Constitutional Principle, Partisan Calculation, and the Beveridge Child Labor Bill

LOGAN EVERETT SAWYER III

Following the 1906 midterm elections, Indiana Senator Albert Beveridge was excited to return to Washington to introduce a bill that would prohibit child labor in the nation's factories, mines, and mills. He hoped the bill would curtail the unpopular practice and help rebrand his Republican Party as the nation's progressive party. The Party's old guard, however, proved uncooperative. Recognizing the unpopularity of child labor, they fought the bill on constitutional grounds and challenged Beveridge with a parade of horribles. If Congress could constitutionally regulate child labor, they asked, could it not also regulate the hours or wages of adults? Could it not prevent a man from joining a labor union? Or require it? One would have expected Beveridge—who opposed such regulations—to blunt that criticism with some legal distinction. Instead, he embraced it. Would Beveridge go so far as to claim that Congress could prohibit the interstate shipment of cotton picked by children, asked one Senator. "Yes," Beveridge retorted, "or [by] a red-headed girl."[1]

1. 41 Cong. Rec. 1808.

Logan Sawyer is an assistant professor of law at the University of Georgia School of Law <lesawyer@uga.edu>. For help at various stages of the project he thanks Brian Balogh, Dan Coenen, Charles McCurdy, Dan Ernst, Paul Heald, Nancy Leong, Stephanie Hunter McMahon, Tim Meyer, Willow Meyer, Cynthia Nicoletti, Laura Phillips Sawyer, Robin West, G. Edward White, David Tanenhaus and the anonymous *Law and History Review* reviewers. Nicholas Rolader provided able research assistance.

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Historians have noted this episode, but hurried past it, seeing little more than a bill that lacked popular support.[2] Beveridge's insistence on the constitutionality of his bill, however, is more than that. It is a case study of constitutional politics in the early twentieth century. The role of constitutional argument in Congress is denigrated by broader studies of Progressive Era legislative and party politics as well as narrower histories of child labor regulation. They generally ignore it or portray it as camouflage for "real" political motivations.[3] That framework, however, cannot

2. Walter I. Trattner, *Crusade for the Children: A History of the National Child Labor Committee and Child Labor Reform in America* (Chicago: Quadrangle Books, 1970); John Braeman, "Albert J. Beveridge and the First National Child Labor Bill," *Indiana Magazine of History* 60 (1964): 1–36; and Stephen B. Wood, *Constitutional Politics in the Progressive Era: Child Labor and the Law* (Chicago: University of Chicago Press, 1968).

3. Works examining earlier periods have increasingly recognized the interaction between constitutional argument and party politics: Charles W. McCurdy, *The Anti-Rent Era in New York Law and Politics, 1839–1865* (Chapel Hill: University of North Carolina Press, 2001); and Gerald Leonard, *The Invention of Party Politics: Federalism, Popular Sovereignty, and Constitutional Development in Jacksonian Illinois* (Chapel Hill: University of North Carolina Press, 2002), as have studies of interest groups during the Progressive Era: Daniel R. Ernst, *Lawyers Against Labor: From Individual Rights to Corporate Liberalism* (Urbana: University of Illinois Press, 1995); and William E. Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge, MA: Harvard University Press, 1991). Nevertheless, the assumptions those works challenge—that political actors saw constitutional law as either inflexible boundaries of legitimate politics or as rhetorical cover for preferences developed independently—still support specific studies of federal child labor reform and more general examinations of legislative and party politics in the Progressive Era. John Braeman's examination of the Beveridge Bill ignores how constitutional structure shaped Beveridge's political arguments and does not explain why he accepted the central argument against his bill. Braeman, "Beveridge and the Child Labor Bill." Stephen Wood's examination of the successful passage of federal child labor legislation a decade after the Beveridge Bill indicates that constitutional arguments against that similar bill were merely camouflage for economic and political concerns. Wood, *Constitutional Politics in the Progressive Era*, 56–58. As an important Progressive Era politician, Beveridge has been the subject of examination, including two full biographies: John Braeman, *Albert J. Beveridge: American Nationalist* (Chicago: University of Chicago Press, 1971); and Claude G. Bowers, *Beveridge and the Progressive Era* (Cambridge: Riverside Press, 1932). Those examinations recognize that Beveridge was a lawyer as well as a talented politician, but do not reckon with the way constitutional argument shaped Beveridge's political strategies. Robert Harrison, *Congress, Progressive Reform, and the New American State* (New York: Cambridge University Press, 2004); and M. Elizabeth Sanders, *Roots of Reform: Farmers, Workers, and the American State, 1877–1917* (Chicago: University of Chicago Press, 1999) are thoughtful examinations of legislative politics in the Progressive Era, but their focus on political and economic issues implies that constitutional politics were unimportant. The examinations of party politics are the same. Lewis L. Gould, *Reform and Regulation: American Politics from Roosevelt to Wilson*, 2nd ed. (New York: Alfred Knopf, 1986); David Sarasohn, *The Party of*

explain why Beveridge respected the integrity of his constitutional argument when doing so undermined his political goals. His behavior is better understood as a striking example of the independent effect of constitutionalism on Progressive Era legislative and party politics.

Beveridge was no prisoner of Supreme Court doctrine. He knew passing federal child labor legislation would require him to redefine the reach of Congress's power to regulate interstate commerce and, he manipulated accepted sources of constitutional law—most importantly the Supreme Court's recent decision in the Lottery Case, *Champion v. Ames*—to produce an original argument that extended federal power far beyond traditional boundaries.[4] However, his willingness to re-characterize well-established principles of constitutional federalism did not extend to another legal principle that was too clear to ignore and to important to popular regulatory programs to reject.

That principle has been noted by several scholars, but its implications for legislative and party politics have been ignored.[5] It was developed in a series of decisions interpreting the Sherman Antitrust Act, in which the Supreme Court established a unique relationship between the right of liberty of contract and Congress's commerce power. Generally, a legitimate regulation of interstate commerce would still be unconstitutional if it violated a right protected by the Constitution; a legitimate regulation of interstate commerce would, nevertheless, be unconstitutional, for example, if it took private property without due compensation. In 1907, however, a legitimate regulation of interstate commerce could not, by definition, violate liberty of contract.

That principle was also of crucial political importance: it ensured that liberty of contract did not interfere with antitrust prosecutions, the most

Reform: Democrats in the Progressive Era (Jackson, MS: University Press of Mississippi, 1989); Horace Samuel Merrill and Marion Galbraith Merrill, *The Republican Command, 1897–1913* (Lexington: University Press of Kentucky, 1971); and James Holt, *Congressional Insurgents and the Party System, 1909–1916* (Cambridge, MA: Harvard University Press, 1967).

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

5. Discussing the principle are Barry Cushman, *Rethinking the New Deal Court* (New York: Oxford University Press, 1998): 109–112; Barry Cushman, "Doctrinal Synergies and Liberal Dilemmas: The Case of the Yellow-Dog Contract," *The Supreme Court Review* (1992): 240–41; Owen M. Fiss, *Troubled Beginnings of the Modern State: 1888–1910* (New York: Macmillan Publishing Co., 1993), 119–28, 168; and John E. Semonche, *Charting the Future:The Supreme Court Responds to a Changing Society, 1890–1920* (Westport, CT: Greenwood Press, 1978), 215. As I discuss in Section IV, the principle meant that an expansion of Congress's commerce power would increase the scope not just of federal power but also of government power more generally. It thus gave opponents of hours and wages regulation a powerful reason to oppose any expansion of federal power.

popular and important regulatory program of the time. As a result, Beveridge never questioned the principle and it drove him to accept the parade of horribles that was the primary argument against his bill. Beveridge's behavior thus contradicts the simple view that politics determined legal interpretation, and reveals, instead, a context-dependent and reciprocal relationship between the period's politics and its constitutional law; a relationship that encouraged politicians to play an active role in developing constitutional meaning.

I. Beveridge, the Republican Party, and the Politics of Federal Child Labor Reform

Beveridge was excited about federal child labor regulation for a variety of reasons. He seemed to genuinely oppose the practice on moral and practical grounds,[6] and personal ambition also played an important role. When he learned that Henry Cabot Lodge, the Republican senator from Massachusetts, also planned to introduce a child labor bill, he responded with anger.[7] "Lord! but I am mad, angry, hot, frothing, etc.," he wrote the editor of the *Saturday Evening Post*. "[H]ere comes that unspeakable Lodge trotting down to Washington and announced last Wednesday that he is going to introduce a national bill to stop child labor. . .." "You must now," he urged him, "have that editorial on 'Pass the Beveridge Bill.'"[8] However, Beveridge's private correspondence indicates that he was most interested in the bill's potential to help transform the Republican Party into a politically dominant progressive party.

