflicts had to do with clerical opposition. By the 1840s rail business had increased and trains began to run freight and passenger trains on Sunday—the Sabbath. This provoked a clerical response. Whether this opposition arose

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[44] Ely, *Railroads and American Law,* 4-10.

[45] Frederick A. Cleveland and Fred W. Powell, *Railroad Finance* (New York: D. Appleton, 1923), 16 (Reprinted by BiblioLife, LLC).

[46] Holbrook, *The Story of American Railroads,* 231-232. Stone, *The Interstate Commerce Commission,* 3.

[47] Holbrook, *The Story of American Railroads,* 232.

from the idea that "Sabbath trains" were an affront to God's Law or the trains were a threat to Church attendance is not clear. The religious opposition lessened during the Civil War (a time window that also provided the political opportunity to create the transcontinental railroad, with Congress under control of the Republicans, who favored commercial and industrial expansion).[48] Religious opposition was revived after the war, only to die out in the 1870s. The direct effect of this early opposition was to contribute to the demise of some lines and cause some changes in scheduling. Additionally, residual opposition may have contributed to the Granger Laws. [49]

As the railways grew it became obvious that some type of governmental response and mediation, beyond the charters that had been granted, was going to be necessary. The first state commission was set up in Connecticut in 1832. In 1844 the first laws against rate discrimination were passed in Rhode Island.[50] In 1869, Massachusetts became the first state to establish a "supervisory" state railroad commission (which was also known as a "weak commission") and other states followed the Massachusetts model for their commissions.[51] Under this model the commissions could censor the lines, but were without significant enforcement power. As a result the laws were ignored and freely

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[48] Zachary M. Shrag, "Transportation and the Uniting of the Nation" in *To Promote the General Welfare: The Case for Big Government*, ed. Steven Conn (Oxford: Oxford University Press, 2012), 30. Maury Klein, *Unfinished Business; The Railroads in American Life* (Hanover, NH: University Press of New England, 1994), 12.

[49] Holbrook, *The Story of American Railroads,* 232-235.

[50] Cherny, *American Politics, 79.*

[51] Bernhardt, *The Interstate Commerce Commission,* 3.

violated.[52] Other complications arose for interstate transport when the states enacted "dissimilar laws on similar subjects" or laws that discriminated against out-of-state

The National Grange of the Patrons of Husbandry—the Grange—was founded by Oliver Hudson Kelly in 1867. It quickly grew in the agriculturalist communities, particularly in the Midwest and the South. Among the prime concerns of the Grange members included what they saw as abuses in the cost of transporting their products by rail, high elevator storage fees in grain elevators (sometimes owned by the train lines) and high fees they paid for the finished products sold to them by the local merchants (who also shipped by rail).[53] As a result the Grangers targeted the railroad companies. It should be noted that the "abuses" were in no way illegal at that time, and were usually practices that were "rational" in the views of those providing freight services, based on the track systems then available.[54] Also, farmers were the victims of their own success—as their production increased the market value of their produce fell. Additionally foreign market fluctuations were often beyond the control of the farmers or the railroad managers.[55]

In response to the Grange's pressure various state railroad laws were introduced and passed to control rates (known as the Granger Laws) with Grange support. In 1873, under Granger influence, Illinois passed laws to create a commission that could enforce

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[52] Campbell, *The Growth of American Government,* 69-70. Shrag, "Transportation and the Uniting of the Nation," 31.

[53] Stover, *American Railroads*, 115.

[54] Campbell, *The Growth of American Government,* 69-70.

[55] Stover, *American Railroads,* 112-113.

orders—a "supervisory-mandatory" body— and set maximum rates.[56] However, these state commissions proved to be unable deal with the complex problems of expansion and of interstate commerce. Railroads found ways to evade or nullify the goals of the laws. When Wisconsin passed the Potter Law of 1874, which established unreasonably low freight trains rates, the lines responded with poor quality and service—the so-called "Potter trains." The Granger laws frequently adversely affected the local economies (by reducing regional investment in local rail service) and reducing the value of train securities (contributing to the Panic of 1873).[57] Also, after the laws were passed the coalitions that sponsored them often disintegrated, which left the laws and their interpretations at the mercy of the railways.

By the mid 1870s the Grange was on the decline. In part this was due to an ongoing demographic shift as American moved from rural to urban areas. This was accompanied by the start of the mechanization of farming. In the opinion of James Beck, a former Solicitor General of the United States, there was justification for the Grange movement, but it "carried the nation into the extreme interference with business…a remedy may often be worse than the disease."[58] After the Grange's collapse many remaining farmers went on to join more politically active and radical anti-railroad

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[56] Bernhardt, *The Interstate Commerce Commission,* 4.

[57] Arthur T. Hadley, "The Railway in its Business Relations," in *The American Railway: Its Construction, Development, Management and Appliances,* ed. Thomas C. Clarke et al. (Secaucus, NJ: Castle, 1988), 363-364. Charles P. Kindleberger and Robert Z Aliber, *Manias, Panics and Crashes: A History of Financial Crises,* 6th ed. (Croydon, UK: Palgrave Macmillan, 2011), 101. Ely, *Railroads and American Law,* 87.

[58] James M. Beck, *Our Wonderland of Bureaucracy* (New York: Macmillan, 1932), 155.

organizations and the Populist movement.[59]As a result of the responses of the carriers and the change in political support in the 1870s many of the Granger laws were repealed.[60]

In the early 1860s merchants and in the 1870s independent oil companies also began to complain of rate discrimination (especially those that favored Rockefeller's Standard Oil). Rate discrimination arose from the chaotic growth of railroads, which ended in duplication of available tracks, high fixed railroad costs and the need for the lines to maintain financial viability. Shelby Cullom's 1886 commission (one of the precipitants of the ICA) listed a history of eighteen 'causes of complaints' against the railroads, mostly involving discriminatory rates, fluctuating rates and charges of pooling and monopolies.[61]

There were three major areas of discrimination: between people, geographic regions and commodities. The major mechanisms of rate discrimination were pooling, long-short haul rate discrimination and rate rebating for larger shippers.

Pooling arose as the railways attempted to control what became ruinous price wars between competitors on trunk lines with the resulting disastrous cutting of rates. Under pooling, groups of railroads developed written and unwritten agreements amongst themselves that assigned traffic and revenues in specific geographic areas to specific members of a pool in order to fix and stabilize rates. Albert Fink, who chaired the Joint Executive committee, was the nation's leading advocate of pooling, which did help

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[59] Stone, *The interstate Commerce Commission,* 4.

[60] Campbell, *The Growth of American Government,* 29. Holbrook, *The Story of American Railroads,* 236-241. Stover, *American Railroads,* 120-121.

[61] Cushman, *The Independent Regulatory Commissions,* 37-38.

stabilize rates for a time. Pools, regulation of rates or some division of labor were legal and prevalent outside of the US, where railroads were often run under control by the state.[62] The major issue against pools was the charge that they stifled competition. Pooling would inevitably fail because the lines ultimately cheated on their agreements and there was no legal enforcement mechanism.[63] As an example, rate wars were aggravated when bankrupt lines, free of the need to make interest payments, lowered rates to make themselves more attractive for takeover bids.[64]

Long-short haul rate discrimination arose as a result of financial pressures and the complexity of rate setting.[65] The first consideration in rate setting was the fact that the major competition among the railroads was on the trunk lines (the major routes between the big cities—where multiple lines competed), on inland and on the coast routes, where water transportation existed to compete with trains. Because of this competition lines would even carry freight at a loss in order to win business. The second consideration was that fixed costs made short hauls more expensive per mile. Finally, there was less competition amongst the trains on the branch lines—smaller routes between rural areas, which were distant from other transportation options. The result of all of these factors was that short haul rates over the branch lines were often higher than the rates to haul the same products, the same distance, over the trunk lines. For example the rate from

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[62] E. P. Alexander, "Railway Management," in *The American Railway: Its Construction, Development. Management and Appliances,* ed. Thomas C. Clarke et al. (Secaucus, NJ: Castle, 1988), 174.

[63] Hoogenboom, *A History of the ICC,* 3-4. Klein, *Unfinished Business,* 127.

[64] Stover, *American Railroads*, 108-109.

[65] Ely, *Railroads and American Law,* 82.

Minneapolis-St. Paul to Chicago was 12.5 cents per hundred pounds while the rate from small towns in Minnesota to St. Paul was 25 cents per hundred pounds.[66]

From the perspective of the rail operators the essential problem was that if the railroads were forced to compete, their tariffs on trunk lines were pushed down and they had to make up their losses on the short hauls and branch lines. According to James C. Clarke, president of the Illinois Central, the only option to high short-haul rates was to "increase the long haul or through rates."[67] As noted by Ely "[a]ny proposed rate system produced a vigorous protest from someone."[68]

The issue of fair and appropriate rates was complicated by the fact that the lines faced different operating costs in different geographical areas and often had a poor idea of their expenses. As a result they tended to value-of-service or "all the market can bear ratemaking."[69]

The best way to avoid the rate wars was to form pools, but the ICA made pools illegal and as noted. Pooling could not succeed due to lack of legal support and enforcement. From the perspective of the shippers the low rates on the trunk lines were the result of competition and therefore competition was good.[70] However, A. B Stickney, a maverick rail president who favored rate regulation, felt competition would not reduce

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[66] Stover, *American Railroads,* 114.

[67] Cited in Stover, *American Railroads*, 123-124.

[68] Ely, *Railroads and American Law,* 82.

[69] Hoogenboom, *A History of the ICC,* 2. Stover, *American Railroads,* 116. Klein, *Unfinished Business,* 124, 125.

[70] Klein, *Unfinished Business*, 125.

costs or rate discrimination, as did Charles Francis Adams, Jr., a president of the Union Pacific (from 1884 until 1890 when he was ousted by Jay Gould).[71] It was pointed out that competition led to disruptive and destructive rate wars and was contradictory to stability.[72] In fact one of the causes of the rate reduction that occurred from 1865 to 1885 was the reduction of competition, which resulted from pools.[73] Over time this view was recognized by members of the ICC; in 1898, the ICC even argued that "competition was wasteful."[74] One solution, advocated by Milton Smith of the Louisville and Nashville (and in his opinion acceptable to most other railway managers), would have been to allow pools that were monitored, approved, and legally enforced by a government commission.[75]

Rate "adjustments" through reclassification, rebates, and bulk discounts was the third major discriminatory mechanism. The lines' goals were to increase traffic over underutilized track, fill empty freight cars, compensate for losses incurred for passenger services and encourage economic growth in certain areas. It is often put forth that the large companies were the big beneficiaries, especially Standard Oil. However, Andrew Carnegie's steel company was in an area serviced only by the Pennsylvania Railroad. As a result he paid higher rates than his rivals and even allied himself with Vanderbilt to

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[71] Klein, *Unfinished Business,* 125-126.

[72] Maury Klein, *History of the Louisville and Nashville Railroad* (Lexington:University Press of Kentucky, 2003), 355.

[73] Hoogenboom, *A History of the ICC,* 4.

[74] Klein, *Unfinished Business,* 127.

[75] Klein, *History of the Louisville and Nashville*, 355.

challenge the Pennsylvania Railroad.[76] Standard Oil, in a region with multiple competing lines, was able to get rebates by promising to ship sixty carloads of oil daily and playing the competing lines against each other. To achieve this volume Rockefeller had to coordinate his shipment with those of smaller refiners (some of whom bitterly opposed rebates until they joined Rockefeller's group and then benefited from the rate reductions).[77] This arrangement allowed the shippers to reduce their round-trip time from Cleveland to New York from thirty to ten days and their fleet size from 1800 to 600 cars.[78] In this case the rail lines benefited from the larger contracts, but this was not usually the case. Rebates also occurred on a smaller scale; in one case a railroad paid a shipper's telegraph bills in return for his business; in another a rail line gave a receipt for seventy-five barrels of whiskey when only seventy-three barrels were actually shipped, which allowed the shipper to make a claim for two "lost barrels." Understating the class or weight of shipments was another way to rebate.[79] Drawbacks were an extreme form of rebates. A drawback was a refund on the rate paid by competitor. If Standard Oil paid 10 cents on a barrel of oil and its competitor paid 35 cents, 25 cents was refunded to Standard Oil (this amounted to $10 million over one and a half years).[80] Rebates arose as a consequence of the pressures of competition; in 1880 William K. Vanderbilt's company

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[76] Stover, *American Railroads,* 110.

[77] Hoogenboom, *A History of the ICC,* 10.

[78] Ron Chernow, *Titan: The Life of John D. Rockefeller, Sr.* (New York: Vintage Books, 1998), 111-112. Hoogenboom, *A History of the ICC,* 2, 4-5.

[79] Alexander, "Railway Management," 174.

[80] Stover, *American Railroads,* 111.

granted six thousand special rates.[81] In 1879 Vanderbilt told the 1879 New York Hepburn committee

> My instructions are, to do the business, get our share of it as against all competitors, and to do the business at the same price that they do….The day of high rates has gone by, and railroad men have come to that conclusion; got to make money now on the volume of business….I do think it is perfectly proper for a common carrier to vary his price according to the volume of traffic he has.[82]

Another form of discrimination that cost the lines and its passengers in the hundreds of thousands of dollars was the free pass. Originally it started as a bribe for rail-friendly public officials but it evolved into an entitlement that antagonized paying passengers. John Walker, a president of the Burlington, said, "I think the grant of a free pass to make one friend creates a dozen enemies."[83] It should be made clear that while rebates and free passes were accepted railroad practices they were not financially advantageous for the railways; one of the goals of the pools was to eliminate them.

Another major complaint, by some accounts the major complaint from the shippers, was the uncertainty of rates. This was a greater problem than discriminatory rates. Due to rate wars, published rates could vary forty to sixty times in a year.[84]

Despite the complaints against the railroads and rate discrimination, rates continued to fall, as the lines modernized. At the same times competition was reduced, for a short time, through attempts at pooling and a worsening of the financial situation in the latter half of the1870s. Eastbound first-class freight rates went from one dollar to 15

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[81] Stover, *American Railroads,* 111.

[82] Cited from Ely, *Railroads and American Law,* 81.

[83] Stover, *American Railroads,* 115.

[84] Stover, *American Railroads,* 108.

cents per hundred pounds and westbound rates from 75 cents to 25 cents; from 1865 to 1885 rates generally fell a third to a half.[85]

Even with all of the railroad's machinations, the underlying issue was that the systems were redundant and inefficient. Their finances were shaky and contributed to the depressions of 1873 and 1893, after which many of the lines were forced into receivership.[86]

Safety concerns were another major issue, not only for railroad companies but throughout all of the newly emerging industries.[87] Railroad accidents and deaths were common.[88] The carnage also led to financial losses through suits based on industrial accidents that harmed society, consumers, and equipment, and most importantly created disruptions in service.[89] It should be noted that while the US railroads were poorly built and "disaster-prone," safety concerns that may have been the primary reason for regulatory action in the United Kingdom seem to have been less important in early US train management (and railroads addressed many of these issues—safety airbrakes and automatic coupling—on their own).[90] It is frequently noted the European train systems

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[85] Hoogenboom, *A History of the ICC*, 4.

[86] Shrag, "Transportation and the Uniting of the Nation," 30-31.

[87] Campbell, *The Growth of American Government,* 71.

[88] Mark Aldrich, *Death Rode the Rails: American Railroad Accidents and Safety, 1828-1965* (Baltimore: Johns Hopkins University Press, 2006), 2.

[89] Aldrich, *Death Rode the Rails,* 1-41. Holbrook, *The Story of American Railroads*, 295.

[90] Christian Wolmar *Blood, Iron and Gold: How the Railroads Transformed the World* (New York: Public Affairs, 2010), 245-246

were built to avoid accidents, while trains in the U. S. were built so that passengers would survive accidents.

The 1870s were a time of economic problems in the United States. The panic of 1873, caused in part by the failure of Jay Cooke's financing of the Northern Pacific Railroad (based on issues as diverse as the Franco-Prussian War and a letter from Custer describing the ferocity of the Sioux, which added to the investors' concerns that the line could not be built), led the lines to cut wages. Initially the result was only minor ineffectual protests.[91] As the economic picture worsened, wages were cut 10 per cent in 1877 for the Pennsylvania, Erie, Michigan, Southern, Lake Shore, New York Central, Baltimore and Ohio as well as for other lines. The first protests and work actions against the wage cuts came from the Brotherhood of Locomotive Engineers, and the firemen and brakeman of the B&O line in Maryland. The local militias were called out to address the unrest. When the militias were reluctant or refused to intervene, the Governor of West Virginia petitioned for and got Federal troops to guard the trains. The strikes were broken in Maryland only through the use of the National Guard and resulted in a considerable number of dead and injured workers. Similar strikes occurred in Pennsylvania, New York, Massachusetts, and Rhode Island. Police, National Guard, and ultimately regular Federal troops had to be called out. In all a total of about 100 people died and more than 500 were injured in the rioting.[92] Throughout history Americans have had mixed feelings towards the railroads. At the onset, the railways were supported at almost any cost. By providing faster, safer, and cheaper transportation for people and goods, the railroads

[91] Holbrook, *The Story of American Railroads,* 244.

[92] Holbrook, *The Story of American Railroads,* 244-251.

opened vast areas to farming and settlement—they created towns and markets; they permitted exploitation of resources, which led to innovations, which resulted in new industries. For these reasons they attracted financing by farmers and local business owners, who mortgaged their farms and businesses to build them hoping for financial gain. This made these farmer/investors vulnerable to the business practices of the railroad companies in addition to the risks that they were exposed to by variation in the commodity markets.[93]

The railroads were undeniably poorly managed; at times they were overly capitalized, at other times undercapitalized. Lines were frequently loaded with debt and poorly conceived, leading to "panics and crashes ruining the greedy hopeful men who invested in them."[94] The "predatory" rate wars and corrupt business practices of the early railroads are legendary and well accepted by all.[95] The picture presented is that they "cheated their shareholders, overcharged their customers, and abused their workers."[96] In addition to the control of the managers of the train lines these small entrepreneurs and investors became vulnerable to business cycles and events that were far removed and little understood by them. These events not only added to price fluctuations of the commodities they produced, but also to the high costs of shipping their produce to distant

[93] Stover, *American Railroads*, 113.

[94] Friedman, *A History of American Law,* 389.

[95] Paul S. Dempsey, "The Rise and fall of the Interstate Commerce Commission; The Tortuous Path from Regulation to Deregulation of America's Infrastructure," *Marquette Law Review* 95, no. 4 (2012): 1151-1189. Accessed from http://web.ebscohost.com.exp=prod1.hul.harvard.edu/ehost/detail?vid=6&sid=bf25397f-85.

[96] Cited from Shrag, "Transportation and the Uniting of the Nation," 30-31.

markets, which was controlled by the same railroads they had financed. Consequently, at the same time shipping rates were high, returns on the investments in the railroads were likely to be disappointing.[97] Another inherent problem that the Western producers had to face was their distance from Eastern markets, which added to their costs and made it difficult to compete with Eastern producers.[98] Due to the complexity of the interactions, it is not always easy to determine which accusations made by the Granges were true and which were distortions to flame the anti-railroad crusade. For example: from 1870 until 1896 agricultural prices dropped and freight rates dropped at the same time.[99] The farmers lost more on the drop of prices than they saved on the reduced freight rates. Since the prices paid in distant markets could not be controlled locally, the farmers organized against the railroads. When attempts by the Granger movement to increase the farmers' control over the pricing of their produce failed it was demonstrated that solutions were not easy.

The issues of railroad finance and corruption will be discussed separately.

Much of the anger against the railroads was justified. The Cullom commission of 1886, one of the precipitants of the ICA, provided eighteen causes of complaints. But it has also been argued that the American railroads were overly vilified and that attention has been focused on them as faceless and impersonal corporations, "rail rogues" and "robber barons." This is an attitude seen in the popular culture's glorification of the train robbers (most famously Frank and Jesse James, and Butch Cassidy) and hoboes, and a

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[97] Stover, American *Railroads,* 113.

[98] Stover, *American Railroads*, 92-93.

[99] Bernstein, *Regulating Business,* 18.

disparagement of those enforcers of the lines, the Pinkertons; this is an altitude that continues to the present day.[100] It should not be forgotten that the growth of the rail systems had numerous positive impacts. It was influential and associated with the spread of the telegraph, the birth of new industries, growth of cities, the gold standard, and the increased power of the corporations, banks and investment elites that led to the resulting concentration of wealth, not to mention the homogenization of society that helped to unify the country and gave rise to the nationalism that threatened restrictive, "small town" or regional views of society, all of which were inimical to the American tradition of the agriculturalist.[101] In most regards this was a continuation of the conflict between the Jeffersonian and the Hamiltonian perspectives. For the farmers, despite its benefits, the railroads endangered their way of life. Nationalization and unification threatened the identities of small farms and villages. It reduced their influence and the influence of their leaders and state dignitaries.[102] Other facts that led to hostility towards the railroads included: the consolidation of the lines, which lessened their connection to local interests, the stories of the railroad stock swindles, and fears that the lines were corrupting politicians.[103] All of these issues led to the rise of the People's Party (Populists) in 1891.

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[100] Wolmar, *The Great American Railroad Revolution,* 203-206, 238-239.

[101] H. Paul Jeffers, *An Honest President: The Life and Presidencies of Grover Cleveland* (New York: Perennial, 2000), 255. Martin, *Railroads Triumphant,* 201. Klein, *Unfinished Business,* 16-17.

[102] Paul D. Carrington, "Law and Economics in the Creation of Federal Administrative Law: Thomas Cooley, Elder to the Republic," *Iowa Law Review* 83 (1998): 371. Accessed from http://scholarship.law.duke.edu/cgi/viewcontent.cgi%3Farticle%3d1153%/28context%3Dfaculty_scholarship.

[103] Ely, *Railroads and American Law,* 83-84.

The Populists viewed railways as "public highways"—"common carriers"—built using public funds and subsidized by mail contracts—that should not be under private domination according to common law.[104] Originally the Populists supported state commissions, but these commissions failed and finally the Populist solution to the problems, real or perceived, was that the railroads had to be taken over, or at least regulated by the federal government. [105]

By the 1870s it was the view of many that the railroads had to be brought under some kind of centralized control. This view of the railways has been summarized by Holbrook: the railroads were a "law unto themselves. They bought United States Senators and Congressmen…with cash. They ran trains when and where and how they pleased. They charged what they would…corrupt is none too strong a word."[106] Importantly, the owners understood that the labor unrest and the competition between lines cut into their profits.

The railroads did respond to safety and rate concerns. Automatic coupling systems and a standardized gauge of four feet 8½ inches had come into being by 1880 and four time zones in 1883 (from fifty-four).[107] Also steel rails replaced iron rails, which permitted larger capacity freight cars to be pulled by heavier, more fuel efficient

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[104] Ely, *Railroads and American Law,* 71-73.

[105] Jeffers, *An Honest President,* 246. Charles Postel, *The Populist Vision* (New York: Oxford University Press, 2007), 147-148.

[106] Holbrook, *The Story of American Railroads,* 36.

[107] Hoogenboom, *A History of the ICC,* 1-2.

locomotives, and there was a drop in the ton/mile rate from 3.09 cents in 1866 to 0.76 cents in 1886.[108]

Demands on the government to act on railroad rates began to mount. Federal interest in interstate commerce started with maritime commerce. In 1824, in *Gibbons v. Ogden,* the Supreme Court ruled that only the federal government could regulate interstate commerce.[109] Nonpayment of loans by the railroads led the government to pass the Thurman Law in 1874 and to create a Bureau of Railroad Accounts.[110]

Congressional interest in the railroads was justified by their importance in unifying the nation as the country grew, especially in the period after the Civil War. The huge public investment in their creation and the fact that the transit lines came to be seen as natural monopolies, like other public services provided further justification.[111] In past histories, private capital was often cited as the only economic driver of the lines, but the facts show many lines were financed by local and state bonds and subsidies.[112] As early as 1830 there were drawbacks on duties on imported railroad iron, and total exemptions from 1832 until 1842.[113] Also, the federal government had provided support for the

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[108] Hadley, "The Railway in its Business Relations," 358-359.

[109] Burton W. Folsom, Jr., *The Myth of the Robber Barons: A New Look at the Rise of Big Business in America,* 3rd ed. (Herndon, VA: Young America's Foundation, 1996), 2.

[110] Folsom, *The Myth of the Robber Barons,* 21.

[111] Shrag, "Transportation and the Uniting of the Nation," 28-29.

[112] Beck, Our *Wonderland of Bureaucracy,* 156. Campbell, *The Growth of American Government,* 70. Cleveland, *Railroad Finance,* 31-33. Alfred D. Chandler, Jr. "Patterns of American Railroad Finance. 1830-1850," *Business History Review* 28, no. 3 (1954): 249.

[113] Cleveland, *Railroad Finance,* 32.

railways by land grants totaling 131,230,358 acres (enough to form the third largest state) and the Federal government provided direct loans or stipends per mile of track laid for many of the lines.[114] Additionally, Congress provided financial support through the mail contracts, which were worth hundreds of thousands of dollars to mail carriers.[115] Indirectly, the construction of the railways was promoted by reductions of the import tariffs for rails.[116] Therefore, there was an interest in how the train systems performed.

After the decline of the Grangers, merchants, small oil companies and the railways themselves (after the failures of pools and the return to competition in the early 1880s) were the prime movers for reform.[117] In 1873, New York farmers and merchants, who opposed railroad rate controls with the goal of achieving a rate advantage over their competitors, formed the New York Cheap Transportation Association (later the Board of Trade and Transportation). They were led by Francis B. Thurber, a grocer and Simon Sterne, an attorney. This movement led to the New York's Hepburn committee of 1879, which revealed the rebates paid to Standard Oil and the extent of the watering of the New

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[114] Folsom, *The Myth of the Robber Barons,* 17-40. Cleveland, *Railroad Finance*, 32-33.

[115] Shrag, "Transportation and the Uniting of the Nation," 27, 29, 30.

[116] Earl J. Heydinger, "The English Influence in American Railroads." *Railway and Locomotive Historical Society Bulletin,* No. 91 (1954). Accessed from http://hiomedo.net/TheHopkinThomasProject/TimeLine/IndustrialRevAmerica/SteamEngine/Heydinger...

[117] Hoogenboom, *A History of the ICC,* 11. Stone, *The Interstate Commerce Commission,* 5-6.

York Central's stock. Sterne was chief investigator for New York State and went on to help the Senate committee draft the ICA.[118]

At the recommendation of President Grant, a Senate committee was appointed to study the increasing transportation needs of the West and South in 1872. This committee (the "Windom Committee") produced a report in 1874 that informed legislators and the public on railroad problems. Additionally the report recommended that the government run a model railroad to serve as a guide to the appropriate rates, a recommendation never acted upon.[119]

Under pressure from the independent oil producers from Pennsylvania, the House first considered regulation in 1876. John Reagan, a Democratic Congressman from Texas and longtime chair of the Committee on Commerce, was responsible for a bill that passed in the House in 1878. It was based on an earlier bill introduced by James Hopkins (of Pennsylvania) and contained provisions requiring railroads to post schedules. It contained anti-rate discrimination provisions (anti-rebating provisions and prohibition on higher rates for short vs. long hauls) and opposed pooling. However, his bill failed in the Senate. He continued to introduce modifications of the bill throughout the early 1880s. Shelby Cullom, a Republican senator from Illinois introduced a bill with more flexible long-short haul rate differentials but left enforcement to a commission. Cullom's bill, which did not deal with pooling, passed the Senate in 1886.[120] Following the *Wabash*

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[118] Hoogenboom, *A History of the ICC,* 9-10. "Sterne, Simon," from *Appleton's Cyclopedia of American Biography.* Accessed from http://en.wikisource.org/w/index.php?=Appletonms%27_Cyclopedia_of_American_Biography/Sterne, Simon&oldid=287715.

