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Child Labor Legislation- Its Past, Present, and Future

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COMMENTS

CHILD LABOR LEGISLATION—ITS PAST, PRESENT AND FUTURE.—One of the long unsolved¹ and impending social, economic and industrial questions of our day and place is the relation of the child to industry—the vexations and complex problem of child labor. Events of late have rendered more complicated and diverse the proposals aiming to limit or prohibit the entrance and continuance of children in industrial employment. The contrasted solutions are being evaluated and assayed in the crucible of legislative halls, constitutional conventions and public debates.² Herein will be considered present and future aspects of child labor and the comparative merits and shortcomings of the pending constitutional and legislative remedies.

Introduction

A comprehensive study of child labor is incomplete without an investigation into the status of the child in the great civilizations of the past. Most pertinent to this inquiry are the highly developed civilizations of Sparta, Athens and Rome. In each of these societies there existed, common to all, three great social classes; agricultural populations;³ guildsmen,⁴ both artisans and merchants; and the ruling⁵ and professional classes. In general, the education and care extended by each of these groups to its children were only that which seemed necessary to enable them to maintain themselves in the social class into which they were born.⁶ These distinct social cleavages strongly conditioned the rights and privileges of the child.

In ancient Sparta⁷ and Rome⁸ the child was regarded solely as material for citizenship, to be trained primarily for future service to the state and subservient to the will and control of the government. The Spartan child was disciplined

1. The first legislative attempts to solve the problem of child labor began in 1802. See notes 18, 19, *infra*.

2. The original child labor amendment, the Vandenberg substitute, the Uniform Child Labor Act, the Wheeler-Johnson Bill, the Black-Connery Bill, are all pending measures, the fate of which will be decided in the near future.

3. BREASTED, *ANCIENT TIMES* (1916) 282; DAVIS, *DAY IN OLD ATHENS* (1914) 191, 51; FLING, *SOURCE BOOK OF GREEK HISTORY* (1907) 58-97; SHOWERMAN, *ETERNAL ROME* (1925) 138.

4. BREASTED, *op. cit. supra* note 3, at 301; DAVIS, *op. cit. supra* note 3, at 92; THORNDIKE, *SHORT HISTORY OF CIVILIZATION* (1929) 112, 113.

5. DAVIS, *op. cit. supra* note 3, at 77; TUCKER, *LIFE IN THE ROMAN WORLD* (1910) 193, 238.

6. BOTSFORD, *HELLENIC HISTORY* (1932) 404-437; *Article on Child Welfare*, 3 *ENCYCLOPEDIA OF SOCIAL SCIENCES* (1931) 504.

7. BOTSFORD, *SOURCE BOOK OF ANCIENT HISTORY* (1929) 112; IRVING, *CATECHISM OF GRECIAN ANTIQUITIES* (1824) 53; LAVELL, *BIOGRAPHY OF THE GREEK PEOPLE* (1934) 50-52; THORNDIKE, *SHORT HISTORY OF CIVILIZATION* (1929) 107-109.

8. BOTSFORD, *HISTORY OF ROME* (1928) 335; POWLER, *ROME* (1912) 55-83; TUCKER, *op. cit. supra* note 5, at 314.

to endure immeasurable hardships and suffering.⁹ The harsh rule of *patria potestas*¹⁰ in Roman law gave the head of the household almost unrestricted power over all the children of the family group. The Romans did, however, extend through the *pueri alimentarii* semi-official charitable aid to suffering children.¹¹ In Athens, more respect and regard for the rights of childhood were present. The Athenian child's life was carefully guided and the objective of his education was the furtherance of a harmonious development of body and mind.¹²

Under the Canon law the child occupies a highly important and distinct position in relation to and in the advancement of Christianity, the Church and society. To insure this successful development, Canon law has conferred upon the child certain basic rights and privileges, the execution of which the parents are under a moral and religious duty and obligation to realize. "Parents are under the gravest kind of obligation to provide to the best of their ability for the religious and moral as well as the physical and civic education of their children and for their temporal well being."¹³ This natural law is based on the fact that not only procreation, but also the education of children belong to the primary end of marriage. The enforcement of such a program undeniably elevates the child to a relatively superior plane and places him beyond the reach of deterrent factors.¹⁴

The humanist movement in the eighteenth century expressed the belief in the equal rights of all children to education and health.¹⁵ Expression of this belief may be found in Rousseau's "Emile," often called the "Children's Charter," which is a declaration of the rights of childhood. Against this humanitarian background and utterly hostile thereto, suddenly appeared the exploitation and abuses of children resulting from the rapid growth of industry in England at the end of that century.¹⁶

The first real importation of children into industry in England began in 1769 when the first patent for a machine for spinning cotton was obtained.¹⁷ Indicative that the machine was responsible for child labor abuses, is the fact that in

9. MILLS, BOOK OF THE ANCIENT GREEKS (1925) 75-90; THORNDIKE, *op. cit. supra* note 7, at 78; 3 UNIVERSAL ANTHOLOGY (1899) 106.

10. GREENE, THE ACHIEVEMENT OF ROME (1933) 89; POWLER, ROME (1912) 58, 59; Comment (1936) 5 FORDHAM L. REV. 460, 461.

11. BOTSFORD, *op. cit. supra* note 8, at 337; GREENE, *op. cit. supra* note 10, at 116, 117.

12. BREASTED, *op. cit. supra* note 3, at 291, 307; DAVIS, DAY IN OLD ATHENS (1914) 57-75; LAVELL, *op. cit. supra* note 7, at 66; MILLS, *op. cit. supra* note 9, at 221-231; QUENNELL, EVERYDAY THINGS IN ARCHAIC GREECE (1931) 125-144; 2 UNIVERSAL ANTHOLOGY (1899) 93.

13. Canon 113: *Parentes gravissima obligatione tenentur proliis educationem tum religiosam et moralem, tum physicam et civilem pro viribus curandi, et etiam temporali eorum bono providendi.* 5 AUGUSTINE, A COMMENTARY ON CANON LAW (1923) 330. See *Pierce v. Society of Sisters*, 268 U. S. 510 at 535 (1924). "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

14. 5 AUGUSTINE, *loc. cit. supra* note 13; SLATER, POINTS OF CHURCH LAW (1924) 113; WAYWOOD, A PRACTICAL COMMENTARY ON THE CODE OF CANON LAW (1925) 703.

15. *Article on Child Welfare*, 3 ENCYCLOPEDIA OF SOCIAL SCIENCES (1931) 506.

16. SCHAPIRO, MODERN AND CONTEMPORARY EUROPEAN HISTORY (1929) 21, 25.

17. WILLOUGHBY, CHILD LABOR, 5 AMERICAN ECONOMIC ASSOCIATION (1890) 13.

1802 was enacted the first child protective legislation.¹⁸ This was followed by the Act of 1819.¹⁹

In the early American colonies industry in the modern sense was unknown, the factory not having as yet developed in America or in Europe. There was, however, much manufacturing of a crude sort to supply the bare necessities.²⁰ Even this pre-factory era was characterized by the labor of children at early ages and for long hours.²¹ In areas far removed from the larger towns, the work of subduing the wilderness and establishing the economic position of the family was of necessity shared by the women and children.²²

Colonial industry was for a time unresponsive to the English Industrial Revolution. In the United States, the factory system and the new industrial order date from 1790 when Samuel Slater built a mill in Rhode Island.²³ The factories established at this time, unlike those in England, did not find any large class of poverty stricken workers who had no choice but to seek employment for themselves or their children in the mills.²⁴ Because of the shortage of labor in the colonies, there grew up the practice of kidnapping or "spiriting" children and adults of the laboring class from England.²⁵ The majority of the employees in the early factories were children of tender years secured mainly from almshouses and neighboring farms; whole families were often employed under a single wage agreement.²⁶ Other primary sources of labor were free indented servants, convicts and vagabonds. The southern tobacco and rice growers, to supply their own labor needs, commenced the use of negro slaves both adult and children.²⁷

Under the stimulus that colonial commerce and industry received from the Embargo and War of 1812, the Industrial Revolution in America began.²⁸ The labor conditions were not very creditable. At this time two-thirds of all the employees in the cotton mills were women or children.²⁹

18. THE HEALTH AND MORALS ACT TO REGULATE THE LABOR OF BOUND CHILDREN IN COTTON FACTORIES. This Act forbade the binding out of children younger than 9 years, restricted the hours to 12 actual working hours a day and prohibited night work.

19. This Act also applied only to cotton mills but extended protection to other than bound children.

20. ADAMS, *PROVINCIAL SOCIETY* (1927) 131; BASSETT, *A SHORT HISTORY OF THE UNITED STATES* (1925) 137, 140, 349; 5 LARNED, *NEW LARNED HISTORY* (1923) 4385.

