YOUNG BOYS IN SHORT PANTS VS. OLD MEN IN BLACK ROBES: 
THE BATTLE TO END CHILD LABOR IN THE UNITED STATES

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ABSTRACT

There was a time in this country when little children worked legally and on a widespread basis. In the period following the Civil War, as industry grew, children often as young as 10 years old but sometimes much younger toiled. They worked not only in industrial settings, but also in retail stores, on the streets, on farms and even in home-based industries. As progressive reformers gained traction during the last quarter of the nineteenth century, efforts expanded at the State level to outlaw the employment of small children. The move toward State-level reforms proved challenging. Many States, particularly in the South resisted the effort. Frequently, child labor law opponents denied the problem existed and aggressively extolled the virtues of children in the workplace. This foiled the goal of uniform laws across the country achieved through State action.

The failures at the State level caused many reformers by the early 1900’s to believe that a federal law might be the best option. The limited role of the federal government under the Constitution however made such a prospect difficult. Many constitutional experts, congressmen, and presidents believed such a law was unconstitutional. In the face of widespread public support for curtailing child labor, a law based on the Commerce Clause of the Constitution was passed in 1916. After the was struck down by the Supreme Court, Congress attempted to use its taxing power to achieve the same goal. That law too was struck down by the Court. As a result, some children, particularly those in the States with the lowest legal protections, continued to work. Frustrated reformers and legislators sought to outlaw child labor through a constitutional
amendment. This too would fail. An attempt by President Franklin Roosevelt to eliminate child labor through executive action through the National Industrial Recovery Act would also be defeated when that law was found unconstitutional. It would not be until 1938 that Congress would finally pass a child labor law that would be upheld by the Court.

This thesis will analyze the use of child labor in the United States during the post-Civil War period through the 1938 enactment of the Fair Labor Standards Act (FLSA) and subsequent 1941 Supreme Court decision upholding the FLSA. The passage of the FLSA was the result of a multi-decade battle waged by reformers in the face of numerous obstacles, most notably the Supreme Court. This thesis specifically examines the decisions of the Court that foiled the reform efforts—particularly in *Hammer vs. Dagenhart* and *Bailey vs. Drexel Furniture*. These decisions while controversial were not clearly out of line with the case precedents at the time. These decisions led to more children in the workplace, and made the Supreme Court responsible for a two-decade period where it was the Court alone that stood in the way of a federal child labor law. Although this was the case, the relatively small number of children that would have been impacted by a federal child labor law, technological changes, and immigration reduced the impact of the Court’s 1941 approval of the FLSA. While this thesis examines the particular circumstances involving child labor, it also highlights the balance between States’ rights and federal power under the Constitution, a topic that remains relevant to this day.
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You are finally correct. This thesis is now “in the bag.”
Oh John and me never was in court [during the *Hammer vs. Dagenhart* case that would determine whether children could be prevented from working by federal law]. Just Paw was there. John and me was just little kids in short pants. I guess we wouldn’t have looked like much in court. We were working in the mill while the case was going on.

—Rueben Dagenhart, 1924
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INTRODUCTION

No factory or farmer or anybody else hires a child because he is so big-hearted he wants to do something for the child. He hires him because he wants to save a man's salary.

— Will Rogers

“It is none of their business,” David Clark, the editor of the Southern Textile Bulletin argued. The “business” that Clark believed should be left alone was the toil of small children in the Southern textile mills. He made this argument after showing up uninvited to a January 6, 1915 meeting of the National Child Labor Committee (NCLC). Clark claimed child labor reformers like the NCLC misrepresented the conditions in the mills. The NCLC had gathered thousands of pictures, some of which depicted small, weak children, working. Clark fundamentally disagreed that child labor was a problem. To him, the employment of children was not only beneficial for the employer and their family, but for the youngster as well. It built strong children, kept them off the streets, and away from the evil of idleness while helping them support their families. Regardless of who was right about the actual conditions children toiled in, Clark insisted that child labor was a local matter and should be left to the States. As he said, “the fact a boy of 13 years old works in North Carolina in no way injures the citizens of New York and Massachusetts.”

By the time of the 11th annual convention of the NCLC, the question whether a local or national approach to eliminating child labor was required was not new. It was understood by most that child labor was an evil. It was widely thought it would be best for the nation if children were moved out of the workplaces and into schools. The law it was understood could be used to achieve this and other societal objectives that could not be met through cooperation amongst individuals. In his 1894 book, economist and progressive Richard T. Ely illustrated the

need for such laws through the story of a town with 20 barbers. All but one of these barbers were good Christians who wished to close their businesses on Sunday. The twentieth however kept his shop open to gain an advantage over the others. In response, the nineteenth barber felt compelled to do the same for fear of losing business. Before long every barber was working on Sunday, all due to the initial actions of one person. To address what Ely called the “problem of the twentieth man,” government regulation was required to set rules for competition.\(^2\)

When it came to the problem of child labor, laws were eventually passed at the State level to prevent employers from gaining an economic advantage from the employment of child laborers in their enterprises. State and federal courts generally upheld these laws, but they set a level playing field within that State only. The “problem of the twentieth man” could be addressed easily when it came to barbers competing in a local market, under the same local or State laws. Child labor though presented a different problem for the United States. Children worked in various industries throughout the country under differing State laws. Without a national framework, some States could behave much like the twentieth barber. By having lax child labor laws they gained an advantage in a particular industry over other States in the national market for the production of goods. This created a disincentive for any State to strengthen its laws.

Therefore many reformers believed that if conditions were going to change, a federal law was needed. The limited nature of the powers granted to the federal government under the Constitution made this a difficult task. Supporters of a national law tried numerous means in their attempt to achieve a uniform federal law. They attempted using the power of Congress to regulate interstate commerce, and to impose taxes. Some efforts would be made directly by

Congress, while others would be through regulations put forth by the executive branch. Fearing that an effective solution to child labor could not be found within the constraints of the Constitution, a movement for a constitutional amendment occurred as well.

These efforts would largely be united by the fact they all failed. When federal victories were achieved during the early decades of the twentieth century, they were short lived. On multiple occasions, most famously in the cases of *Hammer vs. Dagenhart* and *Bailey vs. Drexel Furniture*, the Supreme Court would send the children back to the mills. For years, the Court would insist, like David Clark, that concerns over child labor were not the business of the federal government and could not be regulated under the Constitution. Although the battle in this case was specific to child labor, now over 100 years since that fight began, many of the same State versus federal power issues remain at the center of modern political discourse and Supreme Court decisions.

This thesis will examine these issues in five chapters. Chapter One discusses the use of child labor in the United States concentrating on the period after the Civil War through the start of the reform movement. Chapter Two concentrates on the reform movement up through the passage of the first federal child labor law. Chapters Three and Four examine the setbacks the reform movement was given by the Court's decisions in *Hammer vs. Dagenhart* and *Bailey vs. Drexel Furniture* respectively. Chapter Five examines the aftermath of these decisions and the other measures tried to curtail child labor through federal intervention until success was finally found in 1938. The thesis concludes with an examination of the impact of the Court’s decisions and their impact on child labor.
CHAPTER ONE

“LITTLE CHILDREN WORKING”
HISTORY OF CHILD LABOR IN THE UNITED STATES

The golf links lie so near the mill
That almost every day
The laboring children can look out
And see the men at play.

— Sarah N. Cleghorn

The September 1906 edition of *Cosmopolitan* magazine recounts a story once told of an old Indian chieftain. The chieftain was given a tour of the modern city of New York. On this excursion, he saw the soaring heights of the grand skyscrapers and the majesty of the Brooklyn Bridge. He observed the comfortable masses huddled in amusement at the circus and the poor huddled depressingly in tenements. Upon the completion of his journey he was asked by several Christian men “[w]hat is the most surprising thing you have seen?” The chieftain, a man likely viewed as a savage by his questioners, replied with three words, “little children working.”

While the widespread presence of laboring children may have been a surprise to the chieftain at the turn of the twentieth century, this was a common sight to most Americans at the time. In the United States, the period of the Industrial Revolution through the 1930's was a period in which children worked in a wide variety of occupations. Now, nearly 110 years after the story of the chieftain was told, the overt presence of significant child labor in New York or any other American city is no longer. The move away from the engagement of children in economically productive labor is a fairly recent development. As numerous authors on the subject have remarked, “[c]hildren have always worked.”


of a newborn to a rural family was looked at as an introduction to a future beneficial laborer and an insurance policy for old age.\(^3\) At an age as young as five, a child was expected to help with farm work and other household chores.\(^4\) The agrarian lifestyle common in America required large quantities of hard work, whether it be planting crops, feeding chickens, or mending fences.\(^5\) Large families with more work than children could send children off to another household that could make use of them as a maid, servant, or plowboy.\(^6\) Most families simply could not afford the costs of maintaining a child from birth until adulthood.\(^7\)

This desire for children to work has a long history dating back to the post medieval period. The subsequent advance of capitalism created new social pressures.\(^8\) For example, in 1575, England provided for the use of public money to employ children in order to “accustom them to labor” and “afford a prophylactic against vagabonds and paupers.”\(^9\) It was stated with regret by an Englishman that “a quarter of the mass of mankind are children, males and females under seven years old, from whom little labor is to be expected.”\(^10\) This was consistent with the

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7. Ibid., 42.


Puritan and Protestant beliefs that put work at the center of a moral life. It shaped a citizenry that grew to praise work and scorn idleness. It would be the growth of manufacturing however that provided the greatest opportunity for society to avoid the perceived problem of the idle child. Now that more work was simple, there were more potential opportunities for children. For example, in Britain, one industrialist in 1790 proposed building textile factories around London to employ children in order to “prevent the habitual idleness and degeneracy” that was destroying the community. Not only could society avoid the issue of unproductive children, with the advances in machinery, these children could easily create productive output with only their rudimentary skills.

Similarly, in America, productive outlets were sought for children. Colonial laws modeled after British laws sought to prevent the child from becoming a burden on society. Orphan boys at the age of 13 were to apprentice in a trade while orphan girls were sent into domestic work. All children, except those of Northern merchants and Southern plantation owners, were expected to be prepared for gainful employment. In other areas the primary motivation in employing children was not about avoiding their idleness, but rather about satisfying commercial interests and the desire to settle the vast American continent.

11. Hindman, Child Labor, 46.
15. Hindman, Child Labor, 46.
17. Ibid.
of the motivation, a successful childhood was seen as one that developed the child's productive capacity.\textsuperscript{19}

As tensions increased with England, the desire for an independent manufacturing sector in America became more evident. By employing women and children in this pursuit, the man of the household could still attend to the farm at home. This helped fulfill the Jeffersonian ideal of the yeoman farmer. Child labor also served the Hamiltonian commercial vision of America by providing increased labor to support industry.\textsuperscript{20} In accordance with this vision, in a 1791 report on manufacturing as Secretary of the Treasury, Alexander Hamilton noted that children “who would otherwise be idle” could become a source of cheap labor.\textsuperscript{21}

Around the same time, the influential Nile's Register noted that factory work was not for able-bodied men, but rather “better done by little girls from six to twelve years old.”\textsuperscript{22} It was seen as progress that the machines were so simple a child could operate them.\textsuperscript{23} This was not only perceived as beneficial to the child, but to the public as a whole. In keeping with this ideal, an 1802 advertisement in the Baltimore Federal Gazette sought children from eight to twelve to work in a cotton mill saying “[i]t is hoped that those citizens having a knowledge of families, having children destitute of employment, will do an act of public benefit by directing them to the institution [cotton mill].”\textsuperscript{24} The allure of employing children in the mills was thought to be so

\begin{footnotes}
\item[20] Hindman, Child Labor, 46.
\item[21] Rosenberg, Child Labor in America, 4.
\item[22] Trattner, Crusade for the Children, 26.
\item[23] Ohio Council on Woman and Children in Industry, 11.
\item[24] Ibid., 27.
\end{footnotes}
strong that it would lead parents to choose settlements in New England versus the less-developed Western frontier where no such job opportunities existed.\(^{25}\) By 1820, children comprised in excess of 40 percent of the mill employees in at least three New England States.\(^{26}\) That same year, *Nile's Register* calculated that if a mill were to employ 200 children from the age of 7 to 16 “that [previously] produced nothing towards their maintenance ... it would make an immediate difference of $13,500 a year to the value produced in the town!”\(^{27}\)

While the economic value of this work was emphasized, the perceived underlying benefit of work for children also played a role in its growth in the nineteenth century. This was seen in the nature of the outreach that some organizations such as the Charles Loring Brace Children's Aid Society (CAS) provided to orphaned children. In establishing its first lodging house for boys in 1854, the CAS emphasized that it would “treat the lads as independent little dealers and give them nothing without payment.” Through avoiding the prospect of idle children, the CAS thought it was avoiding “the growth of a future dependent class.”\(^{28}\) It believed that the best way to bring children out of poverty was to have them work at an “honest trade.” To do this, the CAS taught children work skills such as the trade of shoemaking.\(^{29}\) Finding that there were not enough “honest jobs” in New York City, the CAS established trains to move orphaned children out West.\(^{30}\) It was seen as balancing the supply of youth in the cities with the

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25. Ibid.

26. Ibid.


30. Ibid.
demands found in rural areas.\textsuperscript{31} The CAS received further support from abolitionist forces who saw this “free labor” of children as a donation to the cause of “freedom” in the fight against slave labor in the West.\textsuperscript{32} The success of these children was judged by how much they worked for the Western families that took them in. In annual reports, the CAS published letters that highlighted the productive capacity of the children. These letters reported things such as how the child “does nearly as much as a man” or was earning his keep.\textsuperscript{33}

The parallel beliefs that labor benefited children by helping them avoid the sin of idleness and economically benefitted society by helping increase its productive capacity fueled the spread of the practice. The advances in manufacturing techniques in the post-Civil War years caused increasing opportunities for children and led society to take advantage of this productive capacity. While pre-Civil War manufacturing was dominated by women and children, the low volume of such activities caused the number of children employed to remain at low levels.\textsuperscript{34} Similarly, some of the productive capacity that had been met by the use of slaves was met by women and children in the years following emancipation.

However, in the period immediately following the Civil War, it was not always clear what exactly was considered to be “free labor” when it came to recently freed slave children and some immigrant youths. In many cases, former slave children were functionally re-enslaved through apprentice agreements, which bound the child to the former slave master. In these agreements, the labor of the child was exchanged by the parent in return for “training” provided

\begin{itemize}
\item\textsuperscript{31} Ibid., 43.
\item\textsuperscript{32} Ibid., 45.
\item\textsuperscript{33} Ibid., 46.
\item\textsuperscript{34} Hindman, \textit{Child Labor}, 47.
\end{itemize}
by the former slave owner.\textsuperscript{35} It was frequently seen that these agreements were beneficial since
the slave master was in a better position to teach the child “the habits of industry” than were the
recently freed parents.\textsuperscript{36} While these situations were eventually remedied in the South through
the process of Reconstruction, similar abuses of the apprentice system occurred elsewhere. In
New York City, by the 1870's, the operation of Italian padrones (a person who secured
employment especially for Italian immigrants) bordered on child slavery under the guise of
apprenticeship. The padrones frequently deceived Italian children or parents into signing
apprentice agreements purportedly for the purpose of teaching the child how to play a musical
instrument. Once signed, the children were swept off to America where they were forced to
become street performers with all of their earnings provided to the padrone. Children who failed
to comply with the desires of their padrone master were frequently beaten.\textsuperscript{37} As the \textit{New York
Times} put it in 1873, “[t]he world has given up on stealing men from the African coast, only to
kidnap children from Italy.”\textsuperscript{38}

Although the situations involving former slaves and the Italian padrones were egregious,
overall they were a small percentage of the overall number of working children. As child labor
expanded through the end of the nineteenth century, these practices diminished. The 1870
census found that one out of every eight children was employed.\textsuperscript{39} This would increase to over
one in five children by 1900.\textsuperscript{40} Between 1890 and 1910, no less than 18 percent of all children

\textsuperscript{35} Marjorie Elizabeth Wood, “Emancipating the Child Laborer,” 69.
\textsuperscript{36} Ibid., 80.
\textsuperscript{37} Ibid., 69.
\textsuperscript{38} Ibid., 65.
\textsuperscript{39} Zelizer, \textit{Pricing the Priceless Child}, 6.
\textsuperscript{40} Hindman, \textit{Child Labor}, 31.
ages 10 to 15 worked. Age was only one consideration in deciding whether a child was ready for work. Being “big enough to work” was usually not a metaphor about reaching a certain birthday; rather it was often about the physical size of the child as well as the acumen the child appeared to have in performing the labor required. Age and size however were not the only factors that determined whether a child would work. More and more through the turn of the twentieth, century class distinctions between those children expected to work and those that were not became increasingly evident. Children from families at the lower end of the spectrum were frequently employed, while the concern about idle youths did not appear to be one shared by the upper classes. As one well-to-do father explained in 1904, “We work for our children, plan for them, spend money on them, buy life insurance for their protection, and some of us even save money for them.” At the lower end of the income scale though, families were forced to utilize their children for their labor without the luxury of saving for their futures.

By the turn of the twentieth century, the labors that the children of the working class performed were varied. In rural areas, young boys toiled in mines, often working their fingers literally to the bone breaking up coal. Lads in urban areas often earned their living selling newspapers on street-corners or as couriers. In many towns, mills and glass factories often provided employment for girls and boys. Young children worked in the fields performing farm labor and on the coasts in the seafood industry. Even for youngsters who never left the house

43. Zelizer, Pricing the Priceless Child, 5.
44. Hindman, Child Labor, 5.
45. Ibid.
there were still employment options. Home-based businesses provided children a chance to labor by assembling flowers or other items.\textsuperscript{46} With so many options available for employment, children rather than being a drain on the family, were seen as a resource to help many struggling parents out financially.\textsuperscript{47}

At the turn of the twentieth century, children were working in various industries. The discussion that follows highlights some of the occupations children labored in, and examines the employment conditions children faced in detail.

\textbf{Street Trades}

As the story of the Indian chieftain illustrates, the number of occupations children performed made them a widespread presence in urban areas. Most visibly, many engaged in occupations working on city streets.\textsuperscript{48} These children sold newspapers, shined shoes, and carried messages. In the days before the internet, texting, and even the telephone, these messengers provided the easiest way for people within an urban area to communicate. In this role, they became essential to daily commerce for banks, factories, and offices. At night they provided these same essential services to houses of ill repute and those conducting other illicit activities.\textsuperscript{49} Similar, less tawdry courier services were provided within department stores. Children known as “cash” boys and girls were responsible for carrying money, sales slips, and the items purchased to an inspector in the store. That official would wrap the good and verify the amount paid. The child would then return with the change and the item.\textsuperscript{50}

\begin{itemize}
  \item \textsuperscript{46} Ibid.
  \item \textsuperscript{47} Zelizer, \textit{Pricing the Priceless Child}, 6.
  \item \textsuperscript{48} Hindman, \textit{Child Labor}, 215.
  \item \textsuperscript{49} Ibid., 216-217.
  \item \textsuperscript{50} Nasaw, \textit{Children of the City}, 43.
\end{itemize}
While courier boys were common, newspaper boys, popularly known as “newsies,” were the most visible of the street trades and were the face of child labor for most urban Americans.\(^{51}\) According to author Hugh Hindman, it is no exaggeration to say that most urban kids worked as a newsboy for at least a short period of time.\(^{52}\) After buying their papers from the publisher, the newsies would haw papers on street corners. This arrangement meant that the carriers only made a profit when they sold a paper. This led to fierce competition between the carriers for the best locations. While on big news days a flashy headline would help drive sales, on other days, the newsboys would have to use more nefarious means to make a profit.\(^{53}\) These included techniques such as shouting out false headlines and short-changing customers, particularly during the late night hours.\(^{54}\) During World War I, the shouting of false headlines was such a nuisance that Cleveland, Ohio threatened to prosecute boys who shouted “false and amazing” statements. In New York City, an October 1917 *New York Times* article outlined the efforts of police to stop the shouting of baseless headlines of war calamities in an effort to spur sales.\(^{55}\) Yet, the same article noted that when these lovable lads were hauled before the judge, it was more likely that the police officers would be lectured for not devoting their time to more serious crimes.\(^{56}\)

The newsies also frequently took advantage of the kindness of strangers through their use of the “last paper ploy.” In such a ploy, the youngster would feign cold, exhaustion, or

\(^{51}\) Hindman, *Child Labor*, 215.

\(^{52}\) Ibid., 233.

\(^{53}\) Ibid., 230

\(^{54}\) Nasaw, *Children of the City*, 78.

\(^{55}\) Ibid.

hunger saying he could go home only if he sold his last paper. Once a sympathetic purchaser left with the paper, the newsboy or girl would pull out another paper from a hidden stash and use the ploy again.57 Despite devious schemes like these, amongst themselves, the newsies generally developed a cohesive culture. Rather than being picked on by the older and larger lads, the youngest carriers frequently were looked out for by their older competitors.58

The Mines

Although many child laborers, such as the newsies, worked in plain view of others on city streets, many did not. While their coal-stained faces have now become known through pictures, at the time, the children who worked in mines labored in relative obscurity. Some labored in the mines as “trappers,” others were known as “breaker boys,” and many worked as “helpers.” The trapper's sole job was to sit all day waiting to open a wooden door to allow the passage of coal cars. These doors, which served as part of the mine's ventilation system, required opening between 12 and 50 times a day. During the rest of the time the boy sat in dark idleness next to the door59 While less monotonous, the job of the breaker boy was likely more dangerous. Their job was to pick slate and other impurities from coal before it was shipped. To do so these boys, some as young as 14, were precariously positioned on wooden benches above a conveyor belt so they could remove the impurities as the coal rushed by.60 At times the dust from the passing coal was so dense that the view would become obscured.61 Other child coal workers served as helpers. Journeymen miners frequently hired their own helpers and some

57. Nasaw, Children of the City, 84.
58. Ibid., 158.
60. Hindman, Child Labor, 91.
61. Ibid., 92.
parents hired their children to perform this role. These children were not usually an employee of the mine, but were instead paid out of the wages of the journeyman. 62

**The Cotton Mills**

While the coal industry was vital in many sections of the country, perhaps most prominent among the child labor-based industries was the cotton mill. In 1900, 25 percent of the nearly 100,000 textile workers in the South were children under 16. By 1904, overall employment of children had increased, with 20,000 children under 12 employed. The family, particularly the women and children, was central to mill operation. 63 The Southern mill and the labors associated with it are iconic. Pictures of young girls in the mill are likely those most identified with child labor in America. 64

Following the Civil War, the cotton industry, based partially on child labor, was responsible for raising many Southern white families out of poverty. 65 These mills employed almost exclusively white children due to an implicit agreement between the manufacturers and planters. This pact ensured that planters would remain in control of the rural black labor supply. 66 Some early historians actually believed that the altruistic motive of helping the white children avoid idleness was the mill owner's primary purpose in operating the mills. As one mill owner remarked, working 12 hour days, six days a week left children “no time to spend in idleness or vicious amusements.” 67 Later historians acknowledged that the profit motive was the

64. Ibid., 13.
65. Ibid.
67. Ibid., 13.
Regardless of their goal, mill owners saw children as a primary requirement to operating a successful mill. For example, prominent South Carolina mill owner Lewis W. Parker described the rationale for the use of child labor in the mill as follows:

The unfortunate families back in the backwoods drifted to the cotton mills. When they drifted to the cotton mills, what was to be done? It is not possible for a man who has been working on a farm, who is an adult—after the age of 21 years, for instance—to become a skilled employee in a cotton mill. His fingers are knotted and gnarled; he is slow in action whereas activity is required in working in the cotton mills. Therefore, as a matter of necessity, the adult of the family had to come to the cotton mill as an unskilled employee, and it was the children of the family who became skilled employees in the cotton mills. For that reason it was the children who had to support the families for the time being. I have seen instances in which a child of 12 years of age, working in the cotton mills, is earning one and one-half times as much as his father.69

Through this logic, mill owners rationalized that the employment of children was supporting the entire family, even if the child was the only family member employed.

Just as the mill played a central role in the individual family, it played a similar role in supporting the entire commercial ecosystem in many Southern towns.70 The mill owner provided schooling, stores, and housing for the mill families. When workers fell into debt, they could put their children to work to pay the mill owner their living expenses. Large households were seen as a benefit to the mill owner. Even children too young to work were viewed as an investment in future productive capacity for the mill. Often times contractual arrangements with the head of the household bound the family to provide labor.71 In many cases, that agreement included a set quota for the amount of labor the family was to provide.72 The mill might provide schooling for children from the age of 5 to 12, but at that age the children were required to start their working

68. Hindman, Child Labor, 54.
69. Ibid., 54.
70. Rosenberg, Child Labor in America, 170.
71. Hindman, Child Labor, 157-158.
72. Trattner, Crusade for the Children, 38.
life in the mill. It was not just mill owners who insisted upon this arrangement. Many parents believed that once a child reached the age of 10 or 12, the parents should begin to get some money back on their investment. Thus, both the actions of the mill owner and the parents contributed to the widespread use of child labor in cotton mills. While owners were attempting to pull children into the factory, parents were eagerly pushing the children out of the nest and into productive employment.

This push of the children into work started even before they were old enough to competently work on their own. Children who were too young to work independently provided what assistance they could as helpers. This “helper system” enabled children younger than 10 to assist their mothers with any minor chores required at the mill. These children, though, did not earn their own wage. As a result of their limited skills, they were frequently seen as being unprofitable to employ at any wage. Mill owners, however, saw the presence of these children in the mill as of benefit to the parent. This was also in the long-term interest of the mill owner since it helped familiarize them with their future workplace. Other children helped out by bringing their parents and older siblings meals at recess during the school day. In many cases, these same children soon made their way to the mill on a full-time basis. Usually the boys would start as doffers and sweepers while the girls were spinners. Doffers were responsible for replacing the full bobbins filled by spinners with empty ones and often enjoyed hours of free

73. Hindman, *Child Labor*, 157-158.
74. Ibid., 158.
76. Hindman, *Child Labor*, 158.
77. Ibid., 159.
78. Ibid., 161-162.
time in between their required tasks at the mill. These tasks were usually seen as children's work, while other heavier work such as oiling machinery was seen as man's work. In the mill, like in most other factory industrial settings at the time, there was a clear differentiation between work appropriate for children and work seen as appropriate for adults. While mill supervisors oversaw the children that performed these child-appropriate tasks, they were often reluctant to discipline the children. Since in many ways the mill was seen as an extension of the family unit, mill owners usually left it to the parents to discipline their children for any trouble caused at work. This illustrates just how closely the mill was integrated into the family structure.

The Factories

While the cotton mill has a central place in the history of child labor, it was not the only manufacturing operation that children toiled in. Boys took their place in light manufacturing in industries such as glass bottle production. Their small hands made them ideal to perform tasks such as the cleaning of bottles. In some areas such as the East St. Louis region of Missouri, which by 1910 had a concentration of glassworks, a boy shortage existed. In response to this lack of labor, factories hired “boy getters.” These agents were responsible for recruiting boys throughout the Midwest to the factory either alone or with their families. Boys could be obtained from orphanages from as far away as New York City. Trains of orphans and other vagrant children arranged by the Charles Loring Brace Children's Aid Society ended up being a

79. Ibid., 161.


81. Hindman, *Child Labor*, 158.

conduit into the factories.\textsuperscript{83} This is ironic since these trains were sponsored by the CAS, which sought to protect children from the ravages of the inner-city labor market by providing opportunities for them to earn an “honest living” in a rural setting.\textsuperscript{84} It was believed the rural life provided more opportunities for advancement.\textsuperscript{85}

**Home Workshops**

While many children found employment in the mill, factory or on the streets, others worked in the home. Rather than being a respite from the toil of school, home for some children meant labor. As one 7 year old told a child labor investigator, “I like school better than home. I don't like home. There's too many flowers.”\textsuperscript{86} Flowers, brushes, and clothing were all the sorts of goods that began to be produced through home production in the late nineteenth century. Concentrated around New York's garment factories, home workshops gave manufacturers a inexpensive alternative to factory labor when looking to produce easily assembled goods. A middleman known as a sweater frequently was responsible for securing the home-based laborers and providing their produce to the manufacturers. These manufacturers benefited from this arrangement, under which it was estimated that the workers were paid one-third the wages of those in factories.\textsuperscript{87} These home-based businesses provided additional productive capacity to industry and were ideal for women who did not desire to leave the home in order to care for small children. Once those same children reached a productive age, they could easily assist with the work and help the family increase their earnings, which were commonly based on the number of items produced. This also let children work under the watchful eye of a parent

\textsuperscript{83} Ibid., 125.
\textsuperscript{84} Marjorie Elizabeth Wood, “Emancipating the Child Laborer,” 31.
\textsuperscript{85} Ibid.
\textsuperscript{86} Hindman, *Child Labor*, 187.
\textsuperscript{87} Ibid., 189-191.
without having to venture outside the home.

