Regulating the Marrying Kind: The Constitutionality of Federal Regulation of Polygamy Under the Mann Act

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I. INTRODUCTION

The LDS Church [Church of Jesus Christ of Latter-day Saints] acquired the trappings of a conventional faith so successfully that it is now widely considered to be the quintessential American religion. Mormon Fundamentalists, however, believe that acceptance into the American mainstream came at way too high a price. They contend that the Mormon
leaders made an unforgivable compromise by capitulating to the U.S. government on polygamy over a century ago.¹

—Jon Krakauer

Polygamy is as irresistibly fascinating to the American public as it is controversial.² It is the subject of numerous books, web pages, and even a hit cable television show.³ The moral issues have been debated in the United States for over 150 years, and these debates will likely continue for years to come. However, with the surging public interest in the moral questions surrounding polygamy,⁴ talk of legal regulation has predictably followed.⁵

In recent years, polygamy has been the key component in several national news stories. For example, when kidnapping victim Elizabeth Smart was found, the Washington Post headline read “Polygamy Cited as Motive in Kidnapping.”⁶ More recently, polygamist and fundamentalist Mormon leader Warren Jeffs was convicted of two counts of being the accomplice to the rape of a teenage girl because he had arranged a polygamous marriage for her.⁷ In the wake of the media frenzy surrounding Jeffs’s arrest, a Mormon father won the legal right to teach his daughter about polygamy despite his ex-wife’s objections.⁸ These

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1. JON KRAKAUER, UNDER THE BANNER OF HEAVEN: A STORY OF VIOLENT FAITH 7 (2003). Krakauer critiques the religious practices of the modern fundamentalist Mormon sects, but he also notes the sharp division between the Church of Jesus Christ of Latter-day Saints and the fundamentalists on the issue of polygamy. Id.; see also D. Michael Quinn, Plural Marriage and Mormon Fundamentalism, 31 DIALOGUE: J. OF MORMON THOUGHT 1, 9-10 (1998) (describing the theological conflict between the mainstream Mormon church and the Fundamentalists as centered largely around the doctrine of plural marriage).

2. The term “polygamy” is popularly used in America in lieu of the term “polygyny,” which refers to a man having more than one wife at the same time. As practiced by the early Church of Jesus Christ of Latter-day Saints, polygyny was called “plural marriage.” See Gregory C. Pingree, Rhetorical Holy War: Polygamy, Homosexuality, and the Paradox of Community and Autonomy, 14 AM. U. J. GENDER SOC. POL’Y & L. 313, 315 n.13 (2006) (explaining the technical meaning of these terms and the popular use of the word “polygamy”). Both “polygamy” and “plural marriage” will be used in this Comment to refer to the practice of “polygyny.”

3. See Big Love (Home Box Office television broadcast 2007) (depicting the fictional life of a polygamous man and his three wives in modern Salt Lake City).

4. See KRAKAUER, supra note 1 (sharply criticizing the Fundamentalist Latter-day Saints’ (FLDS) modern practice of polygamy and discussing the child abuse associated with the practice); Catherine Blake, The Sexual Victimization of Teenage Girls in Utah: Polygamous Marriages Versus Internet Sex Predators, 7 J.L. & FAM. STUD. 289 (2005) (comparing polygamous men who marry underage girls with men who use the Internet to lure underage girls into sexual relationships); Richard Cohen, Editorial, The Talented Mr. Romney, WASH. POST, Feb. 20, 2007, at A13 (“In recent polls, something like one-third of all voters have said they would be less likely to vote for a Mormon candidate . . . .”).

5. See Press Release, U.S. Senator Harry Reid, Reid Calls for Federal Task Force to Investigate Child Abuse and Polygamy (Sept. 12, 2006) (on file with the McGeorge Law Review) (citing a letter from Senator Reid to the U.S. Attorney General asking for “the creation of a federal task force to investigate the interstate activity of the larger polygamist community in the western United States”).


8. See Shepp v. Shepp, 906 A.2d 1165, 1173-74 (Pa. 2006) (holding that the state did not have a
stories have not only propelled the moral debate over polygamy but have also spurred a legal debate.

Following the decision in Lawrence v. Texas,\(^9\) several legal scholars have considered whether the states have the power to regulate polygamy.\(^10\) Both that continued debate and the placement of Fundamentalist Latter-day Saints leader Warren Jeffs on the Federal Bureau of Investigation’s Top Ten Most Wanted List have contributed to a revived popular cultural interest in polygamy.\(^11\) Additionally, these media spectacles have awakened interest in federal regulation of polygamy. In particular, U.S. Senate Majority Leader Harry Reid asked the U.S. Attorney General to bring “federal charges if, for some reason, Jeffs is acquitted in both Utah and Arizona.”\(^12\) This intriguing proposition raises the question of what charges the federal government may bring against Jeffs and other polygamists. One possibility is that the federal government could bring charges against polygamists engaged in interstate travel as it did in 1944 under the Mann Act, a law that originally prohibited the transportation of women across state lines for the purpose of prostitution or another “immoral purpose.”\(^13\) The question remains as to whether Congress has the ability to regulate polygamy under its Commerce Clause power.

This Comment explores the limits of congressional power in the unique context of polygamous marriage. In the past, the federal government has employed the Mann Act as a tool to prosecute polygamists.\(^14\) This Comment examines the application of the Mann Act to polygamists as a window into the larger issue of whether, and how, Congress may regulate non-commercial sexual compelling interest in preventing a parent from teaching religious principles, even if those principles would be illegal if practiced).

\(^9\) Lawrence v. Texas, 539 U.S. 558 (2003) (overruling Bowers v. Hardwick, 478 U.S. 186 (1986)) (holding that state regulation of consensual and private homosexual sex is unconstitutional). In his scathing dissent, Justice Antonin Scalia wrote that “[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of Bowers’ validation of laws based on moral choices.” Id. at 590 (Scalia, J., dissenting).

\(^10\) See Elizabeth Larcano, Note, A “Pink” Herring: The Prospect of Polygamy Following the Legalization of Same-Sex Marriage, 38 CONN. L. REV. 1065 (2006) (arguing that the states may not have an adequate interest in regulating polygamy based on the reasoning in Lawrence v. Texas); Cassiah M. Ward, Note, I Now Pronounce You Husband and Wives: Lawrence v. Texas and the Practice of Polygamy in Modern America, 11 WM. & MARY J. WOMEN & L. 131 (2004) (arguing that polygamy and homosexual sex are distinguishable under the compelling state interest test).

\(^11\) Cf. Kirsten Schamberg & Manya A. Brachear, Polygamy.; (Utah’s Open Little Secret), CHI. TRIB., Sept. 24, 2006, at C1 (“Although it is rare that allegations of abuse are as systemic or egregious as those reported in the community led by Jeffs, virtually every other polygamous sect practicing in Utah today has been linked to financial, sexual or spiritual improprieties.”).

\(^12\) Press Release, U.S. Senator Harry Reid, supra note 5. Though Jeffs has now been convicted in Utah, he still faces additional charges, including a federal flight charge. Riccardi, supra note 7, at A14.


\(^14\) See Cleveland, 329 U.S. at 20 (upholding a Mann Act conviction of polygamists).
activity through its Commerce Clause power. Because of the current public and legal interest in polygamy, this particular sexual and familial taboo makes an excellent case study for the application of recent Commerce Clause jurisprudence.

Part II of this Comment provides a brief history of the anti-polygamy movement in America and discusses how that movement has historically been connected to the issue of slavery. Part III explains the emergence of the Mann Act as a part of the moral reform movement of the early twentieth century. While the Mann Act targeted prostitution, or “white slavery” as it was popularly called, the Act was ultimately used to regulate non-commercial sex—including polygamy. Part IV examines recent developments in Commerce Clause jurisprudence. Part V argues that federal regulation of polygamy under the Mann Act falls within the regulation of the channels and instrumentalities of commerce. Further, this Part illustrates that the channels and instrumentalities categories of regulation provide a broader base for the regulation of non-commercial sexual activities than the substantial-effects category, which does not provide clear constitutional authority for the regulation of polygamy under the Mann Act. Part VI concludes that the federal regulation of polygamy falls within the constitutionally permissible categories of regulation espoused in *United States v. Morrison* and *United States v. Lopez.*

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15. The law implies non-commercial sex into the institution of marriage. See 4 AM. JUR. 2D Annulment of Marriage § 4 (2006) (summarizing the rule that a statute may allow annulment of a marriage if the marriage is unconsummated); 52 AM. JUR. 2D Marriage § 43 (2006) (noting why a sexual relationship is generally treated as a necessary requirement for a common-law marriage). This explains the reason that polygamy, though a form of marriage, has been legally categorized with concubinage or other forms of illicit non-commercial sexual activity. See generally Cleveland, 329 U.S. at 14 (holding that polygamy was a sexually “immoral purpose” together with debauchery under the operative terms of the Mann Act).

16. See Gonzales v. Raich, 545 U.S. 1, 18-19 (2005) (holding that Congress may regulate activity that affects a national market); United States v. Morrison, 529 U.S. 598, 613 (2000) (holding that violence against women does not substantially affect interstate commerce because violence is not economic activity); United States v. Lopez, 514 U.S. 549, 561 (1995) (holding that Congress lacks the power to regulate firearm possession in schools because the regulated activity does not substantially affect interstate commerce).

17. See infra Part II.

18. See infra Part III.

19. See infra text accompanying notes 91-121.

20. See infra Part IV.

21. See infra Part V.

22. See infra Part V.B.

II. A HISTORY OF THE ANTI-POLYGAMY MOVEMENT

A. Early Mormon Polygamy

Though polygamy has historically been practiced by many religious groups and cultures, the early Church of Jesus Christ of Latter-day Saints introduced the Anglo-American incarnation of polygamous marriage. The church did not practice polygamy at its inception. The church’s founder, Joseph Smith, first taught the doctrine in 1843. While Smith and some of his followers practiced polygamy during the early years of the Mormon Church, plural marriage was not incorporated into formal church doctrine until 1852.

