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## CREATING *HAMMER V. DAGENHART*

Logan E. Sawyer III\*

### INTRODUCTION

In a series of decisions in the early twentieth century, the Supreme Court recognized for the first time that Congress could use its power to regulate interstate commerce to promote the health, safety, morality, and general welfare of the nation. The decisions that recognized what was called a “federal police power”—*Champion v. Ames*,<sup>1</sup> *Hipolite Egg Co. v. United States*,<sup>2</sup> and *Hoke v. United States*<sup>3</sup>—were celebrated by turn-of-the-century progressives who were increasingly looking to the national government to address social welfare problems, especially those created by “race to the bottom,” degenerative competition among the States.<sup>4</sup> In 1918, however, the Court significantly limited that authority. In *Hammer v. Dagenhart*,<sup>5</sup> the Court allowed Congress to exercise its federal police power only when prohibiting the interstate shipment of harmful goods.<sup>6</sup> Congress, according to the Court, could prohibit the interstate shipment of intrinsically harmful goods, like immoral lottery tickets or impure food, but not items that were in themselves harmless, like the products of child labor.<sup>7</sup>

Since it was decided, *Hammer* and the harmless items limit it adopted have been subject to withering criticism.<sup>8</sup> The decision is widely considered inconsistent with

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<sup>1</sup> 188 U.S. 321 (1903).

<sup>2</sup> 220 U.S. 45 (1911).

<sup>3</sup> 227 U.S. 308 (1913).

<sup>4</sup> *Hoke*, 227 U.S. at 320–23; *Hipolite Egg Co.*, 220 U.S. at 57–58; *Champion*, 188 U.S. at 344; William Graebner, *Federalism in the Progressive Era: A Structural Interpretation of Reform*, 64 J. AM. HIST. 331 (1977) (chronicling the Progressive Movement and the fight for uniformity of state legislation).

<sup>5</sup> 247 U.S. 251 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 270–73.

<sup>8</sup> *See, e.g.*, EDWARD S. CORWIN, *THE COMMERCE POWER VERSUS STATES RIGHTS* 18, 253 (1936) (describing *Hammer* as “shockingly lacking in precedential antecedents” and placing it in the “era of *laissez faire*-ism on the Bench”); 2 ALFRED H. KELLY, WINFRED A. HARBISON & HERMAN BELZ, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 418 (7th ed. 1991) (“Seemingly irrefutable authority for the [child labor] act existed in Supreme Court pronouncements.”); THOMAS REED POWELL, *VAGARIES AND VARIETIES IN CONSTITUTIONAL*

precedent, incoherent as policy, and the product of a backward looking, politicized commitment to a laissez faire economy.<sup>9</sup> This paper challenges those claims. It argues that this conventional understanding is wrong in at least three respects: (1) it underestimates the coherence of the Court's federal police power as it developed from *Champion* to *Hammer*; (2) it mischaracterizes the policies that produced the harmless items limit; and (3) it ignores the central role lawyers outside the Supreme Court played in shaping early federal police power doctrine. Given the prominent place of *Hammer* in the canon of constitutional law,<sup>10</sup> and the central role it plays in supporting a contested understanding of the *Lochner* Court, those errors threaten to distort the profession's understanding of constitutional development.<sup>11</sup>

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INTERPRETATION 65–71 (1956); STEPHEN B. WOOD, CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA 180–83 (1968) (reviewing the contemporary negative response to the *Hammer* decision); Kent Greenfield, *Law, Politics, and the Erosion of Legitimacy in the Delaware Courts*, 55 N.Y. L. SCH. L. REV. 481, 487 (2010–2011) (characterizing the reasoning in *Hammer* as “incoherent, unworkable, and transparently political”); *see also infra* notes 48–50 and accompanying text. *But see* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES 393 (1993) (“Given the state of Commerce Clause doctrine at the time of the *Hammer* decision, [the majority's] position was not startling. . . . Since the Court had accepted distinctions between ‘manufacture’ and ‘commerce’ in construing the Commerce Clause, it was not unreasonable to argue that the Act was an effort to stretch that clause to impermissible limits . . .”).

<sup>9</sup> *See, e.g.*, KELLY ET AL., *supra* note 8, at 416–19 (dismissing the harmless items rule and criticizing doctrinal inconsistencies between *Hammer* and prior precedent); 1 LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 828 n.10 (3d ed. 2000) (calling *Hammer* the “first, and probably most egregious,” of federalism cases in which the Court “departed in an unprincipled way from its precedents and confused Commerce Clause jurisprudence” with the harmless items rule used to distinguish prior precedent on “transparently unconvincing ground”); Greenfield, *supra* note 8, at 487 (describing *Hammer* as evidence that “the Supreme Court was so committed to a jurisprudence of laissez-faire that it used virtually every tool at its disposal to fight the ability of state and federal governments to regulate the economy”); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1230 (1986) (claiming that the *Hammer* decision reveals the Court's “continuing distaste for government interference with that most hallowed feature of the market economy: the employment contract” and, along with *Lochner* is “illustrative of the difficult task the Court faced in translating its ideological commitment to an autonomous sphere of property rights into coherent boundaries on public regulation”); *see also infra* notes 48–50 and accompanying text.

<sup>10</sup> *Hammer* is a staple of constitutional law courses and casebooks. *See, e.g.*, WILLIAM C. BANKS & RODNEY A. SMOLLA, CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM 373–77 (6th ed. 2010); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 253 (3d ed. 2006); DAVID CRUMP, EUGENE GRESSMAN, DAVID S. DAY & CHARLES W. “ROCKY” RHODES, CASES AND MATERIALS ON CONSTITUTIONAL LAW 115–16 (5th ed. 2009); DANIEL A. FARBER, WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 844–47 (4th ed. 2009); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 89–91 (16th ed. 2007).

<sup>11</sup> *See infra* Part I.B, which discusses the scholarly reception of *Hammer* and its implications for our understanding of constitutional development.

To support these claims, this Article looks beyond the traditional sources of judicial opinions and the papers of Supreme Court Justices, which provide little insight into the origins of the doctrine adopted in *Hammer*. It looks instead to the public career and rich private papers of the lawyer primarily responsible for establishing, propagating, and defending both the federal police power and the harmless items limit: Philander Chase Knox. Knox, though largely forgotten by lawyers, was a leading attorney of his day; who was asked to join the Court three times by two Presidents.<sup>12</sup> More importantly, he stood at the center of the doctrinal evolution that produced *Hammer*. As Attorney General, he shaped the establishment of the federal police power when he oversaw the litigation in *Champion v. Ames*;<sup>13</sup> as a United States Senator, he helped define the limits of the doctrine in debates over the legislation that led to the decision in *Hipolite Egg*;<sup>14</sup> and as a Presidential candidate and nationally respected lawyer he defended the doctrine's limits in the legal literature.<sup>15</sup> Knox, in other words, was a fine lawyer who knew more about the emergence of the federal police power and its limits than anyone of his time.

Knox's work and ideas demonstrate that the harmless items limit was not invented in *Hammer v. Dagenhart* by a Supreme Court dedicated to promoting a laissez-faire economic order. It was instead an attempt by political moderates to reform Commerce Clause doctrine so that it could address the challenges of a new century while preserving what they saw as valuable in existing doctrine. Knox and his contemporaries constructed the harmless items limit more than a decade before *Hammer* in order to empower Congress to address the problems created by an increasingly integrated national economy while protecting traditional values of federalism, free trade, and freedom of contract.<sup>16</sup> The doctrine adopted in *Hammer* was not, in short, an attempt to return America to an imagined laissez-faire past, but was a half-way house on the road to modern Commerce Clause doctrine.

Knox's interaction with the *Hammer* doctrine, however, does more than illuminate the origins of the harmless items limit. It also provides a case study of the way lawyers outside of the courtroom shape the development of constitutional law. Knox's work

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<sup>12</sup> Letter from Philander Knox, U.S. Sec'y of State, to William Howard Taft, U.S. President (Nov. 29, 1911), in THE PAPERS OF PHILANDER C. KNOX, 1893–1922 (on file with the Library of Congress) [hereinafter THE KNOX PAPERS]; Letter from Theodore Roosevelt, U.S. President, to Philander Knox, U.S. Senator of Pa. (Mar. 3, 1906), in THE KNOX PAPERS, *supra*; Letter from William Howard Taft, U.S. President, to Philander Knox, U.S. Sec'y of State (Nov. 29, 1911), in THE KNOX PAPERS, *supra*.

<sup>13</sup> *Philander Chase Knox: Forty-Fourth Attorney General 1901–1904*, U.S. DEPT. OF JUSTICE, <http://www.justice.gov/ag/aghistprint.php?id=43> (last visited Oct. 14, 2012).

<sup>14</sup> See 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 457–60 (1922); see also *infra* note 177 and accompanying text.

<sup>15</sup> Philander C. Knox, *The Development of the Federal Power to Regulate Commerce*, 17 YALE L.J. 139 (1908) (arguing for limits to the reach of the federal police power while defending the harmless item limit).

<sup>16</sup> *Id.*

reconfigured the way Congress understood its authority and thus determined the legal and legislative precedents that framed the debate in *Hammer*. His ideas and those precedents defined the approach the litigants brought to *Hammer* and ultimately provided the doctrinal structure the Court adopted. Knox thus helps us see a reality that remains true today: that constitutional development results from a clash of ideological and political forces whose demands are balanced, refined, and integrated into established legal structures by politically involved lawyers long before the Court plays its undoubtedly important, but still limited, role of choosing the winning side.

This Article proceeds in six parts. Part I briefly describes the decisions that established the federal police power and summarizes the contemporary view of *Hammer*. Part II introduces Philander Knox and describes the pivotal role he played in reconfiguring early twentieth-century Commerce Clause doctrine. Part III demonstrates that the harmless items limit was not invented in *Hammer* by Justices in 1918, but was instead a widely accepted limit to Congress's commerce power as early as 1907—more than a decade before *Hammer* was decided. Part IV draws on Knox's private papers and public acts to argue that the harmless items limit was not motivated by a commitment to a laissez-faire economy. Part V provides an alternate explanation of the emergence of the harmless items limit, contends that Knox and others supported that limit because it permitted the federal government to address self-defeating competition among states in an increasingly integrated national economy while simultaneously protecting free trade, federalism, and freedom of contract. Part VI assesses Knox's contribution to the *Hammer* decision.

## I. THE FEDERAL POLICE POWER AND THE HARMLESS ITEMS LIMIT

*Hammer* has been long overruled, but it remains central to a long established understanding of the Supreme Court at the turn of the twentieth century, and that understanding, in turn, has been seen as having important implications for modern constitutional theory. Part I.A describes the crucial role *Hammer* played in early twentieth-century Commerce Clause jurisprudence. Part I.B then describes how commentators built on Justice Holmes's classic dissent to depict the decision as a retrograde abuse of judicial power by *Lochner* era Justices dedicated to protecting a laissez-faire economy that advantaged business interests at the expense of the people.<sup>17</sup> It is this modern understanding of *Hammer* that the remainder of this article challenges.

### A. The Road to Hammer

The recognition of the federal police power in *Champion v. Ames* in 1903 marked a significant departure from the traditional understanding of federalism, known as Dual Federalism.<sup>18</sup> Nineteenth-century jurists constructed Dual Federalism from the

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<sup>17</sup> See *infra* note 50 and accompanying text.

<sup>18</sup> 1 DONALD P. KOMMERS, JOHN E. FINN & GARY J. JACOBSON, AMERICAN CONSTITUTIONAL LAW: GOVERNMENTAL POWERS AND DEMOCRACY 326 (3d. ed. 2010).

enumeration of powers in Article I and the Tenth Amendment's reservation of all non-enumerated powers to the States or to the people.<sup>19</sup> Congress had exclusive power over interstate commerce and other subjects enumerated in Article I, Section 8, while the States had exclusive authority over subjects not delegated, including, most importantly, the "police power": the power to promote public health, safety, morality, and general welfare. Because Dual Federalism saw state and federal power as mutually exclusive spheres, the exercise of the police power was considered beyond federal competence. Judges were to enforce this system by using their legal expertise to guard the boundaries between the different areas of state and federal authority.<sup>20</sup>

Courts in the late nineteenth century kept Congress's commerce power from violating that boundary by limiting the purposes that the commerce power could serve. In *Champion v. Ames*, for example, the Court considered whether a federal regulation prohibiting the movement of lottery tickets in interstate commerce was within Congress's power to "regulate commerce."<sup>21</sup> The dissent, in a classic Dual Federalism opinion, argued the law was not a regulation of commerce because the power to regulate commerce was limited to the end of promoting and protecting interstate trade.<sup>22</sup> Prohibiting interstate trade in lottery tickets—or any other good—was beyond Congressional authority because it did not advance that goal; it sought instead to protect morality.<sup>23</sup>

The majority opinion in *Champion v. Ames*, however, created a new approach by upholding a prohibition on the movement of lottery tickets in interstate commerce.<sup>24</sup> The *Champion* majority rejected the contention that the commerce power could only be used to promote or protect interstate trade. That approach would leave activities that government should be able to regulate beyond the authority of both state and federal power, something never intended by the framers of the Constitution. Interstate commerce in lottery tickets threatened the nation's morality, but the dissent's approach kept it from being regulated by the states because it was interstate, and kept it from being regulated by the federal government because it was harmful only to non-economic interests. "We should hesitate long," Justice Harlan wrote for the majority, "before adjudging that an evil of such appalling character . . . cannot be met and crushed by the only power competent to that end."<sup>25</sup>

The establishment of a federal police power in *Champion* was supported by two other decisions: *Hoke v. United States* and *Hipolite Egg Co. v. United States*.<sup>26</sup> There,

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<sup>19</sup> Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4, 15–16 (1950).

<sup>20</sup> *Id.* at 2, 15–16.

<sup>21</sup> *Champion v. Ames*, 188 U.S. 321, 324 (1903) (holding that prohibiting the movement of lottery tickets in interstate commerce was within Congress's power to regulate commerce).

<sup>22</sup> *Id.* at 366–71 (Fuller, C.J., dissenting).

<sup>23</sup> *Id.* at 364–65, 372–74.

<sup>24</sup> *Id.* at 321 (majority opinion).

<sup>25</sup> *Id.* at 357–58.

<sup>26</sup> *Hoke v. United States*, 227 U.S. 308 (1913); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911).

the Court approved the use of the commerce power to ban the interstate movement of prostitutes and adulterated food and drugs.<sup>27</sup> None of those decisions, however, clearly defined the limits on that authority, and *Hoke* suggested that the power was sweeping indeed.<sup>28</sup>

*Hoke* was seen by many as consistent with previous decisions on the narrow ground that in *Champion*, *Hipolite*, and *Hoke*, Congress had prohibited the use of interstate commerce only to prevent interstate commerce from being used as a conduit for harmful goods or transactions. Indeed, Justice Day's opinion for a unanimous Court in *McDermott v. Wisconsin*<sup>29</sup> suggested the Court took that perspective.<sup>30</sup> *McDermott* was decided shortly after *Hoke*, and there, in dicta, the Court reasoned that the Pure Food and Drug Act was constitutional because it prohibited the interstate shipment of harmful goods:

That Congress has ample power [to pass the Pure Food and Drug Act] is no longer open to question. That body has the right not only to pass laws which shall regulate legitimate commerce among the States and with foreign nations, but has full power to keep the channels of such commerce free from the transportation of illicit or harmful articles, . . . and to bar them from facilities and privileges thereof.

. . . .

The object of the statute is to prevent the misuse of the facilities of interstate commerce in conveying . . . misbranded and adulterated articles of medicine or food . . .<sup>31</sup>

But *Hoke* also contained language that indicated the Court had approved a simple and much broader principle: that Congress could prohibit the movement of anything in interstate commerce if the prohibition ultimately promoted the health, safety, morality, or general welfare of the nation.<sup>32</sup> Justice McKenna wrote for the majority that:

the principle established by the cases is the simple one, when rid of confusing and distracting considerations, that Congress has power over transportation "among the several States"; that the power

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<sup>27</sup> *Hoke*, 227 U.S. at 308–09; *Hipolite Egg Co.*, 220 U.S. at 45–46.

<sup>28</sup> *Hoke*, 227 U.S. at 308–09; *Hipolite Egg Co.*, 220 U.S. at 45–46; *Champion*, 188 U.S. at 363 ("The whole subject is too important, and the questions suggested by its consideration are 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.")

<sup>29</sup> 228 U.S. 115 (1913).

<sup>30</sup> *Id.* at 115, 128–31 (1913).

<sup>31</sup> *Id.* at 128, 131.

<sup>32</sup> See KELLY ET AL., *supra* note 8, at 418 (citing *Hoke*, 227 U.S. 308).

is complete in itself, and that 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.<sup>33</sup>

Advocates of child labor reform seized on that principle to argue that Congress could promote the health and welfare of the nation by prohibiting the interstate shipment of products produced by child labor. Congress, in turn, passed the Keating-Owen Child Labor Law,<sup>34</sup> which imposed just such a ban.<sup>35</sup>

In *Hammer v. Dagenhart*, however, the Court invalidated this landmark legislation.<sup>36</sup> The federal police power cases did not, argued Justice Day for the five-Justice majority, permit Congress to prohibit the interstate movement of any article of commerce in order to advance police power ends.<sup>37</sup> The result of such an interpretation would be the end of “all freedom of commerce” and the “elimina[tion]” of “the power of the States over local matters.”<sup>38</sup> *Champion, Hipolite, and Hoke* permitted Congress to advance police power ends by prohibiting the interstate movement of goods only when the goods were themselves harmful. Laws banning the interstate shipment of lottery tickets, prostitutes, or impure food and drugs, Justice Day explained, were upheld because those goods were harmful in themselves.<sup>39</sup> “[T]he use of interstate transportation,” he wrote, was thus “necessary to the accomplishment of harmful results.”<sup>40</sup> The child labor law, however, prohibited the interstate movement of harmless goods and was therefore not a regulation of commerce.<sup>41</sup> It was instead an attempt to use the commerce power to regulate manufacturing, an area of authority reserved for the states by the Tenth Amendment.

*Hammer* inspired one of the most famous dissents by the Court’s “great dissenter.” The power to regulate commerce, Justice Holmes wrote for himself and three others, was given to Congress in “unqualified terms.”<sup>42</sup> He then resolutely rejected Day’s claim that Congress could prohibit the interstate shipment of only harmful items. *Champion*, Holmes claimed, had clearly recognized that Congress could prohibit interstate commerce and “[t]he notion that prohibition is any less prohibition when applied to things now thought evil,” he believed senseless.<sup>43</sup> Since prohibition of commerce was an appropriate way to regulate commerce—“[r]egulation means the prohibition

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<sup>33</sup> *Hoke*, 227 U.S. at 323.

<sup>34</sup> Keating-Owen (Child Labor) Act, Pub. L. No. 64-249, 39 Stat. 675 (1916), *invalidated* by *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

<sup>35</sup> *Id.*

<sup>36</sup> *Hammer*, 247 U.S. 251.

<sup>37</sup> *Id.* at 270–72, 276.

<sup>38</sup> *Id.* at 276.

<sup>39</sup> *Id.* at 269–70.

<sup>40</sup> *Id.* at 271.

<sup>41</sup> *Id.* at 271–72.

<sup>42</sup> *Id.* at 277 (Holmes, J., dissenting).