The Farms

Similarly, farm labor historically had its roots as a home-based undertaking. Unlike the mill and factory work which grew out of the Industrial Revolution, children had long had a place in domestic farming. During the Gilded Age, two-thirds of child labor was done on the farm. As farms grew and shifted away from the family farm model of agriculture, children continued to support farming. In 1900, six out of ten male farmhands were sons of the farmer. While some required farm duties had increasingly become mechanized, most tasks were still largely by hand. Unlike in factory settings, the child was unlikely to interface with the operation of heavy machinery on a large scale. These children provided a beneficial source of manual labor; as one farmer remarked, “[e]very boy born into a farm family was worth a thousand dollars.” If their labors weren't needed on their family's farm, children could often find employment as a hired hand on a neighboring farm. For families without a farm of their own, often times the entire family would be hired to work as farmhands. Children often as young as 3 years old could be found hulling berries. One review of the ages of child cranberry pickers in New Jersey in 1910 found that most children were between 8 and 10 years old. It was estimated that these children accounted for as much as one-third of the entire harvest More broadly, one study found that one-fourth of those employed under the age of 16 in agriculture were under 10 years

88. Ibid., 255.
91. Hindman, *Child Labor*, 255.
92. Ibid., 257.
of age.\textsuperscript{93} While some children harvested crops, others on the coast shucked oysters and picked shrimp.\textsuperscript{94}

The seasonal need of these outdoor industries put a premium on the ability to get laborers to the right place at the right time. To meet this need, a padrone system was utilized. While generally less nefarious than the Italian musical padrone system, like sweaters in the textile environment, the padrones were middle men hired by the farm owner to recruit needed labor. They were paid a certain rate per unit of output and in turn subcontracted with the laborer. This was most efficiently done when large families were available. In these cases, the padrone could secure a family rate.\textsuperscript{95} It was assumed in the South that children from the age of 6 or 7 would help the family work the land.\textsuperscript{96} Regardless of who in the family worked, or how old they were, the family received a fixed rate per bushel of berries picked or bushel of oysters shucked.\textsuperscript{97} Children in farming were seldom paid directly for their labor. Their wages were included in the amount paid to the family.\textsuperscript{98} This made the head of the household responsible for oversight of all the laborers in the family and allowed the padrone only to deal with a minimum number of subcontractors.\textsuperscript{99} Children, therefore, were an integral part of the productive capacity of the household under such an arrangement.

\textbf{The Legal Foundation – The Child as Property}

While, children in the post-Civil War United States labored in a variety of occupations,\

\textsuperscript{93} Lumpkin and Douglas, \textit{Child Workers in America}, 60.
\textsuperscript{94} Hindman, \textit{Child Labor}, 268.
\textsuperscript{95} Ibid., 276.
\textsuperscript{96} Lumpkin and Douglas, \textit{Child Workers in America}, 88.
\textsuperscript{97} Hindman, \textit{Child Labor}, 276.
\textsuperscript{98} Lumpkin and Douglas, \textit{Child Workers in America}, 67.
\textsuperscript{99} Hindman, \textit{Child Labor}, 276.
the legal foundation that allowed parental control was unwavering regardless of the field of employment. The right of parents to take advantage of this productive capacity of their children was long recognized both in the United States and abroad. Eighteenth-century English jurist William Blackstone noted that a child is the property of his father. 100 The toil of children during the period of the Industrial Revolution was consistent with this belief. Seldom were questions raised about the right of the father to benefit from the labors of his offspring. This was simply seen as one of the natural privileges of parenthood. 101 The perceived value of the child can be viewed through how the legal system treated the wrongful death of a child and the damages the parents could hope to recover. Courts usually found the proper amount due was “the probable value of the services of the deceased from the time of his death to the time he would have attained his majority, less the expense of his maintenance during the same time.” These awards often involved testimony from child employers who outlined the wages commonly paid. 102 These courts recognized what was well understood; the parent would naturally benefit from the productive labors of his child until he reached the age of majority.

Consistent with the concept of parental ownership of the work of their offspring, generally the wages the child earned served the common purpose of supporting the family. This happened directly in cases where the family was working on a collective piece-rate basis; in cases when the child earned independent wages, these were usually turned over to the parents as well. 103 In many physically demanding occupations, the wages the supervisor would offer

100. Rosenberg, Child Labor in America, 45.
102. Zelizer, Pricing the Priceless Child, 142.
103. Ibid., 58-59.
frequently varied based upon the physical size of the child. While a fraction of child laborers, some as young as 10, negotiated their pay with their employer directly, this was usually done by the parent. In either case, once earned, these wages generally became the property of the parents. Frequently these wages were the key to survival for many working class families. One analysis of Philadelphia families, for instance, found that for native-born two-parent families, children contributed between 28 and 33 percent of the household income. For Irish and German families, these numbers were as high as 46 and 35 percent respectively. Rather than the wife being the secondary wage earner as would become the case decades later, for many families in the late nineteenth century, this was the role of the child.

Even among those in the street trades, who operated most independently from their parents, one study of 106 newsboys found that nearly all of them gave their earnings to their mother or father. Amongst parents, consistent with legal thinking at the time, there was the belief that any money earned by the child was to first be provided to them. Once that was done, the parent might allocate a small amount as an allowance back to the child to allow him to make a particular purchase. Children were incentivized to work since in many cases work meant money back for clothes, soda water, and other amusements. Among the newsies, one study in St. Louis found that 87 percent of them “frequented movie picture shows and cheap theaters.”

105. Ibid., 17.
106. Ibid., 12.
110. Nasaw, *Children of the City*, 126.
Allowing children, however, to have control of their money was seen as eliminating the distinctions between children and adults, which was thought to have ruinous consequences. This was seen as eliminating the hierarchical structure on which the parent-child relationship was based.\textsuperscript{111} While children could earn money like grownups could, their role in the household was unchanged by their economic contributions. They were looked at as simply an extra money-earning appendage of the mother or father. Just as the parents had a right to earn money from the labors of their own hands, they were due the same as a result of the work of their offspring.

Although there was general agreement with the belief that the parent should have complete control over the economic affairs of the child, not everyone agreed with this logic. For some, this control reduced the child to a creature with only economic value. This concern was even shared by a few in the legal system who spoke out against valuing the life of a child based on the expected monetary contributions to the family. For example, in \textit{Schendel vs Bradford}, a case involving the death of a child, the presiding judge protested “this cold-blooded calculating measure of human life...Awarding pecuniary damages to the next of kin of a child six years of age is merely making a business commodity out of the child and subjecting the loss of that child's life to a dollars and cents argument.”\textsuperscript{112} This way of thinking about children would eventually help contribute to a change in the role of the children of the working class in American society.\textsuperscript{113} In combination with a greater awareness of the exploitive practices of some employers, it would help propel reform efforts that would eventually lead to an end of widespread child labor in the United States. However, reformers would face a long, uphill battle against employers, parents, and the legal system in securing nationwide reform. It would be the

\begin{itemize}
\item[111.] Ibid., 130-131.
\item[112.] Zelizer, \textit{Pricing the Priceless Child}, 152.
\item[113.] Ibid., 219.
\end{itemize}
legal system, primarily the Constitution and the limited scope of powers it granted to the federal government that would prove a primary challenge to reform. By the end of the nineteenth century, the Supreme Court had not heard a single case concerning child labor. Child labor was a matter for the States to deal with under their own laws, which in many cases regulated child labor barely, or not at all. As a result, it would be decades before an observant Indian chieftain would be able to express his surprise at the new-found lack of working children in New York and the greater United States.
CHAPTER TWO

“DON'T TAKE THESE BOYS AWAY FROM US!”
THE REFORM MOVEMENT

I am glad to see there is going to be a meeting here for child labor. I am really tired of seeing so many big children ten years old playing in the streets.

— Prominent Lady Citizen

Don't take these boys away from us! We have just bought these uniforms, and they were made to order.

— Shopkeeper in Cleveland, Ohio

There is a street in Lawrence, Massachusetts named “Camella Teoli Way.” To know the story of how that street came to be named, is to know the story of a struggle. The struggle of Camella Teoli,¹ is one of a young Italian immigrant who started work in a mill and ended up before Congress. To know her story is to know the story of the struggle against child labor.²

The public story of Camella Teoli begins and ends with the 14-year-old’s testimony to Congress in March 1912. There, in front of an audience including Helen Taft, the wife of President William Howard Taft, Teoli told her story.³ Teoli was an employee of the American Woolen Company in Lawrence, Massachusetts. As a result of a new State law, the maximum working hours in the mill were reduced from 56 to 54 per week for women and children.⁴ Mill owners sped up the machines in order to make up for the shorter workweek.⁵ In protest over the

¹. The Congressional Record refers to her has “Came lla” which is consistent with the naming of the street in her name, however her grandson in his 2012 book states her name was “Carmela.” For more on this topic see: Frank Palumbo Jr., Through Carmela’s Eyes: The Life Story of Carmela Teoli (Bloomington, IN: AuthorHouse, 2012).
³. Bartoletti, Kids on Strike!, 156.
⁴. Ibid., 159.
⁵. Ibid.
faster rate of production and the commensurate reduction in pay, mill workers—adults and
children—walked out on strike. Violence between strikers, replacement workers, police and
soldiers grew as the strike went on. Many strikers sent their children out of town to create
publicity for their cause and to ensure the safety of their children. While the children were
accepted with open arms in cities like New York, embarrassed Lawrence officials demanded
parents keep their children in the city. When the next group of children prepared to depart the
train station, they were met by police and soldiers. The police refused to let them board the
trains and launched an attack on the group. A 7 year old was given a black eye when she was
picked up and thrown into a paddy wagon by police. Another witness testified to children being
thrown around like rags. Citizens across the country were horrified by the events.\(^6\)

As a result of the outcry over the confrontation in Lawrence, a federal investigation into
the strike began at once. A delegation of adult and child strikers was sent to Washington, D.C.
President Taft asked to see the children. The strikers testified before a House of Representatives
Committee looking into the events.\(^7\) While the testimony focused on the origins of the strike and
subsequent violence, the most lasting impression was made by Camella Teoli.

Camella explained to the committee that over a year earlier, a man came up to the house
and spoke to her father. She had been attending school and the man asked her father why she
didn't work. Her father explained that he was unsure whether she was 13 or 14 years old. The
man replied that for $4 he could get papers similar to those from the “old country” that said she
was 14. Her father paid the $4 and she was sent off to work.\(^8\) A mere two weeks into her time at
the mill however, things had gone terribly wrong. As she told the committee, one day, near the

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6. Ibid., 168-171.
7. Ibid., 174-175.
8. Ibid., 154.
end of her shift, her hair became entangled in a machine and a portion of her scalp had been torn off. She spent seven months in the hospital and was still undergoing medical treatment. Her father was arrested for falsifying her age. The mill, though, was likely clear from liability since Camella was illegally working as an underage minor.9

The story of Camella Teoli drew widespread attention throughout the country. The presence of the First Lady at the hearing helped heighten awareness of the issue. This, though, was not a watershed moment in the movement against child labor. There was no such seminal event that changed public perceptions and turned the tide against the use of children as laborers. Rather, the struggle would be long, with many victories and failures along the way. Camella’s story of injury, false documents, parental and mill owner apathy is emblematic of the larger fight against child labor.

The initial move against sending children out of the home to labor on their own has its origins well before Camella Teoli and the Lawrence Textile Strike. The first moves against the practice date back all the way to the early nineteenth century. In England at the turn of the nineteenth century, the movement towards child labor legislation was the hard work of a few reformers. They, like the later reformers in the United States, faced obstacles. Manufacturers claimed that if child labor was eliminated, they would be bankrupted. Mr. Justice Grove, an early English child labor reform advocate, answered these charges in a July 4, 1801 article in the Lancaster Gazetteer when he remarked, “[s]hould the manufacturers insist without these children they could not advantageously follow their trade [say] that trade must not for the thirst of lucre be followed, but at once, for the sake of society, be abandoned.”10


Child labor would not be abandoned expeditiously in the United States, either. A lengthy movement would need to take place. Rather than being based on a desire to eliminate the poor conditions children toiled in, the movement was initially fueled by concerns over the lack of education the toiling children received. While the New England breed of Puritanism prized a strong work ethic, it also believed that salvation was achieved through a good understanding of the Bible. This, of course, required that children be able to read. Secularists similarly valued education as a fundamental necessity to achieve an educated citizenry; to them, this was fundamental to democracy.\footnote{Trattner, \textit{Crusade for the Children}, 28-29.}

A focus on these issues led the Connecticut legislature to pass a law in 1813 requiring that children working in factories be educated in reading, writing, and arithmetic.\footnote{Ibid., 29.} Despite facing arguments that such laws were contrary to the parents’ right to raise their children as they pleased, by 1850, three more States passed similar laws.\footnote{Ibid.} Reformers successfully argued that the State had an interest in the education of the child.\footnote{Schmidt, \textit{Industrial Violence and the Legal Origins of Child Labor}, 45.}

While education was at the heart of the initial reform efforts, this was not the only area of attack. In 1832, the New England Association of Farmers, Mechanics and Other Workingmen called for regulation and declared: “Children should not be allowed to labor in factories from morning to night, without any time for healthy recreation and mental culture.”\footnote{Trattner, \textit{Crusade for the Children}, 29.} Around this same time, concerns about the practice of child labor and its impact on wages were being raised by trade unions. An 1836 union convention was the first body to call for a minimum age for

\begin{itemize}
\item[12.] Ibid., 29.
\item[13.] Ibid.
\item[15.] Trattner, \textit{Crusade for the Children}, 29.
\end{itemize}
factory workers.\textsuperscript{16}

In response to the increasing call for legislative intervention, in 1842 Massachusetts limited the workday for children under 12, to 10 hours. Connecticut acted similarly, but applied the law to children under 14.\textsuperscript{17} By the end of the 1840's, every New England State had a child labor law.\textsuperscript{18} These States included age limits ranging from nine to 14. These regulations, however, were fairly limited. An enterprising family could avoid them by moving from State-to-State to keep their children employed.\textsuperscript{19} Generally, these laws and those passed in the following decades, had little impact on the practice of child labor. Many contained exceptions that allowed younger children to work with parental consent and some allowed the hour limitations to be exceeded if the additional work was voluntary.\textsuperscript{20} Furthermore, while it may seem strange now, well into the early twentieth century, it was not uncommon for children to be unaware of their own ages.\textsuperscript{21} This was particularly true in rural Southern areas\textsuperscript{22} and among immigrants.\textsuperscript{23} Without any structured sort of records, the best and sometimes only documentary evidence might be a notation of the birth in the family Bible.\textsuperscript{24} This lack of documentary evidence made requiring proof of age for employment difficult. With the new laws having little impact, in 1869

\begin{thebibliography}{9}
\bibitem{16} Ibid., 30.
\bibitem{17} Ibid. 
\bibitem{19} Trattner, \textit{Crusade for the Children}, 30.
\bibitem{20} Ibid., 30-31.
\bibitem{22} Ibid.
\bibitem{23} Zelizer, \textit{Pricing the Priceless Child}, 76.
\end{thebibliography}
the New York Times warned that the nation's youth were “growing up stunted in body, and with not even the rudiments of school training.”

While throughout most of the nineteenth century, child welfare organizations were primarily concerned with the problem of idle and vagrant children, things changed towards the end of the century. The collection of data concerning the number of child laborers through the 1870 census spurred the first widespread recognition of the problem. As discussed in Chapter One, this drew the attention of socially minded reformers like Charles Loring Brace. While Brace initially believed it would be best to ship the city's children to rural areas to secure their employment, as was done by his CAS organization, seeing 4 year olds working in a tobacco factory changed his mind.

The public was starting to become aware of the conditions in which children labored and politicians slowly began to take notice. In 1872, the Prohibition Party became the first political party to include a provision in its national platform that condemned the use of children in industry. This, though, was not a widespread view. Two years later, in 1874, at least 40 children, some as young as 5, were killed in a fire at the Granite Mill in Fall River, Massachusetts. Young girls were burned alive, suffocated or killed in a futile attempt to jump to safety. The story of the fire made headlines across the country. Surprisingly, the story of why there were so many children in the mill did not. Rather, editorials generally focused on a call for greater fire safety measures in order to prevent future disasters. While the Chicago Tribune

27. Trattner, Crusade for the Children, 30.
29. Trattner, Crusade for the Children, 32.
lamented the fact that so many children had to toil in such conditions, the paper proposed making the workplace more secure for children as the solution. One Massachusetts resident, however, wondered why the mill was filled with children. His solution: “Take the children out of the mills.”

Although some would start to see the need for such action, the public remained slow to focus on the issue. When attention was given to the issue, the public sometimes did not like what they saw. An 1886 investigation of a New York mill with 3,200 employees found 1,200 of the workers were under 16, and 20 were under 13. According to a police sergeant, a majority of the children supported their parents “in idleness and beer.” Supporters of child labor could not argue in favor of working children and idle parents. Such imagery was unseemly. Between 1885 and 1889, stories like this led ten States to pass minimum age laws while six set maximum working hours for children.

Despite such new laws in some States, the number of child workers in the United States continued to increase. In 1890, more than 18 percent of children between 10 and 15 were employed. While by 1900 laws in the North curtailed child labor to an extent, the practice was widespread in the South. Primarily as a result of efforts in the North, enrollment of children across the country in secondary schools increased 150 percent between 1890 and 1900. During

33. Ibid., 35.
34. Ibid., 36.
35. Ibid., 39.
this same time period, the population increased only 21 percent. Compulsory education laws were widely enacted outside of the South during the post-Civil War period. While New England had a tradition of free public education, this system was not a fixture in the Southern States. As a result, parents accustomed to having their children raised through farm labor, preferred to see their children engaged in what they saw as a productive job instead of “wasting time” in a school. Additionally, compulsory education in the South brought fear among whites that they would be required to educate black children. According to an 1891 study referenced in the New York Age, employers in the South, by a ratio of more than three to one, did not see any benefit from having a better-educated black workforce. Where schools did exist, they frequently were owned by the mill, an uncommon occurrence in the North. This gave the mill owner greater control over who went to school. These factors led to a situation where by 1900 the ratio of child to adult laborers was four times greater in the South than in the North. As of that year, 24 States and the District of Columbia still had no law specifying a minimum age to work in manufacturing.

The start of the twentieth century was the time when reform efforts became

36. William C. Hanson, “The Health of Young Persons in Massachusetts Factories” (lecture, Annual Meeting of the National Child Labor Committee, Boston, January 13-16, 1910).
38. Trattner, Crusade for the Children, 39.
42. Trattner, Crusade for the Children, 41.
43. Zelizer, Pricing the Priceless Child, 75.
The growth in socially focused progressive groups that began in the late nineteenth century started to have an impact. Major cities began the process of cleansing themselves of corrupt political bosses while States had begun to increase their regulation of business. From 1902 to 1906, national magazines published 69 articles under the heading of “Child Labor” while only a handful were penned in the previous five-year period. While reformers in some cases admitted there was a need for child labor, they hoped that even the South was becoming well-developed enough to remove its children from the factories. Reformers posited that the long hours of toil, the deprivation of education, and a litany of health problems were caused by premature toil. As Professor Stephen B. Wood has pointed out, this began the process by which child labor changed from being viewed as a “beneficent social institution” to one that had the stigma of “an unrighteous and harmful consequence of industrial capitalism, destructive to the child and community.” Despite this gradual change in the public at large, in seeking change, the reformers would be opposed by parents, industry and in some cases even the children themselves.

The first noted proponent of child labor legislation in the South was Edgar Gardner Murphy, an Arkansas clergyman. He founded the National Child Labor Committee (NCLC) in

44. Trattner, Crusade for the Children, 45.
47. Trattner, Crusade for the Children, 48.
48. Ibid., 48-49.
50. Trattner, Crusade for the Children, 50.
1904 and attempted to organize support for reasonable child labor restrictions among mill operators. The year prior, Murphy gave what would later be widely referred to as “the greatest speech against child labor ever” to the National Conference of Charities and Correction. In the speech he called for a “crusade” to obtain uniform legislation against the evil of child labor. Due to the varying conditions between the States, he did not call for a federal law. Rather, he believed such a law would be “inadequate if not unfortunate.” Instead, he sought to establish the NCLC as a nationwide organization that would support state-based efforts to pass legislation.\footnote{Ibid., 55-56.}

As one of its initial efforts, the NCLC drew up a model child labor bill copying the best features found in progressive States. It contained a minimum working age of 14 for manufacturing and 16 for mining. Furthermore, it specified a maximum workday of eight hours, required proof of age, and outlawed night work.\footnote{Ibid., 70.}

As head of the NCLC, Murphy was among the first to raise the issue of illiteracy in the South and tie that social ill to child labor and race.\footnote{Sallee, \textit{The Whiteness of Child Labor Reform in the New South}, 82.} He highlighted the fact that the native white illiteracy rate in the South for children 10 years of age or older was 24 percent, and 64 percent of illiterate native white children resided in the South. He called child labor a policy of “compulsory ignorance.”\footnote{Ibid.} One study in Alabama found a much higher percentage of blacks were enrolled in schools when compared to whites. Furthermore, it noted that many more whites than blacks stated that they did not desire their children to be educated.\footnote{Ibid., 104.} Murphy recognized that the concern whites had about maintaining their supposed racial superiority could spur them
to get their children into schools and out of the mill.

While the movement against child labor was still in its infancy, by 1903 the NCLC was not alone in the fight. During a strike at a Kensington, Pennsylvania mill, at least 10,000 children left work. Mary Harris “Mother” Jones took up their cause and drew publicity to the plight of working children. She assembled a group of young toilers for a public demonstration. In doing so, she chose children “with their fingers off, and hands crushed and maimed.” Not stopping with a mere static display, she took the children on a march to the Oyster Bay, New York retreat of President Theodore Roosevelt. Roosevelt refused to meet with them. His response was issued through Assistant Secretary to the President, B.F. Barnes. Barnes explained that “the children had the President's heartfelt sympathy ... but under the Constitution, Congress had no power to act ... The states alone have the power to deal with this subject.”

Despite Roosevelt’s refusal to meet with the children, the procession of 200 youngsters from Pennsylvania to New York drew attention from onlookers and brought publicity to the issue. President Roosevelt even raised the issue of child labor in his 1904 and 1906 addresses to Congress. He ordered the Department of Commerce and Labor to pay particular attention “to the conditions of child labor and child-labor legislation in several States.” He did this with an eye towards setting up nationwide rules passed at the State level. A federal law, however, was still out of the question for Roosevelt.

The NCLC continued its work at the State level. As of 1904, no State met all the

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56. Hindman, Child Labor, 25.
58. Hindman, Child Labor, 25.
59. Ibid., 76.
requirements of the “model bill.” To gain passage of these provisions, the NCLC understood it had to secure public support. The public needed to understand that the children were being damaged both physically and mentally by child labor. In order to heighten public understanding, the NCLC attempted to highlight the abuses that existed under the current system. As author Hugh Hindman later noted, reformers were most successful when they showed how these abuses impacted “child welfare.” If child labor was portrayed simply as a labor issue, the reformers were less successful. Since labor issues were typically of concern primarily to trade unions, the lack of support for unions in the South would hamper their reform efforts if they didn't differentiate this issue in such a way.

To highlight the focus on child welfare, reformers spread stories of the horrors of child labor. This meant not only portraying scenes of little children working in dangerous situations as NCLC photographer Lewis Hines did, but also portraying greedy mill owners and parents in a negative light. Most stories concentrated on the greedy parents. The reformers spread tales of fathers who were so drunk and too lazy to work themselves that they pushed their own children into labor. Mothers, too, were portrayed negatively. The New York Observer noted that children's wages helped “to deck out with a little more finery the gaunt figure of a neglectful mother.” A near riot broke out at a New York cannery when the owner attempted to exclude

60. Trattner, Crusade for the Children, 70.
62. Trattner, Crusade for the Children, 72.
63. Hindman, Child Labor, 50.
64. Sallee, The Whiteness of Child Labor Reform in the New South, 56.
66. Ibid., 56.
young children from employment. “[He was] besieged by angry Italian women, one of whom bit his finger 'right through.’”

This interference with the traditional right of parents to do with their children as they wished was not popular among the working class. Most thought it was appropriate for a child to “earn its keep.” Children were seen as duty bound to work in support of the family and to hand over their pay envelope to their parents. The “broken envelope,” the opening of a paycheck prior to giving it to the parent, violated the social norms of the time. Consequently, as illustrated above, the NCLC found that parents were “nearly always” on the side of the mill.

Parents who were ignorant of the damage that child labor did to their children often insisted that their children go to work. The Wisconsin Child Labor Committee reached a similar conclusion that “[t]he violation of the child labor laws, both in letter and spirit, seems to us to increasingly come rather from the side of the parent and child than from the side of the employer.” In Mississippi, NCLC investigators found an “unnatural class of parents who had become accustomed to subsist[ing] by their children's labor.”

One Italian father in Chicago remarked in grief upon the tragic death of his 12 year old girl that “in two years she could have supported me, and now I shall have to work five or six years” until his next eldest was old


68. Ibid.

69. Ibid., 101.

70. Trattner, Crusade for the Children, 100.


enough to provide him support.74 Parents also competed with their children for jobs, thereby lowering the wages they each received.75 In the textile industry, for example, while grown men earned $6 to $7 a week, children could be hired for only $2 a week.76 Florence Kelley, a child labor reformer who served as the chief factory inspector in Illinois in the late 1800's, believed that as a result, adult workers were idled because “children are underselling adults in the labor market.”77 Jane Addams, known as “the mother of social science,” found that gradually it became easier for the parents to just live off the wages of the child. As she put it, this forced the child to “prematurely bear the weight of life.”78

Many parents actively aided their children in thwarting the child labor laws that did exist. An investigation into one Pennsylvania mining town is illustrative. According to the superintendent of schools, between 175 and 200 boys under 16 were employed in the mines. He found that children who had presented certificates from doctors certifying they were unable to attend school due to physical handicap were instead toiling away in the coal mine. In some cases, he observed children so small that they couldn't carry their father's dinner pail without it dragging on the ground at work in the mines. Since miners were paid per carload of coal, any additional hands that could help load coal meant an increase in pay. Fathers were incentivized to bring their sons to work. In many cases, mine supervisors did not ask for a certificate stating the

76. Hindman, Child Labor, 27.
77. Ibid., 50.
78. Ibid., 60.
age of the child, particularly if they felt sorry for the family.\textsuperscript{79} If a certificate was needed, it could be falsified, as evidenced by the case of Camella Teoli. While her case only resulted in injury, in 1907, Patrick Kearney died in a mine in Pennsylvania under similar circumstances. During the investigation into his death, the company produced a certificate indicating he was 14 years old, the age legally required for employment. The father later testified that the boy was really only 9 years old. He had falsified the document because he wanted to get work for the boy.\textsuperscript{80}

These do not appear to be isolated cases. The \textit{Ohio Farmer} found that “parents do not hesitate to swear falsely about the ages of their children in order to put them to work in the mills.”\textsuperscript{81} While overseers knew the documents that they were provided were likely being falsified, the overseers were not in violation of the law since they were relying upon a state-sanctioned certificate. As one boss remarked, “[i]t's queer how all of these little fellows who have come to us this spring are just over fourteen and were all born on the first of May”\textsuperscript{82} One informal NCLC survey found that 21 of 22 boys who had certificates showing they were 14 were actually underage.\textsuperscript{83} Although, in theory, either the parent or the notary could have been prosecuted for their involvement in the scheme, this seldom occurred.\textsuperscript{84} The case against

\textsuperscript{80} Trattner, \textit{Crusade for the Children}, 74.
\textsuperscript{82} Hindman, \textit{Child Labor}, 106.
\textsuperscript{83} Ibid., 106-107.
\textsuperscript{84} Felt, \textit{Hostages of Fortune}, 22.
Camella Teoli’s father, for instance, was later dropped.  

Many times, in the case of foreign parents specifically, the parents did not understand the certificate process. Immigrant fathers, who often had gone to work at an early age, did not see why their children should not do the same. Financially, many believed the earnings of their children were needed, and that the few years of school their child had was more than enough. A request in broken English for a “work paper” could be seen as a request to an unscrupulous notary to falsify the age of the child so he could receive his fee. A review of affidavits in Cook County, Illinois found that 3,000 out of 15,000 certificates issued were for incorrect ages. This situation was eventually remedied by a movement to require birth certificates. However, as late as 1909, in New York State, 25 percent of requests for working papers were from children without such certificates. One enterprising New York notary apparently took advantage of this new requirement to advertise in the window of his drug store “Birth Certificates, 25 cents.” The greed of both the parents and the notaries seems to have contributed to the situation.

In addition to facing opposition from parents, employers of course also worked in opposition to reformers. While some mill owners tried everything possible to get children out of their enterprises, and even enforced age limits that exceeded the State minimums, many

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90. Felt, *Hostages of Fortune*, 100.
welcomed the youngsters. To raise public awareness, reformers were frequently successful at getting newspapers to portray greedy capitalists in vivid form. For example, a 1911 cartoon in *Life* magazine depicted a giant bloated businessman in front of a “child labor factory.” The cartoon portrayed small children dumping profits in the mouth of the man. The drawing was labeled “And a Little Child Shall Feed Them.”

Rather than just relying on drawings, reformers recounted numerous horrifying stories that showcased the impact of labor on small children. When children under 16 worked in the mines, one study found that they were three times more likely to die than was an adult. Seventy-five percent of slate pickers killed were children under 16. One boy had his leg so badly crushed while helping his father load a coal car that he had to spend a year in the hospital. “Breaker boys” were frequently hit on the head or shoulder by the “breaker boss” if they were not working fast enough. One boy touchingly recounted his attitude toward facing the day at the mine this way: “I'll always think of my poor blind father and my mother at home, and I won't never play with the boys at all, and then the cracker boss won't have to beat me like he does the others.” He was 9 years old. While stories like these provoked outrage in many quarters, in the coal-producing regions there was no such concern. The view that “[t]he little devils like it” as one coal boss put it, seemed to be the prevailing sentiment. Child labor wasn't discussed in


92. Ibid., 49.


95. Ibid., 73.

96. Hindman, *Child Labor*, 90.
these regions because it wasn't seen as an issue.\textsuperscript{97}

Conditions at glass manufacturers were no better than in the mines. The higher temperatures combined with the fumes may have caused one worker to remark, “I would rather send my boys straight to hell than send them by way of the glass house.”\textsuperscript{98} The conditions were made worse by the horseplay that the young lads frequently engaged in. The intentional breaking of defective bottles, for instance, robbed one boy of his sight when his eye was struck by a shard of glass.\textsuperscript{99} The average life expectancy for individuals employed in the industry was less than 42 years of age.\textsuperscript{100} This contrasted with an average 1912 life expectancy of 65 for lawyers and clergy.\textsuperscript{101} Adding to the dangerous conditions was the fact that much of the work was done at night when boys naturally were predisposed to want to sleep. Night work was preferred by one manager who explained that at night the boys were too afraid to run away.\textsuperscript{102} Some owners surrounded their factories with barbed wire; at least one of the reasons for this practice seems to have been a desire to keep their workers inside.\textsuperscript{103}

When accidents did occur, even if they weren't a result of horseplay, the child was frequently blamed. During the 1800's, courts generally believed if a minor was old enough to work, he was old enough to follow the rules, and could be responsible for contributing to an

\textsuperscript{97} Ibid., 91.