Beveridge introduced his bill when there was a significant debate over the future of the Republican Party. By 1906, the Party was used to success. Over the previous 20 years, it had enjoyed an average advantage of 18 seats in the Senate and 64 in the House. Over the same time, it had also won every presidential election by increasing margins, culminating with Theodore Roosevelt's 1904 defeat of Alton Parker by almost 200 electoral and 2,500,000 popular votes. The party built that success with a discourse

6. Albert J. Beveridge, "Child Labor and the Nation," *Annals of the American Academy of Political and Social Science* 29 (1907): 115–24; and Braeman, "Beveridge and the Child Labor Bill," 17.

7. Lodge submitted S. 6730, "To prohibit the employment of children in the manufacture or production of articles intended for interstate commerce," in the second session of the Fifty-ninth Congress. Lodge, unlike Beveridge, did little to push his bill forward, letting it die in the Committee on Education and Labor, and working instead for the passage of a child labor regulation for the District of Columbia. 41 Cong. Rec. 197–202 (1907).

8. Beveridge to George Lorimer, December 3, 1906, Papers of Albert J. Beveridge, Library of Congress (hereinafter cited as Beveridge Papers).

of shared interests and an economic program that wedded working class Northerners and Westerners to Northern industrialists with high tariffs that protected industrial jobs and profits, supported prices for Western agricultural products, and funded generous pensions for Union Civil War veterans.[9]

That winning coalition, however, came under pressure as increasing industrialization, urbanization, and immigration undermined faith in the shared interests of capital and labor and put economic regulation at the center of political debate.[10] When a series of exposés in 1906 convinced much of the public that business interests had systematically corrupted politics, Congress responded with a remarkable wave of progressive legislation that drew the Republican Party's intra-party tensions into plain view.[11] That legislation included the Hepburn Act, which allowed the federal government to set railroad rates, as well as the Pure Food and Drug Act and Meat Inspection Amendments, two iconic pieces of legislation made famous by Upton Sinclair's *The Jungle*. The first Federal Employers Liability Act, which made it easier for railroad workers to recover in tort also made it through a Congress that even at the time was recognized as history making.[12] The Republican Party's congressional leadership was largely ambivalent about that legislation. Led by House Speaker Joe Cannon and Senate Majority Leader Nelson Aldrich, the Republican Party's "old guard" preferred traditional Republican issues and supported the progressive legislation of 1906 only under pressure.[13] The driving force for the legislation came from an alliance of Democrats and progressive Republicans committed to the active use of government power. Robert LaFollette and William Borah were among their leaders, and by 1906 Albert Beveridge had joined them.[14]

Beveridge began his career as a traditional Republican.[15] He praised the Party for saving the Union; decried the minting of silver; argued that the tariff advanced the economic interests of laborers, farmers, and businesses

9. John Gerring, *Party Ideologies in America, 1828–1996* (New York: Cambridge University Press, 1998), 57–124; and Richard Franklin Bensel, *The Political Economy of American Industrialization, 1877–1900* (Cambridge: Cambridge University Press, 2000).

10. Gould, *Reform and Regulation*; and Richard L. McCormick, *The Party Period and Public Policy: American Politics from the Age of Jackson to the Progressive Era* (New York: Oxford University Press, 1986).

11. Upton Sinclair's *The Jungle* (New York, Doubleday, Page & Co., 1906); David Graham Phillips's *The Treason of the Senate*, Cosmopolitan Magazine, February, 1906; and Lincoln Steffens' *The Struggle for Self Government* were all published that year. McCormick, *The Party Period and Public Policy*, 332.

12. Harrison, *Congress, Progressive Reform, and the New American State*, 107.

13. Merrill and Merrill, *The Republican Command, 1897–1913*, 4; and Harrison, *Congress, Progressive Reform, and the New American State*, 194–97.

14. Harrison, *Congress, Progressive Reform, and the New American State*, 185.

15. Braeman, *Albert J. Beveridge: American Nationalist*, 20–21, 87–88.

alike; and joined the call for American expansion abroad.[16] After his 1898 election to the Senate, his loyalty and obvious talents earned him rapid advancement. Within 4 years he had joined the Republican Steering Committee, which directed the Republican caucus and thus largely controlled the Senate's agenda.[17] But after winning his second term in 1904, Beveridge split with the Senate's old guard leadership.[18]

Beveridge was no radical. During the fight for child labor regulation he continued to call himself a conservative and an "active defender of honestly-gotten wealth,"[19] but increased union membership, a growing socialist party, and revelations of political corruption convinced him that government intervention was necessary.[20] "We must turn," he told a Republican Party rally in 1906, "to these new social and economic problems which have to do with the daily lives and happiness of human beings and which press for answer; questions that involve the righteousness of American business, a juster distribution of wealth . . . the physical, mental, moral upbuilding of all the workers in factory and on farm . . . [and] the public control of great public businesses."[21]

The first session of the Fifty-ninth Congress in 1906 made Beveridge's shift clear. In the Hepburn Act debates, he bucked the Republican Senate leadership to fight for narrow court review of railroad rate decisions.[22] He played a crucial role in bringing the Pure Food and Drug Act to a vote in the Senate, then drafted the Meat Inspection Amendments, led the floor fight, and helped craft the final compromise.[23] Indicating his feelings toward federal power, Beveridge bragged his Meat Inspection Amendments were "the most perfect meat inspection measure in the world" and "the most pronounced extension of federal power in every direction ever enacted."[24]

16. Ibid., 1–81.

17. Harrison, *Congress, Progressive Reform, and the New American State*, 34–35; and Braeman, *Albert J. Beveridge: American Nationalist*, 80.

18. Braeman, *Albert J. Beveridge: American Nationalist*, 97–121.

19. Beveridge to Isaac Seligman, November 13, 1907, Beveridge Papers.

20. John Braeman, "The Square Deal in Action: A Case Study in the Growth of the 'National Police Power'," in *Change and Continuity in Twentieth-Century America*, ed. John Braeman, Robert H. Bremner, and Everett Walters (Columbus, OH: Ohio State University Press, 1964), 54, 78.

21. Reprinted at Albert Beveridge, *The Meaning of the Times and Other Speeches* (Freeport, NY: Books for Libraries Press, 1968), 263–64.

22. Braeman, *Albert J. Beveridge: American Nationalist*, 100–101.

23. Braeman, "Beveridge and the Child Labor Bill," 6; and Oscar E. Anderson, *The Health of a Nation: Harvey W. Wiley and the Fight for Pure Food* (Chicago: University of Chicago Press, 1958), 176.

24. Beveridge to Albert Shaw, May 26, 1906, Beveridge Papers.

The 1906 elections pushed Beveridge farther away from the Republican Party leadership. Whereas the old guard urged the party to "stand pat" on the accomplishments of the Fifty-ninth Congress and return to a traditional Republican platform, Beveridge pushed to remake the Party in the image of Theodore Roosevelt. The country, Beveridge wrote to Roosevelt, was "sick and tired of that false, reactionary and foolish motto: 'Let well enough alone.'" The old guard "entirely fail[] to comprehend the great movement of the American millions which you are leading." "You are the issue," Beveridge told Roosevelt, "whoever fights on *that* issue will win; whoever fights on some other issue will lose."[25]

Roosevelt described the vision Beveridge had in mind in a widely publicized speech in Harrisburg, Pennsylvania before the 1906 election. There, Roosevelt called for aggressive use of federal power—federal income tax, federal incorporation of interstate corporations, national marriage laws, campaign regulation, and a postal savings bank—and criticized those who erected constitutional barriers to such programs.[26] The "ingenious legal advisers of the holders of vast corporate wealth," Roosevelt argued, made the Constitution "the excuse for government paralysis," "a justification for refusing to attempt the remedy of evil instead of as the source of vital power necessary for the existence of a mighty and ever-growing nation." The "narrow construction of the powers of the National Government," Roosevelt said, was "the chief bulwark of those great moneyed interests which oppose and dread any attempt to place them under efficient government control."[27]

In that context, Beveridge's discovery on the campaign trail in 1906 was exciting indeed. Stumping for his Republican colleagues, Beveridge had expected support for his proposals for an extension of his Meat Inspection Amendments, a federal inheritance tax, tariff revision, direct primaries, and tighter antitrust regulation, but he quickly found that the loudest cheers were for a new proposal: the federal regulation of child labor. "[F]rom Maine to Nebraska," he wrote Roosevelt, "people cheered national regulation of child labor more than any other subject."[28] Those cheers showed Beveridge a way to advance his career, reshape the Republican Party, and ensure his Party's control of the national government.