Following Joseph Smith’s murder in 1844, Brigham Young continued to teach the practice of polygamy as one of the primary tenets of the Mormon faith. The practice played a central role in the church beginning in the 1850s. The early Mormon Church believed that polygamy was sanctioned by the Bible.


26 SAMUEL SPAHR, LAWS, POLYGAMY AND CITIZENSHIP IN CHURCH AND STATE 209 (1906) (arguing that the Book of Mormon “is explicitly and fiercely opposed to polygamy”).

27 See id. at 209 (“Joseph Smith claimed that the revelation authorizing and commanding polygamy was given him and his latter-day saints July 12, 1843.”); see also SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA 4 (2002) (“God, speaking through Prophet Joseph Smith, commanded Mormon men to marry more than one wife—to practice polygamy when called upon by faith and church authority to do so.”); Sears, supra note 25, at 587-89 (explaining the gradual introduction of polygamy into formal church doctrine by Joseph Smith).

28 Pingree, supra note 2, at 320-22.

29 See VAN WAGONER, supra note 25, at 68-70 (describing the events leading up to Smith’s arrest and murder).

30 CAIRCROSS, supra note 25, at 180-81 (“[Brigham Young] regarded polygamy as the central doctrine of the church, and it was his favourite subject for a sermon.”).

31 See BARRINGER GORDON, THE MORMON QUESTION, supra note 27, at 92 (“In its most extreme formulation, men were assured not only that their degree of exaltation in the afterlife was enhanced by having several wives but also that their very membership in the church depended on plural marriage.”); see also HAROLD BLOOM, THE AMERICAN RELIGION: THE EMERGENCE OF THE POST-CHRISTIAN NATION 106 (1992) (“Marked by the glory and stigma of plural marriage, the Mormons of 1850 through 1890 indeed became a peculiar people, a nation apart.”).
as a moral practice. Young taught that “[t]he purpose of marriage was procreation not pleasure.” The number of children that a Mormon man produced was both a status symbol and a determinant of his spiritual transcendence; thus, more wives provided an opportunity to have more children, leading to higher “elevation.” Young also encouraged “faithful men to marry multiple wives and faithful women to encourage their husbands’ polygamy.”

The Church of Jesus Christ of Latter-day Saints officially discontinued the practice of plural marriage in 1890; however, the practice has continued among the people in a sect known as the Fundamentalist Latter-day Saints. After the church formally revoked its prior endorsement of polygamy as a constitutional exercise of religious freedom, the tensions between anti-polygamists and mainstream Latter-day Saints began to wane. However, the fundamentalist sect persisted in the practice of polygamy despite continued external opposition. After well over a century of debate, both the legality and morality of Mormon polygamy remain live controversies in academic literature.

B. Federal Anti-Polygamy Laws

Despite the Mormons’ effort to practice their faith peacefully, removed from American society, the outside world villanized plural marriage after the practice

32. See CAIRNCROSS, supra note 25, at 181-83 (discussing some of the arguments forwarded by the early Mormons, based both on Old Testament and New Testament Biblical scripture).
33. Id. at 181.
34. Id. (explaining that the early Latter-day Saints believed that polygamy would usher in the Millennium).
36. BARRINGER GORDON, THE MORMON QUESTION, supra note 27, at 220 (explaining that Mormon president Wilford Woodruff “abandon[ed] the legal claim to practice the Principle to ensure the survival of the church”). But cf. BLOOM, supra note 31, at 89 (“Fiercely as the Mormon Church now opposes its polygamist Fundamentalists, it remains true that the Church never has repudiated plural marriage as a principle.”).
38. BARRINGER GORDON, THE MORMON QUESTION, supra note 27, at 221.
40. See generally Sealing, supra note 39 (arguing that religious polygamy is protected under the Free Exercise Clause); Maura I. Strassberg, Distinctions of Form or Substance: Mongamy, Polygamy and Same-Sex Marriage, 75 N.C. L. REV. 1501 (1997) (arguing that Mormon polygamy and same-sex marriage are not legally analogous); Elizabeth Warner, Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls, 12 AM. U. J. GENDER SOC. POL’Y & L. 233, 245-46 (2004) (citing fundamentalist Mormon polygamy as an example of child abuse under the guise of marriage).
41. See DONALD GRIER STEPHENSON, JR., THE WAITE COURT: JUSTICES, RULINGS, AND LEGACY 174 (2003) (“Once in Utah, Mormons were geographically well removed from most of the rest of the country, but distance did little to lessen the widespread and intense opposition to their distinctive, well-publicized practice of polygamy.”); see generally EDWIN BROWN FIRMAGE & RICHARD COLLIN MANGRUM, ZION IN THE COURTS: A
was formally announced in 1852.\textsuperscript{42} To a great extent, the characterization of polygamy as a form of white slavery was a matter of timing.\textsuperscript{43} The anti-polygamy movement coincided both temporally and theoretically with the abolitionist movement.\textsuperscript{44} This association of polygamy with slavery ignited a widespread anti-polygamy movement outside of the political realm. For example, popular literature often depicted Mormon women in polygamous marriages as first enticed and then enslaved.\textsuperscript{45}

The Republican Party took up the mantle of the anti-polygamy efforts with the notorious 1856 platform describing polygamy and slavery as “those twin relics of barbarism.”\textsuperscript{46} One scholar argued that the pairing of polygamy and slavery was largely strategic because “it was easier to condemn polygamy than to condemn slavery.”\textsuperscript{47} For a young Republican Party attempting to displace the Whig Party, anti-polygamy rhetoric became a key rallying device.\textsuperscript{48}

After the Radical Republicans gained control of Congress,\textsuperscript{49} the legislative anti-polygamy efforts began.\textsuperscript{50} The first piece of legislation in a series of

\textsuperscript{42} See Van Wagoner, supra note 25, at 105. Van Wagoner notes that the Civil War “provided only a brief respite” from the external opposition and that “[m]any Mormons viewed the Civil War as divine retribution for the government’s refusal to provide redress for the Saints’ losses in Missouri and Illinois.” Id. Cf. Firmage & Mangrum, supra note 41, at 129 (“It was a practice so abhorrent to most nineteenth century Americans that sophisticated constitutional arguments were not required to justify its eradication.”); Quinn, supra note 1, at 8 (arguing that polygamy was the scapegoat for a host of other theological conflicts between Mormonism and American Protestantism).

\textsuperscript{43} See generally Barringer Gordon, The Mormon Question, supra note 27, at 55-83 (detailing the rise of the anti-polygamy movement in conjunction with the anti-slavery movement).

\textsuperscript{44} See id. at 55-58 (describing the intertwining of political anti-slavery and anti-polygamy).

\textsuperscript{45} See Sealing, supra note 39, at 703 (“A ‘flood’ of anti-polygamy tomes began to appear; themes included plural wives as slaves, the lust of old men for young girls, and incest in polygamous families.”); see also Barringer Gordon, A War of Words, supra note 24, at 748 (“In the 1850’s, fiction brought home to readers the fear of betrayal and desolation that novelists claimed were the consequences of polygamy.”).

\textsuperscript{46} Republican Platform of 1856, in National Party Platforms 1840-1972, at 27 (Donald B. Johnson & Kirk H. Porter eds., 5th ed. 1975); see also Barringer Gordon, The Mormon Question, supra note 27, at 56-57 (“As Republicans learned quickly, the identification of slavery with Mormon polygamy allowed opponents of both to claim that the patriarchs of Utah and those of the slaveholding states and territories violated Christian mandates. The political salience of antipolygamy was thus linked inextricably to Christian abolitionism.”).

\textsuperscript{47} Barringer Gordon, supra note 27, at 57 (“The connections between slavery and polygamy in political and constitutional debates meant that claims of authority over the law of marriage fed into battles over the law of slavery.”). Cf. Firmage & Mangrum, supra note 41, at 129 (“Everyone—except the Mormons—favored the eradication of polygamy.”).


\textsuperscript{49} See Foner, supra note 48, at 228-39 (describing the birth of Radical Reconstruction under the leadership of the Republican party). The Radical Republicans were so called because of the party’s focused and vehement efforts to remedy the tragic consequences of slavery and promote equality. See id. at 228-30.
congressional acts targeting Mormon polygamy was the Morrill Act, which created criminal penalties for the practice of polygamy in the territories and limited the ability of the Church of Jesus Christ of Latter-day Saints to own property. However, the Morrill Act proved to be an ineffective tool to control polygamy. Because most Utah jurors and judges were Mormons themselves, the territory’s own judicial system was unlikely to procure criminal convictions of practicing polygamists.

Following the failure of the Morrill Act, Congress passed more aggressive legislation. The Poland Act “reduced the powers of the [Utah] territory’s probate judges and provided for jury pools to be selected by the U.S. marshal” in an effort to control the influence of the Mormon Church in the courts. Four years later, the Supreme Court examined the constitutionality of the federal anti-polygamy laws in Reynolds v. United States. That decision is best known for its narrow and controversial interpretation of the Free Exercise Clause.

Chief Justice Morrison R. Waite authored the majority opinion in Reynolds. The Court held that the Free Exercise Clause does not protect religious practices that are deemed socially immoral or “an offence against society.” This holding has had far-reaching implications with respect to religious freedom and has never been overruled. It also stands as a stinging repudiation of polygamy as a valid form of marriage in American moral and legal culture.