\textsuperscript{98} Trattner, \textit{Crusade for the Children}, 78.

\textsuperscript{99} Hindman, \textit{Child Labor}, 132.

\textsuperscript{100} Trattner, \textit{Crusade for the Children}, 78.


\textsuperscript{102} Hindman, \textit{Child Labor}, 132.

accident. Courts applied the “fellow servant” doctrine when assessing liability. This required the employee to prove the employer had been negligent and that this negligence was the immediate cause of the injury; furthermore, for an employee to prevail, neither the injured employee nor any other worker could have been contributorily negligent.

Courts struggled with the issue of liability in workplace accidents involving children. If the child was old enough to contract for his labor, was the child also old enough to be responsible to safely behave in the workplace? By the early 1900's, courts generally concluded that where the child was employed illegally, this constituted negligence on the part of the employer. In doing so, courts reached the conclusion that child labor laws were meant to prevent workplace accidents, and employers who skirted them did so at their peril. To author James Schmidt, the fact these laws made it easier to address industrial accidents in the courts was the greatest impact that child labor laws had.

It was not only the harm through industrial accidents that reformers feared. The NCLC presented testimony from medical experts that spoke of the hidden dangers of child toil and noted “the prolongation of infancy has been, perhaps, the chief instrument by which the human race became humanized.”

Doctor Albert Freiberg, of the Ohio State Child Labor Committee, lamented the fact that comprehensive research on the topic of child labor had not been performed.

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107. Ibid., 146.

108. Ibid., 156.

109. Ibid., 206.

and outlined how working ten hours a day stifled the development of children. Children naturally wanted to move about and breathe in fresh air. By limiting their movement to a confined work area for ten hours a day, their development was naturally hindered.\footnote{Albert H. Frieberg, “Some of the Ultimate Physical Effects of Premature Toil,” in \textit{Child Labor and the Republic}, ed. National Child Labor Committee (New York: American Academy of Political and Social Science, 1907), 19-22.} Employers hoped to suppress these urges to move about by oversight. \textit{Textile World Magazine} referenced that the child toilers “have to be constantly watched or they will go from bad to worse in order to make more time for play.”\footnote{Mofford, \textit{Child Labor in America}, 43.}

Children were also being harmed mentally through their lack of opportunities for schooling. Symbolic of this was a petition organized by mill operators that was brought to the South Carolina legislature. The petition in opposition to child labor reforms was signed by 3,000 mill employees and stated “We are not overworked, and are satisfied, and only ask to be let alone.” An examination of the signatures indicated that 100 of the children were incapable of signing their own name and could only mark the petition with an 'X.'\footnote{Trattner, \textit{Crusade for the Children}, 83.}

Additionally, many of the “proper” ladies of the reform movement were frequently appalled by what they saw as the moral degradation of children in the work environment. They were shocked when visits to the factories uncovered boys who “chewed tobacco vigorously” and gained superiority among their peers by most deftly speaking “unprintable words of blasphemy and obscenity.” Scenes of flirting and “coarse interchange of talk between the sexes” similarly appalled them. Most shockingly, “girls not fully clothed” engaged in the use of such vulgarities as well.\footnote{Schmidt, \textit{Industrial Violence and the Legal Origins of Child Labor}, 64-65.}

Even where laws were on the books, unless and until owners and parents cooperated, it
would be up to workplace inspectors to police the industry. Lack of concern about the issue made the job of inspectors even tougher, since their presence in town would frequently be spread to employers.\textsuperscript{115} Things were made more difficult by the fact that the inspector was generally required to report to the owner's office upon arrival at the plant. This gave the mill operator even more time to rid the premises of any overt child laborers.\textsuperscript{116} Hiding from the inspectors often took the form of a game for many children.\textsuperscript{117} Adults similarly failed to see the issue as a serious one.

Authorities generally had an equally unserious view of the problem. Exceptions to child labor laws were liberally given if “the child's support is needed for the support of the parent.”\textsuperscript{118} To help rebut the economic necessity of child labor, in some areas the NCLC and other aid organizations offered money to families with working age children if instead of sending their youngsters into labor, they sent them to school. These payments, known as “scholarships” and “child pensions,” helped reduce the economic incentive for such labor.\textsuperscript{119} While orphanhood was generally seen as necessitating child labor, the NCLC hoped that States would eventually adopt this model to reduce the economic pull of child labor.\textsuperscript{120} While these incentives were perceived as a success, many of the poor appeared to be too proud to take such “charity” and

\begin{itemize}
  \item \textsuperscript{115} Hindman, \textit{Child Labor}, 126-127.
  \item \textsuperscript{116} Felt, \textit{Hostages of Fortune}, 65.
  \item \textsuperscript{117} Hindman, \textit{Child Labor}, 126-127.
  \item \textsuperscript{120} Stephen S. Wise, “Justice to the Child” (lecture, Annual Meeting of the National Child Labor Committee, Boston, January 13-16, 1910).
\end{itemize}
believed it more upstanding to have their child “earn” money to support the family. Moreover, while support for widows was frequently played up as a reason that child labor was needed, a Chicago study found that only 23 out of 2,500 children illegally working were the sole source of support for their mother. In most cases when claims of poverty necessitating child labor were investigated further, it was usually found that the wages of the youngsters were not really required. Therefore, in reality the impact of these payments seems to have been fairly limited in terms of moving children out of the workplace and into school.

At least one speaker at the 1910 Boston NCLC convention believed the key to enforcement was to associate violation of child labor laws with “being unpatriotic and bad citizenship.” The Oklahoma representative at that convention echoed this belief and said a member of his committee “would be socially ostracized if he permitted his wife or one of his children to go into a mill or factory.” These views however did not seem to take hold in most areas where economic reality required children to work. Such well-meaning sentiments alone would not be sufficient to change the culture of child labor in areas where it was a way of life.

This way of life was most pronounced in the South. When mill owners did agree that some had gone too far in their employment of small children, they believed it would best be left to the mills themselves to resolve. The extent of child labor, in many cases, depended on the attitudes of the supervisor and ownership. While some employers relied heavily on children, others in close physical proximity to the children employing mills did not. One study of

121. Felt, *Hostages of Fortune*, 76.
123. Missouri Child Labor Committee 152.
125. Lovejoy, *Child Labor in the Soft Coal Mines*, 29
Alabama mills found that those with Northern ownership employed twice the number of children as did the other mills in the State. Some businesses, though, found it beneficial to eliminate child laborers. Speaking at a NCLC convention, a Connecticut manufacturer spoke of removing 400 child workers from his operations. He found that by not employing children under 16, he had to pay a little more in wages, but the increased rate of productivity and the reduced rate of accidents more than made up for this. Consistent with this finding, one 1906 survey found that 63 percent of employers thought children were not of value to their industry. Only 20 percent said they wished to employ children. However, regardless of their views on employing children, mill and factory owners were generally opposed to government regulation of child labor. This view was characterized by one Raleigh employer who remarked, “[w]e think if possible all the mills should run not over eleven hours a day and avoid, if possible, taking children under twelve or thirteen years, but we deem legislation on this subject bad policy; let the employer and the employee settle these things, this is a free country for all.”

Southern States generally went along with this anti-regulation view. No State had fewer restrictions on child labor than Alabama, Georgia, North Carolina, and South Carolina. Georgia had no age limit at all, and instead relied upon voluntary agreements among mill owners to regulate child labor. The others had a 12-year age limit, although South Carolina and


129. Trattner, *Crusade for the Children*, 84.

130. Ibid., 80.

Alabama allowed younger children to work if they could prove it was necessary they do so. Alabama actually repealed its eight-hour day maximum law in 1894 as part of an agreement with Massachusetts’s mill owners who sought to open mills in that State. 132 None of these States had a robust system of factory inspection nor compulsory school attendance laws. 133 What these States had in common was a reliance on the cotton mill as a central focus of many of their communities.

The first major legislative battle in these States took place in 1905 in North Carolina. The bill sought to raise the minimum working age for girls and illiterate children from 12 to 14. It would also prohibit night work for children under 14. 134 While initially this bill appeared likely to pass based on widespread support from the State’s elected leaders, it was defeated after significant lobbying by cotton mill operatives—seventy-five percent of spinners in the State were under 14. 135 The Cotton Manufacturers’ Association president declared that if a minimum age law passed specifying 14 as the minimum age, every mill in the State would close. 136 After an organized campaign of opposition, the measure failed to receive a single vote in the North Carolina legislature. 137

The mill owners blamed the “outside agitators” of the NCLC for stirring up anti-child labor sentiments. They alleged that the NCLC was a Northern-backed group whose aim was the destruction of the Southern way of life, despite the fact that only a small percentage of the funding donated to the NCLC was from the North. The NCLC was more closely aligned with

134. Ibid., 82.
135. Ibid., 41.
136. Ibid.
137. Ibid., 83.
the interests of labor unions. The American Federation of Labor recognized as long as child labor was widespread in the South, it would never be able to increase wages for union workers there. Poorly educated child laborers tended to become poorly educated adults, who were likely to be docile employees unlikely to demand higher wages or get involved in union organizing. As a result, unions put their might behind the anti-child labor cause, and some manufacturers put their efforts behind defeating the twin enemies of unionism and child labor reform.

Furthermore, mill owners argued that the number of child laborers was smaller than claimed and that workplace conditions were not injurious. According to an article by Homer Folks of the NCLC written in 1907, these arguments would be the two standard defenses raised against child labor legislation. Others defenses were that such labor was good for children and that the earnings of the child were necessary to support the family. While child labor opponents countered that responsibility could be taught at home, child labor proponents saw the workplace as a useful place to learn this value.

Some proponents defended child labor based on the training it provided that would allow children to take on additional responsibilities in the future. Emblematic of this view was a statement recorded by NCLC special agent Lewis Hines. While surveying conditions at Gulf Coast canneries, he was proudly told by the mother of a 3-year-old oyster shucker that she was


140. Trattner, *Crusade for the Children*, 83.

141. Folks, “Poverty and Parental Dependence as an Obstacle to Child Labor Reform,” 1.

142. Raymond Garfield Fuller, *Child Labor and the Constitution* (Chicago: University of Illinois Press, 1923), 44.
“learnin’ her the trade.”¹⁴³ Opponents countered that the work children engaged in did not help their future employment prospects.¹⁴⁴ These were not trades in any real sense. At the 1910 NCLC convention in Boston, the Secretary of the New England Chapter summarized the issue as follows: “The breaker boys sitting across the chutes through which pour the ceaseless streams of anthracite, are not learning as they watch the flow of coal ... in exchange for their youthful vigor they aren't acquiring any training which will be useful to them in future years.”¹⁴⁵ These children usually ended up taking any job they could get.¹⁴⁶

1906 – A Historic Year

The year 1906 would be a historic year in the fight against child labor. That year, a federal child labor bill was introduced in Congress by Republican Senator Albert J. Beveridge of Indiana. His bill sought to outlaw the transport in interstate commerce of any articles mined or manufactured by children under 14 years of age. In a speech in support of the bill, Beveridge declared “[w]e cannot permit any man or corporation to stunt the bodies, minds, and souls of American children. We cannot thus wreck the future of the American Republic.”¹⁴⁷ He took special aim at conditions in the South. “I come to the section of the country where this evil is greatest and most shameful and where it is practiced upon the purest American strain that exists in this country—the children in the southern cotton mills,” he said, calling particular attention to white children. As Beveridge made more and more speeches in support of child labor reform, he saw that public interest in the issue was growing.


¹⁴⁴ Fuller, Child Labor and the Constitution, 44.

¹⁴⁵ Everett W. Lord, “Vocational Direction, or the Boy and His Job” (lecture, Annual Meeting of the National Child Labor Committee, Boston, January 13-16, 1910).

¹⁴⁶ Hindman, Child Labor, 77.

¹⁴⁷ Trattner, Crusade for the Children, 89.
Highlighting the need for federal intervention, Senator Beveridge noted that, “even if in one, or a dozen States good child labor laws were still executed, the business man in the good State would be at a disadvantage to the business man in the bad State.” Consequently States frequently were unwilling to take such advances alone for fear of giving another State an advantage. Additionally, in border areas children could seek employment in a neighboring State and return home after their shift. Such situations also gave businesses in a State with the more restrictive child labor laws an incentive to violate them in order to compete with neighboring businesses, in States where child labor was legal. This situation, for example, occurred in the glass industry. While Ohio had banned boys under 16 from the glass industry, West Virginia and Pennsylvania had no such restrictions. The fact that Pennsylvania, with its mine industry and weak child labor laws had a workforce participation rate for twelve year olds that was nearly five times that of the neighboring States of New York and Ohio highlighted the need for a federal law (which restricted child labor), Senator Beveridge argued.

The prospect of a federal law caused an initial split within the reform movement. While the NCLC had opposed federal legislation, many of its supporters and other groups supported

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151. Samuel McCune Lindsay, “Unequal Laws An Impediment to Child Labor Legislation” (lecture, Annual Meeting of the National Child Labor Committee, Boston, January 13-16, 1910).


such an effort. The Knights of Labor had been calling for such legislation since 1880.\footnote{Ibid.} Additionally, Samuel Gompers of the American Federation of Labor adopted the same position. He argued that just as federal intervention was needed to end the practice of slavery in the South, similar action was required in the Southern States to protect the “lives and limbs and health” of the young toilers.\footnote{Sallee, \textit{The Whiteness of Child Labor Reform in the New South}, 64-65.}

The introduction of a child labor bill at the national level brought heightened attention to the topic. This led to a number of articles in newspapers and magazines\footnote{Arthur T. Vance, “The Value of Publicity in Reform,” in \textit{Child Labor and the Republic}, ed. National Child Labor Committee (New York: American Academy of Political and Social Science, 1907), 88.} on what previously was a seldom-covered topic. \textit{Cosmopolitan} prematurely informed its readers in 1907 that child labor would soon end up “with all the institutions of evil memory—with bull baiting, witch burning, and all other execrated customs of the past.”\footnote{Zelizer, \textit{Pricing the Priceless Child}, 62.} While the reports of the demise of child labor proved to be exaggerated, additional coverage helped raise awareness. Specifically, the \textit{Woman's Home Companion} took up the cause and began to publish articles outlining conditions in the mills. Such publicity led President Roosevelt to give the magazine a statement outlining his support for a federal investigation of the child labor issue.\footnote{Arthur T. Vance, “The Value of Publicity in Reform,” 91.}

Civic groups also began to pay attention in greater numbers. The Consumers' League of the State of New York, for instance, prepared a syllabus of study for women's clubs and reading circles titled “Our Working Children” to highlight interest in school attendance and child

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\hspace{1em}154. Ibid. \\
\hspace{1em}155. Sallee, \textit{The Whiteness of Child Labor Reform in the New South}, 64-65. \\
\hspace{1em}157. Zelizer, \textit{Pricing the Priceless Child}, 62. \\
\hspace{1em}158. Arthur T. Vance, “The Value of Publicity in Reform,” 91.
labor. In Detroit and Cincinnati, their Consumers' Leagues sought information on child labor law violations and started a publicity campaign in favor of early Christmas shopping. Shopping earlier in the year lessened the need for merchants to hire additional child toilers in order to cope with the last minute Christmas rush. The Cleveland Consumers' League embarked on a campaign to have citizens report child labor violations to the city solicitor. It does not appear these campaigns had much success. For example, in New York Judge Kempner of Brooklyn quickly dismissed just such a prosecution brought for violation of the hours law. In dismissing the case, the judge told the inspector that he should “wink” at such violations during the holiday season. These laws also did nothing to alleviate the parental incentive to push their children into the workforce. Until 1903, New York's child labor statute included a “Christmas exception” that extended allowable hours and lowered the minimum working age for the period from December 15th through January 1st.

Few organizations openly and directly defended the toil of children in the factory. While Florence Kelley remarked that no delegation of manufacturers goes to the legislature to say “[y]es, there is child labor, and it is a good thing for the children and the republic”, the


161. Ibid.


163. Felt, Hostages of Fortune, 86.

164. Ibid., 129.

165. Florence Kelley, “Obstacles to the Enforcement of Child Labor Legislation,” in Child Labor and
National Association of Manufacturers (NAM) in fact would do so. The Chairman of the association lashed out against labor unions, who he saw as behind the move for federal legislation. He remarked, "[t]his labor union plot against the advancement and the happiness of the American boy ... is also a ploy against industrial expansion and prosperity of the country." Believing that most children were destined for factory work, he thought the ban on child labor would deprive children of the chance to develop "good industrial habits."166 Echoing these sentiments, another opponent of reform remarked, "I say it is a tragic thing to contemplate if the Federal Government closes the doors of the factories and you send that little child back, empty handed; that brave little boy that was looking forward to get money for his mother for something to eat."167

Sentiments like these highlighted the heated debate that began on both sides of the issue when the Beveridge bill was introduced. It also caused further internal debate inside the NCLC over the prospect of federal action. After internal discussion about its constitutionality, the NCLC agreed to support the bill, but did not abandon its state-by-state reform efforts. The measure, though, faced an uncertain future in both the House and Senate. Furthermore, the bill was opposed by President Roosevelt. While in a March 1908 message to Congress he declared "child labor should be prohibited throughout the nation," he doubted that the bill was constitutional. Rather than a uniform federal law, Roosevelt still believed "each state must ultimately settle this question in its own way." Instead of asking Congress to pass the Beveridge bill, Roosevelt asked Congress to appropriate funds for the Bureau of Labor to provide more information to help the States by conducting a study on the conditions of working women and

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166. Rosenberg, Child Labor in America, 183.

167. Hindman, Child Labor, 57.
children in the country.\textsuperscript{168} Congress eventually authorized $300,000 for this undertaking.\textsuperscript{169}

Senator Beveridge saw Roosevelt's actions as a political attempt to curry favor with both sides of the issue. He pressed forward in his attempt to pass a federal law. In support of this effort, he spent three days on the Senate floor nearly alone reading tales of the horrid conditions that many child laborers faced. He railed against “the cruel and greedy interests that were fattening off the blood of the American children.”\textsuperscript{170}

Although the NCLC supported the bill, its leader, Edgar Gardner Murphy, remained in opposition, believing it was not the place of the federal government to intervene in such State matters. He believed that by favoring this legislation, the NCLC had hurt the cause of child labor reform in the South, as opposition could now be based on a State’s rights argument,\textsuperscript{171} opponents could speak out against the coercive nature of federal action and not have to defend child labor. This, Murphy believed, undercut the state-by-state reform efforts taking place in the South.\textsuperscript{172} As a result of this disagreement, not only did Murphy resign from the NCLC, he raised money to fight the bill and urged President Roosevelt to continue his opposition as well.\textsuperscript{173} The opponents were successful and the bill failed to make its way through Congress. In January 1907 Senator Beveridge spoke on the floor of the Senate for in support of the bill to a cheering Senate gallery of supporters. Lawmakers however were less supportive. Lacking required

\begin{footnotesize}
\begin{enumerate}
\item Trattner, \textit{Crusade for the Children}, 89.
\item Ibid.
\item Ibid., 90.
\item Ibid., 91.
\item Felt, \textit{Hostages of Fortune}, 77.
\item Trattner, \textit{Crusade for the Children}, 91.
\end{enumerate}
\end{footnotesize}
support on the Senate floor, the measure died.\footnote{174} Once it was clear the bill would not pass, the NCLC also withdrew its support.\footnote{175}

While increasing action against child labor was now focused at the federal level, some substantive progress during this time period could be seen at the State level. For example, Alabama established a minimum working age of 12 and did away with previous exemptions that allowed 10 year olds to toil. South Carolina also adopted a system of factory inspection. However, by 1910 only four Southern States and the District of Columbia had a minimum working age of 14. The leading cotton producing States of North and South Carolina maintained their 12-year age limit.\footnote{176} To the extent Southern States had passed child labor laws, it seems that some did so in an attempt to discourage future federal intervention.\footnote{177}

The NCLC continued to attempt to work at the State level for reform, but its efforts were met with mixed success. Eighteen percent of children nationwide between 10 and 15 were employed by 1910, a number unchanged over the past 20 years.\footnote{178} That year at the NCLC convention in Boston, many State organizations spoke of problems encountered organizing and passing bills at the State level. Consistent with the varying reports given by States, the gap between States in terms of the percentage of children in the labor force was widening.\footnote{179} The Ohio report, for instance, noted that the press in large cities was not interested in publishing

\footnotetext{174}{Ibid., 90.}
\footnotetext{175}{Millhiser, \textit{Injustices}, 73.}
\footnotetext{176}{Trattner, \textit{Crusade for the Children}, 99.}
\footnotetext{177}{Hindman, \textit{Child Labor}, 70.}
\footnotetext{178}{Trattner, \textit{Crusade for the Children}, 107.}
\footnotetext{179}{Ibid., 107.}
stories on child labor. The Nebraska report lamented that despite its public outreach, its meetings were “apparently regarded much in the nature of church gatherings—belonging to a certain few.” The report from North Carolina was even more downbeat. The State reported that it had no way to enforce the present child labor law, which was a “very poor one in many ways.” As an organization, they reported that their committee “does very little” and that each committee member finances himself and “devotes very little time to the work.”

1912 – Stasis

From a nationwide perspective, by 1912, progress in passing laws at the State level to curtail child labor was minimal. Every State had a child labor law on the books, but no State had adopted the NCLC’s 1910 model law and only four States had put in place its original 1904 outline. Eight States permitted children under 14 to engage in industrial work. According to “Crusade for the Children” by Walter Trattner, the conditions in place as of 1912 were as follows:

- 22 States (including four leading textile producing States) permitted children to work in factories
- 30 States allowed boys under 16 to work in mines
- 31 States allowed children under 16 to work more than eight hours a day
- 28 States let children under 16 work at night

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181. Nebraska Child Labor Committee (lecture, Annual Meeting of the National Child Labor Committee, Boston, January 13-16, 1910).
As a result of the slow pace of reform in individual States, the NCLC began to believe it would take a push primarily at the federal level to secure greater reform.\textsuperscript{185}

Even when laws were in place, enforcement was uneven and was generally lax. Around this time, Bureau of Labor Statistics investigators found that “age-limit laws in effect at the time ... were openly and freely violated in every State visited.”\textsuperscript{186} Maine, for instance, as of 1910, had one factory inspector for the entire State.\textsuperscript{187} In many States, open violations of the laws took place with the knowledge of the public.\textsuperscript{188} While the public would in some instances mobilize in support of child labor laws, enforcement was frequently far from the mind of the public.

Philosopher and muckraker Alfred Hodder summed up the sentiment as follows: “Public opinion demands passage of laws; and the laws once passed, public opinion demands their violation; and it enforces both at the polls.”\textsuperscript{189} Such non-enforcement frequently forced even reputable firms to feel the need to violate the law to compete economically.\textsuperscript{190}

Reformer Florence Kelley judged enforcement by three metrics: The presence of children in schools, prosecution of violators, and the published record of officials in dealing with child labor issues. She that found where child labor thrived, these conditions were generally

\begin{itemize}
  \item 23 States did not require adequate documentary proof of age\textsuperscript{184}
\end{itemize}

\textsuperscript{184} Trattner, \textit{Crusade for the Children}, 115.
\textsuperscript{185} Ibid., 116.
\textsuperscript{186} Lindenmeyer, \textit{A Right to Childhood}, 113.
\textsuperscript{189} Felt, \textit{Hostages of Fortune}, 26.
\textsuperscript{190} E.J. Watson, “Enforcement of Child Labor Laws” (lecture, Annual Meeting of the National Child Labor Committee, Boston, January 13-16, 1910).
lacking. For instance, in regards to enforcement, in 1906 in Pennsylvania there were only 22 child labor prosecutions despite the fact there were 3,243 children employed illegally. Furthermore, she called out the American people for being hypocrites—people who believe child labor is an evil, yet tolerate seeing it daily on their city streets. Kelley called on Americans to stop buying newspapers from child workers. Others activists called on consumers to stop buying products made with child labor. It does not seem either campaign had any notable impact.

In addition to garnering public support and effective enforcement, if the laws were to be successful on a wider scale, they could not operate in isolation. Successful child labor laws worked in conjunction with compulsory education laws. A child in school would at least not be working at gainful employment while in the classroom. By the early 1900's, only around 80 percent of children at the age of 14 attended school. The New York chapter of the NCLC found that “school authorities are able to do more through their ability to hold children back from work than a whole army of inspectors.” Many enlightened mill owners supported these laws. If child labor laws alone were passed however, without compulsory school attendance,

192. Ibid., 50-54.
193. Ibid., 55.
194. Hindman, Child Labor, 173.
198. Felt, Hostages of Fortune, 86.
many owners expressed concern that children would engage in loafing.\textsuperscript{199}

In the South, race further clouded the discussion over education. When it came to black children, one farm boss summarized the popular sentiment when he remarked that a 13 year old was “plenty big for a man's work and likely to get uppity if he didn't quit school.”\textsuperscript{200} Southern States also often provided limited educational opportunities. Such situations made tying together education and child labor laws impractical. In Georgia, for instance, where school was in session only three months a year, reformers remarked that the school session “gives the little fellows a holiday for three months from the mill, and also some opportunities for education.”\textsuperscript{201} It was clear that the primary focus in the South was on production and not education.

In States with more developed education systems, some success was achieved at least up until the point where the child reached the age he could legally be employed. Illinois, for instance, had its factory inspectors and truant officers work together once child labor and compulsory educational laws were passed in tandem in 1903.\textsuperscript{202} While the law kept children in school reliably until 14, within a month of turning that age, 20 percent of children were sent to work, with 20 percent more within four months.\textsuperscript{203} This seemed to be supported by many parents. A West Virginia study of 150 families who kept their children home found that approximately one-half found work to be more important than school.\textsuperscript{204} One mill recruitment

\begin{itemize}
\item 199. Hindman, \textit{Child Labor}, 178.
\item 200. Lumpkin and Douglas, \textit{Child Workers in America}, 5.
\item 203. Ibid., 101.
\end{itemize}
flyer highlighted the realities. It noted a “poor man” could send his child to a school where he or she could become a teacher and earn $35 per month during the school term. However, it noted, “if he or she learned to be a good weaver,” the mill offered “$40 per month for the year.”

Working class families in the early twentieth century simply didn't have the luxury to overlook these facts.

When polled, children in many cases echoed the sentiments of their parents that they generally preferred work to school. A 1909 survey of 500 children in multiple Chicago factories found children had numerous reasons why they preferred work in the factory. While many concentrated on the negative aspects of school and discussed their dislike of learning, others highlighted the positive aspect of employment. Some children referenced the fact they could get paid in the factory. One child expressed that the employer “give[s] your mother yer[sic] pay envelope[sic]” while another mentioned “[y]ou can buy shoes for the baby.”

For most children and their parents these tangible benefits of work outweighed the supposed long-term benefits of education.

**Breakthrough**

While there was no watershed event in the fight to reform child labor in the United States, the closest the movement may have come to such a moment may have been 1912. In the wake of the public outcry over Camella Teoli’s testimony and the Lawrence mill strike, as discussed earlier, President Taft signed a bill establishing the Children's Bureau. Although the agency had no administrative or legal powers, by collecting research data it was able to present a clearer picture of the conditions children faced. It appears that this was a time when the public

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became more supportive of a federal role in the reform efforts as well. 1912 was also the year the Republican President Taft was up for re-election in a four-way race for president. While Roosevelt had supported Taft to succeed him as president in 1908, he had fallen out of favor with Roosevelt due to his lack of progressive accomplishments. The 1912 election accordingly saw the Republican and Democratic parties reverse their traditional roles according to University of Virginia Professor Sidney Milkis.\(^\text{208}\) The traditional Republican progressive mantle was lost when Theodore Roosevelt ran against Taft as the Progressive candidate on the ballot. In doing so, Roosevelt reversed course and became supportive of the efforts of Senator Beveridge for a federal child labor law.\(^\text{209}\) The victory by Democrat Woodrow Wilson eventually led to that party's assumption of the progressive mantle that had been vacated by the Republicans.

Although Wilson, a Southern Democrat, expressed sympathy for the cause, he held that such laws at the federal level were unconstitutional, as had his predecessors in the White House.\(^\text{210}\) His position apparently had not changed since he wrote the following in 1908:

> The proposed federal legislation ... affords a striking example of a tendency to carry out Congressional power over interstate commerce beyond the utmost boundaries of reasonable and honest inference. If the power to regulate commerce between the states can be stretched to include regulation of labor in mills and factories, it can be made to embrace every particular of industrial organization and action of the country.\(^\text{211}\)

Years later, Wilson remarked that the Democratic Party that controlled Congress “represents a strong State's rights feeling. It is very plain that you would have to go much further than most interpretations of the Constitution would allow if you were able to give the [federal] government


\(^{209}\) Trattner, Crusade for the Children, 119.

\(^{210}\) Ibid., 121.

\(^{211}\) Ibid., 122.
general control over child labor throughout the country.”

While Wilson was not yet a supporter of federal legislation, he eventually saw the political necessity of doing so as a result of the political changes that took place in 1912. Despite his reservations, Wilson and the NCLC continued to work with the Congress to draft a new bill the NCLC could support. The NCLC ended up endorsing an extensive bill that banned children under 14 from factories, workshops, and canneries, and children under 16 from mines and quarries. It also prohibited children under 16 from working more than eight hours a day, and between the hours of 7 p.m. and 7 a.m. However, since several States already had more stringent laws on the books, it was not a drastic measure. In February 1914, the NCLC leadership met with President Wilson. At the meeting, the NCLC outlined how they had previously arrived at their position in support of a federal law. Wilson reiterated his belief that such an act would be unconstitutional, but agreed that he would not speak out against it. With this assurance, a bill was introduced by two Democrats, Representative A. Mitchell Palmer of Pennsylvania in the House and Robert L. Owen of Oklahoma in the Senate. There was little opposition to the Palmer-Owen measure. In public hearings, the only people to express opposition to the bill were three South Carolina mill men. Lewis K. Parker, the spokesman for the group, stated that conditions were improving in the South and also opposed the bill on legal grounds.