25. Beveridge to Theodore Roosevelt, August 21, 1906, Papers of Theodore Roosevelt, Library of Congress.

26. Gould, *Reform and Regulation*, 96–98; and "Roosevelt Says Nation Must Curb Plutocracy," *New York Times*, October 5, 1906, 4. For Beveridge's support of this program, see Albert J. Beveridge to Theodore Roosevelt, November 24, 1906, Beveridge Papers.

27. "Roosevelt Says Nation Must Curb Plutocracy," 4.

28. Beveridge to Theodore Roosevelt, October 22, 1907, Beveridge Papers.

Upon his return to Washington, Beveridge began recruiting potential allies by emphasizing the political benefits a child labor law would provide the Republican Party. The Party's losses in the 1906 election, he wrote one Republican congressman, were the result of doubts that it truly supported progressive legislation. A federal child labor law could help correct that problem.[29] The bill, he wrote President Roosevelt, used the interstate commerce powers of Congress to cure nationwide evils, just as Roosevelt had suggested in his "great Harrisburg speech."[30] We must, he wrote Roosevelt's private secretary, "beat [the Democrats] to the goal and score a touchdown before they begin to play."[31]

Despite these advantages, however, Beveridge knew he would have to provide a convincing constitutional argument to support his bill. States were widely understood to be responsible for both labor and child welfare regulations, and Beveridge had seen constitutional arguments nearly sink the Pure Food and Drug Act, his Meat Inspection Amendments, and the Hepburn Act just months earlier.[32] He therefore worked assiduously to develop not only winning political arguments but winning constitutional arguments as well.

II. Federalism and Federal Child Labor Legislation

Beveridge was well positioned to generate those constitutional arguments. He was a creative and thoughtful lawyer and generated a sophisticated set of claims that both supported his bill and undermined well-established principles of constitutional federalism. He had begun his legal career with a successful Indianapolis firm that included a former United States Senator,[33] then quickly developed a practice that dealt with high profile political and constitutional issues. He had taken part in a dramatic contest over the lieutenant governorship of Indiana, and the arguments he developed in a case concerning the constitutionality of state taxes on insurance policies were largely adopted by the United States Supreme Court.[34]

Beveridge also used constitutional argument in his political speeches. Especially noteworthy is a speech he gave in 1898 as he campaigned for the United States Senate. It anticipated the arguments of Roosevelt's Harrisburg speech and revealed Beveridge's nationalistic and teleological

29. Beveridge to Butler Ames, November 14, 1906, Beveridge Papers.
30. Beveridge to Theodore Roosevelt, November 24, 1906, Beveridge Papers.
31. Beveridge to William Loeb, November 12, 1906, Beveridge Papers.
32. Beveridge to Albert Shaw, November 22 1906, Beveridge Papers.
33. Bowers, *Beveridge and the Progressive Era*, 32.
34. Ibid, 37, 40–41.

understanding of constitutional development. For Beveridge, the Constitution's keystone was the broad goals of the Preamble. Increased federal power did not distort the Constitution; it fulfilled its promise because it reflected the growing nationalism of the American people. "[M]ere lawyer[s] and formalist[s]," Beveridge said, had challenged the Constitution's potential for growth, but "jurists and statesmen" had answered. Following John Marshall, whose career Beveridge would later celebrate in his noted biography, the jurists and statesmen realized that "whatever may be essential to the development of [American] Nationality lies latent in [the Constitution's] general terms, awaiting the people's necessity to call it into action." They properly rejected "doctrinaires" such as Jefferson and Madison, to discover "unexpected powers and duties in the National government."[35] That process had led to the use of federal troops to break the Pullman strike, a policy that followed Washington's repression of the Whiskey Rebellion and Andrew Jackson's rejection of the Nullifiers.[36]

Beveridge knew his legal experience would be necessary to defend his child labor bill, because the bill challenged the system of dual federalism, a vision of federal and state authority that by 1900 had a decades-long legal pedigree. Originating in opinions of the Marshall Court and institutionalized during Taney's chief justiceship, dual federalism was the dominant view of the relationship between the federal and state government throughout the nineteenth century. Where Beveridge emphasized the Preamble's broad goals, dual federalism stressed Article I's enumeration of powers and the Tenth Amendment. It understood those provisions to imply that state and federal authority operated on constitutionally defined spheres of sovereign authority with little overlap. The federal government's sphere included interstate commerce and the other subjects outlined in Article I. The states retained control over powers not delegated, including, most importantly, the "police power," a vaguely defined authority to promote public health, safety, morality, and the general welfare.[37] The Supreme Court played umpire, using its expertise to guard the boundaries of state and federal authority. It examined a limited variety of evidence, including the statute itself, and, later, facts susceptible to judicial notice, to determine

35. Albert Beveridge, *The Vitality of the American Constitution* (Address delivered before the Allegheny County Bar Association) (Pittsburgh: The Eichbaum Press, 1898), 10–11.

36. Ibid., 19.

37. See, for example, *Champion v. Ames*, 364–65; Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* (Chicago: Callaghan & Company, 1904); and Everett V. Abbot, "The Police Power and the Right to Compensation," *Harvard Law Review* 3 (1889): 189–205.

the purpose of the statute, which determined whether the statute was an exercise of federal or state power.[38]

Overlap between federal and state authority was rare. Some minor subjects could be regulated by the federal commerce power and the states' police power, including harbor and quarantine regulations, but overlap was rare, because the scope of the federal police power was tightly restricted.[39] The federal government could only exercise a police power in geographic areas where there was no existing state authority: the Territories and the District of Columbia. Chief Justice Salmon Chase made this quite clear in striking down a federal ban on certain types of heating oil in 1869:

> Standing by itself, [the heating oil ban] is plainly a regulation of police . . . As a police regulation, relating only to the internal trade of a state, it can only have effect where the legislative authority of Congress excludes, territorially, all state legislation. . . This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion.[40]

This limit on the federal police power suggested that the federal commerce power was restricted to improving the efficiency of interstate trade and protecting it from state interference. That view was supported by the historical justification for the federal commerce power and the lack of any affirmative exercises of the commerce power for most of the nineteenth century.[41]

Dual federalism, therefore, suggested that the protection of the welfare of children was beyond federal competence, but Beveridge believed that he had found an answer. "I have worked it out very carefully," he wrote an ally.[42] The federal government cannot, "of course, pass a federal statute directly affecting the mines and factories—that is the province of the States."[43] But Congress could use its commerce power to prevent interstate carriers from accepting or transporting any products whenever that prohibition served the national interest. It could, therefore, use its commerce

38. Caleb Nelson, "Judicial Review of Legislative Purpose," *New York University Law Review* 83 (2008): 1784–882.

39. Thomas McIntyre Cooley, *The General Principles of Constitutional Law in the United States of America* (Boston: Little, Brown & Co., 1898), 70. If both the states and the federal government attempted to regulate in one of those areas, the Supremacy Clause ensured that the federal regulation controlled.

40. *United States v. Dewitt*, 76 U.S. 41, 44–45 (1869).

41. John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* (Boston: Houghton, Mifflin and Company, 1886), 312.

42. Beveridge to Albert Shaw, November 13, 1906, Beveridge Papers.

43. Ibid.

power to exercise a kind of federal police power outside the federal government's exclusive territorial jurisdictions.

He justified this conclusion by arguing that the federal government's authority to promote health, safety, morality, and the general welfare where it exercised exclusive territorial jurisdiction was but one instance of a larger principle: that the federal government could pursue such purposes, or, colloquially, exercise a federal police power, in any area of exclusive federal authority. Because Congress had exclusive authority over interstate commerce and because the regulation of commerce could include the prohibition of particular goods, Congress had "absolute and unlimited power to prevent carriers of interstate commerce from accepting or transporting the products of factories and mines employing child labor."[44] His child labor bill was based on that theory. It prohibited common carriers from shipping in interstate commerce the products of any factory or mine without first receiving an affidavit attesting that the business employed no child younger than 14 years of age. It penalized shipping goods without an affidavit and filing false affidavits.[45]

Beveridge, however, did not rest on such generalities. He generated a sophisticated set of legal arguments that within a decade supported the passage of the Keating–Owen Child Labor Act in Congress and anticipated Justice Oliver Wendell Holmes's famous dissent in *Hammer v. Dagenhart*.[46] The Constitution, Beveridge noted, gave Congress power to regulate foreign commerce, commerce between the states, and commerce with the Indian tribes in a single clause. That suggested that Congress had identical authority over each category. If Congress could prohibit the importation of foreign goods for police power purposes, it could also prohibit the movement of goods in interstate commerce, to promote the welfare of the nation's children. Furthermore, before the ratification of the Constitution, states could protect health, safety, or the general welfare by preventing the importation of particular goods, and the Constitution transferred all of the states' power over interstate commerce to the federal government. That delegation, therefore, must have included the power to prohibit the interstate shipment of goods in order to advance purposes associated with the police power. Beveridge also supported his position with legislative precedents: in 1882, Congress prohibited the interstate

44. Ibid.

45. 41 Cong. Rec. 1552 (1907).