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50. See generally STEPHENSON, supra note 41, at 175 (summarizing the nineteenth century anti-polygamy legislation produced under Republican congressional leadership).
52. See BARRINGER GORDON, THE MORMON QUESTION, supra note 27, at 83 (“The act was unenforceable: no grand jury of their peers would indict Mormon leaders for obeying the commands of their religion.”).
53. VAN WAGONER, supra note 25, at 107-08.
54. BARRINGER GORDON, THE MORMON QUESTION, supra note 27, at 112 (describing the impact of the Poland Act, ch. 469, 13 Stat. 253 (1874)).
56. See STEPHENSON, supra note 41, at 175 (“Reynolds asked the Court not to invalidate Congress’s criminalization of polygamy but in effect asked the Court to carve out a religiously based exemption, based on the free exercise clause, to an otherwise valid law of general application.”); see also Sealing, supra note 39, at 710-16 (critiquing the Free Exercise Clause analysis in Reynolds).
57. STEPHENSON, supra note 41, at 175.
58. Reynolds, 98 U.S. at 165.
59. See STEPHENSON, supra note 41, at 176 (noting that the Reynolds holding was limited in 1963 when the Supreme Court held that the government had to “demonstrate a compelling interest,” but was reaffirmed in 1990).
60. See generally FIRMAGE & MANGRUM, supra note 41, at 155-56 (examining Waite’s characterization of polygamy as a “social evil”); Sealing, supra note 39, at 713-15 (arguing that Waite’s adoption of the “Lieber/Hegel analysis” is flawed because it is based on a racially biased critique of polygamy as practiced in China); Pingree, supra note 2, at 369-70 (emphasizing the similarity between Justice Waite’s tradition-based argument against polygamy and Justice White’s tradition-based argument against consensual same-sex sexual activity).
The most significant piece of anti-polygamy legislation was passed in 1882, four years after the Reynolds decision. The Edmunds Act paralyzed the political influence of polygamists and polygamist sympathizers by prohibiting their participation in voir dire, voting, and public office. The Act also outlawed multiple cohabitation, which allowed prosecutors to convict with a lower evidentiary standard. Interestingly, Congress passed this staunchly anti-polygamy legislation during a time when the Republicans had largely abandoned their primary Reconstruction effort: civil rights. Thus, the anti-polygamy movement, which was originally a strategic supplement to the civil rights movement, became an end in and of itself for the Republican Party.

Five years after the passage of the Edmunds Act, Congress passed the Edmunds-Tucker Act. With the Edmunds-Tucker Act, Congress dissolved the Church of Jesus Christ of Latter-day Saints as a corporation and seized church property. The church vehemently fought this legislation in the Supreme Court in 1889. In 1890, the Court found the Edmunds-Tucker Act constitutional in Late Corporation of the Church of Jesus Christ of Latter-day Saints v. United States. The Court held that the dissolution of the church’s corporate status was within the jurisdiction of Congress. Because of the church’s status as a “public
or charitable" corporation, the Court held that the church’s property was properly
confiscated.\footnote{70} Mere months after the Supreme Court rendered its Late Corporation
decision, the President of the Church of Jesus Christ of Latter-day Saints, Wilford Woodruff, announced his intention to submit to the federal laws outlawing polygamy and to publicly encourage other Mormons to submit.\footnote{71} The final legal blow of the nineteenth century came with the Utah Enabling Act—four years after Woodruff’s concession.\footnote{72} This Act conditioned Utah’s statehood upon Utah enacting an eternal prohibition against the practice of plural marriage.\footnote{73} The Mormons accepted this condition: “[t]he Utah constitution, drafted in 1895, prohibited polygamy ‘forever.’”\footnote{74}

The anti-polygamy activists of the nineteenth century were largely appeased by the church’s retreat from arguing for the constitutionality of plural marriage.\footnote{75} Despite this formal compliance from the Mormon Church, the practice of plural marriage did continue.\footnote{76} In response to this problem, the state of Utah enacted criminal legislation “outlawing unlawful cohabitation” in 1898.\footnote{77} Thus, by the end of the nineteenth century, the anti-polygamists had won a constitutional victory; however, the larger movement against illicit sexuality and white slavery had only begun.

\footnote{70} Id. at 47 (“[W]hen a [public or charitable] corporation is dissolved, its personal property, like that of a man dying without heirs, ceases to be the subject of private ownership, and becomes subject to the disposal of the sovereign authority. . . .”).\footnote{71} VAN WAGONER, supra note 25, at 133-40 (describing the events in the months leading up to the Wilford Woodruff Manifesto).\footnote{72} Utah Enabling Act, ch. 138, 28 Stat. 107 (1894).\footnote{73} Id. This portion of the congressional act would likely be unenforceable. See, e.g., Coyle v. Smith, 221 U.S. 559, 574-75 (1911) (finding a portion of the Oklahoma Enabling Act invalid and holding that Congress did not have constitutional authority to require that Oklahoma’s state capital be a particular city).\footnote{74} VAN WAGONER, supra note 25, at 157.\footnote{75} See BARRINGER GORDON, THE MORMON QUESTION, supra note 27, at 221 (“In the end, constitutional law was what antipolygamists fought for, and their opponents had surrendered. They were content, by and large, with a symbolic victory.”).\footnote{76} See VAN WAGONER, supra note 25, at 157 (“Though the number of plural marriages sanctioned after statehood was small compared to pre-1890 practices, the conflict between church leaders’ endorsement of new polygamy and their anti-polygamy public assurances began to cause increased difficulties.”); see also BARRINGER GORDON, THE MORMON QUESTION, supra note 27, at 221 (“Some Mormons might still practice polygamy (although never so unabashedly as before 1890), but they did not openly claim they had a legal right to do so.”).\footnote{77} VAN WAGONER, supra note 25, at 157.
III. THE MANN ACT

A. The Development of the Mann Act as a Response to White Slavery

Because the anti-polygamy movement was theoretically married to the anti-slavery movement, polygamy was often characterized as a subset of white slavery. White slavery grew into a sweeping label for any practice or activity that was popularly viewed as degrading to women—in particular, prostitution. Prostitution became the central focus of moral reform in early twentieth century social politics. The significant premise behind the categorization of prostitution as white slavery was the popular belief that the “women were victims.” It was generally believed that white slave trafficking rings “forced or lured” teenage girls into prostitution.

In 1910, Congress responded to the perceived problem of white slavery by passing the White Slave Traffic Act (commonly known as the Mann Act). The original Mann Act prohibited the transportation “in interstate or foreign commerce” of

any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice.

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79. See Republican Platform of 1856, supra note 46 (citing polygamy and slavery as “those twin relics of barbarism”); see also FREDERICK K. GRITTNER, WHITE SLAVERY: MYTH, IDEOLOGY, AND AMERICAN LAW 95 (1990) (“Like so many others in the white slave reform movement, Mann compared black and white servitude and found the white worse.”).
80. See Sealing, supra note 39, at 703 (noting that popular anti-polygamist novels depicted polygamy as female enslavement).
81. See GRITTNER, supra note 79, at 44-45 (“When purity reformers talked of prostitution in terms of ‘barbarism,’ they employed the rhetoric that was also used in excoriating Mormon polygamy.”).
82. See generally DAVID J. LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT 15 (1994) (“Prostitution gave meaning to deeper problems of immigration, urbanization, and above all, the dramatic changes in the status and roles of women . . . .”).
83. GRITTNER, supra note 79, at 96 (“The statute made no provision for the prosecution of the ‘white slave’ or the ‘hardened’ prostitute. Only the person [presumably male] who sent the woman across state lines was criminally liable.”). Note that the language of the statute is now gender-neutral. See White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. § 2421 (2000)).
84. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 34-35 (1948); see also GRITTNER, supra note 79, at 95-96 (describing the “white slave mythology” that fueled the national moral outrage and the passage of the Mann Act).
85. GRITTNER, supra note 79, at 83.
86. 18 U.S.C. § 2421 (emphasis added). In addition to transportation, the original statute also provided for the criminal punishment of anyone
who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing, enticing, or coercing any woman or girl to go
Representative James R. Mann introduced the Mann Act in 1909 as a part of the moral reform efforts against white slavery. Shortly after its introduction, President Taft opined that the Mann Act was a constitutional exercise of congressional power. The constitutionality of the Act concerned some representatives; however, the moral momentum of the time period propelled the passage of the Mann Act despite concerns about its constitutionality.

Though prostitution was the moral concern that fostered the Mann Act, the expansive language of the statute allowed for the prosecution of persons transporting women for the purpose of non-commercial, illicit sexual activity. Due to the characterization of marriage as “the boundary between” licit and illicit sex, illicit sexual activity was viewed as a “potential threat to marriage.” Not long after the passage of the Mann Act, the statute was used as a tool to control illicit, non-commercial sex.

from one place to another in interstate or foreign commerce, or in any territory or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose. See Caminetti v. United States, 242 U.S. 470, 488 n.1 (1917) (citing sections 2, 3, and 4 of the original Mann Act in their entirety).

88. Grittner, supra note 79, at 87.
89. See id. at 93 (explaining that, for reasons largely related to the new civil rights laws, the Southern Democrats strived to limit the intrusion of federal government into traditional matters of the state).
90. See Dubler, supra note 87, at 788-91 (discussing the controversy surrounding the congressional regulation of vice).
91. See Langum, supra note 82, at 15 (discussing the fervency with which Americans politically condemned prostitution and white slavery during the 1910s).

The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.

Id.

93. Dubler, supra note 87, at 781-82.

The Dillingham Commission’s analysis of the dangers of white-slave traffic already gestured at this more complicated relationship between marriage and immoral sex. Even as its observations preserved marriage as the vessel for crossing the illicit-licit divide, its account of the harm of the white-slave trade simultaneously suggested that illicit sex loomed as a threat to the core licit sexual institution of [monogamous] marriage.