<sup>43</sup> *Id.* at 278, 280.



of something,” he reasoned—the question of when to prohibit was a decision for Congress, not the Court.<sup>44</sup> “It is not for this Court,” he wrote, “to say that [prohibition] is permissible as against strong drink but not as against the product of ruined lives.”<sup>45</sup> He then turned the assumptions of Dual Federalism against the majority. “The act,” he argued, “does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights.”<sup>46</sup> “The national welfare as understood by Congress,” he concluded, “may require a different attitude within its sphere from that of some self-seeking State. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command.”<sup>47</sup>

### B. *The Reception and Critique of Hammer*

The commentary on *Hammer* has overwhelmingly adopted Holmes’s perspective. *Hammer*, according to that conventional view, was inconsistent with *Champion*, *Hipolite*, and especially *Hoke*.<sup>48</sup> Those cases recognized that prohibition was a form of regulation and that Congress could regulate interstate commerce in pursuit of ends other than protecting or promoting interstate trade. The *Hammer* majority, however, ignored that precedent and then established a rule that was simply nonsensical: that Congress could prohibit the interstate shipment of harmful but not harmless goods.<sup>49</sup> The majority, the conventional view concludes, ignored Holmes’s incisive dissent

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<sup>44</sup> *Id.* at 277–78.

<sup>45</sup> *Id.* at 280.

<sup>46</sup> *Id.* at 281.

<sup>47</sup> *Id.*

<sup>48</sup> See, e.g., TRIBE, *supra* note 9, at 828 n.10 (criticizing the harmless items rule for being on “transparently unconvincing ground”); David P. Currie, *The Constitution in the Supreme Court: 1910–1921*, 1985 DUKE L.J. 1111, 1123 (1985) (“It is hard to believe that the [*Hammer*] majority found its own distinctions [from the *Champion* line of precedent] persuasive.”); Thomas Reed Powell, *Child Labor, Congress and the Constitution*, 1 N.C. L. REV. 61, 63 (1922) (calling Justice Day’s distinction of *Hammer* from other cases a “grievous error”); Benno C. Schmidt, Jr., *The White Court*, in 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 2055, 2058 (Leonard W. Levy, Kenneth L. Karst, & Dennis J. Mahoney eds., 1986) (“The reasoning [of the majority in *Hammer*] was entirely question-begging . . . [and] flatly inconsistent with the opinion in *Hipolite Egg* and *Hoke*.”); Norman R. Williams, *The Commerce Clause and the Myth of Dual Federalism*, 54 UCLA L. REV. 1847, 1888 (2007) (noting *Hammer*’s doctrinal inconsistency with the Court’s supposed commitment to formalism and dual federalism).

<sup>49</sup> See, e.g., FARBER ET AL., *supra* note 10, at 846 (“Why isn’t a product of child labor just as much an ‘outlaw of commerce’ as adulterated food (*Hipolite Egg*) or lottery tickets (The Lottery Case)?”); KELLY ET AL., *supra* note 8, at 447 (referring to the harmless items rule as “an unconvincing exercise in judicial ingenuity”); Vanue B. Lacour, *The Misunderstanding and Misuse of the Commerce Clause*, 30 S.U. L. REV. 187, 195 (2003) (“The majority opinion in *Hammer* also clouded the issues by reasoning that the proscribed activity in the earlier cases was noxious whereas child labor was not . . .”).

and adopted this nonsensical rule because of its ideological commitment to a laissez-faire economic order.<sup>50</sup>

That traditional understanding of *Hammer* contributes to a broader historical narrative that in turn supports a particular understanding of the role of lawyers and legal doctrine in the process of constitutional development. The conventional view of *Hammer* is regularly joined with what has been the conventional view of *Lochner v. New York*<sup>51</sup> to indict the early twentieth-century Supreme Court for manipulating meaningless legal forms to protect a laissez-faire economy that privileged powerful business interests at the expense of workers, the people, and even children. In *Lochner* the Court used the Due Process Clause to fight economic regulations; in *Hammer* it used the Commerce Clause, but both demonstrate the same commitment to protecting business interests from government regulation.<sup>52</sup>

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<sup>50</sup> See, e.g., CHEMERINSKY, *supra* note 10, at 252–53 (noting the deep commitment by Justices of the era to laissez-faire economics and the possible willingness of the Court to defer on morals regulations, but not those of an economic nature); ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 146 (1960) (referring to the *Hammer* decision as a means by which the Supreme Court attempted to resist “public control of the nation’s economy”); WALLACE MENDELSON, *CAPITALISM, DEMOCRACY, AND THE SUPREME COURT* 86 (1960) (citing *Hammer* as an example of “pseudo-laissez-faire cre[eping] into the Constitution”); J. M. Balkin, *Federalism and the Conservative Ideology*, 19 *URB. LAW.* 459, 477–80 (1987) (claiming *Hammer* was an example of the Supreme Court using federalism as one of “several different doctrinal strategies for achieving *laissez-faire*”); Steven G. Gey, *The Myth of State Sovereignty*, 63 *OHIO ST. L.J.* 1601, 1672 n.257 (2002) (claiming *Hammer* “constitutionalized laissez faire economics”); Bryan J. Leitch, *Where Law Meets Politics: Freedom of Contract, Federalism, and the Fight over Health Care*, 27 *J.L. & POL.* 177, 233 (2011) (calling *Hammer* a “pointed example of this *laissez-faire* inspired hostility to federal power”); John P. Roche, *Entrepreneurial Liberty and the Commerce Power: Expansion, Contraction, and Casuistry in the Age of Enterprise*, 30 *U. CHI. L. REV.* 680, 702–03 (1963) (arguing that Commerce Clause precedent was flexible enough that a case could be decided based on the majority’s economic philosophies); Barbara Bennett Woodhouse, “*Who Owns the Child?*”: Meyer and Pierce and the Child as Property, 33 *WM. & MARY L. REV.* 995, 1068 n.380 (1992) (“The Court in *Hammer* . . . reverted to its fiercest model of laissez-faire . . .”).

<sup>51</sup> 198 U.S. 45 (1905).

<sup>52</sup> Chemerinsky, for example, notes that during the early twentieth century, the Court aggressively reviewed state economic regulations on the grounds that they impermissibly interfered with freedom of contract and also “used federalism to limit the ability of Congress to regulate the economy.” CHEMERINSKY, *supra* note 10, at 622–23. “Although the doctrines used were different,” he concludes, “they were inspired by the same philosophy: a strong commitment to a laissez-faire economy and to protecting business from government regulations.” *Id.* at 623. See also LOREN P. BETH, *THE DEVELOPMENT OF THE AMERICAN CONSTITUTION: 1877–1917* 185–87 (1971) (examining due process and laissez-faire principles as basis for the *Lochner* decision); MCCLOSKEY, *supra* note 50, at 158–61 (describing the laissez-faire mentality of the Court following *Lochner*); WILLIAM F. SWINDLER, *COURT AND CONSTITUTION IN THE TWENTIETH CENTURY* 206–08 (1969) (describing the laissez-faire means of decision-making of *Hammer*); Memorandum from J. S. Young, Biographical Sketch of Philander C. Knox 1665 (1904), in *THE KNOX PAPERS*, *supra* note 12 (“Decisions like *Hammer v.*

That indictment of the turn-of-the-century Supreme Court has, in turn, supported a particular view of the judicial process. By purporting to prove that constitutional development at the turn of the twentieth century was driven solely by the policy preferences of the Justices of the Supreme Court, that indictment has supported a generalized jurisprudential view that constitutional law is nothing more than the policy preferences of the Supreme Court's Justices. The "attitudinal model" of Supreme Court behavior adopted by many political scientists is the purest example of this approach, but there are both historians and lawyers who adopt similar perspectives.<sup>53</sup> That narrow focus on the Justices' policy preferences rejects—or at least severely minimizes—the contribution actors other than Justices make to constitutional development and denigrates the potential of legal doctrine itself to shape judicial behavior.

The historical understanding of the turn-of-the-century Supreme Court that supports this reductionist understanding of constitutional law has been under increasing attack. Beginning in the 1970s, scholars began pointing out that Justices who had been considered paradigmatic examples of pro-business, laissez-faire ideologues in fact upheld significant regulations of the economy and argued that their behavior is better explained as an attempt to prevent legislatures from promoting the interests of a narrow class.<sup>54</sup> That revisionism has recently been extended to the decision that has given the era its name. *Lochner* itself has been increasingly understood as having its roots in an abolitionist concern with free labor and a long-standing judicial concern with the influence of factions in politics.<sup>55</sup>

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*Dagenhart*, which used the Commerce Clause to protect an exclusive zone of state regulatory authority from federal child labor legislation, are now viewed in exactly the same light as *Lochner v. New York* . . .").

<sup>53</sup> See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 64–73 (1993) (outlining the attitudinal model and how it applies to the Supreme Court); Howard Gillman, *What Has Law Got to Do with It?: Judicial Behaviorists Test the "Legal Model" of Judicial Decision Making*, 26 *LAW & SOC. INQUIRY* 465 (2001) (discussing the attitudinal model and its criticisms).

<sup>54</sup> See generally ALAN R. JONES, *THE CONSTITUTIONAL CONSERVATISM OF THOMAS MCINTYRE COOLEY* 79, 122–65 (1987) (analyzing the laissez-faire politics of the Court through Justice Thomas Cooley); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meanings and Origins of Laissez-Faire Constitutionalism*, 3 *LAW & HIST. REV.* 293 (1985) (describing laissez-faire constitutionalism in relation to the economic view of human liberty); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897*, 61 *J. AM. HIST.* 970, 973 (1975) (arguing that Justice Field's jurisprudence was not grounded in Social Darwinism but rather an attempt to define the "government's legitimate role in American economic life").

<sup>55</sup> See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 48–55 (1993) (expounding on past scholarship and arguing that the *Lochner* era jurisprudence was a post-Civil War response to factionalized politics). But see DAVID BERNSTEIN, *REHABILITATING LOCHNER* (2011) (arguing that

No one, however, has attempted to re-examine the decision in *Hammer*, despite its visibility and its importance to that traditional narrative. The remainder of this article attempts to provide a part of that re-examination by recovering the political, legal, and ideological origins of the harmless items limit the Court adopted in *Hammer*. It does so by looking beyond the traditional sources of judicial opinions and the papers of Supreme Court Justices. Those sources provide little insight into the origins of the harmless items limit, perhaps explaining why *Hammer* has not yet been re-examined. The opinion itself is vague and formalistic, especially in comparison to Justice Holmes's biting dissent, and studies of the Justices on the Court have found little that casts additional light.<sup>56</sup> Most importantly, the origins of the harmless items limit do not lie in Supreme Court opinions. That doctrine had a nearly decade long life before it was formally adopted by the Supreme Court in *Hammer*, a life that can be revealed by examining the rich private papers and active public life of Philander Knox. The following part explains the central role Knox played in the creation of the harmless items limit.

## II. THE HARMLESS ITEMS LIMIT AND PHILANDER KNOX

Knox would not have accepted the conventional understanding of *Hammer*. That story, he surely would have said, underestimates the coherence of the harmless items limit and mischaracterizes the policies it supported. It also, he might have said in an expansive moment, ignores his efforts to establish, propagate, and defend those ideas. Knox's opinion on those issues deserves consideration nearly 100 years after his death because he was a talented and insightful lawyer who played a central role in the development of both the federal police power and the harmless items limit.

Knox's legal acumen is clear from his career in private practice and public service. After serving as an Assistant United States Attorney,<sup>57</sup> he founded a Pittsburgh firm that continues today as Reed Smith LLP.<sup>58</sup> He counted the enormous Carnegie Steel

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*Lochner* was grounded not in concerns with class legislation but in precedent and a natural rights tradition).

<sup>56</sup> See, e.g., JAMES E. BOND, I DISSENT: THE LEGACY OF CHIEF [sic] JUSTICE JAMES CLARK McREYNOLDS 60 n.61 (1992); ROBERT B. HIGSAW, EDWARD DOUGLASS WHITE 48–49 (1981); JOSEPH E. MCLEAN, WILLIAM RUFUS DAY 76–81, 111–12 (1946); David Burner, *Willis Van Devanter*, in 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1969, at 1945 (Leon Friedman & Fred L. Israel, eds., 1969); Fred L. Israel, *Mahlon Pitney*, in 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1969, at 2001 (Leon Friedman & Fred L. Israel, eds., 1969); James F. Watts, Jr., *William R. Day*, in 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1969, at 1773, 1790 (Leon Friedman & Fred L. Israel eds., 1969).

<sup>57</sup> Archibald J. Dodds, *The Public Services of Philander Knox* 7 (1950) (unpublished Ph.D. dissertation, University of Pittsburgh); Young, *supra* note 52, at 3.

<sup>58</sup> RALPH H. DEMMLER, *THE FIRST CENTURY OF AN INSTITUTION*, REED SMITH SHAW & McCLAY 6 (1977); Young, *supra* note 52, at 4.

Company and related H. C. Frick Coke Company among his clients.<sup>59</sup> His turn-of-the-century income was estimated at \$150,000 per year—roughly \$4,000,000 in today's dollars.<sup>60</sup> Perhaps the best measure of his success as a private attorney was the rumor of his representation of the Indianapolis Traction Company.<sup>61</sup> Knox was supposedly retained as “assistant counsel” to former President Benjamin Harrison. Harrison reputedly received an unheard of fee of \$25,000.<sup>62</sup> Knox received \$100,000.<sup>63</sup>

Knox left private practice to become Attorney General. He was appointed to the post by President William McKinley,<sup>64</sup> then President Theodore Roosevelt retained him after McKinley's assassination. He quickly became one of Roosevelt's most important advisors.<sup>65</sup> He left the executive branch in 1904 to represent Pennsylvania in the Senate,<sup>66</sup> where he was appointed to the Judiciary Committee.<sup>67</sup> The best evidence of his legal talent, however, is that he may hold the record for most Supreme Court nominations declined. Roosevelt offered him the seats eventually taken by Justices Moody and Day.<sup>68</sup> Taft offered him the seat of retiring Justice John Marshall Harlan.<sup>69</sup>

That Knox was offered legal positions of such influence indicates that his legal views were far from idiosyncratic. So too do his political activities. He served as chairman of the powerful Rules Committee,<sup>70</sup> was a serious candidate for the Republican Party's presidential nomination in 1908 and 1916, and served as Taft's Secretary of State.<sup>71</sup> In his public positions, he generally sided with the conservative “old guard” of his party against the progressive “insurgent” wing when forced to choose. He supported Taft when Theodore Roosevelt split the Republican Party in two in his 1912 progressive “Bull Moose” campaign for President,<sup>72</sup> and he was a consistent defender of

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<sup>59</sup> Dodds, *supra* note 57, at 8–9; Young, *supra* note 52, at 4.

<sup>60</sup> L. A. Coolidge, *Attorney-General Knox, Lawyer: The Trust Question is a Question of Law—in His Hands*, 19 MCCLURE'S MAG. 471, 473 (1902). See *Consumer Price Index (Estimate) 1800–*, THE FEDERAL RESERVE BANK OF MINNEAPOLIS, [http://www.minneapolisfed.org/community\\_education/teacher/calc/hist1800.cfm](http://www.minneapolisfed.org/community_education/teacher/calc/hist1800.cfm) (last visited Oct. 14, 2012).

<sup>61</sup> Dodds, *supra* note 57, at 10.

<sup>62</sup> *Id.*

<sup>63</sup> Coolidge, *supra* note 60, at 473.

<sup>64</sup> Young, *supra* note 52, at 7.

<sup>65</sup> *Id.*; see also Dodds, *supra* note 57, at 155.

<sup>66</sup> Young, *supra* note 52, at 7.

<sup>67</sup> Dodds, *supra* note 57, at 160.

<sup>68</sup> Letter from Theodore Roosevelt, U.S. President, to Philander Knox, U.S. Senator of Pa. (Mar. 3, 1906), in THE KNOX PAPERS, *supra* note 12.

<sup>69</sup> Letter from Philander Knox, U.S. Sec'y of State, to William Howard Taft, U.S. President (Nov. 29, 1911), in THE KNOX PAPERS, *supra* note 12; Letter from William Howard Taft, U.S. President, to Philander Knox, U.S. Sec'y of State (Nov. 29, 1911), in THE KNOX PAPERS, *supra* note 12.

<sup>70</sup> Dodds, *supra* note 57, at 160.

<sup>71</sup> Letter from William Howard Taft, U.S. President, to Philander Knox, U.S. Sec'y of State (Nov. 29, 1911), in THE KNOX PAPERS, *supra* note 12.

<sup>72</sup> FRANK K. KELLY, THE FIGHT FOR THE WHITE HOUSE: THE STORY OF 1912 78 (1961)

judicial review, which was increasingly being challenged by legal progressives.<sup>73</sup> But he also regularly supported meaningful progressive measures. As Attorney General, he was best known for his work establishing effective federal power over monopolies.<sup>74</sup> As Senator, he ultimately supported two iconic pieces of progressive legislation: the Hepburn Act,<sup>75</sup> which gave the federal government for the first time the power to set railroad rates, and the Pure Food and Drug Act.<sup>76</sup> He was also the lead sponsor of the second Federal Employers' Liability Act,<sup>77</sup> which made it easier for employees injured in interstate commerce to recover in tort.<sup>78</sup> He was even considered the labor candidate in his fight for his party's presidential nomination in 1908.<sup>79</sup>

Knox provides insight into the origins of the harmless items limit not just because of his legal skills and mainstream political and constitutional views, but also because, as Parts V and VI discuss in more detail, he played a decisive role in establishing both the federal police power and the harmless items limit. As Attorney General, he supported the government's attempts to establish a federal police power when he oversaw the litigation in *Champion v. Ames*. He then used the result of that litigation to support his central policy concern: extending federal control over the large interstate businesses then known as trusts. As a Senator, Knox also helped defend the federal police power from challenges, including his support of the Pure Food and Drug Act and the Federal Employers Liability Act.<sup>80</sup>

Knox played an equally important role in establishing the harmless items limit. Parts V and VI discuss in more detail how Knox, as both Attorney General and Senator from Pennsylvania, clearly recognized important limits to the reach of the federal police power and explicitly identified and defended the harmless items limit both in writing and in legislative debates. The most noteworthy example was his widely noticed article in the *Yale Law Journal* in 1908.<sup>81</sup>

Knox also provides a useful window into the forces that led to the emergence of the harmless items limit because, unlike the Justices who voted in *Hammer*, he left

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(noting his support for Taft as Knox described Roosevelt and his Bull Moose campaign as driven by "imperious, ambitious vanities and mysterious antipathies").

<sup>73</sup> See 40 CONG. REC. 6440, 6496–97, 6503 (1906) (recording Knox's arguments pushing back against opposition to the Hepburn Act).

<sup>74</sup> See *infra* notes 145–46 and accompanying text.

<sup>75</sup> 40 CONG. REC. 7088 (1906) (recording Knox's "yea" vote for the Hepburn Act).

<sup>76</sup> Pure Food and Drug Act of 1906, Pub. L. No. 59-384, 34 Stat. 768 (1906); 40 CONG. REC. 2773 (1906) (recording Knox's "yea" vote for the Pure Food and Drug Act).

<sup>77</sup> Employers' Liability (Federal Employers' Liability) Act, ch. 149, 35 Stat. 65 (1908).

<sup>78</sup> See 42 CONG. REC. 499 (1908) (noting Knox's introduction of Senate Bill 3080 "relating to liability of common carriers engaged in commerce"); 40 CONG. REC. 2762, 6440, 6496–97, 6503 (1906) (marking instances of Knox's support for the Hepburn Act and Pure Food and Drug Act).

<sup>79</sup> Dodds, *supra* note 57, at 155.

<sup>80</sup> See *supra* note 76 and accompanying text.