[119] Bernhardt, *The Interstate Commerce Commission*, 4.

[120] Hoogenboom, *A History of the ICC,* 10-11.

decision of 1886, a compromise bill creating the Interstate Commerce Act (ICA) was passed.[121] The major points of contention in reaching the compromise was over the creation of a commission with advisory vs. legal powers, a long-short clause and the issue of pools.[122] President Cleveland signed the bill into law in 1887.[123] There was no provision for rate regulation in the bills as proposed, or in the law that was passed.

The ICA was created with bipartisan support, primarily from Midwestern Republicans and Southern Democrats (opposition came from pro-railroad Northeastern Republicans, and those Democrats who supported a more stringent bill).[124] There was little opposition and actually some half-hearted support from the railroads, which saw railroad regulation as inevitable and the bill as the best that the railroads were likely to do.[125] Five of the Northeastern Republicans who voted against the bill had been railroad presidents; one of the two California senators who opposed the bill was Leland Stanford of the Southern Pacific Railroad.[126]

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[121] James W. Ely, Jr., "The Troubled Beginning of the Interstate Commerce Commission Act," *Marquette Law Review* 95, no. 4 (2012): 1131-1134. Accessed http://web.ebscohost.com.ezp-prod1.hul.harvard.edu/ehost/pdfviewer/pdfviewer?vid=5&sid=6c68bbo4-561e-41de-0d96-8a53-b68bb4d%sessionmgr12&hid=21. Cherny, *American Politics,* 79-80.

[122] Bernhardt, *The Interstate Commerce Commission,* 6.

[123] Campbell, *The Growth of American Government,* 29. Cherny, *American Politics, 79-80.*

[124] Cherny, *American Politics* 79-80.

[125] Hoogenboom, *A History of the ICC,* 15-17.

[126] Campbell, *The Growth of American Government,* 47. Hoogenboom, *A History of the ICC,* 16. Shrag, "Transportation and the Uniting of the Nation," 31. Woll, *American Bureaucracy,* 39.

Twenty-four sections were included in the ICA.[127] In summary, the Act: 1) established the ICC with the authority "to inquire into the management of the business of all common carriers" and with the obligation to make yearly reports to the Secretary of the Interior; 2) the ICC was to consist of five commissioners, with a term of six years, and no more than three from one political party; none was to have a connection with the railroad industry; 3) it granted the Commission the right to receive complaints and investigate violations of statute; in order to accomplish this the Commission had the power to require witnesses to testify and the power to require production; and 4) the Act stated that rates for transportation should be reasonable; 5) it banned preferential rates or rebates for shippers; 6) differential rates for short vs. long hauls were forbidden except "in special cases after investigation by the Commission;" 7) the Act outlawed pooling of traffic or earnings; 8) public posting and filing of rates and ten days notice of increase in rates was required; 9) contracts and agreements between common carriers were to be filed with the Commission. The ICA required 10) the filing of annual reports from all common carriers covering financial issues, rates and regulation, contracts and agreements, and 11) "if practical" that all carriers use a uniform accounting system. Most importantly, 12) the Act applied only "to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad" between or across states or with a foreign country. Intrastate commerce was specifically not covered by the Act.[128] Power to set rates was not a function of the ICC. Enforcement

[127] "Interstate Commerce Act (1887)." Accessed from http://www.ourdocuments.gov/doc.php?flash=true&doc=49.

[128] Transcript of Interstate Commerce Act (1887). Accessed from http://www.ourdocuments.gov/doc.php?flash=true&doc= 49=transcript.

of ICC judgments was a power reserved for the circuit court of the United States. While a goal of the ICC was to try to set up uniform accounting, issues of stock manipulation were not addressed. Initially, the Secretary of the Interior had a degree of formal control over the commission with authority to approve employment and compensation for employees, to furnish offices, and approve expenses. The Secretary was to transmit the commission's annual reports to the Congress.[129] From the very beginning the intention of the Act was unclear; it was very difficult to determine its goal; its terms were confusing and contradictory; some provisions stimulated competition while others penalized it.[130]

Thomas Cooley was the commission's first chairman. Cooley was well-known nationally as a respected Constitutional scholar and a proponent of *laissez-faire business* economics. He was described as a "distinguished jurist" and "Michigan's most illustrious judge."[131]

This is the background that led to the Interstate Commerce Act of 1887 and the Interstate Commerce Commission that it created as it is typically presented. It should be noted that while this is a railroad-specific history, a similar background exists for many other industries that have since come under the control of commissions. Their histories may differ in details, but they would be the same in essence. This picture of the origin of the ICC emphasizes pressures on Congress from socially, economically, and industrially

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[129] Bernhardt, *The Interstate Commerce Commission*, 7.

[130] Ely, Railroads *and American Law,* 93-96. Ely, "The Troubled Beginning of the Interstate Commerce Commission Act," 1131-1134. "Interstate Commerce Act (1887)."

[131] Dempsey, "The Rise and Fall of the Interstate Commerce Commission," 1161. Lawrence M. Friedman, *A History of American Law* (New York: Simon & Schuster, 1973), 323- 324.

motivated interest groups, occurring at a time when the states did not have the ability to control rail transportation in response to these pressures. The states were unable to enforce their own laws and the federal courts limited their ability to expand their power declaring that the states could not deal with the important issues of interstate commerce, which was ruled to be in the Federal domain in *Wabash, St. Louis & Pacific Railway Company v. Illinois* 118 U. S. 557 (1886).[132] The situation was compounded by the complex needs of the railroads and the lack of Congressional expertise in this area.[133] This is a view of the origin of the ICC that suggests the Act was passed primarily in an attempt to respond to societal pressures and pressures of voting blocs. For many this is the standard picture of the origin of the ICC. However, it should be noted that there are multiple objections to this picture. A major issue is that the actual state of the railroads and the "pressure groups" in the period prior to the passage of the ICA is ignored. Also the benefits and value of the railroads are often ignored and business practices are viewed from a mid 20th-century perspective.[134] The primary objection is that the goals of the 1870s that created the pressure for railway regulation were less evident by the late 1880s. As noted, by that time the Grange had ceased to have significant political influence and shipping rates for farmers and merchants had fallen. Oilmen who had initially opposed rebates to Standard Oil had joined with Standard Oil to share in the rebates. On their own the railways had improved safety and operating efficiency and started on the road to

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[132] "Commerce Clause." *Wabash*.

[133] Woll, *American Bureaucracy,* 38-40.

[134] Friedman, "A Word about Commissions," 704-706. Martin, *Railroads Triumphant,* 150-152, 174.

consolidation. Not only was railroad technology and management more complicated at the end of the 1880s but similar changes were taking place in virtually every industry. Despite Kolko's hypothesis, most scholars of the ICA do not see the railroads as its advocates; railroad line acceptance of the ICA was at best limited.[135] Even some of the brief reviews indicate that many of the actions of the entrepreneurs of the lines "revealed slight consciousness of social responsibility" rather than outright criminal actions.[136] For these reasons other approaches to the story of the ICC's origin are needed.

## Origin of the Interstate Commerce Commission and the United States Supreme Court

The ICC is often presented as the result of the Granger movement, pressure from wholesalers and Eastern merchants or the result of the internecine conflicts in the providers of the rail services. However there is evidence that the ICC was also the inevitable result of the unfolding of mechanisms that were put into motion at the onset of the foundation of the American Republic, and the inevitable consequence of Article One, Section 8, Clause 3 of the United States Constitution in which the power to regulate Interstate Commerce is reserved to the Congress. The Clause was about creating a unified nation through interconnected national markets and strengthening the federal government. Congress was given the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[137] That power has played a very

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[135] Hoogenboom, *A History of the ICC*, 33. Klein, *Unfinished Business,* 125.

[136] Bernhardt, *The Interstate Commerce Commission,* 4.

[137] Cited from "Commerce Clause." Accessed from http://www.law.cornell.edu/wexd/commerce_claus.

important role in the expansion of Federal power to this day.[138] The Commerce Clause was first used as early as 1824 to regulate interstate navigation, but it became of even greater importance as interstate commerce and trade vastly increased with the growth of the railway systems after the Civil War. The ICA and ICC can be viewed as the result of the Commerce Clause.

To discover the original intent of the Commerce Clause, events arising from the failure of the Articles of Confederation that led to the framing of the Constitution must be considered.

1) The lack of a strong central government to balance the authority of the state governments.

2) After the end of the Revolution the nation's unity was threatened by weaknesses in the central government under the Articles of Confederation. These weaknesses were especially apparent in the area of regulation of interstate commerce. Conflict arose between the states over state taxation of goods crossing state lines in transit to other states and conflicts over control of waterways that bordered on two or more states.[139] Attempts to rectify the situation led to the Virginia Convention and

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[138] Clark M. Neilly, *Terms of Engagement* (New York: Encounter Books, 2013), 8, 73-83.

[139] Arnheim, *U.S. Constitution for Dummies*, 102. Scott Boykin, "The Commerce Clause, American Democracy and the Affordable Care Act." *Georgetown Journal of Law and Public Policy* 89, no. 10 (2015): 92-94. Accessed from http:www.law.georgetown.edu/academics/law-journals/gjlpp/upload/zs80011200. Walter C. Noyes, "Development of the Commerce Clause of the Constitution," *Yale Law Journal* 16, no. 4 (1907): 253-258. Accessed from URL:http:www.jastor.org/stable/785090.

the US Constitution—to an extent, the Constitution came into being as a result of interstate commerce.[140]

3) "[C]ommerce, taxation and the militia," and promotion of national unity were seen by Madison (Federalist, no. 56) as the most important objectives of Federal legislation.

The "founders" original intent of the Commerce Clause can be found in three sources.

The first is the Constitution itself with its primary intent of forming, a "more perfect union." According to Max Farrand, the fundamental objection to government under the Articles of Confederation was its inability to enforce its degrees. This objection was remedied by the Constitution by the creation of the "supreme Law of the Land" with "the Militia to execute the Laws of the Union." The Constitution "came about that in place of opposition or distrust, commercial confidence caused welcome and support to be extended to the new government…it was floated on a wave of commercial prosperity."[141]

Second, the Federalist Papers (Madison and Hamilton) and records of the Federal Convention are the primary sources that provide insight into the original intent of the Constitution's framers.[142] In Federalist 42, Madison states that the goal of the Clause is

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[140] Max Farrand, *The Framing of the Constitution of the United States* (Stoughton, MA: Yale University Press, 1913), 5, 12, 45.

[141] Farrand, *The Framing of the Constitution,* 210.

[142] E. Allan Farnsworth, *An Introduction to the Legal System of the United States,* 4th ed., ed. Steven Sheppard (New York: Oxford University Press, 2010), 164. Boykin, "The Commerce Clause, American Democracy and the Affordable Care Act," 92-95.

"supervising …reciprocal trade of confederated states" so that "they shall not establish imposts disadvantageous to their neighbors …without general permission," an idea supported by Monroe.[143] From this, it is clear that an original intent of the Commerce Clause was the control of interstate tariffs on trade.[144]

The third source of original intent is the actions of the founding fraternity. Power was in the hands of Federalists—the advocates of a strong central government. When Adams lost his bid for re-election in 1800 to Jefferson (the leading advocate of limited government) he spent his last days in office trying to preserve Federalist ideals through his appointment of judges.[145] His greatest success was his "11:50" appointment—John Marshall—a moderate Federalist who believed in a strong judiciary and the primacy of the federal government over the states; according to John Adams: "John Marshall was my gift to the American People."[146] The Federalist's beliefs were to shape Marshall's view of the Constitution and its development.

The Constitution established a tripartite system of government —it established the three branches of government, which were meant to balance each other. Roles, powers

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[143] Noyes, "Development of the Commerce Clause," 257.

[144] Arnheim, *U. S. Constitution for Dummies,* 102. Randy E. Barnett, "The Original Meaning of the Commerce Clause," *University of Chicago Law Review* 68, no. 1 (2001): 101-147. Boykin, "The Commerce Clause, American Democracy and the Affordable Care Act," 92-95. Farrand, *The Framing of the Constitution,* 7. Noyes, "Development of the Commerce Clause," 254-255.

[145] James M. Burns, *Packing of the Court* (New York: Penguin Press, 2009), 19, 22.

[146] Burns, *Packing of the Court,* 27, 36-37. Cited from William Rehnquist, *The Supreme Court* (New York: Vintage Books, 2001), 43. Peter Irons, *A People's History of the Supreme Court* (New York: Penguin Books, 2006), 132.

and spheres of influence for each branch were outlined in Articles 1-3, but the specifics of power sharing needed to be worked out.[147] In this light Marshall's goal was to assert as much power for the judiciary as he could; if no one challenged his authority all the better for the courts. This was accomplished in *Marbury v.Madison,*1 Cranch (5 U.S.) 137 (1803) where both judicial review and the principle that the Court could define and interpret the terms of the Constitution enabled the Court to create law (previously accepted by the framers as "an unwritten" or implied power). It was established under the premise that the Court's duty to judge gave it the right to interpret constitutionality.[148]

*Marbury* was followed by *Fletcher v. Peck,* 6 Cranch (10 U.S.) 87 (1810), where, for the first time, the Supreme Court reversed a state court.[149]

In *Gibbons v. Ogden*, 9 Wheaton (22 U.S.) 1 (1824) Marshall provided the government with the tool to exercise the power he had secured for it.[150] Ogden had been granted a New York state license to operate a steamship between New York and New Jersey and he sued Gibbons under a federal statue when Gibbons tried to operate a competing line. Marshall's court ruled in favor of Gibbons under the Commerce Clause. Marshall's ruling was based on Webster's argument in the case.[151] Marshall's ruling broadly defined three elements of interstate commerce. Commerce was defined by

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[147] Akhill R. Amar, *America's Constitution: A Biography* (New York: Random House, 2006), 212. Burns, *Packing the Court*, 10-11, 13-17.

[148] Amar, *America's Constitution,* 212. Arnheim, *U. S. Constitution for Dummies,* 50, 53, 75. Farnsworth, *An Introduction to the Legal System*, 7.

[149] Burns, *Packing the Court,* 38.

[150] Farnsworth, *An Introduction to the Legal System,* 165

[151] Irons, *A People's History*, 132.

Marshall to mean not only what was moved, but "commercial intercourse," which included how things were moved, and added the idea of transportation to the Commerce Clause via navigation.[152] Next, "among the several states" was taken to mean everything that was not restricted to the borders of a single state. "Even if an activity was carried on entirely within the borders of a single state, if it affected commerce beyond the borders of the state is was interstate commerce."[153] Finally the power to regulate commerce was defined as a power vested in Congress by the Constitution with no limitations other than those specified in the Constitution.[154] This approach has been the focus and basis of subsequent commentators and interpreters. For them following Marshall, "commerce" had the broad meaning—"all forms of intercourse"/ "gainful activities"—anything that impacted on "activities in more states than one."[155]

For the next sixty years the Clause remained relatively quiescent. Congress did not provide legislative guidance based on it, and the courts temporized. Despite this, issues of interstate commerce came up in multiple cases.[156]

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[152] Jay M. Feinman, *Law 101,* 4th ed. (New York: Oxford University Press, 2014), 35. Noyes, "Development of the Commerce Clause," 255-258.

[153] Feinman, *Law 101, 35.*

[154] Feinman, *Law 101,* 35. David Forte, "Commerce among the States," in *The Heritage Guide to the Constitution,* ed. David F. Forte Sr. (Washington, DC: Regnery Publishing, 2005), 102.

[155] Amar, *America's Constitution,* 107-108. Barnett, "The Original Meaning of the Commerce Clause," 131. Forte, "Commerce among the States," 102.

[156] Shelby Cullom, *Fifty Years of Public Service* (Chicago: A. C. McClurg, 1911), 313.

In *Cooley v. The Board of Wardens of the Port of Philadelphia,* 12 Howard (53 U.S.) 299 (1851)—a decision that some see as somewhat antithetical to *Gibbons*—the court under Roger Taney, who followed Marshall as the Chief Justice and was more favorable to states' rights than Marshall had been, recognized concurrent power (nonexclusive federal jurisdiction) to regulate local commerce (an idea that conflicted with dormant commerce power).[157] In this case, the port of Philadelphia sought to enforce state pilotage regulations on ships coming into port from various ports of origin. The Court found in favor of Philadelphia. It felt that some rules operated "equally…in every port: and some…meet the local necessities of navigation.[158] This case pointed to judicial strengthening of states' power. It is reflective of a time in which the Court was becoming more conservative and less supportive of federal control over business in the era of *laissez-faire* economics, and the antebellum court that ruled in *Dred Scott* (the decision was written by Chief Justice Taney, who was supported by seven of nine justices).

States' rights were also affirmed in so-called *Slaughter-House Cases* (1873) (*The Butcher's Benevolent Association of New Orleans v. The Crescent City Livestock Landing and Slaughter-house Company,* 83 U.S. 36 [1873] et al.) after the Civil War. Here the fourteenth amendment was limited and the states police powers affirmed. It was ruled by Justice Miller that to apply the amendment would "constitute the Court a perpetual censor upon all legislation of the States on the civil rights of their own

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[157] Arnhein, *U. S. Constitution for Dummies,* 86. Farnsworth, *An Introduction to the Legal System,* 47. Forte, "Commerce among the States," 102.

[158] John R. Vile, *Essential Supreme Court Decisions: Summaries of Leading Cases in US Constitutional Law,* 17th ed. (Lanham, MD: Rowman and Littlefield, 2014), 4-5.

citizens," and thus interfere with licensing acts, liquor regulation, hours of labor, and child labor laws."[159]

In *Munn v. Illinois*, 94 U.S. 113 (1877), the most famous of the *Granger Cases*, Ira Munn a grain elevator operator in Illinois, challenged the state's authority to regulate his business. Under the Granger laws the Illinois Railroad and Warehouse Commission claimed the right to regulate railroads, warehouses and grain elevators' maximum fees. Munn argued in part that his business involved interstate commerce, therefore only the United States government and not the state of Illinois could regulate it. The Court found against him. In its opinion the Court noted that since Congress had not acted to regulate grain elevators, Illinois could.[160] Similar opinions were expressed in *Chicago, Burlington and Quincy Railroad v. Iowa,* 24 U.S. 94 (1876) and *Peik v. Chicago and North Western Railway Company,* 94 U.S. 164 (1876).[161] In both of these cases, the companies did business that crossed state lines. Therefore, under the Commerce Clause, they objected to state regulations. In *Chicago* the court accepted that the company was involved in interstate commerce but ruled that "until Congress acts, the State must be permitted to adopt such rules and regulations as may be necessary… even though in so doing those

[159] Cited from Kermit L. Hall and Peter Karstan, *The Magic Mirror: Law in American History,* 2nd ed. (New York: Oxford University Press, 2009), 254.

[160] Gary Hartman, Roy M. Mersky, and Cindy Tate, *Landmark Supreme Court Cases: The Most Influential Decisions of the Supreme Court of the United States* (New York: Facts on File, 2004), 194-195.

[161] Stover, *American Railroads,* 121.

without may be indirectly affected."[162] The ruling in *Peik* was virtually identical.[163] In 1880, James B. Weaver, congressman from Iowa and the Greenback party candidate for president complained that railroads in Iowa were shifting litigation from state to federal courts by incorporating in other states.[164]

Dissenting in the *Civil Rights Cases,* 109 U. S. 3 (1883) in which the Supreme Court ruled that the 14th Amendment did not gave Congress the right to outlaw racial discrimination by private individuals or organization, Justice John Marshall Harlan suggested that under the commerce clause the court "could prohibit discrimination in public conveyances passing from one State to another" hinting at a potentially broadened view of federal power.[165] His view prevailed in the decision in *Heart of Atlanta Motel, Inc. v. United States,* 379 U. S. 241 (1964).[166]

It is important to review the judicial climate of the second half of the 19th century. One of the most important books of this era was: *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, written in 1868 by Thomas M. Cooley, who was to be the first chief commissioner of the ICC. This work provided the legal ideological underpinnings for the *laissez-faire* point of

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[162] *"Chicago, Burlington, and Quincy Railroad Company v. Iowa,* 94 U. S. 155 (1876)." Accessed from http://bulk.resource.org/courts.gov/e/US/94/94.US.155.html.

[163] "*Peik v. Chicago and Northwestern Railway Company,* 94 U. S. 164 (1876)." Accessed from http://supreme.justia.com/cases/federal/us/94/164/case.html.

[164] Stover, *American Railroads,* 122.

[165] Brands, *American Colossus,* 459-460. "The Civil Rights Cases." Accessed from http://oyez.org/cases/1851-1900/1882_2. Cited in Irons, *A People's History,* 215.

[166] Vile, *Essential Supreme Court Decision,* 15-16.

view; it was often cited by the conservative court of this time. It championed limited government, opposed hostile business regulation, and opposed laws favoring "organized labor and the mob."[167]

Interest in the Clause increased from 1886. Afterwards, the Clause was to become more disputed and generate "more cases than any other."[168]

In 1886, after long supporting states' rights, the Supreme Court emphasized the jurisdiction of the federal government over the states in the area of interstate transport in *Wabash, St. Louis & Pacific Railroad Company v. Illinois* citing the Clause, 118 U. S. 557 (1886).[169] It is often stated that this case led to the enactment of the Interstate Commerce Act of 1887, which established the first regulatory commission (limited to control of the railroads). In 1890, justified by the Commerce Clause, Congress passed the Sherman Antitrust Act. The ICC and Sherman Antitrust acts were both innovations. It would seem that issues of interstate commerce could have been raised in the "Erie War" of 1853-1854, which dealt with connecting railroad gauges on interstate transport and the franchise granting to railroads chartered in out-of-state jurisdictions in the 1840s.[170] The ICC was to increase regulation of industry by an administrative agency; the Sherman act was to control the growing industries by legislation. Neither was successful at first.

This review of the history of the Commerce Clause and Supreme Court indicates that the ICA was long predestined. It was the consequence of the battle between the states

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[167] Friedman, *A History of American Law,* 545-546.

[168] Forte, "Commerce among the States, 101, 102. Farnsworth, *An Introduction to the Legal System,* 166.

[169] Arnheim, *U. S. Constitution for Dummies,* 86.

[170] Ely, *Railroads and American Law,* 13-16.

and central Government not only over commerce, but over the balance of power between the states and the federal government. The outcome was predetermined in the Constitution and early decisions of John Marshall. Therefore, it is my contention that the ICC was established in the context not only of social, political and economic trends, but as a result of a judicial current originating in the Constitution and in the original Federalist agenda, which had been set into motion by John Marshall. An issue for future research that should be addressed is the Court's delay in reaching a decision to force Congress to address the implications of the Commerce Clause. They could have reached the same conclusions in any of the cases cited from the 1870s, all of which brought up the Commerce Clause. The interaction of the Court, the railroads and ICC was important as a vehicle whereby the public could shape business ethics and morality. Through the federal Courts it was decided that some of the cornerstones of the *lassiez-faire* business model were illegal, while the court of public opinion and the press that judged them eventually found them to be immoral.

## The Origins of the Interstate Commerce Commission; The People Who Created the Commission

Hoogenboom suggested that looking at what congressmen said and "tallying their votes" is a way to achieve better understanding of the forces that led Congress to pass the ICA.[171] The ICA and hence the ICC both came into being mainly through the efforts of two men, John H. Reagan and Shelby M. Cullom, though numerous other politicians lawmakers played supporting roles. Because of this it is important to understand the

[171] Hoogenboom, *A History of the ICC,* 13.

beliefs, politics, and affiliations that led these men to write and pass the ICA. It is also important to the understanding of their goals for the ICC.

Legislative interest in the railroads began as early as 1868. The idea of a federal railroad bureau appeared in the 1871 Cook bill. A federal commission to gather information for railroad legislation was proposed in the 1873 Hawley bill. A bill by George McCray (a Republican from Iowa), which called for reasonable rates and a commission passed the House, but failed in the Senate in 1874.[172] At President Grant's request, a Senate committee investigated rates and produced the "Windom report" in 1874, which was never acted upon.[173] James H. Hopkins was a Democratic Congressman from Pennsylvania. He called for an investigation into the billing of Standard Oil in 1876 and introduced a bill to prohibit rebates and discriminatory billing, provide for court enforcement of regulation and the posting of train schedules. This bill was reputedly drawn up by the counsel for the Reading Railroad (a line that did not get Standard's traffic). When Hopkins failed to get re-elected in 1877 he urged John H. Reagan, the new chairman of the Commerce Committee to pursue federal regulation (a fact not mentioned by Reagan in his *Memoirs)*. Another Pennsylvania Congressman, Lewis F. Watson, passed a version of Hopkins' measure in 1878.[174]

John H. Reagan (1818-1905) has been called one of the four most prominent Texans of the 19th century. Reagan was an Indian fighter, lawyer, judge, and U. S. Congressman prior to the American Civil War. Before the war, he campaigned and won

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[172] Cushman, *The Independent Regulatory Commissions,* 41.

[173] Bernhardt, *The Interstate Commerce Commission*, 4-5.

[174] Hoogenboom, *A History of the ICC,* 10-11.

his Congressional seat from Texas on a pro-Union platform. Nevertheless he resigned his seat in Congress in January of 1861 following Texas' secession from the Union. He was one of the representatives from Texas to go to the secession convention in Montgomery, Alabama, and within a month was a member of the cabinet of Jefferson Davis as his Postmaster General. In this role he was a noteworthy success. Reagan convinced most of the southern members of the United States Post Office to join him and he had the Confederate Postal Service up and running within six weeks—performing the "minor miracle in keeping the Confederate Post Office Department on the profit side of the Ledger."[175] He accomplished this by abolishing free-franking of mail, raising postal rates, eliminating costly routes, increasing staff efficiency, and increasing competition. Also, he convinced railroad executives to cut transportation rates in half and accept Confederate bonds for payment.[176] Although there was some public dissatisfaction with him, Reagan remained Confederate Post Master General through the war and was even appointed the Sectary of the Treasury of the Confederacy for a short time towards the end of the war.

After the war Reagan antagonized many of his fellow Texans when he wrote his Fort Warren Letter. In it he advocated that they accept the regulations laid down by the North to avoid harsher repercussions—"the complete subjugation and humiliation of the

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[175] Boyd B. Sutler, "The Confederate Postal Service in West Virginia," *West Virginia Division of Culture and History.* Accessed from http://www.wvculture.org/history/journal_wvh/wvh24-1html.

[176] Ben H. Proctor, "John Henninger Reagan," *Handbook of Texas Online.* Accessed from http://www.tshaonline.org/handbook/onlinde/articles/fre02.

Southern people."[177] In 1866 he declined to accept the appointment to be Governor of Texas offered by General Charles Griffin, the Union commander of the Department of Texas. When his predictions were proven right and more "violent measures of reconstruction were adopted," he was returned to favor and the U. S. Congress in 1875.[178] Reagan was a member of the Texas Constitution convention in 1876.