Id.

94. See Caminetti, 242 U.S. at 496 (upholding the convictions of men who transported women for the purpose of non-commercial sex); see also Langum, supra note 82, at 119 (“Just after the conviction of Diggs, in September of 1913, [Representative Mann] was quoted in the Sacramento Bee as saying that Diggs and Caminetti were ’typical cases.’”).
B. The Supreme Court's Interpretation of the Mann Act

In 1917, the Supreme Court interpreted the language of the Mann Act and applied it to non-commercial sex. The Court combined three similar cases in *Caminetti v. United States*. In two of the cases, a male defendant transported a female companion across a state border “for an immoral purpose, to wit, that the aforesaid woman should be and become his mistress and concubine.” In the third case, the accused transported an underage girl across a state border with similar intentions. In these cases, the Court construed the statutory term “immoral purpose” to include non-commercial sex without explaining whether congressional regulation of non-commercial sex was constitutional.

The reasoning in *Caminetti* expanded the application of the Mann Act by interpreting the phrase “any other immoral purpose” as a catch-all for the pervasive notions of non-commercial sexual deviance. *Caminetti* opinion author Justice Day focused the bulk of his analysis on this statutory interpretation issue rather than the constitutionality of the Mann Act. The original version of the Mann Act prohibited the transportation of a woman or girl in interstate commerce “for the purpose of prostitution or debauchery, or for any other immoral purpose.” The majority reasoned that because the word “prostitution” encompassed commercial sex, the phrase “other immoral purpose” must have a separate non-commercial designation to be meaningful. The Court borrowed this reasoning from *United States v. Bitty*, a case interpreting identical language from an act “directed against the importation of an alien woman ‘for the purpose of prostitution or for any other immoral purpose.’”

95. *Caminetti*, 242 U.S. 470; see generally LANGUM, supra note 82, at 97-118 (discussing the historical background and factual circumstances of the *Caminetti* case in detail).


98. Id. at 483-84.

99. See id. (analyzing only the statutory construction of the “immoral purpose” language and failing to analyze the constitutionality of the Mann Act as applied to non-commercial sex).

100. Id. at 486-90; see supra note 15; see also Grittner, supra note 79, at 85 (“The general class of behavior prohibited was sexual immorality, not just prostitution.”).

101. See *Caminetti*, 242 U.S. 470.


103. *Caminetti*, 242 U.S. at 486-87 (citing United States v. Bitty, 208 U.S. 393 (1908) for its statutory construction of “any other immoral purpose”); see also Annotation, Prosecution Under White Slave Traffic Act Based on Interstate Transportation Not Involving Commercial Vice, 23 A.L.R.3d 429 (2006) (“Although the term ‘prostitution’ involves the financial element, the court noted, the other named species, ‘debauchery,’ includes no financial element in its connotation, meaning only the leading of a chaste girl into unchastity and thus the term ‘other immoral conduct’ would not be limited to conduct involving a commercial element, but would include sexual immorality generally.”).

104. United States v. Bitty, 208 U.S. 393 (1908) (interpreting the Alien Prostitution Importation Act, ch. 141, 18 Stat. 477 (1875) (codified as amended at 18 U.S.C. § 1328 (1982))); see also Grittner, supra note 79, at 84-85 (discussing Harlan’s determination in *Bitty* “that concubinage was of the same general class of
The *Caminetti* Court further reasoned that:

While such immoral purpose would be more culpable in morals and attributed to baser motives if accompanied with the expectation of pecuniary gain, such considerations do not prevent the lesser offense against morals of furnishing transportation in order that a woman may be debauched, or become a mistress or a concubine, from being the execution of purposes within the meaning of this law.\(^\text{105}\)

With regard to the constitutionality of the Mann Act, the Court deferred to the reasoning in *Hoke v. United States*.\(^\text{106}\) *Hoke* involved the transportation of a woman across a state line for the purpose of prostitution, a case clearly involving interstate commerce.\(^\text{107}\) The majority in *Hoke* found that the Mann Act was a constitutional exercise of congressional Commerce Clause power because the Act regulated the transportation of female persons in interstate commerce for the purpose of prostitution, a decidedly commercial sexual transaction.\(^\text{108}\) Problematically, unlike the prostitution in *Hoke*, the non-commercial sex in *Caminetti* did not involve or affect interstate commerce on its face.\(^\text{109}\) Consequently, *Caminetti* never analyzed the constitutionality of the Mann Act as applied to non-commercial sex.\(^\text{110}\)

Expressly relying on the *Hoke* analysis, the Court provided little explanation of how the regulation of non-commercial vice could be a valid exercise of congressional power under the Commerce Clause.\(^\text{111}\) The petitioner pointed out the constitutional conundrum: “If the [Mann Act] must be construed to include cases of mere immorality, free from all element of commerce or coercion, then Congress had no constitutional power to enact it.”\(^\text{112}\) The Court did not squarely address this argument, most likely because the Mann Act contained an express jurisdictional element requiring transportation of the woman in interstate commerce.\(^\text{113}\) In this vein of reasoning, the majority briefly discussed the general constitutionality of regulating the movement of persons in the channels of

\(^{105}\) Caminetti, 242 U.S. at 486. Cf. Dubler, supra note 87, at 794 (“With Caminetti, the Supreme Court reinforced Bitty’s holding that sex outside of marriage constituted the genus of immoral sex.” (emphasis added)).

\(^{106}\) Caminetti, 242 U.S. at 491-92.


\(^{108}\) Id. at 320 (“[A] person may move or be moved in interstate commerce.”).

\(^{109}\) But cf. Caminetti, 242 U.S. at 491 (reasoning that the commercial element was the *use* of the channels of interstate commerce for purposes prohibited by the statute).

\(^{110}\) See id. (failing of the Court to address the issue of whether the regulation of non-commercial sexual activity was constitutional at any point in the majority opinion—an issue not present in *Hoke*.).

\(^{111}\) Id. at 491-92.

\(^{112}\) Brief for Petitioner, Caminetti v. United States, 242 U.S. 470 (1917) (No. 163).

interstate commerce;\textsuperscript{114} but the Court did not explain the application of this rule to the transportation of women for the purpose of non-commercial sex. The majority alluded to constitutional limits on congressional regulation of interstate travel with “the intention of committing an illegal or immoral act at the conclusion of the journey” but distinguished the Mann Act only on the basis of its requisite transportation of passengers by the use of the channels of interstate commerce.\textsuperscript{115} Thus, the element of moving passengers in interstate commerce is the probable reason that the Court did not conduct a constitutional analysis of the Mann Act’s application to non-commercial sex.

Interestingly, dissenting Justice McKenna in \textit{Caminetti} criticized the majority opinion for its statutory construction rather than critiquing the majority’s failure to address how regulation of non-commercial sex could be a constitutional exercise of congressional power.\textsuperscript{116} As such, the issue of whether Congress has the power to regulate non-commercial sexual activity—including polygamy—remains unanalyzed and unresolved.

The general constitutionality of the Mann Act and the statutory construction of the Mann Act’s language remained analytically disconnected in the landmark polygamy case \textit{Cleveland v. United States}.\textsuperscript{117} \textit{Caminetti} became Justice Douglas’s primary justification for applying the Mann Act in the polygamy context in \textit{Cleveland}, some thirty years later.\textsuperscript{118} The \textit{Caminetti} opinion forwarded two significant propositions that were transposed into the \textit{Cleveland} decision. The first was that the Mann Act is applicable to non-commercial sex.\textsuperscript{119} The second was that the Mann Act is a constitutional exercise of congressional regulatory power under the Commerce Clause.\textsuperscript{120}

Justice Douglas’s opinion for the majority focused on the questions of whether \textit{Caminetti} rightly applied the Mann Act to non-commercial sex and whether the practice of polygamy could be analytically subsumed by the “other

\begin{footnotes}
\item[114] See \textit{Caminetti}, 242 U.S. at 491.
\item[115] \textit{Id.}
\item[116] \textit{Id.} at 496-503 (McKenna, J., dissenting).
\item[117] 329 U.S. 14 (1946); see also \textit{Burgess v. United States}, 294 F. 1002 (1924) (upholding a Mann Act conviction of a man who transported a woman across the Virginia border for the purpose of marrying her when he was already married to two other women).
\item[118] \textit{Cleveland}, 329 U.S. 14.
\item[119] \textit{Caminetti}, 242 U.S. at 486; see also Annotation, \textit{supra} note 103, at 425 (“[T]he courts have uniformly held that an intention by the transporter to indulge in immoral sexual practices with the transported female, regardless of commercial association, falls within the prohibitions of the act, and have rejected contentions to the contrary”).
\item[120] \textit{Caminetti}, 242 U.S. at 491-92; see U.S. CONST. art. I, § 8, cl. 3 (authorizing Congress to regulate interstate commerce); \textit{Hoke v. United States}, 227 U.S. 308 (1913) (ruling that the Mann Act is constitutional).
\end{footnotes}
immoral purposes” language. The Court failed to address the question of whether polygamy affected interstate commerce, leaving unanswered the question of the constitutionality of the Mann Act as applied in the context of polygamy.

In Cleveland, members of the Fundamentalist sect of the Latter-day Saints were convicted under the Mann Act for transporting plural wives across state borders. The Court rejected the argument that Caminetti was too broad an interpretation of statutory language that the legislature specifically directed at commercial sexual exchanges. Based on the reasoning in Caminetti, the majority held that the plain language of the statute did not limit its application to commercial sex.

After affirming the reasoning in Caminetti, the majority went on to hold that the Mann Act also applied to the non-commercial transportation of plural wives across state lines. Justice Douglas reasoned, “[t]he power of Congress . . . is plenary; it may be used to defeat what are deemed to be immoral practices.”