<sup>81</sup> Knox, *supra* note 15.

behind substantial direct evidence of his views on both economic policy and federalism as well as a clear record of consistent support for the federal police power and the harmless items limit.<sup>82</sup> In contrast, only one Supreme Court Justice voted in each of the four important federal police power cases—*Champion*, *Hipolite*, *Hoke*, and *Hammer*—Chief Justice Edward White.<sup>83</sup> White voted with the majority each time, indicating he too supported the federal police power and the harmless items limit, but he wrote none of the opinions and his views on economic policy in the early twentieth century are more difficult to ascertain than Knox's.<sup>84</sup>

### III. THE HARMLESS ITEMS LIMIT BEFORE *HAMMER V. DAGENHART*

Given Knox's legal abilities and intimate knowledge of the federal police power, his rejection of the conventional account is significant. And Knox clearly would have rejected such claims. As this part establishes, he endorsed the harmless items limit, publicly and elaborately, more than a decade before *Hammer* was decided. He did so in a variety of fora, including legislative debates, private writings, and public speeches that later parts detail. This part focuses on his most systematic defense of the doctrine in the *Yale Law Journal* in 1908. This part also establishes that Knox was not alone in recognizing the harmless items limit. A variety of politicians and legal scholars accepted the rule in legal writings and public debates in the decade before *Hammer* was decided.

#### A. Knox Supported the Harmless Items Limit in 1907

Knox discussed limits to Congress's power to prohibit the interstate shipment of goods in a variety of settings, but in 1908, in the *Yale Law Journal*, he explained his support systematically.<sup>85</sup> He argued for what he saw as a moderate position on the reach of Congress's commerce power. According to Knox, Congress could use its power to regulate commerce to prohibit the interstate movement of goods. But he believed there were important limits to that power. Congress could, he argued, prohibit the interstate shipment of any goods—harmful or not—if it did so in order to protect or promote interstate commerce.<sup>86</sup> It could also prevent the channels of interstate commerce from being used as a conduit for harmful goods, which meant that it could prohibit goods

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<sup>82</sup> *See id.*

<sup>83</sup> *See* WALTER F. PRATT, JR., THE SUPREME COURT UNDER EDWARD DOUGLASS WHITE 1910–1921 33, 93, 202–03 (1999). *See also* *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Hoke v. United States*, 227 U.S. 308 (1913); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911); *Champion v. Ames*, 188 U.S. 321 (1903).

<sup>84</sup> *Id.*

<sup>85</sup> *See* Knox, *supra* note 15. The article began as a graduation speech to the Yale Law School in 1907. Senator Philander Knox, The Development of the Federal Power to Regulate Commerce: Address of Senator Philander C. Knox to the Graduating Class of the Law School of Yale University (June 24, 1907), *in* THE KNOX PAPERS, *supra* note 12.

<sup>86</sup> *See, e.g.*, Knox, *supra* note 15, at 146, 148.

recognized as harmful. What Congress could not do, Knox contended, was prohibit the interstate shipment of intrinsically harmless goods for purposes other than protecting or promoting interstate commerce.<sup>87</sup> Knox, in other words, argued for the very rule the Supreme Court adopted in *Hammer v. Dagenhart* a full decade before that decision was issued.

Knox began his argument from a traditional place: Chief Justice Marshall’s definition of the power to regulate commerce in *Gibbons v. Ogden*<sup>88</sup> as “[t]he power to prescribe the rule by which commerce is to be governed.”<sup>89</sup> Congress could thus regulate interstate commerce itself—the activities and intercourse which constitute the commercial relationship—as well as the instrumentalities and channels of interstate commerce.<sup>90</sup> He also recognized that Congress’s commerce power was “plenary.”<sup>91</sup>

But he was emphatic that the Commerce Clause was a judicially enforceable limit on the *ends* Congress could pursue, rather than the grant of a *means* Congress could use to pursue other ends.<sup>92</sup> “Congress,” he wrote:

may employ such means as it chooses to accomplish that which is within its power. But the end to be accomplished must be within the scope of its constitutional powers. The legislative discretion extends to the means and not to the ends to be accomplished by use of the means.<sup>93</sup>

He then spent much of his article identifying the categories of regulation that met his requirement that Congress’s end be a regulation of commerce. Two categories were uncontroversially constitutional: laws removing obstructions to interstate commerce—including physical obstructions or obstructions resulting from the actions of States or private parties—and laws that protected that commerce from injury. Both were uniformly understood as “regulations” of commerce.<sup>94</sup>

But he also contended that Congress’s power to regulate interstate commerce gave it authority to prohibit commerce.<sup>95</sup> Under Knox’s analysis, the clearest example of Congress’s power to prohibit was a regulation that prohibited one type of interstate commerce in order to protect or promote interstate commerce more broadly.<sup>96</sup> A law prohibiting the interstate shipment of nitroglycerine was constitutional because it protected and promoted interstate commerce by keeping that commerce safe from

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<sup>87</sup> *Id.* at 146.

<sup>88</sup> 22 U.S. 1 (1824).

<sup>89</sup> *Id.* at 143 (citing *Gibbons v. Ogden*, 22 U.S. 1 (1824)).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 144.

<sup>92</sup> *Id.* at 148.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 144.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 146–47.



destruction. For Knox, a law prohibiting the interstate shipment of a good made by a monopoly abusing their market power would be constitutional under the same theory. Such a regulation, he reasoned, properly protected and promoted interstate commerce by prohibiting the movement of goods whose shipment was harming interstate commerce by choking off the interstate exchange of competing goods.<sup>97</sup>

Knox also endorsed the Court's controversial decision in *Champion v. Ames*.<sup>98</sup> In his view, laws that prohibited the interstate movement of diseased cattle or lottery tickets also qualified as regulations of commerce. Such laws, he said, pursued the end of regulating commerce because they "prevent[ed] the arteries of interstate commerce from being employed as conduits for articles hurtful to the public health, safety or morals."<sup>99</sup>

But his understanding that the Commerce Clause identified an end Congress could pursue rather than a means it could use to pursue other ends led him to articulate meaningful limits on that authority.<sup>100</sup> It meant for him that Congress could only prohibit interstate transportation of goods when that prohibition had "for its real object the regulation of interstate commerce and not something *dehors* the Federal power."<sup>101</sup> Congress could not, according to Knox, "under the guise of a commercial regulation . . . deny a person the right to engage in interstate commerce for doing that which Congress cannot prohibit him from doing."<sup>102</sup> Congress, he did not need to point out, had no general police power.

Knox thus did not argue that Congress could use its commerce power to prohibit the interstate shipment of any goods whenever that prohibition would advance police power ends. In a critical move, he identified the harmless items limit as a rule that differentiated prohibitions that advanced police power ends that were regulations of interstate commerce and those that advanced police power ends but were regulations of something else.<sup>103</sup> "The power to regulate interstate commerce," he declared, "does not extend to the laying of an arbitrary embargo upon the lawfully produced, harmless products of a State . . ."<sup>104</sup> Indeed, Knox argued that this limit—the same limit the Court would adopt more than a decade later in *Hammer*—had already been recognized. Congress's "power of prohibition," he pointed out, "has never been sustained except as against articles noxious or dangerous in themselves."<sup>105</sup>

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<sup>97</sup> *Id.* at 148.

<sup>98</sup> *Id.* at 144, 147 (discussing *Champion*, 188 U.S. 321).

<sup>99</sup> *Id.* at 144.

<sup>100</sup> *See, e.g., id.* at 146, 148.

<sup>101</sup> *Id.* at 148.

<sup>102</sup> *Id.* at 146.

<sup>103</sup> Though Knox did not directly mention the implications of this rule for a federal child labor law, it was clearly in his mind. *See Mr. Knox on the Federal Power*, THE INDEP., July 4, 1907, at 46; *Senator Knox at Yale*, ZION'S HERALD, July 3, 1907, at 35.

<sup>104</sup> Knox, *supra* note 15, at 146. Congress, he wrote, could not prohibit "the shipment from [one] State of the innocuous products of producers who are pursuing a course sanctioned by the laws of the State and in no wise in itself interfering with interstate commerce." *Id.* at 146–47.

<sup>105</sup> *Id.* at 147.

Given the criticism *Hammer* has received, it is easy to see claims that the harmless items limit can be derived from text of the Commerce Clause as the result of a transparent conceptual error. This is certainly what Justice Holmes thought of the majority opinion in *Hammer* when he flatly rejected the idea that only some prohibitions counted as “regulations of commerce.” Holmes wrote:

It would not be argued today that the power to regulate does not include the power to prohibit. Regulation means the prohibition of something, and when interstate commerce is the matter to be regulated I cannot doubt that the regulation may prohibit any part of such commerce that Congress sees fit to forbid.<sup>106</sup>

Holmes’s tidy package of linguistic consistency has proven so compelling to modern commentators that they have assumed any opposition was fueled by commitment to a laissez-faire economy. Yet, it is clear that Knox, at least, was not intending to derive the harmless items limit from the dictionary definition of the power to “regulate interstate commerce.” And perhaps it was Holmes who—handicapped by the weakness of Justice Day’s opinion—went too far by suggesting that any prohibition of interstate commerce necessarily qualified as a regulation of interstate commerce for constitutional purposes. Holmes’s suggestion certainly has the benefit of simplicity, but it has implications that are quite broad indeed, and it is unnecessary to adopt it in order to reject the harmless items limit.

Thomas Reed Powell, a political scientist who served on the faculty at the Harvard Law School, was one of the harshest academic critics of the decision in *Hammer*, yet even he rejected Holmes’s claim.<sup>107</sup> To qualify as a regulation of interstate commerce, he argued, it was not enough for a law to simply prohibit the interstate movement of a good.<sup>108</sup> Interstate commerce must contribute in some way to the harm Congress was seeking to prevent.<sup>109</sup> “No one,” he argued in the pages of the *North Carolina Law Review* (giving Holmes the benefit of the doubt):

would have the hardihood to argue in favor of the constitutionality of congressional prohibition of interstate transportation of all goods from states in which divorce is allowed or of all persons who beat their wives. Such interdictions of interstate transit would browbeat the states not to permit divorce and browbeat husbands not to browbeat their wives. They would wield the commerce power as a club to control local enterprises in no way dependent upon interstate commerce. Intra-marital pugilism would be dissuaded, not because belligerent husbands need interstate commerce

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<sup>106</sup> *Hammer v. Dagenhart*, 247 U.S. 251, 277–78 (1918) (Holmes, J., dissenting).

<sup>107</sup> Powell, *supra* note 48, at 64–66.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

for the achievement of this particular aim, but because for other reasons they are sufficiently eager for interstate wanderings to be willing to comply with the independent and unrelated condition which Congress selects as the criterion whether such wanderings may take place. This would partake of the nature of brigandage or blackmail.<sup>110</sup>

He thus rejected the suggestion of Holmes's dissent that any prohibition of movement in interstate commerce qualified as a "regulation of interstate commerce."

But Powell nevertheless resolutely rejected the majority's approach in *Hammer*. The Keating-Owen Child Labor Act was a regulation of commerce not simply because it prohibited the interstate shipment of a good, he argued, but because it prohibited the interstate shipment of a good in order to address harms caused by interstate commerce. The majority's "crucial blunder," he argued, was that it failed to recognize the nexus between child labor and interstate commerce.<sup>111</sup> The law was constitutional because through its operation "the harmful results of child labor are forefended only to the extent that interstate transportation is economically necessary to their fruition."<sup>112</sup>

Once we see that despite Holmes's epigrammatic assertion in *Hammer* there must be some nexus between the harm Congress seeks to regulate and interstate commerce, we can begin to make sense of Knox's claim that Congress's federal police power allows it to prohibit the interstate shipment of only harmful goods. It was a formal doctrinal rule of the kind then common throughout the Court's constitutional jurisprudence that required a tight, rather than loose, connection between the means of prohibition and the end of regulating interstate commerce.<sup>113</sup>

Knox's harmless items limit was in that way similar to the same kind of means-ends analysis now common in equal protection jurisprudence, requiring a kind of strict or intermediate level scrutiny rather than rational basis review.<sup>114</sup> If an article was itself immoral, unhealthy, or unsafe, its shipment in interstate commerce would cause real harm in the receiving state. Prohibiting its interstate shipment would thus prevent a harm that was clearly caused by the item's movement in interstate commerce. The means of prohibition fit tightly with the end of regulating interstate commerce. If, however, the article was itself intrinsically harmless, then to Knox, the fit seemed loose. This looseness of fit suggested the law was, in fact, an attempt to use the commerce

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<sup>110</sup> *Id.* at 63.

<sup>111</sup> *Id.* at 64.

<sup>112</sup> *Id.*

<sup>113</sup> For examples of such formalism within the Court's jurisprudence, see *Pennoyer v. Neff*, 95 U.S. 714 (1877) (requiring an out of state corporation to be doing business in a state for that state to assert personal jurisdiction) and *Munn v. Illinois*, 94 U.S. 113 (1876) (limiting regulation of prices to businesses affected with the public interest).

<sup>114</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (imposing the "most rigid scrutiny" of racial classifications, which will be upheld only if they are "necessary to the accomplishment of some permissible state objective").

power to regulate a subject reserved for state authority and ought to be struck down. Knox and Powell, like others in the debate, disagreed not about whether “prohibition” was “regulation” but about what rule should be used to determine when Congress was, in fact, regulating commerce.

The harmless items rule Knox supported can be fairly criticized on the grounds that it is formalistic and significantly under-inclusive. Often the shipment of even harmless items in interstate commerce can cause significant harm. That is exactly what Powell argued, as did other supporters of a broad federal police power.<sup>115</sup> Without competition for industry, states would be willing to pass stronger child labor laws; competition for industry only occurred because there was a national market for the goods made by children, and that national market depended on interstate commerce. The interstate shipment of harmless goods made by children thus led to the harmful employment of children.<sup>116</sup> Such harm may not be caused as “directly” as the harm caused by the shipment of “intrinsically” harmful goods, but it is a harm created by interstate commerce, nevertheless.

At bottom, that critique of the harmless items limit is a claim that the harmless items line requires too tight a connection between interstate commerce and the harm Congress seeks to regulate. But that means understanding Knox’s support for the harmless items limit requires understanding why he thought that tight connection was necessary, a task undertaken in Parts IV and V. Part IV argues that his support for the rule was not derived from a laissez-faire economic philosophy. Part V argues that he supported the harmless items limit because he hoped to allow Congress to address collective action problems created by the increasing integration of the national economy while protecting the well established constitutional values of free trade and freedom of contract. Before turning to those issues, however, it is important to document that—contrary to the conventional understanding of *Hammer*—Knox’s view of the harmless items limit was, in fact, widely shared by opinion leaders of the day, including those who supported significant regulations of the economy.

### *B. The Endorsement of Knox’s Theory*

Knox was not alone in recognizing the harmless items limit in the years before *Hammer*. His legal and political colleagues on both sides of the aisle agreed with his analysis. Congressmen debating the extent of the federal police power regularly argued that Congress could prohibit the interstate shipment of harmful, but not harmless, articles of commerce.<sup>117</sup> The debates over the Pure Food and Drug Act, which prohibited the interstate shipment of impure food and drugs, are one example. Opponents of the

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<sup>115</sup> Powell, *supra* note 48, at 63–65.

<sup>116</sup> See WALTER I. TRATTNER, *CRUSADE FOR THE CHILDREN: A HISTORY OF THE NATIONAL CHILD LABOR COMMITTEE AND CHILD LABOR REFORM IN AMERICA* 21–42 (1970) (describing the deplorable working conditions for children employed in the production of harmless goods, such as coal, glass, and canned vegetables).

<sup>117</sup> See, e.g., 40 CONG. REC. 8972 (1906).

law argued it was an unconstitutional exercise of a general police power by the federal government.<sup>118</sup> The response of the bill's supporters was that *Champion v. Ames* had established that Congress could use its power over interstate commerce to prohibit the movement of harmful goods.<sup>119</sup> Representative Joseph Robinson of Arkansas, for example, admitted that *Champion* had not explicitly determined "whether Congress might arbitrarily except from commerce among the States any article, however valuable and useful, which it might choose."<sup>120</sup> But it had clearly established that Congress could prohibit the interstate shipment of harmful items, which was enough to support the Pure Food and Drug Act.<sup>121</sup>

The same understanding was advanced during debates over child labor laws in 1907, 1914, and 1916.<sup>122</sup> When Senator Albert Beveridge in 1907 argued *Champion* allowed Congress to pass his child labor bill, which prohibited the interstate shipment of goods produced by factories that employed children, multiple Senators protested.<sup>123</sup> *Champion*, Senator John Spooner said, only allowed Congress to prohibit interstate commerce in things that are deleterious to the people to whom they are shipped.<sup>124</sup> Joining him was Senator Fulton:

I will ask [Senator Beveridge] if he does 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?<sup>125</sup>

The opponents of the Palmer-Owen and Keating-Owen child labor bills followed the same line a decade later.<sup>126</sup> "We contend," said James Emery, counsel for the National Association of Manufacturers, at a hearing on the constitutionality of the law:

that exclusion from commerce has never been applied nor contemplated by the Congress of the United States nor sustained by the courts, with respect to any article that was not bad in itself, nor to

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<sup>118</sup> 40 CONG. REC. 9099 (1906) (recounting Texas Senator Joseph Bailey's argument that the Senate Pure Food and Drug Bill "seems to assert in the Federal Government a police power which I do not think exists").

<sup>119</sup> 40 CONG. REC. 8972 (1906).

<sup>120</sup> 40 CONG. REC. 8973 (1906).

<sup>121</sup> 40 CONG. REC. 8975 (1906).

<sup>122</sup> See 41 CONG. REC. 1872–75 (1907). See generally TRATTNER, *supra* note 116, at 119–42.

<sup>123</sup> See 41 CONG. REC. 1867–81 (1907).

<sup>124</sup> 41 CONG. REC. 1872–75 (1907).

<sup>125</sup> 41 CONG. REC. 1872 (1907).

<sup>126</sup> See, e.g., Argument in Opposition to the Form and Validity of H.R. 8234, Commonly Known as the Keating Child Labor Bill: Hearing Before the S. Comm. on Interstate Commerce, 64th Cong. 40 (1916) (statement of James A. Emery, Counsel, National Association of Manufacturers).

any acts of individuals that did not threaten the safety or the freedom of that commerce.<sup>127</sup>

Governor Kitchin, hired by the southern cotton manufacturers, also sounded the theme. “[A] lawful article of commerce can not be wholly excluded from importation into a State from another State in which it was manufactured or grown,” he said, quoting the Supreme Court.<sup>128</sup> “The bad article may be prohibited, but not the pure and healthy one.”<sup>129</sup> The rule, as he understood it, was that “the article must be of such character as will do damage in the State in which it goes before the goods can be barred.”<sup>130</sup> The rule even surfaced in debates over the Mann Act,<sup>131</sup> which prohibited the interstate movement of women for immoral purposes.<sup>132</sup> “My understanding,” said an opponent of the bill, “is that the courts so far have held that Congress can prohibit the transportation of commodities in interstate commerce only when there is some inherent quality in the commodity which makes it dangerous to health or morals to allow it to be transported.”<sup>133</sup>

In short, the distinction between harmful and harmless items that found expression in *Hammer* was not concocted by Justice Day and the other Justices who joined his opinion to protect a laissez-faire economy they only belatedly realized was threatened by the federal police power. It was, in fact, a concept with a pedigree that can be traced back more than a decade to Knox’s article in the *Yale Law Journal*. And Knox, as Part V reveals, was developing the idea even in 1903.