As a member of the 44th Congress, Reagan was appointed to the Committees on Commerce and on Expenditures of the Post Office Department and states that he realized "the necessity of improving the commercial facilities of my State."[179] He devoted "much labor" to a bill concerning steam vessel commerce and regulation in 1876, only to be opposed by railroad interests. [180] On May 8, 1878, Reagan introduced his bill "to regulate interstate commerce and to prohibit unjust discrimination by common carriers" for the first time (as noted above he does not mention Hopkins).[181] Despite being approached to run for governor of Texas in July of 1878 he chose to remain in Congress to advocate for his bill until its final passage in 1887. Reagan and his supporters ardently opposed pools and the idea of a commission; they wanted rates to be posted, a provision for equal mileage rates and they looked to ordinary court process for enforcement of the law with

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[177] John H. Reagan, *Memoirs with Special Reference to Secession and the Civil War* (Lexington, KY: Old South Books), 237.

[178] Reagan, *Memoirs,* 236.

[179] Reagan, *Memoirs,* 242.

[180] Reagan, *Memoirs,* 243.

[181] Reagan, *Memoirs,* 243.

high penalties for violation.[182] Surprisingly, in his *Memoir,* Reagan does not mention the events that surrounded the ultimate passage of the ICA or Shelby M. Cullom, perhaps because of the compromises necessary to pass the bill.

After serving as chairman of the House Commerce Committee for ten years, Reagan was elected to the Senate and served on the Commerce Committee of the Senate for four years. Resigning from his seat in the Senate in June of 1891, and in support of his friend Governor Hogg's campaign pledge to regulate railroads, Reagan went on to spend the remainder of his public life as chairman of the Texas state Railroad Commission. When Reagan took over the commission, Texas ended a decade as the epicenter of the American railroad boom. During this period over six thousand miles of track had been laid in the state and towns and cities were expanding. Texas, with six railroads, went from ten thousand to nearly forty thousand miles of track.[183] This commission was able to value the railroads in order to control the stocks and bonds and prevent "watering." It could also "regulate, and maintain freight rates and passenger fares, requiring all rates to be reasonable and just, which discouraged rebating and pooling, leading to constant growth in the business [and net revenues] of the roads." [184] Reagan was also named in two cases in which the Supreme Court affirmed the rights of the Texas Commission to regulate its own intrastate roads: *Reagan v. Farmers' Loan and*

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[182] Cushman, *The Independent Regulatory Commission,* 42. Hadley, "The Railway in Its Business Relations," 368.

[183] Postel, *The Populist Vision,* 214-215.

[184] Reagan, *Memoirs*, 249.

*Trust Co., 154 U.S. 362 (1894)* and *Reagan v. Mercantile Trust Co, 154 U.S. 413 (1894).*[185]

The career of Shelby M. Cullom (1829-1914) had a hardly less distinguished than that of Reagan. Cullum studied law (briefly under the tutelage of Abraham Lincoln) and was admitted to the bar in 1855, the year he was elected to his first public office, city attorney of Springfield, Illinois. In 1856 he was elected to the Illinois House of Representatives and served as its speaker in 1861 (first as a Whig, then as a Republican). He was defeated in a bid for the Illinois State Senate in 1862, the year Lincoln appointed him to a commission to investigate the Quartermaster's and Commissary Departments. From 1865 until 1871 Cullom served as a congressman from Illinois in the U. S. House of Representatives. He served in the Illinois House, again as Speaker, from 1873 to 1874. In 1876 and in 1880 he was elected Governor of Illinois. He served as governor until 1883. In 1877, as Governor of Illinois, he took part in suppressing the Great Railroad Strike of 1877.

When Cullom was in the Illinois House in 1873 he was appointed to a committee that addressed the fact that the existing railroad regulation was ineffective and under the existing laws the railroad commission had no power. That committee drafted the Railroad and Warehouse Law of 1873. Stringent state regulation is said to begin with this law. It set up a board of commissioners who set maximum passenger rates, provided freight rates based entirely on distance and prepared a schedule of minimum freight

[185] "John H. Reagan and Early Regulation; The Supreme Court Upholds the Commission" from *History, Regulation, and the Texas Railroad Commission.* Accessed from http://www.tsl.texas.gov/exhibits/railroad/early/page3.html.

rates.[186] As Governor, in 1879, he defended the Law and in his autobiography presented his experiences with regulation of rail transportation and the associated warehouses.[187] He found that railroads in Illinois were overbuilt and forced to compete. Competition forced lines to lose money at points of competition. In order to compensate, rates were raised where there was less competition. The State of Illinois tried to correct the rate discrimination and protect the rights of individuals by the passage of laws and formation of the Railroad and Warehouse Commission. The authority of the Commission (after it was recognized by the U. S. Supreme Court) "put an end to many of the abuses formerly practiced by such corporations."[188] As a result Cullom concluded that the railroads should manage their own affairs and rates "free from meddlesome legislation…as long as they show a reasonable regard for the requirements of the community."[189] This is the same conclusion that, according to Cullom, had been reached in England.

Cullom's background of having been governor of Illinois, one of the states most influenced by the Grangers, with one of the strongest state commissions was important in shaping his views. He saw the benefits that came from the State Commission in the development of fulltime "students of the great subject of transportation," the gathering of statistics and dealing with safety. In Illinois the Commissioners acted as dispute arbitrators.[190] Cullom recognized that Commissioners needed to be given more legal

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[186] Stover, *American Railroads*, 119.

[187] Cullom, *Fifty Years*, 306-312.

[188] Cullom, *Fifty Years*, 310.

[189] Cullom, *Fifty Years*, 310.

[190] Cullom, *Fifty Years*, 311.

authority, that there were limitations on what the states could control and he recognized the Constitutional authority of the federal government in interstate commerce.[191] This was Cullom's background when he entered the Senate.

Governor Cullom resigned from his office in 1883 in order to become the U. S. Senator from Illinois.[192] When Cullom entered the Senate he had three objectives: control of Interstate Commerce in order "to protect the individual rights of the people as against the great railroad corporations," obliteration of polygamy in Utah and the Hennepin Canal.[193] (The Hennepin Canal was built to connect the Illinois and Mississippi Rivers and compete with rail service. It was obsolete even before it was completed in 1907.)[194] Senator Cullom introduced a bill for a railroad commission in 1883 that was less stringent than Reagan's bill. It proposed a federal commission and accepted pooling under the supervision of the commission.[195] Despite an adverse report from the Senate Commerce Committee it passed the Senate in January of 1885. A special Senate committee, chaired by Cullom, was established in 1885 to help to break the deadlock between the House and Senate bills.[196] After investigating the railways, and over 2000 pages of testimony, the committee reported back to the Senate. It was unanimously

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[191] Cullom, *Fifty Years*, 312-313, 325.

[192] "Shelby Cullom," from *Illinois Governors: Shelby Cullum.* Accessed from http:www.illinoisancestors.org/governors/cullom.html.

[193] Cullom, *Fifty Years*, 222, 325.

[194] "Hennepin Canal," from *Illinois Department of Natural Resources*. Accessed from http:dnr.state.il.us/lands/landmgt/parks/rl/Hennepin.html.

[195] Cushman, *The Independent Regulatory Commission,* 43.

[196] Bernstein, *Regulating Business,* 22.

agreed that there are "evils" in the transportation system. Cullom's commission found eighteen causes of complaint, "the paramount evil…is unjust discrimination between persons, places, commodities or particular descriptions of traffic" to be rectified by "redress and enforcement punishment, and…publicity as to the rates, financial operations and methods of management."[197] Federal intervention to correct the "evils" of the transportation industry was deemed necessary, according to the report, to protect the interest of those discriminated against, especially the small shipper, because the problem was too big and beyond the jurisdiction of the states.[198] The report notes, somewhat ambiguously:

> [t]hat a problem of such magnitude, importance, and intricacy can be summarily solved by any masterstroke of legislative reason is beyond the bound of reasonable belief…That a satisfactory solution of the problem can ever be secured without the aid of wise legislation the committee does not believe.[199]

The report also raises a question of the "evil" intent of the carriers:

> [t]he first question to be determined, apparently, is whether the inequalities complained of and admitted to exist are inevitable, or whether they are entirely the result of arbitrary and unnecessary discrimination on the part of the common carriers of the country.[200]

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[197] Bernhardt, *The Interstate Commerce Commission,* 6. "Report of the Senate Select Committee on Interstate Commerce (With Appendix)." Forty-ninth Congress, first session, 180-181. Submitted to the Senate January 18 1886. Accessed from http://docs.newsbank.com.ezproxy.bpl.org/openurl?ctx_ver=z39.88-2004&rft_id=info:sid/iw.newsbank.com:SERIAL&rft_val_format=info:ofi/fmt:kev:mtx:ctx&@rft=10EAD3A6D8027048&svc_dat=Digital:ssetdoc&req_dat=0F20FECAAFCBE6ED.

[198] "Report of the Senate Select Committee," 175-180.

[199] "Report of the Senate Select Committee," 180.

[200] "Report of the Senate Select Committee," 182.

The resulting focus of the bill that Cullom presented was clearly on rate discrimination and not on other forms of financial manipulation. This bill was passed by the Senate in 1886. Cullom, in his autobiography, is laudatory and expansive about the members of the Senate committee who researched and wrote the bill. However, his description of Reagan's role and the House bill is terse and he does not mention the role of Simon Sterne in working with the Senate committee.[201]

The major issues of contention between the House and the Senate bill were the appointment of a commission, the long-short haul rates and the anti-pooling section.[202] Pressure on the Congress increased when the Supreme Court decided the *Wabash* case. As a result a compromise on the two bills was reached. Cullom got the Commission, subject to judicial appeal, rather than direct judicial control, but lost on the issues of pools and long-short haul rate control.[203] As late as 1913 Cullom expressed his doubts about the anti-pooling section.[204]

Cullom continued to serve as a U. S. Senator until 1913, serving on the Committee on Interstate Commerce (where he tried to introduce a bill strengthening the ICC, a progenitor of the Hepburn Act) and the Foreign relations Committee. During this time period he was noted for attempting to pass a bill excluding Utah from statehood

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[201] Cullom*, Fifty Years*, 313-322.

[202] Bernhardt, *The Interstate Commerce Commission*, 6. Cullom, *Fifty Years,* 215, 322. Cushman, *The Independent Regulatory Commissions,* 45-54.

[203] Bernhardt, *The Interstate Commerce Commission*, 6. Cushman, *The Independent Regulatory Commissions,* 43-44.

[204] Cullom, *Fifty Years*, 322.

based on polygamy and was appointed to the commission to establish the government of the Territory of Hawaii by President McKinley. Shelby Cullom died in 1914.

In the Senate, Cullom's bill was adopted with thirty-seven yes votes and twelve no votes; twenty-six Senators (including many of the most "bitter" opponents of regulation) were absent.[205] Senators from the northeast and west coast generally opposed the bill, which they felt would jeopardize their region's competitive position and bankrupt or unduly restrict railway growth.[206] Midwesterners were generally supportive of the bill, primarily based on their opposition to the power of the railroads. While there was bipartisan support for the bill Republicans from the northeast and Democrats who opposed the Republicans and supported the earlier and more restrictive Reagan bill, opposed the compromise bill.[207]

Finally, President Grover Cleveland's opinions about the ICA must be considered. According to Hoogenboom, President Cleveland signed the ICA with some hesitation.[208] However, Cullom, Graff, and Jeffers all indicate his backing for the ICA and active lobbying in support of its passage.[209] Cleveland was known for his strict interpretation of the constitution, support of a *laissez-faire* approach to business and

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[205] Cullom, *Fifty Years*, 326-327.

[206] Cullom, *Fifty Years*, 211.

[207] Hoogenboom, *A History of the ICC,* 13-17.

[208] Hoogenboom, *A History of the ICC,* 17.

[209] Cullom, *Fifty Years*, 227-228. Henry Graff, *Grover Cleveland* (New York: Times Books, 2002), 85. Jeffers, *An Honest President,* 193.

favoring government arbitration over intervention. At the same time he is famous for his campaign against protective tariffs, which he felt overcharged consumers and favored special interests.[210] While governor of New York, Cleveland opposed a fare rate increase by Jay Gould's Manhattan Elevated Railroad; nevertheless he vetoed the bill that would have lowered the rate on the grounds that the bill was unconstitutional.[211] Likewise, as president, he famously opposed the *Texas Seed Bill of 1887,* stating, "I can find no warrant for such an appropriation in the Constitution…though the people support the Government, the Government should not support the people."[212] In response to the Southwest Strike of 1886, Cleveland recommended legislation for arbitrating labor disputes and advocated for a government "which dealt even handedly with capital and labor"[213] (although Cleveland was later criticized as being less than even handed in his actions in the Pullman Strike).[214] The passage of the ICA and creation of the ICC, which led to an increased role for government, was clearly constitutional. Pafford suggests that Cleveland may have felt that the ICA struck a balance between the exploitation by business monopolies and government intervention.[215] The lack of firm and enforceable

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[210] Campbell, *The Growth of American Government,* 9.

[211] Jeffers, *An Honest President,* 3.

[212] Cited from John M. Pafford, *The Forgotten Conservative: Rediscovering Grover Cleland* (Washington, DC: Regnery Publishing, 2013), 17, 55.

[213] Jeffers, *An Honest President,* 161-162.

[214] Jeffers, *An Honest President,* 293-309.

[215] Pafford, *The Forgotten Conservative,* 56.

goals by a commission without judicial power was in line with Cleveland's beliefs and the beliefs of the man he chose to be the commission's first commissioner, Thomas Cooley, with the support of Senator Cullom.[216]

In consideration of the motives of those involved in the passage of the ICA several themes emerge. The first is that many of the Congressmen involved responded to their constituents, be they the oil producers, agriculturalists, merchants, shippers of raw and finished materials, or railroad magnates and voted for, or against, the bill merely to placate them or because of their limited knowledge of the issues at hand.[217] For them the ICC was simply a means to placate public opinion. As a result, from its inception the ICC was not "particularly fierce" and "born to be crippled."[218] However, other members of the Senate obviously had much stronger feelings. Pro-railroad Congressmen (and the railroads), despite Kolko's thesis, either voted against the bill or were absent from the voting.[219] On the other hand, several Congressmen who opposed the lines were opposed to the bill as not strong enough.

When Cullom first came to Washington and was appointed to the Senate Committee on Railroads it was a non-working committee. His experience and interest in railway regulation energized the committee. For Cullom, the motivation was his goal of protecting individuals from the discriminatory practices of the corporations. Based on his

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[216] Cullom, *Fifty Years*, 229.

[217] Cullom, *Fifty Years,* 314.

[218] Friedman, *A History of American Law*, 395, 396. Woll, *American Bureaucracy*, 6-7.

[219] Cushman, *The Independent Regulatory Commissions,* 44.

familiarity with the issues, he favored a regulatory commission that would arbitrate conflicts between the parties, and he did not oppose pooling. His view was that given time and encouragement backed by the power of legal pressure, the commission could encourage the rail lines to self-correct. This belief was probably a view that President Cleveland shared. It may explain the original structure of the ICA and ICC. Both shared the view that the federal government had the obligation to deal with the issues of interstate commerce.

Finally, while Reagan was said to be a Unionist even prior to the Civil War, above all Reagan remained a loyal Texan, Southerner, and defender of states' rights—"the late Confederates were not rebels nor traitors; in their attempt to withdraw from the Union they were guided and animated by the purest and most exalted patriotism and justified in their actions by the Constitution of the United States."[220] Reagan's interests that led to the ICA were a combination of state interest and his understanding that the post-Civil War recovery of the state of Texas was connected to its role as a transportation and commerce hub within the United States. He exhibited a progressive rather than a populist approach in that he favored an agency based on "a staff of experts" in order to investigate and understand problems. Rational compromise and cooperation, not confrontation was the key approach of the Commission.[221] However, the ability to maintain control of the railroads within Texas was vital to him. Still, there is little doubt that he believed that the destiny of Texas was to be part of the United States.[222]

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[220] Reagan, *Memoirs,* 239.

[221] "John H. Reagan."

[222] Reagan, *Memoirs,* 239, 244.

Robert Cushman has noted that when Cullom—the activist for commissions—was Speaker of the Illinois House of Representatives he took an active interest in the Illinois Railroad and Warehouse Commission. Cushman also noted that Reagan, who opposed the creation of a federal commission, came from Texas, which was a state that had no railroad commission in 1887.[223]

Typical histories of the ICC focus on Reagan and Cullom, rarely mentioning those who advocated for regulation of the carriers before them. Yet this review shows that while they may have turned out to be the prime movers in the passage of the ICA, the movement to regulate the railways was under way before either arrived in Washington. While this review may not totally explain the motivations behind each group or individual, it does indicate that all concerned agreed regulation was an idea whose time had come. They voted for an agency of limited power, either because they felt that the guidance of an agency would work by persuasive influence and thereby change the workings of the railways, or because, through lack of experience, they had no better idea. The result was that the ICC with its vague mandate and no power of enforcement.

## Origins of the Interstate Commerce Commission; Railroad Fraud and Finance

In addition to dealing with rate discrimination the ICC also had limited power to monitor the financial workings and management of the railways. Rate discrimination has already been addressed. In this section a review of railroad financing will be presented followed by a discussion of railroad mismanagement and corruption. It should be noted

[223] Cushman, *The Independent Regulatory Commissions,* 34.

that most authors of books on the ICC follow Stone in asserting rampant abuses of the railroads, but cite few specific examples. Those who write railroad histories are much more sympathetic to the entrepreneurs who built the roads. As a generalization, abuse and fraud in the initial building and financing of the railroads set the stage for later rate discrimination. This happened due to the duplication of main lines and creation branch lines that could not be supported by the volume of available traffic. [224]

Railroad financing got off to a shaky start and in this regard it was very similar to the early financing of canals and turnpikes. Despite the success of the Erie Canal, "most of these early navigation projects were spectacular failures expending vast sums of public and private money with little or nothing to show for it" and destroying the credit of state bonds. [225] According to Holbrook, the stocks and bonds of the early railroads traded with little regard for their actual worth, making it more profitable to build the railroads then it later was to run them.[226] Most of the capital used to finance the earliest railways came from local sources. For example, in the early 1850s nearly 6000 Wisconsin farmers had invested in railroad stock. They raised the money needed to buy the stock by mortgaging their farms.[227] It has already been noted that the farmers were frequently the stockholders in the companies that they were so critical of, and as such they were vulnerable to the

[224] Stone, *The Interstate Commerce Commission,* 1, 3.

[225] Downey, review of Larson.

[226] Holbrook, *The Story of American Railroads,* 43. Stone, *The Interstate Commerce Commission,* 3.

[227] Ely, *Railroads and American Law,* 29-30.

financial manipulations of the companies' managers.[228] Investors in the lines likely expected two benefits. First they expected benefits to their own enterprises by more accessible, faster, and cheaper transportation and they expected safe and profitable returns on their investments.[229] There is little doubt the first goal was achieved (whatever discrimination they faced, the rail transport was, without doubt, more reliable, faster, and cheaper than any other form of transport), but often they were disappointed in the second goal. As Chief Justice Jeremiah S. Black noted in *Sharpless and Others v. Mayor of Philadelphia* 21 Pa. 147 (1853): "The dividends…have disappointed stockholders. Not one of the completed railroads in this state has uniformly paid interest on its cost."[230] Undoubtedly the financial mismanagement of the lines biased the way in which shareholders viewed the carriers.

The story of the financing of the *Brownville Railroad Corporation* (a fictitious, but typical early American line) is told by Holbrook and repeated by Wolmar. After the need for a railroad was established (or created) and a charter obtained, the task of financing the road began. Like the canals and turnpikes before them, the railroads were financed locally by the sale of stock and/or bonds to local businessman, mine owners, farmers, "widows and old men, and guardians of fools and minors."[231] Shares were

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[228] Hadley, "The Railroad its Business Relations," 353. Hoogenboom, *A History of the ICC,* 7.

[229] Cleveland, *Railroad Finance*, 14.

[230] Cited from Ely, *Railroads in American Law,* 23. Stone, *The Interstate Commerce Commission,* 3.

[231] Holbrook, *The Story of American Railroads,* 40-42. Wolmar, *Blood Iron and Gold,* 83-87.

offered through printed prospectus, the press (with editorial support), through direct personal appeal, under the authority of the pulpit and via the great American institution of the public meeting.[232] This private financing had some success in the financing of the early roads, which were short lines with guaranteed customers, such as those lines between New York and Washington and between the coal mines.[233] In 1850, the longest and most expensive line connected Albany and Worcester. It cost $8 million.[234]

Stocks were the preferred investment vehicle in the early New England lines. Stocks had the advantage of giving investors some say in the running of the lines, but were seen as risky because of uncertain returns and abuse potential. A major issue with stocks is that they usually had only a very limited local market and had to be supplemented by other securities.[235] Frequently, stocks could be bought for a fraction of their face value by the directors of the lines who then issued bonds that were sold to investors. The bonds gave the directors control of all decisions related to the construction and management of the line. They made money on construction, leasing equipment, terminals, and right-of-way.[236] Bonds were perceived to be safer to the investor. Investors preferred to exchange voting rights for the guaranteed returns (however, bonds also had the potential for abuse). As a result, investor preference between stocks and

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[232] Cleveland, *Railroad Finance,* 19-21.

[233] Klein, *Unfinished Business,* 9.

[234] "The Railroads: Finance," from *Encyclopedia.com.* Accessed from http://www.encyclopedia.com/doc/1G2-2536601343.html.

[235] Cleveland, *Railroad Finance*, 43.

[236] Hadley, "The Railway in its Business Relations," 354-356.

bonds varied over the course of the history of rail system financing.[237] Early on the bonds were secured by governments. By 1837 more than two hundred lines were built (often poorly) or conceived, with no overall plan and undercapitalization.[238]

When the rail lines failed to be profitable, the states would attempt to default on their bond obligations (as in the case *Gelpcke v. Dubuque,* 1 Wallace 175, 206-207 [1864], often with the help of state supreme courts). "Railroad-bond cases were very much a staple of the [Supreme] Court's business during the 1860s and 1870s" according to Judge Rehnquist. .[239]

By the 1850s local financing was rarely adequate for the major projects. Distant financing from the major bankers in America and Europe were solicited primarily through bankers first in Philadelphia (often through Nicholas Biddle who was the president of the Second Bank of the United States), then in Boston, and finally in New York (which ultimately became the finance capital of the country, because of the investment market in railroad and municipal securities).[240] At the same time railroad bonds were marketed directly to "specialists" in the marketing of railroad securities in British, French, German, Swiss and Dutch importing houses.[241] These Europeans were

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[237] Chandler, "Patterns of Railroad Finance," 248, 248-263.

[238] Holbrook, *The Story of American Railroads,* 43. Cleveland, *Railroad Finance*, 45-46.

[239] Rehnquist*, The Supreme Court,* 86-90.

[240] Chandler, "Patterns of Railroad Finance," 248-263. Cleveland, *Railroad Finance,* 21. Klein, *Unfinished Business,* 10.

[241] Ralph W. Hidy and Muriel E. Hidy, "Anglo-American Bankers and the Railroads of the Old Northwest. 1848-18760," *Business History Review* 34, no. 2 (1960): 150-169.

well established in conservative financial houses with access to advice and in contact with American Bankers and railway consultants.[242] London had become the primary European market for all the bonds, which were often issued in sterling and payable in London starting in the late 1820s.[243]

Compared to 1½ per cent securities usually offered in London, the 5 to 10 percent American securities were very attractive.[244] At that time Baring Brothers and Co. became one of the major London banks dealing with America. It dealt with multiple state issues of securities including those that went towards railway finance. Even prior to 1850 many American lines were partially English owned.[245] London bankers not only sold securities, they also arranged financing for purchases of iron rails and made direct loans to the lines.[246] The bankers who marketed the bonds were also investors who bought the securities and encouraged investment by friends and associates.[247] In 1847 the Michigan Central issued 8 per cent convertible bonds (short-term interest rates in the late 1840s were generally between 6 and 9 per cent); in the 1850s when short-term interest rates were above 6 per cent railroad convertible issues of mortgage and construction bonds were offered at 7 and 8 percent and they were quickly bought up.[248] In the 1870s, short

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[242] Heydinger, "The English Influence on American Railroads."

[243] Chandler, "Patterns of Railroad Finance." 249.

[244] Heydinger, "The English Influence on American Railroads."

[245] Heydinger, "the English Influence on American Railroads."

[246] Hidy, "Anglo-American Bankers," 166.

[247] Hidy, "Anglo-American Bankers," 166.

[248] Chandler, "Patterns of Railroad Finance," 259, 262. Hidy, "Anglo American Bankers," 165. "Interest Rates: 1821-2011." Accessed from

term interest rates ranged from 4 per cent to more than 10 per cent; during this time period the more speculative American railroad bonds ranged from 7 to 10 percent on the Dutch market while the more solid bonds paid between 5 and 6 per cent.[249] The actual rates of return on some bonds were higher as the bonds were often sold at sub-par value. Like the canals and turnpikes before them many of the proposed lines were never built and failed to produce a profit to the financial detriment of their financers.[250]

Europeans even served as directors on American lines in which they held large shares.[251] Not all railway investors were naïve Americans.[252] Sometimes the banker-investors judged correctly and sometimes not—some of the investments were successful and some were not; there were also missed opportunities.[253] During the early-mid 19th century defaults caused investor losses as well as later in the Panic of 1873.[254] The majority of these losses in the 1840s were not on railroad securities, but on state issued bonds (some of which did fund railway construction). These defaults greatly tainted the American market for the European investors.[255] In 1847, the English railroad bubble

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http://www.ritholtz.com/bog/2011/12/interest-rates-1831-20011/. Augustus J. Veenendaal, Jr. "The Kansas City Southern Railroad," *Business History Review* 61, no, 2 (1987): 293.

[249] Veenedall, "The Kansa City Southern," 294. "Interest Rates."

[250] Wolmar, *The Great Railroad Revolution,* 8-13.

[251] Veenendaal, "The Kansas City Southern," 294.

[252] Chandler, "Patterns of Railroad Finance," 263. Cleveland, *Railroad Finance,* 16-19, 21-29. Hidy, "Anglo-American Bankers," 150-169.

[253] Hidy, "Anglo-Americans Bankers," 167-169.

[254] Veenendaal, "The Kansas City Southern," 293-294.

[255] Heydinger, "The English Influence on American Railroads."

burst, which added to the average English investor's concern over railroad securities. High American yields and 16 per cent discounts by October of 1857 helped the American market to recover.[256] When there was a default, the bond owners were able to form protective committees in order to save as much as possible (American companies were not the only ones to default).[257] In 1899, despite the "risk," fraud, and corruption of the American railroads, the Dutch had $214 million of investment and the British more.[258] By 1857 England had invested $400 million in American railways. By 1859 American rail corporations had floated $1.1 billion worth of bonds.[259] In 1868 the English owned $1.5 billion and in 1914, $3.1 billion.[260] From 1870 to 1880, the decade that included the world wide Panic of 1873, American lines paid 9.3 per cent, Indian lines 6.3 per cent, and Canadian lines 2.1 per cent.[261] Despite their large investments there is no indication that foreign investors ever tried to influence government policy towards the railroad.