The Court characterized polygamy as one such immoral practice based on the traditional and longstanding Western conception of marriage and morality. In his dissenting opinion, Justice Murphy objected to the majority’s classification of polygamy with prostitution and other illicit sex. In response to this argument, Justice Douglas wrote that “[w]e could conclude that Congress excluded these practices from the Act only if it were clear that the Act is confined to commercialized sexual vice.

Notably, the analytical battle in this case, as in Caminetti, focused on the meaning of “immoral purpose” rather than the constitutional validity of the Mann Act when applied to non-commercial sexual activity. The Court gave only a cursory analysis of the general constitutionality of the Act as an exercise of the Commerce Clause. In fact, the Court simply relied on Hoke, reasoning that the congressional power over interstate commerce “may be used to defeat what are

121. Cleveland, 329 U.S. at 17-19. Cf. LANGUM, supra note 82, at 211 (“Behind the smokescreen of polygamy, all concerned understood that the case was a review of Caminetti.”).
123. Id. at 16.
124. Id. at 17.
125. Id. at 18; see Caminetti, 242 U.S. at 485-90; see also LANGUM, supra note 82, at 211 (“[T]he decision of whether to overrule Caminetti] would have determined the outcome of the case, as there was no hint of commercial motive among these sincere religious practitioners.”).
126. Cleveland, 329 U.S. at 18.
127. Id. at 19.
128. Id. at 18-19 (citing Reynolds v. United States, 98 U.S. 145, 164 (1878) and Late Corp. of Church of Jesus Christ v. United States, 136 U.S. 1, 49 (1890) for their characterizations of polygamy as immoral).
129. Id. at 26 (Murphy, J., dissenting).
130. Id. at 19 (majority opinion).
deemed to be immoral practices; and the fact that the means used may have ‘the quality of police regulations’ is not consequential.’”

The Caminetti legacy has been the subject of many critiques, but the case has never been overruled. Nevertheless, the reasoning regarding the scope of the phrase “immoral purposes” is now a moot point because that language has been eliminated from the Mann Act. The revised language of the statute has replaced “immoral purposes” with “any sexual activity for which any person can be charged with a criminal offense.” However, because polygamy is a crime in all fifty states, the statute is arguably still applicable to polygamous marriages that involve crossing state lines. Additionally, the statute would certainly still apply to polygamous marriages involving the transportation of underage girls across state lines because statutory rape is a criminal “sexual activity.” Thus, the central constitutional proposition in Caminetti and Hoke, that non-commercial sexual activity may be regulated under the Commerce Clause power, would still prove relevant to polygamy prosecutions under the revised version of the Mann Act. The question remains as to whether this line of cases provides an adequate constitutional justification for federal regulation of non-commercial sexual activity, particularly in light of the most recent Commerce Clause cases.

IV. MODERN COMMERCE CLAUSE JURISPRUDENCE

A. New Limitations on the Commerce Clause Power

1. Narrowing Regulation in United States v. Lopez

Under the Commerce Clause, Congress may enact laws to regulate interstate commerce. The Supreme Court has long engaged in interpretation of the

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133. Id. at 19 (citing Hoke v. United States, 227 U.S. 308, 323 (1913)).
134. See, e.g., LANGUM, supra note 82, at 97-118 (analyzing and criticizing the sparsely supported reasoning in Caminetti).
135. See Caminetti, 242 U.S. 470. To date, the analysis in Caminetti has never been overruled.
138. I say “arguably” because it is debatable whether polygamy fits into the “any sexual activity” language. Because marriage—polygamous or otherwise—presumably involves sexual activity, it is probable that the state crime of polygamy fits into the revised statute’s rubric. See supra note 15. Many polygamous marriages, including those performed by Jeffs, have involved transportation of women across state borders because the largest polygamous communities are based in the Four Corners region of Utah, Colorado, New Mexico, and Arizona. See Karen Brooks, Jeffs Hasn’t Been Here, or Has He?, DALLAS MORNING NEWS, June 15, 2006, at 18A (pointing out that Jeffs travels to the communities along the state borders to perform polygamous marriages).
139. 18 U.S.C. § 2421.
140. U.S. CONST. art. I, § 8, cl. 3.
boundaries of this power, but the Rehnquist court has defined the current Commerce Clause limitations. In 1995, Chief Justice William H. Rehnquist wrote a landmark majority opinion limiting the ability of Congress to regulate criminal activities. Just five years later, Justice Rehnquist again delivered the opinion of the Court in a Commerce Clause case, reasoning that some activities are “truly local.” After another five years, the Court rendered a Commerce Clause decision seemingly antithetical to the previous two cases. Together, these cases impose limitations upon congressional Commerce Clause power that the Mann Act cases did not directly address.

In United States v. Lopez, the Supreme Court adjudged the constitutionality of the Gun-Free School Zones Act of 1990, which criminalized the possession of firearms in school zones. The central issue in the case concerned the only possible source of Congress’s power to enact such a law—the Commerce Clause. The majority arranged the previous sixty years of Commerce Clause cases into three categories of activities that Congress may regulate: “the use of the channels of interstate commerce,” “the instrumentalities of interstate commerce, or persons or things in interstate commerce,” and “those activities that substantially affect interstate commerce.” The Government contended that gun possession in school zones fell into the last of the three categories because gun violence burdens the national economy. The Government argued that firearms in schools “[threaten] the learning environment” and impair the chances of individual children to become contributing members of society.

The Court considered the Government’s argument problematic because it asserted too much. The majority reasoned that the same argument could be forwarded for any violent crime and further reasoned that the argument led to a slippery slope, making it “difficult to perceive any limitation on federal power.” Specifically, the Court was concerned that the Government’s “national

141. See, e.g., Heart of Atlanta Hotel, Inc. v. United States, 379 U.S. 241, 255-56 (1964) (holding that Congress has the power to regulate business establishments that conduct business related to interstate commerce).
145. Gonzales v. Raich, 545 U.S. 1 (2005).
146. Lopez, 514 U.S. at 551.
147. Id. at 552.
148. Id. at 558-59.
149. Id. at 564.
150. Id.
151. Id.
productivity” argument would allow Congress to regulate matters of family law—including marriage.152

Significantly, the Court reasoned that the statute lacked a “jurisdictional element” that may have brought individual instances of firearm possession on school campuses into the purview of federal regulation.153 This reasoning suggested that a congressional act regulating non-commercial activities could survive review under Lopez if the act contains an express jurisdictional limitation.154 Further, the majority noted that a criminal statute, such as the Act in question, presumptively had no relationship to interstate commerce “by its terms.”155 In concluding the majority opinion, Justice Rehnquist admitted that previous Supreme Court cases had paid “great deference to congressional action,” but made it clear that Lopez was meant to curb generous interpretations of the Commerce Clause power.156

2. Further Limits in United States v. Morrison

In the subsequent case of United States v. Morrison, the majority opinion further solidified the Court’s position that congressional acts claiming constitutionality under the Commerce Clause must fit into one of the three Lopez categories.157 The issue in that case was the constitutionality of the Violence Against Women Act of 1994, which created a federal civil remedy for gender-motivated violent crimes.158 Unlike Lopez, Congress extensively investigated gender-motivated violence prior to enacting the law and made the express factual finding that violence against women substantially affects the ability of victimized women to participate in the national job market.159 Nevertheless, the majority

152. Id. at 561-62. (“[The act] has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.”). An “express jurisdictional element” limits the scope of a statute by explicitly requiring some nexus between the regulated activity and interstate commerce. Id. at 566-68 (stating that the Court would not expand the limits of Commerce Clause power any further).

154. Cf. Choper & Yoo, supra note 142, at 850.

A jurisdictional element, for example, could require that the prosecution prove that the defendant had transported the gun across state boundaries on the way to the school zone. A jurisdictional element might even be met by requiring the prosecution to prove only that the defendant had purchased the gun from someone engaged in interstate commerce, or even perhaps only that the gun itself had traveled at some point in interstate commerce.

155. Lopez, 514 U.S. at 561.

156. See COENEN, supra note 143, at 107 (explaining the pre-Morrison scholarly speculation that Lopez would be “an isolated event”).


158. Id. at 629-31; see also COENEN, supra note 143, at 108 (explaining that Congress had conducted an extensive four-year study of the effects of gender-related violence upon interstate commerce).
again rejected the “national productivity” arguments that the Government had attempted in Supreme Court decision of 1984 (Lopez).  

Once again, Chief Justice Rehnquist wrote for the Court majority. Rehnquist again emphasized the Lopez concept that an express jurisdictional element limiting the scope of the statute may be enough to validate an otherwise unconstitutional statute. However, the Morrison Court appeared to have gone beyond Lopez by discarding the argument that non-commercial violent activities may be regulated when the conduct has an “aggregate effect on interstate commerce.” Based on Lopez, the majority reasoned that evaluating the effect of non-economic activities in the aggregate is dangerous because the identical rationale could be applied to family law and other traditional areas of state regulation.

In a problematic portion of the majority opinion, Rehnquist stated that historically “our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.” This reasoning would seem to indicate a presumption of unconstitutionality against statutes regulating non-commercial activities; however, the majority misstates Commerce Clause case history. Both Caminetti and Cleveland are examples of Supreme Court sanction of the Commerce Clause power to regulate non-economic activities.

Functionally, Morrison both repeated and further restricted the Lopez analysis. In addition, Morrison served as evidence that Lopez was more than a mere token gesture of federalism. However, the fixed categories of Lopez and Morrison did not go unchallenged for long. Only five years after the Court rendered its decision in Morrison, an identical set of justices reached a seemingly contradictory result in Gonzales v. Raich.