21. *Article on Child Labor*, 3 *ENCYCLOPEDIA OF SOCIAL SCIENCES* (1930) 412; see also, DUNLOP AND DENMAN, *ENGLISH APPRENTICESHIP AND CHILD LABOUR* (1912); HUTCHINS AND HARRISON, 10 *A HISTORY OF THE FACTORY LEGISLATION* (2nd ed. 1911) 18.

22. ADAMS, *op. cit. supra* note 20, at 131 *et seq.*; GREENE, *PROVINCIAL AMERICA* (1905) 270.

23. *Article on Child Labor*, *op. cit. supra* note 21, at 414; LARNED, *loc. cit. supra* note 20.

24. *Article on Child Labor*, *loc. cit. supra* note 21.

25. BASSETT, *A SHORT HISTORY OF THE UNITED STATES* (1925) 137, 140; WENTEN-BACKER, *FIRST AMERICANS* (1927) 24.

26. OSGOOD, *HISTORY OF INDUSTRY* (1878) 372-375; see also, LODGE, *SHORT HISTORY OF THE ENGLISH COLONIES* (1881).

27. See note 25, *supra*.

28. FORMAN, *ADVANCED AMERICAN HISTORY* (1919) 105, 150; *Article on Child Labor*, *loc. cit. supra* note 21; BASSETT, *loc. cit. supra* note 20.

29. ASHLEY, *AMERICAN HISTORY* (1920) 113; FORMAN, *loc. cit. supra* note 28.

I. STATUTORY ATTEMPTS TO REGULATE CHILD LABOR

The history of child labor legislation in the United States reveals a gallant battle fought by social reformers to combat the evils of child labor. When the practice of employing children for long hours, in unhealthy atmospheres had become an acute social problem, steps to find a solution were taken. Naturally enough the reformers turned to their various state legislatures for aid. Regulatory legislation began to be passed about 1850,³⁰ but no substantial prohibitions were enacted until the beginning of the twentieth century.³¹ During the years from 1879 to 1889, the typical minimum age for legal employment in manufacturing industries, incorporated in state statutes, was ten years. During the next decade it was twelve, and in the period extending from 1899 to 1909 it was raised to fourteen. The maximum hours which these child workers were allowed to labor was, on the average, 9 hours a day and 54 hours a week.³² But progress in securing such legislation was slow and its enforcement was not stringent.³³ Communities depended on factories for their economic sustenance and the competition between the states to have industries locate within their borders was keen. The threat of the exploiters to remove their plants to states with lower standards of social legislation sounded the death knell to many a drive for reform.³⁴ When the census count of 1910³⁵ showed no decrease in the number of child workers, the reformers turned to Congress for the enactment of Federal regulations as the better means of handling the problem.

Their efforts finally culminated in the passage in 1916 of a bill entitled "An Act to prevent interstate commerce in the products of child labor and for other purposes."³⁶ By this law Congress sought to prohibit child labor in factories and mines by an exercise of its power to regulate interstate commerce. The act was short-lived, for two years later the Supreme Court declared the law unconstitutional in the celebrated case of *Hammer v. Dagenhart*.³⁷ Justices Holmes, Brandeis, McKenna and Clarke dissented. The ruling of the court in this case was a serious set-back to the cause of child labor reform and many doubts were expressed as to the soundness of the opinion of the majority of the court.³⁸ This adverse decision served only as a check in the drive for federal legislation regulating child labor. Congress attempted again to exercise its control over the subject, this time by the method of taxation. The Child Labor Tax Law of 1919³⁹ imposed a prohibitory tax upon manufacturers employing child labor. This law was enacted only to meet the fate of its predecessor, being declared unconstitutional by the Supreme Court in the case of *Bailey v. Drexel*

30. See LOUGHRAN, *HISTORICAL DEVELOPMENT OF CHILD LABOR LEGISLATION* (1921) 18, 69, 73.

31. *Id.* at 18.

32. For authority for this and the preceding facts see LOUGHRAN, *HISTORICAL DEVELOPMENT OF CHILD LABOR LEGISLATION IN THE UNITED STATES* (1921) 7.

33. FULLER, *CHILD LABOR AND THE CONSTITUTION* (1923) 25.

34. CALCOTT, *CHILD LABOR LEGISLATION* (1931) 49.

35. The census count of 1910 listed 1,990,225 children as gainfully employed. *ABSTRACT OF THE FIFTEENTH CENSUS OF THE UNITED STATES* (1930) 369.

36. 39 STAT. 675 (1916).

37. 247 U. S. 251 (1918).

38. For a discussion of this case see p. 233, *infra*.

39. 40 STAT. 1138 (1919).

*Furniture Co.*⁴⁰ The purpose of Congress was obviously not to collect revenue by means of this law but was to exert a police power in a matter not within federal jurisdiction. This legislation clearly exceeded the taxing power given to Congress which was granted by the Constitution solely for the purpose of revenue.⁴¹ To have held otherwise would enable Congress to exact penalties under the guise of taxation and thus usurp the police power which the separate states expressly retained by the Constitution.

As a result of these setbacks, proponents of child labor reform began their successful efforts to have Congress recommend a child labor amendment to the Constitution. But while the debate aroused by the form of the amendment was being waged in the nation, Congress essayed another attempt at Federal control of the problem by the passage of the National Industrial Recovery Act.⁴² Child labor provisions were incorporated in the codes sent to the President for his approval. The principal feature of restriction was the minimum age of 16 agreed upon in most of the codes.⁴³ The cause of the children received another setback when the act was declared unconstitutional by the Supreme Court,⁴⁴ two years after its passage by Congress.

II. THE PROPOSED AMENDMENT OF 1924

As a result of the declarations of the Supreme Court holding unconstitutional the first two attempts of Congress to deal effectively with the problem of child labor, a determined campaign was initiated to have a child labor amendment added to the Constitution. This was regarded as the only means left by which to obtain the objective of federal regulation of child labor. Some twenty-four forms of amendments were submitted to the Judiciary Committee of the House of Representatives, drafted largely by outside groups desirous of child labor regulations.⁴⁵ The proposed amendment in its present form was submitted to Congress and on June 2, 1924, by authority of Article V of the Constitution, which gives to Congress the power to initiate amendments "whenever two-thirds of both Houses shall deem it necessary," the amendment was proposed to the various states for ratification. It immediately met with stubborn opposition and provoked a bitter national controversy which has lasted to the present day. Progress in the fight for ratification was practically at a standstill in the nine years following its submission. Approval of one state was obtained in 1924,⁴⁶ three more in 1925.⁴⁷ By March 5, 1925, thirteen states, a number

40. 259 U. S. 20 (1922).

41. It would seem from the very language of the Constitution that no taxing power was given to Congress for the purpose of police regulation. The ruling of the court in *Bailey v. Drexel Furniture Co.* distinguishes an earlier decision of the same court in *United States v. Doremus*, 249 U. S. 86 (1919). For an excellent discussion of this case see Sutherland, *The Child Labor Cases and the Constitution* (1923) 8 CONN. L. Q. 338, at 350.

42. 48 STAT. 195 (1933), 15 U. S. C. A. § 701 (1927).

43. Basic Code, NRA Release No. 6367, July 12, 1934.

44. *A. L. A. Schecter Corp. v. United States*, 295 U. S. 495 (1935).

45. See Report of House Hearing on Child Labor Amendment (1924).

46. Arkansas. For complete record of action by states on the child labor amendment see (1937) 23 A. B. A. J. 827.

47. Arizona, California and Wisconsin.

sufficient to defeat ratification, had affirmatively rejected the amendment.⁴⁸ Only two more certified their ratification in the intervening years to 1933.⁴⁹ In that year the all but stalled campaign was given the impetus of the approval and cooperation of the New Deal and the effect was so great that the end of the year saw fourteen states⁵⁰ signify their assent to the incorporation of the amendment into the Constitution. This landslide of approvals awoke the dormant opposition to the peril of their situation, and despite the intensified campaigns of the proponents of the amendment in eleven state legislatures during 1934 their efforts resulted in failures in every instance.⁵¹ The year 1935 saw the conflict waged more bitterly and successes were recorded by the advocates of ratification in four more states.⁵² No states ratified in 1936 but four more⁵³ certified their approval in 1937 bringing the total at present to twenty-eight, eight short of the requisite thirty-six. Additional ratifications might be forthcoming in 1938 with the reconvening of seven state legislatures⁵⁴ besides the possibility of others meeting in special sessions.⁵⁵

Thus the still uncompleted process of ratifying this proposed amendment has extended over a period of thirteen years and eleven months. This is in startling contrast to the period of three years and six months required for the ratification of the Sixteenth Amendment which was the longest period of time that the process of ratifying an amendment had previously necessitated. The reason for the long delay has been the determined opposition of a large body of American citizenship to the amendment's becoming part of the Constitution. The objections of the opposition are generally three: (1) criticism of the language in which the amendment is phrased; (2) fear that ratification will effect a weakening of states' rights and a centralization of power in the federal government; and (3) belief that there is no necessity for a child labor amendment.