#### IV. THE HARMLESS ITEMS LIMIT AND LAISSEZ-FAIRE

It is clear Knox and others supported the harmless items limit as early as 1907. It is equally clear that Knox did not support a laissez-faire economic order. Knox’s private papers and public acts demonstrate that by 1902 he had rejected the classical economic ideas that justified a laissez-faire approach to regulation.<sup>134</sup> He was instead a moderate progressive committed to adjusting constitutional doctrine to the demands of a new century while retaining the core constitutional values of the past. The following part

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<sup>127</sup> *Id.*

<sup>128</sup> *Interstate Commerce in Products of Child Labor: Hearing on H.R. 8234 Before the S. Comm. on Interstate Commerce*, 64th Cong. 101 (1916) [hereinafter *Hearing on Interstate Commerce in Products of Child Labor*] (statement of William Walton Kitchin, Governor of N.C.) (citing *Schollenberger v. Pennsylvania*, 171 U.S. 1, 12 (1898)).

<sup>129</sup> *Id.*; see also *Schollenberger*, 171 U.S. at 14.

<sup>130</sup> *Hearing on Interstate Commerce in Products of Child Labor*, *supra* note 128, at 102 (statement of William Walton Kitchin, Governor of N.C.).

<sup>131</sup> White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2006)).

<sup>132</sup> 45 CONG. REC. 818 (1910).

<sup>133</sup> *Id.*

<sup>134</sup> See *infra* Parts IV.B and IV.C.

explains that he supported some judicial limits on government regulation of the economy, including doctrines that protected free trade among the states and freedom of contract. But, as this part shows, he also believed technological and organizational developments required additional federal regulation of the economy. By 1902, experience had convinced him that government needed to play an active role in ensuring that monopolies did not destroy functioning markets. He had also become concerned with problems created by the way the increasing integration of the national economy was interacting with the limits the Supreme Court's Dormant Commerce Clause doctrine placed on the States.<sup>135</sup> The collective action problems that interaction created—in conjunction with his recognition of the government's role in protecting a functioning market—explain why he worked assiduously to expand Congress's commerce power.

#### *A. Laissez-Faire*

“Laissez-faire,” can mean many things, but two ideas lay at its core. The first is that the market is “natural”—that it existed prior to the creation of government and continues to exist independent of government regulation. The second is that government intervention in the market beyond protecting property and contract rights inevitably decreased liberty, which was both politically and economically undesirable. Following Locke and Hobbes, laissez-faire supporters saw liberty as a good in itself and opposed regulation on that ground.<sup>136</sup> They also argued laissez-faire was preferable on economic grounds: the “natural” market unencumbered by government regulation was believed to maximize aggregate welfare by allowing individuals to choose the most productive trades.<sup>137</sup> Knox did have policy preferences that supported some limits to government regulation of the economy: he believed freedom of contract was an important constitutional right, opposed boycotts and other coordinated action by labor unions, and valued free trade and a competitive market economy. But he saw a much larger role for government regulation than a laissez-faire label suggests.

#### *B. Knox's Private Rejection of Laissez-Faire*

Knox's rejection of a laissez-faire system and embrace of a moderate progressivism is manifest in his private papers. Before the turn of the twentieth century, Knox largely accepted laissez-faire principles. His Presidential address to the Pennsylvania Bar Association critiqued proposed antitrust legislation in Pennsylvania by combining support of free trade and freedom of contract with laissez-faire assumptions of a natural market and the benefits of private economic ordering.<sup>138</sup> The law, Knox argued,

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<sup>135</sup> See *infra* notes 138–51 and accompanying text.

<sup>136</sup> BARBARA FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE* 29 (1998).

<sup>137</sup> *Id.*

<sup>138</sup> Philander C. Knox, President, Pa. Bar Ass'n, Address to the Members of the Pennsylvania Bar Association: The Law of Labor and Trade 1–24 (June 30, 1897), in *THE KNOX PAPERS*, *supra* note 12.

undercut the freedom of contract he saw as the foundation of free governments.<sup>139</sup> “Segregated competition in business is not a plank in our platform of rights, but the liberty of contract,” he said, “is a main one. It is not nearly so important to foster a fanciful system of free trade in a state as to rear a race of free men.”<sup>140</sup> This perspective grew in part from his belief that the rights of property and contract preceded government. “The right to labor for the production of property,” he claimed, was “a necessary consequence of the right to live.”<sup>141</sup> The right to property was “the first concession by tyranny to progressing humanity” and was “equally invaded by obstructing the free employment of the means of production as by violently depriving the proprietor of the product.”<sup>142</sup> The right to exchange or sell property was “equally fundamental” and “one of the inalienable rights of the citizen.”<sup>143</sup> “We approach . . . legislation affecting the rights to acquire, possess and protect property,” he said, “with the certainty that by the fundamental law they are inherent and indefeasible in all men.”<sup>144</sup>

His speech then portrayed government interference with any of these rights as harmful and short-sighted. Like mid-nineteenth-century Jacksonians, he opposed monopolies but believed they were created only when government granted an exclusive privilege to private parties. Monopolies were “odious”<sup>145</sup> but they could “only exist by grant from the sovereign.”<sup>146</sup> He simply ignored the possibility that private businesses—even the enormous corporations like the Carnegie Steel Corporation that Knox had represented—could abuse their market power to create the functional equivalent of a government-created monopoly. “Two or more persons, whether natural or artificial,” he wrote, “combining their labor, skill or capital in the prosecution of any work or trade, cannot create a monopoly no matter what the terms of their combination may be.”<sup>147</sup> Laws against monopolies, he argued, were “meaningless, confusing and unnecessary.”<sup>148</sup> All that was needed was the refusal of the state to grant special privileges, which was the real evil.

Additional antitrust legislation, he argued further, was not only unnecessary, it would interfere with market processes and thus ultimately cause harm.<sup>149</sup> “What is to become of trade,” he wrote, “if methods cannot be changed to meet its ever varying laws?”<sup>150</sup> Existing law was sufficient, and had allowed competitive forces to generate

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<sup>139</sup> *Id.* at 1–3.

<sup>140</sup> *Id.* at 22.

<sup>141</sup> *Id.* at 2.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 3.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 8.

<sup>146</sup> *Id.* at 9 (citing the definition of monopoly from *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837)).

<sup>147</sup> *Id.* at 12.

<sup>148</sup> *Id.* at 13.

<sup>149</sup> *Id.* at 12–13.

<sup>150</sup> *Id.* at 24.



great advances that should be celebrated, not stopped. “If it is true,” he said, “as alleged upon the one hand that there never was a time when the business of the country was so concentrated, it is claimed to be also true upon the other hand that the public has never been so well and cheaply served.”<sup>151</sup>

By the early twentieth century, however, Knox had developed a very different understanding of the role of government, the need for regulation, and the impact of the large, interstate businesses then known as trusts.<sup>152</sup> He never rejected his belief in the importance of free trade or freedom of contract, but he did conclude that government regulation was necessary to create well functioning markets that would serve the interests of all.

That transition is clear from a summary he wrote of Benjamin Kidd’s *Principles of Western Civilisation*, published in 1902.<sup>153</sup> That summary demonstrates how Knox used the pre-historicist and teleological assumptions of Social Darwinism not to support laissez-faire economic theory, but to undermine it.<sup>154</sup> In those notes, he accepted that the law of survival of the fittest was “as valid and inexorable among social phenomena and forces as in any other field of biology.”<sup>155</sup> Competition produced progress in nature and in society and that iron law of development was largely beyond the control of mankind. Its consequences could be resisted but ultimately not avoided.<sup>156</sup>

Kidd’s work, however, led Knox to recognize that government regulation created properly functioning markets and to conclude that additional regulation of the American economy was necessary. Kidd convinced Knox to view evolutionary pressures as acting on groups, not just individuals. Knox accepted Kidd’s teleological claim that evolutionary pressures driving social development would ensure that the “social tendencies” that survived would be those that would be most helpful for future generations.<sup>157</sup> What that insight meant for Knox was that altruism and cooperation were not ethical considerations unrelated to the survival of the fittest but were tools in the fight for survival. One group might develop effective institutions that would increase social efficiency, which would in turn give them a competitive advantage over other groups. The inexorable pressure of competition therefore actually encouraged cooperation, which was, to Knox, a “more enlightened reading of the maxim, ‘the greatest good to the greatest number,’ than that contained in the utilitarian doctrines of enlightened selfishness and *laissez faire*.”<sup>158</sup>

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<sup>151</sup> *Id.*

<sup>152</sup> *See infra* notes 153–66 and accompanying text.

<sup>153</sup> BENJAMIN KIDD, *PRINCIPLES OF WESTERN CIVILISATION* (1902); Memorandum of Philander C. Knox, U.S. Att’y Gen., Comment on “underlying laws” (in all social and industrial movements) as suggested by Kidd’s *Principles of Western Civilisation* (1902), in *THE KNOX PAPERS*, *supra* note 12.

<sup>154</sup> *See Knox, supra* note 153.

<sup>155</sup> *Id.* at 1.

<sup>156</sup> He discusses the “laws which are irresistibly carrying forward the advancing peoples of the world,” and the “immutable and irresistible laws” of development. *Id.* at 3–4.

<sup>157</sup> *Id.* at 1–2.

<sup>158</sup> *Id.* at 2.

Applying these ideas to economic policy led Knox directly away from his earlier laissez-faire opposition to government regulation. The error, he wrote, of the “great modern economists” was that they had understood social advancement to require not just competition but “*uncontrolled* competition.”<sup>159</sup> Drawing support from what he understood as the political theory of the Constitution, Knox argued that “uncontrolled competition like unregulated liberty is not really free.”<sup>160</sup> That meant that in both democratic governance and economic policy “there must be freedom secured by control and regulation.”<sup>161</sup> It meant that “the right method requires control of those factors tending to become immoderate through unregulated liberty, and calls for just restraint upon the excesses of freedom which are themselves, in truth, unjust restraints in the interest of a few.”<sup>162</sup> What was needed was “regulation and control in the interest of all and for the future.”<sup>163</sup>

To be clear, Knox’s critique of laissez-faire economic policy was not radical. He did not, for example, join Robert Hale or others in undermining support for freedom of contract.<sup>164</sup> Nor was he willing to argue that property rights were in fact the creation of government, as some critics did.<sup>165</sup> He continued to believe a competitive market economy was the best pathway to wealth and justice. And he remained concerned about the power of labor unions. He rejected the “wage-fund” theory of classical economics, which had been used to justify limiting wages for workers, and supported the right to strike, but to him, boycotts interfered with the market for labor in the same harmful ways that monopolies interfered with the market for goods.<sup>166</sup> Yet despite these limits, Knox had clearly rejected the central tenants of laissez-faire by the early twentieth century. By then, he had come to believe that functioning markets required effective government regulation and that the American economy needed additional government oversight. And, as Part V establishes, he came to these conclusions at the same time he was developing the harmless items limit to the federal police power.

### *C. Knox’s Public Rejection of Laissez-Faire*

These ideas that Knox expressed in private were consistent with the policies he pursued in public as both Theodore Roosevelt’s Attorney General from 1901 until 1904 and as Senator from Pennsylvania from 1904 until 1909, when he turned his attention from domestic affairs and accepted appointment as Secretary of State. As Senator and Attorney General, Knox not only consistently supported the harmless

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<sup>159</sup> *Id.* at 3.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 5.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 3.

<sup>164</sup> See FRIED, *supra* note 136, at 16–18 (explaining Hale’s belief that coercion prevented true freedom of contract even when the government did not interfere with contracts).

<sup>165</sup> See *id.* at 19 (describing Hale’s position that government created property rights).

<sup>166</sup> Knox, *supra* note 153, at 4.

items limit to Congress's commerce power but also consistently fought to extend federal regulation of the economy. Though he never abandoned his concerns with ensuring some limits on federal power, he supported far too wide a variety of federal economic regulation to be considered a supporter of laissez-faire.

As Attorney General, Knox spearheaded the central policy priority of Theodore Roosevelt's first term: the fight to extend federal regulatory power over the large, interstate businesses then commonly called trusts. "In 1902, his [Justice Department] filed a series of antitrust suits against the 'grain trust,' the 'cotton trust,' the 'beef trust,' and, in what became perhaps the most watched case of the entire Progressive Era, the Northern Securities Company of E. H. Harriman and J. P. Morgan."<sup>167</sup> Northern Securities was an enormous victory for the government, and one that would not have happened without Knox. Roosevelt recounted that Knox insisted that the government could win the suit and Knox was active in the litigation until the end, actually arguing the case before the Supreme Court.<sup>168</sup>

Knox also helped Roosevelt push a series of economic regulations through Congress. His efforts led to the creation of the Bureau of Corporations—which was empowered to examine and publicize pernicious corporate activity—and the passage of the Elkins Act<sup>169</sup>—which limited the practice of railroad rebating—and bills that eased procedural difficulties with antitrust prosecutions.<sup>170</sup> Knox was so closely involved with preparing and defending each of these initiatives that they were popularly known as the "Knox Bills."<sup>171</sup> Illustrative of his commitment to regulation of the economy was a proposal among the Knox Bills to prohibit the interstate shipment of goods produced by businesses who took advantage of their monopoly status.<sup>172</sup> That idea

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<sup>167</sup> Logan E. Sawyer, III, *Federalism and Reform: Party Politics and Constitutional Argument in the Progressive Era Fight for Federal Child Labor Reform 67* (Aug. 2010) (unpublished Ph.D. dissertation, University of Virginia) (on file with author). *See also id.* at 67–68 n.40 ("The first challenged a practical monopoly on the purchase of grain from Midwestern farmers created by railroads giving preferential rates to some grain dealers who paid the railroads for the privilege then used it to drive other dealers from business. The second challenged pooling agreements among railroads to distribute among themselves shipments from Southern cotton producers. The case against the Beef Trust alleged that the large Chicago meat packers had colluded to set prices for the purchase of cattle and the sale of dressed beef. It was a significant case because the meat packers operated officially only within the state of Illinois. The Northern Securities Case was among the most watched of the entire Progressive Era. The suit alleged that the Northern Securities Company, a holding company, was formed to illegally eliminate competition among competing railroad lines." (citation omitted)).

<sup>168</sup> THEODORE ROOSEVELT, THEODORE ROOSEVELT 444 (1913); *A Great Legal Triumph*, WASH. POST, Apr. 11, 1903, at 6.

<sup>169</sup> Elkins Act, ch. 708, 32 Stat. 847 (1903).

<sup>170</sup> LEWIS L. GOULD, REFORM AND REGULATION 36 (1996).

<sup>171</sup> *Anti-Trust Legislation: Senators Confident That Some Measure Will Be Passed*, N.Y. TIMES, Jan. 13, 1903, at 8.

<sup>172</sup> GEORGE F. HOAR, REPLY OF THE ATTORNEY-GENERAL DATED JANUARY 3, 1903, S. DOC. NO. 57-73, at 19 (1903).

was, as Part V discusses, one especially associated with Knox, but it was never passed by Congress.

Knox left the Roosevelt administration in 1904 to become the junior Senator from Pennsylvania, and in that role he again supported significant expansions of federal authority over the economy. To be sure, Knox was unwilling to go as far as the most progressive wing of the Republican Party. For example, he declined to support Senator Beveridge's federal child labor law in 1907,<sup>173</sup> supported more aggressive judicial review of the Interstate Commerce Commission's authority to set railroad rates in 1906,<sup>174</sup> and continued to support William Howard Taft for President rather than join Theodore Roosevelt's progressive "Bull Moose" Party in 1912.<sup>175</sup> He nevertheless supported some of the most important expansions of federal power over the national economy while in the Senate. He ultimately supported the Hepburn Act.<sup>176</sup> He voted for the Pure Food and Drug Act in 1906 and helped defend its constitutionality from attack on the floor of the Senate.<sup>177</sup> He supported the first Federal Employers Liability Act<sup>178</sup> and then took the lead in the Senate in passing the second version of that bill, which used the federal power to regulate interstate commerce to make it easier for injured workingmen to win tort suits for on the job injuries.<sup>179</sup>

In sum, the progenitor of *Hammer's* harmless items limit was far from an apologist for a laissez-faire economy. His record, in fact, indicates that he had rejected laissez-faire in both theory and practice, in both public and private, which suggests the harmless items limit itself reflected a much more moderate understanding of the role of the federal government's commerce power.

#### V. FEDERALISM, FREE TRADE, AND FREEDOM OF CONTRACT

If it was not a commitment to a laissez-faire economic order that generated the harmless items limit, then what did? This part contends that Knox created, propagated, and defended both the federal police power and the harmless items limit, because together they appeared to him the best way to allow the federal government to solve problems created by the increasing integration of the national economy while simultaneously protecting the values of federalism, free trade, and freedom of contract.

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<sup>173</sup> See 41 CONG. REC. 1825, 1878–79 (1907) (recording Knox's arguments against Beveridge's bill).

<sup>174</sup> ROBERT HARRISON, CONGRESS, PROGRESSIVE REFORM, AND THE NEW AMERICAN STATE 64 (2004) (detailing Knox's introduction of an amendment to the Hepburn bill to allow for greater judicial review by the Interstate Commerce Commission).

<sup>175</sup> See KELLY, *supra* note 72, at 72.

<sup>176</sup> 40 CONG. REC. 6440, 6496–97, 6503 (1906).

<sup>177</sup> See SAWYER, *supra* note 167, at 140.

<sup>178</sup> *Id.* at 274.

<sup>179</sup> 42 CONG. REC. 499 (1908) (noting Knox's introduction of Senate Bill 3080 "relating to liability of common carriers engaged in commerce").

As Part V.A explains, Knox supported the federal police power because he believed Congress needed to be able to address the collective action problems that resulted from the increasing integration of the national economy. In the late nineteenth and early twentieth century, national railroad networks and the Court's Dormant Commerce Clause doctrine created a unified national economy. American politics and governance, on the other hand, remained largely local, with the states responsible for most economic regulation. The result was that states competed to attract and retain businesses with lax regulation, something many, including Knox, believed led to poor regulatory outcomes.<sup>180</sup> In the courts and in Congress, Knox fought to address this problem by arguing Congress could constitutionally prohibit the interstate shipment of goods, either to protect interstate trade or to advance police power ends.<sup>181</sup>

But, as the remainder of this part argues, his concern with solving collective action problems among the States had to be balanced with other concerns and integrated into existing constitutional doctrine. Ultimately, the approach he adopted and then defended was what he described systematically in his article in the *Yale Law Journal*: Congress could prohibit the interstate shipment of any goods—harmful or harmless—when it was protecting or promoting commerce, but when it was exercising the “federal police power,” it could prohibit only the interstate shipment of harmful goods.<sup>182</sup>

To modern eyes, support of the harmless items limit can seem unreasonable. Most notably, as Part II indicated, allowing Congress to prohibit the interstate shipment of only harmful items is a formal rule that can seem woefully under-inclusive if the goal is solving collective action problems. Parts V.B, V.C, and V.D seek to explain why Knox supported the harmless items limit despite this under-inclusiveness. Together they recover a set of crucial assumptions Knox and many of his contemporaries made about law and government that are too often misunderstood or forgotten. It is those assumptions that explain why Knox and many others supported the harmless items limit.