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160. Morrison, 529 U.S. at 612-14 (reasoning that the congressional findings were not enough, without something more, for the Court to find the Act constitutional); see also Lopez, 514 U.S. at 564 (“Similarly, under the Government’s ‘national productivity’ reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example.”).

161. Morrison, 529 U.S. at 601.

162. Id. at 612.

163. Id. at 617-18 (“The Constitution requires a distinction between what is truly national and what is truly local.”).

164. Id. at 615-16.

165. Id. at 613 (emphasis added).

166. See Caminetti v. United States, 242 U.S. 470 (1917) (upholding the Mann Act in its application to the transportation of women for the purpose of non-commercial sex); Cleveland v. United States, 329 U.S. 14 (1946) (upholding the Mann Act in its application to the transportation of women for the purpose of non-commercial polygamous marriage).

167. See COHEN, supra note 143, at 107 (mentioning that some legal scholars expected that the Lopez reasoning would not be repeated).

B. The Impact of Gonzales v. Raich

In *Gonzales v. Raich*, the Court once again addressed the issue of the reach of congressional power under the Commerce Clause.\(^{169}\) Congress passed the comprehensive regulatory Controlled Substances Act, which provides federal penalties for manufacturing, distributing, or possessing controlled substances outside the purview of the Act.\(^{170}\) Conversely, California voters passed a proposition that legalized the sale and use of marijuana for medical purposes.\(^{171}\) *Gonzales* involved the intersection of these two laws where the respondents were using marijuana lawfully under the California law but unlawfully under the federal law.\(^{172}\) The paramount issue in this case was whether Congress had authority to enact a “categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law.”\(^{173}\)

The analysis in this case dealt with the third *Lopez* category of valid Commerce Clause power: activities having a substantial effect on interstate commerce. Justice Stevens, writing for the majority, first emphasized the rational basis standard of review as the proper limitation on the Court’s inquiry, stating that the Court needed only to conclude that Congress had a rational basis for finding that the regulated activities “in the aggregate” substantially affected interstate commerce.\(^{174}\) The Court distinguished *Lopez* by characterizing the Controlled Substances Act as a longstanding “comprehensive framework” for national drug control, as opposed to the gun control statute in *Lopez*, which had a narrow application to intrastate activities.\(^{175}\) Further, the majority largely relied on the analysis from *Wickard v. Filburn*, which held that the Commerce Clause power could be used to regulate intrastate activities that substantially affect interstate commerce.\(^{176}\)

In contrast to the emphasis on express congressional findings in *Lopez*, the Court in *Gonzales* stressed that it does not require Congress to make “particularized findings” in order to find the legislation constitutional.\(^{177}\) Additionally, the majority rejected a “myopic” interpretation of *Lopez* and *Morrison*, distinguishing these cases by reasoning that the activities regulated by the Controlled Substances Act were economic in nature because the regulated

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169. *Id.*

170. *Id.* at 13-14.

171. *Id.* at 5-6 (noting that the California law was passed in 1996).

172. *Id.* at 6-8.

173. *Id.* at 15.

174. *Id.* at 22.

175. *Id.* at 24-25 (describing trade in marijuana as “quintessentially economic”).


177. *Gonzales*, 545 U.S. at 21 (“[T]he absence of particularized findings does not call into question Congress' authority to legislate.”).
substances were commodities.\textsuperscript{178} In sharp contrast to the Court’s rejection of the aggregate effect on interstate commerce argument in \textit{Morrison},\textsuperscript{179} the majority in \textit{Gonzales} reasoned that “[w]hen Congress decides that the ‘total incidence’ of a practice poses a threat to a national market, it may regulate the entire class.”\textsuperscript{180}

The resulting law of \textit{Gonzales}, in combination with \textit{Lopez} and \textit{Morrison}, is somewhat ambiguous. The current case law clearly allows Congress to regulate both the channels and instrumentalities of interstate commerce.\textsuperscript{181} Congress may also regulate intrastate activity that is economic in nature when the aggregate sum of the activities affects interstate commerce.\textsuperscript{182} The third \textit{Lopez} category creates a dubious issue when the intrasate activity is not economic in nature. The most recent opinion, \textit{Gonzales}, contains competing reasoning as to how the Court should determine which non-commercial activities substantially affect interstate commerce.\textsuperscript{183}

\section*{V. The Constitutionalcy of the Regulation of Polygamy Under the Mann Act}

\subsection*{A. Channels and Instrumentalities of Interstate Commerce}

The modern Commerce Clause cases state that Congress may regulate the channels and instrumentalities of interstate commerce.\textsuperscript{184} To analyze whether the Mann Act’s permissible regulation of polygamy is constitutional under the channels and instrumentalities theory, it is necessary to first define the terms. A channel of interstate commerce is typically characterized as an avenue or course for an instrumentality of interstate commerce, which includes “vehicles and other tools used in exploiting those corridors.”\textsuperscript{185} For example, an interstate highway would be a channel of interstate transportation; however, an automobile would be the means or instrumentality of transportation because it is the tool one would use to exploit the interstate highway. If a federal statute regulates an activity that

\textsuperscript{178} Id. at 23-26.
\textsuperscript{179} United States v. Morrison, 529 U.S. 598, 615-16 (2000).
\textsuperscript{180} Gonzales, 545 U.S. at 17.
\textsuperscript{182} Gonzales, 545 U.S. at 17 (“Our case law firmly establishes Congress’ power to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”).
\textsuperscript{183} \textit{See supra} text accompanying notes 166-71.
\textsuperscript{184} \textit{See Lopez}, 514 U.S. at 558-59 (holding that Congress may regulate both the channels and instrumentalities of interstate commerce without any additional limitation); \textit{Morrison}, 529 U.S. at 609 (repeating the holding in \textit{Lopez}).
\textsuperscript{185} \textit{Cohen}, \textit{supra} note 143, at 32-33 n.2 (“On one understanding, [the term ‘channels’] focuses on corridors of movement and trade (sea routes, air routes, highways, rail and communications lines, electrical wires, pipelines, etc) . . . .”).

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fits into either of these two categories under rational basis scrutiny, then the statute is a constitutional exercise of congressional Commerce Clause power. 186

The language of the Mann Act, both currently and prior to its amendment, requires transportation or the intent to transport. 187 The current language reads: “[w]hoever knowingly transports any individual in interstate or foreign commerce . . . with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense” violates the Mann Act. 188 The choice of the word “transport” is significant because, under the traditional interpretation of the channels and instrumentalities theory, “transportation” implies the use of a channel or instrumentality of interstate commerce. 189 Even the majority in Morrison noted that the Federal Courts of Appeals unanimously upheld another portion of the Violence Against Women Act that required interstate transportation as falling squarely within the power to regulate channels and instrumentalities of interstate commerce. 190 The regulated activity in Morrison, gender-motivated violence, is still inherently non-commercial criminal conduct; however, because that section of the statute requires transportation across the channels of interstate commerce, the Court considers it uncontroversibly constitutional. 191

Notably, one of the earliest Commerce Clause cases to discuss the breadth of the channels and instrumentalities theory was also the analytical predecessor of the non-commercial sex Mann Act case: Hoke v. United States. 192 The unanimous Hoke Court reasoned that Congress could regulate transportation across state lines “to promote the general welfare, material and moral.” 193 Significantly, this reasoning does not limit the congressional regulatory power over transportation to commercial activities. Instead, the reasoning specifically authorizes Congress to use the channels and instrumentalities theory to regulate morality. In this Mann Act case, the Court explained that Congress has “complete” power over

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186. See Morrison, 529 U.S. at 609 (identifying channels and instrumentalities of interstate commerce as appropriate areas of congressional regulatory power); Gonzales, 545 U.S. at 22 (clarifying that the Court must apply rational basis scrutiny to Commerce Clause inquiries).


188. Id.

189. Cf. COENEN, supra note 143, at 33-35 (summarizing the early channels and instrumentalities cases that have led to broad congressional control over all methods of land, sea, and air transportation).

190. Morrison, 529 U.S. at 613 n.5; see also United States v. Lankford, 196 F.3d 563, 570-72 (5th Cir. 1999) (describing travel in channels of interstate commerce as “interstate transportation”).

191. See Morrison, 529 U.S. at 613 n.5 (noting that the “Courts of Appeals have uniformly upheld this criminal sanction,” and implicitly agreeing that this portion of the statute is constitutional under the channels and instrumentalities theory).

192. Hoke v. United States, 227 U.S. 308 (1913) (holding that the Mann Act was a constitutional exercise of Commerce Clause power in a prostitution case).

193. Id. at 322.
the transportation of persons across state borders. Moreover, the Court claimed that this power may be exercised in the form of “police regulations.”

From the reasoning in Hoke, it is clear that Congress may regulate channels and instrumentalities, a principle that recent cases limiting the exercise of Commerce Clause power have reiterated. Also from Hoke, it is clear that a transportation element, particularly the transportation element in the Mann Act, indicates a valid congressional regulation of channels and instrumentalities. Even though Hoke involved a commercial transaction (prostitution), the Court focused its analysis on the transportation element. Moreover, the Court did not hold that the channels and instrumentalities theory is limited to commercial activities in its application. Thus, the commercial element under the channels and instrumentalities theory is the transportation itself, rather than the targeted activity.

If an element of interstate transportation is all that is required of a congressional statute to bring it under the purview of the uncontroversial channels and instrumentalities theory, then the first two Lopez categories may prove to be broader than the third substantial-relation category. While elaborating on the channels of interstate commerce category, the Lopez Court cited Caminetti, the first case to apply the Mann Act to non-commercial sex, for the proposition that Congress has the power to clear interstate channels of immorality. In a twist of constitutional fate, the minimal constitutional analysis in Caminetti, a case allowing the regulation of an inherently non-commercial activity, was ultimately

194. Id. at 323 (“[T]he power is complete in itself . . . Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations.”). See also COENEN, supra note 143, at 111-12.