46. *Hammer v. Dagenhart*, 247 U.S. 251 (1918); Brief for Appellants, *Hammer v. Dagenhart*, 247 U.S. 251 (No. 704); and To Prevent Interstate Commerce in the Production of Child Labor, S. Rep. 64-58, at 16–23 (1916).

shipment of nitroglycerine; in 1902, falsely labeled dairy products; in 1903, cattle without a federal certificate; and in 1905 quarantined cattle.[47]

Beveridge's most important authority, however, was *Champion v. Ames,* a 1903 Supreme Court decision popularly known as the "Lottery Case".[48] The decision, which Beveridge called "one of the six greatest opinions in the whole history of jurisprudence," upheld an 1895 law that tried to stop interstate lotteries by prohibiting private carriers from moving lottery tickets in interstate commerce.[49] Justice Harlan's opinion for a narrow majority of five held that Congress could exercise its commerce authority to pursue non-economic ends and that prohibition of lottery tickets in interstate commerce was an appropriate means to stop the evil created by lotteries. Harlan seemed driven by a concern that only Congress could address the evil produced by the interstate shipment of lottery tickets. The Court's dormant Commerce Clause doctrine put regulation of interstate commerce beyond the power of the states, Harlan noted. States could prohibit the purchase or sale of alcohol, but they could not prohibit the shipment of alcohol to private parties within their boundaries. Likewise, they could prohibit lotteries within their territory, but not the shipment of lottery tickets into it. Because Harlan believed the Constitution would not leave substantive evils beyond the power of the government, he concluded that Congress could use its authority to address the evils of lotteries in its areas of responsibility just as the states could in the areas entrusted to their care. "We should hesitate long," wrote Harlan, "before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end."[50]

How far this power to prohibit extended, however, remained unclear. It "would not be difficult to imagine legislation" that would "infringe rights secured or protected by [the Constitution]," wrote Harlan. But he declined to draw any lines. "The present case," he felt, "does not require the court to declare the full extent of the power that Congress may exercise in the regulation of commerce among the states."[51] Beveridge, nevertheless, believed the decision sufficient to support his child labor bill. If Congress could prohibit the interstate movement of lottery tickets to protect the morality of the nation, it could prohibit the interstate movement of goods produced by

47. Beveridge to Theodore Roosevelt, October 22, 1907, Beveridge Papers; 41 Cong. Rec. 1881–83.

48. *Champion v. Ames,* 321.

49. Albert Beveridge and William Jennings Bryan, "The Nation Versus States Rights I," *The Reader* 9 (1907): 360.

50. *Champion v. Ames*, 357–58.

51. Ibid., 362–63.

children to protect the welfare of the nation's future citizens.[52] The decision "completely covers every point," he wrote President Roosevelt. Its holding was "decisive."[53]

III. Constitutional Argument in Congress

In late 1906, Beveridge believed that both public opinion and the law were on his side. "No constitutional argument, plausible or otherwise, can be made against" the bill, Beveridge wrote Roosevelt.[54] "By thunder," he wrote a supporter, "I begin to think I will get the bill through next session and possibly, though not probably, this session. It is sure the most popular reform now before the people."[55] But he quickly learned that he had underestimated the strength of the opposition. The source of that opposition has conventionally been attributed to the self-interest of Northern businesses that employed many children, traditional Southern opposition to federal power, and the ambivalence of the labor movement and President Roosevelt.[56] This explanation may be incomplete, but whatever their motivation, it is clear Beveridge's old guard opponents publicly justified their opposition on constitutional grounds.[57] Their opposition was most effective in the House. Beveridge failed to convince Massachusetts Congressman Butler Ames to introduce a companion child labor bill in the House, but found a willing partner in Herbert Parsons of New York.[58] The Republican leadership of the House responded by immediately sending Parsons' bill to the Judiciary Committee, which unanimously reported that the bill was unconstitutional. "Under the police power," reported the Committee, "the State can not regulate interstate

52. Beveridge to Theodore Roosevelt, October 22, 1907, Beveridge Papers; and 41 Cong. Rec. 1875–77, 81.

53. Beveridge to Theodore Roosevelt, October 22, 1907, Beveridge Papers.

54. Beveridge to Theodore Roosevelt, November 24, 1906, Beveridge Papers.

55. Beveridge to George Lorimer, December 15, 1906, Beveridge Papers.

56. Sanders, *Roots of Reform*, 349; and Braeman, "Beveridge and the Child Labor Bill."

57. Most notably, although the North did employ more children than the South, it also had stricter child labor laws. Northern businesses should have therefore supported a national standard to eliminate the competitive advantage of Southern manufacturers, a point Republican Senators Nelson Aldrich and Henry Cabot Lodge recognized and at least one Northern manufacturer tried to drive home to President Roosevelt, 41 Cong. Rec. 1822. Gould to Theodore Roosevelt, January 28, 1905, Papers of Theodore Roosevelt, Library of Congress.

58. Beveridge to Butler Ames, November 14, 1906, Beveridge Papers; and *A Bill to Prevent the Employment of Children in Factories and Mines*, H.R. 21404, 59th Cong., 2nd sess. (1906).

commerce; and under the commerce clause of the Constitution, Congress can not interfere with the lives, health, property, good order, or morals of the people, or anything in the opinion of the legislature for the good of the State and its citizens."[59]

In the Senate, Republican leaders hoped to follow the lead of the lower chamber, but Beveridge took advantage of more flexible rules to force the issue. Beveridge's bill was first sent to the Committee on Education and Labor,[60] but Republican Senator John Spooner of Wisconsin soon introduced a resolution asking the Senate Judiciary Committee to consider whether Congress could prohibit the transportation of commodities in interstate commerce because they were produced by child labor.[61] Beveridge, however, did not wait for the report. Three days into 1907 he introduced an amendment to a pending child labor bill for the District of Columbia that had earlier passed the House, and informed his colleagues that he intended to "submit some remarks."[62] When Beveridge took the floor on January 23, he used the opportunity to introduce his national bill as an amendment to the District of Columbia bill. That strategy allowed him to force debate. And debate he had. Over 3 days, Beveridge met fierce opposition from some of his own party's most powerful and legally adept senators, including John Spooner, Nelson Aldrich, Charles Fulton of Oregon, Porter McCumber of North Dakota, and Philander Knox of Pennsylvania.[63] That assembly suggested the Republican leadership took Beveridge's arguments seriously. All but Aldrich were lawyers, and Spooner and Knox had national reputations, but even more important was the combined presence of Spooner and Aldrich. Those Senators, along with William Allison of Iowa and Eugene Hale of Maine, controlled the Republican caucus and, therefore, the Senate.[64] Bills rarely passed the Senate without their approval.[65]

Beveridge's Democratic opponents were less august, but still important figures. Benjamin Tillman of South Carolina was a clear opponent of child labor and a powerful figure within the Democratic Caucus. He was joined by Senators Rayner of Maryland, Overman of North Carolina, Carmack of Tennessee, and Bacon of Georgia. The Democrats, other than Tillman, were all lawyers, but they lacked the talent for debate or the intellectual precision of their Republican colleagues.

59. Committee on the Judiciary, Jurisdiction and Authority of Congress Over the Subject of Woman and Child Labor, H.R. Rep. No. 59-7304, at 2 (1907).
60. 41 Cong. Rec. 50.
61. Ibid., 449.
62. Ibid., 612.
63. Ibid., 1552–57, 1792–1883.
64. Merrill and Merrill, *The Republican Command, 1897–1913*, 18.
65. Harrison, *Congress, Progressive Reform, and the New American State*, 35–36.