Part V.B explains how Knox's concern that Congress could pose a real threat to free trade among the states led him to support the harmless items limit. Part V.C establishes that Knox supported freedom of contract and then explains why he reasonably believed that the harmless items limit was necessary to prevent Congress from using its commerce power to make an end run around the restrictions imposed by freedom of contract doctrine. Part V.D then discusses how the harmless items limit was supported by the high value many progressives like Knox placed on meaningful local politics and

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<sup>180</sup> Graebner, *supra* note 4, at 332 (“Key business groups, largely from highly competitive industries with interstate markets, opposed most state social legislation on the grounds that it would place their firms at a competitive disadvantage in relationship to firms operating in states with less advanced, and therefore less costly, programs.”); David A. Moss, *Kindling a Flame Under Federalism: Progressive Reformers, Corporate Elites, and the Phosphorus Match Campaign of 1909–1912*, 68 BUS. HIST. REV. 244, 244 (1994) (“No state wanted to be the first to act (for fear of driving industry from its borders)”).

<sup>181</sup> See SAWYER, *supra* note 167, at 82.

<sup>182</sup> Knox, *supra* note 15, at 148.

their sanguine expectation that many collective action problems could be addressed by interstate cooperation. These assumptions are contestable, and few would adopt them today. But recovering them is necessary to understand why Knox and others supported the harmless items limit.

*A. The Problems of an Integrated National Economy*

A central problem in the political economy of the United States in the early twentieth century was the growing disconnect between an increasingly integrated national economy and a localistic political system.<sup>183</sup> As the railroads, the telegraph, and other technological innovations increasingly integrated the national economy, regulatory decisions made in one state had increasingly important effects in other states. At the same time, the Supreme Court's Dormant Commerce Clause doctrine prevented the states from effectively grappling with the problem.

In the late nineteenth century, the Court's Commerce Clause decisions were almost exclusively concerned not with the reach of Congress's authority under the Commerce Clause, but with the limits the Commerce Clause placed on state authority. The central concern of those cases was to turn the nation into a "free-trade zone" by ensuring that state laws did not interfere with interstate trade.<sup>184</sup> "[T]he Court's dormant Commerce Clause jurisprudence," Professor Barry Cushman has explained, "was driven by frankly instrumental impulses: to secure a national market for the products of an increasingly vibrant and integrated economy, while at the same time preserving state and local prerogatives to regulate business in an era of comparative federal lassitude."<sup>185</sup> Justice Bradley's opinion in *Robbins v. Taxing District of Shelby County*,<sup>186</sup> for example, struck down a tax on traveling salesmen on the grounds that it protected local dealers from out-of-state competition.<sup>187</sup> Allowing a state to "impose restrictions upon interstate commerce for the benefit and protection of its own citizens [would bring the nation] back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes that led to it."<sup>188</sup> Justice Matthews explained

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<sup>183</sup> Graebner, *supra* note 4, at 331–32.

<sup>184</sup> See 8 OWEN FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910*, at 257–59 (1993) (examining early twentieth-century Supreme Court attempts to allocate power between state and federal governments); Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1101–26 (2000) (arguing that formalism was in part an attempt to promote free trade on a national level and maintain states' ability to regulate); Charles W. McCurdy, *American Law and the Marketing Structure of the Large Corporation, 1875–1890*, 38 J. ECON. HIST. 631, 632 (1978) (describing the emergence in the late nineteenth century of an American "free trade" doctrine).

<sup>185</sup> Cushman, *supra* note 184, at 1126.

<sup>186</sup> 120 U.S. 489 (1887).

<sup>187</sup> *Id.* at 497–98.

<sup>188</sup> *Id.* at 498.

the reason the Court struck down an Iowa law that effectively prohibited the importation of liquor this way:

If the State of Iowa may prohibit the importation of intoxicating liquors from all other States, it may also include tobacco, or any other article, the use or abuse of which it may deem deleterious. . . . It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures or arts of any description . . . . In view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several States of the Union, it cannot be supposed that the Constitution or Congress have intended to limit the freedom of commercial intercourse among the people of the several States.<sup>189</sup>

To accomplish its goal of protecting an integrated national market, the Court invalidated a significant number of what had been long established state tax and regulatory laws. It did so when those laws were acknowledged to be otherwise legitimate exercises of a state's police power. *Minnesota v. Barber*<sup>190</sup> is a clear example: the decision struck down a state law that required the preslaughter inspection of beef because the law "by its necessary operation . . . directly tends to restrict the slaughtering of animals . . . to those engaged in such business in [the] State."<sup>191</sup> The Court pursued this goal even when those barriers to interstate trade did not discriminate against out of state goods.<sup>192</sup> States, for example, were denied authority to exclude liquor<sup>193</sup> and oleomargarine<sup>194</sup> from their borders, two items that were regarded by many as harmful to health and whose manufacture and sale were prohibited by states.

Given the efficiency of interstate trade networks created by the telegraph and the railroad, these decisions made it impossible for states to prohibit their citizens from obtaining items the state believed harmful. An excellent example is the "original package saloons" that sprung up in dry states in response to the Supreme Court's decision

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<sup>189</sup> *Bowman v. Chicago & Nw. Ry. Co.*, 125 U.S. 465, 494 (1888).

<sup>190</sup> 136 U.S. 313 (1890).

<sup>191</sup> *Minnesota v. Barber*, 136 U.S. 313, 322 (1890); see generally McCurdy, *supra* note 184, at 645–48 (discussing *Barber*, 136 U.S. 313).

<sup>192</sup> See Cushman, *supra* note 184, at 1101–26.

<sup>193</sup> See generally *Rhodes v. Iowa*, 170 U.S. 412 (1898); *Leisy v. Hardin*, 135 U.S. 100 (1890); *Bowman*, 125 U.S. at 465.

<sup>194</sup> See generally *Collins v. New Hampshire*, 171 U.S. 30 (1898); *Schollenberger v. Pennsylvania*, 171 U.S. 1 (1898). *Plumley v. Massachusetts*, 155 U.S. 461, 461–62 (1894), in contrast, allowed a state to prohibit the importation of oleomargarine colored to look like butter and distinguished it from *Leisy v. Hardin*, 135 U.S. 100, on the grounds that this state law was intended to prohibit fraud. It was a distinction commentators found unpersuasive. See JAMES PARKER HALL, *CONSTITUTIONAL LAW* 301 (1917).

in *Leisy v. Hardin*.<sup>195</sup> That decision held that states could not prohibit the interstate importation or sale of a legitimate article of commerce like liquor that remained in its “original package.”<sup>196</sup> While it remained in such a package, it remained within the domain of interstate commerce and thus beyond the reach of the state police powers.<sup>197</sup> Saloon owners took advantage by selling individual patrons packages of liquor and state lacked the authority to stop them. Though states attempted to regulate items they considered harmful like alcohol, despite these challenges, many reformers recognized that these rules not only interfered directly with the attempts of states to protect their citizens, they also discouraged states from trying to pass such regulations in the first place. At different times, reformers blamed the difficulties of effectively regulating child labor, meat products and other food, phosphorus matches, mine safety, even corporations, on the difficulties created by collective action problems created by the federal system.<sup>198</sup>

These problems could be addressed in many different ways. Reconfiguring the Supreme Court’s Dormant Commerce Clause doctrine to allow states more power to protect their own citizens was one approach. That was the focus of the campaign against alcoholic beverages.<sup>199</sup> But Knox largely rejected that approach, because, as discussed below, he was committed to free trade among the states.<sup>200</sup> He instead dedicated his energies to finding ways to empower the federal government to address the problem.

### 1. Antitrust, Degenerative Competition, and the Prohibition of Interstate Commerce

Knox’s fight against the trusts exemplifies his approach. In the early twentieth century, states had ample formal authority to corral the trusts. At that time, most trusts had taken advantage of New Jersey’s lax corporation laws to organize themselves as

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<sup>195</sup> See, e.g., *Original Package Saloons*, BOSTON EVENING TRANSCRIPT, May 14, 1890, at 1.

<sup>196</sup> *Leisy*, 135 U.S. at 124–25.

<sup>197</sup> *Id.*

<sup>198</sup> Moss, *supra* note 180, at 247 n.5 (explaining the problem among states at the turn of the twentieth century of “degenerative competition,” a term Moss uses to refer to “legislative laxity at the state level resulting from economic competition among the various states”); see also WILLIAM GRAEBNER, *COAL-MINING SAFETY IN THE PROGRESSIVE PERIOD* 113 (1976) (illustrating the challenge of regulating mine safety in the face of collective action issues); Graebner, *supra* note 4, at 331–32 (describing the difficulty in regulating in light of economic competition and reformers’ acceptance of that reality at the time); David Brian Robertson, *The Bias of American Federalism: The Limits of Welfare-State Development in the Progressive Era*, 1 J. POL’Y HIST. 261, 261 (1989) (“Faced with well-known resource disparities among the states [and] perceived ‘beggar-thy-neighbor’ economic development strategies . . . state policymakers felt enormous pressure to maintain an attractive ‘business climate’ characterized by . . . limited social expenditure.”).

<sup>199</sup> See FISS, *supra* note 184, at 262–65. See generally RICHARD F. HAMM, *SHAPING THE EIGHTEENTH AMENDMENT* (1995).

<sup>200</sup> See *infra* notes 258–64.



New Jersey holding companies.<sup>201</sup> The New Jersey parent corporation would own subsidiary corporations in other states that in turn owned the production facilities or natural resources necessary to the businesses' operation. States could prohibit the operation of trusts organized that way by using a variety of tools. They could, for example, bring *quo warranto* suits to dissolve a domestic corporation on the grounds that it had violated its state law by alienating control of the corporation to the New Jersey holding company. It could then use its authority to prohibit foreign corporations from operating within its limits to ensure that the New Jersey company itself would not purchase the assets within the state.<sup>202</sup>

When used, these tools were successful. *Quo warranto* suits succeeded in dissolving the in-state arms of the Cottonseed Oil Trust in Louisiana, the Sugar Trust in New York and California, the Whiskey Trust in Illinois and Nebraska, and the Standard Oil Trust in Ohio.<sup>203</sup> The same approach could have been just as effective in the early twentieth century.

What states could not do, however, was ensure that someone else would step in to purchase and run the factories after the trust's investment was removed. Because trusts arose in response to a nationwide excess of productive capacity, it was possible no one would step in to replace the trust's investment in the state after a successful *quo warranto* suit. Thus, if other states failed to follow suit, the only thing the state would win for its trouble would be the shuttering of factories in its jurisdiction and a boom to the trust owned factories in nearby states, which could, under the Supreme Court's Dormant Commerce Clause, ship products into the state. This created a clear reason for the states to decline to address the trust problem.

Knox's private papers make clear that he believed increased federal power was needed to solve this problem.<sup>204</sup> Pushing him towards that conclusion were the problems created by the massive strikes in the Pennsylvania anthracite coal mines in 1902. The bitter contest between mine owners and the United Mine Workers of America forced President Roosevelt to intervene when a bargaining stalemate threatened to disrupt the supply of coal to multiple major East Coast cities outside the state of Pennsylvania that winter.<sup>205</sup> Roosevelt's involvement helped resolve the strike and to Knox it became an example of the failure of state regulation to address national needs, even though the issues raised by the strike were traditionally state law issues. "The need of Federal control over interstate transportation and trade in articles produced under conditions

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<sup>201</sup> Dante J. Scala, *Taxing the Intangibles: How States Pursued Corporate Wealth in the Early Twentieth Century*, 27 BUS. & ECON. HIST. 431, 432 (1998).

<sup>202</sup> See generally Charles W. McCurdy, *The Knight Sugar Decision of 1895 and The Modernization of American Corporation Law, 1869–1903*, 53 BUS. HIST. REV. 304 (1979) (explaining the use of *quo warranto* suits and analyzing the *Knight* decision as an attempt to maintain a measure of state control over state-chartered corporations).

<sup>203</sup> *Id.* at 321–22.

<sup>204</sup> See SAWYER, *supra* note 167, at 62–63.

<sup>205</sup> See ANDREW ROY, A HISTORY OF THE COAL MINERS OF THE UNITED STATES 391–404 (1907); see also ROOSEVELT, *supra* note 168, at 465–67.

of practical monopoly which exist in many States,” he wrote in a memorandum on the issue, “is strikingly exemplified by the possible situation in Pennsylvania.”<sup>206</sup> Pennsylvania’s monopoly laws—the same laws Knox opposed strengthening in 1897—would allow the entire coal industry to come under the control of one person, no matter how “irresponsible, arbitrary or avaricious.”<sup>207</sup> And labor, “as we have seen to our cost for the last six months,” could not be counted on to bring “relief to the general interests.”<sup>208</sup> It was the federal government that ought to address such problems.<sup>209</sup>

Knox’s public acts reveal the same concern. He spent much of his time as Attorney General trying to find a way to minimize the effects of the Supreme Court’s 1895 decision in *United States v. E. C. Knight Company*.<sup>210</sup> That decision had cast grave doubts on the federal government’s ability to regulate the trusts effectively by striking down the application of the Sherman Anti-Trust Act to a business organization that controlled ninety eight percent of the nation’s sugar refining capacity. Manufacturing, the Court held, was not part of commerce and thus a manufacturing monopoly like the Sugar Trust could not be regulated under Congress’s commerce power.<sup>211</sup> Knox launched a litigation campaign against the trusts that included the high profile suit against the Northern Securities Company of E. H. Harriman and J. P. Morgan.<sup>212</sup> In the same period, he also launched a less known but, for the purposes of this paper, more important legislative campaign.

In 1902, Knox laid his “Knox Bills” before Congress.<sup>213</sup> Among them was his most aggressive idea: a proposal to prohibit the interstate shipment of goods produced by businesses that misused their market power.<sup>214</sup> He introduced the proposal in a widely publicized speech in Pittsburgh in October of 1902.<sup>215</sup> *E. C. Knight*, Knox

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<sup>206</sup> Memorandum from Philander C. Knox, Memorandum Regarding Anthracite Coal Strike (1902), in THE KNOX PAPERS, *supra* note 12.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> 156 U.S. 1 (1895).

<sup>211</sup> *Id.* at 17.

<sup>212</sup> *Northern Sec. Co. v. United States*, 193 U.S. 197 (1903).

<sup>213</sup> The other bills concerned the creation of the Bureau of Corporations—empowered to examine and publicize pernicious corporate activity—the Elkins Act—which limited the practice of railroad rebating—and bills that eased procedural difficulties with antitrust prosecutions. GOULD, *supra* note 170, at 35–37. For a reference to the “Knox Bills,” see *Anti-Trust Legislation: Senators Confident That Some Measure Will Be Passed*, *supra* note 171, at 8; *New Anti-Trust Bill: Senator Elkins Introduces Measure Embodying Knox Recommendations as to Railways’ Rebates*, N.Y. TIMES, Jan. 22, 1903, at 1.

<sup>214</sup> Philander C. Knox, Attorney-General of the United States, Address Before the Chamber of Commerce, Pittsburgh, PA (Oct. 14, 1902), in PHILANDER C. KNOX, THE COMMERCE CLAUSE OF THE CONSTITUTION AND THE TRUSTS: AN ADDRESS DELIVERED BY PHILANDER C. KNOX, ATTORNEY-GENERAL OF THE UNITED STATES, BEFORE THE CHAMBER OF COMMERCE, PITTSBURGH, PA (OCT. 14, 1902) at 10–14, 18 (1902).

<sup>215</sup> *Id.* at 1–42.

argued, even if correctly decided, was a more limited holding than was generally understood, because the Sherman Act was a more limited law than was commonly supposed.<sup>216</sup> The Act, he said, only prohibited “attempts to monopolize interstate commerce[;]” it did not prohibit “monopolies of production” or seek “to free [interstate commerce] from the restraints such monopolies” of production create.<sup>217</sup> Because the Sherman Act did not attempt to free commerce from those indirect effects, *E. C. Knight*, Knox argued, could not and “did not say that these indirect effects upon interstate commerce could not be prevented by Congress.”<sup>218</sup> Congress, in other words, had a power that it had not yet tried to exercise, and that power could be used to prohibit the interstate shipment of goods produced by trusts that abused their market power.

The speech created a sensation. Theodore Roosevelt called it one of “the most important” speeches given by any member of his administration.<sup>219</sup> A leading conservative Democratic newspaper called Knox’s plan “radical” and a “federal despotism.”<sup>220</sup> Days later, the Chairmen of both the House and the Senate Judiciary Committees wrote to Knox asking him for more information about his plan.<sup>221</sup> The speech was reprinted verbatim in two official Congressional publications,<sup>222</sup> and it prompted the Senate to ask him to propose specific additional antitrust legislation.<sup>223</sup> Even five years later, a Pennsylvania Congressman said its farsightedness demonstrated that Knox would make an excellent President.<sup>224</sup>

Despite the attention, Knox lacked a Supreme Court decision that explicitly confirmed that Congress’s power to regulate interstate commerce allowed it to prohibit interstate shipments of goods. To find the support he needed, he looked to *Champion v. Ames*. Whether Knox’s Pittsburgh speech was influenced by the then-pending litigation in *Champion*, or whether the government’s arguments in *Champion* were shaped by Knox’s antitrust proposals is difficult to determine. Most likely the influence was

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<sup>216</sup> *Id.* at 8, 10–12, 18.

<sup>217</sup> *Id.* at 12 (stating Knox’s conclusion as to “how far [the Sherman Act] went and where it stopped”).

<sup>218</sup> *Id.*

<sup>219</sup> Letter from Theodore Roosevelt, U.S. President, to W.H. Keach (1902), in THE PAPERS OF THEODORE ROOSEVELT (on file with the Library of Congress); see also James Burke, *Senator Knox and the Presidency*, THE INDEP., Mar. 26, 1908, at 664.

<sup>220</sup> Editorial, *The Knox Anti-Trust Programme Tried and Condemned Thirty Years Ago*, N.Y. SUN, Jan. 18, 1903, at 8. Other papers were more supportive, including THE J. OF INDUSTRY, June 22, 1903.

<sup>221</sup> S. DOC. NO. 57-73, at 3 (1903); Letter from George F. Hoar, U.S. Sen. from Mass., to Philander C. Knox, U.S. Att’y Gen. (Jan. 3, 1903), in THE KNOX PAPERS, *supra* note 12; Letter from Philander C. Knox, U.S. Att’y Gen., to Charles E. Littlefield, U.S. Rep. from Me. (Jan. 6, 1903), in THE KNOX PAPERS, *supra* note 12.

<sup>222</sup> S. DOC. NO. 57-73, at 37–50; 36 CONG. REC. 413–15 (1902).

<sup>223</sup> S. DOC. NO. 57-73, at 3 (detailing the request made to Knox).

<sup>224</sup> James Burke, U.S. Rep. from Pa., Speech of Hon. James Francis Burke Before the Pa. Delegation in Cong. 1–2, 12–13, 15–16 (Dec. 4, 1907), in THE KNOX PAPERS, *supra* note 12.

reciprocal; both Knox's speech and the government's third argument in *Champion v. Ames* occurred in October of 1902.<sup>225</sup> But Knox clearly saw them as serving related purposes. When the House and Senate Judiciary Committees challenged the plans Knox outlined in his Pittsburgh speech on the grounds that Congress lacked the power to prohibit the interstate shipment of goods,<sup>226</sup> Knox provided the committees with copies of the government's brief from *Champion*.<sup>227</sup>

*Champion*, in other words, was for Knox a weapon that could empower the federal government to control the trusts. Ultimately, it was not enough. The rest of the Knox Bills passed Congress, but his antitrust bill did not. Even so, Knox's attempt to use *Champion* to support his antitrust bill brings clearly into view his efforts to solve collective action problems of the states by establishing that Congress could prohibit the interstate shipment of goods in the proper circumstances. The broader point, too, is clear. While the harmful items limit of *Hammer* is widely viewed as the invention of Justices committed to a laissez-faire economy, it was actually generated by a lawyer who was fighting to expand federal regulation of business in critical ways.