195. Hoke, 227 U.S. at 323.

196. Cf. Morrison, 529 U.S. at 609 (reasoning that channels and instrumentalities of interstate commerce are subject to congressional regulation); Pierce County v. Guillen, 537 U.S. 129, 146-47 (2003) (reiterating that Congress has authority over the channels and instrumentalities of interstate commerce).

197. See supra text accompanying notes 178-84.

198. See Hoke, 227 U.S. at 322-24 (finding that Congress may regulate interstate transportation as a form of interstate commerce).

199. Cf. Morrison, 529 U.S. at 609 (reasoning that Congress may regulate the channels and instrumentalities of interstate commerce without imposing any additional requirement that the regulated activity be commercial in nature).

200. Both of the more restrictive Commerce Clause cases (Lopez and Morrison) have found that Congress may unquestionably regulate the channels and instrumentalities of interstate commerce. See supra text accompanying note 176.

cited in *Lopez* for the proposition that Congress may regulate transport across channels of interstate commerce.\(^202\)

In its description of the second permissible category of regulation, the instrumentalities of interstate commerce, the *Lopez* Court held that Congress may “regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.”\(^203\) This category would also apply to the statutory language of the Mann Act since the statute, by its terms, regulates the transport of persons in interstate commerce.\(^204\) There is no indication that the transported persons must actually be bought or sold in interstate commerce; rather, the transportation itself is enough to bring the activity within the authority of Congress.\(^205\) This reasoning is verified by the holding in *Caminetti*, where the commercial element was the use of channels and instrumentalities of interstate commerce for purposes prohibited by the statute.\(^206\)

The Court essentially reasoned that because the interstate channels are inherently commercial in that they are used for trade, the regulated activity need not be commercial so long as it utilizes these channels.\(^207\) The broadness of this reasoning has been criticized,\(^208\) but the Court has continued to affirm the validity of the channels and instrumentalities theory.\(^209\) When a person uses a channel of interstate commerce (such as an interstate highway or railway) to transport another person with the intent to facilitate or engage in polygamy, the transporter violates the Mann Act.\(^210\) Because the term “transportation” in the Mann Act implies the use of a channel of interstate commerce,\(^211\) the statute is constitu-

\(^202\). *Id.*

\(^203\). *Id.* at 558.


\(^205\). See *Lopez*, 514 U.S. at 558 (reasoning that Congress may protect “persons or things in interstate commerce” even if the regulated activities are wholly intrastate in nature).

\(^206\). See *Caminetti*, 242 U.S. at 491 (reasoning that Congress has the power to regulate inherently non-commercial activities when the terms of the regulatory statute limit its application to activities that employ use of the channels of interstate commerce).

\(^207\). Cf. *Id.* (holding that Congress has power to regulate “immoral” activities involving the channels of interstate commerce).


\(^211\). United States v. Lankford, 196 F.3d 563, 571 (5th Cir. 1999) (describing travel in channels of interstate commerce as “interstate transportation”).
tionally valid even though it applies to polygamy, which is an inherently non-commercial activity.\footnote{212} Under \textit{Lopez} and \textit{Morrison}, the Mann Act is a constitutional exercise of congressional power because it regulates the channels and instrumentalities of interstate commerce.\footnote{213} According to the current explication of the channels and instrumentalities theory in \textit{Lopez} and the historical authorities cited therein, the commercial element appears to be the transportation itself. There is no requirement in the case law that the regulated activity be commercial in nature when the channels and instrumentalities theory applies. Thus, regulation of the only type of non-commercial sex that falls within the amended terms of the Mann Act—polygamy—is constitutional under the channels and instrumentalities theory. However, regulation of non-commercial sex under the Mann Act would likely be unconstitutional under the substantial-effects doctrine.\footnote{214} The differing results of these doctrines as applied to the Mann Act’s regulatory power over polygamy illustrates the constitutional “loophole” that Congress may still regulate inherently non-commercial activities by incorporating a transportation element into the statute.\footnote{215}

\textbf{B. The Substantial-Effects Doctrine}

In addition to the channels and instrumentalities theory, there are arguments that the federal government may constitutionally apply the terms of the Mann Act to regulate polygamy under the substantial-effects theory.\footnote{216} \textit{Lopez, Morrison,} and \textit{Gonzales} are the primary Supreme Court cases that govern the application of this third category. Because of the legal ambiguities in this area, it is far less certain that the regulation of polygamy under the Mann Act would survive independent of the channels and instrumentalities theory.

The reasoning of \textit{Lopez} and \textit{Morrison} raises many unresolved Commerce Clause issues; however, there is strong indication that a jurisdictional element suffices for purposes of the substantial-effects doctrine.\footnote{217} The jurisdictional element should function as a limiting mechanism on the range of activities that fall within a statute’s language, focusing the scope of the statute on activities “that additionally have an explicit connection with or effect on interstate commerce.”

\begin{itemize}
  \item \footnote{212} See \textit{Morrison}, 529 U.S. at 608-09 (citing \textit{Lopez} for that opinion’s explication of the channels and instrumentalities theory).
  \item \footnote{213} Cf. \textit{id.} (holding that Congress may regulate activities involving the use of channels and instrumentalities of interstate commerce).
  \item \footnote{214} See infra Part V.B.
  \item \footnote{215} See McGimsey, supra note 208, at 1680-81 (arguing that, under \textit{Lopez} and \textit{Morrison}, Congress still has broad regulatory power over non-commercial activities under the channels and instrumentalities theory).
  \item \footnote{216} See \textit{Morrison}, 529 U.S. at 608-09 (affirming the reasoning in \textit{Lopez} regarding the third category of permissible congressional regulation, the substantial-effects category).
  \item \footnote{217} Cf. \textit{id.} at 611-12 (citing \textit{Lopez} and reasoning that a jurisdictional element could have provided a constitutional basis for congressional regulation).
\end{itemize}
commerce.\textsuperscript{218} Thus, there are actually two separate requirements: (1) a jurisdictional element that (2) limits the scope of the law’s application to activities that bear a relation to interstate commerce.\textsuperscript{219} The Court noted that both \textit{Lopez} and \textit{Morrison} lacked such an element and further noted that if an element had been present, it may have changed the outcome.\textsuperscript{220}

The Mann Act contains an express jurisdictional element requiring transportation “in interstate commerce.”\textsuperscript{221} However, the analysis only begins with the finding of a jurisdictional element because of the appended requirement that the scope of activities relate to interstate commerce.\textsuperscript{222} Without further explanation, this requirement becomes almost circular because the class of regulated activities must “affect” interstate commerce or otherwise bear some “explicit” connection to interstate commerce.\textsuperscript{223} Thus, a jurisdictional element does not proffer a test of \textit{whether} a regulated activity substantially affects interstate commerce because the Court reiterates its requirement of a relationship between the activity and actual interstate commerce. This language essentially returns the analysis to the beginning. The only material difference between the language of the third category and the language describing a jurisdictional element as a factor to consider when evaluating a statute under the third category is that the latter lacks the word “substantial.”\textsuperscript{224} Therefore, at most, the presence of a jurisdictional element only eliminates the requirement of substantiality in the relationship between the regulated activity and interstate commerce.

The jurisdictional element in the Mann Act would probably be the strongest basis for its constitutionality as applied to polygamy under the substantial-effects doctrine but for the additional requirement of some “connection to” or “effect on” interstate commerce. Given these requirements, it is unlikely that the Court would find the Act’s application to non-commercial sex constitutional on the basis of the jurisdictional element alone. This is because the best arguments that a non-commercial criminal activity, such as polygamy, affects interstate commerce are similar to the “‘costs of crime’” and “‘national productivity’” arguments that

\begin{itemize}
  \item \textsuperscript{218} United States v. Lopez, 514 U.S. 549, 562 (1995).
  \item \textsuperscript{219} \textit{See id.} (problematically, the Court does not offer a test for how to determine whether an activity is sufficiently linked to interstate commerce).
  \item \textsuperscript{220} \textit{Morrison}, 529 U.S. at 611-12.
  \item \textsuperscript{221} White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. § 2421 (2000)).
  \item \textsuperscript{222} \textit{Lopez}, 514 U.S. at 562.
  \item \textsuperscript{223} \textit{Cf. id.} at 558-59 (“Finally, Congress’ commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.”).
  \item \textsuperscript{224} \textit{Compare id.} at 562 (requiring only an “effect on” or a “connection with” interstate commerce), \textit{with id.} at 558-59 (requiring that the regulated activity “substantially affect” or bear “a substantial relation to interstate commerce”).
\end{itemize}
the Court rejected in *Morrison*. In this way, polygamy is comparable to the
gender-motivated violence that Congress attempted to regulate in *Morrison*.

Despite the Court’s requirement of a very close relationship between the
regulated activity and interstate commerce in *Lopez*, *Gonzales* diminished the
rigidity of the requirement. The *Gonzales* majority reasoned that it needed only
a rational basis for finding that the regulated activity, “taken in the aggregate,
substantially affect[s] interstate commerce.” Both the standard of review and
the term “aggregate” are essential to the constitutional analysis of the Mann Act
in its application to polygamy. In this context, the proper inquiry is whether there
is a rational basis for concluding that the interstate transportation of persons for
the purpose of engaging in polygamy substantially affects interstate commerce in
the aggregate.