Along with private bonds, railways were supported by state and federal governments. Governments helped to finance the rail lines by issuing state bonds, exclusive charters, tax exemptions, and drawbacks on tariffs and special banking privileges.[262] Starting in 1850, with the Illinois Central, the federal government began to

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[256] Heydinger, 'The English Influence on American Railroads,"

[257] Veenendaal, "The Kansas City Southern," 295.

[258] Veenendall, "The Kansas City Southern," 295.

[259] "The Railroads: Finance."

[260] Heydinger, "The English Influence on American Railroads."

[261] Heydinger, "The English Influence on American Railroads."

[262] Cleveland, *Railroad Finance,* 17-19.

provide land grants to subsidize construction costs.[263] In this manner they maintained some control over the location and construction of the roads.[264] The notable exception to government financing was the self-subsidizing Great Northern Railway, built by James J. Hill.

The main victims of stock and bond manipulations were the individual, often small, investors who (accumulatively) lost millions of dollars when they were caught up in the well-documented financial machinations amongst the major "barons'' for control of the lines.

However, the financing of the lines created other vulnerabilities—many of the roads were poorly conceived and inappropriately capitalized from the beginning, which foredoomed them despite good intentions. Some were overcapitalized, which led to corruption, others undercapitalized, which meant they could not be completed. Throughout their histories railroads and their shareholders were vulnerable to national and foreign financial market fluctuations, bank failures, and instability in foreign political affairs that impacted investment.[265] Also of note is that the rail lines required new technological, financial and management skills. Laws and business practices were in a state of flux. What is now illegal was normative business in the 19th century at the high

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[263] "The Railroads: Finance."

[264] Cleveland, *Railroad Finance,* 16-19, 31-33. Klein, *Unfinished Business,* 10. Heydinger, "The English Influence on American Railroads." Rehnquist, *The Supreme Court*, 86.

[265] Chandler, "Patterns of Railroad Finance," 254, 260-261. Hidy, "Anglo-American Bankers,"153, 162.

point of *laissez-faire* economics.[266] With this perspective, it has been claimed that perhaps most post-Civil War lines inflated costs, involved fraudulent stock manipulation and suffered from mismanagement.[267] It is not clear how the smaller investor or newspapers attributed or understood their losses, or their underlying cause. They often falsely attributed their losses to corrupt management.

Having addressed the general background of railway finance, instances of major abuse and corruptions were well in evidence and some of the more notorious need to be presented.

After the Civil War the rail system was found to be totally inadequate. The task of rebuilding and growing these roads fell to Northern carpetbaggers, their Southern accomplices, and the state governments. In 1868-1869, North Carolina authorized $27,850,000 of bonds and actually spent $17,640,000 to build 93 miles of line. The bulk of the money was reputedly spent on gambling and bribing state officials.[268]

In Georgia, Hannibal I. Kimball, who was a charismatic carpetbagger, in collaboration with Rufus B. Bullock, the governor of the state, received state aid for railroads that he never built.[269] Corruption existed on multiple levels. When he was investigated, a company auditor for the state-owned Western and Atlantic Railroad explained that he had saved $30,000 in a year or two, by the "most rigid economy."[270]

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[266] Klein, *Unfinished Business*, 16-17. Stover, *American Railroads,* 97-98.

[267] Stover, *American Railroads*, 97.

[268] Stover, *American Railroads*, 98-99.

[269] Stover, *American Railroads*, 99-100.

[270] Cited from Stover, *American Railroads*, 100.

The most famous of the stock manipulators/robber barons were "Uncle Daniel" Drew, Jim Fisk, Jay Gould, and Commodore and William Vanderbilt. They were famous for their stock manipulations of the major lines that ran between New York City and Chicago to the detriment of both the lines and investors. In one of the most publicized incidents, the "Erie War," Fisk, Drew, and Gould sold 100,000 shares of highly "watered" Erie stock to Vanderbilt, costing him $7 million and causing Vanderbilt to say it "has learned me it never pays to kick a skunk."[271] Of course Vanderbilt was no innocent in this "war" in which he matched his opponents bribe for bribe.[272] Later, proving there was no honor among thieves Gould and Fisk cost Drew $1.5 million and his seat on the Erie board of directors through their stock manipulations.[273] Fisk and Gould were also involved in other schemes, including an attempt to corner and manipulate the market for gold (in this case Gould also cheated Fisk, his "partner" in the scheme).[274] While they were the most notorious stock manipulators, they were not the ones to manipulate the capital value of their holdings. In 1869, the *Commercial and Financial Chronicle* reported that twenty-eight railroads increased their capital value from $287 million to $400 million in less than two years.[275]

Jay Gould was the acknowledged master of stock manipulation. After ruining the Erie, Gould was able to take control of the Union Pacific when its stock prices fell in the

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[271] Cited from Stover, *American Railroads*, 105.

[272] Brands, *American Colossus,* 29-32.

[273] Wolmar, *The Great Railroad Revolution*, 241-243.

[274] Brands, *American Colossus,* 34-39.

[275] Stover, *American Railroads,* 102.

Panic of 1873. He was then able to force the Union Pacific to buy the shares in the Kansas Pacific and Denver Pacific. These were shares that he had purchased earlier for a few dollars a share and that he sold to the Union Pacific at par value.[276]

Unlike others, Jay Gould and both the Commodore and his son also knew how to add value to the lines that they controlled. These lines were run effectively and made money for the stockholders (even if it meant damning the public).[277] In the 1870s when short-term interest rates were usually 4 to 6 percent, Vanderbilt's roads paid dividends of 6-8 per cent on inflated capitalization.[278]

It should be noted that the dividends generally paid on railroad stock could hardly be the source of great wealth. In 1876 the average return on all railroad stock was 3.03% and a little more than 2% in 1887. In the 1880s many roads paid no dividends and few stocks traded at par.[279] In perspective from 1870 until 1890 the short-term interest rates ranged from between about 3.5% and 12 % (this included the period of the Panic of 1873).

In defense of the railroad president's bookkeeping practices, and business ethics,

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[276] Stover, *American Railroads,* 105.

[277] Hadley, "The Railway in its Business Relations," 351, 352. Stover, *American Railroads*, 101, 105. Wolmar, *The Great Railroad Revolution,* 244-245.

[278] "Interest Rates." Stover, *American Railroads,* 101-102.

[279] Fletcher W. Hewes, "Statistical Railway Studies," in *The American Railway: Its Construction, Development, Management and Appliances,* ed. Thomas C. Clarke (Secaucus, NJ: Castle, 1988), 443-444.

regulations in the late 19th century were in a state of development and flux and far from modern standards.[280] An issue often faced by the managers was whether to distribute any profits as dividends or to reinvest them to maintain and/or upgrade services.[281] Technical and managerial improvements such as consolidation of service and lines, automatic coupling, improved braking systems, the creation of four time zones, and use of steel rails all made rail transport cheaper and safer and all were accomplished prior to the ICA, but were costly to implement. It should also be noted that even with the discriminatory rates, rail transport was most often cheaper than its competitors (again, it was the inequality of the rates rather than the rates themselves that were at issue).[282]

The most famous railroad scandal of the 19th century was the Credit Moblier Scandal. Before reviewing its history it has to be understood that most of what was done was not illegal or atypical of business practices of the times. The Credit Moblier was "as a type of the construction companies which have built most of the railroad mileage in this country" (as noted by Cleveland)[283] The president of the Union Pacific was a former union general, John A. Dix, but it was the vice-president Thomas Durant who decided that it would be more profitable to build a railway than to run one and created the Credit

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[280] Brands, *American Colossus,* 358. Hadley, "The Railway in Its Business Relations," 357. Wolmar, *The Great American Railroad Revolution,* 229-231.

[281] Wolmar, *The Great American Railroad Revolution,* 66.

[282] Hadley, "The Railway in Its Business Relations," 359.

[283] "The Credit Moblier Scandal," from WGBH. Accessed from http://www.pbs.org/wgbh/americanexperience/feature/general-article/tcrr-scandal/. "Durant's Big Scam," from WGBH. Accessed from http://www.pbs.org/wgbh/americanexperience/feature/general-article/tcrr-scam/. Cleveland, *Railroad Finance,* 65.

Moblier.[284] Durant did profess little confidence in the line's success as an investment, and he and his associates sought to profit by its construction, but first he had to get financing. The building of the Union Pacific was seen as a major investment risk and there was a problem attracting investors.[285] To make the venture more attractive Durant first set up a company, at first headed by a company employee, with contracts to build the road. He arranged for leading shareholders to benefit from the contracts. However, this left the shareholders exposed to unlimited liabilities. As a result Durant and associates set up a construction company. They bought an idle company in 1864, the Pennsylvania Fiscal Agency, and renamed it "Credit Moblier of America" (after a French company, *Societe Generale de Credit Moblier,* a French construction company Durant had been told of by George Train, another early promoter of the Union Pacific). Durant then made sure that his Credit Moblier got exclusive contracts to build the Union Pacific.[286] Credit Moblier was to serve multiple functions. It was to appear as an independent construction company that was impartially chosen and it was meant to limit the risk to its investors of their investment in the Credit Moblier, since this was not related to the risk of actually running the trains. These companies, which usually had railroad directors on their boards, were independent entities. Construction companies were the buffers between the railroad promoters and those who actually built the lines. They did not actually build anything, but they directed the contractors who did the work. If the costs to build the road were excessive, the construction company could go bankrupt but the railroad company would

[284] "The Credit Moblier Scandal."

[285] "Durant's Big Scam." Cleveland, *Railroad Finance,* 65-66.

[286] Wolmar, *The Great Railroad Revolution,* 136.

not. This arrangement was typical in the 19th century. It was open to abuse and corruption.[287] Profit was guaranteed by inflated costs for material and construction. Shareholders of the Union Pacific were given the option of trading their shares for Credit Moblier shares, or selling their shares to the Union Pacific or Credit Moblier. At the time the Credit Moblier was formed the Union Pacific began to attract New England investors.[288] The Credit Moblier made money by being paid in stock shares, which could then be sold on the open market.

Conflict between investors over the goals of the Credit Moblier led to the involvement of Oliver and Oakes Ames in its management and an eventual compromise with Durant. Oakes Ames was a congressman from Massachusetts and he represented the company's interests in Congress. These interests were promoted by the distribution/sale of stocks of Credit Moblier to senators and representatives in positions to promote the railroads goals by voting to appropriate additional government funds to pay Credit Moblier charges. The 1864 Pacific Railroad Act passed by Congress doubled the land grants for construction.[289] The side benefit to the congressmen was that their shares in the company increased in value.

In 1872 a list of Oakes Ames stock contacts, not necessarily those who received stock, appeared during President Grant's bid for a second term. The list included the then vice-president, the nominee for vice-president, the speaker of the house, a future president (James Garfield) and nine others. Ultimately some of those on the list were

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[287] Wolmar, *The Great Railroad Revolution,* 38.

[288] Cleveland, *Railroad Finance,* 65-66.

[289] Wolmar, *The Great Railroad Revolution,* 136-137.

shown not to have accepted stock. While Ames and James Brooks, a democrat from New York (who had been a Government director of the Union Pacific Railroad in 1867), were censured by Congress in 1873; no criminal or civil charges were ever filed. According to both Cleveland and Powell "the attitude of Ames and his associates towards public officials was one which had been winked at and condoned for decades by a public that now demanded a sacrifice," he was "the man to whose efforts the success of the great task is mainly due."[290] Later Ames was exonerated by the state of Massachusetts (in 1883) and commemorated by the Union Pacific Railroad. The investors in the railroad who were left with nearly worthless securities probably felt differently from Cleveland and Powell, the Union Pacific, and the state of Massachusetts. It was the views of these investors that helped to create the climate that led to the ICA. Ultimately the Credit Moblier Scandal may be viewed as everything from the result of a yellow journal tabloid competition between the *New York Times* and the *New York Sun* to a political ploy to influence Grant's re-election in 1872 with some basis in fact for both views.[291]

In the end, as much $180 million of capital stock in the roads was said to be missing (the promoters of the Credit Moblier are said to have cleared $23 million and maybe more).[292] While most of the losses are attributable to fraud on the part of the principals, investors driven by their own greed must bear part of the blame. Against this, it may be true that without Durant and the Credit Moblier construction of the Union Pacific would have been delayed; what would that delay have cost the country? The

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[290] Cleveland, *Railroad Finance,* 69.

[291] Brands, *American Colossus,* 356-360.

[292] "The Credit Moblier Scandal." "Durant's Big Scam."

financing of the Central Pacific was not much different with Charles Crocker's Crocker and Company and later his Contract and Finance Company serving as the construction companies for the Central Pacific. Leland Stanford, one of the road's principles, ultimately left the money he made to the University built to memorialize his son.[293] However, as pointed out by James Surowieki, who is a staff writer for *The New Yorker* (where he writes a column on business and finance) unlike Enron, Credit Moblier and its Central Pacific counterparts really did build something: "people are still riding trains on the U. P. line."[294] It may also be noted that during the same time period, the Central Overland California and Pikes Peak Express (better known as the "Pony Express") lasted only eighteen months, charged $5 for a letter and ended in bankruptcy and a bond scandal.[295]

Perhaps the biggest railroad "scam" of all, as noted by Wolmar, in his discussion of the building of the transcontinental, was that the transcontinental (like many of its predecessors and successors) could not have been financially viable at the time in which it was built—"[t]here was no potential for immediate profit from the transcontinental."[296] The only one of the transcontinental railways that was a financial success was James J.

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[293] "History of Stanford." Accessed from http://www.standford.edu/about/index.html. Cleveland, *Railroad Finance,* 70-72. Wolmar, *The Great Railroad Revolution,* 133-134.

[294] "Durant's Big Scam."

[295] Laura Ruttum, "The Pony Express: History and Myth," from the New York Public Library. Accessed from http://www.nypl.org/blog/2010/02/01/pony-express-history-and-myth.

[296] Wolmar, *The Great Train Revolution,* 153.

Hill's Great Northern—the only one of the five transcontinentals to be built without government subsidy.[297]

Stock watering was another common fraud. The reputed origin of the term was the practice of cattle drovers to feed their stock salt and then gave them free access to water prior to sale, in order to increase their weight. This practice was attributed to Daniel Drew in his pre-railroad career. In watering stock the assets of a company were inflated and the stock of the company was sold based on the inflated value. Officers of the company pocketed the difference between the actual value and the value of the watered stock. The Hepburn commission determined that between fifty and seventy per cent of the New York Central $90 million of stock was water. Since dividends were based on the watered stock there was increased pressure to make lines profitable. This also led to rate inflation as the managers justified their dividend rates based on the lines watered valuation. [298]

A common practice of the train lines was to induce settlers to move to the West through the use of "fairyland pamphlets" that presented an idealized picture of life in the West—"[t]he world portrayed in much of this publicity material was far divorced from the harsh reality." This practice can be counted along with the other railroad deceptions. Sale of land along the right-of-way to farmers and other settlers helped pay for construction costs. Later, the lines would benefit from commerce created by the settlers. Originally the marketing was directed to the people living in the Eastern United States

[297] Wolmar, *The Great Train Revolution,* 177-178.

[298] Hoogenboom, *A History of the ICC*, 9-10.

and then to people in Europe; in fact the reality of the upheavals and oppression in Europe may have contributed more to emigration than the "Utopian" images of the railways.[299]

Having reviewed some of the many ways in which practices that were at least questionable, if not outright illegal, cost investors and settlers, it is important to understand that not all of the rail stock losses were caused by corrupt practices or were within the control of rail line financers or managers. The Panic of 1873 is an example. Jay Cooke, head of "America's premier banking house" and the chief financer of the Union Army, undertook the building of the Northern Pacific in 1870.[300] To finance this venture he had to look to Europe for financing. At the same time one-tenth of the Franco-Prussian War indemnity of 1871 was to be paid in gold (this initially created additional German capital). The German government stopped minting silver coins in 1871, while insurers were paying out on the Chicago fire of 1871 and the Boston fire of 1872. The Credit Moblier scandal erupted in 1872 and was fresh in memory. By the Coinage Act of 1873 the United States moved to a gold standard and the World Exhibition in Vienna in May of 1873 failed to revive the Austrian economy. The Granger laws, which threatened railroad regulation, had been passed. They dampened optimism about rail stocks and reduced the value of some rail stocks to 6 cents on the dollar. Also, there were real estate booms in Berlin, Vienna, and Chicago that competed with the railroads for investment dollars. The result of all of these factors was a reduction of

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[299] Wolmar, *The Great Train Revolution,* 168-172.

[300] "1873: Off the Rails" from Harvard Business school. Accessed from http://www.library.hbs.edu/hc/crises/1873.html.

money available for investment in the building of railways.[301] Financial collapse started in Austria and Germany in 1873 and reached the United States in September of that year. Cooke was heavily invested in the Northern Pacific. He could not get a new loan for construction and there was no market for the securities held by his bank. Cooke's bank, Jay Cooke & Co., collapsed and declared bankruptcy on September 18, 1873. This set off a chain of bank and business failures. Corporations controlling almost half of the nation's train track mileage went into receivership in the depressions of 1873 and 1893.[302] One victim of the Panic was Daniel Drew, one of the most notorious of the "robber barons."[303]

Railroad financing played a part in the panic of 1873, but no one ever accused Jay Cooke of any sort of chicanery. Railroad losses occurred as a consequence of events on a national and global scale. The Northern Pacific, which was the largest railroad enterprise of its time, was eventually completed in 1883.[304]

This review of the early financing of the railroads leaves major questions unanswered. If the management practices were so corrupt and the returns so low in comparison with the short-term interest rates, why did local European bankers (who were not naïve American farmers) and conservative investors continue to see railroad securities as conservative investments and back and buy these products? If stock, financial, and managerial manipulation were major issues and the rail corporations

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[301] Kindleberger, *Manias, Panics and Crashes,* 52, 101,112, 165-166, 238. "1873: Off the Rails."

[302] Shrag, "Transportation and the Uniting of the Nation," 31.

[303] Stover, *American Railroads,* 105.

[304] Wolmar, *The Great Train Revolution,* 177.

operated under state charters, why were the states not more active in enforcing the charters?

From this review it is seen that historians have focused on machinations of a few well-known, colorful "villains." However, it is not clear how prevalent abuses really were.

When looking at the issue of railroad mismanagement and corruption, it is important to remember that some of the practices required to finance and build businesses in 19th century America may be dubious only in retrospect, and even in that time period (as is true today), the skills and financing that entrepreneurs needed to start these enterprises differed from those needed to run them. It should also be considered that the late 19th century was a time when the ethics of business and the laws that were to regulate business were in a state of flux as noted by Thomas Cooley in the first Report of the Interstate Commerce Commission. Finally, it should be appreciated that from 1865 to 1885, the period just prior to the ICA, freight rates dropped by a third to a half, despite the corruption. It should be reiterated that railroads were actually built and provided a service vital to the growth and unity of the country.[305]

## Origins of the Interstate Commerce Commission and the Regulatory Agencies

While the ICC was the first official independent federal agency it had multiple predecessors on both the federal and state levels. It is for this reason that both Mashaw

[305] Hoogenboom, *A History of the ICC,* 4.

and Novak see the ICC as a continuance of regulatory processes that started long before 1887, and not as a particularly defining moment. [306]

Early federal administrative agencies included the U. S. Patent Office, the Post Office, the Bureau of Indian Affairs, the Army Corp of Engineers, the General Land Office, and most notably the Pension Office of the Department of the Interior (which had a work force of more than 6,000 and in 1891 was said to be the largest executive bureau in the world).[307] Massachusetts had an insurance commission in 1852. State insurance commissions, which started as information collectors, moved to become regulatory bodies by the 1870s. [308]

These agencies had a common root, the response of government to the need for regulation of business or areas of society that were growing in size and complexity beyond the ability of governmental control.[309] Another commonality of the early agencies is that they were less than successful. Friedman notes that the Pension Office worked "often badly" and "that insurance regulation in this period was not a triumphant success."[310]

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[306] John L. Mashaw, *Creating the Administrative Constitution; The Lost One Hundred Years of American Administrative Law* (New Haven, CT: Yale University Press, 2012). Novak, "A Revisionist History," 12, 14.

[307] Friedman, *A History of American Law,* 384. Schubert, *Introduction to Law,* 471.

[308] Friedman, *A History of American Law,* 387.

[309] Cushman, *The Independent Regulatory Commissions,* 21. Friedman, *A History of American Law,* 384.

[310] Friedman, *A History of American Law,* 384, 388.

Initially railroads were established under state charters and the states attempted to use the charters of incorporation to exert control over the emerging railways and other enterprises to prevent their reputed abuses.[311] Later, due to the poor success of the charters, they developed the state railroad commissions that regulated freight rates, in addition to agencies controlling warehouses, grain elevators, banking, insurance, education, and health.[312]

Connecticut issued a state railroad charter in 1832; in 1844 Rhode Island created a railroad commission to prevent rate discrimination and New Hampshire had a commission to monitor safety.[313] Connecticut set up the first permanent commission, tasked with monitoring compliance to the charters in 1844.[314] Maine followed with a commission in the 1850s. These commissions were variously charged. In addition to the powers already noted, they were to settle disputes among rival railways, control rates and services, inspect the books and records of the companies, reduce accidents, and monitor the physical equipment. In 1855 New York created a commission. The New York commissioners were paid off by the railroads and voted to end the commission in 1857. Massachusetts established a commission in 1869 that became a model for other states. Publicity, annual reports to the legislature, and an energetic chairman, Charles Francis Adams, Jr. (descendant of two American presidents and later to be the president of the

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[311] Bernstein, *Regulating Business*, 20, 26. Cushman, *The Independent Regulatory Commissions,* 21.

[312] Friedman, *A History of American Law,* 384.

[313] Hoogenboom, *A History of the ICC,* 6. Cushman, *The Independent Regulatory Commissions,* 22.

[314] Cushman, *The Independent Regulatory Commissions,* 22.

Union Pacific Railroad), were the only means this commission had to enforce its decisions.[315] The Massachusetts commission was the prototype of the so-called "weak" or advisory commission (commonly found in the Eastern states). It had "general supervision of all railroads," and the ability to inform the companies when rates or modes of operation required change, but weak commissions lacked enforcement power and "they had no power to fix rates or make any major changes on their own."[316] The weak commissions fundamentally served to provide expert opinion for the legislative branch of the state governments.[317]

The Illinois' Railroad and Warehouse Commission was established in 1871. It was expanded and given the legal power to prosecute violations in 1873. The Illinois commission exemplifies the "strong" commission (more common in the Mid-West), which had the legal power to enforce state laws and the authority to set maximum rates.[318] Elimination of rate discrimination and advising the legislature were also among the important foci of the strong commissions. Most strong commissions were not under the supervision of the governor. Commissioners had administrative, quasi-judicial, and legislative functions.[319] The authority of this type of commission was upheld (see above) by the Supreme Court in *Munn v. Illinois* (1877) and supported by the Grangers.

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[315] Hoogenboom, *A History of the ICC,* 6. Hadley, "The Railroad in Its Business Relations," 376.

[316] Friedman, *A History of American Law,* 390-391.

[317] Cushman, *The Independent Regulatory Commissions,* 23-25.

[318] Cushman, *The Independent Regulatory Commissions,* 25-27.

[319] Cushman, *The Independent Regulatory Commissions,* 31-33.

Virginia established a Railroad Commission in 1877, South Carolina in 1878, and Georgia established a commission in 1879 with the power to fix rates. [320] As early as 1876 there were attempts to form a Railroad Commission in Texas. When the Texas Railroad Commission (ultimately to become one of the most important of the state commissions) finally came into being in 1891 it gave its first chairman, John Reagan, the ability to regulate rates, prevent rebates and pooling, and to prevent stock "watering."[321]

In the long run the state commissions tended to be either corrupted (especially in the case of New York and California) or not live up to expectations. Some of the worst offenses of the railroads could have been curbed by the state penal laws, but these laws were not enforced due to the fact that the states' created independent advisory commissions that usually did not have enforcement powers (i.e., "weak" commissions).[322] In practice the coalitions of farmers and merchants that led to their formation tended to fall apart after the commissions were established. Over the long term most of the state commissions and railroad companies learned to coexist. Ultimately the road consolidations and the increase in interstate and through traffic went beyond state control.[323] Finally the Supreme Court intervened in *Wabash Railroad v. Illinois* (1886)

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[320] Friedman, *A History of American Law,* 390-393.

[321] Proctor "John Henniger Reagan." Reagan, *Memoirs,* 249. "John H. Reagan."

[322] Beck, *Our Wonderland of Bureaucracy,* 156. Shrag, "Transportation and the Uniting of the Nation," 31. Holbrook, *The Story of American Railroads,* 240-241. Campbell, *The Growth of American Government,* 70.

[323] Hadley, "The Railway in Its Business Relations," 367.

and established federal control over the railroads, at least in the area of interstate commerce.[324]

The adoption of the commission form of regulation in the ICA was controversial and, as noted, opposed by Reagan and his supporters. It represented, in the words of Woll, the "transference of the concept of commission regulation from the state to the national level." [325] Arguments in favor of the commission form (then and now) include: 1) the ability of a commission to provide specialists with expert knowledge to the Congress and courts; 2) the need for a permanent body that could provide for continuity of service; 3) the establishment of an agency that would be relatively free from political pressure.[326] Opponents feared that in the end commissions would be dominated by the carriers.

Railroad regulations did exist in other countries; however, it is of interest that in the United Kingdom, unlike in the US, safety was the main issue leading to regulation.[327] British railway regulation, which developed at the same time as American regulation had little impact in America.[328]

Agencies/commissions did not arise *de novo* with the ICC, nor were the weaknesses and problems of commissions unique and unknown to the legislators who established the ICA. As a consequence the ICC may have been less of a "watershed" than

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[324] Friedman, *A History of American Law, 394.*

[325] Woll, *American Democracy,* 36-37.

[326] Woll, *American Democracy,* 37. Schubert, *Introduction to Law,* 476.

[327] Wolmar, *Blood Iron and Gold*, 243-244.

[328] Cushman, *The Independent Regulatory Commissions,* 34-36.

it is commonly represented to be. Although the ultimate failure of the state commissions led to the establishment of the federal commission, the long experience with federal agencies and state commissions did not benefit the ICC.[329] As noted by the Cullom committee "Congress is entering upon a new and untried field. Its legislation…is incapable of accurately forecasting its effect."[330] At its core the notion of the commission did have several compelling ideas. What was missing was a direction (a mission) and the internal structure that would enable the commission to use these ideas to advantage.[331]

## The Origins of the Interstate Commerce Commission; Discussion

The typical history of the ICC suggests that the Commission was the result of the successful pressure exerted by special interest groups that included the Grangers, merchants, oil shippers and to an extent railroad managers as a consequence of the frauds and discriminations perpetrated by the railroads. It particularly stresses the view that the Commission was established to rectify the wrongs done by the carriers to the farmers and small shippers by the railroads. This is the result of the presentation of a one-sided view of the impact of rail transport. As noted by Martin "[n]ot for the embattled American farmer, nor the politician who coveted his vote, was the abstract idea that transportation created value."[332] While the influence of the special interests and wrong doings of the

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[329] Bernstein, *Regulating Business,* 25.