## 2. The Federal Police Power

Knox's attempt to use *Champion* to pass far-reaching antitrust legislation is not the only example of his efforts to address the states' collective action problems. Knox supported *Champion* not just because it bolstered the idea that Congress could prohibit commerce in order to protect commerce, but also because it recognized that Congress's commerce power could be used to prevent the channels of interstate commerce from being used as a conduit for items harmful to the health, morality, safety, or general welfare of the nation. That is, Knox supported it because he supported a limited federal police power.

Knox's primary interest in *Champion v. Ames* may have stemmed from its potential to support his antitrust bill, but he also supported its recognition that Congress could exercise that prohibitory power to address other state collective action problems. In fact, it may be that Knox pushed the Solicitor General to take a more aggressive position on the constitutionality of the federal police power in the *Champion* litigation. And it is certain that Knox helped convince Congress that it had such a power and that it should exercise it.

From the start, *Champion v. Ames* was a case about state collective action problems. The central problem that all federal anti-lottery legislation sought to solve was

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<sup>225</sup> *Champion v. Ames*, 188 U.S. 321, 335–44 (1903); Knox, *supra* note 214.

<sup>226</sup> 36 CONG. REC. 415–16 (1902); Letter from George F. Hoar, U.S. Sen. from Mass., to Philander C. Knox, U.S. Att'y Gen., *supra* note 221.

<sup>227</sup> Letter from Philander C. Knox, U.S. Att'y Gen., to George F. Hoar, U.S. Sen. from Mass. (Jan. 5, 1903), in *THE KNOX PAPERS*, *supra* note 12 (citing the Assistant Attorney General's brief for *Champion* as support for his position on Congress's commerce power); Letter from Philander C. Knox, U.S. Att'y Gen., to Charles E. Littlefield, U.S. Rep. from Me., *supra* note 221.

the states' inability to prohibit their citizens from playing lotteries that took place in other states. A law banning the shipment of lottery tickets in the mails was necessary, proclaimed the relevant House Report, because the states were "helpless" against the evils created by the largest lottery of the time—the Louisiana Lottery.<sup>228</sup> They could not stop mail trains from bringing advertisements, tickets, or winnings into the state. It was thus the "duty of Congress" to prevent one state from using the mails to "violate the laws" of the other.<sup>229</sup> The Lottery Act of 1895<sup>230</sup>—which led to the litigation in *Champion v. Ames*—aimed to prevent lottery companies from simply shifting their business from the mail to private express companies whose interstate operations were placed by the Dormant Commerce Clause beyond state regulatory authority.<sup>231</sup>

Each of the government's briefs in *Champion*—including briefs written while Knox was Attorney General—emphasized that the Lottery Act was necessary because the states could prevent lotteries based within their borders, but could not address the evil of lottery tickets shipped in from out of state.<sup>232</sup> The government argued in its second brief:

[I]f this act be declared unconstitutional, and there be no power in Congress to suppress interstate commerce in lotteries, then the demoralization of these business enterprises can not be successfully combated. Is it possible that the Federal Government is so impotent that when it sees the channels of interstate commerce used as a means to strike down the police powers of the State that it can not by auxiliary legislation [aid] the States in their laudable purpose of suppressing this demoralizing business?<sup>233</sup>

This same concern was also highlighted in Justice Harlan's majority opinion in *Champion*. In upholding the law, Harlan emphasized that regulating lotteries was a legitimate government end and that the Court's Dormant Commerce Clause doctrine prohibited states from stopping out-of-state lotteries. "We should hesitate long," he

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<sup>228</sup> H.R. REP. NO. 50-787, at 2 (1888) ("Against this evil, condemned by public opinion and by their laws, the States are helpless.").

<sup>229</sup> *Id.*

<sup>230</sup> Anti-Lottery Act, ch. 908, 26 Stat. 465 (1890).

<sup>231</sup> 27 CONG. REC. 3013 (1895) (setting forth the text of the bill and also capturing the arguments made in support of its passage).

<sup>232</sup> See Revised Brief for the United States on Third Oral Argument, *Champion v. Ames*, 188 U.S. 321 (1902) (containing a consolidation of the briefs).

<sup>233</sup> Brief for Appellee at 31–32 *Champion v. Ames*, 188 U.S. 321 (1903). The United States has previously argued:

Such police power must exist somewhere as to interstate trade. It can not be nonexistent. Obviously it does not exist in the States; therefore it must exist in the Federal Government, and there is nothing in the legislative or judicial history of the country that in any manner gainsays this conclusion.

Revised Brief for the United States on Third Oral Argument at 72, *Champion v. Ames*, 188 U.S. 321 (1902) (No. 9).

wrote, “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. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce.”<sup>234</sup>

Knox seems to have supported the concept of a federal police power in *Champion*, and he certainly did not oppose it. Indeed, the first formal reference in any briefs to a federal police power came in the third brief, when Knox was firmly established as Attorney General and focused on the issue of Congress’s ability to prohibit the interstate shipment of goods.<sup>235</sup>

But, regardless of how closely Knox engaged himself in the *Champion* litigation, he surely worked to convince Congress that the approach was valid. Not only did he begin the debate over Congress’s power to prohibit the interstate shipment of goods in the debates over his antitrust bill, he also voted and argued for the constitutionality of the Pure Food and Drug Act (PFDA), an iconic piece of Progressive Era legislation that later led to the Supreme Court’s decision in *Hipolite Egg*.<sup>236</sup> The PFDA was the forerunner of the modern Food and Drug Administration, and its passage was famously made possible by the publication of Upton Sinclair’s *The Jungle*.<sup>237</sup> The Act proposed to prohibit the interstate shipment of food and drugs that had not been inspected and approved by the federal government.<sup>238</sup> Such inspections required federal inspectors be allowed inside the factories that produced the food or drugs for export.<sup>239</sup>

Opponents of the bill argued that the inspection of food and drugs was a classic example of the exercise of a police power and thus, under dual federalism, within the sole authority of the state governments. In Congress, the chief proponent of that view was Texas Senator Joseph Bailey. The PFDA, Bailey argued, was clearly unconstitutional. It was understood by everyone to be an attempt to protect the people from “deleterious articles of food and drink.”<sup>240</sup> It was thus not a regulation of commerce. It was “purely and only an exercise of the police power, and therefore not within the power of the Federal Government.”<sup>241</sup> The way to fix the problem, Bailey argued, was

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<sup>234</sup> *Champion v. Ames*, 188 U.S. 321, 357–58 (1903). “The framers of the Constitution never intended,” Harlan continued, quoting from *In re Rahrer*, 140 U.S. 545, 562 (1891), “that the legislative power of the Nation should find itself incapable of disposing of a subject matter specifically committed to its charge.” *Id.* at 358.

<sup>235</sup> See Revised Brief for the United States on Third Oral Argument at 72, *Champion*, 188 U.S. 321 (No. 9).

<sup>236</sup> See 40 CONG. REC. 2773 (1906) (recording Knox’s “yea” vote for the Pure Food and Drug Act).

<sup>237</sup> See generally UPTON B. SINCLAIR, *THE JUNGLE* (1906).

<sup>238</sup> Pure Food and Drug Act, Pub. L. No. 59-384, 34 Stat. 768, 768–72 (1906).

<sup>239</sup> See Harvard Law Review Association, *Development in the Law—The Federal Food, Drug, and Cosmetic Act*, 67 HARV. L. REV. 632, 686–87 (1954).

<sup>240</sup> 40 CONG. REC. 2758 (1906) (“[I]t is intended, understood, and supported for the purpose of protecting the people of the several States against injurious articles of food and drink . . .”).

<sup>241</sup> *Id.*

to recognize that the states could prohibit the importation of articles of commerce they felt were harmful.<sup>242</sup>

Knox, as was his usual practice in such debates, answered Bailey with a pointed and effective counter. “May I,” he said, “ask a question of the Senator from Texas?”<sup>243</sup> He then drove straight to the weakness in Bailey’s case: the *Champion* decision. “I only rise to ask the Senator if he has considered in . . . connection [with his argument] the case of *Champion* against Ames?”<sup>244</sup> The question alone was enough to put Bailey on the defense. “[S]o far as the case is worth anything it tends to establish the doctrine of a police power in the General Government,” Bailey admitted, and the best he could do was to admit he disagreed with the Court.<sup>245</sup> Later that day, the PFDA passed by a vote of 63–4.<sup>246</sup>

### 3. Knox, Congress’s Prohibitory Power, and the Harmless Items Limit

Knox’s support for solving collective action problems caused by the increasing integration of the national economy by empowering Congress to prohibit the interstate shipment of goods might be understood to contradict his commitment to the harmless items limit. His antitrust legislation explicitly prohibited the interstate shipment of harmless goods, and his hope that *Champion v. Ames* would support that legislation could imply that he believed that *Champion* recognized Congress’s authority to prohibit the interstate shipment of any goods, not just harmful goods.<sup>247</sup> But he explained in his 1908 *Yale Law Journal* article how the harmless items limit to the federal police power was consistent with his proposed antitrust legislation.<sup>248</sup> He also clearly recognized these limits much earlier.

Knox’s recognition of meaningful limits to Congress’s power to prohibit commerce found early expression in his response to a critique of his Pittsburgh speech in

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<sup>242</sup> *Id.* (“I insist that such legislation belongs to the States and not to the General Government, because with the States is left the right to control and the power to control the health and morals of their people.”).

<sup>243</sup> *Id.* at 2762.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* Bailey, in expressing his disagreement with the *Champion* decision, remarked that he “never refer[s] to [*Champion*]” if he could “avoid it.” *Id.*

<sup>246</sup> 40 CONG. REC. 2773 (1906).

<sup>247</sup> See KNOX, *supra* note 214, at 1–42; *supra* notes 96–99 and accompanying text.

<sup>248</sup> See *supra* notes 85–105. There he argued that Congress’s commerce power permitted it to pursue the end of regulating commerce. Prohibiting the interstate shipment of goods pursued such an end when the prohibition protected or promoted interstate commerce—as when the law prohibited the interstate shipment of nitroglycerine. It also did so, as Knox argued in Pittsburgh and again in the *Yale Law Journal*, when the shipment of trust-made goods was choking off trade from other participants. What was called a federal police power also pursued the end of regulating commerce if Congress was prohibiting interstate trade in order to prevent interstate commerce from being a conduit for harmful goods or transactions. See *supra* notes 85–105.

the *Harvard Law Review* in 1903.<sup>249</sup> Parmalee Prentice had already written a treatise on the Commerce Clause, but his 1903 *Harvard Law Review* article focused on a specific issue: he argued that the right to engage in interstate commerce arose from state law before the Constitution, and was not altered by the Commerce Clause.<sup>250</sup> This conclusion, he argued, was important because some had argued that the federal government's commerce power allowed it to either grant or withhold the authority to participate in interstate commerce at its pleasure.<sup>251</sup> The only person he identified as making this claim was Philander Knox.<sup>252</sup>

But, even at that early date, Knox supported the end-based limit on congressional power that he outlined systematically in the *Yale Law Journal*.<sup>253</sup> In a memorandum that seems aimed at Prentice's critique, Knox denied the accusation. The charge, Knox wrote, was "wholly incorrect. The distinction between the power to prohibit arbitrarily and for the protection of commerce I have now pointed out, was [in my Pittsburgh speech] clearly and emphatically noted."<sup>254</sup> He wrote:

There is a plain distinction between denying to the guiltless the undoubted right to engage in interstate commerce, without Federal authority, which right existed prior to and independent of the Constitution, and denying that right to [persons or] combination[s] guilty of restraining or monopolizing such commerce.

The one proposition is that the right to engage in interstate commerce cannot exist without the Government's permission; the other is that the right is denied to those who abuse its enjoyment by disobeying a lawful government regulation against its restraint.<sup>255</sup>

Knox also made clear in early public statements that *Champion v. Ames* did not address the question of whether Congress could prohibit the interstate shipment of any good if by doing so it would promote police power ends. In the same January 1903 submission to Congress that contained his antitrust proposal, Knox told Congress the decision in *Champion* would determine a narrower issue: whether "the right to regulate [interstate commerce] includes the right to prohibit where the character of the article warrants its exclusion from commerce."<sup>256</sup>

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<sup>249</sup> E. Parmalee Prentice, *The Origin of the Right to Engage in Interstate Commerce*, 17 HARV. L. REV. 20, 21 & n.1 (1903).

<sup>250</sup> *Id.* (relying on Knox's Pittsburgh speech to support his argument).

<sup>251</sup> *Id.* ("If the right to engage in interstate commerce find its source only in federal law, . . . the right may be one which the federal government may grant or withhold at pleasure.")

<sup>252</sup> *Id.*

<sup>253</sup> Knox, *supra* note 15, at 139, 144–46.

<sup>254</sup> Memorandum from Philander C. Knox, Comments on Pittsburgh Chamber of Commerce Speech 1 (1904), in THE KNOX PAPERS, *supra* note 12.

<sup>255</sup> *Id.* at 3.

<sup>256</sup> S. DOC. NO. 57-73, at 11 (1903).



Knox, in short, was consistent in articulating limits to Congress's commerce power that reflected the rule adopted by the Court in *Hammer*, but he did so at the same time he was fighting to establish that there were situations in which Congress could constitutionally use its commerce power to prohibit the interstate shipment of goods and was urging Congress to use that power to regulate business. When combined with the evidence from Knox's private papers that rejected the central ideas of laissez-faire economics, it is inconceivable that Knox's support of the harmless items limit was driven by a simple desire to protect business from government regulation. His support for the harmless items limit had its sources elsewhere, which the next three Parts identify.

### *B. Free Trade in the Early Twentieth Century*

Knox supported the harmless items limit not because it advanced a laissez-faire agenda, but because it would, he hoped, allow Congress to address the problems caused by the increasing integration of the national economy while protecting other important constitutional values: free trade among the states, freedom of contract, and federalism.

Like the Supreme Court,<sup>257</sup> Knox was committed to protecting free trade among the states, as his discussion of Kidd's *Principles of Western Civilisation* makes clear.<sup>258</sup> His notes highlight his hope that antitrust law would ensure a market free of both fraud and monopoly.<sup>259</sup> In summarizing his understanding of Kidd's argument, Knox wrote that "[w]hat is needed for the right development is free play for all forces, a free conflict; but free in the sense that liberty is freedom under law and not license for the sport of the strongest and most unrestrained forces."<sup>260</sup> That freedom would come "by controlling the conditions of competition,"<sup>261</sup> which would result in curtailing "[t]hose processes of organization and management . . . by which . . . legitimate investors are fleeced, capitalization dishonestly inflated in the interests of promoters, and the great prizes are always for the most unscrupulous."<sup>262</sup> He even explicitly tied his concern with free trade to the harmless items limit in his *Yale Law Journal* article. "If prohibition of interstate trade is within the arbitrary power of Congress," he wrote, "it might be exercised so as to exclude the products of particular states or sections of the country. Congress then might prohibit the shipment of cotton or wheat to promote the interests of wool or corn."<sup>263</sup>

Today, this concern with interstate protectionism may seem overdrawn. Congress, with representatives of all the states, might be thought unlikely to use its commerce power to advance the parochial economic interests of one group or region. In the early

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<sup>257</sup> See *supra* Part V.A.

<sup>258</sup> Knox, *supra* note 153.

<sup>259</sup> *Id.* at 4.

<sup>260</sup> *Id.* at 2.

<sup>261</sup> *Id.* at 3.

<sup>262</sup> *Id.* at 4.

<sup>263</sup> Knox, *supra* note 15, at 147.

twentieth century, however, this concern would have been a serious one. Political parties in the late nineteenth and early twentieth century were highly regional parties that, because of the uneven economic development of the nation, represented quite different economic interests. As a result, a Congress controlled by Republicans used its power to regulate foreign commerce to pass a tariff that advantaged the economic interests of their constituents in the North and West to the detriment of the South.<sup>264</sup>

The result was constant conflict between Republican supporters of the tariff and Democratic opponents, furious that Congress was using its power to regulate foreign commerce to disadvantage their constituents. Claims that this use of the commerce power was unconstitutional were common, but unsuccessful.<sup>265</sup> In such a context, concerns that Congress might use the authority to prohibit the interstate shipment of goods to advantage one set of economic interests over another would have seemed serious indeed.

The harmless items limit addressed that concern by limiting the exercise of the federal police power to cases in which there was a clear connection between the prohibition and a legitimate end. If the good itself was harmful, then it would clearly cause harm in the state to which the good was shipped. The prohibition would thus seem to be an attempt to address a legitimate problem that the Supreme Court was already trying to address through its Dormant Commerce Clause doctrine.<sup>266</sup> On the other hand, if the good itself was not harmful then it was possible—even likely in the context of early twentieth-century politics—that the prohibition was not an attempt to solve a problem created by degenerative competition, but was instead an attempt by Congress to favor the interests of one industry, or one region, over the other.<sup>267</sup>

The tight fit the harmless items limit required between the harm caused by the interstate shipment of a good and the actual shipment of goods in interstate commerce that Thomas Reed Powell complained of was thus not a senseless oversight, at least not for Knox.<sup>268</sup> It was justified in part by an expectation that such a tight fit was necessary to prevent Congress from misusing the federal police power to advance parochial over national interests. It was simply an extension of the policy concern that had driven the Supreme Court's Dormant Commerce Clause doctrine for decades.

### *C. Freedom of Contract and the Commerce Clause in 1906*

Knox's concern with free trade was not the only reason he was willing to accept the under-inclusiveness of the harmless items limit. His concern with protecting freedom of contract was also important. Knox was not oblivious to problems of labor. He led the

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<sup>264</sup> JOHN GERRING, *PARTY IDEOLOGIES IN AMERICA, 1828–1996*, at 65, 68–69 (1998).

<sup>265</sup> Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1799–1802 (2008).

<sup>266</sup> *See, e.g.*, *Gibbons v. Ogden*, 22 U.S. 1 (1824).

<sup>267</sup> *See, e.g.*, *Champion v. Ames*, 188 U.S. 321 (1903).

<sup>268</sup> *See* POWELL, *supra* note 8, at 180.

fight for the Federal Employers Liability Act,<sup>269</sup> and in 1908 was seen as labor's candidate for the Republican Party presidential nomination.<sup>270</sup> But throughout his career, Knox supported freedom of contract.<sup>271</sup> That support is important because of an underappreciated relationship between the Supreme Court's freedom of contract doctrine and its Commerce Clause doctrine. That relationship meant that Knox believed the harmless items limit was necessary to ensure that the Commerce Clause was not used to make an end run around the restrictions of liberty of contract.

The reason Knox's concern with protecting freedom of contract pushed him to support the harmless items limit may, at first glance, seem clear. *Hammer v. Dagenhart*, after all, used the approach to strike down a federal law regulating the employment of children.<sup>272</sup> But upon closer inspection the connection between those doctrines is hard to locate. Both state courts and the Supreme Court agreed that laws regulating the employment of children did not violate freedom of contract, although maximum hour, minimum wage, and other regulations of the employment relationship for most adult men did.<sup>273</sup> When the issue came before the Supreme Court in 1913, the Court followed the lead of state courts<sup>274</sup> and unanimously upheld the state regulation of child labor.<sup>275</sup> In addition, the Fifth Amendment limited Congress's exercise of its commerce

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<sup>269</sup> See *supra* note 78 and accompanying text.

<sup>270</sup> See *supra* note 71 and accompanying text.