*Morrison* holds a key to the puzzle of how to apply the *Gonzales* “aggregate”
analysis. In finding that the Government’s reasoning was flawed because it
would lead to the regulation of areas of family law, the majority conceded that
“the aggregate effect of marriage, divorce, and childrearing on the national
economy is undoubtedly significant.” The Court intended to leave the
regulation of violence to the states; and the Court later explicitly rejected the
use of the aggregate effect test when the regulated activity is “noneconomic,
violent criminal conduct.” Conversely, *Gonzales* explicitly reasoned that the
aggregate effect test was the relevant inquiry without barring its application to
non-commercial activities. Though *Gonzales* does not expressly overrule the
*Morrison* limitation on the aggregate effect test, *Gonzales* may have done so by
implication.

There are two possible resolutions of the apparent conflict between *Morrison*
and *Gonzales* in reference to the aggregate effect test. Either *Gonzales* impliedly
overruled that portion of *Morrison* or the formulation of the test in *Gonzales* does
not apply to the regulation of non-commercial violent crimes. If the former is the
correct interpretation, then the regulation of interstate travel for the purpose of
polygamy easily meets rational basis scrutiny because, as *Morrison* clearly states,

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225. See *Morrison*, 529 U.S. at 612-13 (reasoning that these arguments are ineffective because the same arguments could be made to support the regulation of any crime).
226. Cf. id. at 613 n.5 (noting that the transportation element in another portion of the Violence Against Women Act was clearly constitutional under the channels of interstate commerce category).
227. Cf. *Lopez*, 514 U.S. at 558-59 (holding that the activity should “substantially affect” interstate commerce).
229. Id. at 22.
230. *Morrison*, 529 U.S. at 615-16.
231. See id. (employing a slippery slope argument to rebut the Government’s reasoning).
232. Id. at 617.
234. See id. (applying the aggregate effect test without limiting the analysis to commercial activities).
the aggregate instances of marriage substantially affect the economy.\textsuperscript{235} If the aggregate effect test is inapplicable to non-commercial violent crimes,\textsuperscript{236} the issue becomes whether polygamy is a non-commercial violent crime.

Polygamy is both non-commercial and criminal conduct, but polygamy probably does not qualify as an inherently violent activity. Though some individual polygamous marriages may involve violence, polygamy itself is not a violent crime per se but merely an illegal form of marriage.\textsuperscript{237} If the Court’s use of the word “violent” is significant, then the regulation of polygamy likely survives the more conservative interpretation of the interplay between \textit{Morrison} and \textit{Gonzales}. It would probably be reasonable to conclude that polygamy imposes a substantial effect on interstate commerce in the aggregate.\textsuperscript{238} However, there is indication that the Court’s use of the word “violent” was not intended as an additional limitation. The Court specifically claims that “the noneconomic, criminal nature of the conduct at issue was central to our decision in [the \textit{Lopez}] case.”\textsuperscript{239} This suggests that the Court intended most non-commercial crimes to be left to the regulation of the states, regardless of whether the crime is violent. Additionally, \textit{Lopez} rejects the notion that the Court may uphold a criminal statute regulating non-commercial activities with the aggregate effect test.\textsuperscript{240} If the \textit{Morrison} Court intended to reject the aggregate effect test’s application to all non-commercial crimes (regardless of the lack of an element of violence) and if \textit{Gonzales} did not overrule this portion of \textit{Morrison} by implication, then there is no constitutional basis for regulating polygamy under the substantial-effects doctrine.

As an alternative to the ambiguous application of the aggregate effect test to non-commercial criminal statutes, \textit{Gonzales} also offered the national market test. \textit{Gonzales} stated that Congress may regulate activities that pose “a threat to a national market” in their aggregate.\textsuperscript{241} Though the institution of marriage may rely on a “market” of singles in the social sense of the word, marriage probably does not involve a “national market” in the fundamental, economic sense of the term.\textsuperscript{242} Failure to regulate intrastate instances of polygamy would not “undercut”

\begin{itemize}
\item \textsuperscript{235} See \textit{Morrison}, 529 U.S. at 615-16 (listing marriage and other areas of family law as affecting interstate commerce in the aggregate).
\item \textsuperscript{236} Cf. \textit{United States v. Lopez}, 514 U.S. 549, 561 (1995) (also rejecting the use of the aggregate effect test in application to “a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise”).
\item \textsuperscript{237} But cf. \textit{Blake}, supra note 4 (describing polygamous marriages involving underage girls as comparable to violent child sex crimes).
\item \textsuperscript{238} See \textit{Gonzales}, 545 U.S. at 22 (emphasizing the Court’s duty to apply the rational basis standard of review).
\item \textsuperscript{239} \textit{Morrison}, 529 U.S. at 610.
\item \textsuperscript{240} \textit{Lopez}, 514 U.S. at 561.
\item \textsuperscript{241} \textit{Gonzales}, 545 U.S. at 17.
\item \textsuperscript{242} Cf. \textit{BLACK’S LAW DICTIONARY} (8th ed. 2004) (defining “market” as “[a] place of commercial activity in which goods or services are bought and sold” and defining “open market” as “[a] market in which any buyer or seller may trade and in which prices and product availability are determined by free competition”).
\end{itemize}
federal regulation of an interstate “commodity” as in *Gonzales*, since wives are not generally traded as commodities.\(^{243}\) Thus, the best way to argue that polygamy threatens a national market is to employ the taboo “costs of crime” and “national productivity” reasoning.\(^{244}\) Since the court rejected this reasoning twice before,\(^{245}\) polygamy probably does not fit into the national market test for the third *Lopez* category.

In *Gonzales*, the majority emphasized the facts that (1) the regulated activities were economic in nature, and (2) the regulating statute was a “comprehensive framework” of controlled substance regulation as opposed to “the discrete prohibition established by the Gun-Free School Zones Act of 1990.”\(^{246}\) The Court considered these factors significant in applying the substantial-effects test and distinguishing *Lopez*.\(^{247}\) The Mann Act is more comparable to the “discrete prohibition” in *Lopez* than the “comprehensive framework” in *Gonzales*.\(^{248}\) Additionally, the non-commercial sexual activities, such as polygamy, that may be prosecuted under the terms of the Mann Act, are not inherently economic activities like the marijuana use in *Gonzales*.\(^{249}\) Thus, the regulation of polygamy under the substantial-effects category would likely fail under *Gonzales* because both of the elements that the Court used to distinguish *Gonzales* from *Lopez* are lacking in the context of the Mann Act’s application to polygamy.

Both *Lopez* and *Morrison* support another argument that Congress may not regulate polygamy based on the third *Lopez* category. In *Lopez*, the Court specifically rejected the Government’s “costs of crime” and “national productivity” arguments because of a slippery slope toward the regulation of all areas of criminal and family law, areas of regulation that have traditionally been left to the states.\(^{250}\) The majority opinion cited “marriage” as an example of a

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244. *Lopez*, 514 U.S. at 564 (reasoning that these arguments lead down a slippery slope toward a regulation of all crimes and areas of family law).


246. *Gonzales*, 545 U.S. at 24-25.

247. *See id.* at 45-46 (O’Connor, J., dissenting) (“Today’s decision allows Congress to regulate intrastate activity without check, so long as there is some implication by legislative design that regulating intrastate activity is essential . . . to the interstate regulatory scheme.”).

248. *See also id.* at 24-25 (majority opinion) (identifying the wide reach of the statute and its complex design as factors making it a “comprehensive framework”). *Cf. id.* discussion *supra* Part III.A-B.


250. *Lopez*, 514 U.S. at 564; *see also* United States v. Morrison, 529 U.S. 598, 615-16 (2000) (reasoning that the Government’s argument was flawed because it would necessitate the regulation of marriage and other areas of family laws).
family area that the federal government should not regulate.\textsuperscript{251} Because polygamy is not merely a crime but a form of marriage, the \textit{Lopez} reasoning invites the argument that Congress may not regulate polygamy with the substantial-effects doctrine. Because the Court was concerned about congressional regulation of criminal and family law, it is likely that the Court would hesitate to uphold the regulation of an activity that is both a crime and a form of marriage.

VI. CONCLUSION

In conclusion, whether polygamy may be regulated under the substantial-effects doctrine is a much closer issue than its regulation under the channels and instrumentalities theory. Unless \textit{Gonzales} overruled the limitations on the aggregate effect test, the case law indicates that the Mann Act as it applies to polygamy would be unconstitutional under the substantial-effects doctrine.\textsuperscript{252} However, \textit{Lopez} and \textit{Morrison} did not close the door on the regulation of polygamy.\textsuperscript{253} Federal regulation of polygamy under the terms of the Mann Act is constitutional.\textsuperscript{254} Because the Mann Act’s terms clearly fall within the channels and instrumentalities theory, the Act is constitutional even though it would probably not withstand the substantial-effects analysis.\textsuperscript{255} Thus, polygamous relationships are still subject to federal limitations.

The letter from Senate Majority Leader Harry Reid to the Attorney General may prove prophetic.\textsuperscript{256} The growing concern about polygamy among Mormon fundamentalists in the western states and among Islamic immigrants in New York may lead to federal Mann Act prosecutions.\textsuperscript{257} Alternatively, Congress may craft legislation that is more specifically tailored to criminalize interstate transportation for the purpose of polygamy. In either case, it seems that the remaining way for Congress to regulate such non-commercial, illicit sexuality is by narrowing the scope of the statute to activities that utilize interstate channels or instrumentalities.

\textsuperscript{251} \textit{Lopez}, 514 U.S. at 564.
\textsuperscript{252} See supra text accompanying notes 227-38.
\textsuperscript{253} See supra Part V.A.
\textsuperscript{254} See supra text accompanying notes 184-213.
\textsuperscript{255} See supra Part V.B.
\textsuperscript{256} See Press Release, supra note 5 (asking the U.S. Attorney General to bring federal charges against Warren Jeffs).
\textsuperscript{257} See supra notes 7-12, 24 and accompanying text.