The most sustained attack against the bill came from David Clark of North Carolina, the editor of the Southern Textile Bulletin. He argued that no child's health had ever been harmed by

212. Ibid.
213. Ibid., 124.
214. Ibid., 125.
215. Ibid., 124.
216. Ibid., 125.
working in a mill, and that the bill was a plot by Northerners to control the South. The NCLC, he alleged, had used dishonest propaganda to gain public support for the legislation.\footnote{Ibid., 126.} The pro-child labor movement countered with its own propaganda. The \textit{Manufacturers’ Record} attempted to create an idyllic picture of mill life. It reported that mill employers witnessed “the emancipation of pale-faced children gaining the appearance of robust health” once the child entered the mill. One reformer gave unwitting support to the idea that the mill life was an improvement remarking “that to most of these unfortunate people, factory life is a distinct improvement over the log cabin, salt pork, and peach brandy, white-trash and Georgia-cracker type of life from which many of them were sifted out [from] when the mills came.”\footnote{Sallee, \textit{The Whiteness of Child Labor Reform in the New South}, 97.}

If David Clark was looking for an example of anti-child labor propaganda to support his assertion that child labor reform was a Northern “plot,” he could have found it in the June 15, 1914 edition of \textit{The Day Book} in Chicago. Its headline “If Chicago Wants Healthy Men Boys Must Play and Have Fun” set the tone for that paper on that day.\footnote{K.W. Payne, \textit{The Day Book}, 15 June 1914.} Inside was a drawing of a scary looking gunman titled “Effect.” The “Cause” was a lunchbox-carrying child toiler. The story accompanying the pictured referenced a study that claimed 90 percent of the 269 murders that the author investigated were committed by former “child slaves.”\footnote{Ibid.}

Such propaganda probably wasn't needed. The bill easily passed the House 233 to 43, with only the delegations in North Carolina, South Carolina, Georgia and Mississippi in opposition. Their opposition was primarily based on organized opposition from the Executive Committee of Southern Cotton Manufacturers, a group organized by David Clark. Despite this
limited opposition, Congressman Palmer appeared to be correct when he declared that the country was “for it, as it is very few things in either branch of Congress today.” However, due to a procedural objection by Senator Lee Overman of North Carolina, the bill would not be brought up in the Senate prior to the close of the session and languished.

The Fleeting Triumph of Reform

The bill was reintroduced in the House and Senate in 1916. This time it was sponsored by Colorado Democrat Edward Keating in the House and Robert Owen again in the Senate. As happened the previous year, the bill received widespread support. The only opposition on the record this time would come from an attorney for the NAM. Arguments were raised that the legislation would deprive children of the ability to learn needed skills, did not provide school for the soon to be idle children, robbed widows of a source of financial support, overrode the inherent right of everyone to work, and trampled the rights of the States to decide such matters. Despite this list of objections, the bill easily passed the House 343 to 46. One observer noted that the “States’ rights” argument did not have appeal in all the Southern States, but rather only those States where cotton manufacturing was most entrenched. Overall, 105 of 150 Southern Congressmen ended up voting for the bill.

In the Senate, the drama over passage was greater and the subject of political intrigue. Democrats were concerned about the lack of reforms that had been achieved under the Wilson administration. They were mindful of what happened to the Taft administration in 1912 when it failed to win re-election because of its scant reform record. President Wilson was lobbied by his

221. Trattner, *Crusade for the Children*, 126.

222. Ibid., 127.

223. Ibid., 128.

224. Ibid.

225. Ibid., 128.
longtime friend Alexander McKelway of the NCLC to support the federal bill despite his previous objections. He outlined to Wilson the political peril his opposition would put him in—the Republicans would be in support of the bill. If Wilson opposed it, they would have the high ground on this popular issue. Wilson's argument that the bill was unconstitutional was also expected to be undermined by an endorsement of the bill by former Supreme Court Chief Justice Charles Evans Hughes (the eventual Republican presidential candidate in 1916). Wilson concluded that politically he had to support the bill and rallied his fellow Democrats in the Senate to pass it.\textsuperscript{226} Wilson then told them that he would only accept the re-nomination for President if he received assurance from Democratic Senators that the bill would be passed during the current session.\textsuperscript{227} He informed the Senators that “I am encouraged to believe that the situation had changed considerably.” It had.\textsuperscript{228}

After some debate in the Senate on the constitutionality of the law, it passed 52 to 12.\textsuperscript{229} Those in opposition were 10 Southern Democratic and the two Republican Senators from Pennsylvania, a State with more child toilers than all of the Southern States combined.\textsuperscript{230} President Wilson signed the Keating-Owen bill into law on September 1, 1916. The next day he accepted the nomination of his party and referenced his achievement in securing “the emancipation of the children of the nation by releasing them from hurtful labor.”\textsuperscript{231} Wilson not

\textsuperscript{226} Ibid., 130.

\textsuperscript{227} Trattner, \textit{Crusade for the Children}, 130.

\textsuperscript{228} Ibid.

\textsuperscript{229} According to author Stephen B. Wood in his book Constitutional Politics in the Progressive Era, p. 77 the fact that approximately a third of the Senate did not vote could be explained by the fact that the outcome was nearly certain and the vote took place late at night near the end of the term.

\textsuperscript{230} Trattner, \textit{Crusade for the Children}, 131.

\textsuperscript{231} Ibid., 130.
surprisingly did not reference his previous views that such legislation was unconstitutional. Yet, Wilson's change in position on this issue seems even more understandable in light of the political situation at the time. Wilson's new-found progressivism on child labor won him the support of many who previously supported the reformer Theodore Roosevelt in 1912. Author Walter Trattner for one believed that while Wilson’s peace platform was key to his re-election, without the child labor law Wilson would have lost re-election in 1916. 232

Despite the significant achievement of the legislation, the law was only to impact the estimated 150,000 children working in mines, quarries, canneries, mills, and factories along with other businesses engaged in interstate commerce. It left unaffected the estimated 1,850,000 children working in home-based businesses, the streets and the fields. 233 The law was scheduled to go into effect on September 1, 1917. The entry of the United States into World War I in the spring of 1917 caused child labor opponents to call for a delay in its enforcement. By pointing out the health issues English and French children faced when those nations relaxed their child labor limits due to the hostilities, the NCLC and other supporters overcame this hurdle. 234

While the Keating-Owen Child Labor Act of 1916 was not perfect, it was another milestone in the fight against child labor. Reformers had overcome many challenges to eventually pass a law that, while limited in scope, was the first nationwide victory in the battle against child labor. Child labor was now officially an issue of concern to the federal government and was subject to regulation under the Commerce Clause of the United States Constitution. It was a resounding victory for child labor reformers. However, how long it would stay that way would soon come into question. The question would eventually have to be answered by the

232. Ibid., 132.
233. Ibid.
234. Ibid., 134.
United States Supreme Court.
CHAPTER THREE
“WON FIRST BLOOD”
HAMMER VS DAGENHART

Let us pass the bill. And if some court declares it unconstitutional, let it do so ... if we are going to err, for God's sake, let us err on the side of humanity.
—Congressman Mahlon Garland, 1916

We all know what effect it has when the high court sets aside an act of Congress or an act of a State legislature the passage of which benevolent people had been able to procure. All the journals of the country, the magazine writers, and the “uplifters” a great many of whom deal in language and not brains, who know nothing about the law, but are very versatile with epithets, denounce the Supreme Court and say it is time to haul off the bench and to have referendums and recalls and all that sort of thing.
—Senator Frank Brandegee, 1916

In his remarks in opposition to the Keating-Owen bill, Senator Lee Overman declared that “not even the request of every man woman, and child in the State of North Carolina” would be enough for him to violate his solemn oath by voting for the bill due to his belief in its unconstitutionality.\(^1\) The Senator did not have to fear facing such public unanimity in his home State. There was at least one person in North Carolina who made his presence and opposition to the law well-known. That man was Roland H. Dagenhart. The North Carolinian, at the behest of David Clark, lent his name to the challenge of the law. Although, as discussed in Chapter Two, David Clark lost the battle in Congress, he always knew there would be another fight in the courts. He attempted to find the perfect test case to challenge the new law. After considerable work, Clark located both a mill that wouldn't mind having a case brought against it along with the perfect plaintiff for his lawsuit.\(^2\)

Roland H. Dagenhart and his two sons were employed by the Fidelity Manufacturing

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2. Lindenmeyer, *A Right to Childhood*, 123.
Company of Charlotte, North Carolina. In that State, nearly all cotton mill owners had signed voluntary agreements against employing children under 12 in their facilities.³ As a result, the new 14-year minimum age for factory work and the hour limitation for children had a significant impact. In preparation for the new law going into effect on September 1, 1917, Fidelity posted signs indicating no one under 14 could be employed and that all children under 16 were limited to an 8-hour work day.⁴ One of Roland's sons, Rueben, was 15 and had been working 60 hours per week. Under the law his hours would have to be cut to 40 hours per week. His other son, John, was under 14 and would lose his job.⁵ By convincing Dagenhart to pursue his lawsuit, Clark was able to test both the age and the hours limitations at the same time.⁶

Roland Dagenhart believed that the law unfairly deprived him of the earnings of his sons, which he was entitled to receive until the time they reached age 21.⁷ He was a man of small means with a large family, and the compensation from the work of his children was essential for their support, he claimed.⁸ Of their $32 per week in family income, $17 was earned by his children.⁹ Furthermore, he argued the law robbed his sons of the right to work “in the cotton mill as their life vocation.”¹⁰

On August 9, 1917 Roland H. Dagenhart filed suit in U.S. Court for the Western District

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⁴. Hindman, *Child Labor*, 68.

⁵. Ibid.

⁶. Ibid.

⁷. Ibid.


of North Carolina. His suit was financed by Clark's Executive Committee of the Southern Cotton Manufacturers. However, Clark struggled to raise the money necessary to carry the test case through the Supreme Court. In August 1917 he wrote an editorial in his newsletter titled “Tight Wads and Slackers” in which he called out an apparently substantial number of mill owners who weren't appropriately supporting the fight against the law. Clark believed this was because many now saw the fight as a lost cause. According to Clark, at the time the Keating-Owen bill was passed, “it was the opinion of 75 percent of the cotton manufacturers and fully that percent of lawyers that it was useless to contest the law.” Only two members of his Executive Committee believed they had any chance of winning.

Clark's maneuvering to find the perfect judicial district however likely assured that the case was not a lost cause, at least at the district court level. Its assignment to Judge James E. Boyd, a man known for his opposition to child labor laws, was not by coincidence. Clark had restricted his search for potential plaintiffs to Boyd's district in light of the judge’s conservative politics. The law would be defended by William C. Hammer, United States attorney for the Western District of North Carolina. Hammer in 1921 would be elected as a member of Congress.

Due to the importance of the case, Hammer received assistance from Harvard Law

11. Hindman, Child Labor, 68.
13. Ibid.
15. Ibid., 75.
School Dean Roscoe Pound. After three days of hearings, Judge Boyd issued a permanent injunction barring the prosecution of Keating-Owen violators in the Western District of North Carolina, and declared the child labor law unconstitutional. He issued no written opinion.\footnote{Trattner \textit{Crusade for the Children}, 135.}

However in announcing his ruling, Judge Boyd remarked that he was gratified by the candor of the Department of Justice and their assertion that “Congress had used its power over interstate commerce for the object of regulation of local conditions.” In response, Boyd remarked that Congress “can regulate trade among the States, but not the internal conditions of labor.” It cannot “do by indirection that which it can undoubtedly not do directly.”\footnote{New York Times, “Child Labor Act Declared Invalid”, \textit{New York Times}, 1 Sept 1917.}

Although Judge Boyd's decision drew mixed reactions, it did not receive significant nationwide attention. David Clark in an editorial titled “Won First Blood,” trumpeted his role in what he believed was a courageous decision by Judge Boyd.\footnote{Stephen B. Wood, \textit{Constitutional Politics in the Progressive Era}, 109.} However, one legal commentator remarked that the decision “cannot stand as law. It is a displaced fossil from a bygone epic of constitutionalism and as such merits a place in the cabinet of legal curiosities, but it deserves no weight whatever in the choice of current legislative programs to meet the needs of the day.”\footnote{Trattner, \textit{Crusade for the Children}, 135.}

Another commentator called the decision a bunch of “pure absurdities” and a “severe breach of judicial canons.”\footnote{Ibid., 136.}

Although the law remained in effect everywhere outside of Judge Boyd's district, Attorney General Thomas Gregory quickly decided to appeal the case to the Supreme Court. Solicitor General John W. Davis asked the NCLC to help prepare material outlining the
reasonableness of the law. Most reform groups looked on the decision as a temporary setback. An editorial in the Raleigh News and Observer noted “[t]here is little doubt, we believe, that the Supreme Court will sustain the law. The trend of decisions in the tribunal in recent years had been in line with the ideas and [constitutional] doubts have been resolved in favor of ... what appeared to be the common good.”

In the 20 years prior, no progressive federal law had been found unconstitutional by the United States Supreme Court. However, according to author Stephen B. Wood, the constitutionality of those progressive laws was also widely debated just like Keating-Owen, as discussed in the previous Chapter. As one member of the House of Representative remarked prior to passage of Keating-Owen, “I have seen the Constitution of the United States cuffed about so much on this floor during the past eight years that, not being a lawyer, I have about reached the conclusion there is some doubt about the constitutionality of the Constitution.” Another member remarked that he supported the bill solely because it would allow the question of constitutionality to finally be settled. Even before the first federal child labor law was formally introduced by Senator Beveridge in 1907, Southern senators had immediately questioned its constitutionality. Senator Augustus Bacon of Georgia warned that if Congress had this “arbitrary power,” its ability to control the life of the citizenry would be “practically

23. Ibid., 136.
25. Ibid., 71.
26. Ibid.
28. Ibid., 135.
Supreme Court Context

On September 26, 1917, an appeal of Judge Boyd's ruling was filed at the Supreme Court to resolve the question of whether the federal government had the power to regulate child labor. The Court according to author Hugh Hindman was “divided between laissez-faire and progressive doctrines.” By the time of the decision, the Court had not only its strong laissez-faire wing dating back to the 1890's, but also a progressive wing that was not inclined to overturn laws passed by the Congress. The previous era of legal formalism where arguments were only primarily legal, analytical, or technical gave way to some arguments based on consideration of the societal condition to be remedied. Between the death of Chief Justice Morrison Waite in 1888 and the 1908 decision in Muller vs. Oregon, upholding the right of Oregon to set a minimum wage for women, the Court decided numerous cases by a vote of five to four. While the Court had upheld the progressive minimum wage law in Oregon, in 1905 the Court struck down the New York law that limited hours for bakers in Lochner vs. New York by the same five-to-four margin.

The divided Supreme Court that would decide Hammer vs. Dagenhart would be further changed by the 1908 election. The election of the conservative President Taft signaled a shift away from judicial support for politically popular programs. Taft promoted Justice Edward Douglas White, a conservative, to the role of Chief Justice. He also appointed Justice William Van Devanter, a man who would later become one of the most vociferous opponents of the New

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30. Millhiser, Injustices, 72.
31. Hindman, Child Labor, 69.
32. Novkov, “Historicalizing the Figure of the Child in Legal Discourse,” 371.
Deal.\textsuperscript{34} In total Taft appointed five men to the Court.\textsuperscript{35} Moreover, as Vice President, Taft interceded on behalf of his friend William Rufus Day to secure him a Supreme Court appointment from President Theodore Roosevelt.\textsuperscript{36} Consequently, Wilson's election in 1912 did not have the progressive impact he would have hoped. One of Wilson’s appointments, Justice James Clark McReynolds has been described as “one of the most perplexing in history” since his conservative views were so foreign to Roosevelt’s own.\textsuperscript{37}

\textbf{Interstate Commerce and the Constitution}

In taking into consideration the anticipated concerns of the Court and the Constitution, the Keating-Owen Act was structured by its authors to be a regulation of interstate commerce. Rather than banning the production of the child labor-produced goods, which would have clearly been unconstitutional, the law struck at their post-production movement from one State to another.\textsuperscript{38} Therefore, the key to the decision in the case for the Justices would be the role of the Commerce Clause, which expressly empowered Congress to regulate interstate commerce; versus the Tenth Amendment, which reserved all other non-enumerated rights to the States.\textsuperscript{39} According to University of Georgia Law School Professor Dan Coenen, it is this debate over the proper division between the role of the federal government and the States that perhaps has been the greatest focus of constitutional thought.\textsuperscript{40}

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\textsuperscript{34} Millhiser, \textit{Injustices}, 77. \\
\textsuperscript{36} Millhiser, \textit{Injustices}, 77. \\
\textsuperscript{37} Hindman, \textit{Child Labor}, 69. \\
\textsuperscript{38} Millhiser, \textit{Injustices}, 74. \\
\textsuperscript{39} Hindman, \textit{Child Labor}, 69. \\
\end{flushright}
The provision that has been most at the center of this interplay between State and federal government roles in American society has been the Commerce Clause.\textsuperscript{41} In the opinion of Professor Coenen, the debate over this Clause is essential to understanding what the true meaning of the “United States of America” is.\textsuperscript{42} Article 1, Section 8, Clause 3 of the Constitution states Congress can regulate “commerce with foreign nations, and among the several States, and with Indian tribes.” During the Constitutional Convention of 1787, this Clause was one remedy to the previous failings found in the Articles of Confederation. Under the Articles, Congress lacked the power to tax or to regulate interstate commerce; these were seen as deficiencies that needed to be addressed in the new Constitution.\textsuperscript{43} The Commerce Clause was a result of the need for the Framers to preserve strong State boundaries while still giving the federal government the power over the States it needed.\textsuperscript{44} The Framers reinforced the limited role of the federal government by including the Tenth Amendment. It states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”\textsuperscript{45}

The balance between these two concepts created division from the start. They brought the more nationally minded “Hamiltonians” into opposition against the locally focused “Jeffersonians.”\textsuperscript{46} Their first battle was over whether Congress had the authority to charter a

\begin{itemize}
  \item \textsuperscript{41} Ibid., 2.
  \item \textsuperscript{42} Ibid., 5.
  \item \textsuperscript{43} Ibid., 7.
  \item \textsuperscript{44} Ibid., 9.
  \item \textsuperscript{45} Ibid., 13.
  \item \textsuperscript{46} Ibid., 2.
\end{itemize}
The Supreme Court's role as the interpreter of the Constitution placed it at the center of the controversy. In the landmark 1819 *McCulloch vs. Maryland* decision, the Supreme Court, in a unanimous opinion by Chief Justice John Marshall, sided with the Hamiltonians. It found that Congress had the right to charter a national bank.

Five years later, the Court further defined the scope of the Commerce Clause in *Gibbons vs. Ogden*. In the decision, Chief Justice Marshall found that the Clause gave Congress the right to regulate navigation between the States. He stated that commerce “is traffic, but it is something more: it is intercourse,” and regulating commerce involves “prescribing rules for carrying on that intercourse.” Furthermore, he found that commerce power “may be exercised to the utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.” Rather than the Court being the primary check on the power of the Commerce Clause, he stated that such limits should come from “[t]he wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections.” Senator Beveridge in championing his initial federal child labor bill in 1906 cited Marshall as the basis for such a broad conception of the power of Congress. Yet, in *McCulloch*, Marshall had supported the classic legal principle of judicial review which gave the Court the right to determine the limits of Congressional power.

According to Professor Coenen, Chief Justice Marshall still saw a “constitutional system
built around the existence of 'two distinct governments.'” Marshall recognized in McCulloch that “the letter and spirit of the Constitution” put limits on Congressional authority. A strong local government was seen as benefitting the citizenry by fostering a sense that the people had a connection and an ability to influence the government that was nearest to them. This dispersion of power allowed programs to be tailored to the local needs of the people and allowed the States to serve as a “laboratory of democracy” in the words of a later Supreme Court decision.

As discussed in the previous Chapter, States frequently passed laws in the area of child labor that varied from State to State. Most NCLC members believed these laws were more effective than federal action and had the additional advantage of being legally unobjectionable. State courts found that the employee “may sell his labor for what he thinks best,” but this right could be curtailed in the case of children. As John Stuart Mill remarked, “[f]reedom of contract, in the case of children, is but another word for freedom of coercion.” Echoing the same sentiments, philosopher Samuel Taylor Coleridge remarked, in the case of children, “[i]f the labor were truly free, the contract would approach, on one side, too near suicide, on the other to manslaughter.” The child simply did not have the capability to enter into such contracts. As a result, third parties performed the role on behalf of children. Often these parties, even when

54. Ibid., 28.
55. Ibid., 29.
59. Ibid., 317-318.
60. Ibid.
they were the parents, had their own self-interests in mind. States therefore could use their “police power” to protect these children. This power was largely unquestioned, and it would not be until 1913 that such a case would even reach the Supreme Court. In *Sturges Manufacturing Co. vs. Beauchamp*, the Court found an Illinois child labor law was a reasonable use of the protective powers of the State. It noted that “[i]t cannot be doubted the State was entitled to prohibit the employment of persons of tender years in dangerous occupations.”

In contrast, the right of the federal government to implement similar protections had always been more controversial. While in *Gibbons* the Court gave Congress that power to regulate commerce between the States, throughout most of the nineteenth century, Congress seldom used its powers under the Commerce Clause. Consequently, the Court had not addressed the question of whether Congress could use the Commerce Clause as a “police power” to stop the movement of certain items in interstate commerce. This issue was first addressed by the Court in its 1903 *Lottery Case* decision. This case involved a challenge to a federal law that prohibited the movement of lottery tickets from one State to another. The opponents of the law argued that a prohibition on commerce was not a regulation of commerce, and was therefore unconstitutional. They posited that the drafters of the Constitution included the Commerce Clause to facilitate the smooth interchange of goods between the States, not to inhibit such movement.

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61. Ibid.
63. Novkov, “Historicalizing the Figure of the Child in Legal Discourse,” 387.
66. Ibid.
In a five-to-four decision, the Court upheld this prohibition as a proper use of the Commerce Clause. The Court relied upon *Gibbons* and its holding that Congressional power to regulate commerce amongst the States “may be exercised to the utmost extent.” Prohibition, the Court found, was just a form of regulation. In writing the majority opinion, Justice Harlan stated the following:

If a state, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money in that mode, why may not Congress invested with the power to regulate commerce among the several states, provide that such commerce shall not be polluted by carrying the lottery tickets from one state to another?

Congress, Justice Harlan said, may protect the citizens of the United States from the “widespread pestilence of lotteries” just as the “State may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits.”

The dissent attacked the idea that a prohibition was regulation, and differentiated a prohibition on interstate movement of lottery tickets from a case where diseased animals were being removed from commerce. In that case, diseased livestock were “in themselves injurious to the transaction of interstate commerce,” as they could obviously infect healthy livestock. The dissenters believed that the regulation of morality was to be reserved to the States through the Tenth Amendment, stating “[i]t is a long step in the direction of wiping out all traces of state lines, and the creation of a centralized Government.”

67. Ibid., 36.
68. Ibid.
69. Fuller, *Child Labor and the Constitution*, 239.
70. Ibid., 273.
72. Ibid., 36.
Within a decade, it would become clearer that the Commerce Clause could be used for a moral purpose. In *Hoke vs. United States*, the Court unanimously upheld the White Slave Act. The Act prohibited the transportation of women across State lines for immoral purposes.\(^7^4\) In *Caminetti vs. United States*, the Court expanded this same power to regulate transportation to cases where women had moved across State lines voluntarily for extramarital affairs. In that case the Court stated “Congress has the power over transportation 'among the several states' ... and that Congress, as incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulation.”\(^7^5\) Similar reasoning was applied in the case of *Hipolite Egg Co. vs. United States*. In that case, the Court found that the federal government could confiscate improperly labeled eggs that had been illegally shipped across State lines. The Court determined that the confiscation of the eggs was “an appropriate means to [the] end” of preventing their trade.\(^7^6\)

**The Arguments: Hammer**

Like the above cases, the Keating-Owen Act was based upon utilizing the power of Congress to regulate interstate commerce to protect public health morals and safety. As a result of these decisions, supporters of the federal child labor law were confident that the law would be upheld.\(^7^7\)

Making the arguments before the Court would be Solicitor General John W. Davis for the government and Morgan J. O'Brien for David Clark. O'Brien was chosen only after the death

\(^7^5\) Ibid., 39.
\(^7^6\) Ibid.
\(^7^7\) Fuller, *Child Labor and the Constitution*, 239.
of Clark's first choice, John G. Johnson. The well-regarded Johnson had provided critical advice to Clark, by leading him to litigate the initial case in front of Judge Boyd. Now however, in the legal matchup between O'Brien and Davis, Davis seemed to clearly have the edge in terms of the stature he enjoyed before the Court. Davis was so admired by the Court that in 1914 the Justices had made a request of President Wilson that he nominate him to join them on the Court. One Justice even remarked that “it was impossible to remain objective when Davis was arguing a case.” Wilson though believed Davis was perfect as Solicitor General and instead nominated James McReynolds for a 1914 vacancy. When two more vacancies arose in 1916, Wilson again passed over Davis and nominated Louis Brandeis and John Clark.

Since there was no written decision to challenge, in his brief Davis refuted the supposed reasons why the Act may have been found unconstitutional, in the trial court, which he condensed to the following:

- It is not a regulation of interstate commerce as defined by the Constitution.
- It contravenes the Tenth Amendment to the Constitution.
- It is in conflict with the Fifth Amendment to the Constitution.

83. A record of oral argument is not readily available for this case. The arguments addressed in this Thesis are based upon the written briefs.
The Davis brief argued that the Act was in fact a regulation of interstate commerce. Davis recited the plain language of the law which referred to “interstate commerce” and then provided an outline of how commerce between the States was vital to the nation throughout its history. In taking on the argument that a prohibition is not a regulation of commerce, he asserted the law was clearly a regulation. He cited *Gibbons vs. Ogden* where the Court held that to regulate is “to prescribe the rule by which commerce is to be governed.” He also cited the *Lottery Case* and *Hopolite Egg Co.* to support his statement that “[i]t is now well settled that one form of such regulation is prohibition.” He further pointed out that the Act only applied to manufacturers who choose to place their goods into interstate commerce.

The brief outlined why it was reasonable for Congress to legislate against child labor. Davis argued that “[c]hild labor, once regarded as harmless or beneficial, had come to be regarded as immoral or injurious.” He drew a parallel with lottery tickets stating that “neither the ticket nor the labor are inherently bad” and that a similar change in public opinion had occurred against each.

Davis then examined the harm that such toil inflicted upon children and how these facts caused Congress to reasonably see a need to take action. Citing the high death rate from tuberculosis among mill girls in Massachusetts Davis highlighted how such labor did not promote a healthy educated citizenry. Rather such toil subjected children to circumstances akin

86. Ibid., 7.
87. Ibid., 9.
88. Ibid., 10.
89. Ibid., 12.
to “child slavery.”90 He also addressed the real problem with State regulations. State laws were not uniform and this caused “unfair discrimination in interstate commerce.” The growth of Southern mills was cited as proof of this.91 These unequal situations led to circumstances like the Lawrence Strike in Massachusetts simply because the laxer laws in Southern States had caused wages to be depressed nationwide.92 A nationwide approach was therefore required to remedy the problem.93 Additionally, Davis quoted Senator Keating who believed that when child labor-produced goods are introduced into interstate commerce the effect is to reduce the ability of States to counteract the evil, thereby infringing upon the rights of the States. Manufacturers in the other States have to compete with those goods and are put at a disadvantage.94

Davis also argued that the Keating-Owen Act did not violate the Fifth Amendment right to “due process.” He quoted the Lottery Case in support of the principle that the federal government “may prohibit the use of facilities for interstate commerce for the same purpose that a State may prohibit intrastate traffic.”95 This was the expansive view of the Commerce Clause that Chief Justice Marshall had expounded and that seemed to have carried the day in the recent decisions of the Court.96 Therefore, Davis argued, if a State can bar facilities from being used to produce goods for intrastate commerce, the federal government should be able to do the same for

90. Ibid., 13-14.
91. Ibid., 15-16.
92. Ibid., 20.
93. Ibid., 24-25.
94. Ibid., 33.
95. Ibid., 36-37.
commerce between the States.\footnote{97}{Appellant's Brief, \textit{Hammer vs Dagenhart}, 247 U.S. 251 (1917), 36-37.}

Further Davis argued that the fact the child labor-produced articles are themselves harmless is immaterial to the question of constitutionality. He posited that the “discussion of the inherent badness of things is largely futile.”\footnote{98}{Ibid., 41.} In his view there was no support for the idea that the power to regulate commerce is limited to harmful goods. Mislabeled food he argued may not actually be harmful, nor may every girl banned from interstate travel by the White Slave Act actually do anything to harm the morals of another.\footnote{99}{Ibid., 41-42.} He quoted Justice Harlan in the \textit{Lottery Case} “it must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is complete in itself, subject to no limitations except what may be found in the Constitution.”\footnote{100}{Ibid., 56.}

Not only did the Act not violate the Fifth Amendment, Davis argued, it also did not violate the Tenth. He stated “[i]t is settled so far as regulation of essentially local matters is necessary for the proper conduct of interstate commerce [that] Congress has jurisdiction.”\footnote{101}{Ibid., 59.} For instance, while Congress had no power to suppress lotteries within States, in the \textit{Lottery Case} the Court found the federal government could prohibit the movement of tickets from one State to another.\footnote{102}{Ibid., 60.} In this case he argued, Congress sought through the Keating-Owen Act to protect citizens outside of the shipping State from the harm inflicted by child labor.\footnote{103}{Ibid., 65.} Whether
Congress had motives in passing the law that were not solely interstate in character, Davis argued, its motives were not an area that the Court had chosen to consider in the past in judging the constitutionality of a law.\textsuperscript{104}

In closing, Davis stated that “no act of Congress purporting to be a regulation of commerce has so far been declared unconstitutional where the subject of the act had real relation to commerce itself and where the terms of the act did not extend beyond its operation in interstate trade.”\textsuperscript{105} The child labor law he concluded “is not believed to differ in any matter of principle from those statutes which have been heretofore considered and upheld.”\textsuperscript{106}

\textbf{The Arguments: Dagenhart}

Morgan J. O'Brien filed his brief on behalf of David Clark and Roland Dagenhart. He argued that the regulation of hours and minimum ages for employees was a purely local matter to be left to the States. He posited that the vast differences between States made it essential that each State deal with such matters in its own way.\textsuperscript{107} For instance, while New York had to have laws dealing with “sweatshops” the fact that they do not occur in North Carolina meant that North Carolina did not need laws to address this nonexistent problem.\textsuperscript{108}

Davis also took aim at the assertion that child labor was unhealthy. He cited a 1916 study by the Metropolitan Life Insurance Company in North Carolina that found textile workers under 15 were on average less likely to be sick than children who didn't work in a mill.\textsuperscript{109}

\begin{itemize}
\item\textsuperscript{104} Ibid., 66.
\item\textsuperscript{105} Ibid., 69.
\item\textsuperscript{106} Ibid.
\item\textsuperscript{107} Appellee's Brief, \textit{Hammer vs Dagenhart}, 247 U.S. 251 (1917), 9.
\item\textsuperscript{108} Ibid., 10.
\item\textsuperscript{109} Ibid., 13.
\end{itemize}
devoted a relatively small portion of his brief to this line of argument.