These Senators challenged the Beveridge Bill with arguments that had originally been used to support the Pure Food and Drug Act and Beveridge's own meat inspection amendments. Those arguments were outlined systematically in 1907 by Philander Knox, then a Senator, but formerly Roosevelt's Attorney General and a fine lawyer. Knox claimed that Congress could prohibit the interstate shipment of goods only when that prohibition had "for its real object the regulation of interstate commerce and not something *dehors* the Federal power."[66] That meant for him that Congress could only prohibit the interstate transportation of articles likely to harm commerce or that were themselves intrinsically harmful. The interstate movement of articles unlikely to harm interstate commerce or "in themselves innocuous" could not be prohibited.[67]

Knox seems to have developed these rules by comparing the ends Congress could pursue under its commerce power with the means it employed. If an article of commerce was a threat to interstate commerce itself—such as an explosive or a trust-made good that could choke off the channels of commerce—then prohibiting its movement fit well with the end of regulating interstate commerce. Everyone accepted that a law protecting the safety and efficiency of interstate commerce was a "regulation" of that commerce. His focus on the intrinsic nature of the article seems to rest on a similar analysis. If an article was itself immoral, unhealthy, or unsafe, it was then likely to cause real harm in the receiving state that the state itself could not prevent, as a consequence of the Supreme Court's dormant commerce clause doctrine. Prohibiting its interstate shipment, therefore, fit well with the end of regulating interstate commerce. If, however, the article neither threatened interstate commerce nor was itself intrinsically harmful, then to Knox it seemed a poor means of regulating interstate commerce, which suggested that the law was an attempt to use the commerce power to regulate a subject reserved for state authority.

That constitutional argument was the basis for the opposition to Beveridge's bill. Beveridge argued that the Lottery Case demonstrated that Congress's power over interstate commerce was just as broad as its power over foreign commerce, that Congress could prohibit the interstate shipment of goods for any national purpose, and that the character of an article was irrelevant. His Republican colleagues contradicted each point. The Lottery Case was decided by a closely divided Court, Spooner noted, and both Spooner and Aldrich argued that it was more limited

66. Philander C. Knox, "The Development of the Federal Power to Regulate Commerce," *Yale Law Journal* 17 (1908): 148.

67. Ibid., 145.

than Beveridge had suggested.[68] Aldrich and Knox argued that Congress may, indeed, have different authority over foreign and interstate commerce, because the country could have an inherent power over foreign commerce that it lacked over interstate commerce.[69] Knox also reminded everyone that he had overseen the Lottery Case as attorney general. The government, he noted, had specifically argued that Congress's power over interstate commerce was the same as its power over foreign commerce, but the Court had declined to rule on that ground.[70]

Spooner, joined by Senator Fulton, argued that the Lottery Case allowed Congress to prohibit interstate commerce only in "things that are deleterious to the people to whom they are shipped."[71] Senator Fulton put it more forcefully, "does [Beveridge] not observe that the lottery case and the whisky case and all the cases cited have this element in them: The exclusion of the articles amounts to a regulation of commerce in that it withdraws from commerce things that are deleterious to the people to whom they are shipped?"[72] Does Beveridge's argument not mean, Spooner asked, that Congress's constitutional power to "regulate commerce for the purpose of keeping the channels of commerce free and unobstructed is prostituted into a construction which warrants the General Government itself to obstruct the channels of commerce?"[73] The Democrats made similar points.[74]

Beveridge, however, could rebut most of these challenges. The "injurious nature of the thing prohibited," he argued "has nothing to do with the power of Congress but only with the policy of Congress in exercising the power."[75] Lottery tickets may be harmful, he admitted, but there was no such restriction on Congress's power over foreign commerce or commerce with the Indian tribes. And legislative precedent showed no such limit to Congress's power over interstate commerce. Nutritious but falsely labeled dairy products were not injurious articles, nor were healthy cattle that had been quarantined. Congress had prohibited the interstate shipment of gold and silver with "U.S.A" stamped on it. Certainly such a stamp did not make those metals injurious. Abuse of the commerce power, Beveridge endlessly repeated, should be stopped by the ballot box, not the courts.[76]

68. 41 Cong. Rec. 1871, 1875.
69. Ibid., 1825, 1878–79.
70. Ibid., 1879; and Revised Brief for the United States on Third Oral Argument at 31, *Champion v. Ames*, 188 U.S. 321 (1903) (No. 9).
71. 41 Cong. Rec. 1872–75.
72. Ibid., 1872.
73. Ibid., 1874.
74. Ibid., 1824–26, 73–75.
75. Beveridge to Theodore Roosevelt, October 22, 1907, Beveridge Papers.
76. 41 Cong. Rec. 1552–57, 1792–883.

One of his opponents' arguments, however, caused Beveridge significant problems: the claim that the constitutional justification for his child labor bill would allow the federal government to regulate the working conditions of any American for virtually any reason, rational or irrational. This concern seems strange, because such regulations seem to clearly violate the "liberty of contract" that the Court had famously enforced 2 years earlier in *Lochner v. New York*.[77]

During the late nineteenth and early twentieth century, the Court found in the Due Process Clauses of the Fourteenth Amendment an individual right to make business contracts, including the right to purchase and sell labor.[78] Laws that limited that liberty were permissible only if they were passed pursuant to what was known as the states' police power: the authority to promote the health, safety, morality, and general welfare of the public.[79] In *Lochner*, for example, a maximum hour law for bakers was understood by the Court to interfere with the bakers' liberty of contract and was struck down because the majority found that the law was not an exercise of New York's police power. The law did not promote the health or general welfare of the public. Neither was the occupation of baking sufficiently dangerous to justify the state passing laws to protect the health of the bakers themselves. Because the Fifth Amendment includes a due process clause like the Fourteenth Amendment, it has been assumed that liberty of contract in the early twentieth century would have similarly prevented the federal government from using any of its enumerated powers to pass a maximum hour law or otherwise interfere with the employment relationship. A maximum hour law passed pursuant to Congress's commerce power, for example, would be struck down because it would have to conform to the requirements of the Fifth Amendment's Due Process Clause, which included the right to liberty of contract.

However, both the House and the Senate emphasized the possibility that liberty of contract could be bypassed if Beveridge's arguments were accepted. "[W]hat limit is there to the power?" asked Spooner, trotting out a series of unpleasant scenarios. Could Congress, he asked, prohibit the interstate shipment of goods produced by workers who labored more than 8 hours a day? Could it prohibit the interstate shipment of goods made by nonunion labor?[80] Aldrich asked the same question, "[is it] possible that Congress can constitutionally regulate the hours of labor in a State

77. *Lochner v. New York*, 198 U.S. 45 (1905).

78. *Lochner v. New York*, 198 U.S. 45 (1905); and *Adair v. United States*, 208 U.S. 161 (1908).

79. *Lochner v. New York*, 198 U.S. 45 (1905), 53.

80. 41 Cong. Rec. 1874.

for humanitarian reasons?"[81] The House Report followed the same tack: it "is not extreme or ridiculous to say that it would be just as logical and correct to argue that Congress can regulate the age, color, sex, manner of dress, height, and size of employees and fix their hours of labor, as to contend that Congress can exercise jurisdiction over the subject of woman and child labor."[82]

Beveridge met this seemingly strange concern with a seemingly stranger response: he admitted his argument allowed Congress to do all those things and more. Congress had "the unquestioned power to exclude from interstate commerce any article which, in our judgment, is deleterious to the people of the United States, whether it be by reason of its unhealthfulness, . . . or whether it be by reason of a circumstance of its manufacture. . .."[83] "Certainly" Congress could prohibit all commerce among the states.[84] It could prohibit interstate transportation in goods made by laborers who worked more than 8 hours a day or who were not members of a union.[85] It could prohibit interstate transportation of goods produced by people over the age of 50.[86] "Will you ask me," he exclaimed, "whether or not I think we have the power to prohibit the transportation in interstate commerce of the milk of a cow milked by a young lady eighteen years old? Undoubtedly we have the power . . ."[87]

IV. Constitutional Principle and Legislative Strategy

Beveridge did not accept this list of unpleasant scenarios because he supported labor laws for adults. He opposed such laws. He believed that the 8 hour day should be established by negotiations between employers and employees, and supported only limited restrictions on labor injunctions.[88] He accepted the primary argument against his bill because he believed that rejecting it would do too much violence to a constitutional principle that was too clear to ignore, too important to undermine, and too popular to reject. Developed in a series of recent Supreme Court opinions that upheld some of the government's most important antitrust prosecutions, the

81. Ibid., 1822.
82. H.R. Rep. No. 7304, 7–8 (1907).
83. 41 Cong. Rec. 1873.
84. Ibid., 1825.
85. Ibid., 1873–76.
86. Ibid., 1875–76.
87. Ibid., 1826.
88. Braeman, Albert J. Beveridge, 136–37; Beveridge, "The Relation of the State to Labor," *The Reader: An Illustrated Monthly Magazine* 10 (1907): 383–85.

principle was a linchpin of the most popular government policy of the period. It was the proposition that no legitimate regulation of interstate commerce could interfere with liberty of contract.