[330] Cited in Bernhardt, *The Interstate Commerce Commission,* 7.

[331] Cushman, *The Independent Regulatory Commissions,* 27-36.

[332] Martin, *Railroads Triumphant*, 174.

railways cannot be denied, this history demonstrates that they are overstated as factors leading to the ICC. This review indicates that the reality was much more complex.

By the time of the passage of the ICA and the creation of ICC in 1887, the special interest groups that originally drove their establishment had become less influential. The groups, which had originally promoted the issues that led to Congressional action, had dissipated. Specifically, the Grangers were no longer a powerful political entity. Their legacy, the notion of oppressive railroads, remained to be a cause taken up by populist politicians. While oil interests and merchants may have initiated the movement to regulation in the 1870s, support for the ICA, when it passed, came from the agricultural states of the South and Midwest where the populists had their strongest support, and not from the Northeast, the home of the oil interests and merchants. History also shows that railway support for regulation was at best acceptance and resignation. As for the politicians who voted for the ICA, many and perhaps most, lacked an educated understanding of the issues involved; they were responding to the politics of the time and the pressures of an earlier time.

Furthermore, this review indicates that many of the charges against the lines (i.e., rate issues, financial wrong doing, and excessive profits on the part of the railroad lines) have less substance than often presented. This is especially true when viewed in terms of the business practices of the times.

There were undoubtedly cases of mismanagement and fraud that required regulation. This is well documented in Thomas Cooley's first annual report to the Congress in which he also notes the absence of laws to regulate the railways leading to

"abnormal law-making" on the part of the rail corporations.[333] It needs to be considered that these practices may have been more often due to individual malefactors then the industry in general. Rail historian Keith Bryant Jr. noted: "Journalists created the image of the 'robber baron' who displayed no interest in operating a railroad for profit or in improving the property, but simply used the carrier's stocks and bonds as a vehicle for personal gain…[This image] never dissipated and was used again and again by the detractors of the industry as representative of all railroad executives."[334] One example is the reporting of the blue-blooded, yellow-journalism of the historian Henry Adams, which admittedly, which like its successors, had some factual basis.[335] However, this review shows that even Jay Gould, one of the great stock manipulators, ran his lines and added value to them.

Discriminatory rates are said to be one of the major factors that led to the ICC and are mentioned in the first Annual Report of the ICC. However, they are extremely difficult to document and few specific cases were found in the sources, despite the frequent mention of "huge" discrimination reported by several authors. The best documentation is Vanderbilt's ready admission of rebates in front of the New York Commission. His admission, and comments, suggests that rebates were not hidden, readily available, seen as part of the normal way in which businesses operated, and controlled by local agents rather than the lines. Other forms of discrimination proved harder to document. Fogel notes a "government warehouse near Washington" containing

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[333] Vander Velde, "Thomas Cooley," 99-100.

[334] Cited in Wolmar, *The Great Railroad Revolution,* 251.

[335] Brands, *American Colossus,* 32-42.

the "tariffs filed was the ICC." He also notes that even with these rates available "some procedure will have to be devised by which one can check the reliability of the evidence of the public record and estimate rebates for which no direct evidence exists."[336]

Many of the issues that led to the ICC were part of the longstanding great American divides—these were regional debates, and conflicts between agricultural and industrial interests, and between laborers and management—these debates were highlighted and accelerated by the changes that came with the trains.[337] However, this review shows that many, if not most of the so-called "robber barons" ran their lines in a businesslike and efficient manner. At the time the ICA was debated and passed, the railroad rates were close to their historic lows.[338] Biased presentations of the issues by partisans across the political and social spectrum have found its way into the histories of the period and lead one to question whether these practices on their own would have led to federal regulation.

While the *Wabash* case is seen as having forced the House and Senate to come to the compromise that was the ICA, I suggest that even this is too limited a perspective. I emphasize that the ICA was the result—the inevitable fulfillment—of the Federalist agenda, as inserted into the United States Constitution (the Commerce Clause) and championed by John Marshall. As such it had to happen sooner or later. It was the result of a plan to create a unity among the states of the United States and to shift the balance the power between the state and federal governments through empowerment of the

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[336] Robert W. Fogel, *Railroads and American Economic Growth: Essays in Econometric History* (Baltimore: Johns Hopkins University Press, 1964), 36-37.

[337] Wolmar, *The Great Railroad Revolution*, 216-223.

[338] Wolmar, *The Great Railroad Revolution,* 245-249.

central government. Commerce between the states was used to accomplish this goal. The Commerce Clause, the federal courts, the ICA, the ICC, and the railroads were the tools needed to bring the plan to reality. This was a direction resisted into the late 19th century by the conservative proponents of states' rights and even by the courts as seen in the cases cited. The *Wabash* case, in context of the Commerce Clause, forced the issue on the Supreme Court and therefore the country. The decision in *Wabash* was every bit as much about the assertion of federal power over states' rights as it was about the control of the railroads. Perhaps this is the fact that explains the Court's delay and reticence in directly addressing the Commerce Clause for so many years.

The ICC was also the result of the growth in size and complexity of industry—an inability of the courts to deal with the emerging complex economic issues of the developing railroads (a view challenged by Supreme Court Justice J. David Brewer).[339] More than being the first independent government agency, the ICC marked the start of federal administrative law and the explosion of federal authority and bureaucracy, whether or not it was intended to do this.[340] Prior to the ICC, under the doctrine of *laissez-faire,* central government interventions in business were meant to be helpful, not regulatory. It has been suggested that the promoters of the ICA still accepted the view that government intervention should be as minimal as possible and maintained an allegiance to limited government.[341] Even as the government tried to shape industry (and the railroads in particular), industries were shaping the government. Friedman sees the

[339] Bernstein, *Regulating Business,* 26, 27, 30-32.

[340] Carrington, "Law and Economics," 365, 378.

[341] Bernstein, *Regulating Business,* 22. Vander Velde, "Thomas M. Cooley," 98.

administrative agency as the "child of necessity." It is big government's answer to big business, when the "[t]raditional agencies of government [and its courts] could not regulate big business" due to lack of specialists and specialized bodies.[342] This is a notion that Shelby Collum recognized through his earlier interactions in Illinois, and that Grover Cleveland and Thomas Cooley endorsed. It was a notion consistent with the goal of creating a durable, politically independent commission of experts to arbitrate within the industry and mediate between the industry and government. Such an agency would be a bulwark against excessive centralization of executive power and thereby protect both shippers and carriers.[343] The issues of durability and expertise are particularly important and should be viewed in light of the fact that at the time of the establishment of the ICC legislatures in many states met biennially, and most of the legislators served limited terms. Few congressmen had any knowledge of railroading. The size of government was such that on the national level, "President Cleveland personally answered the White House telephone and sometimes the doorbell." Large cities were the first to look to experts to direct technical services such as sewers, parks, and public health.[344]

In concluding this section of the thesis, the first two questions posed can be answered. Viewing the origin of the ICA and ICC from the various historical perspectives that have been taken in the current thesis indicates that regulatory commissions were not invented in 1887; their origins were deeply embedded in American history.[345] The ICC

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[342] Friedman, *A History of American Law,* 384-385.

[343] Bernstein**,** *Regulating Business***,** 4-5, 24, 27.

[344] Campbell, *The Growth of American Government,* 20-21.

[345] Cushman, *The Independent Regulatory Commissions,* 19.

was not the result of any one particular activity, individual, or reform movement (as is typically and simplistically presented) or even a coordination of groups, but the consequence of multiple factors, many of long duration and probably not unique to the American experience. The research does not deny, but brings to question the nature and the extent of the so-called railroad abuses and highlights the need for further investigation in this area. Two of the most important factors leading to the ICA and ICC appear to be the need for legislators to appease their constituents' perceptions of railroad wrongdoing and the influence exerted on the origin through the existence of the Commerce Clause of the United States' Constitution.[346] The Commission form was chosen because of inherent theoretical strengths. However, the commission was given little direction and structured without the power to initiate or enforce its rulings. As a consequence it was doomed to fail.

The ICC was to set the pattern for the government commissions and agencies to come. How the ICC developed to fulfill this role will be addressed in the next section of the thesis.

[346] Carrington, "Law and Economics," 378.

# IV

## The Development of the Interstate Commerce Commission, 1887-1918

Following passage of the Act, the initial response was generally very positive, but of short duration.[347] There were some improvements in pricing. While rates went up on some lines they were more predictable and stable.[348] The carriers submitted annual reports.[349] Carriers made attempts to adjust rates to the length of the haul.[350] Therefore, the ICC may have provided some benefit to the railroad industry and those who depended upon it. Despite these successes, the fact is that in its early years the ICC was frustrated by small staffs, conflicts with state regulatory agencies (in some states as part of the Granger Laws), highly competent railroad attorneys and jurisdictional disputes, not to mention the limitations of the ICA (since Congress had neglected to grant the ICC the power to set rates).[351] Determination of discriminatory rates proved to be technically and

[347] Stover, *American Railroads,* 123-124

[348] Shrag, "Transportation and the Uniting of the Nation," 31-32.

[349] "Interstate Commerce Act."

[350] Bernhardt, *The Interstate Commerce Commission,* 15.

[351] Friedman, *A History of American Law,* 395. Holbrook, *The Story of American Railroads,* 243. Shrag, "Transportation and the Uniting of the Nation," 31.

politically difficult.[352] At best, in its early years, the ICC did little harm to the railroad industry and its consumers.

The standard story of the period following the passage of the ICA is one in which the history of the ICC is divided into two periods. In the first period the ICC's role was poorly defined and the ICC was restricted by court decisions. At the end of this period it was generally accepted that the ICC was powerless. In the second period, in response to the support of the progressives, the Commission was able to develop. At the end of this period the ICC had been empowered and came to dominate the railways. A different approach will be used here, one that is similar to that taken in the first part of the thesis. Here the period will not be divided. Rather the continuity in the evolution of the ICC from 1887 until the federal takeover of the railroads at the end 1917 will be traced in various perspectives. It is felt that this approach better reflects the evolution of the ICC and the factors that influenced it.

To start, the development of the railroads and their interrelationship with the ICC during this period will be briefly reviewed as a background to the understanding of the changes taking place in the carriers and their relationship with the ICC. Major changes affected the lines: technological developments, changes that led to consolidation of lines, and shifts in financing with the onset of American capitalism (as the America banking system was developing and European money was less available) will be described. Then, this time frame will be revisited to focus on the developing structure and scope of the ICC. First, the earliest period of the ICC when it was under the influence of Thomas

[352] "Interstate Commerce Act."

Cooley the first chairman of the ICC, his vision and impact, will be highlighted. Next, the court's relationship and impact on the development of the ICC will be reviewed. Finally, the expansion of the ICC's influence under the Progressives, the president and Congress, and the legislative acts that shaped the ICC, will be reviewed. The role that the changes in the structure and the organization of the ICC played in its development will be considered along with the social and political influences that particularly favored the development of the Commission will be reviewed. This is despite the fact that at least one major scholar of independent commissions (Marver Bernstein) seems to have downplayed the role of structure.[353]

## The Development of the ICC and the Railroads: 1887-1918

> The jury consists of twelve persons chosen to decide who has the better lawyer
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> —Robert Frost.

> "Until 1906, for the most part the ICC was powerless, unable to impose its rules on the industry and given the runaround by clever railroad-company lawyers…"
>
> —Wolmar[354]

> "My special field of knowledge is figures—a subject of which most lawyers know next to nothing"
>
> —Brandeis.[355]

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[353] Bernstein, *Regulating Business,* 6.

[354] Wolmar, *The Great Railroad Revolution*, 271.

[355] Alpheus Thomas Mason, *Brandeis: A Free Man's Life* (New York: Viking Press, 1956), 71.

The railroads were the first of the large corporations. They had been initiated in a period with limited or absent government restraints—an environment that has been described as "the ideal hothouse for the rapid flowering of private economy. Government did little to help and, more important, even less to hinder this explosion of entrepreneurial energy."[356] The Interstate Commerce Commission came in to being with the Interstate Commerce act in 1887 as the first attempt by the government to control a major industrial age corporation. Because of lack of enforcement power and the fact that its cease and desist orders were often ignored, the ICC had to go to the federal court to enforce its rulings. In the courts, the average case lasted for four years—many lasted much longer—due to legal maneuvering. By the late 1890s, due to the vagueness and ambiguity of the ICA, frequent resistance of the carriers and the actions of the federal courts, the ICC lost cases. The ICC was essentially rendered powerless by time-consuming legal procedures.[357]As Richard S. Olney, a originally a corporate lawyer and then Attorney General under Cleveland, said of the ICC in 1896, "It satisfies the popular clamor for a government supervision of the railroads, at the same time that such supervision is almost entirely nominal."[358]

A major goal of the ICC was to eliminate long-short haul discrimination, as stated in section four of the ICA. This proved difficult based on the wording of the act that stated rates were to be made equal under similar circumstances. At first the ICC exempted railroads that competed with unregulated carriers (water, intrastate, and foreign

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[356] Klein, *Unfinished Business,* 16.

[357] Cushman, *The Independent Regulatory Commissions,* 65-66.

[358] Cited from Stover, *American Railroads*, 125.

carriers) and gave the lines the option to make their own determinations. This was changed in 1892. In the *Interstate Commerce Commission v, Alabama Midland Railway Co.,* 69 Fed 227 (1895) case the Supreme Court accepted the railways view that "no two points were similar," which effectively destroyed the ICC's ability to regulate long-short haul rates.[359]

At the same time railroads, like the other nascent businesses, were becoming larger and more complex. The lines were undergoing consolidation. As noted most lines started as localized short lines. Starting in the 1850s these lines joined, end to end, to form trunk lines. From 1873 the trunk lines acquired feeder lines to become railroad systems. In 1889, an attempt was made to get around the anti-pooling section of the ICA. Led by J. P. Morgan, a group of bankers and railroad presidents formed the Interstate Commerce Railway Association to maintain rates. The organization had very limited success, but it was supported by the ICC.[360] The systems, partially in response to the ban on pooling and also due to the economic circumstances (Panic of 1893) started to consolidate in the late 1890s.[361] By the early 1900s consolidation of lines was progressing aided by the Panic, which led to the pruning of the weaker lines. Another attempt at cooperation was the Joint Traffic Association formed in 1896. Despite opposition by the ICC, it had some success in maintaining grain rates. The Association collapsed in 1897.[362] At the end of the 19th century there were seven large corporations

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[359] Hoogenboom, *A History of the ICC,* 36-37.

[360] Hoogenboom, *A History of the ICC,* 28-29.

[361] Hoogenboom, *A History of the ICC,* 4.

[362] Hoogenboom, *A History of the ICC,* 35-36.

that were dominated by the banking houses of J. P. Morgan and Company and Kuhn, Loeb and Company. Cooperation between the corporations was tacit and took place in spite of the ICC. Consolidation permitted J. P. Morgan to meld the Southern railroads together for more efficient transport of raw materials and vacationers; it permitted the passengers to travel further without the need to change trains.[363] Government tolerance of coordination of efforts had it limits as demonstrated by the dissolution of the Northern Securities Company by the Supreme Court in 1904.

After the Panic of 1893, times were good for the train industry. Alexander Cassatt, who became the president of the Pennsylvania Railroad in 1899, introduced the idea of communities of interest. Under this idea, the New York Central and Pennsylvania bought stock in competing lines in order to present a united front against big shippers (such as the Rockefeller oil interests) in order to prevent rate cutting. Communities of interest soon spread to lines in other parts of the country.[364] Passenger travel, especially elite and business travel, increased. Electric lights and steam heat became standards. Larger, more powerful and faster locomotives pulled trains more comfortably and efficiently. Improved wheels and roadbeds made travel safer and more comfortable. Safety was also improved with more sophisticated signaling systems and the erection of fences along the right-of-way. Wood frame cars were replaced by the safer all-steel cars. The culmination was the introduction of high-profile luxury trains. During this period the lines made profits on their busy routes, but lost money on the poorly traveled routes.

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[363] Wolmar, *The Great Railroad Revolution*, 259-261.

[364] Hoogenboom, *A History of the ICC,* 40-41.

From 1870 to 1900, farm prices dropped 37 per cent, but over the same thirty years freight rates dropped by close to 70 per cent.[365]

After signing the ICA President Cleveland did little to strengthen the ICC. Prior to his election to the presidency, in 1889, Benjamin Harrison had been a corporation lawyer, generally took a pro-business position and little interest in the ICC. Due to the economic prosperity during his time in office, President McKinley gave the ICC little support.[366]

The picture began to change at the start of the 20th century. Rising costs led to the higher rates that followed the long period in which rates had declined or remained stable. The railroad lines were not able to meet the demands of the new century with 19th-century equipment. Increased operating costs and inflationary pressures created a need for capital. At the same time investors had more lucrative opportunities in emerging enterprises. During this time period three new members were appointed to the Commission, Martin A. Knapp, Charles A Prouty and Judson C Clements, all lawyers by training and all opposed to rate hikes (although Knapp did favor pools). At the same time efforts to strengthen the ICC led by Shelby Cullom failed because of Senators who were supportive of the carrier's interests.[367]

At the same time rate discrimination continued. While the ICC had some tolerance towards the railroad communities, the progressives and especially Theodore Roosevelt rejected self-regulation through consolidation and favored empowerment of the Commission. The Elkins Act of 1903, which was a collaboration between Knapp,

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[365] Stover, *American Railroads,* 92.

[366] Stone, *The Interstate Commerce Commission,* 9.

[367] Hoogenboom, *A History of the ICC,* 41-44.

Prouty and Elkins (who supported the shippers) and James A. Logan of the Pennsylvania Railroad, was supposed to end rebates. Even after passage of the Elkins Act, the railroads continued with their discriminatory practices, including new rebates in the form of special "midnight rates" These were special rates offered to large shippers that were revoked as soon as the shipment had been made.[368]

In 1904, in *Northern Securities Co. v. United States,* 193 U. S. 197 (1904), the Supreme Court ruled in the government's favor, and effectively ended the movement to consolidation.[369] In the same year, Roosevelt, with the support of Midwestern Governors Robert M. La Folette and Albert B Cummins, as well as others, began the process that would give the ICC the power to regulate interstate rates and enforce its decisions. Their goal was attained in 1906 when the Hepburn Act was passed under the influence of the Progressive Movement. It has been suggested by the Hoogenbooms that the movement for regulation was a result of strong popular, and thereafter political, support in the face of strong opposition by the carriers.[370]

The Hepburn Act set maximum rates and required that rates be "just and reasonable" as determined by the ICC. This occurred at a time when the railways found that the increased revenue from growth of traffic could not cover the rising costs, fixed

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[368] Hoogenboom, *A History of the ICC,* 44-45. Stover, *American Railroads*, 127-128.

[369] Hoogenboom, *A History of the ICC,* 46-47.

[370] "An Act to Amend an Act Entitled 'An Act to Regulate Commerce.'" Fifty-ninth Congress. Sess. I. Ch. 3591. (1906), 584-595. Accessed from legisworks.org/sal/34/stats/STATUE-34-Pg584.pdf. Hoogenboom, *A History of the ICC,* 47-50. Stover, *American Railroads*, 129-130. Wolmar, *The Great Railroad Revolution*, 262-271.

rates, and the need to modernize the systems (James Hill estimated that the industry would require $5 billion). Problems faced by the railroads included increased labor costs based on newly passed labor legislation, increased costs due to regulation and the inability of the companies to work together due to antitrust laws. There was also the public's and the ICC's distrust of railroad management that was justified by the actions of the bankers and promoters who looted the Chicago and Alton and the Rock Island lines between 1898 and 1905– according to Hoogenbaum the role of the "the unscrupulous railroad managers, who damaged the reputation of all railroads" has often been ignored.[371] The year 1901 was the year in which Frank Norris' *The Octopus* appeared with its vision of the American railroad:

> the galloping monster, the terror of steel and steam, with its symbol of a vast power, huge, terrible…the leviathan, with tentacles of steel clutching into the soil, the soulless Force, the iron-hearted Power, the monster, the Colossus, the Octopus.[372]

On the other hand, it should be noted that Norris' farmers were not Jefferson's "virtuous small farmers." They can easily be seen as the prototypes of the modern corporate farmers. They were not bereft of financial or political power and influence, and hesitated only briefly when it came to using both to influence politicians.

In 1903 Louis Brandeis began his seven-year crusade that ultimately proved Morgan's role in the mismanagement and fraud in the running of the New York, New Haven and Hartford (the final order to separate the New Haven and Boston and Maine

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[371] Hoogenboom, *A History of the ICC,* 58. Stover, *American Railroads*, 127.

[372] Frank Norris, *The Octopus* (Stilwell, KS: Digiread.com Book, 2008), 25.

came from James McReynolds, then the Attorney General; later, McReynolds was to have a problematic relationship with Brandeis when they both served on the Supreme Court and McReynolds was Franklin Roosevelt's bane as one of the four horsemen).[373]

The Mann-Elkins Act of June, 1910, further increased the ICC's control over rates. It established a "Commerce Court" to hear appeals from rate decisions, extended ICC control to telephone, telegraph and cable companies, deleted the phase "under substantially similar circumstances and conditions" from the original ICA based on the Court's rulings, permitted suspension of rate increases for up to ten months, and placed the burden on the carriers to show the reasonableness of the rate increases. At this time, after President Taft appointed two new commissioners, the members of the ICC reputedly considered themselves to be judges and not policy makers.[374] The funding for the "Commerce Court" was not renewed in 1913 as the court was seen to be favoring the railroads.[375]

In 1910, railroads in the Western Traffic Association and in the Northeast requested a general rate increase. Hearings on the requests were held for the eastern lines in New York and Washington D. C. For the western lines, hearings were held in Chicago. Brandeis was asked to join those opposed to these rate increases.[376] The hearings shed light on railroad management. Throughout all stages of the hearings Brandeis showed

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[373] Mason, *Brandeis*, 177-214. Stover, *American Railroads,* 127.

[374] Stone, *The Interstate Commerce Commission,* 15.

[375] Bernhardt, *The Interstate Commerce Commission,* 26-27. Stover, *American Railroads,* 130.

[376] Hoogenboom, *A History of the ICC,* 62. Mason, *Brandeis,* 315-334.

that the witnesses for the increases could not provide any basis for the requested increase. According to the *New York Evening Post* "they did not know how the figures they presented had been arrived at…they did not know the causes of the thing."[377] These witnesses included top managers of the most important lines in the country. Their lack of understanding of costs of services and charges were, in this regard, very much in line with business practices of the late 19th century and the same could be said of leaders in most of the industries of the time.[378] Of note, but probably not so surprising, in this case the Railway Brotherhoods were supportive of the management in their efforts. Brandeis, under the Mann-Elkins act was able to show that the corporations had not met their new obligation to show that the rate increases were justified and not solely based on the arbitrary judgments of the railroad corporations (the Mann-Elkins Act states "the burden of proof to show that the…proposed increased rate is just and reasonable shall be upon the common carrier").[379] His argument, in line with the progressive principles, was that there was no need to increase rates since substantial savings would result from efficiency and greater "scientific" management. He presented expert witnesses to prove his point. Brandeis also insinuated that the railways were being manipulated by bankers who controlled the railways and iron companies manipulating them both to attain the highest benefits to themselves. Accounting data were presented by Brandeis to prove that the financial situation of the lines was better than they had represented it to be. Most controversially, Brandeis claimed the lines could save close to $1 million per day in

[377] Cited in Mason, *Brandeis*, 316.

[378] Brands, *American Colossus,* 101.

[379] Cited in Mason, *Brandeis*, 318.

wages alone by following his suggestions. Both the eastern and western hearings went poorly for the railways.[380] On February 23, 1911, the ICC delivered its decision. It unanimously rejected the request for increased rates.

In May of 1913, the railroads asked for a rehearing on the case for a five per cent rate increase. From 1901 to 1913 operating expenses had increased 42 per cent, while revenues had increased only 33 per cent. On this occasion the carriers got some support for the increases from some shippers and no opposition from others.[381] The ICC employed Brandeis to serve as special counsel. Mason states that Brandeis' role for the Commission was to make sure that all of the facts were presented and to be neutral; Hoogenboom states his role was to "represent those opposed to a general rate increase."[382] Immediately his appointment and impartiality were questioned. Apparently, Brandeis' stance antagonized both shippers and transportation companies. His view was that in many cases the railways were undercompensated, but that rate increases by the ICC would not solve the problem. Instead, in these hearings he stressed the financial mismanagement as causative for the current financial problems. He also felt that the compensation paid out, when fairly earned by the railroads, should not be limited. The decision, which on this occasion was not unanimous, that the ICC handed down on July 29, 1914, reflected Brandeis views; it granted the increases only in the Central Freight association's territory.[383]

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[380] Hoogenboom, *A History of the ICC,* 60-66.

[381] Hoogenboom, *A History of the ICC,* 71-71.

[382] Hoogenboom, *A History of the ICC,* 70.

[383] Hoogenboom, *A History of the ICC,* 70-73. Mason, *Brandeis*, 335-348.

Under the shadow of World War One, which started in Europe in August of 1914, the railroads once more asked to be reheard. Once more Brandeis appeared as council for the ICC. Even though the case was essentially a retrial, this time the Commission (with the support of President Woodrow Wilson) voted, to Brandeis' disappointment, to grant 5 per cent increases by a 5-to-2 margin. This increase actually provided little relief to the stressed lines.[384]

Alpheus Mason, Brandeis' biographer, has stated that the ICC's 1915 decision was "puzzling, since little or no additional evidence was presented to warrant it."[385] Brandeis was certainly the better and most convincing lawyer throughout most of the battles. He was almost certainly right that the railroads accounting and managerial methods were obsolete. That the carriers would have benefited from a better analysis of unit costs was something on which many of the lines' managers would also agree.[386] They also agreed that there were improvements to be made by "scientific management" and that there were economies in the systems that would have saved them money. [387] However, considering the decision from the perspective of time and the railroads costs, charges, productivity, and profits, makes the final vote of the ICC more understandable. First, Brandeis, or least one of his experts had gotten his facts wrong. One of Brandeis' scientific managers, Harrington Emerson, claimed that the carriers could save $300 million a year in labor costs. He based this on the railways paying annual wages of $6

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[384] Hoogenboom, *A History of the ICC,* 73-74. Stover, *American Railroads,* 168.

[385] Mason, *Brandeis*, 348-351

[386] Mason, *Brandeis*, 327.

[387] Mason, *Brandeis*, 333.

billion. In fact they only paid $1.1 billion in wages.[388] It should be noted that the railways had not denied science; they had made many "science based" improvements to the lines as noted above, which had required massive inputs of capital and resulted in lowering of freight and passenger rates.[389] Management had improved, without violating the laws, by such mechanisms as the creation of union stations, which permitted easier transfer between lines. Dividends were paid in the range from 5.4 to 8 per cent (compared to a short term rate of 4 to 7 per cent between 1900 and1920).[390] Costs of rail transportation undercut most water transportation costs on the canals and rivers. The efficiency of rail workers had increased two and one-half times. On the other hand the worker's wages had increased almost as fast as productivity—"compensation of labor per rail revenue dollar rose from an average of 40 cents in the years 1895-99 to 46 cents in the years 1911-15."[391] Rail debt had increased and the operating ratio increased from a healthy 65 to 68 per cent to almost 70 per cent.[392] Brandeis seems to have ignored the fact that while major savings could be achieved through increase in efficiency the major schemes that could have led to economies of scale were prohibited by the ICC. Railroads were forbidden by law from what was potentially their greatest cost cutter—cooperation and coordination (pooling) between lines. The bond market at the time supported the lines' appraisal of their financial situation. In 1910 the market for bonds, even for "good bonds,

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[388] Hoogenboom, *A History of the ICC,* 63-64.