At the heart of the case, the O’Brien brief attacked the idea that the Commerce Clause gave Congress the right to prohibit child labor. If Congress had this power, O’Brien argued, Congress could outlaw the use of commercial fertilizers on vegetables in interstate commerce if it decided that organic vegetable fertilizers were better.\(^{110}\) It could allow the Congress to mandate a minimum wage, or declare that “no factory which refuses to employ negroes, side by side with whites” could enter interstate commerce.\(^{111}\) Each of these scenarios was a “perversion of the powers of Congress to prohibit the passage of goods in interstate commerce as a means of coercing labor conditions.”\(^{112}\)

O’Brien also cited the *Lottery Case* and differentiated lotteries from child labor. While the Court in that case found Congress reasonably acted “for the purpose of guarding the people of the United States against the ‘widespread pestilence of lotteries,’” child labor did not spread into other States in the same way.\(^{113}\) If child labor was an evil it was one that was contained within the goods-producing state, unlike lottery tickets, which could be transported from state-to-state thereby creating new gamblers. Similarly, O’Brien argued, this case was different from *Hipolite Egg Co.* In that case, the Court remarked that “[w]e are dealing it must be remembered with illicit articles—articles which the law seeks to keep out of commerce because they are debased by adulteration.”\(^{114}\) In contrast, O’Brien argued, the articles in this case were perfectly fine products that just happened to be made by children.

\(^{110}\) Ibid., 16.
\(^{111}\) Ibid., 40.
\(^{112}\) Ibid., 41.
\(^{113}\) Ibid., 18.
\(^{114}\) Ibid., 19.
O’Brien argued that these cases, plus the White Slave Act decision, stood for the proposition that “Congress may regulate commerce with the view of achieving a police purpose, that is, a purpose that has its origin in concern for the physical, mental, or moral well being of the citizens.” While Congress protected the citizens in other States from lotteries, adulterated food, and immoral acts, the child labor law did not offer any protection from harm.115 The harmfulness or harmlessness of a particular product, he argued, is in no way impacted by whether or not it was touched by a child.116

Additionally, while Davis argued that the child labor regulation was needed to ensure that the terms of competition between the States are fair, the O’Brien brief pointed out there were numerous other areas where competition was unequal. For instance, the brief cited the example that cotton manufacturers in New England may be able to borrow money at four percent interest while in North Carolina the rate may be six to eight percent. Congress would therefore be able to mandate a uniform rate across the country based on such logic.117

The brief discussed doubts among members of Congress who supported the bill as to whether or not the bill was constitutional. O’Brien characterized many of the Act’s supporters of in a sense saying “we have to pass this bill to find out if it's constitutional”—as at least one Congressman expressly said—rather than being fully convinced of its constitutionality at the time they voted for it.118 The brief also cited the House Judiciary Committee report from 1907 that found “there is no question as to the entire want of power to exercise jurisdiction and authority over the subject of woman and child labor. In fact it is not a debatable question ... It

115. Ibid., 21.
116. Ibid.
117. Ibid., 42.
118. Ibid., 52-53.
would be an unwelcome burden on the Supreme Court to so legislate.”

Supporters of the bill in essence had wanted the Congress to vote for the bill based on whether or not the bill was desirable and leave it up to the Court to determine whether or not it was constitutional.

The brief also included reference to a litany of prominent individuals who believed such a law would violate the Constitution. It included lengthy quotes from both President Woodrow Wilson and former President Taft. Taft in a 1913 publication stated that “such an attempt by Congress to use its power of regulating such commerce to suppress the use of child labor in the State of shipment would be a clear usurpation of State's right's.” The fact that the products of child labor were not injurious to the people at their destination put such a law outside the power of Congress according to Taft.

This view was in stark opposition to the expansive view of the Commerce Clause that Chief Justice Marshall espoused in *Gibbons vs. Ogden*. This narrow view was the finding the Court had reached in its 1895 decision in *United States vs. E.C. Knight Co.* when it held that commerce succeeded manufacturing, but was not a part of it.

The O’Brien brief closed with a discussion of how Congress was given only limited powers. Setting working hours and conditions would allow Congress to create a privileged class of citizens whose products could be traded in interstate commerce. This, O’Brien argued, would violate the right to due process guaranteed by the Fifth Amendment.

The Decision

On June 3, 1918, the Supreme Court issued its decision. In the lead-up to the decision,

119. Ibid., 53.


123. Ibid., 51.

Clark expressed concerns that the NCLC and Children's Bureau were spreading anti-child labor propaganda in the Washington, D.C. area to try to influence the Justices. He responded with his own version in his publication entitled the “Health and Happiness Issue” presenting an idyllic picture of life working in the Southern textile industry. If the decision was based on the basis of the propaganda of each side, it seems that Clark won. The Court found by a five-to-four vote that the Keating-Owen Act was indeed unconstitutional. Congress had exceeded its commerce power and invaded the powers reserved to the States. The Court found “[t]he manufacture of goods is not commerce nor do the facts that they are intended for, and are afterwards shipped in, interstate commerce make their production a part of that commerce subject to control of Congress.”

The opinion of the Court was written by Justice William R. Day. He was joined by three Taft appointees in his majority decision. In the decision, Day examined the same three issues that O'Brien on behalf of Clark had raised in his brief to the Court. The controlling question, Day found, was whether the law was within the authority Congress had to regulate commerce between the States. He cited **Gibbons vs. Ogden** as giving the Congress the power to “control the means by which commerce is carried on, which is directly contrary to the assumed right to forbid commerce from moving.” While the Court had allowed Congress to prohibit

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126. Ibid., 142.


128. Ibid.


130. Day was joined his decision by Chief Justice Edward White, as well as Justices Mahlon Pitney, Willis Van Devanter and James McReynolds. Justices Joseph McKenna, Louis Brandeis and John Clark joined the dissent authored by Justice Oliver W. Holmes.
the shipment of certain goods, “these cases rest upon the character of the particular subjects dealt with.” The *Lottery Case, Hoke, and Hipolite Egg Co.* cases all dealt with situations where “the use of interstate commerce was necessary to accomplishment of the harmful results.” In those cases, Congress could only remedy the evil by prohibiting the use of interstate commerce. In this case, Justice Day found that the “aims” of Congress were not based on interstate commerce, but rather to “standardize the ages at which children may be employed.”

Echoing the argument of O'Brien who cited *E.C. Knight Co.*, which held that commerce succeeded manufacturing, but was not a part of it, Justice Day cited his 1915 opinion in *Delaware, Lackawanna & Western R.R. Co. vs. Yurkonis*. In that opinion, he found that “[t]he making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce make their production part thereof.”

He also cast aside the argument that Congress can regulate child labor in order to equalize the competitive landscape among the States. He found there is “no power vested in Congress to require the States to exercise their police power as to prevent possible unfair competition.” In his view, the Commerce Clause does not allow Congress to level the playing field which may have become unleveled as a result of any number of local factors.

The Court agreed that “there should be limitations upon the right to employ children in mines and factories in the interest of their own and public welfare.” However, the decision in this matter was one left for the State of North Carolina, as the federal government is one of

132. Ibid.
133. Ibid.
134. Ibid.
135. Ibid.
“enumerated powers.” As a result, Justice Day found that the Keating-Owen Act not only oversteps the power delegated to Congress over commerce, but also “exerts a power as to a purely local matter to which the federal authority does not extend.” Therefore, Justice Day concluded that if the Act were to be upheld, “the power of States over local matters may be eliminated, and, thus, our system of government be practically destroyed.”

The Dissent

Justice Oliver Wendell Holmes in dissent questioned the logic of Justice Day. Holmes found that regulation by its very nature includes the right to prohibit. Therefore, prohibiting items made by children from entering interstate commerce was clearly within the purview of Congress. While Justice Day considered the aims of Congress in regulating the local conditions of child labor, Holmes pointed out that previously the Court had chosen not to do so. In the Oleomargarine Case, the Court upheld the government’s right to tax colored margarine in a manner so as to prohibit its ability to compete with butter, and explicitly declined to inquire as to the purpose of the Act.

Furthermore, while Justice Day arrived at a different standard in Dagenhart that allowed Congress to regulate goods that were themselves harmful, Holmes did not understand such a distinction: “The notion that prohibition is any less prohibition when applied to things now thought evil I do not understand. But if there is any matter upon which civilized countries agreed—far more unanimously than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused—it is the evil of premature and excessive

136. Ibid.
137. Ibid.
138. Ibid.
139. Ibid.
140. Ibid.
child labor.” Therefore, if the Court was to properly consider the nature of the good produced, a product of child labor should have been seen as particularly evil. In closing, Holmes argued that if no federal government existed, States would have to reach agreements with each other as to what goods could cross their State lines in the course of trade. However, since the federal government exists, and was given responsibility for the regulation of this commerce, it only is logical that Congress could determine this policy regardless of the impact on the local affairs of the State. By choosing to enter into interstate commerce, Holmes observed, the manufacturer agrees to the conditions he must operate under.

The Reaction

While these arguments forcefully made by Holmes were not victorious, they would be echoed by many of the critics of the Court's decision. The decision provoked widespread outcry. The Kalamazoo Gazette called the decision “damnable” and lamented the fact that five “cold-hearted old men ... could not have seen the endless rows of pinched faces and shrunken bodies of the child slaves ... when they rendered that decision.” The Wilkes-Barre Times Leader declared that “[g]reedy, dollar-chasing mill owners, alone will rejoice in Justice Day's dictum.”

Indeed, mill owners did rejoice in the decision. For the Cotton Manufacturers'

141. Ibid.
142. Ibid.
143. Ibid.
144. Fuller, Child Labor and the Constitution, 261.
146. Ibid.
Association president, the decision brought gratitude for Clark and his Executive Committee. The president remarked that “I can only say that I think to the southern industry is due the thanks and gratitude of the nation because they fought alone in the face of blind prejudice aroused by paid agitators all over the country.”\textsuperscript{147} Similarly, the decision was lauded in editorials in newspapers such as the \textit{Charlotte Observer} and the \textit{New York Tribune}.\textsuperscript{148}

As one might expect due to the initial discord within the reform movement over pursuing a federal law, some reacted in a manner much like Clark and his Executive Committee. George Alger and Manfred Ehrich of the New York Child Labor Committee both spoke out in favor of the Court's decision. Alger described the law as “an utterly ineffective piece of legislation at best [presenting] to the Supreme Court in the harshest, crudest, and most imperfect form the Federal control of interstate commerce in child life.”\textsuperscript{149} Ehrich likewise supported the decision noting “if Congress had the power to exclude goods from interstate commerce because they were made by children, it could likewise exclude goods because it disapproved of the lighting or toilet facilities of the factories.”\textsuperscript{150}

Additionally, some who supported the law found a silver lining in the decision. Julia Lanthrop of the Children's Bureau took solace in the decision because the Court acknowledged that child labor was an “evil” and that there should be limitations on the right to employ children in mines and factories. All that was needed, she believed, was to come up with a way to do so within the confines of the Constitution.\textsuperscript{151}

Much like the divided reaction in the public, constitutional lawyers disagreed on whether

\begin{enumerate}
\item Trattner, \textit{Crusade for the Children}, 137.
\item Bair, “The Silent Man.”
\item Felt, \textit{Hostages of Fortune}, 195.
\item Ibid.
\item Lindenmeyer, \textit{A Right to Childhood}, 124.
\end{enumerate}
the Court's arguments and conclusions were sound.\textsuperscript{152} Columbia Law School Professor Thomas Reed Powell thought the Court was in error because it “did not see that the interstate transportation was the cause of the evil.” While the Court differentiated child labor from the \textit{Hoke} case by holding in that case that the interstate commerce was necessary to accomplish the harmful result, he saw no difference. The additional interstate markets provided more opportunities for child laborers to be employed to produce the goods needed for these markets and therefore the resulting interstate commerce could also be seen as causing the evil.\textsuperscript{153}

Former Supreme Court Justice Charles Evans Hughes, who had resigned from the Court to run against Woodrow Wilson in 1916 spoke out in favor of the decision to the New York bar association. He remarked that “[t]he prior decisions in which prohibitory rules had been sustained rested upon the character of the particular subjects involved. It was held that the authority over interstate commerce was to regulate such commerce and not give Congress the power to control the States in the exercise of their police power over local trade and manufacture.”\textsuperscript{154}

Writing in 1920 for the University of Pennsylvania Law Review, Professor Henry Wolfe Bikle believed that the decision in the case abandoned the logic of the \textit{Lottery Case} and instead reverted to “the older and unsatisfactory test of earlier cases.”\textsuperscript{155} The Court asserted that the law is invalid because instead of aiming at regulation of interstate commerce, the aim was to standardize the ages of manufacturing in the States. Bikle found no support for the Court’s considering the “aims” and “intentions” of Congress to determine the Act’s validity. As a result,

\begin{itemize}
  \item \textsuperscript{152} Fuller, \textit{Child Labor and the Constitution}, 257.
  \item \textsuperscript{153} Ibid., 240-241.
  \item \textsuperscript{154} Ibid., 241.
\end{itemize}
he saw the case as causing uncertainty over the scope of congressional authority. Additionally, he found no support for the idea that the exclusion of articles from commerce should be treated differently than any other regulation of commerce.\textsuperscript{156} Since power to regulate commerce among the States was granted to the federal government through the Commerce Clause, such power was not retained by the States under the Tenth Amendment. He alleged the Court reached its decision based on a political desire to avoid disturbing what it saw as the “proper distribution of power between the Nation and the States.” This Bikle argued was not a Constitutional basis for striking down the law.\textsuperscript{157}

The decision was also criticized in an article written by Professor and Catholic Priest John A. Ryan. He pointed out that up through the Civil War period, the law would have likely been declared unconstitutional without a dissenting vote, but in light of the more recent Commerce Clause decisions the opinion deserved scrutiny.\textsuperscript{158} He believed that the framers of the Constitution did intend for the Commerce Clause to provide protection for citizens in one State from the actions of another. While this was done through a prohibition on tariffs between States, he saw similar disadvantages accruing as a result of differing child labor laws between the States.\textsuperscript{159} However, he recognized that the authors of the Constitution never would have supported using the Commerce Clause against States in such a manner since they would have seen this area of labor legislation as outside the federal government's purview.\textsuperscript{160}

While Justice Day had found that at the time of transport of the child-produced good, the evil of child labor had already occurred, the same could be said in the case of a lottery ticket—

\textsuperscript{156} Ibid., 30.
\textsuperscript{157} Ibid., 35.
\textsuperscript{159} Ibid.
\textsuperscript{160} Ibid.
the evil Ryan pointed out occurred at the time of purchase of the ticket, not once it was brought into commerce. By eliminating the ability to send goods out of State, the practice of child labor would be curtailed. Hence, he found this met Justice Day's test that “the use of interstate commerce was necessary to the accomplishment of harmful results.”

Ryan also found a contradiction in the fact the Court in this case considered the aims of Congress in finding the law unconstitutional. In the *Oleomargarine Case*, the Court in an opinion by Justice White, who voted to overturn the child labor law, found that it was not appropriate for the Court to consider the aim of that law in seeking to end the manufacture of margarine. Congress, Justice White found, should have the power to control the selfish actions of States that negatively impact others outside its borders. He recognized the impact would be lessened if the progressive States had not passed additional protective laws. However, he found this an unsatisfactory objection since it would mean every progressive leaning State could not act because of concern over what the other States could or would do. In summary, Ryan found the dissent of Justice Holmes to be very reasonable and thought it possible that in the future this could become the majority opinion.

The Aftermath

Overall, it seems that the decision created a strange outcome by creating an area of commerce that was outside the ability of either the State or the federal government to control. As Professor Thomas Reed Powell commented at the time:

If a State denied admittance to products of child labor from other states, it would be held

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161. Ibid., 216.
162. Ibid., 219.
163. Ibid., 220.
164. Ibid., 222.
165. Ibid., 223.
to exercise a power within the Constitution, by conferring upon Congress, had denied to
the States. But when Congress denies admittance to a state of products of child labor
from other states, it exercises a power never conferred. This power over interstate
transportation has evaporated by the establishment of the federal Constitution. 166

This though was the decision of the Court. The country would have to deal with its impact.

In some ways the impact of the decision was limited due to how it had been structured in
the first place in an effort to make it palatable to the Court. Since the measure was based solely
on the Commerce Clause, it was limited only to children engaged in the production of goods
mined or manufactured that were carried in interstate commerce. Additionally, the law did not
touch children who were engaged in agriculture as well as in street trades, tenement production,
and other service jobs. 167

The impact of the law and its subsequent overturning on the practices of child labor
throughout the country seem difficult to measure according to author Hugh Hindman. 168 It was
in effect for only a period of 10 months outside of the area of the initial injunction by Judge
Boyd. Additionally, in some areas, even if the law was fully implemented it would not have had
much of an impact. 169 In several industrial Northern States, the standards of the law were
already exceeded by State statutes such that the law would not have had any impact. 170 Elsewhere,
while some employers ignored the law, others brought their companies into
compliance and kept the new standards in place even after the law was repealed. 171

A review of the implementation of the law while it was in place does give an idea of the

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167. Fuller, *Child Labor and the Constitution*, 244.
169. Ibid.
170. Ibid.
scale of its impact. In the run up to the Keating-Owen Act going into place, the Children's Bureau established procedures for its enforcement. Since its small staff could not adequately enforce the law, it was agreed that enforcement would require cooperation with State authorities if the law was going to be successful. Officials were authorized to enforce fines and/or imprisonment on individuals who *knowingly* violated the law.\textsuperscript{172} This “knowing” requirement brought the focus again on how to determine whether or not a child was of age to work.

While the law was in place, the Children's Bureau took responsibility for issuing working papers to children in North Carolina, South Carolina, Georgia, Mississippi, and Virginia, the five States with age limits below the new federal minimums.\textsuperscript{173} The Bureau issued a total of 19,969 certificates to children in these States. In almost every case where a certificate was issued, the child did not have a birth certificate. The rate of children with birth certificates ranged from a low of 0.2 percent in North Carolina to a high of 6 percent in Virginia.\textsuperscript{174} As a result, the Bureau relied upon Baptismal certificates and notations in family Bibles as the favored forms of proof of age. In other cases they had to resort to statements from doctors.\textsuperscript{175} They also applied minimum height and weight limitations. These according to author Kriste Lindenmeyer may have protected some children but they left no room for individual differences.\textsuperscript{176} Mill owners sometimes advised parents to “fatten them [their children] up” and in some cases sent the children to mill-operated farms in hopes the youngsters would gain weight

\begin{flushright}
\textsuperscript{172} Lindenmeyer, *A Right to Childhood*, 122.
\textsuperscript{173} Ibid.
\textsuperscript{174} Ibid.
\textsuperscript{175} Ibid.
\textsuperscript{176} Ibid.
\end{flushright}
so they could reapply to receive a work permit. The fact that the federal law did nothing to alleviate poverty among poor families led parents to try to get around it, as they had the State laws. Additionally, since so few of the children receiving the certificates from the federal government had birth certificates, it makes one question how effective the law was in limiting work to children above the required ages.

Of course, in the wake of the Court’s decision, child labor increased. Age limits were lowered while working hours were extended. The Court's decision also caused an increase in the violators of State child labor laws, according to the NCLC documents. The impact that the law may have had could also be seen in the writings of David Clark in his newsletter. In rejoicing over the verdict, he wrote:

> The Keating law is nothing but a “scrap of paper” and mills of each state will operate in accordance with their State laws. All of the Federal inspectors and certificate-issuing ladies can pack their trunks and start for home, for there is no longer any Federal child labor law and people of each state can conduct its own affairs.

Consistent with this attitude, a South Carolina newspaper reported that children's hours in mills were being raised from eight to eleven, as they had been prior to the federal law. Outside of North Carolina, most mill owners had complied with the federal law; now the trend reversed itself and some believed any child labor law could be scoffed at. One article from January 1920 cited a study that found that the number of children working illegally under State laws in

177. Ibid.
178. Ibid.
182. Ibid., 138.
factories increased from the time period before the law was passed.\textsuperscript{183}

The law’s implementation however did seem to have some positive effects on the practice of using children in the workplace. Mill owners were given the opportunity to see how they could adjust to not having children around. This helped shape their opinion of whether or not employing children was worthwhile. The \textit{Textile World Journal}, a leading trade publication, explained that “[t]he decision of the Supreme Court declaring the Keating-Owen child labor law unconstitutional is not nearly as important today as it would have been had it been rendered before the effect of the bill had been given a thorough test.” Operating without children under 14 allowed manufacturers to see that the presence of these children was inefficient. Due to the limited working hours that 14 to 16 year olds could work, it was also difficult to have them fit into the work schedules of the mills.\textsuperscript{184}

Even before the passage of the Keating-Owen Act a natural decline in child labor was already beginning to take place in some industries due to mechanical inventions. For example, as early as 1916, a child labor investigator on an inspection of a mine in Pennsylvania noted a reduction in the number of breaker boys, partially due to the installation of mechanical slate pickers as well as a compulsory schooling law through age 16.\textsuperscript{185} In the absence of the World War I mobilization and labor scarcity in the South, the \textit{Textile World Journal} believed that mills would not have re-employed children. Additionally, despite the dire predictions, mills were able to maintain or even advance their profits during the period.\textsuperscript{186}

While the exact impact on the number of children employed seems to be impossible to

\textsuperscript{183} Ibid., 138.

\textsuperscript{184} Hindman, \textit{Child Labor}, 112.

\textsuperscript{185} Ibid.

judge, according to Hugh Hindman, the largest impact of the federal law seems to be the fact it spurred the States to take action.\textsuperscript{187} In between the 1906 introduction of the Beveridge Bill and the passage of the Keating-Owen Act in 1916, a number of States adopted the federal requirements. In the aftermath of the Supreme Court decision other States implemented them to discourage future federal action.\textsuperscript{188}

\textbf{Legacy}

Today the \textit{Hammer vs. Dagenhart} decision is frequently seen as one of the worst Supreme Court decisions in history. It put an end to an Act that reformers viewed as the “new Emancipation Proclamation.”\textsuperscript{189} One constitutional historian has called it “the low watermark in American constitutional adjudication.”\textsuperscript{190} An \textit{Encyclopedia Britannica} editorial includes the decision on its list of the 10 “Worst Supreme Court Decisions” along with the \textit{Dred Scott} decision, the universally reviled decision that gave slaveholders the right to take their slaves into free territories.\textsuperscript{191}

Within the past year alone, multiple books have made reference to the decision in a negative way. In his 2014 book, “The Case Against the Supreme Court,” law professor Edwin Chemerinsky called the decision “a reflection of ideologies of the justices at the time and their

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\textsuperscript{187} Hindman, \textit{Child Labor}, 70.
\textsuperscript{188} Ibid.
\textsuperscript{190} Berger and Johansson, “Child Health in the Workplace: The Supreme Court in \textit{Hammer v. Dagenhart},” 82.
\end{flushright}
hostility to regulation of business.”^192 He found the case to be indistinguishable from the *Lottery Case*. He noted the Court acknowledged the “pestilence of lotteries” in the *Lottery Case* while never acknowledging the “pestilence” of child labor.^193 He found *Hammer vs. Dagenhart* a case of the conservative Court simply being “much more willing to defer to laws regulating conduct deemed immoral than to economic regulations.”^194 Similarly, in the 2015 book “Injustices: The Supreme Court’s History of Comforting the Comfortable and Afflicting the Afflicted,” author Ian Millhiser devotes a chapter to *Dagenhart*. In it he argues that the case stands “for the proposition that, in order to prevent Congress’s powers from becoming too expansive, the Court must create new arbitrary limits on that power even if those limits have no basis in the text of the Constitution.”^195

Modern opinions about *Dagenhart* though are not universal. In his 2007 book “How the Progressives Rewrote the Constitution,” Richard Epstein argues that the Court struck a proper balance between States’ rights and the relatively weak central government the Founders envisioned. Allowing different standards for child labor laws enabled a competition among the States, echoing some of the benefits of local government Justice Marshall raised in *McCulloch*. To support his argument, Epstein cites the Tiebout hypothesis: “Competition between local governments allows ordinary citizens to sort themselves into those communities that supply the public amenities that suit their own particular needs.”^196 While some may see this as a race to the bottom, in the case of child labor laws, a State may have found it to be in the best interests of

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193. Ibid.
194. Ibid., 93.
its citizens to allow parents to reap benefits from the toil of their children.\textsuperscript{197} He finds that parents who allowed their children to engage in child labor were making the best of a bad situation. He points out that “the alternative to child labor is not a life of education or leisure for the young. It could be begging, prostitution, or back-breaking work in the informal economy without any legal protection at all.”\textsuperscript{198}

In his 2012 paper, “Creating Hammer v. Dagenhart,” University of Georgia School of Law Professor Logan Sawyer also questioned the conservative view of the decision. He argued that the decision was consistent with precedents such as the Lottery Case. The Supreme Court, he believed, did not invent the distinction between harmful items that could be regulated and others that remained outside the scope of the Commerce Clause.\textsuperscript{199} Instead this distinction was previously propagated and defended by Philander Chase Knox, the Attorney General who oversaw the federal government's position in the Lottery Case. As Senator, Knox also defended the use of federal police power in the Hipolite Egg Co. case and in other expansive ways.\textsuperscript{200} Therefore, the “harmless items” distinction was not invented by the Court as a way of justifying its laissez-faire attitudes toward progressive legislation.\textsuperscript{201} Knox had supported this distinction going back to 1907 finding that Congress could not prohibit the shipment of harmless goods for the purpose of promoting or protecting interstate commerce.\textsuperscript{202}

This view, Professor Sawyer finds, was largely supported by opinion leaders of the

\textsuperscript{197} Ibid., 61.
\textsuperscript{198} Ibid.
\textsuperscript{200} Ibid., 79.
\textsuperscript{201} Ibid., 69.
\textsuperscript{202} Ibid., 80-81.
day. In the debate over the original Beveridge bill for instance, Senator Charles Fulton of Oregon remarked in opposition to the bill that the previous laws stood for the proposition that Congress could “withdraw from commerce things that are deleterious to the people to whom they are shipped.” Thus, this distinction was a conscious decision by Knox and other supporters in order to ensure there was not undue interference in either the national market nor with the freedom of individuals to contract.

Afterword

Although reformers had failed in their attempt to outlaw such practices at the federal level, this was not the end of the story. In the aftermath of the Dagenhart decision, one Senator remarked that Congress should pass the law again, but this time should include a clause forbidding the Supreme Court from declaring the law unconstitutional a second time. While Congress would not take that clearly unconstitutional path, the fight for a federal child labor law was far from over.

203. Ibid., 85.


Unfortunately we cannot strain the Constitution of the United States to meet the wishes of good people.
—Supreme Court Chief Justice William Howard Taft, Letter to his brother, 1922

On December 8, 1911, two-year-old Grier Gripa reached for a box containing what he must have thought was candy. Rather than candy, the box was filled with poisonous phosphorous matches. The baby, not recognizing the difference, grabbed the matches and placed their heads into his mouth. Young Grier would soon get violently ill. Despite their best efforts doctors would be unable to save the child.¹

Little Grier was not alone in facing death or great harm at the hands of these matches. The poisonous phosphorous match not only ended the lives of numerous children, it was used as a method of suicide and homicide. Furthermore, the production of the matches caused debilitating effects in the factory worker that produced them. Many contracted a condition known as “phossy jaw” which caused the teeth to rot away and the jaw of the worker to deteriorate.² While other technologies were available to produce matches, the ease of use and lower the cost of the phosphorous matches made them attractive.

In the face of the carnage wrought by these deadly matches, Congress sought a way to stop the menace. They considered banning them through the use of the interstate commerce power, but concluded this would still leave open the possibility of match production for intrastate use. The lucrative nature of the trade caused Congress to believe this would pose a

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significant problem. President Taft in his annual message to Congress laid out another means of attack as follows:

I invite attention to the very serious injury caused to all those who are engaged in the manufacture of phosphorous matches. The diseases incident to this are frightful and the matches can be made from other materials entirely innocuous. I believe that the injurious manufacture could be discouraged and ought to be discouraged by the imposition of a heavy Federal tax. I recommend the adoption of this method of stamping out this very serious abuse.