Because this principle has received scant attention in the scholarship of the period, the general assumption is that the "liberty of contract" that stopped New York from using its police power to pass a maximum hour law in *Lochner* also limited Congress's commerce power.[89] As a result, the old guard's parade of horribles appears to be little more than posturing. Prohibiting the interstate shipment of milk from a cow milked by 18-year-old girls seems a clear violation of the substantive due process of the *Lochner* era, as does a law that prohibited the interstate shipment of goods produced by men who worked more than 8 hours a day.

In 1907, however, the liberty of contract protected by the Fifth and Fourteenth Amendments' Due Process Clauses did not limit legitimate regulations of interstate commerce. Or, as Progressive Era lawyers would have understood it, if a law was a legitimate regulation of commerce then it was not, by definition, a violation of liberty of contract. To be clear, the restrictions of the Fifth Amendment applied to Congress's exercise of its commerce power,[90] but the substantive scope of the right of liberty of contract was determined in part by the scope of Congress's commerce power: if a regulation was legitimate regulation of interstate commerce then it was not a violation of liberty of contract and, therefore, would not be struck down on due process grounds.[91]

This relationship between the Commerce Clause and liberty of contract mirrored the relationship between liberty of contract and the states' police powers. Liberty of contract was never absolute. State laws regularly interfered with individual contracts, but if the law was a legitimate police regulation—if it promoted health, safety, morality, or general welfare—then the interference was constitutional. Only regulations that went beyond such purposes were unconstitutional, such as regulations that took property from one person and passed it to another or that arbitrarily limited an

89. Scholars noting the principle are listed in footnote 5. Scholars accepting the traditional understanding include William Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886–1937* (New York: Oxford University Press, 1998), 152–56 and Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham: Duke University Press, 1993), 139–40.

90. See *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 336 (1893) (applying the 5th Amendment's takings clause to require the United States to pay for property taken pursuant to its commerce power).

91. Separating the question of how the Commerce Clause affects the substantive scope of liberty of contract from whether the Fifth Amendment applies to exercises of the commerce power was what Frank Goodnow (perhaps purposely) confused in *Social Reform and the Constitution* (New York: The Macmillan Company, 1911), 89.

adult male's contractual rights. Progressive Era judges understood themselves to be separating laws that served legitimate government ends from those that did not.[92]

In 1907, the relationship between Congress's commerce power and liberty of contract had the same structure. Neither the federal government nor the states could pass regulations that pursued illegitimate ends. If a regulation of interstate commerce was legitimate, it meant that the rule did not interfere with state prerogatives, but crucially for Beveridge, it also meant that it did not improperly invade the private sphere. In this system, an unalterably private sphere still existed. Liberty of contract and other doctrines outlined its limits, but because the Constitution expressly gave the federal government the authority to regulate interstate commerce, such regulations did not invade that private sphere. Any legitimate regulation of interstate commerce, therefore, could not, by definition, interfere with liberty of contract.

The Supreme Court applied this structure to resolve its most important antitrust cases. In *United States v. Trans-Missouri Freight Association*, the Supreme Court adopted a "literalist" interpretation of the Sherman Act's prohibition on "every contract . . . in restraint of trade."[93] That language, the Court held, meant what it said. It did not just prohibit contracts that unreasonably restrained trade, it prohibited *all* contracts that restrained trade,[94] but by holding that Congress could prohibit reasonable contracts, the Court's opinion suggested that the Sherman Act imperiled liberty of contract. The following year in *United States v. Joint Traffic*, a railroad accused of antitrust violations advanced that argument. "The right of the individual to make contracts regarding his own affairs," argued the railroad, was guaranteed by the Fifth Amendment's Due Process Clause. Citing the decisions that established liberty of contract, the railroad argued that liberty of contract "can be limited only so far as may be requisite for the security or welfare of society—by the exercise of the police power."[95] Because reasonable contracts in restraint of trade were not

92. Wiecek, *The Lost World of Classical Legal Thought*, 107–12; Fiss, *Troubled Beginnings of the Modern State*, 157–78; Gillman, *The Constitution Besieged*; and Michael Les Benedict, "Laissez Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez Faire Constitutionalism," *Law and History Review* 3 (1985): 293–331.

93. *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897). The Supreme Court famously exchanged its literalist understanding of the Sherman Act for the "rule of reason" in *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); and *Standard Oil of New Jersey v. United States,* 221 U.S. 1 (1911).

94. *Trans-Missouri Freight*, 340.

95. The brief especially emphasized *Allgeyer v. Louisiana*, 165 U.S. 578 (1893), which established that the Fourteenth Amendment protected liberty of contract, as well as a

prejudicial to the security or welfare of society, it concluded, Congress lacked the authority to prohibit all contracts in restraint of trade.[96]

The Court rejected the railroad's argument, holding that a legitimate regulation of interstate commerce could not, by definition, violate liberty of contract. "The power to regulate commerce," admitted Justice Peckham, "does not carry with it the right to destroy or impair those limitations and guaranties which are also placed in the Constitution." Those limitations included "the liberty of the citizen to pursue any livelihood or vocation, and for that purpose to enter into all contracts which might be proper, necessary, and essential to his carrying out those objects to a successful conclusion." However, Peckham's admissions did not lead him to conclude that liberty of contract limited Congress's commerce power. Instead, he held the opposite: the scope of liberty of contract was limited by the scope of Congress's commerce power. A citizen, he explained,

> may have the right to make a proper (that is, a lawful) contract, . . . [but the] question which arises here is whether the contract is a proper or lawful one, and we have not advanced a step towards its solution by saying that the citizen is protected by the fifth, or any other, amendment, in his right to make proper contracts to enable him to carry out his lawful purposes. . . . Notwithstanding the general liberty of contract which is possessed by the citizen under the constitution, we find that there are many kinds of contracts which, while not in themselves immoral or mala in se, may yet be prohibited by the legislation of the states, or, in certain cases, by congress. The question comes back whether the statute under review is a legitimate exercise of the power of congress over interstate commerce, and a valid regulation thereof.[97]

This understanding also supported later antitrust cases. In 1899 in *Addyston Pipe & Steel Co. v. United States*, Peckham's opinion for a unanimous majority reinforced his position in *Joint Traffic*.[98] The Fifth Amendment's Due Process Clause, he wrote, did not stop Congress from prohibiting contracts in restraint of trade. "On the contrary," he continued, "we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution. . ."[99]

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plethora of state cases, including *Godcharles v. Wigeman*, 113 Pa. 431, 6 A. 354 (1886); and *People v. Gillson*, 109 N.Y. 389 (1888).

96. Brief for the Central Railroad Company of New Jersey at 2, *United States v. Joint Traffic,* 171 U.S. 505 (1898) (No. 341).

97. *United States v. Joint Traffic Association,* 171 U.S. 505, 569, 572–73 (1898).

98. *United States v. Joint Traffic Association*, 175 U.S. 211 (1899).

99. *Addyston Pipe & Steel Co. v. United States*, 229.

That principle remained true in 1907. That year, as Beveridge fought for his child labor bill, the United States applied the principle to defend the constitutionality of the Erdman Act. In *United States v. Adair,* a railroad challenged a provision of the Act that prohibited interstate railroads from firing employees who had joined a union on the grounds that it violated liberty of contract.[100] Citing *Joint Traffic* among other decisions, the government argued that the act could not violate liberty of contract because it was a legitimate regulation of interstate commerce. The act protected unionized workers in order to prevent strikes that could hamper interstate commerce. It was, therefore, a legitimate regulation of interstate commerce, which meant it did not violate of liberty of contract because "the right of individuals or corporations to make contracts and do business is at all times subservient to the power of Congress to regulate interstate commerce."[101]

The Court's 1908 decision to strike down the Erdman Act in *Adair* also respected the principle. Justice Harlan's majority opinion first established that the Act was a violation of liberty of contract.[102] It then noted the government's argument that a legitimate regulation of commerce could not be a violation of the Fifth Amendment, but rather than rejecting that argument by holding that freedom of contract constrained Congress's commerce power, Harlan denied that the provision of the Erdman Act at issue regulated interstate commerce.[103] The legal literature, including the Columbia and Yale Law Reviews, noted that *Adair* followed the principle. The opinion suggested that liberty of contract limited the commerce power, wrote the *Columbia Law Review*; however, "no one has a constitutional right to make contracts which are opposed to a definite public policy. None such are protected by the Bill of Rights." The result, as demonstrated by *Joint Traffic* and *Trans-Missouri Freight*, was that "Congress may make police regulations with regard to those matters expressly entrusted to its care, even though incidentally it abrogate freedom of contract."[104]

The understanding that legitimate regulations of commerce could not violate liberty of contract had crucial implications for the debate over the Beveridge Bill. It meant that expanding the scope of Congress's commerce power expanded not just federal power but also government power more

100. *Adair v. United States*, 208 U.S. 161 (1908).