The language of the amendment which gave rise to the great protest against its ratification is contained in Section I:

"The Congress shall have power to limit, regulate and prohibit the labor of persons under eighteen years of age."⁵⁶

In making an analysis of this language, the rules of statutory construction should be observed. Courts are not inclined to go beyond the evident, unambiguous meaning of the language of the enactment, if its phrasing is of such quality.⁵⁷ It is the contention of the opposition that the language contained in

48. At the close of 1925, thirty-five states had rejected the amendment.

49. Montana (1927), Colorado (1931).

50. Illinois, Iowa, Maine, Michigan, Minnesota, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Washington and West Virginia.

51. Kansas, Kentucky, Louisiana, Massachusetts, Mississippi, New Mexico, New York, Rhode Island, South Carolina, Texas and Virginia.

52. Idaho, Indiana, Utah and Wyoming.

53. Kansas, Kentucky, Nevada and New Mexico.

54. Louisiana, Massachusetts, Mississippi, New York, Rhode Island, South Carolina and Virginia. New York again rejected the amendment in 1938.

55. Kentucky so ratified at a special session in 1937.

56. Sec. 2 of the proposed amendment reads: "The power of the several States is unimpaired by this article, except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress."

57. See *Jacobson v. Massachusetts*, 197 U. S. 11, 22 (1905).

Section I clearly and indisputably vests in Congress unlimited and supreme power over the physical activities of all persons under eighteen years of age. It would seem that this conclusion is correct after a consideration of the phrasing in Section I and in particular the words "prohibit", "regulate" and "labor".

The inclusion of "prohibit" confers a general unrestricted grant of power to Congress to control the labor of all persons under eighteen years of age. On the basis of a ruling of the Supreme Court in *McCulloch v. Maryland*,⁵⁸ the words "limit" and "regulate" might be construed to vest in Congress the power to make only appropriate limitations and regulations. But because of the insertion of the word "prohibit", the amendment would give Congress a complete power to regulate without qualification and would make the national legislature sole arbiter of the measures to be adopted.

Conferring upon Congress the power to make prohibitions in the field of child labor legislation is not objectionable in itself⁵⁹ if the prohibitions were limited to the abuses to be abolished, but this broad grant would seem unwarranted and could be subjected to grave abuses.

Labor

The use of the term "labor" in the form of the amendment has been the principal cause of the great opposition it has evoked. This broad term was inserted in preference to "employment", which was used in the two previous enactments of Congress seeking to regulate child labor. It was the intent of the framers that, by the inclusion of the word "labor", the amendment would empower Congress to reach into the home and regulate labor upon farms.⁶⁰ The purpose of such a vast grant was to enable Congress to prohibit "industrial homework"⁶¹ and to regulate the analogous situations in agriculture where whole families are hired but only the parents receive pay.⁶² Thus, in order to insure that Congress would have power to cope with this evil, which affects only an infinitesimal portion of our youth, the language of the amendment was made so broad as to destroy the parental right of authority over their offspring.⁶³ That

58. 4 Wheat. 316, 413 (U. S. 1819).

59. It is to be noted that the alternative child labor amendment submitted by Senator Vandenberg (75 Cong. 1st Sess.; S. J. Res. 144) contains the word "prohibit" but the grant of power is restricted to persons under 16 years of age and confines the scope of Congressional action to the "employment for hire of persons. . . ." For a discussion of this proposed alternative amendment see *infra*, pp. 230.

60. See Sen. Rep. on the Child Labor Amendment, p. 39 (1924).

61. "Industrial homework" is the manufacturing in a home, in whole or in part, with material which has been furnished by an employer, of any article or articles to be returned to the employer. It is the usual procedure in this practice for one member of the family to receive the pay and conduct the relations with the employer although other members of the household (usually children) join in the manufacturing.

62. See Burlingham, *The Need for a Federal Child Labor Amendment* (1935) 21 A. B. A. J. 214, 216.

63. Further evidence of the intention of the framers to give to Congress as broad powers as possible is the unreasonably high age limit of eighteen years contained in the amendment. Youths of sixteen and seventeen could be prevented from entering trades or aiding in their education by having "odd" jobs after school. The reason such a high age limit was fixed was to enable Congress to deal with older boys and girls engaged in hazardous occupations. See Sen. Rep. on the Child Labor Amend-

the ratification of this amendment would give, and was intended to give, Congress the power to reach into the home and suspend the rights of parents over children is apparent from an examination of the following proposed additions to the amendment which were rejected by Congress:

(1) "But no law enacted under this article shall affect in any way the labor of any child or children on the farm of the parent or parents."⁶⁴

(2) "Provided, that no law shall control the labor of any child in the house, or business, or on the premises connected therewith, of the parent or parents."⁶⁵

The conclusion that the power to "limit, regulate and prohibit the labor of persons under eighteen years of age," would cede to Congress complete control of the physical labors of persons under eighteen would seem to be inescapable despite reassuring statements to the contrary.⁶⁶ If the amendment became a part of our Constitution, and Congress prohibited the labor of all persons under eighteen, whether in the home or otherwise,⁶⁷ there would seem to be no ground

ment, pp. 18, 19 (1924). It would seem that if a general grant of control up to sixteen years had been provided, with an increase to eighteen years in the case of hazardous occupations, the age range could be more readily defended.

Proponents of the amendment dismiss objections that the amendment grants too broad powers to Congress, by declaring that the amendment is only an enabling act and that if Congress passed unreasonable legislation it could be easily repealed. See *N. Y. Times*, Jan. 28, 1934, § viii, p. 3, col. 3. Even if this contention could justify the broad language of the amendment, it would seem unwarranted. The history of legislative bodies reveals a tendency on their part to exert the powers that they possess to the ultimate degree.

64. 65 CONG. REC. 7293 (1924).

65. 65 CONG. REC. 7292 (1924). The following proposed amendment was likewise rejected: "The Congress shall have power to limit, regulate, and prohibit the labor of persons under 16 years of age, but no labor of such persons in the homes and on the farms where they reside."

66. "The amendment gives Congress power only over the labor of children for hire, and nothing else. It would not give Congress power to send inspectors any place except where work for hire was being carried on, and therefore Congress would have absolutely no power to send inspectors into families, schools or churches any more than it has now." Secretary of Labor, Miss Perkins, *N. Y. Times*, Jan. 28, 1934, § viii, p. 3, col. 5.

67. Proponents argue that since the states never prohibited all labor of children in the home, Congress would not undertake such a task. It is submitted that the States do not now possess power to enact such legislation, being prohibited by the due process clause in the Fourteenth Amendment. *Pierce v. Society of Sisters*, 268 U. S. 510 (1924).

It is also contended that laws prohibiting all labor in the home would not be passed by Congress because the enforcement of such a law would entail great difficulties. Remembering the lengths to which Congress was permitted to go in seeking to enforce the Eighteenth Amendment, could it not be urged with reason that, since Congress has power to prohibit all labor, it could require youths under eighteen to spend terms in camps similar to the C.C.C. as a reasonable means of enforcement of this prohibition? Since one of the aims of the abolition of child labor is to reduce our "standing army" of unemployed by having them take over the work the children formerly did, such a statute could be reasonably upheld as constitutional under the proposed amendment. See, *Everhard's Breweries v. Day*, 265 U. S. 545, 559 (1924); *Lambert v. Yellowley*, 272 U. S. 581, 604 (1926); *Ruppert v. Coffey*, 251 U. S. 264 (1919).

on which an objection to the validity of such a statute could be based.⁶⁸ The due process requirements of the Fifth Amendment would be complied with by the ratification of the clear and unambiguous language of the amendment.