Many manufacturing associations spoke out in favor of such a federal law, preferring it to a patchwork quilt of differing State laws which would put some of them at a disadvantage.³ Congress went along with this plan and on April 9, 1912, Taft signed the bill relying on Congress’s taxing power in the Constitution. The $0.02 per hundred tax made these matches unprofitable and they were quickly eliminated from the market.

As discussed in previous Chapters, unlike the quick victory in the case of poisonous matches, the battle against child labor would not be won by progressive forces so easily. The Dagenhart decision struck a major blow against the opponents of child labor. It caused impacts on the lives of children in many States. In its wake, the Department of Labor reported that it was “flooded with telegrams of inquiry from employers throughout the country [questioning] whether they are now free to employ children.”⁴ Professor Frederick Green of the University of Illinois highlighted the importance and the potential impact of the Dagenhart decision as follows:

This is the most important decision that any court had made in many years ... In its effect on child labor, and, in a sense, in its denial of the nation of power to make its will effective, the immediate results of the decision are regrettable; but if it brings about an amendment to the Constitution which will give Congress the power to deal directly with the subjects that it ought to have control of, the decision may prove a blessing in

³. Ibid., 80.

In the face of this increase in the employment of children, and the popular backlash against the Court, and in light of the narrow margin of the *Dagenhart* ruling, the NCLC and members of Congress looked for alternative legislative approaches.\(^5\)

Some members of Congress embodied the public outrage and spoke of their “contempt” for the Court. Others spoke of a desire to limit its power.\(^6\) Senator Owen proposed reintroducing the Keating-Owen bill, but now added language to require any judicial officials who questioned its constitutionality to vacate their office. The bill also eliminated the power of the courts to review the law. While Owen was a leader in the Senate, it was believed only a few senators supported such a bill and many dismissed it as “ridiculous.”\(^7\) Owen was apparently an outlier. It was clear for the most part the Congress was not questioning the outcome in the *Dagenhart* case. However, many in Congress believed that while the “form of legislation” had been struck down, the potential existed for another method of federal legislation that could be upheld.\(^8\)

Not everyone believed that the Court had spoken in such a limited manner. For example, Senator Thomas Hardwick of Georgia thought that the Court in the *Dagenhart* decision had defined an area that Congress had “no right to touch.”\(^9\) Those forces caused consideration to be given to the prospect of a Constitutional amendment that would give Congress unlimited power

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5. Fuller, *Child Labor and the Constitution*, 266.
8. Ibid., 156.
9. Ibid., 181.
10. Ibid., 184.
in the area of child labor regulation.\textsuperscript{11} For that reason, some found the decision in \textit{Dagenhart} to be a “blessing in disguise” since such a reform was seen as much more effective than the indirect (and unconstitutional) method of using the commerce power.\textsuperscript{12} However, soon other means were devised to deal with the problem that would withstand Court scrutiny without the need for the laborious amendment process. Within three days of the \textit{Dagenhart} ruling, multiple resolutions were introduced in Congress. They sought to ban the products of child labor through various methods such as by preventing firms that employed children from using the postal service or by taxing the products the children produced.\textsuperscript{13}

The urgency of the matter was further heightened by World War I. The labor shortages caused by the war served as a magnet that drew more children to the factories and caused the fight against child labor to be overshadowed in the eyes of the public.\textsuperscript{14} The war for instance forced the initial news of the \textit{Dagenhart} decision to page 14 of the \textit{New York Times}. To counteract this, the Children's Bureau embarked upon multiple campaigns to either encourage children to return to school or to prevent them from engaging in premature toil in the first place.\textsuperscript{15} The War Labor Policies Board addressed this concern when its head, Felix Frankfurter, drafted a clause for war contracts that applied the restrictions of the Keating-Owen Act to each holder of a federal contract.\textsuperscript{16} High off their recent victory in the courts, the American Cotton Manufacturers’ Association advised on grounds of patriotism and constitutionality that contracts

\begin{flushleft} \textsuperscript{11} Ibid., 163. \\
\textsuperscript{12} Ibid. \\
\textsuperscript{13} Ibid., 171. \\
\textsuperscript{14} Trattner, \textit{Crusade for the Children}, 138. \\
\textsuperscript{15} Hindman, \textit{Child Labor}, 165. \\
\textsuperscript{16} Trattner, \textit{Crusade for the Children}, 138. \end{flushleft}
with such provisions should not be accepted.\textsuperscript{17} Regardless of this threat, the war contract provision still left many children who didn't work for companies holding such contracts beyond the reach of the federal government. When President Wilson proposed the Keating-Owen Act again as a war powers measure meant to ensure national security and defense, Congress failed to act on this measure before the war ended in November 1918.\textsuperscript{18}

The wartime measure would have only been a short-term fix. Reformers mainly looked for a new, permanent strategy that they believed would fit within the Constitution. NCLC legal advisors eventually arrived at a tax as that strategy. The taxing of the products of child labor was not a new idea; a bill utilizing the taxing power of the federal government in this manner was originally introduced in 1907. This was around the same time Senator Beveridge first introduced his national child labor law.\textsuperscript{19} The tax would apply to items made partially or completely through the use of child labor. The rate was to be set so high that it would eliminate any profits for the employers and thus cause them to end the practice.\textsuperscript{20}

The introduction of a revenue bill in the wake of end of World War I provided tax law proponents with the chance they needed.\textsuperscript{21} A plan, similar to the NCLC's proposal, was introduced by Ohio Senator Atlee Pomerene as an amendment to the 1918 Revenue Bill. It placed a 10 percent tax on the net profits of all canneries, mills, factories or other manufacturing establishments that employed children under 14 years of age, on all mines and quarries that

\textsuperscript{17} Karis, “Congressional Behavior at Constitutional Frontiers, from 1906, the Beveridge Child-Labor Bill, to 1938, the Fair Labor Standards Act,” 170.
\textsuperscript{18} Trattner, \textit{Crusade for the Children}, 138-139.
\textsuperscript{19} Karis, “Congressional Behavior at Constitutional Frontiers, from 1906, the Beveridge Child-Labor Bill, to 1938, the Fair Labor Standards Act,” 39.
\textsuperscript{20} Trattner, \textit{Crusade for the Children}, 139.
\textsuperscript{21} Karis, “Congressional Behavior at Constitutional Frontiers, from 1906, the Beveridge Child-Labor Bill, to 1938, the Fair Labor Standards Act,” 178.
employed children under 16 years of age, and on any concern that employed children more than eight hours a day or six hours a week at night. After some internal debate, the NCLC agreed to scrap its own tax bill and put its support behind the Pomerene tax.22

Through this bill, Congress openly sought to reverse Dagenhart. It was stated on the floor of the Senate that Congress was acting “for the purpose of destroying the decision of the Supreme Court.”23 While the child labor measure was included as part of a revenue act, no justification was given for supporting the tax because of its impact on federal revenue. The summary of revenue raised through the bill's provisions did not even list an amount to be raised from the child labor provision.24 Although some members of Congress did not like using the taxing power for this purpose, it was seen as the best option available.25 As author Thomas George Karis has pointed out, it was not difficult to see the rationale for taxing heavily those who profited from the toil of children.26 While Senator Pomerene believed the purpose of the law was the reduction of child labor, he claimed the act had “a two-fold purpose” that included raising revenue.27

Unlike the Keating-Owen Act, the debate over whether the Constitution permitted using the taxing power in this way did not provoke a fierce battle in Congress.28 Again as happened with the previous bill, some members of Congress voted for the Child Labor Tax simply to find

22. Trattner, Crusade for the Children, 140.


24. Ibid., 186.

25. Ibid., 184.

26. Ibid., 175.

27. Ibid., 187.

28. Ibid., 191.
out if it was constitutional. For example, Senator John Works of California believed it would “furnish the best opportunity the Supreme Court of the United States had ever had to determine this question definitely and for all time.” While Works believed the Court would find the bill unconstitutional, others used a similar logic believing the Court could help clarify the issue. However others thought that continuing in this manner caused the Supreme Court to lose public esteem. Opponents of the bill like Congressman James Byrnes of South Carolina believed that “the public … will come to regard the Supreme Court as an obstacle to all real progress and an enemy of the people.” Congress some members of that body believed, had the role as "first judge" and should not be supportive of unconstitutional legislation.

The attitudes of the American people were unchanged, despite the fact the previous child labor law (Keating-Owen) had been found unconstitutional in *Dagenhart*. This new move to control child labor at the federal level was very popular. As a result, the Pomerene bill ended up passing the House and Senate in a similar manner as the Keating-Owen Act had. This time however, manufacturing interests, recognizing the futility of opposing such efforts in Congress, did not mount an attempt to stop the legislation. President Wilson signed the bill into law on February 24, 1919, less than nine months after the Keating-Owen Act was found unconstitutional. It would become effective 60 days later.

Once again, David Clark organized an effort to stop a federal child labor law. He rallied

29. Ibid., 135.
30. Ibid.
32. Ibid.
33. Trattner, *Crusade for the Children*, 140.
34. Ibid.
his supporters and raised funds for another court battle. While Clark frequently spoke in high-minded rhetoric about his desires to preserve the Constitution, he on at least one occasion openly voiced what was likely his main concern. Following the introduction of the Child Labor Tax, he remarked, “[i]f the Federal Labor Law is held constitutional almost every phase of our cotton manufacturing industry will be regulated by National legislation so as to remove any advantage we now have over New England.”

Stressing his success in previous court battles, Clark's ability to raise the funds he needed was greatly enhanced. Cotton manufacturers largely understood that *Dagenhart* would not be the end of their struggle. In addressing a session of the Cotton Manufacturers' Association of North Carolina, President William Hendren stated:

> I would not feel that I had performed my duty with respect to this association if I did not say to you that the fight is going to keep up and that it is backed by the most powerful and ingenious people in this country. I wouldn't have any man get it into his head that the fight has been won because it hasn't. I want to suggest to you that nothing within the power of this association be omitted to deprive your antagonists of the opportunity of success.

The antagonists though felt confident that the courts would provide them a favorable outcome. Believing that they had addressed the concerns of the Supreme Court in *Dagenhart*, many observers believed the Court would uphold the constitutionality of this new law. Confidence was greater than it was in the battle over the Keating-Owen Act. In light of this, many employers began adjusting their businesses so they could operate without child laborers.

35. Fuller, *Child Labor and the Constitution*, 298.


37. Ibid., 171.

38. Trattner, *Crusade for the Children*, 141.


40. Trattner, *Crusade for the Children*, 141.
Clark by now was used to operating in opposition to the conventional wisdom. He followed the same tactics that had proved successful in *Dagenhart*. This time he found Eugene W. Johnston to be his plaintiff. Both Eugene and his 15 year old son John worked for the Atherton Mills of North Carolina. Johnston sought a permanent injunction to prevent Atherton Mills from laying off or reducing the working hours of his son.\(^{41}\) Once the law went into place, if John worked more than eight hours in any day or more than six hours at night in any week, Atherton Mills would be subjected to the Child Labor Tax. While the law allowed 14 and 15 year olds to work in the mill without paying the tax, these hour limitations made it impractical for them to work the same shifts as older employees. On April 25, 1919 the Atherton Mills announced that it would discharge all its employees under 16 years of age in order to avoid both the scheduling challenges and the potential tax.\(^{42}\) The impending discharge gave Clark the legal opening he needed.

On May 2, 1919 a challenge to a federal child labor law ended up before Judge Boyd, the jurist who had found the Keating-Owen Act unconstitutional. The government was not technically a party to the case since it had been brought against the Atherton Mills by Eugene Johnson as a result of their decision to impact the employment of his minor child. The government nonetheless filed a brief arguing that procedurally the case should be thrown out since there was no issue or controversy—the mill could fire an employee for any reason it wanted to. The case it argued was simply a contrived controversy. Clark knew that his method of legal attack was risky. The alternative however would have been to have a mill sue the government once it had paid its child labor tax. This would have forced the court challenge to be

\[\text{\^{41}}\] Ibid., 140-141.

delayed until the law had been fully implemented for a year and taxes had been paid.⁴³

Clark however had nothing to worry about, at least in the federal district court. It was expected that the arguments would take several days as they had in the Dagenhart case, but Judge Boyd found such processes unnecessary. He interrupted the plaintiff at the start of their case to declare that he agreed the law was unconstitutional and that no further arguments were required.⁴⁴ Judge Boyd relied upon the same grounds he used when declaring the Keating-Owen law unconstitutional. The decision though only applied to Johnston. It had no impact on the law’s application to any other children.⁴⁵ For that to occur, the Department of Justice would have to appeal Judge Boyd's ruling to the Supreme Court.⁴⁶ Thus, as in the case of phosphorous matches, the taxing power and William Howard Taft would once again be at the center of the story.

According to author Walter Trattner, Judge Boyd’s ruling evoked “a storm of reaction that ranged from violent denunciation to mild disapproval.”⁴⁷ The American Federation of Labor (AFL) Executive Committee immediately issued a statement condemning the decision. The AFL saw the mills and factories filling up once again with children if the decision was not overturned by the Supreme Court. If there ever was a case that justified the use of the taxing power, the AFL declared, it was “protecting the life and health of innocent children.”⁴⁸

The immediate impact of Judge Boyd's decision was limited by the fact that the

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⁴³. Ibid., 223-228.
⁴⁴. Trattner, Crusade for the Children, 141.
⁴⁶. Trattner, Crusade for the Children, 141.
⁴⁷. Ibid.
government decided to continue enforcing the tax until the Supreme Court made its decision. The Bureau of Internal Revenue had established a 15-person group known as the Child Labor Tax Division to ensure the tax was complied with. The group would continue its work.49 By 1919, it noted that there had been a more than 40 percent decrease in child labor.50 Furthermore, the largest decreases were in the Southern cotton mills where 85 percent of mills were operating in a manner that exempted them from the federal tax since they were no longer employing child laborers.51

In the midst of this legal uncertainty over the long-term fate of the law, an editorial in the American Child proclaimed that “[t]he fight for federal protection of the child against child labor has not been lost, perhaps it has only just begun.”52 While some immediately raised the prospect once again of amending the Constitution, it was still generally believed that the Supreme Court would uphold the law. Senator William S. Kenyon of Iowa summed up those sentiments when he remarked:

I have absolute faith that the Supreme Court will sustain the law. We studied every phase of the case when we drafted the section, including the point raised by Judge Boyd, that it was an invasion of the rights of states. I do not believe that the Supreme Court will rule against it. If it does it will have to go back on every one of its own decisions regarding the taxing power of the United States.53

Similarly, President Wilson, who had misgivings about the original Keating-Owen Act, spoke out in support of the constitutionality of the new bill, stating:

This law can be based on the taxing power of Congress. It is hoped to do with child labor products of mines, quarries, canneries, and factories exactly what was done by the use of the taxing power with State banknotes, artificially colored oleomargarine, and

51. Ibid.
53. Trattner, Crusade for the Children, 141.
The taxing power Wilson spoke of was at the heart of the original motivation for scrapping the Articles of Confederation in favor of a stronger document. As author Roger Brown remarked, “[t]he experience with the breakdown in taxation ... drove the constitutional Revolution in 1787.”55 The weakness of the Articles of Confederation made the need for a stronger central government apparent. Under the Articles, the national government could only make requests of the States for money. This requisition system according to one study only had a compliance rate of around 37 percent for the period between October 1781 and August 1786.56 Alexander Hamilton however believed he had the cure for this problem of the inability of the federal government to directly tax its citizens. “What, sir, is the cure for this great evil? Nothing, but to enable the national laws to operate on individuals, in the same manner as those of the States do.”57

Others however feared giving too much power to the strong central government in the area of taxation. To remedy this problem, the Framers had to decide whether the central government would be able to tax the citizens of the country directly or whether it would only be able to do so by taxing the States.58 States feared that giving the federal government the ability to tax their citizens directly could cause them to lose the ability to raise the funds needed for


57. Ibid.

58. Ibid., 18.
effective State governments.\textsuperscript{59}

At the Constitutional Convention, the Framers decided in a manner consistent with Hamilton and implemented a system that allowed for direct taxation. Knowing that such taxing power would be unpopular at the State ratifying conventions, safeguards were included to limit it.\textsuperscript{60} The concern that the federal government could use its taxing power to punish one region of the country was particularly worrisome in the South. They feared Congress would be able to destroy slavery through taxation, as a result, they sought a linking of taxation with representation. This meant the level of taxes any State paid would be correlated with its level of representation. This they believed prevented Congress from being able to destroy slavery through taxation.\textsuperscript{61} They drafted Article I, section 8, clause 1 of the Constitution which states: “The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.” The uniformity of the taxing power, along with Article I, section 9 clause forbidding taxation of exports, was seen as working with the Commerce Clause in order to remove barriers to free trade according to Professor Nelson Lund.\textsuperscript{62} This framework created a standard set of tax and free trade rules for the nation rather than allowing each State to determine how they would treat exports and imports.

Author Erik Jensen points out that as a result of this article, the Constitution has often times been characterized as a “pro-tax” document, one that gave Congress basically unlimited

\begin{flushleft}
\textsuperscript{59} Ibid.
\textsuperscript{60} Ibid., 19.
\textsuperscript{61} Ibid., 27.
\textsuperscript{62} Ibid., 23.
\end{flushleft}
taxing power. Although Article I, section 8, clause 1 contained only a limit that such taxes be uniform James Madison argued the taxing power was indeed limited. In Federalist 41, he stated that because the government was one of enumerated powers, reading the taxing power in isolation overstated the power Congress had. The taxing power could only be used as needed to carry out the other powers that were invested in Congress. In contrast Alexander Hamilton understood that the taxing power could have effects beyond the simple raising of revenue. In Federalist 12, in discussing a tax on spirits, he said “and if it should tend to diminish the consumption of it such an effect might be equally favorable to the agriculture, to the economy, to the morals and to the health of society.” This view would become central to later battles over the scope of the taxing power.

The Supreme Court first addressed the scope of the power in 1796. In *Hylton vs. United States*, the Court supported the idea that the taxing power of Congress was expansive. In that case, the Court upheld a national tax on carriages finding Congress was given “plenary authority in all cases of taxation.” In 1867, the Court again addressed the issue of the scope of the taxing power. Congress had passed laws requiring the licensing of businesses engaged in activities such as liquor sales and lotteries. In the *License Tax Cases*, the Court found that while “Congress has no power of regulation nor any direct control [over] the internal commerce or domestic trade of the States,” it could use its taxing power to require purchase of a license before

63. Ibid., 2.


67. Ibid., 4.
allowing certain trade to be engaged in.\textsuperscript{68}

In 1904, in \textit{McCray vs. United States}, the Court again held that the taxing power of Congress was nearly without limitation. The case concerned an 1886 act that taxed yellow margarine whose color was easily confused with butter at a rate of 10 cents a pound. Margarine of other colors, those that couldn't compete with butter, was taxed at only one-quarter cent per pound.\textsuperscript{69} While it was clear that the purpose of the Act was to make margarine less competitive with butter, the Court refused to look beyond the text of the law. It stated that “[t]he judicial department cannot prescribe to the legislative department limitations upon acknowledged powers. The power to tax may be exercise oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected.”\textsuperscript{70}

In 1919, in \textit{United States vs. Doremus}, the Court upheld the right of Congress to charge a $1 per year tax on dealers of certain drugs. The Act authorized only those dealers utilizing the required forms provided by the government upon payment of the tax to distribute drugs such as opium. The Court found that Congress reasonably included such conditions on the ability to trade in drugs, and such a scheme could be justified by the desire of Congress to avoid illegal transactions and allow its tax revenue to be maximized.\textsuperscript{71}

Seven months after Judge Boyd issued his decision in \textit{Dagenhart}, in December 1919, the scope of the taxing power was once again argued before the Supreme Court, this time in \textit{Atherton Mills vs. Johnston}, on appeal from Judge Boyd’s district court ruling, as discussed earlier. At the time of argument, what was already a questionable case had become even more

\begin{itemize}
\item \textsuperscript{68} License Tax Cases, 73 U.S. 462 (1866).
\item \textsuperscript{69} Jensen, \textit{The Taxing Power A Reference Guide to the United States Constitution}, 181.
\item \textsuperscript{70} Ibid.
\item \textsuperscript{71} \textit{United States vs. Doremus}, 249 U.S. 86 (1919).
\end{itemize}
so. Justice Brandeis highlighted the fact that the Johnston boy was now 16 years old.\textsuperscript{72} Therefore, to Justice Brandeis it was even clearer that a real controversy did not exist in this case. The case however would not be decided during the next 18 months. During this time period, Chief Justice Edward Douglas White was in failing health. It is speculated that this may have had something to do with the delay in the decision;\textsuperscript{73} the exact reason for the delay is unclear.\textsuperscript{74}

**Implementing the Tax**

As a result, of this indecision, by the Spring of 1920 concern over the state of the Child Labor Tax grew on both sides of the issue. While many textile manufacturers began to see the tax as a permanent fixture,\textsuperscript{75} the NCLC had concerns about the quality of its enforcement. In a December 1919 article in *The Sun*, Beverly Robinson, a federal investigator spoke of her experience enforcing the law in the North Carolina mills. Similar to the experiences found under the Keating-Owen Act, parents and children sought to avoid the law in many cases. Robinson found in at least a third of 2,000 North Carolina cases she reviewed that the ages of children were falsified. One boy told her in response to a question over his age, “[w]ell I don't know how old I am, but I don't feel 14.” He was 11. In another instance, a pair of twins was brought to her by their father for a work certificate. The father brought a family Bible. The fresh ink and the fact that the Bible to no longer listed the children in birth order, made it clear that the father had revised the birth dates and falsified the record. She admonished them, saying “in faking any

\begin{itemize}
  \item \textsuperscript{72} Stephen B. Wood, *Constitutional Politics in the Progressive Era*, 238.
  \item \textsuperscript{73} Moskowitz, “Dickens Redux: How American Child Labor Law Became a Con Game,” 128.
  \item \textsuperscript{75} Ibid., 251.
\end{itemize}
kind of records one must be consistent and fake all the way through.\textsuperscript{76}

Additionally, there was concern that the cost of administering the law had greatly exceeded the taxes collected. While the tax had brought in only around $2,000, $90,000 had been spent on its enforcement.\textsuperscript{77} Although the Bureau of Revenue said it did not have a statistical estimate of the reductions seen in child labor, it claimed decreases had been seen in various areas. Informants though alleged that while violations were observed in two-thirds of the plants visited, taxes had been collected in only two cases.\textsuperscript{78} While it would turn out that these reports were exaggerated, they created unease at the NCLC at the time.\textsuperscript{79}

From a wider perspective, despite the federal court fights, the NCLC had to be pleased with the success it had over the past decade. While the federal laws were in place, many State labor officials had seen them as helpful in enforcing the State statutes.\textsuperscript{80} By the 1920 Census only slightly over a million children between the ages of 10 and 15 were employed. This was a decrease of nearly 50 percent from 1910. Factoring in the increase in children in this age group, the percentage of children working had decreased from 18.4 percent in 1910 to 8.5 percent by 1920.\textsuperscript{81} However, changes in how the Census was conducted may have magnified the actual decline. The Census shifted from April 15 to January 1 between 1910 and 1920 meaning many fewer children would have been working in seasonal agriculture at the time of the count. Furthermore, the instructions in 1910 made specific reference to the need to annotate the

\begin{footnotes}
\footnote{76. The Sun, “Child Labor Tax Saves Many from Bondage,” \textit{The Sun}, December 14, 1919.}
\footnote{78. Ibid., 253-254.}
\footnote{79. Ibid.}
\footnote{80. Trattner, \textit{Crusade for the Children}, 165}
\footnote{81. Lumpkin and Douglas, \textit{Child Workers in America}, 17.}
\end{footnotes}
occupations of laboring children. No such instructions were included in the 1920 Census. Nonetheless, it seems clear strides were made. A decision by the Supreme Court to uphold the Child Labor Tax would provide the NCLC with the most obvious path towards continued gains in the future.

**The Supreme Court Context**

The Court that would decide the fate of the tax was one in the midst of changes as was the country. In 1921, President Warren G. Harding succeeded Woodrow Wilson in the White House. The progressive Democrat Wilson was replaced by the conservative Republican Harding. The difficulties the country faced in adjusting to the post-war years shifted opinions. Americans became pre-occupied with domestic concerns. The urge to enact social reform measures was tempered. Harding and his Vice President Calvin Coolidge similarly were disinclined to support such measures. The statement “[w]e want less government in business and more business in government” embodied their platform.

Harding had an opportunity to put his imprint on the Supreme Court early in his administration. The death of Chief Justice White in May 1921 created an opening to move someone that shared Harding's values onto the Court. His selection of William Howard Taft for that role not only embodied Harding's politics, but also was emblematic of the change in the mood of the country. In joining the Court in 1921, Taft had overcome the defeat he faced at the hands of progressives in the 1912 election. According to law professor John P. Frank, the appointment of Taft in 1921 was “[t]o an amazing extent ... the choice of all of America.”

As a result of the appointment of the new Chief Justice and the consolidation of the

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82. Ibid.


84. Ibid., 257.
**Atherton Mills** case with two other cases, they would be reargued in 1921.\(^{85}\) When ordering the case be re-argued, the Court requested that the lawyers focus their arguments on the technical jurisdictional issues involved in the case. This signaled to Clark that this test case was in serious trouble.\(^{86}\)

To resolve these concerns, Clark sought a more solid case that could be used to test the law. To do so he had a list compiled of the manufacturers in Judge Boyd's district that had been assessed the tax. From the list, he found one firm, Drexel Furniture Company, that was willing to cooperate with a lawsuit.\(^{87}\) Drexel Furniture had paid their $6,312.79 child labor tax. After informing the Bureau of Revenue that the money had been illegally collected, and having their request that the money be returned denied, they took the matter to court.\(^{88}\) As of this time, the law had been in place for two-and-a-half years.

Judge Boyd once again would hear a child labor-related case. This time the challenge would be from Drexel Furniture against the federal tax collector J.W. Bailey. The case, which was argued on December 10, 1921, was quickly decided by Boyd.\(^{89}\) He, once again, found the Child Labor Tax unconstitutional. He referred to an earlier opinion he had given in *George vs. Bailey*, which he had decided by referring to the *Dagenhart* decision. In the case of *George vs. Bailey*, the Vivian Spinning Mills had sought an injunction against the Bureau of Revenue to forbid it from collecting the overdue child labor taxes owed by the mill.\(^{90}\) The suit though was

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85. Trattner, *Crusade for the Children*, 141.
87. Ibid.
88. Ibid., 262.
89. Ibid., 265.
90. Ibid., 266.
widely seen as defective since a federal statute prevented any lawsuit from restraining the collection of taxes. Rather the collection could be challenged in court only after the taxes had been paid. Despite this, Judge Boyd ruled in favor of the mill and barred the collection of the tax.\textsuperscript{91} It is believed that as a result, Judge Boyd may have made history by being the only federal judge to declare a law unconstitutional on three separate occasions.\textsuperscript{92}

At the start of Chief Justice Taft's first term on the Court, in consultation with the Justice Department and Clark's counsel, it was agreed that the \textit{Atherton Mills} decision would be delayed until it could be consolidated with another case that lacked its defects. As a result, the \textit{Drexel Furniture} case was heard before the Supreme Court in an expedited fashion. Arguing the case for the government would be J.M. Beck. Beck however did not believe in the constitutionality of the Child Labor Tax.\textsuperscript{93} As a result, according to author Stephen B. Wood, the brief that he submitted in support of the law was self-defeating. Although it appeared to be a vigorous defense of the law’s constitutionality, it was so over the top in discussing the all-encompassing taxing power the Congress possessed, it seemed the Supreme Court was certain not to go along with the government’s arguments.\textsuperscript{94} In a journal article, Beck had previously argued that the regulation of child labor was “a subject beyond question exclusively within the police power of the state.”\textsuperscript{95} He had been a supporter of the \textit{Dagenhart} decision. Most tellingly, three weeks before the \textit{Drexel Furniture} case was argued, he told the St. Louis Bar Association that if courts continued to sustain federal taxation without looking at the motive, “little will be left of the

\begin{flushright}
\textsuperscript{91} Ibid. \\
\textsuperscript{92} Ibid., 267. \\
\textsuperscript{93} Ibid., 268. \\
\textsuperscript{94} Ibid., 268-269. \\
\textsuperscript{95} Ibid., 269.
\end{flushright}
rights of the State. 96

The Arguments: Bailey

Oral arguments 97 in Drexel Furniture were heard on March 8, 1922 at the Supreme Court. Beck was subjected to difficult questions concerning the small amount of revenue the tax raised versus its large cost for enforcement. 98 Chief Justice Taft, the man who had previously supported the use of the taxing power for the non-revenue raising purpose of banning phosphorous matches, 99 was particularly hostile to Beck. He demanded that Beck explain how the Court should determine congressional intent for the statute and the limits of federal regulatory authority over the States. 100

According to the author Stephen B. Wood, Beck in his brief drastically overstated the arguments and dared the Court to uphold his view of judicial impotence. 101 The brief also contained an admission that could have been seen as undercutting his claims. He argued:

This excise tax may be unreasonable, arbitrary or oppressive, but as the cases herein before cited show, such considerations are within the discretion of Congress, and that body, representing in a peculiar way that popular will, has the exclusive right of determining the reasonableness of selecting one class for taxation or exempting another, with all the attendant consequence of such discrimination. If its uses it power tyrannically, the remedy can only be with the people who elect the members of Congress. 102

Beck further argued for an extremely limited power of judicial review. He stated that “the

96. Ibid.
97. No transcript of oral arguments exists. An abstract of oral argument is cited later in this Chapter.
102. Ibid.
judiciary has no power of revision whatever, except where a concrete case is presented between the litigants, and if, in such a case, an invincible, irreconcilable, and indubitable repugnancy develops between a statute and the Constitution.”