101. Brief for the United States at 21, *Adair v. United States*, 208 U.S. 161 (1908) (No. 293).

102. *Adair v. United States*, 176.

103. *Adair v. United States*, 176–80; and Cushman, "Doctrinal Synergies and Liberal Dilemmas: The Case of the Yellow-Dog Contract," 240–41.

104. Notes, "Liberty of Contract and the Commerce Clause," *Columbia Law Review* 8 (1908): 302; Comments, "The Unconstitutionality of the Erdmann Act of 1898," *Yale Law Journal* 17 (1908): 614–16.

generally. It meant the senators and congressmen debating the Beveridge Bill properly understood the implications of Beveridge's constitutional argument. By expanding the purposes Congress could pursue with its commerce power, Beveridge's argument would justify more than the regulation of child labor. It would allow Congress to effectively control the terms of employment for any significant industry by denying the industry the ability to participate in interstate commerce unless it first met federal guidelines on hours, wages, or union labor.

This understanding of the interaction between liberty of contract and Congress's commerce power was not limited to the senators who debated the Beveridge Bill. The principle was an implicit assumption of the debate over the Beveridge Bill in the popular and legal press.[105] The *Washington Post*, for example, criticized Beveridge's constitutional argument because it would justify laws that prohibited the interstate shipment of goods produced by men who drank.[106] In the legal literature, Philander Knox, John W. Davis, and Henry Wade Rodgers—three lawyers of the first rank—rejected Beveridge's argument, but never challenged his assumption about the relationship between the commerce power and freedom of contract.[107] The supporters of Beveridge's argument, including lawyers such as William Jennings Bryan, did the same.[108] The only academics to support the constitutionality of a child labor law abandoned the commerce clause argument altogether. They generated arguments based on unenumerated powers that no one seems to have taken seriously.[109]

The interest group most invested in a national child labor law—the National Child Labor Committee (NCLC)—also accepted the principle.

105. Popular press accounts include, "Child Labor Assailed," *Washington Post*, January 24, 1907, 4; "Child Labor Laws," *New York Times*, January 28, 1907, 6; "Extremely Dangerous?," *Washington Post*, February 4, 1907, 6; "Comment," *Harper's Weekly*, February 9, 1907, 2; and "A Study in States' Rights," *Washington Post*, February 26, 1907, 6.

106. "Constitution and Child Labor," *Washington Post,* January 31, 1907, 6.

107. Knox, "Development of Federal Power to Regulate Commerce"; John W. Davis, "Growth of the Commerce Clause, Part I," *American Lawyer* 15 (1907): 171–76; and Henry Wade Rogers, "The Constitution and the New Federalism," *North American Review* 188 (1908): 321–35.

108. Joseph Culberson Clayton, "The True Constitution: Suggestions toward its Interpretation," *American Lawyer* 15 (1907): 121–24; and William Jennings Bryan, "Our Dual Government," *The Reader* 9 (1907): 349–56.

109. Edwin Maxey, "The Constitutionality of the Beveridge Child Labor Bill," *The Green Bag* 19 (1907): 290–92; Andrew Alexander Bruce, "The Beveridge Child Labor Law and the United States as Parens Patriae," *Michigan Law Review* 5 (1907): 627–38; [anonymous review] "Federal Police Power," review of Edwin Maxey, "The Constitutionality of the Beveridge Child Labor Bill," *Harvard Law Review* 20, (1907): 658–59.

Some members of the NCLC did oppose the Beveridge Bill, but the organization provided critical support for the bill that began before it was introduced and continued into the Sixtieth Congress.[110] The NCLC also had access to superb legal advice and experience fighting constitutional barriers to reform. Florence Kelley helped lead the NCLC and was herself a fine lawyer who was contemporaneously cooperating with Louis Brandeis in the fight for a minimum wage for women.[111] The executive committee included two other excellent lawyers, one of whom, Robert DeForest, authored the Supreme Court brief in *Joint Traffic* that had unsuccessfully argued liberty of contract limited the scope of Congress's commerce power.[112] DeForest and the other executive committee attorney opposed the Beveridge Bill on legal and strategic grounds,[113] but the NCLC understood the legal landscape. It nevertheless embraced Beveridge's constitutional theory even when it became clear that the theory was the primary target of the opposition.[114]

On the third day of debate, Beveridge seems to have realized that his constitutional argument was causing serious problems, but he did not change or abandon it. He instead further emphasized the protections of the political process. Congress, he said, would never pass a law prohibiting the interstate shipment of goods made by men who worked more than 8 hours a day, or men who joined labor unions, or red-headed girls. The question of whether such laws were constitutional was, therefore, an

110. They did eventually abandon the Beveridge Bill, but only when it was clear that it would not pass and that Beveridge's strategy was holding up a child labor law for the District of Columbia. Even then, the NCLC was careful not to reject the idea of federal regulation. Trattner, *Crusade for the Children*, 87–92.

111. Kelley's legal acumen is discussed in Felice Batlan, "Florence Kelley and the Battle Against Laissez-Faire Constitutionalism," working paper, http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm? per_id = 1462970 (March 4, 2011); and Kathryn Kish Sklar, *Florence Kelley and the Nation's Work: The Rise of Women's Political Culture, 1830–1900* (New Haven: Yale University Press, 1995).

112. Brief for the Central Railroad Company of New Jersey, *United States v. Joint Traffic*, 171 U.S. 505 (1898) (No. 341).

113. Robert W. DeForest to Edgar Gardner Murphy, May 28, 1907, Papers of Edgar Gardner Murphy (Wilson Library, Chapel Hill, North Carolina); Robert W. DeForest to Paul Warburg, December 6, 1906, Papers of the National Child Labor Committee (Manuscript Division, Library of Congress); and Francis G. Caffey to Edgar Gardner Murphy, November 30,1906, Papers of Edgar Gardner Murphy (Wilson Library, Chapel Hill, North Carolina).

114. Alexander McKelway, the NCLC's Washington lobbyist, defended the Bill by referring to Beveridge's "masterly Constitutional argument" several weeks after Beveridge's speech. Alexander McKelway, "The Evil of Child Labor: Why the South Should Favor a National Law," *Outlook* 85 (1907): 360–64.

"impossible question."[115] That argument was, however, unavailing. After 3 days of debate, his bill disappeared. Debate was concluded without a vote and each time the bill came up, action was delayed.[116]

In the Sixtieth Congress, Beveridge tried again, but despite his experience in the Fifty-ninth, he used the same constitutional argument to support his bill. In October of 1907, he wrote to Roosevelt, again trying to recruit him. His letter restated the constitutional arguments he had made on the Senate floor, and never denied that those arguments justified federal regulation of both child and adult labor.[117] Unsurprisingly, Beveridge's second bill met the same fate as his first: it died without a vote. That November, Beveridge lost his seat in the Senate and the fight for a federal child labor law continued without its most committed and powerful voice.

Conclusion

Beveridge's decision to accept the parade of horribles that was the central argument against his bill would be puzzling, if his constitutional arguments had merely reflected his political preferences. Beveridge believed that his child labor bill would help solve a serious national problem, boost his political career, and turn his Republican Party into a politically dominant progressive party. He nevertheless admitted that his constitutional theory implied that federal regulation of adult labor was constitutional. He admitted it even when it was clear it was the central argument against his bill, even though he opposed government regulation of the hours and wages of adult men, and even after he had had an opportunity to reassess his tactics between the Fifty-ninth and Sixtieth Congresses. It also seems clear that Beveridge's failure to challenge the main argument against his bill was not a result of a lack of legal acumen or nerve. He was an astute lawyer who used ambiguities in the Lottery Case to undermine long-established and pivotal principles of constitutional federalism. Accepting that constitutional argument in the Progressive Era was something more than obfuscation, however, can explain why Beveridge felt compelled to accept his opponents'series of unpleasant scenarios: because he was unwilling to undermine the integrity of the doctrinal connection between the Supreme Court's commerce clause and liberty of contract doctrines.