<sup>271</sup> Knox, *supra* note 15. One example of Knox's lifelong support for freedom of contract was his critique of the Adamson Act in 1916, which was passed to avert a nationwide railroad strike. Adamson Act of 1916, 45 U.S.C. §§ 65–66 (repealed 1996); see *Wilson v. New*, 243 U.S. 332, 376 (Pitney, J., dissenting) (mentioning in his dissenting opinion that the Adamson Act should be invalidated and that “[t]he suggestion that it was passed to prevent a threatened strike” gives it no greater legal effect); Comment, *Federal Protection of Collective Bargaining under the Railway Act of 1926*, 40 *YALE L.J.* 92, 95 n.20 (1930). It established that eight hours would qualify as a full day's work for purposes of calculating wages on interstate railroads. 45 U.S.C. § 65. Knox attacked the Act with traditional freedom of contract arguments. Philander C. Knox, Speech of Hon. Philander C. Knox, at a Republican Mass Meeting, New York City (Oct. 19, 1916), in *THE KNOX PAPERS*, *supra* note 12. He wrote that:

[t]he immediate effect of the successful establishment of the power to destroy contracts between employer and employed and to fix the wages for which the employed shall work is to invite a struggle between those classes to control congress in order to control wages, the direful consequences of which need to be enlarged upon. . . . [T]he exercise of such power [may be] even more disastrous as it involves the surrender of individual liberty and the relegation of the citizen to conditions of slavery and peonage . . . . Slavery to congress is just as slavery to the individual . . . .

*Id.* at 5–6.

<sup>272</sup> *Hammer v. Dagenhart*, 247 U.S. 251 (1917).

<sup>273</sup> See Julie Novkov, *Historicizing the Figure of the Child in Legal Discourse: The Battle over the Regulation of Child Labor*, 44 *AM. J. LEGAL HIST.* 369, 372–73 (2000) (detailing state efforts to regulate child labor and state courts' approval of such regulations).

<sup>274</sup> *Sturges & Burn Mfg. Co. v. Beauchamp*, 231 U.S. 320, 325 (1913).

<sup>275</sup> *Id.*

power, and the right to freedom of contract was protected by the Fifth Amendment's Due Process Clause.<sup>276</sup> Nevertheless, the fact that the harmless item limit ensured that Congress could not use its commerce power to invade the right to freedom of contract that the Court would enforce most famously in *Lochner v. New York*<sup>277</sup> was a crucial reason that limit was supported by Knox and others.

The reason Congress's commerce power needed to be limited in order to protect freedom of contract was a doctrinal relationship between the Supreme Court's freedom of contract doctrines and its Commerce Clause doctrine in the early twentieth century first identified by Barry Cushman.<sup>278</sup> That relationship can be clearly seen in the Court's late nineteenth-century antitrust decisions.<sup>279</sup> Those decisions established that the freedom of contract protected by the Fifth Amendment's Due Process Clauses did not apply to legitimate regulations of interstate commerce.<sup>280</sup> 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 freedom of contract. To be clear, it was definitively established that the Bill of Rights, including the Fifth Amendment, applied to regulations of commerce.<sup>281</sup> But the Court's antitrust decisions established that freedom of contract was a special case because the substantive right of the freedom of contract was determined by the extent of legitimate government power.<sup>282</sup> The Fifth Amendment thus limited the exercise of Congress's commerce power, but the scope of the commerce power helped determine the scope of the substantive right to freedom of contract: if a regulation was a legitimate regulation of interstate commerce then, by definition, it was not a violation of freedom of contract and therefore would not be struck down on due process grounds.<sup>283</sup>

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<sup>276</sup> U.S. CONST. amend. V.

<sup>277</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>278</sup> CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 109–12 (1998); Barry Cushman, *Doctrinal Synergies and Liberal Dilemmas: The Case of the Yellow-Dog Contract*, 1992 SUP. CT. REV. 235, 238–43 (1992).

<sup>279</sup> See, e.g., *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897).

<sup>280</sup> See *Joint Traffic Ass'n*, 171 U.S. at 505; *Trans-Missouri Freight Ass'n*, 166 U.S. at 290.

<sup>281</sup> See, e.g., *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 336, 345 (1893) (applying the Fifth Amendment's Takings Clause to require the United States to pay for property taken pursuant to its commerce power).

<sup>282</sup> *Id.*

<sup>283</sup> See Editorial, *Liberty of Contract and the Commerce Clause*, 8 COLUM. L. REV. 301, 302 (1908) (“Congress may make police regulations with regard to those matters expressly entrusted to its care, even though incidentally it abrogate freedom of contract.”); Comment, *The Unconstitutionality of the Erdmann [sic] Act of 1898*, 17 YALE L.J. 614, 614 (1908) (coupling the Court's rationale of upholding freedom of contract with not finding a proper regulation of commerce in deciding *Adair v. United States*, 208 U.S. 161 (1908)). Failing to separate the question of how the Commerce Clause affects the scope of the substantive right of freedom of contract from the question of whether the Fifth Amendment applies to exercises of the

The idea that a legitimate exercise of Congress's power over interstate commerce could not violate freedom of contract was supported by the social contract perspective of most Progressive Era lawyers and judges.<sup>284</sup> From that perspective, government authority was not organic. It did not emerge directly from the existence of society. It was, instead, created by society to serve specific ends.<sup>285</sup> Government authority was not, for example, like that of a parent over a child, which extends to all areas of the child's life, and which is arguably justified by the relationship between the parent and the child. It was like that of a voluntary association, whose authority is limited to the specific purposes for which the association was created. Your chess club, for example, can disqualify you from the club tournament for cheating, but it cannot stop you from changing jobs.

The freedom of contract doctrine of *Lochner* emerged from that same perspective.<sup>286</sup> State regulations that advanced police power purposes—the health, safety, morality, or general welfare of the community—were legitimate, because state governments were created to pursue those ends. But regulations that went beyond those purposes—that, for example, aimed to simply take property from one person and pass it to another or that arbitrarily limited an adult male's contractual rights—were illegitimate because the Justices believed government was not created to advance such ends.<sup>287</sup> Freedom of contract in the *Lochner* era was never absolute.<sup>288</sup> Legitimate police regulations regularly interfered with individual contracts,<sup>289</sup> but since they were legitimate police regulations they by definition did not violate freedom of contract. What the Progressive Era Court understood itself to be doing in its freedom of contract cases was separating laws that served legitimate government ends from those that did not.<sup>290</sup> “Freedom of contract” was a convenient term for the category of private activity whose regulation was not within the scope of proper government authority. It was a derivative category. It was the activity “left over” after proper government police regulations were exhausted.

At the federal level in the late nineteenth and early twentieth century, the Commerce Clause played a similar role to the states' police power. The federal government, no more than the states, could pass regulations that went beyond the ends it was created to serve.<sup>291</sup> But since “freedom of contract” was a derivative category, any legitimate

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commerce power was what Frank Goodnow (perhaps purposely) confused. See FRANK J. GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 88–89 (1911).

<sup>284</sup> See FISS, *supra* note 184, at 159–65.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Lochner v. New York*, 198 U.S. 45, 56 (1905).

<sup>288</sup> *Id.* at 53–54.

<sup>289</sup> See Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294 (1913) (providing an extensive list of valid regulations from various states).

<sup>290</sup> *Id.* at 311–12 (citing *Schmidinger v. Chicago*, 225 U.S. 578 (1913)).

<sup>291</sup> FISS, *supra* note 184, at 159.

exercise of federal power would, by definition, not interfere with that liberty. If a regulation of interstate commerce was legitimate, it meant that the rule did not interfere with state prerogatives. It also meant that it did not improperly invade the protected private sphere.<sup>292</sup> In this system, an unalterably private sphere still existed. “Freedom 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.<sup>293</sup> Any legitimate regulation of interstate commerce thus could not, by definition, interfere with “freedom of contract.”<sup>294</sup>

This was not an understanding that was merely theoretical. It was at the center of the Court’s antitrust decisions between the 1896 decision in *United States v. Trans-Missouri Railway*,<sup>295</sup> and 1911, in *United States v. American Tobacco Company*.<sup>296</sup> During that period, the Supreme Court had adopted a “literalist” interpretation of the Sherman Anti-Trust Act’s prohibition on “[e]very contract . . . in restraint of trade.”<sup>297</sup> That statutory language, the Court held, meant what it said.<sup>298</sup> It did not just prohibit contracts that unreasonably restrained trade; it prohibited *all* contracts that restrained trade, whether reasonable or not.<sup>299</sup> By holding that Congress could prohibit reasonable contracts, that interpretation imperiled freedom of contract, an argument made the following year, in *United States v. Joint Traffic Association*,<sup>300</sup> by a railroad that had been sued for violation of the Sherman Act.<sup>301</sup> “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.<sup>302</sup> That right, it claimed, citing the central decisions

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<sup>292</sup> *Id.* at 160.

<sup>293</sup> *Id.* at 163–64.

<sup>294</sup> The last three paragraphs follow the analysis of Professor Fiss. *See* FISS, *supra* note 184, at 157–79. *See also* GILLMAN, *supra* note 55, at 54–55 (“[The] Justices were expressing a commitment to a well-defined and long standing but largely neglected feature of early American political culture: a belief among elites and state managers that the exercise of public power should be limited to those goals and purposes that truly advanced the interests of the ‘community as a whole’ or the ‘general welfare’ and not the ‘factional,’ ‘special,’ ‘private,’ ‘unequal,’ ‘selfish,’ ‘class,’ or ‘partial’ interests of certain groups or classes.”); WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT* 107–12 (1998); Les Benedict, *supra* note 54, at 327–31. *But see* BERNSTEIN, *supra* note 55 (arguing that *Lochner* was grounded not in concerns with class legislation but in precedent and a natural rights tradition).

<sup>295</sup> 166 U.S. 209 (1897).

<sup>296</sup> The Supreme Court famously exchanged its literalist understanding of the Sherman Act for the “rule of reason” in *United States v. American Tobacco Company*, 221 U.S. 106, 179–80 (1911) and *Standard Oil Company of New Jersey v. United States*, 221 U.S. 1, 66–68 (1911).

<sup>297</sup> Sherman Anti-Trust Act, ch. 647, 26 Stat. 609 (1890) (current version at 15 U.S.C. § 1 (2004)).

<sup>298</sup> *Trans-Missouri Freight Ass’n*, 166 U.S. at 312.

<sup>299</sup> *Id.* at 340–41.

<sup>300</sup> 171 U.S. 505 (1898).

<sup>301</sup> *Id.*

<sup>302</sup> Brief for the Central Railroad Company of New Jersey at 3, *Joint Traffic Ass’n*, 171 U.S. 505 (No. 341).

establishing the freedom 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.”<sup>303</sup> Because reasonable contracts in restraint of trade are not prejudicial to the security or welfare of society, it concluded, Congress lacked the authority to prohibit such contracts.<sup>304</sup>

The Court, however, rejected this argument on the grounds that freedom of contract could not be violated by a legitimate exercise of Congress’s power over interstate commerce.<sup>305</sup> “The power to regulate commerce,” Justice Peckham admitted, “does not carry with it the right to destroy or impair those limitations and guarantees which are also placed in the Constitution,” limitations which 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.”<sup>306</sup> According to Peckham, however, this principle did not invalidate the law. He rejected the defendant’s claim by defining the right to freedom of contract as limited by Congress’s authority to regulate commerce:

The citizen may have the right to make a proper (that is, a lawful) contract . . . [but t]he 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.<sup>307</sup>

This approach to the limits of freedom of contract was followed in later antitrust cases. In 1899, in *Addyston Pipe & Steel Company v. United States*,<sup>308</sup> Peckham wrote again for the majority, which this time was unanimous, reinforcing his position from

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<sup>303</sup> *Id.* The brief especially emphasized *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), which established that the Fourteenth Amendment protected liberty of contract, as well as a plethora of state cases, including *People v. Gillson*, 17 N.E. 343 (N.Y. 1888) and *Godcharles v. Wigeman*, 6 A. 354 (Pa. 1886). *Id.* at 4–6.

<sup>304</sup> *Id.* at 2.

<sup>305</sup> *Joint Traffic Ass’n*, 171 U.S. at 571.

<sup>306</sup> *Id.* at 571–72.

<sup>307</sup> *Id.* at 572–73.

<sup>308</sup> 175 U.S. 211 (1899).

*Joint Traffic Association*.<sup>309</sup> The Fifth Amendment’s Due Process Clause, he wrote, did not stop Congress from prohibiting contracts in restraint of trade.<sup>310</sup> “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, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree commerce among the States.<sup>311</sup>

That relationship was at the center of the government’s defense of the constitutionality of the Erdman Act<sup>312</sup> in 1907. The Erdman Act was passed in the wake of the Pullman Strike of 1894<sup>313</sup> and was aimed to decrease the tension between labor and management that had sparked that strike and thereby effectively shut down the nation’s railroads. In *Adair v. United States*,<sup>314</sup> a railroad challenged the provision that prohibited interstate railroads from firing employees who had joined a union.<sup>315</sup> The government first sought to establish that the Act was a regulation of commerce because protecting unionized workers would prevent strikes that would interfere with interstate commerce.<sup>316</sup> It then turned to the Fifth Amendment freedom of contract question. It recognized and accepted the existence of freedom of contract but argued that “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.”<sup>317</sup> Looking back at the Court’s antitrust decisions, the government argued that the Sherman Act was upheld even though it “forbid[s], not only contracts which were . . . unreasonable restraint[s] of interstate trade and commerce, but those which were reasonable in their nature,” demonstrating, it argued (citing the Court’s language from *Joint Traffic Association*), that freedom of contract did not restrict legitimate regulations of commerce.<sup>318</sup> Because the government believed the Erdman Act was a valid regulation of interstate commerce, it concluded that it was constitutional regardless of freedom of contract.<sup>319</sup>

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<sup>309</sup> *Id.* at 228.

<sup>310</sup> *Id.* at 228–29.

<sup>311</sup> *Id.* at 229.

<sup>312</sup> Erdman Act of 1898, ch. 370, 30 Stat. 424 (1898).

<sup>313</sup> ALVIN L. GOLDMAN, *THE SUPREME COURT AND LABOR AND MANAGEMENT RELATIONS LAW* 12 (1976).

<sup>314</sup> 208 U.S. 161 (1908).

<sup>315</sup> *Id.* at 170.

<sup>316</sup> Brief for the United States at 12, *Adair*, 208 U.S. 161 (No. 293).

<sup>317</sup> *Id.* at 21.

<sup>318</sup> *Id.* at 21–24.

<sup>319</sup> *Id.* at 19–37.



The Court's decision in *Adair* struck down the Erdman Act, but accepted the principle that a legitimate regulation of interstate commerce did not, by definition, violate liberty of contract.<sup>320</sup> Justice Harlan's opinion for the majority first established that the Act was a violation of freedom of contract.<sup>321</sup> He then noted the government's argument that a regulation of commerce could not be a violation of the Fifth Amendment, and instead of rejecting that argument outright—by stating, for example, that freedom of contract constrained Congress's commerce power—he rejected the argument on the grounds that the provisions of the Erdman Act at issue did not qualify as regulations of interstate commerce. Harlan then explained why the provision was not, in fact, a regulation of commerce.<sup>322</sup>

Legal treatises recognized this relationship as well. Frederick Cooke's *The Commerce Clause of the Federal Constitution* recognized Congress's commerce power was limited by the Fifth Amendment and agreed that “the word ‘liberty’ as [used in the Fifth Amendment] is not ‘confined to the mere liberty of person, but includes, among others, a right to enter into certain classes of contracts for the purpose of enabling the citizen to carry on his business.’”<sup>323</sup> But he also recognized that “such constitutional guaranty does not prevent Congress, in the exercise of power under the commerce clause, from legislating, even by way of prohibition, upon the subject of such contracts in respect to commerce within the scope thereof, as ‘directly affect and regulate that commerce.’”<sup>324</sup> For support, Cooke cited *Addyston Pipe*.<sup>325</sup>

The understanding that legitimate regulations of commerce could not violate freedom of contract meant that the proper scope of the Commerce Clause had implications not just for the distribution of power between the states and the federal government, but also for the distribution of power between the public and private sphere. An expansion of the subjects the Commerce Clause could regulate would not only expand the scope of federal power, it would permit Congress to bypass the restrictions of freedom of contract.

That possibility contributed to Knox's support of the harmless items limit even though that limit allowed Congress to solve only some of the collective action problems created by the increasing integration of the national economy. The relationship to freedom of commerce meant that without a limit to the federal police power Congress could effectively bypass the restrictions of freedom of contract by prohibiting the interstate shipment of goods produced by men who worked more than eight hours a

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<sup>320</sup> *Adair*, 208 U.S. at 180.

<sup>321</sup> *Id.* at 172.

<sup>322</sup> *Id.* at 176–79; see also Cushman, *supra* note 278, at 235 (discussing the Erdman Act and *Adair* as the origin of a body of doctrine seeking to resolve the tension between the Commerce Clause and due process).

<sup>323</sup> FREDERICK H. COOKE, *THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION* 68–69 (1908).

<sup>324</sup> *Id.* at 69.

<sup>325</sup> *Id.* (citing *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899)).

day. Given Knox's commitment to freedom of contract, he would have seen that as a disaster and a powerful reason to support the harmless items limit.

*D. The Harmless Items Limit and Progressive Era Federalism*

Concern with protecting freedom of contract and free trade among the States helps explain why Knox supported the harmless items limit. As the previous subparts have argued, the harmless items limit served Knox's twin goals of ensuring that Congress could not interfere with a unified national market without good reason or use its commerce power to make an end run around the requirements of freedom of contract. Those may have been reason enough for Knox to support the rule even though it allowed Congress to address only some of the collective action problems generated by the increasing integration of the national economy. But any doubts he had about the costs of an under-inclusive rule were further assuaged by his concerns with protecting space for meaningful local politics and a hope that interstate cooperation could solve some of the collective action problems the harmless items limit stopped Congress from addressing.

Knox believed federalism itself protected important values, as he made clear in a 1908 speech on the battlefield at Gettysburg.<sup>326</sup> At the site of that great national victory—about which Knox, as a Pennsylvanian, would have had no ambivalence—he emphasized the important role of the states in American government.<sup>327</sup> He praised the sacrifice of the soldiers and the end of slavery, but he also encouraged his listeners to “jealously guard” the system of American federalism from people “interested in the accomplishment of laudable aims [who have] become impatient and restive under the checks and balances and boundaries which control and harmonize our system.”<sup>328</sup> “[T]his tendency,” Knox said:

threatened seriously to disturb the just relations between the State and Federal governments. Impatient of the difficulties and delays which must attend the action of separate States in the accomplishment of their objects, some of the people have seemed to feel that by an assumption of Federal power, or by ignoring State power, their aims could be speedily and fully obtained.<sup>329</sup>

Knox urged his listeners to resist that tendency. Americans, he argued, must keep each of the “dual governments . . . within its own sphere, untrammelled and uncontrolled

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<sup>326</sup> Philander C. Knox, Memorial Address by Hon. Philander C. Knox on the Battlefield of Gettysburg 18–21 (May 30, 1908), in *THE KNOX PAPERS*, *supra* note 12.

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* at 17–18.