Education

But it is not even possible to state safely that the language of the amendment could be so narrowly construed as only to include the physical activities of "persons under eighteen years of age." Grave fears are felt among the opposition that the ratification of this amendment would also cede to Congress the right to control the education of the youth of the nation. This apprehension seems to have a solid basis in legal fact. Labor in a non-legal sense is commonly used to include mental activity and has been so defined by leading dictionaries.⁶⁹ This fact is important, for the Supreme Court has declared "Words in a constitution . . . are always to be given the meaning they have in common use, unless there are very strong reasons to the contrary."⁷⁰ Legally, the term labor has been usually held to signify physical toil.⁷¹ However, it is generally recognized that it is a comprehensive word of very extensive meaning.⁷² Courts

68. It has been submitted that the courts will construe the word "labor" in the sense of child labor. And that since "child labor" is a restrictive term implying in its legal meaning the gainful labor of children at unfit ages, for unreasonable hours or under unwholesome conditions, there is no fear of a broad interpretation. See Wait, *The Child Labor Amendment* (1925) 9 MINN. L. REV. 179. It would seem that such an assumption is unwarranted for how can it be explained that the use of the word "child" or "children" was studiously avoided in drafting the amendment although the two prior acts of Congress regulating child labor employed them? The title "Child Labor Amendment" was not conferred by Congress but grew out of later discussion. See (1935) 21 A. B. A. J. 14.

Some proponents of the amendment urge that the use of the word "labor" will permit Congress to control only those persons who are "laborers" within the narrow legal construction given to that term. Reference to dictionaries will show the difficulty of sustaining such a construction. See *Paddock v. Balgord*, 2 S. D. 100, 48 N. W. 840, 841 (1891), "Labor" either as a noun or a verb, is a comprehensive word, and does not seem to carry to its derivative, 'laborer,' as ordinarily used, its full original meaning."

69. SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES (1936) (1. Bodily or mental toil); FUNK AND WAGNALL'S, NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE (1930) (1. Physical or mental efforts, particularly for some useful or desired end). WEBSTER'S NEW INTERNATIONAL DICTIONARY (1926) (1. Physical or mental toil; bodily or intellectual exertion, esp., fatiguing, painful, irksome, or unavoidable). These dictionaries list other alternative definitions but it is to be noted that these selected were placed first.

70. *Tennessee v. Whitworth*, 117 U. S. 139, 147 (1886).

71. *Church of the Holy Trinity v. United States*, 143 U. S. 457 (1892); *Ex parte Aird*, 276 Fed. 954 (E. D. Pa. 1921); *United States v. Union Bank of Canada*, 262 Fed. 91 (C. C. A. 2d 1919); *In re Ho King*, 14 Fed. 724 (D. C. Ore. 1883); *Wakefield v. Fargo*, 90 N. Y. 213 (1882); *Hovey v. Ten Broeck*, 26 N. Y. Super. Ct. 316 (1865); *Cavanaugh v. Art Hardware Co.*, 124 Wash. 243, 214 Pac. 152 (1923); *Beakley v. Lind*, 32 S. W. (2d) 671 (Tex. 1930); *Moore v. American Industrial Co.*, 138 N. C. 304, 50 S. E. 687 (1905); *Wildner v. Ferguson*, 42 Minn. 112, 43 N. W. 794 (1889); *Brockway v. Innes*, 39 Mich. 47 (1878).

72. *Massachusetts Bonding Ins. Co. v. Steele*, 293 S. W. 647, 648 (Tex. 1927); *Crook v. Commonwealth*, 147 Va. 593, 136 S. E. 565 (1927); *Commonwealth v. Connor Co.*, 222

have cited with approval definitions of labor which declare it to include mental activity.⁷³ Thus, there is a plausible basis for the fear that educational activities could be regulated through the presence of the expansive term labor in the pending amendment.⁷⁴

If such an interpretation were placed on the word labor, the ratification of this amendment would be a great calamity. Centralization of education in a federal bureaucracy is to be avoided to prevent stagnation of an independent spirit of learning. Moreover, if the amendment gives Congress the control over education, it would seem that it would also have power to dictate that all youths attend public schools and thus abolish schools where religion is included as part of the curriculum.⁷⁵ Despite attempts to minimize the possibility of a "labor" construction to include "education",⁷⁶ the flexibility in the construction of the term "labor" by the courts justifies the opposition to the form of language used in the

Mass. 296, 302, 110 N. E. 301, 302 (1915); *Paddock v. Balgord*, 2 S. D. 100, 102, 48 N. W. 840, 841 (1891).

73. *Johnson v. Citizen's Trust Co.*, 78 Ind. App. 487, 136 N. E. 49 (1922) (Exertion of body or mind, or both for the accomplishment of an end); *Dixon v. People*, 168 Ill. 179, 48 N. E. 108 (1897) (Intellectual exercise; mental effort, as the labor of compiling a history); *State v. Smith*, 198 Pac. 879 (Okla. 1921) (Labor, in its usual sense, may be defined as physical or mental toil; bodily or intellectual exertion); *Ex parte Steiner*, 68 Ore. 218, 225, 137 Pac. 204, 206 (1913) (Work requiring execution or effort, either physical or mental). See also, *Hightower v. Slaton*, 54 Ga. 108, 21 Am. Rep. 273 (1875) (*held*, a school teacher's salary is not liable to garnishment under statute declaring that all journeymen, mechanics, and day laborers shall be exempt from process of garnishment. "It is difficult to say that a teacher in a public or private school, who faithfully performs his or her duty, is not as much a day laborer, within the meaning of the statute, as an overseer.")

BOUVIER'S LAW DICTIONARY (Rawle's 3d ed. 1914) defines labor as work requiring exertion or effort, either physical or mental.

74. There is another source of danger to education if the amendment was incorporated into the Constitution. Congress would probably be held to be invested with an implied power to fix minimum educational standards which persons under eighteen would be obliged to attain before being allowed to work. This would give the central government an indirect control over education. Evidence that the Congress which submitted the amendment regarded such a grant as within its scope, is the address by Rep. Foster delivered in anticipation of ratification shortly before the submission of the amendment to the States. It was entitled, "What Kind of a Child Labor Law Should Congress Pass?" and approximately one quarter was devoted to a discussion of the educational standards to be incorporated in the law enacted after ratification. 65 CONG. REC. 9786 (1924).

75. See *Pierce v. Society of Sisters*, 268 U. S. 510 (1924). In this case a state sought to enforce such improper legislation but it was declared unconstitutional as violative of the due process clause in the Fourteenth Amendment. But if the proposed amendment gives control over education to Congress, the due process clause in the Fifth Amendment would not similarly restrain such legislation because (1) it would seem that due process had been complied with and (2) the latter amendment would control over the former. *Schick v. United States*, 195 U. S. 65, 68 (1903).

76. Governor Lehman of New York: "It seems to me most difficult, even on technical or legalistic grounds to say that labor means education or to confuse the two." N. Y. Times, March 6, 1937, p. 4, col. 5; President Roosevelt: "It is. I am sure an unmerited interpretation to suggest that under it . . . that it would interfere with accepted educational practices. . . ." N. Y. Times, March 6, 1937, p. 1, col. 6.

pending amendment. When viewed in the light of the judicial expansion of the interstate commerce clause in recent decisions,⁷⁷ it would seem that the ambiguous term "labor" is capable of being interpreted to include education.

III. APPRAISING THE FUTURE

A. *The Originally Proposed Amendment*

The possibility of the amendment's ratification in the future is problematical. Although only eight states need certify their approval to the Secretary of State to raise the number to the requisite thirty-six, the remaining twenty states which have not ratified have repeatedly rejected the amendment.⁷⁸ Indicative of the present attitude toward the proposed constitutional change is the significant fact that nineteen of these twenty have made affirmative rejections within the last two years while the twentieth, Virginia, reasserted its disapproval within the last three years. The prospects of valid ratification are further complicated by constitutional questions which have arisen. These questions are: (1) Must ratification of an amendment take place within a reasonable time after its proposal by Congress? (2) May a state reverse its deliberative refusal and later ratify?

(1) Exclusive of the "Bill of Rights" the longest period required for the ratification of an amendment has been three years and six months, the shortest has been nine months, and the average time required has been one year and six months.⁷⁹ The pending amendment was submitted to the states on June 2, 1924, and has been awaiting ratification for thirteen years and eleven months. The ratifications of two of the states that approved the amendment, Kentucky and Kansas, have been challenged on the ground that more than a reasonable time has elapsed since it was submitted to the states by Congress.⁸⁰ That such a contention, if sustained, would be sufficient to prevent ratification does not appear to be in dispute. Surely some limitation of time is implied which will cause a proposed amendment to become outworn because of inaction or negation

77. Congressional regulation of labor disputes in factories was held to be a proper exercise of its power under the commerce clause. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937). Prohibition of certain articles in interstate commerce has generally been held a valid use of the power to regulate commerce. *United States v. Popper*, 98 Fed. 423 (N. D. Cal. 1899) (obscene literature); *Rupert v. United States*, 181 Fed. 87 (C. C. A. 8th, 1910) (wild game illegally killed); *Brooks v. United States*, 297 U. S. 124 (1936) (stolen automobiles); *Gooch v. United States*, 297 U. S. 124 (1936) (kidnapped persons).