[389] Stover, *American Railroads,* 157-l64.

[390] "Interest Rates: 1831-2011." Stover, *American Railroads,* 161-162.

[391] Stover, *American Railroads,* 162.

[392] Stover, *American Railroads,* 162.

guaranteed by the Baltimore and Ohio Railroad, could not find a purchaser" (according to Daniel Willard, President of the Baltimore and Ohio); this was at a time when the net earnings of national banks averaged 8.5 to 10 per cent, with minimal risk when compared to the railroad bonds.[393] It should also be noted that based on a joint congressional committee report of 1914, it was determined that the railroads were entitled to an increase in compensation for carrying the mails, which was approved by the Commission and even Brandeis agreed the lines were underpaid $15 million for carrying the mail.[394]

An issue frequently unmentioned is the competition from fast-freight lines and private-car lines, or their corruption potential, even though they controlled "virtually all the high-rated freight."

Originally set up in the 1850s as independent stock companies (to get around rules against pooling), fast-freight lines owned their own rolling stock and were able to operate over multiple railroads, which provided for through traffic and maintenance of the rolling stock.[395] They carried high priority high value freight for a wide range of customers. Because of concerns from legislatures and stockholders, in 1866 co-operative lines were formed. These were no longer separate companies, but administrative pools to which the major trunk lines contributed cars.[396] The First Annual Report of the Interstate

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[393] Cited in Mason, *Brandeis,* 320. Pierce Butler, "Valuation of Railway Property for Purposes of Rate Regulation," *Journal of Political Economy* 32, no.1 (1915): 32. Accessed from stable URL: http://www.jstor.org/stable/1819530.

[394] Bernhardt, *The Interstate Commerce Commission,* 40. Hoogenboom, *A History of the ICC,* 71.

[395] Roger C. Hinman, personal communication, 3/5/15.

[396] Martin, *Railroads Triumphant,* 204. Stover, *American Railroads,* 139-140.

Commerce Commission specified that it was doubtful that express companies, not controlled by railways, were within the ICA's jurisdiction.[397] Later the Hepburn Act brought them under ICC control and as a result they were investigated by ICC commissioner Franklin K. Lane who issued reports on them in 1912 and 1913.[398]

Unlike the fast-freight cars, the private-cars tended to be specialty cars owned and operated by large producers—refrigeration cars were owned by meat packers and tanker cars were owned by the oil companies.

The issue of the practices, discrimination, extent, and power of fast-freight and private-car lines is one that deserves further attention and research.[399]

Based on the events that followed it may be argued that, for once, the railroads had not had the better lawyer. Even though in the end the rate increases were granted and Brandeis did not prevail, Brandeis's experience in these cases would have demonstrated to him the potential of the commission for regulation and shaped his view of commissions.

The rate increase granted by the Commission was followed by an increase in operating expenses and a decline in freight traffic. In 1914, the operating ratio had increased to an unsustainable 72 per cent. While gross revenues increased, net revenues

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[397] "First Annual Report of the Interstate Commerce Commission" (Washington, DC: Government Printing Office, 1887), 14. Accessed from http://babel.hathitrust.org/cgi/pt?num=1&u=1&seq=31&view=image&size=100&id=hvd.hntc8j.

[398] "An Act to amend an Act," 584-595. Hoogenboom, *A History of the ICC,* 25, 69.

[399] Bernhardt*, The Interstate Commerce Commission,* 40. Hoogenboom, *A History of the ICC,* 69-70.

fell.[400] As a result many of the lines were faced with bankruptcy. By 1915, one-sixth of the carriers representing 40,000 miles of track and $2.25 billion of capitalization were under court control or awaiting receivership. A declining credit picture (competing options offered creditors higher yields) limited the funds that were available for maintenance and improvements. When the rail traffic increased again in 1915 and 1916 the lines were faced with union demands for an eight-hour day (instead of the ten-hour day they were working). After a long battle, and just prior to a Supreme Court ruling that favored the unions, the railroads yielded to the union's demands.[401]

The 1915 requests for increases resulted in minimal changes in passenger or freight rates (despite the fact that the operating expenses on some of the western railroads had reached 79 per cent).[402] In 1917, requests by the carriers, this time for an across-the-board 15 per cent increase due to the rising costs of dealing with war-related traffic, met with limited success despite support from some of the commissioners.[403]

As a result of these battles, when the United States entered World War I in April of 1917 its rail transportation system was in poor condition. After the start of the war rail traffic and operating costs increased once more. Major issues included heavy eastbound traffic and the inability to empty the cars once they reached the ports. Secondary to the threat of German submarines there were fewer ships to accept the cargoes, therefore

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[400] Hoogenboom, *A History of the ICC,* 57.

[401] Stover, *American Railroads,* 168-170.

[402] Hogenboom, *A History of the ICC,* 75-76.

[403] Hogenboom, *A History of the ICC,* 79-81. Stone, *The Interstate Commerce Commission,* 17, 18.

railroad cars could not be unloaded and were used for storage. A five-man Railroad's War Board setup by the rail executives failed to coordinate the lines, in part due to the Antitrust Act. Under the Esch Car-Service Act, passed in May of 1917, the ICC had the authority to control the movement and use of all railroad cars in order to deal with emergencies, but it failed to use this power.[404]

In August of 1917, at its request, Congress increased the size of the ICC to nine members and allowed three divisions and ten bureaus: Correspondence and Claims, Inquiry, Law, Carriers' Accounts, Statistics, Safety, Locomotive Inspection, Valuation, Indices, and Car Service. At this time decision making began to shift from the commissioners to examiners.[405]

On December 1, 1917, the ICC recommended that the government assume control of rail transportation. On December 28, the government took over operations of the railroads with support from the ICC, shippers, labor, wartime administrators and the railroads.[406] This was not an act without precedent. At the time of the American Civil War, in the North, legislation had been passed that would have permitted the government to operate the lines if necessary. While the lines were not taken over, General Daniel McCallum used his authority to act as a liaison between the government and railroad presidents. McCallum also ran the United States Military Railroads, much of which ran

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[404] Bernhardt, *The Interstate Commerce Commission,* 50. Stone, *The Interstate Commerce Commission,* 18.

[405] Stone, *The Interstate Commerce Commission,* 18.

[406] Stone, *The Interstate Commerce Commission,* 19. Stover, *American Railroads,* 170-174.

on the tracks of former Confederate railways.[407] During the years of World War I the government ran the railways, under the United States Railroad Administration, headed by William Gibb McAdoo. It should be noted at this point that that the legal authority of the ICC under the ICA did not extend to the physical operation of the railways. The failed attempts of the ICC and Railroad's War Board to coordinate the railroads' activities, and the fact that Wilson and his advisors were displeased with the ICC created the need for the United States Railroad Administration.[408] The Railroad Administration had to increase wages, freight rates (28 percent) and passenger fares (18 percent) and lost $2 million per day (or $1.2 billion over 26 months).[409] At this time the lines were running at an operating expense ratio of 87 per cent.[410]

During the war the ICC took direction from the Railroad Administration, functioning as an auxiliary agency. Commissioners helped by "drafting contracts, studying ways to increase efficiency (especially fuel consumption, mediating local disputes, performing safety inspections, and providing statistical information.[411]

On March 1, 1920 the government returned the railways to private control under the Transportation Act of 1920—commonly known as the Esch-Cummins Act— after much discussion over the fate of the lines. Among other provisions the Esch-Cummins

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[407] Stover, *American Railroads,* 57.

[408] Bernhardt, *The Interstate Commerce Commission,* 36. Hogenboom, *A History of the ICC,* 77. Stone, *The Interstate Commerce Commission,* 17.

[409] Stone, *The Interstate Commerce Commission,* 19.

[410] Stover, *American Railroads,* 177, 190.

[411] Stone, *The Interstate Commerce Commission,* 19.

Act gave the ICC the power to set minimum rates, oversee railway finances and regulate acquisitions and mergers. It also directed the ICC to prepare a plan for consolidation of carriers. In many ways the Act continued the pre-World War I strengthening of the ICC.[412]

The importance of this time period in the Commission's hearings was considerable. They demonstrated the change in the authority of the ICC that had taken place since the beginning of the century. At the peak of its power, just prior to the War the ICC could no longer be ignored. Even if the railways achieved limited goals in 1914, in the future the lines would have to answer to the ICC, as representatives of the people's will. In this sense the hearings were a definite win for the ICC. One thing is abundantly clear, the carriers were not dictating policy to the ICC.

This time period saw a major shift in the way that the railways were viewed and evolving. They were moving from serving the needs of individual cities to being viewed more in terms of their ability to coordinate and serve the nation's needs driven by large industries and the needs of finance and capitalism.[413]

Moreover, in the late 19th century the federal government was weak and Washington DC a city of little significance compared to the great cultural, commercial, and financial centers. The rise of the nation, federal government and a national economy was fostered by the railroads, and the railroads were to be controlled through the ICC.[414]

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[412] "Esch-Cummins Act," from Answers.com. Accessed from http://www.answers.com/topic/esch-cummins-act. Stone, *The Interstate Commerce Commission,* 20-22.

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[413] Stover, *American Railroads,* 139.

[414] Lawrence M, Friedman, *Law in American: A Short History* (New York: Modern Library, 2002), 125-126.

To accomplish this it was important for the ICC to succeed—to flex its muscle. A win for the ICC was a win for the emergence of a strong centralized government. The government was going to have to deal with other problems using agencies and commissions. In 1906, the same year Sinclair's *The Jungle* was published (and five years after Norris' *The Octopus*) the Pure Food and Drug Act was passed, which led to the Food and Drug Administration. Congress passed the Sixteenth Amendment to the Constitution in 1909 and it was ratified in 1913, initiating the income tax (the Bureau of Internal Revenue, the progenitor of the Internal Revenue Service was formed in 1861, but originally did not collect income tax).[415] The emergence of the ICC was in no small part due to its evolution under the influence of Thomas Cooley, its struggle with the courts, and support from the executive and legislative branches.

## The Development of the ICC and Thomas M. Cooley's Vision of the ICC; 1887-1891

Thomas M. Cooley was President's Cleveland's choice to be the first commissioner appointed to the ICC, and then its first chairman. Cooley was a choice that was widely applauded. He was commonly acknowledged to be one of the country's foremost jurists, legal teachers, and constitutional scholars. In addition he had experience dealing with railroads.[416] It was under his commissionership that the limits imposed by the ICA on the jurisdiction of the ICC were first revealed and the movement to define and empower the Commission, which led greater control over the carriers, was initiated.

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[415] Friedman, *Law in American*, 125-126.

[416] Vander Velde, "Thomas M. Cooley," 77-108.

Cooley was virtually self-taught. He never attended university or law school as a student, but often was invited to institutions of higher education as a guest lecturer. Initially he practiced law but also dabbled in real estate and politics. In 1848 he was an early organizer of the Free Soil party. In 1854 he was a Democratic candidate for a judgeship and after his defeat he became a Republican. When Cooley returned to law in Michigan in 1857 he became the court reporter for the Michigan Supreme Court and compiler of the laws of Michigan. In this role he gained recognition as "one with the capacity to interpret the law and apply it to established facts."[417] Cooley joined the faculty of the Law Department of the University of Michigan in 1859 and in 1864 he was elected to be a Justice of the Michigan Supreme Court. He continued to be re-elected for twenty years. Four years later he published *A Treatise on the Constitutional Limitations Which Rest Upon the Legislatures of the Several States,* the first of his many volumes, which was one of the seminal works of 19th-century judicial literature. In this book Cooley stated his support of the rights of local governments and property. While he was generally against centralized government control, he accepted a right for governmental interference in some cases. As time went on he apparently became more willing to accept and even advocate for government regulation. [418] His writings brought him national recognition. Cooley became one of the premier and most cited judges in the country. He was distinguished as a teacher and a visiting scholar in numerous universities including

[417] Jerome C. Knowlton, "Thomas McIntyre Colley," *Michigan Law Review* 5, no. 5 (1907): 312. Accessed from www.law.umich.edu/historyand traditions/faculty/Faculty_Lists/Alpha_Faculty/Documents/Thomas_Cooley/thomas_m_cooley_by_Knowlton.pdf.

[418] Bernstein, *Regulating Business,* 33-33.

Johns Hopkins and Harvard (Cooley received an honorary doctorate from Harvard, as part of the university's 250th anniversary celebrations).[419]

Cooley's judicial stance was that of a strict constructionist; for example he opposed the annexation of Hawaii since treatment of outlying colonies is not mentioned in the Constitution. He felt that a state's government was defined by its constitution and legislatures had the right only to make laws that did not infringe on those constitutions. He was an advocate of strict separation of powers; in his view courts had no supervisory power over legislation and could only rule on a law based on the constitution, not on whether or not they liked the law (something that happened only too often according to Cooley). Most famously Cooley was the strong advocate of the rights of local government—municipal corporations. He opposed legislative control of private business, and monopolies that restricted competition; he favored private property and personal liberty.[420] Despite this, Cooley was no friend of big business, especially the railroads. Cooley was well aware that the public "sentiment is adverse to the construction of railways by the state and the opinion is quite prevalent… they can be better managed, controlled and operated for public benefit in the hands of individuals."[421] In what has been seen as a controversial decision he had opposed state bonds to support building private railways in Michigan, which would have benefited only private corporations, in *People v. Salem* 20 Mic. 452 (1870). This judgment was possibly due to Michigan's experience with the Central Railroad in the 1830s and 1840s (an experience that led to

[419] Carrington, "Law and Economics," 363.

[420] Knowlton, "Thomas McIntyre Cooley," 316-323.

[421] Cited in Ely, *Railroads and American Law,* 3.

the Michigan Constitution of 1850, which barred the state from involvement in internal improvement projects).[422] Finally, he was an advocate of the working class; he felt that capital "needed awakening to the moral duties accompanying citizenship" and that this goal could be accomplished by "searching for moral or religious constraints on the conduct of employers."[423]

His formal interest in the field of railroad regulation began in January of 1882 when the Trunk Line Executive Committee, representing five eastern railways, asked him to serve on a committee investigating rate differentials. In his study of rates Cooley came to understand that there were shippers who benefited from the various rate schemes and that one solution would not please everyone (rates were what has come to be called a "zero-sum game").Based on this, he wrote an article explaining why pools were a response to competition and he appears to have favored pooling.[424] However, during his time with the ICC he opposed repealing the anti-pooling provision and setting minimum rates, either of which would have reduced competition.[425]

Failing to get re-elected to his judgeship (probably for his support of Cleveland, a Democrat) Cooley resigned from the court in 1884 and returned to teaching. At the same time his interest in railroads increased. In the spring of 1886 he served as arbitrator for the Association of the Railroads of Kentucky, Tennessee and Arkansas; in December of

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[422] Ely, *Railroads and American Law,* 3, 20, 27-28. "First Annual Report of the Interstate Commerce Commission," 5. Knowlton, "Thomas McIntyre Cooley," 321-322.

[423] Carrington, "Law and Economics," 367, 368.

[424] Carrington, "Law and Economics," 375, 380.

[425] Hoogenboom, *A History of the ICC,* 28.

that year he was appointed receiver of the Wabash Railroad property west of the Mississippi. In 1887 Cooley was asked to be the first ICC commissioner.

In their first annual report, Cooley and the other members of the ICC reviewed the history of commerce regulation and affirmed the abuses of the railroads (this report is of particular significance because it provides a picture of the carriers at the time that the ICA was enacted). The Annual Report cites abuses of passes, the making and breaking of trade centers, ruinous competition between carriers, publication of confusing rate schedules, stock manipulations and arbitrary rate making, often made on local levels. Many of these abuses are reported to be shrouded in secrecy; there is little attempt to substantiate the charges or the extent of the abuses—no specific cases are cited in the report. While the report states the transactions would "in many cases" be held illegal under common law, "the proof was in general difficult." It is mentioned that absolute rates were deemed less important by the shippers than access to equal, consistent, and published rates; the goal of the discriminated against shippers, as noted in the Report, was often to secure for themselves the preferred rates. Ultimately, the rivalry was between special interests, shippers and communities. Each was striving "to secure rates as will most benefit itself."[426]

Of interest, the Report acknowledges that discrimination may have had positive effects on the lines and on the promotion of industries. Reasonable charges are discussed at length in the report, which starts the discussion by noting that none of the duties of the Commission "is more perplexing and difficult than that of passing upon complaints made

[426] "First Annual Report of the Interstate Commerce Commission," 1-9, 37, 41.

of rates as being unreasonable."[427] The complexities of the issues involved in the setting of reasonable rates and long-haul-short haul rates are reviewed at length, as is the impact of compliance with the ICA on competition. A complicated interplay of factors beyond rates is presented in depth in the Report. In defense of railway rates, the ICC accepts that competition that results in unsustainably low rates may distort the public's view of fair rates; that long-short rate charges may be reasonable and even beneficial in some circumstances, and likewise that rate disparities between lines can also be reasonable. The review of the issues in the Report, unlike some of the contemporary depictions of the lines, is not anti-railroad and is often sympathetic to their point-of-view. [428] Additionally, competition by water is recognized as a factor in the setting of rates.[429]

This report has much interesting information on the state of the lines in 1887. For instance, it reveals that between 500 and 1200 corporations were subject to the ICC (and it is pointed out the abuses of a limited number of lines may be "visited upon all roads," but there is no indication of how many of the corporations were involved in dubious activity). Also the cost of building the lines was estimated as $7.25 billion with a payment of $80 million paid out in dividends (a 1.1 per cent return).[430]

Also, in defense of the carriers and the *status quo,* the report notes that it was the absence of regulation under common law that in good part that led to the problems. Some of the problems with the railways were stated to be due to the fact that "railroad

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[427] "First Annual Report of the Interstate Commerce Commission," 36.

[428] "First Annual Report of the Interstate Commerce Commission," 15-23, 36-41.

[429] Fogel, *Railroads and American Economic Growth,* 1-10.

[430] "First Annual Report if the Interstate Commerce Commission," 1-2, 9.

transportation was wholly unknown to common law"—the law simply did not exist—leading to "indirect and abnormal law-making [by the corporations] exceedingly unequal and oftentimes oppressive."[431] Cooley's and the ICC's concern was that these practices would depress the weak and strengthen the strong at the same time that they "tended to fix in the public mind…that success in business was to be sought for in favoritism rather than in legitimate competition and enterprise."[432] Lack of regulation in railways permitted the carriers to choose their own routes, favoring certain locations. It also led to wasteful duplication of routes that resulted in destructive competition and discriminative. Finally the report acknowledges the issue of stock manipulation, but points out that since the railways were chartered by the states, correction of these abuses must be by state legislation rather that federal regulation.[433]

In conclusion, the First Annual Report of the Interstate Commerce Commission would lead one to believe that the abuses of the carriers were so widespread and known that they required no substantiation, but also that in some cases the abuses may have justification in factors not evident to the public at large. There was something in the Report for everyone. It emerges from the Report that the ICC and shippers were less interested in the issue of reasonable rates than they are in equal treatment.[434]

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[431] Cited in Vander Velde, "Thomas M. Cooley," 100. "First Annual Report of the Interstate Commerce Commission," 4.

[432] Cited in Vander Velde, "Thomas M. Cooley," 101. "First Annual Report of the Interstate Commerce Commission," 7.

[433] "First Annual Report of the Interstate Commerce Commission," 9.

[434] Anthony Arpaia, "The Independent Agency—A Necessary Instrument of Democratic Government," *Harvard Law Review* 69, no. 3 (1956): 483. Accessed from http://web.eboscohost.com.exp-prod1.hul.harvard.edu.ehost/resultad.

According to Cooley and the ICC, as a public agency and common carriers, railroads owed an obligation to the public. Congress laid down rules of equity and equality to be followed in order to establish regulation and make certain that the public was served. Equity, equality, and restoration of public confidence were Cooley's ideals. Under Cooley's direction the ICC attempted to enforce the provisions of the ICA, especially the anti-pooling and long-haul discrimination policies, while it acknowledged a responsibility to assure reasonable return for the investors.[435] In 1889, the Commission made its first request to amend the ICA. Congress responded by extending its power and making the Commission independent of the Department of the Interior. Under Cooley's leadership railroad safety was also made an issue of concern. In 1889, the Commission conducted a conference on the problem, which led to the Safety Appliance Act of 1893.[436]

Cooley's background as a judge (along with the fact that the four other initial commissioners were also lawyers) led to the courtroom character of the Commission's proceedings. This led to the Commission addressing issues in a case-by-case manner. Other elements of Cooley's "style" have been noted and "held out as a model for emulation."[437] The first was the attempt to resolve issues by mediation rather than adjudicative power; Cooley was a strong believer in the power of moral persuasion. This supported the Commission's case-by-case approach—an approach that succeeded in

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[435] Carrington, "Law and Economics," 382.

[436] Shrag, "Transportation and the Uniting of the Nation," 32.

[437] Bernstein, *Regulating Business,* 29. Carrington, "Law and Economics," 384-390. Hoogenboom, *A History of the ICC,* 20.

some cases. It was praised by some, condemned by others (who thought that a "cut and slash" approach was more likely to get everyone's attention); in the long run, the case-by-case approach, which in the opinion of Richard Stone, prevented the ICC "from developing a comprehensive railroad policy." [438] It was Cooley's hope that this approach would educate and reform both the railroads and the public. Second, Cooley developed the concept of a rule making process that later evolved into administrative due process. Under this due process the Commission's findings based on facts would be considered final. Eventually, this concept became part of the Administrative Procedure Act of 1946. Finally, Cooley's regulations and interpretations were presented with exceptional clarity and his integrity was acknowledged by all.

While Cooley favored mediation, a review of his history shows that he understood the problems and limitations of the ICC as ordained under the ICA and did not oppose a judicious show of judicial force when necessary. Ultimately, he felt the functions of the Commission should have included the ability to intervene in labor disputes, to develop policy and an enhanced power of regulation.[439]

Henry Carter Adams was another of Cooley's legacies to the Commission. Adams, who had been a colleague of Cooley's in Michigan, was a founder of the American Economic Association, a critic of *laissez-faire* economics and proponent of collective bargaining. He was a statistician who believed that statistical analysis and public education would solve the problems of the railways.

Following the death of his wife and due to his own poor health Cooley resigned

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[438] Hoogenboom, A *History of the ICC,* 25-26. Stone, *The Interstate Commerce Commission,* 7, 13.

[439] Hoogenboom, *A History of the ICC,* 26-28.

from the ICC in 1891. He was succeeded by William Morrison.

After Cooley left the ICC, the Court made statistical analysis the prime mission of the ICC. It is difficult to determine how much the early successes of the ICC were due to the Cooley "style" because this was also an era of national prosperity. Rate discrimination was on the wane, published trunk-line rates were stable, and trunk-line net receipts and common-stock prices were up. Short-distance rates were cut in 1887 and 1893 by ICC rules and average ton-mile rates declined on all lines (with the large shippers not receiving their customary share of the reductions).[440]

## The Development of the ICC and Its Relationship to the Courts

Since the ICC had no enforcement authority of its own it depended on the courts to back its decisions. The courts initially seem to have seen the ICC as an agency whose mission was only to collect statistics and to prepare preliminary reports, while it saw rate setting as the prerogative of the court.[441] Court rulings dominated and diminished the ICC from 1887 until the start of the 20th century.

While the ICC could set aside rates that were felt to be unreasonable, it did not have the power to enforce its rulings.[442] The form of procedure required a formal complaint to be made (the ICC could not initiate actions), then a hearing was held in

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[440] Hoogenboom, *A History of the ICC,* 31.

[441] Ely, "The Troubled Beginning of the Interstate Commerce Commission Act," 1131-1134.

[442] Ely, "The Troubled Beginning of the Interstate Commerce Commission Act," 1131-1134. Stover, *American Railroads*, 125.

which a decision was rendered. If the carrier chose not to comply with the decision it could appeal to a federal court and ultimately to the Supreme Court to force compliance. As a rule the Commission's role was reduced to that of an originator of proceedings that usually took at least four years and frequently longer. When the cases were heard before the courts they could refuse to accept the factual materials presented to the Commission and they permitted the defendants to submit evidence that had not been presented in earlier hearings. In essence this caused the cases to be presented *de novo.* As a result shippers and carriers paid little attention to the initial hearings or judgments by the ICC and their case presentations were limited. Rulings of the Commission were simply ignored.[443] Furthermore, the only party who could be awarded damages was the party bringing suit. The railroads typically had their contracts with the middlemen—the shippers—and not the producer/farmers. The shippers had adjusted the price they paid to the farmer based on the rate charged to them. Therefore, they—the middlemen— were usually not out money and had little incentive to sue.[444] As a result the system was not working the way it was supposed to.

Often witness testimony was required for the Commission to do its job, but witnesses were loathe to place themselves in jeopardy by their testimony. Among other concerns was that they felt the carriers would retaliate against them and their own liability under the law. The constitutional right of witnesses to refuse to testify was upheld by the Court in *Counselman v. Hitchcock ,* 142, U. S. 547(1892). In 1893,

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[443] Bernhardt, *The Interstate Commerce Commission,* 11-14. Cushman, *The Independent Regulatory Commissions,* 66.

[444] Bernhardt, *The Interstate Commerce Commission,* 12.

Congress passed the Compulsory Testimony Act, a law compelling witnesses to testify while protecting them from legal prosecution. This law was contested in several cases; it was not until 1896 that the Supreme Court gave the law its approval. In *Brown v. Walker*, 161 U. S., 591, the Court gave the ICC the right to compel witnesses to testify.[445] In the "*Social Circle"* case the Court decided the courts could rule only on procedure not substance of a case.[446] However, of the sixteen railroad cases that appeared before the Supreme Court from 1887 until 1905 brought under the ICA, fifteen were decided in favor of the railroads and against the Commission.[447]

From its origin the ICC had the power to rule on whether or not a rate was reasonable—to encourage the correction of rate abuse. Early, the ICC believed that it had been given an implicit mission to set rates. Nevertheless in 1887 (the "Social Circle" case, *C. N. O. and T. P. Railroad v. Interstate Commerce* Commission, 162 U. S., 184, and the "Maximum Freight Rate Cases," *Interstate Commerce Commission v. Cincinnati, N. O. and T. P. Railroad*, 167 U. S., 479 (1897) and in *Texas Pacific Ry. Co.* 167 U. S. 479, 494 (1897)*,* the Supreme Court definitively ruled that Congress had not given the ICC power to set rates either explicitly or implicitly.[448] Based on this decision, the only

[445] Bernhardt, *The Interstate Commerce Commission,* 13. Cushman, *The Independent Regulatory Commissions,* 66-67.

[446] Stover, *American Railroads,* 125.

[447] Stover, *American Railroads,* 125.

[448] Bernhardt, *The Interstate Commerce Commission,*14. Interstate Commerce Commission v. Cincinnati, N.O. & Texas Pacific Ry. Co., 167 U. S. 479 (1887). Accessed from http:supreme.justic.com/cases/federal/us/167/479/case.html. Friedman, *A History of American Law,* 395.

way that the Commission could influence rates was to declare one rate after another illegal until the carrier finally complied.