Congress, he argued, could pass laws that aimed at an unconstitutional end, but while “[t]hat is deplorable. It is anti-constitutional. It may be subversive of our form of Government; but, here again, the only remedy is with the people.” Beck concluded his brief by noting that “this Court is powerless to say judicially that the motive of Congress in levying the tax under consideration was not to impose a tax, but to regulate child labor.”

The Arguments: Drexel Furniture

Clark's brief on behalf of Drexel Furniture, in contrast was characterized by Stephen B. Wood as “vigorous but restrained advocacy.” It included large sections that were copied directly from the case brief in Dagenhart, including the same arguments over the benefits of local regulation of working conditions. Just as the regulation of interstate commerce had done, the tax usurped the powers reserved to the States. It was not a tax to raise revenue to provide for the “common defense and general welfare,” but rather “a usurpation of the rights and powers of the various states.” The fact that the taxing power was used to accomplish these purposes did not make the action any less unconstitutional. It was a federal prohibition of child labor through a different means.

The issue had already been decided in Dagenhart and the utilization of the

103. Ibid., 271.
104. Ibid.
105. Ibid.
106. Ibid., 273.
taxing power should not make the result any different than in that case.\textsuperscript{109}

The brief pointed out that while Beck had played up citations that stressed the unlimited power Congress had in taxation, these were not applicable in this case. The Clark brief cited \textit{Pacific Insurance Company vs. Soule} for example where the Court said: “Where the power of taxation is exercised by Congress, is warranted by the Constitution, as to the mode and subject, it is, necessarily, unlimited in nature.” In this case the tax is not “warranted by the Constitution” so Congress had no power at all to act.\textsuperscript{110}

The brief further argued that if the proposition Beck put forth were true, there would be no limit to the taxing power of Congress. Congress could impose any tax, for any purpose, (unless it was a tax on exports since those were specifically forbidden).\textsuperscript{111} Beck in his brief was basically saying that as well.

Clark also used \textit{Dagenhart} to lend further support to the unconstitutionality of the Child Labor Tax. In that case, the Court found that Act “repugnant to the Constitution” for two reasons—it not only “transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the federal authority does not extend.”\textsuperscript{112} This new act of Congress had done nothing to address the second deficiency. Congress, the brief argued, was attempting to nullify the \textit{Dagenhart} decision.\textsuperscript{113} Furthermore, the Child Labor Tax was worse since it impacted all child labor produced products, not just those that made it into

\textsuperscript{109} Appellee's Brief, \textit{Bailey vs Drexel Furniture Co.}, 259 U.S. 20 (1922), 5.


\textsuperscript{111} Ibid., 11.

\textsuperscript{112} Ibid., 6.

\textsuperscript{113} Ibid., 32.
interstate commerce.\(^{114}\)

While the taxing power had addressed half of the problems with the Keating-Owen Act, this had not changed the fact that child labor was a local matter. The federal government was one of enumerated powers as numerous cases had pointed out.\(^{115}\) The brief cited *McCulloch vs. Maryland*, “[i]n America, the powers of sovereignty are divided between the government of the Union and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign, with respect to the objects committed to the other.”\(^{116}\) The brief argued that “[t]he Federal Government is supreme in its own sphere, but that sphere does not extend into and overlap the reserved sphere of the States” as the Court said in *Collector vs. Day*.\(^{117}\)

Therefore, limitations were of course placed on the taxing power of Congress to prevent it from being able to “invade or destroy” the powers of the State.\(^{118}\)

Moreover, the courts could only interfere in an incidental fashion, as the Court found in the *License Tax* cases. In those cases, the Court said “[n]o interference by Congress with the business of the citizens transacted within a State is warranted by the Constitution, except as is *strictly incidental* to the powers granted to the Legislature.”\(^{119}\) The effect of the Child Labor Tax however was to encroach *directly* upon the exclusive powers of the States.\(^{120}\) While the Act on its face was simply a tax, the brief argued, “[a] statute must be judged on its natural and

\(^{114}\) Ibid., 33.

\(^{115}\) Ibid., 12.

\(^{116}\) Ibid., 15.

\(^{117}\) Ibid., 22.

\(^{118}\) Ibid., 24.

\(^{119}\) Ibid., 25.

\(^{120}\) Ibid., 29.
reasonable effect,” citing Dagenhart.\textsuperscript{121} The effect of the act would not be to raise revenue, but rather to standardize ages of employment throughout the nation.\textsuperscript{122} Furthermore, the brief quoted Senator Henry Cabot Lodge of Massachusetts who had remarked that “[t]he main purpose is to put a stop to what seems to be a very great evil, and one that ought to be in some way put a stop to.”\textsuperscript{123}

The brief provided data to underscore the true purpose of the Act. The law had cost the Bureau of Revenue over $100,000 per year to administer, but it had only raised $2,380.20 in 1920 and $24,223.67 in 1921.\textsuperscript{124} This was unlike the case of “incidental interference” with the police powers of the State as the Court found in the Doremus case where State powers over narcotics regulation were interfered with.\textsuperscript{125} It was argued that the Child Labor Tax was different because the narcotics regulation in Doremus was required in order to ensure the correct amount of tax was collected by the federal government.\textsuperscript{126} The impact on child labor, which was trumpeted by the government, was also used to undermine the idea that the act had a taxing purpose. The brief recited the fact that the issuance of work certificates had declined by 29 percent over the implementation period of the act as a result of the “tendency of the employer to refuse employment to those under 16.”\textsuperscript{127}

Clark's attorneys particularly took on the McCray margarine tax case, which the government believed most strongly supported the Child Labor Tax. The Clark brief argued that

\begin{itemize}
\item \textsuperscript{121} Ibid., 30.
\item \textsuperscript{122} Ibid., 35.
\item \textsuperscript{123} Appellee's Brief, Bailey vs Drexel Furniture Co., 259 U.S. 20 (1922), 8.
\item \textsuperscript{124} Abstract of Oral Argument, Bailey vs Drexel Furniture Co., 259 U.S. 20 (1922), 57.
\item \textsuperscript{125} Ibid., 52.
\item \textsuperscript{126} Ibid., 53.
\item \textsuperscript{127} Ibid., 58.
\end{itemize}
the Child Labor Tax was not similar to McCray, due the rate of taxes involved. Clark's attorneys claimed that while the tax on yellow colored margarine was high, even with the tax it could still be sold at a price less than butter. The tax just allowed the two products to compete on an equal basis. The higher tax on the colored margarine had also raised more revenue than the lesser tax on uncolored products. The brief pointed out that in Dagenhart the government had argued that there was no economic advantage to the employment of children. If that was the case with child labor, there was not an economic disadvantage that needed to be compensated for, unlike the comparison of butter versus margarine. The brief cited the words of Chief Justice Marshall in McCulloch vs. Maryland that the power to tax is the power to destroy. Therefore, the Court in this case needed to carefully scrutinize whether Congress had the power to impose the tax on child labor.

In closing, the brief argued that if such intrusion into the affairs of the State were allowed, it might not only be child labor that was destroyed, but the whole structural framework of the Constitution. While the Court in Dagenhart had protected the Constitution, a decision to uphold the Child Labor Tax would effectively overrule that decision and give Congress the ability to control “matters purely local.”

**The Decision**

The Supreme Court issued its long-delayed rulings in the child labor cases on May 15, 1922. The cases would decide the fate of the Child Labor Tax which had been in effect for three

128. Ibid., 59.
129. Ibid.
130. Ibid., 61.
132. Ibid., 46.
133. Ibid., 50.
years. While the main event was expected to be the *Bailey vs. Drexel Furniture Co.* decision, the Court had two other cases to decide as well. In the *Atherton Mills vs. Johnson* case, the Court found the case was moot since the Johnston boy had reached the age of 16. In *Bailey vs. George*, the Court found Judge Boyd erred in allowing an injunction against the Internal Revenue Service and reversed his decision in favor of the Vivian Cotton Mills. The Court's decision in *Bailey vs. Drexel Furniture Co.* however would make these two decisions irrelevant. The Court found the Child Labor Tax unconstitutional by a vote of eight-to-one. Justice Clark opposed the decision, but he did not pen a dissent.

The majority in an opinion written by Chief Justice Taft held that the act interfered with the States’ police powers as guaranteed under the Constitution.134 It found that “[a]n act of Congress which clearly, on its face, is designed to penalize, and thereby discourage or suppress, conduct the regulation of which is reserved by the Constitution exclusively to the States, cannot be sustained by the federal taxing power by calling the penalty a tax.”135 In the decision, Chief Justice Taft drew a fine distinction between taxes that caused some restraint on a particular activity and taxes that were a penalty similar to a criminal statute.136 Chief Justice Taft considered the following questions: “Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as penalty?”137 In deciding the answers to these questions Chief Justice Taft found:

In light of these features of the act, a court must not be blind to see that the so called tax is imposed to stop the employment of children within the age limits prescribed. Its


prohibitory and regulatory effect are palpable. All others can see and understand this. How can we properly shut our minds to it?138

The terms of the Act which applied the same rate of tax whether an employer employed one child for one hour, or 1000 children for a year, was meant to penalize, not simply tax.139 He further noted that the act only impacted those who “knowingly” employed child laborers was an attribute normally seen in penalties and criminal statutes, rather than a tax. The fact that the Department of Labor would be involved in enforcing the tax was an additional fact Chief Justice Taft cited for believing the tax was primarily meant to be a regulation.140 Rather than seeing the taxing power as basically unlimited as Beck argued, Chief Justice Taft stated that the taxing power was narrowly defined through the limitations of the Tenth Amendment.141 He acknowledged that the Court in the past had gone far in upholding acts in deference to Congress, but this act he found went too far.142

Chief Justice Taft distinguished the act from a number of past cases where the Court upheld the right of Congress to use its taxing power. In Doremus, the Court had upheld the right of Congress to impose a tax on those distributing narcotics and also required such sales be made in the manner specified by the Bureau of Revenue. The use of such forms and inspection provisions in that case Chief Justice Taft found, were differentiated from this case, because such a regulatory scheme in Doremus was related to the need of Congress to collect the required taxes.143

140. Ibid.
142. Ibid.
143. Ibid.
The case that offered proponents of the Child Labor Tax the most hope had been *McCray*. The use of the taxing power to support margarine of one color over another in that case, Chief Justice Taft found to be reasonable. He did not think that it was necessary to look at the motive of Congress, and where such motive existed, it would not have been sufficient to invalidate the tax.\textsuperscript{144} His decision in *Drexel Furniture* turned on whether the tax was primarily meant to be a regulation enforced by a penalty or primarily meant to produce income. Exactly where Chief Justice Taft set the line was unclear to most.\textsuperscript{145} It was also unclear how this decision could be squared with the tax on phosphorous matches that Taft signed into law while President. In the end though Chief Justice Taft found that *Drexel Furniture* could not be distinguished from *Dagenhart*. The purpose of the Child Labor Tax was not simply to impose a tax, but to cause “the achievement of some other purpose plainly within state power.”

Although both Justices Brandeis and Holmes had been in the minority in *Dagenhart*, they both concurred with this decision. While Justice Holmes had issued a vigorous dissent in *Dagenhart*, now he had gone along with the majority in striking down the law.\textsuperscript{146} In 1928, in a dissent in another tax case, Holmes criticized Justice Marshall's characterization in *McCulloch* of the taxing power and stated “[t]he power to tax is not the power to destroy while this Court sits.”\textsuperscript{147} The decision to go along with the majority by the progressive Justice Brandeis also shocked some. In a letter to a friend he later remarked that “[t]he new Progressivism ... requires local development—quality not quantity.” His biographer Alexander Bickel found the decision

\textsuperscript{144} Ibid.
\textsuperscript{145} Ibid., 282.
\textsuperscript{146} Ibid., 287.
\textsuperscript{147} Ibid.
difficult to reconcile with Brandeis’s views in other cases.\textsuperscript{148} Bickel thought however that both Brandeis and Holmes had found the Child Labor Tax “more disingenuous than tolerable.”\textsuperscript{149}

\textbf{The Aftermath}

This case, like the \textit{Dagenhart} decision, drew criticism from legal scholars. Professor Edward S. Corwin noted the difficulty in differentiating \textit{Drexel Furniture} from \textit{McCray} and others. In criticizing Chief Justice Taft, he remarked “he is unable to so convincingly [differentiate \textit{Drexel Furniture}] since he is unable to deny the regulatory purpose of Congress was not fully palpable in those cases as in his.”\textsuperscript{150} Corwin conveyed the fear among progressives in the \textit{New Republic} when he remarked that “[t]he notion of cooperation of the National Government and the states in furtherance of the general welfare ... had apparently dropped out of view.”\textsuperscript{151} Professor Thomas Reed Powell echoed these sentiments, stating “[t]he oleomargarine tax was in all substance as much a perversion of the taxing power as was the tax on child labor.”\textsuperscript{152}

The \textit{Harvard Law Review} believed the Child Labor Tax could not be distinguished from cases like \textit{McCray}. Based upon this and the broad nature of the federal taxing power, it concluded that the Child Labor Tax was in fact constitutional. It argued there should have been a distinction between the \textit{Drexel Furniture} decision and \textit{Dagenhart} since the taxing power was broader than the power given to Congress to regulate interstate commerce.\textsuperscript{153}


\textsuperscript{149} Ibid.


\textsuperscript{151} Fuller, \textit{Child Labor and the Constitution}, 295.


Some however agreed with the decision of the Court. The *California Law Review* believed *McCray* had been wrongly decided. The Court in *Drexel Furniture*, it believed, had correctly placed limits on the taxing powers of Congress despite the fact that it failed to do so in *McCray*.154

While Chief Justice Taft’s opinion was criticized by many in the legal community, it did receive support from an unlikely source. After the decision, Beck, who had argued the case on behalf of the government, wrote Chief Justice Taft:

> You may be surprised to know that, although I presented the Government's contention in the Child Labor Case as strongly as I was able, yet none who heard you deliver your opinion may have welcomed it more than I. Had the Court adhered tenaciously to the views of the late Chief Justice White in *McCray v. United States*, our form of government would have sustained a serious injury.155

These though were not the common sentiments in the wake of the decision. Most in the legal community found the distinction that Taft drew between the cases too difficult to follow.

According to a 1922 article in the *Bulletin of the National Tax Association*, the *Drexel Furniture* decision was the first time the Supreme Court had ever struck down a tax imposed by Congress.156 The article posited that if the Court had upheld the law, it would have marked an extension of the federal taxing power. Based upon the harshness of the intent and operation of the law, the article supported the decision.157

Newspapers were mixed in their reaction to the decision. The *New York Tribune* for

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example raised concerns over the impact of the law and what it meant for future legislative efforts. The article noted:

Inexorable economic law will exert its steady pressure to make all states standardize at the lowest level ... Scarcely less discouraging is the evidence given that the Supreme Court, after a period of liberalism with respect to social legislation, is seemingly on the backtrack—is retreating to the caverns of states' rights, with their frigid and dogmatic legalism.\textsuperscript{158}

The \textit{New York Times} and the \textit{Wall Street Journal} however endorsed the action of the Court. The \textit{Times} wrote that the decision returned “the subject of child labor to the States, where it properly belongs.”\textsuperscript{159} It noted that the decision would only impact a small fraction of the 2,000,000 children between 10 to 15 years of age who toiled. Only 15 percent were in industries that were subject to the law, and only a fraction of those 300,000 were in States that would have had their standards impacted by the law.\textsuperscript{160} Therefore, State action remained key to the success of controlling child labor, as it was before the Child Labor Tax.\textsuperscript{161} The \textit{Journal} more directly heralded the decision as a “Victory for States' Rights.” The editorial posited that “Congress is at present butting its head against a stone wall.” The editorial found any national law to be unworkable because it failed to take into account the “varying living conditions,” “racial extremes,” and the “diversities of crops and climate” found throughout the nation.\textsuperscript{162}

The Court’s striking down of the law would cause a return to such varying conditions throughout the nation. During the three years the law was in effect, there was relative success in

\begin{itemize}
\item \textsuperscript{158} Fuller, \textit{Child Labor and the Constitution}, 295.
\item \textsuperscript{159} Ibid., 297.
\item \textsuperscript{161} Ibid.
\end{itemize}
passing laws in the States.\footnote{Elizabeth S. Magee, "Child Laborers' Gains and Losses Since the War," The ANNALS of the American Academy of Political and Social Science 151, no. 1 (1930): 57.} Since the Keating-Owen law had passed, States had increased their standards. Two States added a 14-year minimum age. Nine adopted a 16-year minimum for mine work. Three prohibited night work for children under 16. Eight States established an eight-hour daily working hours limit in factories for children under 16.\footnote{Fuller, Child Labor and the Constitution, 245.} Even though the federal law had been repealed, children had greater protections overall than they ever had before.\footnote{Magee, "Child Laborers' Gains and Losses Since the War," 57.} Still, by 1922, 31 States did not meet the 14-year age standards for factories, the eight-hour day, and the prohibition of night factory work. Sixteen States had standards similar to the Child Labor Tax that allowed exemptions such as for cases where the wages were needed to support the family. Overall, in one way or another 35 States fell below the standards in the Child Labor Tax law.

In the wake of the return to the lower standards in these States, the number of child toilers increased significantly between 1922 and 1923. In 29 out of 34 cities tracked by the Children's Bureau, the number of children employed between 14 and 15 years of age increased. In nine cities, the increase was 50 percent or more. These numbers only reflect the number of children who registered for working permits under State law, which would not include children working illegally.\footnote{Forest Chester Ensign, “Compulsory Education Attendance and Child Labor,” in Selected Articles on Child Labor, ed. Julia E. Johnsen (New York: The H.W. Wilson Company, 1925), 31.} While some employers had violated the law deliberately, others complied with it out of ignorance. Child labor investigator Harold Cary noted that during a visit to the Pennsylvania coal mines that managers were still complying with the unconstitutional Child
Labor Tax, apparently unaware of the Supreme Court decision.\textsuperscript{167} He also believed this proved the federal child labor laws had worked pretty well before they were both thrown out as unconstitutional.\textsuperscript{168}

No man had done more to keep these cities and States from having to comply with a federal standard than had David Clark. In victory, he was once again lauded by the cotton manufacturers for another win in his battle against the reformers. The cotton manufacturers believed that he had done the nation a service. In the words of their president, William Hendren, “[y]ou gentlemen have been instrumental in presenting for consideration one of the most important and far reaching questions with respect to the form and substance of our Government that has been considered in more than a quarter of a century.”\textsuperscript{169}

While a great victory had been secured, Clark knew the battle to keep the federal authorities out of the mills of North Carolina was not yet over. In 1923 he again committed to his \textit{Southern Textile Bulletin} readership that he would continue to lead the fight on their behalf.\textsuperscript{170}

Although Clark was praised for his efforts, reformers were not shocked by the outcome. The NCLC’s Owen Lovejoy called the law a farce.\textsuperscript{171} While the Child Labor Tax was similar to a measure drafted by NCLC lawyers, most members of the organization similarly lacked respect for the Child Labor Tax, believing a direct attack on the problem was best. Many were not


\textsuperscript{168} Cary, “Wisconsin Says No,” 212.

\textsuperscript{169} Fuller, \textit{Child Labor and the Constitution}, 298.


\textsuperscript{171} Lindenmeyer, \textit{A Right to Childhood}, 127.
surprised when it met its defeat at the hands of the Supreme Court. In light of the defeat of both laws, in an article in the North American Review, Grace Abbott noted that it is “clearly established that either the policy of Federal assistance in eliminating child labor must be abandoned, or the Constitution must be amended.”

The Drexel Furniture decision caused a reevaluation of the value of federal action. While some believed that a federal law would have been better enforced than State enactments, the argument that uniformity was required and would be secured through a federal law was not accurate. As author Raymond Garfield Fuller posits, if either federal child labor law had been sustained there would have still been States with standards that exceeded the federal requirements. Therefore, while the federal law would have set a minimum floor, the standards would not have been uniform. Some States would have remained more attractive to child labor-employing enterprises and parents than others.

The Court’s action caused others to highlight their belief in a need to focus child labor reform efforts at the State level. Writing in the New Republic, Professor and future Supreme Court Justice Felix Frankfurter wrote that he believed the Court had erred in its Dagenhart decision but if that case was rightly decided, a tax on the shipment of goods had to suffer the same fate. While he had drafted the World War I clause for military contracts that had outlawed child labor in war factories, Frankfurter believed “a renewed energetic movement to rouse the States to action” was now needed. He did not support the traditional “States’ rights” argument, but found State control a more effective way of dealing with “local conditions of [a]

172. Fuller, Child Labor and the Constitution, 247.
173. Lindenmeyer, A Right to Childhood, 137.
174. Fuller, Child Labor and the Constitution, 246.
175. Epstein, How Progressives Rewrote the Constitution, 62.
great variety throughout the country.”

Similarly, George Alger of the New York Child Labor Committee saw the need for State action as the center of future efforts. He found that “[t]he States in the main will have to work out their own child labor statutes ... neither control over interstate commerce nor the power to tax was intended as a means of supplanting the state in regulation of its internal affairs.”

Writing in the aftermath of the decision, author Raymond Garfield Fuller remarked that “[v]ery many people record this second decision of the Supreme Court, reinforcing the first, as a calamitous blow to child labor reform.” The law, he believed however, had created a renewed interest in child labor reform in this country. If the law with its limited scope had been found constitutional, more far-reaching efforts may have lacked support. Both laws, he believed, had limitations because they attacked the problem indirectly. They also failed to address agricultural labor and left the large number of child toilers who were 14 years and older unaffected.

Furthermore, according to author Stephen B. Wood, while the Drexel Furniture decision put a “gloom over progressivism,” reformers were more fractured in their opinions as opposed to the relative unanimity in the Dagenhart case.

Although the scourge of phosphorous matches had been eliminated relatively easily through the taxing power by a law signed by President Taft, the child labor decision by Chief Justice Taft had made the movement against it far more difficult. It was now resolved that

177. Fuller, Child Labor and the Constitution, 196.
178. Ibid., 243.
179. Ibid., 244.
180. Ibid.
181. Ibid., 294.
neither the taxing power nor the commerce power of the Constitution could be used to fight child labor.\(^{182}\) The *New York Mail* believed that the decisions were a sign to the movement that new direction was needed. In an editorial the paper stated: “After muddling around for more than ten years with the child labor question, it would seem that Congress must be convinced by now that the only adequate recourse is to an amendment of the Federal Constitution.”\(^{183}\) Whether the amendment process would be successful remained an open question. One thing was certain: Child labor reformers were back at square one.


CHAPTER FIVE
“CHILD LABOR HAS BEEN ABOLISHED”
DAGENHART OVERRULED

Shall we say to the children who have worked all day in the factory, 'Child labor is a local issue and so are your starvation wages; something to be solved or left unsolved by the jurisdictions of 48 states?'

—President Franklin Roosevelt, Message to Congress, 1936

By 1922, successive Supreme Court decisions had dealt the child labor movement a significant defeat. To some however these decisions were a positive development. These laws would have only addressed child labor in certain situations and they would have only done so by indirect means. Realizing that public opinion was still on their side, the NCLC decided to pursue a more direct and aggressive strategy. In a statement, the NCLC argued that “[i]t is not more important to maintain a sacred political tradition than to protect little children exposed to industrial exploitation.”¹ While the Court had prevented Congress from attacking the problem through the use of its interstate commerce and taxing powers, it left open the possibility of a constitutional amendment. The NCLC and other reformers fought for an amendment to the Constitution that would give Congress the explicit right to regulate child labor throughout the nation.² In the end, the change they hoped for would come through different means.

The Fight for a Child Labor Amendment

Within four days of the Court's Drexel Furniture decision, on May 15, 1922, bills to amend the Constitution were introduced in the House and Senate with the support of President Warren Harding.³ Congress under the Child Labor Amendment would be given power to

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¹ Trattner, Crusade for the Children, 145.
² Ibid.
³ Ibid.
regulate the labor of persons under 18. The Amendment itself did not outlaw the employment of anyone, but it simply gave Congress the ability to regulate the working conditions of children under 18 through future legislation. While Congress failed to act during that session, support for the Amendment was widespread and diverse. A 1923 survey by the NCLC found that 125 newspapers were in favor a Child Labor Amendment to the Constitution, five did not object strongly to it, and only nine were opposed.

In 1923, after being reintroduced in both the House and Senate, the bill passed with widespread support. The battle then moved to the States where the support of 36 States would be required in order for the Constitution to be amended. By 1924, the quick ratification by Arkansas and favorable opinions from the Republican, Democratic, and Progressive presidential candidates continued the optimism regarding the Amendment's prospects for passage.

Opposition to the Amendment however quickly developed. Once again, David Clark would be involved in leading the forces. Clark, despite having no ties to agriculture, set up the Farmers' States Rights League. This served as a front group to oppose the Amendment over concerns regarding the impact on agricultural labor. The group, while backed by cotton mill owners, gave the appearance of being a grassroots farming organization. As Clark admitted, “[w]e fought the devil with fire ... Had the literature gone out under the name of the Southern

4. Ibid., 163.


7. Ibid., 169.

8. Ibid.


10. Ibid., 41.
Textile Bulletin they would have killed its effect by attacking the author when they could not answer the literature ... [W]e turned an almost hapless situation into an overwhelming victory.”

Clark barnstormed the country and expanded his advocacy beyond his home State of North Carolina to get more States to oppose the Amendment. He distributed 50,000 pieces of mail in rural areas to rally anti-Amendment forces.

Like David Clark, The National Association of Manufacturers again extolled the virtues of work for children in denouncing the Amendment and worked to secure its defeat. NAM spread rags to riches tales of men who had worked their way up from toiling as a child. The president of the group wore as a badge of honor the fact his 14-year-old son toiled in a tobacco field for $3.50 a week.

The fact the Amendment gave Congress the power to regulate “labor” versus just “employment” and contained an 18 versus 16 year age threshold increased the number of attacks the law faced. Herbert Hoover, although a supporter of the law, later claimed in his memoirs that these two additional years were demanded by the “lunatic fringe” of the anti-child labor movement. The Manufacturers’ Record noted that 850,000 soldiers in the Union Army were under 18 years of age and remarked “[i]f they were old enough to fight for their country, they ought to be old enough to regulate the manner of their own employment.” Others brought up the age-old concerns of child idleness—“[i]f the child is not trained to useful work before the age

11. Ibid., 42.
12. Ibid., 46-47.
13. Hindman, Child Labor, 184.
15. Hindman, Child Labor, 187.
of 18, we shall have a nation of paupers and thieves” they believed.\textsuperscript{16}

The use of the term “labor” also opened up new possibilities for regulation. Opponents of the Amendment argued that children's household chores could be subject to Congressional oversight.\textsuperscript{17} Additionally, the biggest area of child labor was farming. Hence the views of Clark's farming-related front group would have been seen as particularly influential. While farm work heretofore had largely escaped inclusion in the child labor discussion, the Amendment opened this up to regulation.

Farm labor always held a special place in America and harkened back to the Jeffersonian ideal. In 1843, the French mathematician Joseph Fourier remarked that “[n]ature must have calculated upon the extended employment of children in the vegetable kingdom, for she created in great abundance little fruits, vegetables and shrubbery, which should occupy the child, not the grown man. The greater portion of our gardens are composed of little plants, which are adapted to the labor of children.”\textsuperscript{18} In 1906, when Senator Beveridge lashed out against mill conditions and the plight of the “little merchants” he differentiated this work from farm-work, because that work took place under the clear skies.\textsuperscript{19} In 1920, President Wilson's Industrial Conference condemned child labor generally, but noted “[t]he employment of children in agriculture may, if wisely supervised, develop physique and lay a good foundation for more formal education in the country school.”\textsuperscript{20} By 1921, only Arkansas treated farm labor the same as any other type of

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employment.\textsuperscript{21} Including the potential for the regulation of farm labor in the bill therefore was seen as a radical concept for 1924, as was the 18-year age limit.

While many, such as David Clark and NAM, opposed the Child Labor Amendment based on these concerns, or because of their opposition to child labor laws in general, others believed there were better ways to deal with the problem. As had been the case with the two previous attempts at a federal law, some reformers believed working through the States was a better approach. Felix Frankfurter for example suggested that women, who as of 1920 could vote, might make passage of State laws a better plan. He believed that the fact that progress in the States had been slow in the past need not be the case now that women could vote. He asked “[w]hy should not the League of Women Voters in every State make it the order of the day to put a wise child labor law upon the statute books of every State?”\textsuperscript{22} Likewise, Columbia University President Nicholas Murray Butler opposed the Amendment believing child labor was already on the road to extinction and its demise should be secured through local means. He believed child labor “will wholly disappear if constant appeal is made to local opinion and local sentiment where child labor still exists as a result of either greed or indifference. There is no possible excuse for this amendment ... when that which it aims to accomplish can be done far more efficiently by other truly American methods.”\textsuperscript{23}

The concerns of Butler alluded to rumors that the Child Labor Amendment was a communist-inspired plot.\textsuperscript{24} The American Bar Association came out against the Amendment

\begin{itemize}
\item \textsuperscript{22} Garrett, “The Defeat of the Child Labor Amendment,” 19.
\item \textsuperscript{23} Ibid., 69.
\item \textsuperscript{24} Trattner, Crusade for the Children, 170-171.
\end{itemize}
calling it a “communistic attempt to nationalize children.” Fear spread that a massive federal bureaucracy would be required to enforce the law. The hierarchy of the Catholic Church generally opposed it. They believed the increased role of the federal government interfered with the right of parents to raise their children and could lead to future federal interference with the Catholic schools. In some cases, the backlash against Prohibition and to a lesser extent women’s suffrage contributed to the opposition to another constitutional Amendment. Echoing this view, one father of five remarked, “[t]hey have taken our women away from us by constitutional amendment; they have taken our liquor away from us; and now they want to take away our children.” People found any number of reasons to oppose the Amendment. As one newspaper put it, “the opposition to the child labor proposal is ... almost always an opposition to something else.”