78. The states so rejecting the amendment and the number of rejections are as follows: Alabama (1), Connecticut (2), Delaware (2), Florida (3), Georgia (2), Louisiana (3), Maryland (3), Massachusetts (5), Mississippi (2), Missouri (3), Nebraska (2), New York (5), North Carolina (4), Rhode Island (3), South Carolina (3), South Dakota (5), Tennessee (2), Texas (5), Vermont (2), Virginia (2). See (1937) 23 A. B. A. J. 827.

79. Eleventh: 2 years, 4 months. Twelfth: 9 months. Thirteenth: 10 months. Fourteenth: 2 years, 1 month. Fifteenth: 1 year, 1 month. Sixteenth: 3 years, 6 months. Seventeenth: 1 year, 2 weeks. Eighteenth: 1 year, 1 month. Nineteenth: 1 year, 2 months. Twentieth: 11 months. Twenty-first: 9 months, 2 weeks.

80. *Wise v. Chandler*, 108 S. W. (2d) 1024 (Ky. 1937); *Coleman v. Miller*, 71 P. (2d) 518 (Kan. 1937).

by the ratifying bodies.⁸¹ This view received the approbation of the Supreme Court in *Dillon v. Gloss*⁸² wherein the Court, in speaking of Article V said:

"We do not find anything in the Article which suggests an amendment once proposed is to be open to ratification for all time, or that ratification in some of the States may be separated from that in others by many years and yet be effective."⁸³

The Kansas and the Kentucky courts accepted this *dictum* of the Supreme Court.⁸⁴ Nor did the courts differ as to the test to be applied to determine what was a reasonable time. Both courts agreed that the ratifications of three-fourths of the States must be sufficiently contemporaneous in that number of States, to reflect the will of the people in all sections at relatively the same period.⁸⁵ However, the Kansas court concluded that the interest and agitation over the amendment had continued since its submission,⁸⁶ and upheld Kansas' ratification. The Kentucky court, on the other hand, concluded that under the circumstances twelve and one-half years was not a reasonable time.⁸⁷ In view of the period of inactivity between 1927 and 1933 during which only one state took action upon the amendment, it would seem that the holding of the Kentucky court is the sounder interpretation of the facts.⁸⁸

(2) An additional constitutional ground for invalidating the original amendment was set down by the Court of Appeals of Kentucky in denying the validity of that state's ratification.⁸⁹ The court based its decision on the proposition that a state which has acted upon a proposed amendment, has exhausted its power to act again, either by way of reversing a previous ratification or by way of

81. Otherwise, an amendment once proposed could, in lieu of action upon it, be held pending forever. Four amendments proposed long ago, two in 1789, one in 1810 and one in 1861 are still pending for ratification unless deemed to have died for lack of ratification within a reasonable time.

82. 256 U. S. 368 (1921).

83. 256 U. S. 368, 374 (1921).

84. *Wise v. Chandler*, 108 S. W. (2d) 1024, 1034 (Ky. 1937); *Coleman v. Miller*, 71 P. (2d) 518, 527 (Kan. 1937).

85. This contention was originally expressed by JAMESON, *CONSTITUTIONAL CONVENTIONS* (4th ed. 1887) § 585, and was approved by the Supreme Court in *Dillon v. Gloss*, 256 U. S. 368, 375 (1921).

86. *Coleman v. Miller*, 71 P. (2d) 518, 527 (Kan. 1937).

87. *Wise v. Chandler*, 108 S. W. (2d) 1024, 1034 (Ky. 1937). Twelve and one half years had elapsed since the submission of the amendment and the ratification by Kentucky. The time now has lengthened to thirteen years and eleven months.

88. Results of a poll on the child labor amendment conducted by the American Institute of Public Opinion in the ten states which ratified more than ten years ago show an overwhelming sentiment for the amendment. Note (1937) 37 *COL. L. REV.* 1201, n. 41. Courts of law, however, are not permitted to consider such hearsay evidence in weighing their decisions.

The Kentucky Court stated in its opinion that since Congress attached a limitation of seven years to its submission of the Twentieth and Twenty-first Amendments it is a proper conclusion that Congress thereby expressed the view that seven years is a reasonable limitation. The soundness of such an implication is greatly mitigated by the fact that Congress rejected such a limitation to the Child Labor Amendment 65 *CONG. REC.* 7297 (1924).

89. *Wise v. Chandler*, 108 S. W. (2d) 1024 (Ky. 1937).

ratifying after earlier rejection. The Kansas court concurred⁹⁰ in holding that a ratification was an act incapable of being rejected but dissented from the ruling that a rejection was of equal finality. That rejection is an act which does not destroy the power to ratify subsequently is a view which has the support of precedent⁹¹ and constitutional commentators.⁹² The principle upon which this conclusion is based is that the power of amending is a power to ratify, not to reject, since the contingency of rejection was not provided for in Article V.⁹³ This would seem a rather nebulous foundation upon which to base the procedure by which we are to amend our most important law.⁹⁴ The mere fact that the power to reject was not expressly mentioned in Article V does not support a claim that an amendment can never be effectually and finally rejected or that such was the attitude of the framers.⁹⁵ Since the assent of three-fourths of the states is required for ratification, reason and the orderly procedure with which our legislative government is carried on, would seem to warrant the conclusion that when more than one-fourth have rejected, the amendment should be regarded as dead.⁹⁶ The right of a state to reverse a prior rejection before such positive repudiation occurs would seem to be of the same nature as the right possessed by members of legislative bodies to reverse their vote before the final vote is announced.⁹⁷

On the basis of the foregoing reasoning, it should logically follow that since a state has the right to reverse a rejection, it should also be able to rescind an approval before final ratification or rejection of the amendment. But the doctrine that once a state has ratified an amendment, it has exhausted its power to act is generally accepted⁹⁸ and has the authority of precedent.⁹⁹ Both the

90. *Coleman v. Miller*, 71 P. (2d) 518 (Kan. 1937).

91. States which had previously rejected, were proclaimed to have validly ratified the Fourteenth and Fifteenth Amendments. LONG, *CASES ON CONSTITUTIONAL LAW* (2d ed. 1932) 1156, 1157. The precedent established in the ratification of the Fourteenth Amendment is weakened by the fact that the conflicting actions were mostly by the military and "Amnesty Proclamation" governments. See *Wise v. Chandler*, 103 S. W. (2d) 1024, 1029 (Ky. 1937). However, Ohio's ratification of the Fifteenth Amendment is untainted by the confusion existing under the Reconstruction Acts.

92. JAMESON, *CONSTITUTIONAL CONVENTIONS* (4th ed. 1887) § 579; 1 WILLOUGHBY, *CONSTITUTIONAL LAW OF THE UNITED STATES* (2d ed. 1929) 593.

93. This contention was originally suggested by Governor Bramlette of Kentucky, in his message to the General Assembly of March 1, 1865.

94. Even conceding that the power of amending is a power to ratify and not to reject and that a previous rejection does not operate to deprive an individual state of the power of subsequent ratification, the contention that rejection by thirteen states cannot operate as an effective rejection because they all possess power to ratify subsequently would seem to be straining to a "drily logical conclusion".

95. The long period of time which the amendment of 1924 has been pending before the states for approval has caused a bill forbidding any further action on the amendment, to be introduced in the New York State Legislature. However, no action was taken upon this proposal. See *N. Y. Times*, Jan. 28, 1938, p. 10, col. 3.

96. See Grinnel, *A "Point of Order" on the Child Control Amendment* (1934) 20 A. B. A. J. 448.

97. CUSHING, *MANUAL OF PARLIAMENTARY PRACTICE* (1907) 152, 153. See also note 96, *supra*.

98. 1 WILLOUGHBY, *CONSTITUTIONAL LAW OF THE UNITED STATES* (2d ed. 1929) 594; Dodd, *Amending the Federal Constitution* (1921) 30 *YALE L. J.* 321. But see *contra*,

Kentucky and Kansas courts accepted this view.¹⁰⁰ In practical application the rule might prove to be unwise. In the instant amendment, if the people of a state which had ratified, decided through their duly elected legislators that, because of the decrease in the number of child workers and the elevation of the standard of state laws, they wished to revoke a ratification issued thirteen years ago, they would be precluded from doing so. Such a result would seem to subvert the right of the people. Whether the Supreme Court would entertain a suit to clarify the procedural requirements necessary to amend our Constitution was a matter of doubt. Before a proclamation of ratification, the petitioners could be held to have no standing to challenge the validity of the resolution¹⁰¹ and after the proclamation the Court could hold this conclusive upon them.¹⁰² But the Court has decided to settle the conflict between the Kansas and the Kentucky courts and has granted *certiorari*¹⁰³ to review the decision of the Kansas court and to determine the legal status of the proposed amendment. But even if the Supreme Court solves the constitutional difficulties in favor of the validity of the amendment of 1924, the prospect of the proponent's securing the eight more approvals which are necessary for ratification, is rather dubious. For this reason, a resort to another solution might be the quicker way of securing desirable legislation.