<sup>329</sup> *Id.* at 18.

by the other.”<sup>330</sup> “This Government,” he wrote, “is not seriously threatened by Anarchy . . . . Our peril is to be found in weak or insidious acquiescence by our public servants in specious demands for inroads upon the established and tried institutions of our country sometimes made in the name of reform, sometimes masquerading as justice.”<sup>331</sup>

Knox did not pause to detail the functions federalism served, but there were multiple reasons people in his period supported federalism. Most scholars have emphasized the importance of federalism’s ability to protect liberty.<sup>332</sup> Owen Fiss’s review of the Waite Court, for example, posits that the Court in the late nineteenth century believed local governance protected by a federal system was more likely to protect liberty because it gave individuals a larger say in the rules that governed them and would permit them, if necessary, to move to places where they agreed with the local consensus.<sup>333</sup> But in the early twentieth century it is clear this was not the sole support for federalism or perhaps even the dominant justification. Many lawyers, politicians, and intellectuals on both the left and right were concerned with protecting federalism because they believed meaningful local politics were necessary to create the kind of citizens capable of productive participation in national politics.<sup>334</sup>

Though Progressives are often portrayed as proponents of increased bureaucratic and state power, many also remained concerned with preserving local political involvement. Progressives were the driving force behind the creation of the Federal Trade Commission,<sup>335</sup> the Federal Reserve Board,<sup>336</sup> the strengthening of the Interstate Commerce Commission,<sup>337</sup> and other state-building projects, as well as significant reforms of the political system, including the extension of the vote to women<sup>338</sup> and the direct election of senators.<sup>339</sup> They rarely, however, criticized the states as states. They challenged the direct election of senators, not the anti-democratic way the Senate distributes votes.<sup>340</sup> They added little to the century-old critique of localism that began with Federalist Number 10, and many Progressives, including Louis Brandeis and

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<sup>330</sup> *Id.* at 19.

<sup>331</sup> *Id.* at 21.

<sup>332</sup> See, e.g., FISS, *supra* note 184; Robert Post, *Federalism in the Taft Court Era: Can It Be “Revived”?*, 51 DUKE L.J. 1513 (2002).

<sup>333</sup> FISS, *supra* note 184, at 258.

<sup>334</sup> See generally Martha Derthick & John J. Dinan, *Progressivism and Federalism*, in PROGRESSIVISM AND THE NEW DEMOCRACY 81–102 (Sidney M. Milkis & Jerome M. Mileur eds., 1999).

<sup>335</sup> AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 258–59 (2010).

<sup>336</sup> Chad Emerson, *The Illegal Actions of the Federal Reserve: An Analysis of How the Nation’s Central Bank Has Acted Outside the Law in Responding to the Current Financial Crisis*, 1 WM. & MARY BUS. L. REV. 109, 114–15 (2010).

<sup>337</sup> RANA, *supra* note 335, at 258–59.

<sup>338</sup> *Id.* at 259.

<sup>339</sup> Andrew Brady Spalding, *The Irony of International Business Law: U.S. Progressivism and China’s Laissez-Faire*, 59 UCLA L. REV. 354, 367–68 (2011).

<sup>340</sup> Derthick & Dinan, *supra* note 334, at 91.

New Nationalist Herbert Croly affirmatively praised the opportunities the States provided for policy experimentation.<sup>341</sup>

Woodrow Wilson personifies the tension in Progressive thought between the support of increased federal power and a republican emphasis on the importance of the virtues produced by meaningful local politics. Wilson successfully advocated the creation of national administrative institutions like the Federal Reserve and the Federal Trade Commission, and his late conversion to support for federal child labor regulation was critical to its passage, but he also commonly argued for the benefits of decentralized authority:

Moral and social questions originally left to the several States for settlement can be drawn into the field of federal authority only at the expense of the self-dependence and efficiency of the several communities of which our complex body politic is made up. Paternal morals, morals enforced by the judgment and choices of the central authority at Washington, do not and cannot create vital habits or methods of life unless sustained by local opinion and purpose, local prejudice and convenience,—unless supported by local convenience and interest; and only communities capable of taking care of themselves will, taken together, constitute a nation capable of vital action and control. You cannot atrophy the parts without atrophying the whole.<sup>342</sup>

Elihu Root, a close adviser of President Roosevelt and a proponent of his New Nationalism, shared Wilson's ambivalence. At the first National Conference of Governors, Root compared the states to the nations of Europe to emphasize their individual sovereignty and their increasing interdependence.<sup>343</sup> The “forty-six sovereign states,” were lagging behind European nations that were effectively cooperating to solve their common problems. American states should follow the Europeans' example and use their sovereign powers “with a wise regard for the common interest, upon conference, upon complete understanding of the duties of good neighborhood.”<sup>344</sup> Only such cooperation would remove the “continu[ed] pressure to force the National Government into the performance of the duties that the states ought to perform.”<sup>345</sup>

Root's speech also suggests another reason lawyers like him and Knox would have supported a harmless items rule that seemed clearly under-inclusive. As Root's speech suggests, many Progressives believed their ambivalence about federal power could be resolved by interstate cooperation. One example was a popular Progressive proposal

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<sup>341</sup> *Id.* at 92.

<sup>342</sup> WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 195 (1908).

<sup>343</sup> ELIHU ROOT, *ADDRESSES ON GOVERNMENT AND CITIZENSHIP* 372–73 (Robert Bacon & James Brown Scott eds., 1916).

<sup>344</sup> *Id.* at 373.

<sup>345</sup> *Id.*

that Root regularly advanced: the passage of uniform state legislation. The American Bar Association supported the approach and state legislatures created a Commission on Uniform State Laws.<sup>346</sup> Using the approach to address workman's compensation laws garnered the support of both the American Association for Labor Legislation and the National Civic Federation, a business group.<sup>347</sup> President Roosevelt's call for the first National Conference of Governors in 1908 was intended to encourage the states to cooperate to address conservation policy, and provides further evidence of the Progressive emphasis on interstate cooperation.

Progressives' expectations for interstate cooperation built on a sanguine hope that advances in technology and communication would increasingly integrate not only the economy but also the body politic. A variety of Progressive social theorists, including Mary Follett, James Dewey, Jane Addams, and Josiah Royce, believed that changes in communication and technology could redeem American politics by uniting the nation in the search for the common good. But the active involvement of individuals in meaningful local politics was crucial to the creation of a unified national community that placed the public good above selfish interests. Mary Follett's praise of the community created by urban neighborhoods, Dewey's concern with community centers, and Addams's work on social centers were all justified as ways to create an active citizenry capable of acting for the common good.<sup>348</sup>

This strong commitment to federalism was thus another wellspring of Knox's support for the harmless items limit. It, along with his support for freedom of contract and free trade among the states, provided powerful reasons for Knox's belief that Congress's authority to prohibit interstate commerce needed to be limited. What that means is that even though the harmless items limit has seemed incoherent as policy to commentators for nearly a century, it was for Knox and the many others who shared his concerns not just coherent but wise. The harmless items limit did not interfere with Congress's authority to address the most pressing problems caused by the increasing integration of the national economy—most important among them the trusts. It preserved sufficient space for meaningful local politics that would produce a democratic people while preventing Congress from interfering with free trade or freedom of contract. And any fear that the harmless items limit was under-inclusive was blunted by the broadly shared hope in the potential of cooperative state action.

#### VI. PHILANDER KNOX, THE HARMLESS ITEMS LIMIT, AND THE CREATION OF CONSTITUTIONAL LAW

At the base of the traditional story of *Hammer v. Dagenhart* is an understanding of constitutional development that centers on the Supreme Court. Though rarely made

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<sup>346</sup> Graebner, *supra* note 4, at 334, 351.

<sup>347</sup> *Id.* at 349–50.

<sup>348</sup> See generally JEAN B. QUANDT, FROM THE SMALL TOWN TO THE GREAT COMMUNITY (1970).

explicit, the assumption that the Court itself was the primary actor is implicit in the criticism directed at the Court for making what is commonly understood to be an abrupt about face.<sup>349</sup> This assumption is in part justified. The *Hammer* majority did endorse the harmless items rule and lodge it in the United States Reports. They could have chosen another path; that is exactly what the four dissenters did. Nothing made the majority's choice inevitable.

Yet, the Justices were not the only important actors, and were perhaps not even the most important. Others contributed to the outcome by determining the options presented to the Court, by shaping the legislative and judicial precedents the Court had to analyze, and by creating a broadly shared understanding of the limits of Congress's commerce power. Others, that is, created the arguments that convinced the Court that the harmless items limit was correct and pushed Congress towards a decade of legislation that confirmed it. Among those others, Knox was crucial. As much as anyone, he created the doctrinal system adopted by the Court in *Hammer v. Dagenhart*.

There is no straight line between Knox's 1908 article in the *Yale Law Journal* and the decision in *Hammer*. There were, importantly, two changes that significantly undermined the justification for the harmless items limit. First, in 1908, there was substantial hope that interstate cooperation could solve many of the collective action problems caused by degenerative competition. By 1918, that hope had dimmed, a change that would have made the under-inclusiveness of the harmless items limit seem more problematic.<sup>350</sup> Second, at least some important political and constitutional actors believed the doctrinal relationship between freedom of contract and Congress's commerce power had changed.<sup>351</sup> In 1908, everyone agreed that the commerce power could be used to make an end run around the restrictions of freedom of contract. By 1918, the status of that assumption was no longer clear. Some had begun to believe that, to the contrary, a legitimate regulation of commerce could still be unconstitutional on the grounds that it violated freedom of contract. That change undermined the harmless items limit because it suggested protecting freedom of contract no longer required limiting the reach of Congress's commerce power.

Evidence of that change is clear from a comparison of the debates over the Beveridge Child Labor Bill in 1907, and the Keating-Owen Child Labor Bill in 1914. In 1907, Albert Beveridge, a fine lawyer and committed advocate of a federal child labor regulation, submitted a bill to Congress that looked very much like the Keating-Owen Act at issue in *Hammer*. In debates on the floor of the Senate he received significant constitutional challenges to his bill but was able to successfully combat the

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<sup>349</sup> See *supra* notes 48–50.

<sup>350</sup> Graebner, *supra* note 4, at 352–54 (examining the extent to which regulations were uniform among the states by 1918).

<sup>351</sup> Barry Cushman has pointed out areas where the Supreme Court applied the original approach well into the 1930s. CUSHMAN, *RETHINKING THE NEW DEAL COURT*, *supra* note 278, at 123–38. But that understanding was no longer universally accepted. See discussion *infra* notes 354–58.

majority of them.<sup>352</sup> But when he was asked whether his child labor bill would allow the federal government to regulate the working conditions of adult men, he admitted it would. He did so not because he supported such regulations—he did not—but because he respected the implications of the rule that any legitimate regulation of interstate commerce was by definition consistent with liberty of contract. He accepted them because he could find no way around it and that argument was one of the central weapons used to defeat his bill.<sup>353</sup>

In 1916, however, debates over child labor regulation reflected that the relationship between freedom of contract and the Commerce Clause had changed. 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.<sup>354</sup> “[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.”<sup>355</sup> First, “[w]hat are the respective jurisdictions of the Federal Government and the State governments over commerce?”<sup>356</sup> Second, “what are the respective rights and powers of the Federal Government and the individual,” a question which “arises under the [F]ifth [A]mendment to the Constitution.”<sup>357</sup> Parkinson used that division to counter concerns that the passage of a child labor law meant an adult labor law was also constitutional.

This decoupling of the Commerce Clause and freedom of contract doctrine and the declining hope in interstate cooperation undermined two central supports for the harmless items limit. No longer was limiting the reach of the commerce power necessary to protect freedom of contract. And the dimmed hope that collective action problems among the states could be solved with interstate cooperation made the harmless items limit’s under-inclusiveness more problematic.

On the other hand, some support for the doctrine remained and new issues emerged. Concerns remained that politicians might regulate interstate commerce in ways that advanced their constituents’ own parochial interests at the expense of the national interest. Certainly there were no indications that the Court was backing away from its Dormant Commerce Clause doctrine.<sup>358</sup> In addition, by 1918, the nation was

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<sup>352</sup> See *supra* notes 122–25 and accompanying text.

<sup>353</sup> Logan Everett Sawyer III, *Partisan Calculation*, 31 LAW & HIST. REV. (forthcoming 2013).

<sup>354</sup> See *An Act to Prevent Interstate Commerce in the Products of Child Labor, and for Other Purposes: Hearings on H.R. 8234 Before the S. Comm. on Interstate Commerce*, 64th Cong. 113–52 (1916) (statement of Thomas I. Parkinson, Director of the Legislative Drafting Bureau at Columbia University).

<sup>355</sup> *Id.* at 114.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

<sup>358</sup> See Post, *supra* note 332, at 1605 n.315 (noting that between 1921 and 1928, the Supreme Court struck down more than half of the regulations challenged under the Dormant Commerce Clause).

recovering both from the exertions of World War I and from the remarkable centralization of authority in the federal government that war produced. The Wilson administration, for example, effectively took control of the shipping, railroad, telephone, and telegraph industries.<sup>359</sup> It commandeered manufacturing plants, fixed prices for dozens of commodities, and conscripted millions. Such centralization of authority, even if effective, generated serious concern and may have pushed some judges towards traditional constitutional limits on federal power.<sup>360</sup>

Together, the changes between Knox's article in 1908, and the *Hammer* litigation in 1916, both supported and undermined the original justification for the rule. For some, the decoupling of freedom of contract and Commerce Clause doctrine, as well as decreasing hopes for interstate cooperation, must have indicated the rule should be abandoned. Others may have thought continuing concerns with parochial regulation of commerce and the centralization produced by World War I suggested the rule should be upheld. But what is crucial to see is that while those structural developments would have affected support for some limit on federal power in 1918, they did not determine what that limit would be. And while Justice Day and the *Hammer* majority had the ultimate decision on that issue, they were not acting in a vacuum. In choosing a doctrinal rule, they looked at traditional sources for guidance: briefs of counsel, legislative history, and judicial precedent. And Knox played a critical role in shaping each of those sources.

Knox did not write the briefs for the opponents of the Keating-Owen Act, but his influence was clear. Appellee's briefs advanced the harmless items limit that Knox had helped create, propagate, and defend in Congress and in the pages of the *Yale Law Journal*. That counsel chose that doctrinal structure should be unsurprising. Those same arguments had been used by the opponents of federal child labor laws for over a decade. They were used by the opponents of the Keating-Owen Act in 1916, of the Palmer-Owen Act in the previous Congress, and the Beveridge Child Labor Bill in 1907 and 1908. In those last debates, Knox's influence was particularly clear: he participated in them personally and reminded his fellow senators that his work as Attorney General gave him additional insight into the limits of the federal police power. Even with the changed circumstances between Knox's work propagating the harmless items limit in the debates over the Beveridge Child Labor Bill, just the fact that this doctrinal limit had been accepted by leading legislators and treatise writers for a decade must have weighed heavily on counsel.

Knox's influence did not just extend to the arguments counsel made to the Court. It is also fair to say that his work influenced the context in which the Court evaluated those arguments. A defining characteristic of the legal landscape when *Hammer* was decided was that every decision that approved the federal police power could be characterized as consistent with the harmless items limit. That alone gave Justices looking for

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<sup>359</sup> Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489, 1489 (1998).

<sup>360</sup> Post, *supra* note 332, at 1520. See also Post, *supra* note 359.



a way to limit federal power encouragement to adopt that approach. That state of affairs, however, did not occur by accident. Judicial precedent developed through statutes that passed Congress, and because of the work of Knox and others, the only federal police power statutes that passed Congress prior to the adoption of the Keating-Owen Child Labor Act were arguably consistent with the harmless items limit.

Pursuant to the federal police power, Congress passed the Pure Food and Drug Act, the related meat inspection amendments, and the Mann Act. In debates over each of those laws, most congressmen made arguments consistent with Knox's understanding of the federal police power. Knox himself took part in the earlier debates—over the Pure Food and Drug Act and the meat inspection amendments. Prior to the contested passage of the Keating-Owen Act, Congress also declined to pass laws that were inconsistent with the harmless items limit, and, just as importantly, declined to pass them on the grounds that they were unconstitutional. The clearest example was the Beveridge Child Labor Bill in 1907.

In sum, when it came time to decide *Hammer*, there was already a long line of judicial and legislative precedent that was consistent with the harmless items limit. And Knox's support for both the federal police power and the harmless items limit as a nationally respected lawyer, recognized through his experience as Attorney General as deeply knowledgeable about those issues, helped establish that understanding. Even if most senators and representatives were using constitutional arguments only as cover for their real political motivations, Knox's support for the harmless items limit in no small way provided it.

#### CONCLUSION

To modern commentators, the harmless items limit is almost universally seen as constitutionalizing a nonsensical policy. Putting aside the difficulties of determining what goods were “intrinsically harmful,” they see no good reason the Constitution should differentiate collective action problems involving the shipment of a harmful good from those that do not. Because traditional sources do little to explain the emergence of or rationale for the harmless items limit, those commentators have concluded that the doctrine was an unprincipled invention of a laissez-faire Supreme Court.

Using untapped archival sources to recover the origin of what became the *Hammer* doctrine, this paper has challenged that conclusion. The actions and ideas of Philander Knox indicate that the harmless items limit was not an attempt to return America to an imagined laissez-faire past. It was an effort by politically engaged lawyers to reconfigure doctrinal structures to address the problems of a new century while preserving existing protection for what they saw as important values. Knox and his contemporaries wanted to change Commerce Clause doctrine just enough to address growing collective action problems, but not so much as to threaten free trade, federalism, or freedom of contract. Their solution was the harmless items limit.

This new perspective extends the ongoing revision of the so-called “*Lochner* Era.” The past several decades have seen a revolution in our understanding of the Supreme Court at the turn of the twentieth century. Scholars have increasingly shown the doctrine of the period was not a result of the Court’s dedication to a pro-business, laissez-faire economic order, but from abolitionist inspired ideas of free labor and a Jacksonian concern with government neutrality.<sup>361</sup> Yet the traditional understanding stubbornly hangs on in many areas, perhaps in part because that revision has not yet provided a convincing explanation for *Hammer*, which many see as a central pillar of the laissez-faire interpretation.<sup>362</sup> This paper attempts to provide that explanation.

This new perspective also supports the growing recognition that lawyers outside judicial chambers shape the development of constitutional law. As part of the broader interest in the Constitution outside the courts,<sup>363</sup> scholars have been exploring the ways that litigators impact constitutional development.<sup>364</sup> They make clear that courts only address issues raised by counsel, only consider facts shaped and even selected by counsel, and only evaluate arguments counsel develops. Knox’s activities help extend those insights by demonstrating the important role played by lawyers outside the courtroom altogether.<sup>365</sup> Knox was a superb litigator, but his primary contribution to *Hammer* was as a policymaker and advisor to the President and Congress.

Finally, this new perspective also suggests lessons for contemporary constitutional development. More than fifteen years before the decision in *Hammer*, Philander Knox began to consider how concerns with the increasing integration of the national economy could be balanced with the competing interests of federalism, free trade, and freedom of contract, and then how those concerns could be integrated into existing Commerce Clause doctrine. Through these efforts, Knox can fairly be credited with creating the *Hammer* doctrine, yet until the decision was handed down, a focus on the Court itself would reveal only faint traces of his efforts. As we are again considering what limits there are to Congress’s commerce authority, that story is worth remembering. Then, as now, the ideology of Supreme Court Justices was enormously important. But Knox’s story demonstrates how focusing on the Court alone can obscure both larger structural forces and the role lawyers play in directing those forces. Now, as then, if we hope to understand constitutional development, we need to look beyond the Court.

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<sup>361</sup> See *supra* Part IV.B.

<sup>362</sup> See *supra* Introduction and Part IV.B.

<sup>363</sup> See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

<sup>364</sup> See DANIEL R. ERNST, *LAWYERS AGAINST LABOR* (1995); RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* (2007); MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950* (1987).

<sup>365</sup> These issues have been explored by others, but only rarely. See, e.g., PETER H. IRONS, *THE NEW DEAL LAWYERS* 4–6, 10–13 (1982).