115. 41 Cong. Rec. 1874.
116. Ibid., 1883, 2065, 3300, 4100.
117. Beveridge to Theodore Roosevelt, October 22,1907, Beveridge Papers.

Beveridge respected that doctrinal connection, while undermining the much longer established principles of dual federalism, because the connection between liberty of contract and Congress's commerce power was too clear to ignore and too important to anti-trust regulation to reject. In 1907, few agreed with Beveridge's interpretation of how the Lottery Case altered Congress's authority over interstate commerce, but everyone agreed that the decision was important and had unclear implications. Justice Harlan's opinion itself admitted that the "whole subject is too important, and the questions suggested . . . too difficult of solution, to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause."[118] The leading Democratic lawyer in the Senate, Joseph Bailey of Texas, was willing to argue that the decision was flatly mistaken.[119] The unique relationship between liberty of contract and the commerce clause, however, was clear enough that everyone assumed it was true, and not one voice challenged it. Had Beveridge ignored it, he would have been thought a fool.

The principle was not just widely recognized, it was also a crucial support for antitrust regulation, then broadly viewed as the government's most important regulatory program.[120] Because the Supreme Court had developed that doctrinal relationship in order to reject the claim that liberty of contract limited the federal government's ability to challenge the trusts, any attempt to undermine it would seem unsettling if not irresponsible. Had Beveridge claimed that liberty of contract should be interpreted to limit Congress's authority to regulate interstate commerce, he would have raised a host of questions with serious implications but without clear answers. What would antitrust regulation look like under such a regime? Did such an argument mean that the government's great antitrust victories in *United States v. Joint Traffic Association*, *United States v. Trans-Missouri Railway Association, Addyston Pipe and Steel Co. v. United States*, and even *Northern Securities Co. v. United States* were wrong?[121] Such concerns explain why neither Beveridge nor any other senator, congressman, commentator, or interest group challenged the principle.

Accepting that principle was a significant admission for Beveridge. Substantive opposition to child labor regulation was impossible. In all the debates over child labor regulation for the nation and the District of

118. *Champion v. Ames*, 363.

119. 40 Cong. Rec. 2762.

120. Martin J. Sklar, *The Corporate Reconstruction of American Capitalism, 1890–1916: The Market, the Law, and Politics* (New York: Cambridge University Press, 1988).

121. *United States v. Trans-Missouri Freight Association*, 290; *United States v. Joint Traffic Association,* 505; *Addyston Pipe & Steel Co. v. United States*, 211 (1899); *Northern Securities Co. v. United States*, 193 U.S. 197 (1904).

Columbia in the Fifty-ninth and Sixtieth Congresses, only one politician spoke out in support of child labor in factories, mines, and mills. And even he quickly noted that he supported child labor regulation in the District of Columbia.[122] But many objected to the Beveridge Bill on constitutional grounds, pointing especially to its far-reaching implications. Constitutional arguments were the primary weapon against the bill, and they were enough to kill it.

The ultimate passage of federal child labor legislation provides additional evidence that the structure of antitrust law shaped the debate over the Beveridge Bill. The first federal child labor bill, known as the Keating–Owen Act, passed Congress in 1917. The debates over that law show that it only passed after changes in antitrust doctrine had reconfigured Congress's understanding of the relationship between it's commerce power and liberty of contract. In 1911, the Supreme Court upheld antitrust suits against American Tobacco and Standard Oil. In those decisions, the Court reconfigured antitrust doctrine by adopting the rule of reason, holding that the Sherman Act prohibited only *unreasonable* restraints of trade.[123] Because liberty of contract never protected unreasonable contracts in restraint of trade, those decisions made clear that liberty of contract did not threaten antitrust policy. It became possible to argue that liberty of contract was an independent limit on Congress's commerce power without being accused of undermining antitrust policy, which is exactly what proponents of the Keating–Owen bill did.

Thomas Parkinson, the director of the Legislative Drafting Bureau at Columbia University and a supporter of child labor regulation, made the point clear in his opening remarks at hearings in 1916. "[T]he [constitutional] problem," with the federal child labor bill, he said, "is not only capable of division into two general parts, but it requires that division, if we are to keep the precedents and our own consideration clear. . .." First, "[w]hat are the respective jurisdictions of the Federal Government and the State governments over commerce?" Second, "what are the respective rights and powers of the Federal Government and the individual," a question that "arises under the fifth amendment to the Constitution."[124]

122. Senator Nathan Scott of West Virginia owned a glass factory himself and argued for the benefits of child labor, but still supported the District of Columbia child labor law. 41 Cong. Rec. 196–99, 207.

123. *Standard Oil of New Jersey v. United States*, 1; *United States v. American Tobacco Co*, 106.

124. *An Act to Prevent Interstate Commerce in the Products of Child Labor and for Other Purposes: Hearings on H.R. 8234, Day 3, Before the Committee on Interstate Commerce*, 64th Cong. 114 (1916) (statement of Thomas Parkinson, Director of the Legislative Drafting Bureau at Columbia University).

Parkinson used that division to reject the series of unpleasant scenarios that Beveridge felt compelled to accept.

Did his expansive interpretation of the scope of Congress's commerce power mean that Congress could prohibit commerce with a state that allows women to vote, or prohibit the interstate shipment of the product of the labor of African Americans, Parkinson was asked. "So far as the commerce clause alone is concerned . . . yes," he admitted.[125] But, he continued, "Congress has not arbitrary power over interstate commerce, and the reason . . . is the fifth amendment."[126] He made clear that liberty of contract was an independent limit on Congress's commerce power, which made the constitutionality of federal child labor and adult labor legislation different questions. A federal law prohibiting the interstate shipment of goods produced by children, he indicated, would not violate the liberty of contract protected by the Fifth Amendment because the Supreme Court had found regulations of child labor consistent with the liberty of contract protected by the Fourteenth Amendment. The situation for adults was different. *Coppage v. Kansas* had recently struck down a state law banning yellow-dog contracts on liberty of contract grounds, which indicated that a federal adult labor law would be unconstitutional.[127]

Beveridge's loss in the 1910 elections kept him from taking part in the debates over the Keating–Owen Act, at least formally, but his contribution was recognized. Woodrow Wilson gave the pen he used to sign the law to the chief lobbyist of the NCLC, but he passed it to Beveridge, whom he recognized as the inspiration for the law and the constitutional argument that made it possible. But whatever gratification Beveridge felt was short lived. One year later the Supreme Court struck down the Keating–Owen Act by adopting the narrow view of the commerce power that Beveridge had fought so hard against.[128] Federal child labor regulation would not pass the Court's watchful eye until 1941, after Beveridge's death.[129] Perhaps even more discouraging for Beveridge was the failure of child labor reform to spark a reformation of his Republican Party. In 1912, the conflict between insurgents and old guard Republicans widened into a split. Progressives threw their support to Theodore Roosevelt and his new Progressive Party, whereas most Republicans stood with sitting President William Howard Taft. The split allowed the Democratic Party

125. Ibid, 117.
126. Ibid, 118.
127. Ibid, 123.
128. *Hammer v. Dagenhart*, 247 U.S. 251.
129. *United States v. Darby*, 312 U.S. 100 (1941).

—despite its significant conservative elements—to claim the mantle of progressivism, a title it still retains.

Albert Beveridge was a successful politician, driven by political concerns. He believed that increasing Congress's power over interstate commerce was good policy and good politics; therefore, he was willing to push the ambiguities of the Lottery Case as far as they could reasonably go, even though it challenged long-standing assumptions about federal power. But he was also a lawyer, and in fighting for his child labor law he believed he could not reject his opponents' series of unpleasant scenarios without denying a doctrinal principle that was clearly established and a crucial support to trust-busting, a widely popular policy.

Beveridge's speeches and correspondence indicate that he respected that doctrinal principle because he believed a legalistic system of constitutional interpretation was the proper foundation for American politics. Alhough his teleological understanding of the Constitution looked beyond the Supreme Court for the causes of doctrinal development, he never challenged its central role in defining the limits of government authority. He seemed confident the Court would ultimately recognize the Constitution's true purpose. He may also have had more cynical motivations and supported the Supreme Court's antitrust doctrine only to make his bill appear constitutional and, therefore, more palatable to his colleagues and the public. But regardless of his internal motivation Beveridge chose to respect the logical integrity of legal principle even when it hurt his child labor bill. And that choice, in turn, reveals the subtle but important ways that legal principle shapes the course of legislative politics and confirms, that political history—even of the legislature—is unavoidably legal history as well.