B. The Vandenberg Amendment

Because the language of the proposed child labor amendment of 1924 is so needlessly broad and definitely objectionable and because some of the opponents of the original amendment still feel that there is a need for an amendment, an alternative amendment was proposed by Senator Vandenberg and was reported unanimously to the Senate by the Senate Committee on the Judiciary.¹⁰⁴ The pertinent language of the proposal is contained in Section I:

Grinnell, *Finality of State's Ratification of a Constitutional Amendment* (1925) 11 A. B. A. J. 192.

99. New York withdrew her consent to the Fifteenth Amendment but was included in the proclamation of the Secretary of State. 16 STAT. 1131 (1870). This precedent is weakened by the fact that New York's approval was not needed to incorporate the Amendment into the Constitution. Several states sought to rescind their approvals to the Fourteenth Amendment but were included in the proclamation of the Secretary of State. However the Secretary of State expressed doubt as to the validity of his action. 15 STAT. 706 (1868). These ratifications were necessary for the amendment. When subsequent states ratified and removed the necessity for the revoked ratifications, the Secretary of State again proclaimed the ratification of the Amendment. 15 STAT. 708 (1868). He included the revoked ratification again in his proclamation.

100. *Coleman v. Miller*, 71 P. (2d) 518 (Kan. 1937); *Wise v. Chandler*, 108 S. W. (2d) 1024 (Ky. 1937). For excellent discussions of these cases, see (1937) 37 COL. L. REV. 1201; (1937) 47 YALE L. J. 148.

101. *Tyler v. Judges*, 179 U.S. 405 (1900); *Williams v. Riley*, 280 U.S. 78 (1929); *Ex parte Albert Levitt*, 82 L. Ed. 1 (U.S. 1937).

102. *Leser v. Garnett*, 258 U.S. 130 (1922); see (1937) 37 COL. L. REV. 1201; (1937) 47 YALE L. J. 148. Cf. *National Prohibition Cases*, 253 U.S. 350 (1920); *United States v. Sprague*, 282 U.S. 716 (1931).

103. (1938) 5 U.S.L. WEEK 869.

104. Seventy-fifth Congress, 1st Session, S. J. Res. 144. Reported to Senate June 21, 1937.

"The Congress shall have power to limit and prohibit the employment for hire of persons under sixteen years of age."¹⁰⁵

The Vandenberg proposal, by limiting its scope to the abolition of the evils of child labor, obviates some of the objections directed against the first form of the child labor amendment. This was accomplished by substituting "employment for hire" for the all-inclusive term "labor"; by omitting the word "regulate" with all its broad implications and by limiting Congressional power to direct prohibitions to persons under sixteen who are employed for hire. Thus, if submitted to the States for ratification, this amendment would present only the question as to whether there should be a constitutional amendment at all. Inquiry would be limited to the question whether the present day needs of child labor reform require an additional centralization of government and a consequent weakening of states' rights—a result that any like amendment must effect.

Other solutions to control the evils of child labor have been offered which do not necessitate amending the Constitution. Before considering them it might be well to appraise the present day needs by an examination of existing state legislation. Every state in the union now has child labor and compulsory school attendance laws.¹⁰⁶ All the states, with the exception of Wyoming which is not a manufacturing state, prohibit the employment in factories of minors at least under 14 years of age. In thirteen states, the minimum age for employment in factories is 15 or 16 years; forty-four states and the District of Columbia require employment certificates for children employed in regulated occupations. These laws are supplemented by compulsory school attendance requirements. Every state requires school attendance at least to the age of 14. Thirty states and the District of Columbia require attendance up to the age of 16. Thirteen of the states have raised their standards to the ages of 17 or 18 but with certain exemptions permitting legal employment after 14, 15 or 16. It is fair and reasonable to presume that the sharp drop in the number of child workers, from 18 per cent of all children between 10 and 15 years of age in 1910 to 4.7 per cent

105. There are two additional sections to the Amendment:

"Section 2. The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress.

"Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

It will be noted that Sec. 2 incorporates the same language contained in Sec. 2 of the original amendment. Sec. 3 contains two innovations. The time limit of seven years in which the ratification must take place in order to be valid follows the precedents set by Congress in prescribing a similar limitation upon the Eighteenth, Twentieth and Twenty-first Amendments. The provision calling for ratification by conventions instead of by legislatures was introduced because it is thought that this method will be likely to bring about an early decision for or against ratification. (1937) 23 A. B. A. J. 821.

106. The authority for this and succeeding statements will be found in COLEMAN, *CHILD LABOR AND COMPULSORY SCHOOL ATTENDANCE LAW OF ALL THE 48 STATES* (1936). This is an official document prepared by the Division of Review of the National Recovery Administration, Work Materials § 72.

in 1930,¹⁰⁷ has been largely due to successful state regulation; a contributing factor has been the vast change in moral and economic viewpoints resulting from the publicity given to the plight of the child workers. With this picture in mind we proceed to a consideration of the solutions which, if acceptable, would obviate the necessity of an amendment.

C. Uniform Child Labor Act

In point of time, the first solution offered as an alternative to the proposed amendment of 1924 was the Uniform Child Labor Act. After many years of scientific study, the National Conference of Commissioners on Uniform State Laws, approved this act in 1930.¹⁰⁸ This Uniform Act allows work between the ages of 14 and 18 years, provided the employer procures a permit issued according to provisions of the Act. In order to obtain a permit the minor must present evidence of (1) age,¹⁰⁹ (2) schooling,¹¹⁰ (3) physical fitness,¹¹¹ and (4) the nature of the prospective employment.¹¹² Children engaged in agriculture, domestic service and athletic games are excluded from the provisions of the Act. These exemptions were made for the sake of uniformity, and because it is generally thought that such employments are, by their nature, healthful and not excessively burdensome. Other noteworthy sections of the Act provide for an eight-hour day, a minimum age of 18 years for work in mines or quarries, and an enumeration of dangerous occupations in which children under 16, 18 and 21 may not be employed.¹¹³ The Uniform Child Labor Act has much to commend it. Its provisions for the issuance of permits seem a sound method of completely abolishing the evils of child labor.¹¹⁴ However, the efficiency of the Act is strongly doubted since recalcitrant states with subnormal labor laws could still ship child-labor products into the states accepting the Uniform Act. Its success depends upon uniform passage by all states—an end hardly possible of attainment. Because of these facts and also because of the clamor for a child

107. ABSTRACT OF THE FIFTEENTH CENSUS OF THE UNITED STATES (1930) 369.

108. There was an earlier UNIFORM CHILD LABOR ACT approved by the Conference in 1911. This was enacted into the laws of Kentucky (1914), Massachusetts (1913) and Mississippi (1914). Utah accepted the act with modifications in 1915.

109. Since it has been found that much deception has been practiced in this matter, the Act requires evidence of a searching nature. U. C. L. A. § 9.

110. In the case of work during school hours, the Act requires a completion of the eighth grade. In work outside of school hours, the approval of the head of the school is required to show that the candidate is capable to undertake such work in addition to his school work. U. C. L. A., § 10.

111. This is evidenced by a certificate of physical fitness issued by a public physician. U. C. L. A. § 11.

112. This is to consist of a statement signed by the prospective employer promising to give employment and setting forth the nature of the work. If such employment is not given within two months, the permit is void. U. C. L. A. § 12.

113. The complete text of the Act may be found in (1937) 2 MARTINDALE-HUBBELL LAW DIRECTORY, part III.

114. The feasibility of the permit method of control is vouched for by Miss Grace Abbott who testified, "The work-permit system is at the bottom of the enforcement of the Child Labor Law, and through the machinery involved in the issuance of work-permits it is possible to reduce the necessity for Federal action to a minimum". 65 CONG. REC. 7179 (1924).

labor amendment in recent years, the Act has received scant attention. To date it has been accepted in only one jurisdiction, the District of Columbia.