One of the most important factors in the passage of the ICA was the issue of rate discrimination. Section four of the Act made it illegal for lines to discriminate in rates for transport of freight or passengers "under substantially similar circumstances and conditions."[449] Initially there were some attempts to correct the discrimination against short-haul rates. However, in 1892 the railroads found that by forming separate lines for long hauls and short hauls they could get around the issues of discrimination. This was initially accepted by the courts, but reversed in 1896.[450] At the same time the Court supported the carriers by accepting the idea that competition should be considered a factor in the determination of the similarity in circumstances and conditions in setting rates. In 1897, *Interstate Commerce Commission v. Alabama Midland Railway Co.,* 69 Fed. 227 (1895), 74 Fed. 715 (1896), 168 U. S. 144 (1897), the Court addressed this issue.[451] Under the Court's interpretation, no two points were similar. This ruling in effect barred the ICC from enforcing the ICA and led to the carriers filing for thousands of rate increases.[452] In dissent, Justice Harlan wrote that the ICC has been shorn, by

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[449] Cited from Bernhardt, *The Interstate Commerce Commission,* 15.

[450] Bernhardt, *The Interstate Commerce Commission,* 15-16.

[451] Bernhardt, *The Interstate Commerce Commission*, 15. Dempsey, "The Rise and Fall of the Interstate Commerce Commission," 1163. Friedman, *A History of American Law,* 395. Hepburn Railroad Regulation Act (1906). Accessed from http://what-when-how,com/the-american-economy/Hepburn-railroad-regulatory-act-1906/. Shrag, "Transportation and the Uniting of the Nation," 32. Woll, American *Bureaucracy,* 39.

[452] Hoogenboom, *A History of the ICC*, 36-37.

judicial interpretation, of authority to do anything of an effective character."[453] This completely destroyed the Commission's ability to determine rates. Also, the Supreme Court blocked the further attempts of the ICC to deal with rebating and long-haul/short-haul rates.

The most famous railroad discrimination case did not involve rates; the case was *Plessy v. Ferguson* 163 U. S. 537 (1896). Under Cooley several racial discrimination cases came before the ICC; in each case the Commission's ruling accepted "separate but equal" facilities to be acceptable.[454] (Ida Wells, an African-American activist, had won a case against the Chesapeake, Ohio and Southwesterm Railroad in 1884 on the grounds that the railroad did not comply "with a Tennessee law mandating that railcars set aside for blacks be comparable to those reserved for whites," but that verdict was reversed by the Tennessee Supreme Court.)[455] The Plessy case followed a similar case that was thrown out because Daniel Desdunes, the passenger involved, had bought an interstate ticket and therefore could not be arrested for traveling in a "whites only" car under federal law. Mr. Plessy, who was one-eighth black (or alternatively seven-eighths white), had purchased a first-class ticket for intrastate travel in Louisiana and attempted to sit in a "whites-only" coach. He was denied access to the coach as a "member of the colored race." When the case reached the Supreme Court, the justices confirmed the railroads right, under state law, to deny Plessy access to the whites-only car, thereby affirming the guidelines of "separate but equal." Justice Henry Billings Brown, who wrote the majority

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[453] Cited from Bernstein, *Regulating Business,* 28.

[454] Hoogenboom, *A History of the ICC,* 23-24.

[455] Brands, *American Colossus,* 432-433.

opinion, cited (among other cases), a Massachusetts Supreme Court ruling of 1849 that accepted segregated schools as constitutional. Only John Marshall Harlan, a former slave owner from Kentucky, dissented.[456] He wrote: "It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for the state to regulate the enjoyment by citizens of their civil rights solely upon the basis of color."[457] The ICC accepted the Court's ruling and never challenged the "separate but equal" polices of the "Jim Crow" laws.

In 1889, in an attempt to mitigate the destructive rate wars, a group of bankers led by J. P. Morgan formed the Interstate Commerce Railway Association in order to reach agreements and stabilize rates. The Association failed, but it was not opposed by Cooley. During the 1890s the ICC accepted cartel arrangements that set rates, but did not apportion freight. In 1897, the Supreme Court ruled that these arrangements violated the Sherman Antitrust Act, further reducing the regulatory ability of the ICC.[458]

Another major case, the *Northern Securities Co.*, the Supreme Court's decision impacted the relationship between the railroads and the ICC. Theodore Roosevelt wanted increased federal regulation of rail transportation companies and to accomplish this goal he started his campaign against the Northern Securities Co. in 1902. The Northern Securities Company was a result of a compromise between James Hill (backed by J. P. Morgan) and Edward Harriman (backed by Kuhn, Loeb and Co. and the Rockefeller interests). Both groups wanted control of the Chicago, Burlington and Quincy line. At

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[456] Brands, *American Colossus*, 458, 461-470.

[457] Cited from Hartman, *Landmark Supreme Court Cases,* 99-101.

[458] Hoogenboom, *A History of the ICC,* 28-29, 35.

first there was a ruinous battle for stock in the Northern Pacific which controlled the Chicago, Burlington and Quincy. In the end, instead of competing they agreed to cooperate and formed a holding company, the Northern Securities Co. (in 1901) with joint control by Hill and Harriman. In 1902 the United States filed suit to breakup Northern Securities and in 1904 the Supreme Court ruled in favor of the government under the Anti-trust law, five to four. Justice Homes, who had been carefully vetted and chosen by President Roosevelt, was among the dissenters. As a result Roosevelt was said to express his opinion of Holmes: "Out of a banana I could have carved a Justice with more backbone than that."[459] John Marshall Harlan voted with the five-judge majority. In reality, the decision had little impact on the way in which the lines were run.[460] In 1970, with the blessings of the Supreme Court the Great Northern, Northern Pacific Chicago, Burlington and Quincy and the Spokane, Portland and Seattle Railway formed the Burlington Northern Railroad.[461] Even at the time of the decision to breakup the company some in the railroad community voiced their opposition. Balthasar Meyer, who would later become a commissioner, called for "legislation which will enable companies to act together under the law, as they now do quietly among themselves outside of the law."[462]

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[459] Cited from Rehnquist *The Supreme Court*, 217.

[460] Hoogenboom, *A History of the ICC,* 46-47. Stover, *American Railroads,* 128.

[461] John F. Stover, *The Routledge Historical Atlas of the American Railroads* (New York: Routledge, 1999), 92-93.

[462] Hoogenboom, *A History of the ICC,* 64-65.

As a result of these Court rulings and the ICC's inherent weaknesses, the Commission came to be described as powerless as a "toothless tiger."[463] In essence the Court came to control the ICC.[464] Despite the common notion that the courts were in opposition to the lines this is not a complete picture. In many cases the court favored the carriers in cases where states attempted to reduce rates. In a unanimous opinion, written by Justice John M. Harlan in *Smyth v. Ames,* 171 U. S. 361 (1898), the court ruled a Nebraska tariff, which would have reduced freight rates, unconstitutional under the Fourteenth Amendment as it took property without due process. The ruling in *Smyth* would be extended to other regulated industries. The ruling is seen as the Court's support of the rights of property owners, and its desire to protect the national rail system and investment capital. [465]

The attitude of the conservative Supreme Court majority during this period was articulated by Justice David J. Brewer (who served on the Court that ruled in *Smyth)*. Brewer was a conservative believer in the rights of property and in the evils of governmental regulation of the economy. Brewer also defended the carriers against state-mandated rate reductions that he felt were confiscatory.[466] He wrote the Supreme Court's unanimous decision *In re Debs*, 158 U. S. 564 (1895). This opinion justified the federal government's intervention in the Pullman Strike and Eugene Debs' conviction for

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[463] "Hepburn Railroad Regulation Act." Friedman, *A History of American Law,* 396.

[464] Friedman, *A History of American Law,* 396.

[465] Ely, *Railroads and American Law,* 98-99.

[466] Ely, *Railroads and American Law,* 97.

contempt, based on the Commerce Clause; it favored the railroads and business and was seen as anti-labor.[467] Brewer saw no need for commission experts as he felt that the Court was well suited to determine what was right and what was wrong. Brewer believed in an independent and vigorous judiciary.[468] He also believed that the state and federal governments' right to regulate the railways was limited by the Fifth and Fourteenth Amendments to the Constitution.[469] Another Justice who was in favor of opposing the Commission's attempts to extend its power was Oliver Wendell Holmes.[470]

Under the power of a conservative Court the primary role of the ICC was limited to a yearly status report, the gathering of statistics and establishing a uniform system for accounts.[471] It had to rely primarily on publicity for enforcement.[472] In addition to the lack of goal, lack authority to set rates and enforcement power, and judicial interference, a major issue at this time seems to be the lack of definition of internal structure and power (as has been noted earlier, a problem that the state commissions were unsuccessful in resolving). The interrelationship between executive, legislative, and judicial function is important in determining how a commission operates on a day-to-day manner, how it

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[467] Brands, *American Colossus*, 527.

[468] Bernstein, *Regulating Business,* 30-32

[469] Butler, "Valuation of Railway Property," 26-27.

[470] Cited from Bernstein, *Regulating Business,* 40.

[471] Ely, "The Troubled Beginning of the Interstate Commerce Commission," 1131-1134. Bernhardt, *The Interstate Commerce Commission*, 17-19.

[472] Campbell, *The Growth of American Government* (New York: Oxford University Press, 2012) 74.

interacts with those subject to its authority, and how its rules are to be seen as either court rulings or laws.[473]

The passage of the Hepburn Act and the Mann-Elkins Act that helped to define the role of the ICC led to a narrow-review policy and liberalization of the Court's "interpretation of the commission's power."[474] In 1913 and 1914 two important consolidations of cases were decided: the Minnesota cases (*Minnesota Rate Case* 230 U. S. 352 (1913)) and the Shreveport cases (*Houston East &West Texas Railway Co. v. United States* 234 U. S. 342 (1914)).[475] In essence these cases were extensions of the right of the central government to regulate intrastate commerce, based on the Commerce clause and on the grounds that such commerce would ultimately impact on interstate commerce. These cases demonstrate the changes in the power of the ICC. In the Minnesota decision the Supreme Court states "if the Federal control exists, it will have to be exercised through the 'body created for that purpose'—the Interstate Commerce Commission" and the ICC was actively involved in the Shreveport Case.[476]

Perhaps the most important result of this period was that the judicial experiences revealed to the Congress and the President the weaknesses of the ICC and the legislative fixes that were needed for the Commission to work effectively in the future in order to

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[473] Friedman, "A Word about Commissions," 711-715.

[474] Bernhardt, *The Interstate Commerce Commission,* 42.

[475] Stone, *The Interstate Commerce Commission,* 16-17.

[476] "The Minnesota Rate Cases," *Virginia Law Register* 19, no. 3 (1913): 161-167. Accessed from http://www.jstor.org.ezp-prod1.hul,harvard.edu/stable/1104901.

achieve the goals set by the Progressive's addenda that dominated in the beginning of the 20th century.[477]

## The Development of the ICC and Federal Legislation; 1887-1918

The major impetus for Congressional intervention was the failure of the ICC and the Sherman Antitrust Act of 1890—in the face of pressure from the growing progressive movement and growing railroad consolidation. In the mid-1890s one quarter of the lines, representing $2.5 billion , were in default and entering into consolidations. By 1906 seven groups (under control of different bankers) controlled two-thirds of America's tracks.[478] Interventions to strengthen the ICC by the Congress had the support of progressive politicians; the most noteworthy was President Theodore Roosevelt. The success of the ICC was important to those supporters of a strengthened central government and in line with progressive goals. If this first commission failed the old laissez-faire would continue; if, on the contrary, the agency proved virile and effective, the precedent for federal regulation would have been established, with the inevitable ultimate consequence of vastly increased federal administrative power.[479] The major legislative acts impacting on the ICC from the passage of the ICA in 1887 to the federal takeover of the lines in 1918 will be reviewed.

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[477] Bernhardt, *The Interstate Commerce Commission*, 16-17. Hoogenboom, *A History of the ICC,* 53-54.

[478] Stover, *American Railroads*, 125-126.

[479] Vander Velde, "Thomas M. Cooley," 99.

From its inception the Commission looked to Congress to clarify its role. Based on requests from the Commission, amending acts in 1889 give the ICC power to initiate inquiries on its own, enforce equal access to facilities, enforce prohibition of discrimination (by extending penal liability to shippers) and require uniformity in publication of rates. This act also abolished the supervision of the Secretary of the Interior, replacing it with the requirement that the ICC reported directly to Congress. In essence this made the Commission independent.[480] Senator John Reagan, allegedly, promoted the bill to make the ICC more independent because of his mistrust of President Benjamin Harrison, who had been a railroad lawyer.[481] An act of February 1893—the Compulsory Testimony Act—permitted the ICC to take testimony by deposition and protected witnesses, but it took the Court until 1896 to rule on the act.

In 1893, Congress extended the Commission's mandate to cover safety issues. Based on the investigations and recommendations of the ICC and American Railway Association, the Congress passed the Safety Appliance Act of 1893, requiring self-couplers, driving-wheel brakes and train brake systems, standardized drawbars and grab-bars. However, at that time, the Congress rejected the ICC's requests for other safety requirements.[482]

Following the Chicago strikes of 1894, a recommendation was made by the ICC to grant it the power to investigate labor disputes and enforce its recommendations. It was

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[480] Bernhardt, *The Interstate Commerce Commission,* 8. Bernstein, *Regulating Business,* 23. Cushman, *The Independent Regulatory Commissions,* 67.

[481] Bernstein, *Regulating Business,* 19.

[482] Shrag "Transportation and the Uniting of the Nation," 32. Bernhardt, *The Interstate Commerce Commission,* 9.

not enacted, but an act of 1898 (the Erdman Law) designated the Chairman of the Interstate Commerce Commission and the Commissioner of Labor to attempt to arbitrate controversies (when an attempt was made to make use of this act one year later it was a total failure). After 1907 this mechanism was used with increasing frequency, and in 1913 a permanent board, the Board of Mediation and Conciliation, was established under the Newlands Act. This board removed disputes between the carriers and their employees from the jurisdiction of the Commission.[483]

In all of these cases the ICC had to work to get the support of Congress; in that sense it was not independent—control and regulation of the railroads came through acts passed by the federal government and court rulings, not the ICC.

Starting in 1903, based on the suggestions and support of the ICC, Congress began to pass several laws that broadened the Safety Appliance Act of 1893. These laws were primarily designed to increase the safety of travel and protect employees. Some of the laws (per Bernhardt) had "rules and instructions with such modifications as the commission might require" and "such rules after approval by the commission were to become obligatory;"also, "the commission was made the final court of appeal."[484] In 1901, the Accident Reports Act was passed, which was designed to throw light on the causes of accidents. When it was suggested that excessive work hours were a cause of the accidents the Hours of Service Act of 1907 was passed and the execution of the act was assigned to the ICC. Based on investigation the Commission also recommended block

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[483] Bernhardt, *The Interstate Commerce Commission,* 7-11, 17, 41-42. Hoogenboom, *A History of the ICC,* 59.

[484] Bernhardt, *The Interstate Commerce Commission,* 30-34.

signaling and automatic control of trains (which were not put in place despite the Commission's report). An act in 1908 required the Commission be aware of appliances and systems to promote railroad safety.[485] All of these actions and laws were the result of suggestions, interactions and cooperative actions between the Congress and ICC.

At the end of the century Senator Cullom and Senator William Chandler (a Republican, from New Hampshire) supported by the Industrial Commission and ICC introduced several bills to strengthen the rate setting power of the ICC and expedite judicial review; however, no action was taken.[486] Until 1906 the Congress was busy with currency legislation, the Spanish American War, pure food and trust problems and did not act on bills requested by the ICC. At the same time railroad issues were changing, rates were climbing, the lines were consolidating and being absorbed into large industrial combinations.[487]

One of the first issues to be dealt with in the new century was the long delay in getting ICC cases in front of federal courts. This was addressed in the Expediting Act of 1903. Through this act the Attorney General could file a certificate stating that an ICC case had general public importance and it would be given priority in the federal system up to the Supreme Court.[488] Also in 1903, in response and with the support of the carriers, the Elkins amendment was passed by Congress to end rebates and individual

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[485] Bernhardt, *The Interstate Commerce Commission,* 34-36. Calvert, "Manual Block in the United States."

[486] Cushman *The Independent Regulatory Commissions,* 68-69.

[487] Bernhardt *The Interstate Commerce Commission,* 20.

[488] Bernhardt, *The Interstate Commerce Commission,* 20.

discrimination (free passes). The Act required adherence to published rates. It made the railroad corporations, shippers and their agents liable to financial penalties for deviating from published rates, but eliminated imprisonment as a punishment. What the Elkins Act did not do was to assure that the rates published and charged by the railroads were reasonable.[489] Under this amendment the ICC still had to petition a circuit court of the United States when it had reasonable belief that a carrier was not conforming to published tariffs. It was made the duty of the district attorneys or the Attorney General "to institute and prosecute such proceedings."[490] This amendment did little to change the state of the ICC. As already noted the amendment led the lines to invent innovative ways of avoiding the law.[491]

Under pressure from President Roosevelt, who had made railroad regulation a priority, in 1906 Congress overwhelmingly passed the Hepburn bill, which expanded the scope and authority of the ICC for the first time.[492] This act was passed despite railroad opposition with strong popular and political support. The Hepburn bill amended the ICA of 1887. Most importantly, the Commission was given the power to determine and enforce maximum rates and charges for services. It also increased Commission membership from five to seven, extended the term of office to seven years, made the ICA

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[489] Stone, *The Interstate Commerce Commission,* 11.

[490] "An Act to Further Regulate Commerce with Foreign Nations and among the States," Fifty-seventh Congress. Sess. II. Ch. 708 (1903), 847-849. Accessed from legisworks.org/sal/32/stats/STATUTE-32-Pg847.pdf.

[491] Bernhardt, *The Interstate Commerce Commission,* 20-21. Stover, *American Railroads*, 127-128.

[492] Bernhardt, *The Interstate Commerce Commission,* 21. Cushman, *The Independent Regulatory Commissions*, 69.

applicable to express companies, sleeping-car companies, and oil pipe lines. Part rail and part water transportation was covered and the terms "railroad" and "transportation" were defined and broadened. Free passes, with exceptions that interestingly included attorneys at law, were eliminated. Both the corporations and individual carriers and shippers could be prosecuted for violations. The bill made it harder for the carriers to ignore the ICC and for courts to set aside the ICC's orders. When a shipper appealed a sanction, the burden of proof was on the carrier. Also the law required access to all books of the companies and made it illegal for the companies to keep records not approved by the Commission. The new law permitted the Commission to change freight classifications and set up required standard accounting systems. The "commodity clause" that was a part of the new law prohibited a company from carrying any good that it manufactured, except for lumber or products necessary for its own use. This bill clearly expresses the will and goals of the Congress that the Commission was to monitor and enforce; it also strengthened the judicial role of the Commission. From the passage of the Act the rulings of the Commission were effective from the date of the decrees unless reversed by a court decision; the rulings of the Commission were to be enforced. Finally, the Act extends to the commissions the authority to set and enforce standards of its own without going back to Congress (particularly in the reports and statistics that it could require from the common carriers). The Act did not give the commission the power to initiate actions on its own.[493] The Act was passed with the Allison Amendment, which left the extent of judicial review undetermined and provided for quick appeal to the Supreme Court (which

[493] "An Act to Amend an Act," 584-595. Bernhardt, *The Interstate Commerce Commission*, 21-23. Cushman, *The Independent Regulatory Commissions,*70, 83. "Hepburn Act," from *Laws.com.* Accessed from http://commercial.laws/hepburn-act.

ultimately adopted a narrow review policy). It was with the passage of the Hepburn Act that the ICC became "an independent regulatory commission with quasi-legislative, executive and judicial powers" and one of the most important agencies in the United States government.[494]

This issue of the segregation of powers was extensively discussed at the time the Hepburn Act was debated. Railroad interests and their supporters strongly opposed the Act based on the fact that it would be "a detective agency, a prosecuting attorney, and a lord high executioner."[495] Remedies were put forth, particularly an independent commerce court, but this was not enacted at the time the Hepburn Act was passed.

Several of the judicial decisions highlighted defects of the law. The Supreme Court quickly recognized fully "the constitutionality of the free and full exercise of legislative power delegated by Congress beyond the power of the court to review."[496] Its most important defect was the lack of ability to suspend increases prior to their taking effect. Action in these cases was left to the Attorney General. One immediate consequence of the Act was a significant increase in the number of cases promulgated by the increase in governmental control.[497]

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[494] Hoogenboom, *A History of the ICC,* 52, 53. Stone, *The Interstate Commerce Commission,* 12.

[495] Cushman, *The Independent Regulatory Commission,* 70-83.

[496] Cited from Bernhardt, *The Interstate Commerce Commission,* 24.

[497] Bernhardt, *The Interstate Commerce Commission,* 24-25.

After the passage of the Hepburn Act, formal complaints to the ICC increased from 65 in 1905 to 1,097 in 1909 and from 503 informal complaints in 1905 to about 4,500 informal complaints in 1909.[498]

The next major legislation that impacted the ICC and railways was the Mann-Elkins law of 1910. Through this act jurisdiction of the ICC was extended to include telegraph services and telephone and cable companies. It gave the Commission power to suspend rate changes for up to ten months pending investigation, made the carriers responsible for proving the reasonableness of rate increases and also original rates, and eliminated the words "under substantially similar circumstances and conditions" from Section 4 of the original ICA. The Act gave the ICC the ability to change freight classifications. Hearings were required to lower rates, and lower compensation for through traffic was prohibited. Lowering rates in response to competition from water transport was to require a hearing. The long-short haul clause was modified to restore the control to the ICC. Importantly the Commission was granted the right to institute its own inquiries without a formal complaint. The Mann-Elkins Act also provided for a Commerce Court. Not included in the final law were provisions for legalization of traffic agreements or the supervision of railroad capitalization.[499]

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[498] Hoogenboom, *A History of the ICC,* 55.

[499] Bernhardt, *The Interstate* Commerce *Commission,* 26. Cushman, *The Independent Regulatory Commissions,* 86-87. Dempsey "The Rise and Fall of the Interstate Commerce Commission," 1164-1165. Hoogenboom, *A History of the ICC,* 61, 66-68. Mann-Elkins Act, from *Laws.com.* Accessed from http://commercial.laws.com/commerce/mann-elkins-act. Stone, *The Interstate Commerce Commission,* 14-15.

The function of this Commerce Court, established at the recommendation of President Taft, was to alleviate congestion in the court system and to provide for an impartial final review of ICC decisions. In this regard the formation of the Commerce Court was a remedy for the merger of powers in the ICC. Commission orders were to be defended in front of the Commerce Court by the Attorney General and it left open the possibility that the Commission could also be represented by its own lawyers. Progressives opposed the court fearing that it would limit the ICC.[500] The role of the Attorney General was hotly debated as it was felt that requiring the Attorney General to advocate for the ICC jeopardized its independence and placed it under the political control of the executive branch.[501] This court, which consisted of five judges, was to deal with cases based on the orders of the ICC that did not involve forfeiture, penalty, or criminal punishment, suits brought under the Elkins Act and suits that compelled the keeping of records and reports, or suits that compelled movement of traffic or furnishing of facilities. In 1913, Martin Knapp, former ICC Chairman and then Commerce Court judge expressed his opinion that [t]he shipper is not always the underdog. Too often it happens that he is dishonest and that the carrier is wronged."[502] However, as noted by Felix Frankfurter, the Court could not afford its "indifference to popular sentiment."[503] The Commerce Court reversed the ICC in 20 of 27 cases, while the United States Supreme Court reversed the Commerce Court in four of the first decisions appealed to it

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[500] Cushman, *The Independent Regulatory Commissions*, 84-86, 88-99.

[501] Cushman, *The Independent Regulatory Commission,* 99-102.

[502] Hoogenboom, *A History of the ICC,* 67.

[503] Hoogenboom, *A History of the ICC,* 67-68.

in 1913 (and later ten of twelve). Whether or not the Court was successful and beneficial was debated. [504] It is generally felt that the Commerce Court had favored the carriers too strongly. The Progressive Party platform stated "in order that the power of the Interstate Commerce Commission to protect the people may not be impaired or destroyed, we demand the abolition of the Commerce court."[505] As a consequence, despite a favorable report from the Senate Committee on Interstate Commerce and strong support from President Taft, the Court's funding was not renewed by Congress and its jurisdiction was transferred to the federal courts, which were now seen as more liberal in its interpretation of the Commission's powers.[506]

After the Elkins Act, the federal courts respected the Commission's findings on facts. With the elimination of the "similar circumstances and conditions" phrase, the Supreme Court granted the ICC the right to consider competition in rate setting. Additionally the court "did not hold valid the objection…the law delegated legislative power to the commission."[507]

By the Panama Canal act of 1912, the ICC was granted additional power to regulate competition. Under this act, the railroads could not control or operate steamship companies going through the Panama Canal or water traffic elsewhere that would

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[504] Cushman, *The Independent Regulatory Commissions,* 103-104.

[505] Cited in Cushman, *The Independent Regulatory Commissions,* 104.

[506] Bernhardt, *The Interstate Commerce Commission,* 28, 42. Cushman, *The Independent Regulatory Commissions,* 104-105. Stone, *The Interstate Commerce Commission,* 15.

[507] Bernhardt, *The Interstate Commerce Commission,* 27-29. Stover, *American Railroads,* 130.

compete with railroads for traffic. It could be ruled acceptable only if such competition was in the interest of the public.[508]

A long-standing problem for the determination of rates and a fair rate of return to investors was the lack of a precise valuation of the railroads. A congressional act of 1913 (based on La Folette's view that rates should be based on the actual value of the railroads) directed the ICC to value the property of all common carriers. The role of the ICC in this valuation was not only to ascertain value but to report on the principles and theories of railroad evaluation. As pointed out by Pierce Butler in 1915 (while working as a railroad attorney, and prior to his serving on the Supreme Court), the purpose of the valuation was not limited to rate setting but included taxation, valuation of securities, and use as a guide to future legislation. As a result the ICC spent $45 million and the railroads $138 million collecting statistics in a decades-long process determining those values; the complexity and issues of the evaluation are discussed by Butler.[509] The assessment, when finally completed by the ICC's Bureau of Valuation after twenty years, supported the railroad's positions—it showed the railroads were not overcapitalized, that dividends on watered stock did not mask excess profits, and that the carriers were not getting fabulous returns on their investments.[510]

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[508] Bernhardt, *The Interstate Commerce Commission,* 30. Stone, *The Interstate Commerce Commission,* 16.

[509] Bernhardt, *The Interstate Commerce Commission,* 30. Butler, "Valuation of Railway Property," 17-33. Shrag, "Transportation and the Uniting of the Nation," 32-33.

[510] Hoogenboom, *A History of the ICC,* 68. Stone, *The Interstate Commerce Commission,* 16.