D. The Present Status of Hammer v. Dagenhart

Another possible solution of the child labor debacle, which has come to the forefront of late, is the passage of an act by Congress patterned along the same lines as the previous attempt at federal child labor legislation¹¹⁵ declared unconstitutional in *Hammer v. Dagenhart*.¹¹⁶ It may well be that such an enactment, at the present day, would be upheld by the Supreme Court, as within the Constitution. The ruling of the Court in the case of *Hammer v. Dagenhart* has been severely criticized,¹¹⁷ and it appears, justly so. The question presented to the Court was whether the power given to Congress to regulate interstate commerce includes authority to prohibit the transportation between states of goods produced by child labor. That Congress has the power to prohibit certain articles from moving in interstate commerce was well settled by previous decisions of the Supreme Court, which upheld the ban on the interstate shipment of lottery tickets,¹¹⁸ impure foods,¹¹⁹ women for immoral purposes,¹²⁰ and liquor.¹²¹ These decisions were distinguished by the following language:

"In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended. This element is wanting in the present case."¹²²

But it appears that there is an evil effected in the states into which the goods are shipped, in that these states would be likely to postpone enacting child labor laws in order to avoid placing on their manufacturers the burden of competing with rivals in other states which possess a cheaper labor market. But even conceding with the majority that this evil is not present, it would seem that Congress has supreme control over interstate commerce even though its purpose in exercising this control is for the welfare of children. Under the Articles of Confederation, the states retained their right to dictate what commerce could be carried on with the other states.¹²³ This power embraced the privilege of barring products of other states for purely arbitrary reasons. The states relinquished this

115. Such a law is pending before the House of Representatives. H. R. 2635.

116. 247 U. S. 251 (1915).

117. Gordon, *The Child Labor Law Case* (1918) 32 HARV. L. REV. 45; Sutherland, *The Child Labor Cases* (1923) 8 CORN. L. Q. 338; Jones, *The Child Labor Decision* (1918) 6 CALIF. L. REV. 395; Bikle, *Commerce and Power and Hammer v. Dagenhart* (1919) 67 U. OF PA. L. REV. 21 (1919).

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

119. *Hipolite Egg Co. v. United States*, 220 U. S. 45 (1911).

120. *Hoke v. United States*, 227 U. S. 308 (1913); *Caminetti v. United States*, 242 U. S. 470 (1917).

121. *Clark Distilling Co. v. Western Md. Ry.*, 242 U. S. 311 (1917).

122. *Hammer v. Dagenhart*, 247 U. S. 251, 271 (1918). The court also distinguishes this case from the previous cases on the ground that here the goods are harmless commodities while in the other instances they were not. It is difficult to reconcile this reasoning with the White Slave cases, *supra*, note 120.

123. ARTICLES OF CONFEDERATION, Art. IX, 1 U. S. C. A. § 12 (1935).

authority and conferred it upon Congress by the following broad language of the Constitution:

"The Congress shall have power . . . (3) to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."¹²⁴

It would seem that this complete power possessed by the states was ceded to Congress. If Congress uses it to promote the general welfare, it is not for the states to object, for as was stated by Mr. Justice Holmes in the dissenting opinion:

"The act does not meddle with anything belonging to the States. . . . But when they seek to send their products across the state line they are no longer within their rights. . . . It (Congress) may carry out its views of public policy, whatever indirect effect they may have upon the activities of the states."¹²⁵

The decision reached by the Supreme Court in *West Coast Hotel Co. v. Parrish*,¹²⁶ which expressly overruled¹²⁷ a prior decision of the Court,¹²⁸ has given rise to a belief that *Hammer v. Dagenhart* might also be discarded.¹²⁹ However, it is doubtful whether the Court would go so far if Congress should seek again to control child labor directly by virtue of its power over interstate commerce. The Court gave a conservative construction to the commerce clause in invalidating the N.R.A.¹³⁰ and the Guffey Coal Act,¹³¹ both of these being laws by which Congress attempted to regulate manufacturing. However, in the *Wagner Act Cases*¹³² the Court held that since the bulk of raw materials used, as well as most of the articles produced, crossed state lines, the manufacturing plants were engaged in interstate commerce. The basis of this broad decision would seem to be the right of Congress to protect interstate commerce. Here, it was found that a strike due to the refusal of the employer to bargain collectively would have a "most serious effect on interstate commerce."¹³³ This element seems to be lacking in the case of a manufacturing

124. UNITED STATES CONST., Art I, § 8, cl. 3. It would seem that the linking in the same sentence of the grant of control of interstate commerce with the grant of control of commerce with foreign nations is an indication that the drafters intended to give Congress equal power in both grants. That its power to regulate foreign commerce is complete is not disputed.

125. *Hammer v. Dagenhart*, 247 U. S. 251, 281 (1918).

126. 300 U. S. 379 (1937). This case upheld the right of a State to enact a minimum wage law for women.

127. 300 U. S. 379, 400 (1937).

128. *Adkins v. Children's Hospital*, 261 U. S. 525 (1923).

129. It is true that these cases are concerned with the due process clause while the problem of the constitutionality of a child labor law would be under the power of Congress to regulate interstate commerce. But the decision in *West Coast Hotel Co. v. Parrish* shows a liberal tendency on the part of the Court. It is significant that both the *Adkins* case which was overruled and *Hammer v. Dagenhart* were both five to four decisions.

130. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935).

131. *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936).

132. *National Labor Rel. Bd. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937); *National Labor Rel. Bd. v. Fruehauf Trailer Co.*, 301 U. S. 49 (1937); *National Labor Rel. Bd. v. Friedman-Harry Marks Clothing Co.*, 301 U. S. 58 (1937).

133. *National Labor Rel. Bd. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 41 (1937).

plant employing child labor, even though such plant received its raw materials from foreign states and sold its products beyond state lines. The fact that child labor was or was not employed would have little effect on interstate commerce. The rule expressed in *Hammer v. Dagenhart*, that the evil sought to be corrected by Congress by the exclusion of products from interstate commerce must come into being after the completion of the interstate shipment¹³⁴ was restated by the Court in *Kentucky Whip & Collar Co. v. Illinois Central Railway*¹³⁵ in harmonizing the latter decision with the Child Labor case. Thus it would appear that in order for the Court to sustain a direct Congressional prohibition on the products of child labor, it would be necessary to establish that some harm would be accomplished in the state of destination. It would be possible to prove that some evil was effected,¹³⁶ and a liberal court might deem it a sufficient excuse for the exercise by Congress of its power over interstate commerce, even though the police power of the sending state be incidentally effected. However, recent developments in constitutional law have uncovered a solution which might preclude the problem in *Hammer v. Dagenhart* from being presented to the Court again.

E. National and State Cooperation

The Supreme Court in *Whitfield v. Ohio*¹³⁷ upheld the validity of the Hawes-Cooper Act¹³⁸ which made the products of convict labor, shipped in interstate commerce, subject to the laws of the state of destination. This principle was further extended by the Ashurst-Summers Act¹³⁹ which forbade the introduction into interstate commerce of prison-made goods intended to be sold in violation of the laws of the state of destination and required the labeling of all such goods, regardless of where they were shipped. This legislation has been declared constitutional in the epochal case of *Kentucky Whip & Collar Co. v. Illinois Central Ry.*¹⁴⁰ The wide ramifications of the joinder of state and national legislation to outlaw economic evils are at once apparent. Specifically, the possibility that similar complementary state and federal legislation might prove to be the solution to the child labor problem, has been much discussed.¹⁴¹ It would seem that Congress has the power to prohibit the shipment of the products of child labor in interstate commerce if they are

134. *Hammer v. Dagenhart*, 247 U. S. 251, 271, 272 (1918).

135. 299 U. S. 334, 350 (1936).

136. See p. 233, *supra*.

137. 297 U. S. 431 (1936); see, Note (1936) 49 HARV. L. REV. 1007; Note (1936) 24 GEO. L. Q. 1013; Note (1936) 34 MICH. L. REV. 1244.

138. 45 STAT. 1084 (1929), 49 U. S. C. A. § 60 (1927).

139. 49 STAT. 494 (1935), 49 U. S. C. A. §§ 61-64 (1927).

140. 299 U. S. 334 (1937); see Note (1937) 6 FORDEHAM L. REV. 299; Note (1937) 23 VA. L. REV. 584; Note (1937) 85 U. OF PA. L. REV. 529.