The Commission was given jurisdiction to administer those provisions of the Clayton Act in 1914 that applied to the carriers.[511] In part the Clayton Act was passed in response to the Supreme Court's unanimous decisions: *In Re Debs* 158 U. S. 564 (1895) and the *Danbury Hatters' Case* (*Lowe v. Lawlor* 208 U. S. 274 (1908)), cases in which the Court found that the Sherman Act applied to labor and therefore making boycotts across state lines illegal under U. S. law. (In fact the Clayton Act was plagued by ambiguity and the unions won exemption from antitrust litigation only in the late1930s.)[512]

Prior to the onset of World War I the Commission suggested legislation to: increase its membership and form subdivisions to deal with specific issues, authority to resolve conflicts between state and interstate rates, and authority to control the maintenance and operation of the physical properties of the carriers. It also sought to declare all current rates reasonable and require justification only for rate increases (based on the principle of English law), in order that energies best be utilized. Additionally, legislation was recommended to permit joint ownership of rail and water lines (even if that reduced competition) as long as it served the public interest. These recommendations were made at a time when rail systems were having difficulty keeping up with the demands on the lines that were made by the war, which had started in Europe. They were having problems accessing required capital for maintenance and new equipment and were

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[511] Bernhardt, *The Interstate Commerce Commission,* 30.

[512] "Danbury Hatter's Case," from *Dictionary of American History,* (2003). Accessed from http://www.encyclopedia.com/topic/Danbury_Hatters_Case.aspx. William E. Forbath, "Clayton Act, Labor Provisions," from *Dictionary of American History* (2003). Accessed from http://encyclpedia.com/doc/1G2-3401800857.html.

faced with a reduction in net incomes despite increased gross revenues. The result was that, in July 1916, a joint subcommittee consisting of members of the Senate Committee on Interstate Commerce and the House Committee on Interstate and Foreign Commerce was authorized to investigate. The committee began hearings in November of 1916 and had not finished its report at the time the government assumed control of the railroads in December 1917. An act of August 1916 gave the President the power to take possession and assume control of any transportation system in a time of emergency. [513]

Additional legislation in 1916 impacted the railroads. Growth in rail workers unions led to increases in wages and costs to the carriers. When the unions pushed for the eight-hour day the carriers refused a compromise put forward by President Wilson to grant the union demands in order to get rate increases. As a result, Congress passed the Adamson Act of 1916 to legislate the eight-hour day for railroad workers. [514]

The Car-Service Act of May 1917 gave the Commission the right to control the movements and use of cars and to form a "Commission on Car Service." In August of 1917 in response to the Commission's requests (see above) some of the ICC's concerns were addressed. The Commission was enlarged to nine members and it was permitted to divide into subdivisions each with the power to act subject to review by the entire Commission. At this time the ICC developed bureaus in which decision making was shifted from commissioners to examiners (a process that had started in 1906). This ultimately led weaker commissioners to simply ratify the views of examiners. The same Act legalized existing rates until January 1, 1920 and required approval for any future

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[513] Bernhardt, *The Interstate Commerce Commission,* 47-50.

[514] Stone, *The Interstate Commerce Commission,* 17.

increases.[515] Another act was passed in August of 1917. This act gave the President the right, in time of war, to direct those shipments that he deemed necessary. It also directed the Commission to carry out the orders of the President and prioritize the shipments (something that proved to be a failure).[516] As the transportation situation worsened, the ICC recommended the carriers to be operated under a unified management. On December 28, 1917, the federal government took over the railroads for the duration of the war under Director General William McAdoo (who had been Wilson's campaign manager and Secretary of the Treasury and was Wilson's son-in-law).

After the Standard Time Zone Act of 1918, the ICC was given the power to define the time zone boundaries.[517]

In a provision of March 1918, the ICC was directed to determine the operating costs of the carriers for the three years ending on June 30, 1917, in order to set compensation for the railways. During the war the Commission worked to advise the government on rates, to respond to railroad requests to modify rates, to advise the President and Director General McAdoo on reasonable rates and in a general advisory capacity.[518]

This review of the relationship between the Interstate Commerce Commission and the U. S. legislature, from 1887 until 1918, traces the growth of the Commission's

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[515] Bernhardt, *The Interstate Commerce Commission,* 49-50. Hoogenboom, *A History of the ICC,* 81-82.

[516] Bernhardt, *The Interstate Commerce Commission*, 51. Stover, *American Railroads,* 172.

[517] Holbrook, *The Story of American Railroads,* 359.

[518] Bernhardt, *The Interstate Commerce Commission,* 52-54.

authority and the evolution of its structure under the control of the Congress. Presidents varied in their relationship to the ICC. They were able to, if inclined, to exert their will through the Congress and their ability to appoint its commissioners. President McKinley had little interest in the ICC; Roosevelt used the Congress to promote his progressive agenda, particularly in the Hepburn Act. The Commerce Court came into its brief existence under pressure from President Taft. Because of these developments, and despite the opposition of the railroads and the obstruction of the United States Supreme Court, the commission was able to control the largest industry in the country based on political support.[519] This review shows that during this period the ICC, while an independent agency, was very much under the control of the Presidents (when they chose to exert their authority) and Congress, and not the railroads. The ICC used its newly minted authority to control the lines. Railroad regulation happened despite the opposition of the carriers.

## The Development of the Interstate Commerce Commission; Discussion

When the ICA was passed in 1887 it was "clearly recognized that the important problem of federal railroad regulation would have to be solved by trial and error." [520]This review confirms Bernhardt's opinion that in the end the legislative changes led to more

[519] Samuel Huntington, "The Marasmus of the ICC: The Commission, the Railroad, and Public Interest," *Yale Law Review* 16, no. 4 (1952): 470. Accessed from URL:http://www.jstor.org/stable/793586.

[520] Cushman, *The Independent Regulatory Commissions,* 64.

stringent regulation than contemplated by the original Act, or by Thomas Cooley.[521] As described in the origination section of this thesis, the ICA and ICC came into existence due to historical and political pressures, technological advances, and economic developments that demanded change and reform in the relationship between the government and emerging industrial components of society. The demand was for reform; the problem was how to change this demand into "regulatory policy and administrative operation."[522] Despite the advantages of independent commissions cited in the conclusions of the origination section of this thesis, critics found that there were many issues or problems with commissions.[523] These issues, raised in the initial debate over the incorporation of the commission form in the ICA, as well as issues that arose later, will be discussed. It was the combination of the intrinsic assets of the Commission and the attempts to correct its flaws that shaped the ICC and its subsequent history.

One of the most serious problems was the provision in the act that disqualified from commission membership those having immediate railroad connections. Per Mr. Gosvenor of Ohio: "Men who know anything about this business upon which the commission is to embark are to be disbarred from appointment."[524]

Inability to avoid political entanglement is another of these flaws. A major goal of the progressive movement that dominated the early part of the 20th century was to distant

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[521] Bernhardt, *The Interstate Commerce Commission,* 5.

[522] Bernstein, *Regulating Business,* 35.

[523] Cushman, *The Independent Regulatory Commissions,* 50-54.

[524] Cited in Cushman, *The Independent Regulatory Commissions,* 63-64.

governmental control from politics; a major belief was that this could be accomplished through regulatory agencies or commissions. The independent commission was to be the solution, an entity that was above politics, its purity guaranteed by nonpartisan experts. One of the chief supporters of this view of commissions was Louis Brandeis.[525] Critics suggested that this was naïve. They felt that the political facts of life were largely ignored by the advocates of the commissions and that the regulatory agencies would be dominated by "well-organized private [or public] groups seeking to identify their interests with the general welfare."[526] While regulatory capture (see below) of the commission by economic interests has been the subject of much interest, political capture of the commissions and its potential for corruption seems to have attracted less attention. The progressive view ignores the basic fact that while politicians may be true believers, even progressive politicians have to be elected in order to exert power. As a consequence, politicians do what they feel is necessary to appease their constituents, which is what many politicians felt they were elected to do. Additionally, as noted by Huntington, "to remain viable over a period of time, an agency must adjust its sources of support so as to correspond with changes in the strength of their political pressures."[527] There is little that is pure, and no lack of self–interest either on the part of the politicians or the bureaucrats. Roosevelt and his progressive allies, as noted, were highly responsive to their constituent base. The demise of the Commerce Court is one example. Stone states, "the Commerce Court is not much more than a footnote to history," demonstrating the growing power of

[525] Bernstein, *Regulating Business,* 36, 39.

[526] Bernstein, *Regulating Business,* 5, 7, 36-37.

[527] Huntington, "The Marasmus of the ICC," 470.

the ICC.[528] His dismissal misses the important role of political, and especially progressive pressure, exerted to control the ICC and railroads. Congress stopped its funding simply because it felt the Court favored the carriers. In another example the ICC accepted value-of service pricing. Under value-of-service pricing the lines charged more for carrying expensive finished goods than for raw materials. Shipping rates for bulk goods such as farm produce, soap, flour, salt, and fertilizer were lower than the rates for manufactured goods. As a result, certain industries and locales were promoted at the expense of others. The consequence was that value-of-service pricing increased the cost of the finished goods that all consumers purchased, shifting a cost away from producers of raw materials onto others. Neither the ICC nor the progressives addressed this issue, or its discrimination. The progressives accepted cost-of-value pricing despite its consequences and discrimination because of its benefits for their constituents and their own political agenda.[529] Progressive politicians were not, and many would argue should not have been, interested in righting the wrongs that did not help their constituents, or wrongs that were not recognized or promoted by their agenda; they are not interested in the common welfare. In fact the progressives were most interested in obtaining discriminatory freight rates on farm products and necessities for their special interest groups. The politicians and members of the Commission under their influence were more responsive to these vocal constituent groups than to the very real needs of the carriers and country.[530]

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[528] Stone, *The Interstate Commerce Commission,* 15.

[529] Stone, *The Interstate Commerce Commission,* 13.

[530] Bernhardt, *The Interstate Commerce Commission,* 43. Hogenboom, *A History of the ICC,* 56.

An issue related to political control of an agency is control of a regulatory body by the industry that it was supposed to control or regulate—regulatory capture. This was a major concern voiced by Reagan and others concerning commissions. Reagan was worried that based on their wealth and power the carriers had the "capacity to appoint such men as would serve their purposes."[531] Herbert Croly, a progressive political thinker, expressed his concern that the railroads were "big enough to control the public officials whose duty it was to supervise them."[532] Likewise, Charles Francis Adams, Jr. recognized the power of the carriers to control commissions and legislatures; nevertheless he favored the regulatory commission.[533] While regulatory capture may have occurred in the past and may have been true in other fields, the evidence revealed for regulatory takeover of the ICC by the railroads is at best weak for the time period 1887-1918. The subsequent relationship between the ICC and railroads, in my opinion, is less dominance of the ICC by the railroads than a symbiotic relationship between the two that developed when the ICC and carriers were both economically and politically weakened.[534] This is a stage of development not considered by Bernstein. Theodore Roosevelt's desire and success in establishing a mechanism for control over the railroads, as seen in his support for the Hepburn Act, indicates that the government rather than the railroads was the dominate power in the formation and directing the ICC. This review shows that by the start of the First World War despite all of the efforts and opposition of the railroads, the

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[531] Cited from Bernstein, *Regulating Business,* 25, 40-41.

[532] Cited in Bernstein, *Regulating Business,* 42.

[533] Novak, *A Revisionist History of Regulatory Capture,* 24. 30-31.

[534] Huntington, *The Maramus of the ICC,* 472-473.

Commission's power and influence over the railways had increased enormously. Even the increases in rates, that were granted to the carriers in the pre-war years starting in 1915, which were justified by the economic realities, were too little too late.

Another problem that was of concern was that the job of railroad regulation would prove to be too large and beyond the capacity of the Commission, leading to delay of effective regulation.[535] Justice Oliver Wendell Holmes (1910) wrote that the "Commission naturally is always trying to extend its power."[536] As the reach of the ICC grew, its staff grew. There were five commissioners in 1887 and nine commissioners in 1917. In 1887 the Commission had eight clerks and two messengers; in1890 the staff of the ICC was 104; in 1905 the staff was 178; in 1907 the staff was 330, and in 1909 it had grown to 527. By 1930 the commission had 2,252 employees in 13 subdivisions deciding 20,553 matters with 4,351 registered lawyers. In the 1940s it had eleven commissioners, 2,700 employees and was the largest employer of administrative judges in the government.[537]

With the Act of 1917, the ICC was divided into divisions and bureaus. During this time, decision making and the preparation of reports was shifted from the commissioners to examiners (a process that had started as early as 1906). Some of the commissioners still decided issues, but later commissioners tended to rubberstamp their staffs; a bureaucracy was coming into being.[538]

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[535] Bernstein, *Regulating Business,* 25.

[536] Bernstein, *Regulating Business,* 40.

[537] Beck, *Our Wonderland of Bureaucracy,* 158. Dempsey, "The Rise and Fall of the Interstate Commerce Commission," 1174. Hoogenboom, *A History of the ICC,* 53.

[538] Hoogenboom, *A History of the ICC,* 82.

This history also demonstrates that very early on, in part due to the provision that prevented anyone with any railroad connection from appointment to the Commission, the ICC was taken over by lawyers (whose connections with shippers, railroads, or state commission did not seem to bar them). Even before the passage of the ICA, commenting on the existing state commissions, Charles Francis Adams (himself an attorney) noted for the appointment of state commissioners "any antecedent familiarity with the railroad system [was regarded] as a total disqualification."[539] He continued, the commissioners

> ever reflected the angry complexion of the movement out of which they had originated. They were where they were, not to study a difficult problem and to guide their steps by the light of investigation...On the contrary they were there to prosecute. The test of their performance of duty was to be sought in the degree of hostility they manifested to the railroad corporations.[540]

From the very beginning the legalistic tone of the Commission was set by Thomas Cooley, a renowned judge, and the four other initial commissioners who were also lawyers as were many of their successors.[541] As a result, legal issues and proceedings quickly came to dominate the Commission's agenda. In 1906, Herbert Croly discussed prominence of lawyers in American politics noting "that a government by law is not only government by lawyers, but is a government in the interest of litigation." [542] Consequently, the members of the Commission lacked business experience and were more interested in what lawyers do, eliminating abuses and eradicating conflicts through

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[539] Cited from Cushman, *The Independent Regulatory Commissions,* 29.

[540] Cited from Cushman, *The Independent Regulatory Commissions,* 29.

[541] Bernstein, *Regulating Business,* 34. Hoogenboom, *A History of the ICC,* 20.

[542] Cited in Bernstein, *Regulating Business,* 15

the medium of litigation.[543] Croly felt that commissions should be promoters of social welfare; they should assert public interests and take "a more positive approach toward the formulation of regulatory policy."[544] (Admittedly, this historical review shows that the Congress and ICC did lead innovation in some fields, especially in work rules and in industrial safety, but also that many of the innovations that promoted safety and increased efficiency came from the carriers themselves.) Ultimately the ICC remained true to the Cooley tradition in regard to the methods of procedure, and continued to judge on a case-by-case basis; it did not use its authority to develop broad principles of regulation.[545] Another flaw of the ICC to be considered is the piecemeal and haphazard development of both the regulation of business and the structure of the Commission. Consequently, in the absence of a firm directive, the ICC was especially vulnerable to the political, legal, and bureaucratic influences that shaped it.[546] As the ever insightful Croley put it, "the commission would divide responsibility for business decisions between public and private officials and would be driven to harmful interference with business efficiency" (efficiency was always a progressive goal).[547] Likewise, Bernhardt felt that a defect of the regulatory system, as it came into being, was that it led to a diffusion of responsibility for management of "the carriers between law makers, administrative commission and

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[543] Bernstein, *Regulating Business,* 29, 38

[544] Bernstein, *Regulating Business,* 42-43.

[545] Hoogenboom, *A History of the ICC,* 55-56.

[546] Cushman, *The Independent Regulatory Commissions,* 27-34.

[547] Bernstein, *Regulating Business,* 42.

railroad executives."[548] This lack of defined authority also permitted the states to pass regulations that interfered with interstate commerce by increasing expenses of interstate commerce (another topic for further investigation).[549]

Finally it should be noted that neither the original ICA nor any of the acts that followed it gave the ICC authority over roads, water (when not related to railways), or air transportation. This was to have a significant impact in the 20th century in shaping the relationship between the carriers and the ICC.

Despite all of the problems that seem inherent to the Commission, during the period between 1887 and 1918 the ICC had changed from a "toothless tiger" to an agency of considerable power and influence.

It is time to address the third and fourth questions that have been raised about the structure, the determinant pressures that defined the commission's goals and the reason for the choice of the commission model. The answers to these questions are to be found in the current review of the Commission's history: its relationships to the railroads and government, the inherent problems in the form of the commissions and its initial failures. The Commission's survival was accomplished by the redefinition of the mission, authority, the structure and procedures of the Commission.

The authority of commissioners, and consequently the structure of the ICC was a concern of the congressional leaders who debated the ICA. The lack of structural definition and the limited power initially granted under the ICA, which led to much vagueness about the ICA's goals and uncertainty about the "independence" of the

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[548] Bernhardt, *The Interstate Commerce Commission,* 43.

[549] Bernhardt, *The Interstate Commerce Commission,* 46-47.

Commission was contributory.[550] For instance, initially when the constitutional question of the delegation of judicial powers to the Commission first arose it was answered by noting the Commission did not have final authority and it decisions would be subjected to court review.[551] Another constitutional question arose later when the Hepburn Act was debated; this was whether or not the commission could set rates. While the Court had indicated that it could, opponents of the Hepburn Act felt that in that Act Congress had delegated the right to set rates, a legislative power, to the Commission, but under the Constitution legislative power could not be delegated. Proponents countered by stating that the Congress had set the rates by requiring that they should not be unjust or unreasonable and the Commission was only acting as an agent of its will.[552] Ultimately, as the structure of the Commission evolved under the direction of the Congress and it freed itself of external judicial oversight it became a quasi- administrative, quasi-judicial, and quasi-legislative body within the executive branch of government. In this sense it is a repudiation of the American ethic of the doctrine of the separation of powers, which is the basis of the tripartite government. [553]

Procedurally the Commission followed two paths. The first was set by the states'

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[550] Cushman, *The Independent Regulatory Commission,* 61-62.

[551] Cushman, *The Independent Regulatory Commission,* 54-61.

[552] Cushman, *The Independent Regulatory Commission,* 70-74.

[553]Arpaia, "The Independent Agency," 483-488. Amar, *America's Unwritten Constitution,* 382. Cushman, *The Independent Regulatory Commissions,* 27. Hoogenboom, A *History of the ICC,* 52-53. Stone, *The Interstate Commerce Commission,* 15.

commissions and Cooley. It became an organ for resolution of disputes and to enforce edicts. The Commission continued to be dominated by lawyers and legal procedure. The second procedural path was the increase in bureaucracy, as the areas of responsibility broadened and workloads increased, the work of the Commission was shifted to underlings working within the confines of the ICC.

The Commission had the power that was granted to it by the government and politicians. The Commission was independent as long as it carried out the dictates of Congress and the President expressed through Congress, or the Congress responded to its requests for expansion of power, personnel, and jurisdiction. The Commission had broken free of external judicial review except in cases of Constitutional issues. Its relationship with the court changed from the one expressed by Justice Harlan in 1897: "it has been shorn by judicial interpretation of authority to do anything of an effective character," to Holmes' 1910: "I have written some decisions limiting it (by constructions of statutes only)."[554] It was not directly answerable to the needs of the public, transportation at large, or the needs of the carriers. In short, this review shows that in the long run the ICC came under control of the electorate via the Congress (most clearly seen in the history of the Commerce Court) and the ballot box, despite the judiciary the powerful money interests of the railroads and the real needs of the country—a lesson that seems to have been overlooked.

This review indicates that, in the early period of the Commission's existence, the original intent and need was to establish some level of control over the railways. As time

[554] Cited in Bernstein, *Regulating Business,* 28, 40.

progressed the ICC came to be an arm of governmental control in order to actuate political agendas in a rapidly changing country. Ultimately, the ICC permitted both the Congress and the President to centralize power, unite the country and strengthen Washington. Industrial improvement was low on their list. The ICC strengthened the influence of the central government; Congress' need of specialized resources caused it to help the commissions to grow. It has also been noted that the commission model located the commissions between the public and Congress—the commissions could buffer the Congress from public demands and dissatisfaction. The fact that the commission model was successful in accomplishing these goals of government is another reason why it was perpetuated. When Woodrow Wilson (as Theodore Roosevelt had done) was looking to promote his agenda, on the counsel of Brandeis he opted for commissions. Commissions had the power and the merit of regulating industry and avoiding the need for direct legislative intervention.[555] This review gives little to support the widely held idea of the enormous power that the railroads exerted over the government (although they did try their best). During the period from 1887 until 1918 the carriers dominated neither the Commission nor the government. In fact this research indicates that both came to dominate the railroads.

At the conclusion of *The Octopus,* Norris's hero comes to see the railroads as a force that cannot be stopped or controlled.[556] The history of the ICC from 1887 to 1918, shows him to be wrong. The changes and growth of the railroads, and by implication the

[555] Brand, *American Colossus,* 619.

[556] Norris, *The Octopus,* 275.

industrialization of the United States and the changes in the social structure of America, which had increased in size and complexity, were in fact unstoppable, but not uncontrollable. The mechanism of that political and governmental control would be agencies or commissions, which developed on the model of the ICC in order to control not only industry but the social aspects of life. In 1906 the Pure Food and Drug Act was passed, in 1913 the Federal Reserve Act was passed and the Sixteenth Amendment to the Constitution was ratified leading to the Bureau of Internal Revenue, in 1914 the Federal Trade Act was passed, and in 1916, The Shipping Board Act.

# V

## Conclusions and Issues for Further Research

To reiterate, the origination section of this thesis demonstrates that that the ICA and ICC did not originate in the 1870s and 1888s as much as the 1780s. It was the combined result of the need to address the complexity of merging industries, strengthening of the power of the central government over both industry and state governments, and a populist response to a perceived or real need to regulate the railroads. The development section of the thesis clearly demonstrates that despite fears of the times and the beliefs of later historians, regulatory capture of agencies was not intrinsic to the early evolution of the ICC—the agencies, when supported by government and politicians, clearly dominated the railroads to achieve their aims, even to the point of near destruction of the lines. The development of the commission was in response to inherent problems in that form and its needs to respond to the needs of government and provide government the services it needed.

1) Two main streams of historical research were consulted and converged in the current thesis. One was the history of the development of railroad transportation in the United States. Noteworthy is that the mention of the ICC in these histories is very sparse and limited. The other was the history of the ICC; these histories all considered the role of the railroads in the origin and

development of the ICC extensively. While this thesis attempts to merge these approaches there is room for further reconciliation.

2) Early on, railroads were chartered and through their charter came to be regulated by the states. Even after the ICA and ICC and during the developmental phase of the ICC state charters and commissions continued to play an important role in rail transport.[557] The states continued to have railroad commissions, some of which were very important locally and nationally (Texas). This may be seen as a consequence of Madison's view that provided for dual protection for individual rights.[558] State commissions have been mentioned at several points in the thesis and further research on the interrelationship and interactions between state and federal railroad regulation is needed. Related is the role the ICC played in asserting federal authority over the states after the period of reconstruction and during redemption.

3) In the "First Annual Report of the Interstate Commerce Commission" the history of modes of transportation in the United States was reviewed; there were three in 1887: navigable waters and oceans, land commerce via roads and highways, and railroads. The ICA did not provide for the ICC to regulate roads even when they crossed state lines. The reason was lack of traffic due to

[557] "The First Annual Report of the Interstate Commerce Commission," 2-4, 9-10.

[558] Campbell, *The Growth of American Government*, 13

the poor condition of the roads along with the expense and delay associated with highway transportation. The invention and dissemination of the bicycle in the 1880s changed the condition of the roadways. Before the automobile, bicyclists formed the League of American Wheelmen to push for better roads. Better roads were a plank in the 1885 Populist Party platform. As a result of the road lobby, New Jersey passed the State Aid Act in 1891 and at the national level the Office of Road Inquiry was created in 1893. In was not until 1896 that the Duryea Motor Wagon Company of Springfield, Massachusetts, built the first production automobile in the United States.[559] From the beginning of the 20th century, cars and trucks challenged and then dominated land transportation, quickly followed by airplanes especially for passenger and fast freight transport. These changes and the way in which they impacted the ICC, the carriers and their interrelationship is a topic that needs further research.

4) Growth of the federal government is often seen as a result of welfare and entitlement policies—expansion of government in social spheres. This thesis provides evidence that shows provisions for the growth of federal authority were part of an agenda formalized in the Constitution.[560] The rapid growth in size and power of the ICC over the period studied is indicative of the growth

[559] Owen D. Gutfreund, *20th Century Sprawl: Highways and the Reshaping of the American Landscape* (New York: Oxford University Press, 2004), 9-12.

[560] Randall G. Holcombe, "Federal Government Growth before the New Deal," from *The Freeman,* September, 1997. Accessed from

of government authority long before the New Deal and is part of a continuum of that growth that started in the late 19th century with the ICC. In this regard it is interesting that the size of the federal government, as measured by per cent of Gross National Product spent on government (admittedly not the only way to measure government size) grew only from 7.3 per cent to 7.5 per cent between 1870 and 1913.[561] It may be that the growth in size, scope, and power of government agencies preceded the growth of cost in government, or that GNP may in fact not be a good measure. Study of the ICC, and the rise of other independent agencies, could be used to examine government growth secondary to increased technological and industrial complexity, prior to the era of increase in social programs.

5) The major premises that led to the ICA and ICC was that railway rates were unequal, discriminatory, and unreasonable. These realities are accepted, uncritically, by virtually every author cited in this work. The sole exception is James W. Ely, Jr. In the current review a few cases of unequal rates were cited in passing without discussion of what may have led to the inequalities, but in general substantiation is lacking. Ely presents, in my opinion, a balanced view

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http://independent.org/publications/article.asp?id=360. Novik, *A Revisionist History of Regulatory Capture,* 13.

[561] Robert Higgs, "Government Growth," in *The Concise Encyclopedia of Economics.* Accessed from www://www.econlib.org/library/Enc/GovernmentGrowth.html.

> Historians would do well to look with a critical eye at allegations of rate abuses by the railroads. Although the Progressives tended to accept these complaints at face value, one should bear in mind that merchants and farmers had their own economic agenda, and were quick to invoke the "public interest" as a cloak. Still rail critics voiced legitimate concerns. Many of the charges flung at the railroads were overstated but not entirely untrue.[562]

(My only issue with Ely is that he does not note the self-interests of the politicians.) The First Report of the Interstate Commerce Commission does discuss the many issues that may have led to discriminatory rates and the difficulties in determining reasonable rates. It also notes that the lines that did not engage in discriminatory acts suffered in reputation because of those that did, but at no point is there any indication of the number of corporations (of a potential of 500 to 1200) that were governed by the ICC that actually discriminated in rates. The true scope and degree of discrimination, along with the factors that led to the discriminations, are in need of further investigation. The farmers are often portrayed as the virtuous passive victims of the railroads; this review does not support this depiction. This review strongly suggests that a more balanced approach to the story of the "evil" railroads and virtuous yeomen farmers is indicated.

6) Finally, while this work has attempted to place the origin of the ICA in the context of the political, economical, judicial, and social movements that led to its origin additional research is still needed. It indicates that it is only through the fullest understanding of how a legislative act comes into existence, the

[562] Ely, *Railroads and American Law,* 83.

motivations and driving forces behind the act, that its appropriate place in history is established.

VI

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