141. The current comment is optimistic as to the constitutionality of such legislation. See Chambliss, *Constitutional Code Control* (1936) 30 ILL. L. REV. 829; Corwin, *National-State Cooperation—Its Present Possibilities* (1937) 46 YALE L. J. 599; Fraenkel, *Constitutional Issues in the Supreme Court, 1936 Term* (1937) 86 U. OF PA. L. REV. 38, 44; Powell, *Commerce, Pensions, and Codes*, II (1935) 49 HARV. L. REV. 193, 231-34; Ribble, *National and State Cooperation Under the Commerce Clause* (1937) 37 COL. L. REV. 43.

intended to be sold in violation of the laws of the receiving state. The requisite which was lacking in *Hammer v. Dagenhart*¹⁴² i.e., that the evil should come into existence after the use of the channels of interstate commerce, seems to be supplied by the possible violation of the law of the state of destination. That there would be no enlargement of the powers of Congress in upholding such a law is confirmed by the Court in the *Kentucky Whip Case*:¹⁴³

"The Congress has not sought to exercise a power not granted or to usurp the police powers of the States. It has not acted on any assumption of a power enlarged by virtue of state action. The Congress has exercised its plenary power. . . ."

There is greater doubt, however, as to the validity of the complementary state law prohibiting the sale of the products of child labor. The due process objections can probably be refuted by the decision in *Whitfield v. Ohio*¹⁴⁴ which decided that when the statutory provisions apply alike to citizens of the home state and to those of the foreign state the privileges and immunities of the citizen are not affected. Since the domestic citizen probably could not complain of being deprived of property without due process,¹⁴⁵ the foreign citizen could not. But a serious question arises as to whether the underlying state legislation might not be condemned as, in effect, creating interstate tariffs. Such state legislation, standing alone, would surely be invalid¹⁴⁶ but with Congressional consent a state may interfere with interstate commerce.¹⁴⁷ To what extent Congress may consent to a state's invoking Congressional powers in this field remains to be limited by the Court.¹⁴⁸ If abused, this consent doctrine may have to be limited in order to preserve our dual system of government. However, it would seem that the Court would permit the use of this method of cooperative action to control child labor.¹⁴⁹ That such legislation will soon be in force appears to be likely. Missouri,¹⁵⁰ Vermont¹⁵¹ and New York¹⁵² have already enacted underlying laws dealing with the abuses of child labor, along the lines pointed out by the decisions of the Supreme

142. 247 U. S. 251 (1918).

143. 299 U. S. 334, 352 (1937).

144. 297 U. S. 431, 437 (1936).

145. *Nebbia v. New York*, 291 U. S. 502 (1934).

146. *Baldwin v. Seelig*, 294 U. S. 511 (1935).

147. *In re Rahrer*, 140 U. S. 545 (1891); *Whitfield v. Ohio*, 297 U. S. 431 (1936). See also *Baltimore National Bank v. State Tax Commission*, 297 U. S. 209 (1936) (permitting a state to tax an instrumentality of the central government if the central government consents).

148. Cf. *Ashton v. Cameron County W. I. Dist. No. One*, 298 U. S. 513 (1936).

149. See note 141, *supra*.

150. Mo. ST. ANN. (Supp. 1937) § 14094-1-2-3-4.

151. VT. PUB. LAWS (1937) § 176, No. 8.

152. N. Y. GEN. BUS. LAW (1937) § 69a-b-c-d This statute provides that no goods produced by the employment of persons under sixteen years of age in or for a factory or a mine or by industrial homework shall be sold in this state, no matter where produced. A violation of this law constitutes a misdemeanor. There is also a saving clause as to other laws regulating child labor in New York.

Court and the supplementary federal legislation is now pending in Congress.¹⁵³ The feasibility of such legislation has been questioned.¹⁵⁴ But it would seem that with the aid of label provisions similar to that incorporated in the Ashurst-Summers Act,¹⁵⁵ the cooperation of state and national agencies would provide an effective means of enforcement. A meritorious feature of this solution is the fact that once a huge consumer-state such as New York closes its market to products of child labor, the recalcitrant states will be apt to raise their standards in order to preserve this market.

Conclusion

Although the evils of child labor have been greatly abated during the last two decades, the problem is still of such magnitude as to demand further legislative action.¹⁵⁶ Despite the gradual decrease in the number of child workers during a period when regulatory measures have been chiefly confined to legislation by the states alone, it nevertheless appears that some sort of appropriate Federal assistance would be advisable at this time as a means of hastening the end of this serious problem. It is very likely that such Federal aid will soon be forthcoming but the form that such aid will take still remains in doubt. The selection of a proper remedy is of vital importance.

The originally proposed child labor amendment should not be chosen as the solution to the problem. Its needlessly broad language would place in jeopardy some of our most cherished rights, a risk not commensurate with the gains of whatever beneficial child labor legislation might result from its incorporation into the Constitution. Whether the necessity of the situation calls for the substitute Vandenberg Amendment's becoming a part of our fundamental law is a matter of some doubt. However, the number of child workers that should be in existence to make a case for a constitutional change, and a further weakening of states' rights is rather difficult to affix. In view of

153. Wheeler-Johnson bill (S-2226). This bill passed the Senate, 81 CONG. REC. 11937 (1937), but was referred to the Committee on Labor in the House, 81 CONG. REC. 12193 (1937).

154. LUMPEIN & WAGNER, *CHILD WORKERS IN AMERICA* (1937) vi.

155. 49 STAT. 494, 49 U. S. C. A. §§ 61-64 (Supp. 1935). See *Kentucky Whip & Collar Co. v. Illinois Cent. Ry.*, 299 U. S. 334, 352 (1936).

156. A significant cross-section of legal opinion regarding the comparative merits of the proposed remedies is found in the poll of the American Bar Association. The following is a summary of the questions submitted together with the results of the vote:

(1) Should the Constitution be amended to give to the Congress powers as to the employment of children in industry? Yes, 7,513. No, 6,126.

(2) Should the amendment submitted to the States in 1924 be ratified? Yes, 2,743. No, 10,840.

(3) As between the amendment submitted in 1924 and the Vandenberg Amendment now before the Senate, of which would you prefer the ratification? 1924 Amendment, 1,797. Vandenberg Amendment, 11,254.

(4) Should the proposed Vandenberg Amendment be submitted and ratified? Yes, 7,729. No, 5,777.

(5) Should the Wheeler-Johnson bill be enacted? Yes, 6,347. No, 6,907. N. Y. L. J., Dec. 6, 1937, p. 2002, col. 1.

the solution revealed by the decisions in the *Prison Goods* cases,¹⁵⁷ it would seem politically unwise at this time to so amend our Constitution. This remedy of national and state cooperation has the virtue of preserving state control. Because of the alarming increase in national bureaucracy, this advantage alone merits that solution a trial. This compromise seems capable of removing the last stages of child labor from the American scene.

PAROL EVIDENCE RULE IN WARRANTIES OF SALE OF GOODS—CONTRACTUAL DISCLAIMERS.—A cursory examination of bargains for the sale of personalty will indicate that warranty representations are matters of recurring dispute, and that in such transactions the time-honored and precautionary formalities impressed upon realty transfers are usually lacking. In the feudal system the transfer of personalty did not attain the dignity and solemnity of a sale of realty. The transfer of a chattel was, and was treated as, relatively unimportant; it was carried through with informality. Litigation over the terms of the transfer resulted. These personal dealings, and over the counter sales of chattels, not unsuited to an age of informal barter, are rapidly being overshadowed by modern business practice. In the course of a century the economic world has seen the transition of sales agreements from the setting and practices of the small town or sea port to the intricate commercial processes of the present day,¹ but the litigation over the terms of the sales contract continues. The outcome of such litigation often depends upon the effective proving of warranties alleged to have been made by the seller. If the contract had consisted of written or printed matter, the proof of the warranty is dependent upon the exclusionary effect of the parol evidence doctrine. It is this relationship of the parol evidence rule and the warranty obligation which will be treated here.

Clarity requires that the commentary be divided into the following topics: I. The History and Nature of the Parol Evidence Rule; II. The Completeness of the Written Contract; III. Warranties as Collateral Agreements; IV. The Express Warranty; V. The Restatement on Express Warranties; VI. The Implied Warranties; VII. The Express Warranty Excluding the Implied Warranty; VIII. Written Disclaimers of Warranties.

I. THE HISTORY AND NATURE OF THE PAROL EVIDENCE RULE

The doctrine of parol evidence, that oral testimony is inadmissible to contradict, vary, add to, or subtract from the terms of a valid written contract, has found general acceptance in the common law; despite this general acceptance, however, few principles in the realm of jurisprudence have been so subject to diversified opinion and contradictory application. The testing ground for the doctrine is the heavily litigated field of warranties of personal property.

Originally, no unique validity attached *per se* to written forms.² The truth

157. *Whitfield v. Ohio*, 297 U. S. 431 (1936); *Kentucky Whip & Collar Co. v. Illinois Central Ry.*, 299 U. S. 334 (1936).

1. LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* (1930) 204.

2. The fact was that the writing did not legally establish anything. 5 WIGMORE, *EVIDENCE* (2d ed. 1923) § 2426.