The widespread opposition overwhelmed supporters of the Amendment. Opponents were able to focus their intensity in the State ratification battles. As one might expect, due to the concerns raised by manufacturing interests, Southern States such as Louisiana, North Carolina, and Georgia swiftly rejected the Child Labor Amendment. It failed in a referendum in largely Catholic Massachusetts by a margin of three to one. Once people focused on its specific terms, they became less supportive of the concept than they had been originally. By the end of the 1920's, the Amendment had failed to gain ratification. This left the NCLC with little to show for

27. Ibid., 171.
their efforts during the decade.\textsuperscript{30}

By 1930, 2,145,919 children under 16 were gainfully employed.\textsuperscript{31} The percentage of children under 16 employed had dropped from 8.5 percent\textsuperscript{32} to 5 percent between 1920 and 1930.\textsuperscript{33} On the legal front, rather than making gains, the NCLC struggled to maintain the State laws that had passed. According to author Stephen B. Wood, while 15 years earlier the reform movement had been “undertaken with enthusiasm,” the movement had now become a “workaday social objective.”\textsuperscript{34} He found it was “routinely applauded by public figures but rarely supported energetically.”\textsuperscript{35} Other than a few minor laws in the most unregulated States, the NCLC accomplished enactment of no new State laws of significance. Progressive States were becoming less inclined to add to their child labor restrictions for fear of putting themselves at further competitive disadvantage.\textsuperscript{36} As a result, at the end of the decade there may have been a small increase in child labor.\textsuperscript{37}

Where there was some movement against child labor, it occurred through the workers’ compensation system. The patchwork workers' compensation laws which spread through the 1910's had reached 41 States by 1920. Throughout the decade, while only three States added

\begin{flushleft}
\begin{enumerate}
\item Ibid., 180.
\item Lindenmeyer, \textit{A Right to Childhood}, 137.
\item Leuchtenburg, \textit{The Supreme Court Reborn}, 94.
\item Ibid.
\item Zelizer, \textit{Pricing the Priceless Child}, 64.
\item Trattner, \textit{Crusade for the Children}, 180.
\end{enumerate}
\end{flushleft}
these protections for workers, most States strengthened the laws they had on the books. Some States, like Wisconsin, had laws that made the employer liable by default if an under-aged worker was injured while on the job. This caused insurance companies to take the problem of child labor seriously. They published literature warning policy holders that their workman's compensation insurance would be cancelled if they violated the State's child labor laws. In many cases, these schemes tied the premiums companies paid to the frequency of accidents at their establishments. This economic incentive helped eliminate the employment of accident-prone children and led some firms to voluntarily choose to stop employing youngsters.

The 1920’s and the Great Depression

It should not be surprising that it was the private insurance system and not government intervention that had the biggest role to play during the decade of the 1920’s is when it came to child labor. The decade was a booming time for business and the government largely stayed out of its way. Although the Republican Presidents Harding, Coolidge, and Hoover were all in favor of federal child labor laws, they were generally disinclined to involve government in the affairs of business. The Supreme Court during the decade was in tune with these views as well. The Court continued it laissez-faire attitude towards regulation at the federal level. In 1923, in Adkins vs. Children's Hospital, the Court found the District of Columbia minimum wage law for women to be unconstitutional. It found that society had changed so much since the 1908 Muller decision, which upheld a minimum wage law in Oregon, that these protections for women were


40. Ibid., 210.

By the end of the 1920's, the boom years that Harding, Coolidge, and Hoover oversaw gave way to an economic disaster. In 1932, in the midst of the Great Depression, President Hoover would be swept out of office in favor of the progressive Democrat Franklin D. Roosevelt. As New York's Governor, Roosevelt supported making child labor laws as strict as possible, even if it caused industry to leave the State. He was also a supporter of the Child Labor Amendment. He urged holdout States to ratify it and by 1933 it had been passed by 20 States but still needed 16 more. While the NCLC had years earlier suspected the Amendment was dead, the economic conditions in the country caused a renewed hope that it could gain approval in the required number of States.

The Great Depression caused the primary motivation for eliminating child labor to be a desire to increase the number of employed adults. By 1933, pressure on retailers to cut prices led many manufacturers to seek cheaper sources of labor. This led to an expansion of sweatshop conditions throughout the industrial Northeast. Conditions that were previously observed in only the South could now be seen in the North. Roosevelt sought to improve the economic state of the nation by getting more adults back to work. A reduction in the unemployment rate could be achieved by removing children from the workforce. This, like the Depression-era movement to reduce working hours, would spread more jobs around. As child labor shifted from a social to an economic issue, organized labor rather then reform groups was now seen as the dominant

42. Ibid., 115.
44. Trattner, *Crusade for the Children*, 190.
45. Ibid., 185.
The National Industrial Recovery Act

The desires of Roosevelt to implement an economic recovery program and the interests of child labor reformers to curtail the practice of child labor would eventually come together in the passage of the National Industrial Recovery Act (NRA). The NRA sought to improve the economic conditions of the nation by regulating competition through a series of industry codes. The first code the NRA proposed, one for the cotton industry, initially contained no reference at all to child labor. In response to protest from the NCLC and others, a clause was added that outlawed the employment of children under 16 in cotton mills. Children between 14 and 16 could only work up to three hours a day during daylight hours and only when school was not in session. This first code would end up setting the standards for others. From the time the cotton code was introduced in July 1933 to December 1933, over 100,000 children would be put out of work. According to author Walter Trattner, this was the first time in the history of the country that child labor declined sharply during a period of improving economic conditions. In January 1934 President Franklin Roosevelt announced, “child labor has been abolished.” In his first Fireside Chat, highlighting how government could solve the “problem of the twentieth man,” he remarked that: “Child labor was an old evil. But no employer acting alone was able to wipe it out. If one employer or State tried it, the cost of operation rose so high that it was impossible to

47. Ibid., 202.
48. Trattner, Crusade for the Children, 190.
49. Ibid., 191.
50. Ibid., 192.
51. Ibid.
52. Mofford, Child Labor in America, 13.
compete with employers or States. The moment the Recovery Act was passed, this monstrous thing went out in a flash.”

Despite the impact these codes had, it was well understood that NRA was meant to be a temporary measure and it would go away once the economic emergency had passed. For a permanent resolution to the child labor problem, the constitutional Amendment required passage. Sixteen of the 28 remaining States that had not yet voted on the issue would have to support the measure in order for it to become law. Not knowing which States were most likely to pass it, the NCLC spread its efforts over all 28 States. The NCLC however found that its fight in support of a child labor provision in the NRA code for the newspaper industry had alienated it from many newspaper publishers who had previously supported its efforts. Most ominously, in 1935, the American Bar Association (ABA) came out with a new argument against the Child Labor Amendment. The ABA believed that since the Amendment had been before the States for 10 years, the remaining States had failed to consider it within a “reasonable” time and its passage was no longer possible.

Public support though for curtailing child labor was strong. A May 1936 poll found that 61 percent of the country supported the Child Labor Amendment. Improving economic conditions in 1936 led to an increase in the number of children working. A Department of Labor report covering 10 States and 98 cities showed a 150 percent increase in the number of work

55. Ibid., 198.
56. Ibid., 199.
57. Ibid., 201.
permits issued for 14 and 15 year olds from 1935 to 1936.58 In January 1937, President Roosevelt sent letters to the leaders of the 19 States that had not yet taken action on ratification urging them to support the Amendment.59 The movement had been slowed as a result of the NRA and Roosevelt's own assertion that it had ended child labor.60 However, Roosevelt stated that the Amendment was still “the obvious way” to deal with the problem of child labor.61 Relying on the States for action was “a proven impossibility.”62 Herbert Hoover echoed the sentiments of Roosevelt and issued a rare statement in favor of passage of the Child Labor Amendment.63

While the progressive forces led by Roosevelt had taken over the executive and judicial branches of government, the judicial branch was still stuck in the previous era. In 1935, another legal blow to efforts to curtail child labor was struck by the Supreme Court in the *Schechter Poultry vs. United States*. In this case, the Court ruled that the NRA codes were invalid.

In the wake of the decision, work permits issued to 14 and 15 year olds rose by 150 percent in 10 States and Washington, DC from 1935 to 1936.64 Writer Rose C. Feld remarked that now “[c]hildren have found work while their elders have gone to the bread lines or relief agencies.”65 The children that had just a short time earlier been displaced by the passage of the


60. Felt, *Hostages of Fortune*, 213.


62. Ibid., 346.

63. Trattner, *Crusade for the Children*, 201.

64. Ibid., 200.

NRA, could now return to their jobs. This is not a conclusion that all historians agree with. Historian James Hodges maintains that “[c]hild labor was not a problem that New Deal labor policy had to attack” since children had already been driven from the mills. Writing in their 1937 book, “Child Workers in America,” authors Katharine DuPre Lumpkin and Dorothy Wolff Douglass claimed the impact of the NRA was “overrated to the point of absurdity.” They believed the NRA only impacted a small number of children and only a federal Child Labor statute with effective enforcement would solve the problem.

Scholars though seem to agree that the NRA codes signaled an end to widespread child labor. Elizabeth Davidson summarized the conventional view:

With the establishment of the NRA codes in 1933, most of the employment of children under sixteen was stopped. After the codes were invalidated, some manufacturers re-employed workers under sixteen, but the indicators seem to be that many of them retained the code age standards even when state laws did not require it.

Even Republican Herbert Hoover, who was of course not a fan of New Deal programs generally, believed that codes had reduced overall child labor by 25 percent and eliminated sweatshops in certain trades. One New York charity reported a decrease in calls to pay “scholarships” to keep kids from working as a result of the NRA. This combined with the poor economic conditions caused more children to stay in school.

Court Packing

While the NRA was only meant to be a temporary measure, its elimination by the

67. Ibid.
68. Hindman, Child Labor, Child Labor, 84.
69. Ibid.
70. Felt, Hostages of Fortune, 74.
71. Ibid.
Supreme Court in the *Schechter* case outraged President Roosevelt who declared that “[w]e have been relegated to the horse-and-buggy definition of interstate commerce.”72 One frustrated Kentucky attorney wrote Roosevelt to say: “I should think that you and the Congress were as tired of the Supreme Court stunts as the people are.”73 Some had been growing tired of the Court since its *Dagenhart* decision. As such, Roosevelt's Attorney General Homer Cummings believed that if Justice Holmes’ dissent in *Dagenhart* had became the law of the land, the subsequent issues Roosevelt had with the Court wouldn't have occurred.74

Most reaction to Roosevelt's remarks was negative. Taking on the Court in such a manner was unheard of.75 Roosevelt as a result held off on his initial inclinations to directly square off against it. Instead he gave the Justices more opportunities to issue even more unpopular decisions.76 He decided to bring more Commerce Clause cases to the Court in order to give them a chance to change their views.77 If they didn't, his advisors believed this would hurt the Court in the eyes of the public, thereby increasing the likelihood he would have support for direct action against the Court.78 Additionally, he used other means to put in place his New Deal reforms. He had a small victory in the passage of the Walsh-Healey Act which applied the


74. Leuchtenburg, *The Supreme Court Reborn*, 123.

75. Ibid., 90.

76. Ibid., 91.

77. Ibid., 92.

invalidated NRA wage, hour, and child labor provision to government contracts.79

To meet the wider concerns over the Court, Congress introduced approximately 50 bills and joint resolutions designed to weaken the ability of the Court to interfere with the other two branches of government.80 Roosevelt himself floated trial balloons concerning a potential constitutional amendment to strip the Court of its ability to declare laws passed by Congress unconstitutional.81 A poll on this question in the fall of 1935 found that 31 percent of the public supported such a plan, 53 percent opposed, and 16 percent had no opinion.82 In addition to public opinion, the President was also dissuaded from pursuing such an approach by the history of the Child Labor Amendment. By this time the struggle for that Amendment had gone on for over a decade with little likelihood of ever being ratified; Roosevelt needed quick action.83 Additionally, the Amendment would affirm the notion that the Constitution had a fixed meaning, a notion that Roosevelt disavowed.84

Roosevelt instead came up with an alternate plan. In the wake of his landslide 1936 election victory, Roosevelt finalized his scheme. He called for “a constant infusion of new blood in the courts”85 noting that “[w]e have, therefore, reached a point as a Nation where we must take action to save the Constitution from the Court and the Court from itself ... In our courts we want

80. Ibid., 328.
81. Leuchtenburg, The Supreme Court Reborn, 94.
82. Ibid.
83. Ibid., 110.
84. Moreno, The American State from the Civil War to the New Deal, 279.
a government of laws and not of men."  

The plan he laid out allowed the President to appoint a new Justice to the Court for each member over the age of 70 who had been on the bench for 10 years or more. Up to six additional Justices could be appointed. This, Roosevelt claimed, would relieve some of the burden on the elderly overworked Justices.

According to author William E. Leuchtenburg, the “Court Packing” episode created a bigger controversy than any episode in the century except perhaps the League of Nations. The debate over the issue split families and flooded the mailboxes of members of Congress.

While in 1937 the Court Packing plan passed the House easily, its passage in the Senate was far more problematic. The debate was highlighted by the theatrical unveiling by Senator Burton Wheeler of a letter authored by Chief Justice Charles Evans Hughes. In the letter, the Chief Justice denied that the Court was in need of the additional Justices and claimed the enlargement would only make the Court’s job more difficult since there would be more Justices involved in the deliberations.

In the wake of the threat to appoint additional Justices, the Supreme Court surprisingly upheld multiple progressive laws by five-to-four margins. The Court upheld a Washington State minimum wage law despite the fact it had struck down a similar law in New York less than a year before. It also found two of Roosevelt's programs constitutional by upholding the National

86. Ibid., 363.
87. For more on President Roosevelt’s Court Packing Scheme see: Brandi Marie Keith, “Old Court, New Deal: Roosevelt’s Supreme Blunder” (master’s thesis, Georgetown University, 2009).
88. Leuchtenburg, The Supreme Court Reborn, 134.
89. Ibid.
90. Ibid.
91. Ibid., 140.
Labor Relations Act in the *Wagner* decision and the Social Security Act.\(^{92}\) Whether these decisions were affected by Roosevelt's scheme is unclear, but they gave Roosevelt the results he wanted.\(^ {93}\) The Court Packing plan lost any chance of passage upon the death of Senate Majority Leader Joseph Robinson. While Robinson had been close to marshaling the needed votes in the Senate, the commitments to him dissolved at his death.\(^ {94}\) Despite this, the Court as political scientist Edward S. Corwin wrote, “discarded the idea that the laissez-faire, non-interventionist conception of governmental function offers a feasible approach to the problem of adapting the Constitution to the needs of the Twentieth Century.”\(^ {95}\)

This shift in the opinions of the Court caused many to believe there was an opening for another attempt at a federal child labor law. While the NCLC believed the constitutional Amendment would have been the preferred solution, they saw its passage as increasingly unlikely since additional States voted against the Amendment despite widespread public support. By 1937, eight more States were needed to ratify the Amendment.\(^ {96}\) Therefore, based on this ratification shortfall and the recent change in view by the Supreme Court, it was decided the time was right to attempt instead to pass another law under the Commerce Clause.\(^ {97}\)

The prospect was heightened by the retirement announcement of Justice Van Devanter, one of the two remaining *Dagenhart* majority Justices.\(^ {98}\) The prospects of the Court upholding a

\(^{92}\) Leuchtenburg, *The Supreme Court Reborn*, 142-143.

\(^{93}\) Ibid., 143.

\(^{94}\) Ibid., 152.

\(^{95}\) Ibid., 163.


\(^{98}\) Karis, “Congressional Behavior at Constitutional Frontiers, from 1906, the Beveridge Child-
progressive law were further enhanced by the retirement of the conservative Justice Sutherland. These two moves allowed Roosevelt to appoint Hugo Black and Stanley Reed, who were New Deal supporters, to the Court.99

The Court Upholds A Federal Child Labor Law

While multiple bills were being drafted that would have limited child labor, President Roosevelt sought to combine child labor reform with a bill to establish a minimum wage and maximum working hours. Although the NCLC favored a separate bill, they agreed to Roosevelt's plan to group the measures. As one lawmaker remarked, Roosevelt wanted the popular child labor provisions included in the bill so he could say “[w]hen you vote against this bill you are voting against the prohibition of child labor.”100 Roosevelt decided that now was time to challenge the Dagenhart decision. Assistant Attorney General Robert Johnson hoped the Court would “remove this blemish from our judicial history.”101 The new bill however was structured in such a way to allow the Court to potentially uphold the law without having to overrule Dagenhart.102 The fact the bill contained general labor standards, which clearly affected interstate commerce, made it possible that the Court could reach a different conclusion in this case without expressly overruling Dagenhart.103

The Fair Labor Standards Act (FLSA) included child labor limits modeled after the Keating-Owen Act that had been struck down in Dagenhart. It forbade the shipment of goods in

99. Ibid., 399.

100. Trattner, Crusade for the Children, 203.


102. Ibid., 387.

103. Ibid.
interstate commerce when child labor had been employed in their production within 30 days prior to shipment. It defined child labor based on an age of 16 with the exception of hazardous occupations. These occupations had a limit of 18 years of age. This was an increase over the first and second child labor laws that both contained limits of 14 years of age generally and 16 years of age for hazardous work (see Chapters Three and Four). At the time the FLSA passed, only 11 States had a 16-year age limit. Additionally, the law forbade children under 16 from engaging in industrial homework as well.

The impact of the FLSA was not as widespread as the Child Labor Amendment would have been. As of 1938, of the 850,000 children under 16 who were employed, only around six percent would be affected by the FLSA. The rest labored outside in fields such as agriculture, bowling alleys, delivery and messenger services that were outside the reach of the law.

By the time the FLSA was passed, child labor had already been on a natural decline. As author Viviana Zelizer points out in her book “Pricing the Priceless Child,” the improving standard of living in the country caused parents to change how they viewed their children. Parents could now afford to send their children to school and no longer face the necessity of sending their children into the workplace. By the first two decades of the twentieth century she finds, there was an expectation that the man would be able to provide for his family without the need to have the wife and children work. Professor Paul Osterman claims that children were also pushed out of the labor market by a new wave of immigrants. This increasing supply

105. Hindman, *Child Labor*, 211.
108. Ibid.
combined with the declining demand for unskilled labor due to technological advances decreased the need to employ children.\textsuperscript{109} Complex machines found a greater role in the workplace. They frequently required greater skills than children could master in order to operate them.\textsuperscript{110}

In 1939, the Supreme Court issued two decisions favorable to the fight against child labor. The Court ruled that the Child Labor Amendment was still open to ratification notwithstanding the length of time that had passed since it was first sent to the States for consideration. Furthermore, the Court ruled that States that had earlier voted against ratification could in fact reverse their decision and support the Amendment. These decisions would not end up having much of an impact and would be overshadowed by the Court's FLSA decision.

In 1941, twenty-three years after the Court struck down the Keating Owen Act in 1918, the Court unanimously found a federal child labor law constitutional by upholding the FLSA in \textit{United States vs. Darby}. The FLSA had been challenged by a Georgia lumber company that objected to the $0.25 minimum wage and overtime pay requirements of the Act.\textsuperscript{111} Chief Justice Harlan Fiske Stone wrote in a unanimous decision that “Hammer vs Dagenhart was a departure from the interpretation of the Commerce Clause before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled.”\textsuperscript{112} The Court now implicitly agreed that the 1918 dissent that Justice Holmes wrote in \textit{Dagenhart} should have been the law of the land. The Court as Felix Frankfurter noted had succumbed to “that impalpable but controlling thing, the general drift of public opinion.”\textsuperscript{113}

\textsuperscript{109} Ibid.

\textsuperscript{110} Rosenberg, \textit{Child Labor in America}, 194.


\textsuperscript{112} Trattner, \textit{Crusade for the Children}, 208.

While the Court was indirectly immune from public opinion, the fact that Justices are appointed by the elected President makes such shifts possible. It supported Roosevelt’s belief that the meaning of the Constitution was not fixed and that constitutional amendments should not be required to address the changing circumstances the country faced. With the decision in *Darby*, the fight for a Child Labor Amendment largely evaporated despite the fact the FLSA covered a small fraction of the children that could have been subject to regulation under such an Amendment.

Despite the relatively limited scope of the FLSA concerning child labor, historian Paul R. Benson Jr. in 1970 noted that the *Darby* decision was “one of the half-dozen most important cases in the whole 180-year history of American constitutional law.”¹¹⁴ The decision defined the bounds of the Commerce Clause and answered the long-contested question of the role of the federal government with regard to child labor. For the child labor movement the *Darby* decision was a monumental victory. Although the scope of the law was limited, it gave the federal government a role in the regulation of child labor that it has since expanded upon and that it continues to exercise to this day.¹¹⁵

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¹¹⁴ Leuchtenburg, *The Supreme Court Reborn*, 224.

¹¹⁵ The Child Labor Amendment is pending ratification by the required 38 states to this day. In 1937 Kansas was the last of 28 states to ratify the Amendment.
CONCLUSION

20 years already—and no one knows how many more are to come—to obtain a constitutional interpretation that will let the Nation regulate the shipment in national commerce of goods sweated from the labor of little children.

—President Franklin Roosevelt, 1937

By the time the Supreme Court issued its decision in *Darby*, a quarter-century had passed since the 1916 signing of the Keating-Owen Act and the proclamation by President Woodrow Wilson that the child laborers were emancipated. Children who would have otherwise been freed by the Act would instead continue to work legally for the two decades following the *Dagenhart* decision. One such working child was Rueben Dagenhart. He though would not be grateful for the Court’s decision, despite the fact it was instigated by his father. At age 23 Rueben Dagenhart was asked what he and his younger brother got out of the lawsuit; he replied:

> We got some automobile rides [and] they bought us both a Coca-Cola. That's what we got out of it ... Look at me! A hundred and five pounds, a grown man and no education. I may be mistaken, but I think the years I put in the cotton mills have stunted my growth. They kept me from getting any schooling. I had to stop school after 3rd grade and now need the education I didn't get.¹

Rueben who by 1924 had a child of his own,² could have seen his offspring labor as a child in a mill before the Court issued its *Darby* decision, as a whole generation of children had done in the intervening years between the *Dagenhart* decision and the passage of the FLSA. In the end, after a generation toiled, the sustained efforts of the child labor reformers had finally defeated David Clark and his belief that the labor of these small children was no business of the federal government.

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¹ Hindman, *Child Labor*, 68.

As we have seen, the path to such a victory was fraught with difficulty. The widespread presence of children in many occupations during the post-Civil War period caused many to believe it was only natural that children would have a place in the workforce. Working children were children not out on the streets begging or otherwise getting into trouble. These youngsters could be seen as getting a leg up on their competition and starting off their lives in a productive way.

Those who opposed the labor of children faced not only legal challenges, but also the practical problem of economic necessity. Telling parents that their child could no long provide income to the family was an impractical prospect for many families in the late nineteenth and early twentieth century. As a result, parents sought to get around what laws existed and cooperated with employers to keep their children employed. In most cases children, preferring work to school, were eager to work and assist in skirting the laws. This lessened the impact that the State laws had when they were not effectively enforced.

The concerns over constitutionality and whether an approach based on federal or State laws was better, delayed the initial move for a federal law. Once federal laws were passed, through what Congress believed was the proper use of its interstate commerce and taxing powers, these laws were struck down by the Supreme Court. In both instances the Court found that the laws overstepped the power that the federal government was given by the Constitution.

In the case of the first federal child labor law (Keating-Owen), it appears that if the Court had upheld the law, it would have expanded the scope of the Commerce Clause beyond the outlines of case precedents. While the clause had been used to prohibit items from entering into interstate commerce, these were items that had an impact directly on the other items in commerce. Unlike the case of outlawing the movement of diseased animals that directly threatened the healthy, the impact of child labor-produced goods was indirect. The fact a child
labor-produced good crossed State lines only put indirect pressure on that State to employ children in order to compete. This is not to say that such a law was beyond the Constitution, but it would have been an expansion of what the previous cases covered. Although *Dagenhart* is frequently portrayed as one of the worst decisions in the history of the Supreme Court, the fact that many prominent politicians including progressives like President Woodrow Wilson believed such a law was unconstitutional, supports the idea that the Court was operating within the mainstream for the time period.

The Court’s ruling in *Drexel Furniture vs. Bailey* similarly found the federal government had overstepped its authority. In an attempt to reverse *Dagenhart*, Congress tried to utilize its taxing power to achieve the same ends through the Child Labor Tax. While this decision, unlike *Dagenhart*, remains valid today, it is tougher to square with Court precedents at the time. The fact that the Court had previously upheld a law taxing colored margarine in a manner designed to end the sales of the product, makes the overturning of the Child Labor Tax difficult to fathom, as was widely acknowledged. As a result, Chief Taft struggled to make such a clear distinction in his decision in *Drexel Furniture*. This is even more ironic since as President, Taft signed into law a similar tax on phosphorus matches that was designed to eliminate their production. The fact that the decision in *Drexel Furniture* was reached by an eight-to-one majority, which included liberal justices Holmes and Brandeis, however makes the outcome seem a less controversial.

Regardless of the motivations behind the rulings, without question, each of them clearly caused more children to be in the workforce than would have been the case if the decisions had been different. However, it is also easy to overstate the impact of the decisions. One cannot say that every child, or even most children, who worked between the initial *Dagenhart* ruling in 1917 and the passage of the FLSA in 1938 would have been removed from the labor force had
the laws been upheld. The law that *Dagenhart* overturned was relatively limited in nature and only impacted children engaged in interstate commerce. This was a relatively small fraction of children since most worked in local activities and agriculture that would have been beyond the scope of the law.

The later Child Labor Tax, unlike the Keating-Owen Act, applied to more children since it was not limited by the constraints of the Commerce Clause in applying to only children engaged in interstate commerce. However, the fact that the Child Labor Tax was only in effect from its passage in 1919 until the Court struck it down in 1922 reduced the impact that the decision had. While child labor increased in many areas in the time period following the decision, it does seems that during the period the law was in place allowed many employers to see that they could thrive without using child laborers.

The impact that the Court decisions had was also dependent on the effectiveness of the enforcement of the federal laws, as well as the extent to which they exceeded the standards under existing State laws. State laws were frequently foiled through the concerted action of parents, children, and employers. The enforcement mechanism that the federal government was going to rely upon was primarily dependent on the cooperation of State authorities in States with existing laws. The States with the best enforcement mechanisms would be unaffected by federal enforcement. This meant that most federal resources were focused on States used to the laxest standards. Enforcement in areas that resisted the passage of State laws was difficult and would have remained challenging if the laws had remained in place. This along with the fact that many States had existing laws that in some manner met or exceeded the federal laws lessened the impact that the Supreme Court decisions had.

The limited historic role of the federal government up through the New Deal had forced the child labor reform efforts to focus on State versus federal laws. Similar arguments over the
proper role of the federal government continued to this day. For instance, the battle over the 2010 enactment of the Patient Protection and Affordable Care Act (ACA) resulted in a Supreme Court decision that dealt with the constitutionality of federal action under both the taxing power and the Commerce Clause. In his majority opinion, Chief Justice John Roberts cited *Drexel Furniture vs. Bailey* in finding the law to be constitutional under the taxing power based on the test that Chief Justice Taft laid out, but found the ACA to be an unconstitutional use of the Commerce power.3

Like the later fights that have occurred over the constitutionality of numerous federal actions, the battle for a federal child labor law drew the child labor movement into a debate over States’ rights, as Edgar Murphy of the NCLC feared. State laws, particularly in the South, could be put forth by reformers without facing arguments that the laws encroached upon States’ rights. In the case of federal laws, such arguments frequently obscured the underlying concerns over the working children. This did in some sense sidetrack the movement into arguments over constitutionality, which would have been avoided if the movement had only focused on State laws. Although it may have been theoretically useful to avoid this argument, it seems unlikely that uniform laws across the country could have been achieved by concentrating only at the State level.

As the story of the “problem of the twentieth man” illustrates, individual States had economic incentives to have laxer child labor laws in order to gain a competitive advantage. This of course assumes there was an economic advantage in the employment of children. While this remains unclear, it seems that at least in the case of the mills, David Clark believed such labor was economically advantageous to North Carolina. This though is contradicted by the fact

that the implementation of the Child Labor Tax caused many owners to see they do without child labor and they therefore gave up employing children even after the law was overturned.

The fact that the later Child Labor Amendment failed to gain ratification in the required number of States also seems to indicate that the public, while concerned about child labor, wanted it addressed in a measured way. The citizenry was not so outraged by the adverse child labor decisions of the Court that they were willing to grant vast new powers to Congress to regulate the employment of children under 18. This seems to support the idea that the decisions of the Court, while important, were somewhat limited in the impact that they had.

By 1941 when the Supreme Court overturned *Dagenhart* and upheld a federal child labor law for the first time, the social and legal landscapes had changed drastically from the post-Civil War period. The Justices that had decided *Dagenhart* were all no longer on the Court. The idea that the father should be responsible for providing support for the family had become the norm. As the ability to support a family on one income became more widespread, families could now afford to send their children to school. Technological advances and immigration as an alternative labor source also lessened the need for children at work.

The fact that these changes occurred made the shift that took place on the Supreme Court less impactful. Yet the *Darby* decision still had an impact and prevented many children from being allowed to work. It took away the discretion from parents to send their offspring into the workplace. As we have seen, one such parent who lost that ability was Roland Dagenhart. In a 1924 interview his son, Rueben spoke of his desires to prevent his father from allowing his younger sister to work in the mill as he had. “I ain’t going to let them put my kid sister in the mill, like he’s thinking of doing! ... I bet I stop that!”

While the Court’s ruling was too late for Rueben and his siblings (and for Camella Teoli and hundreds of thousands of other child

laborers), Rueben would end up getting his wish when *Dagenhart* was overturned. With the overruling of the case that bears his name in 1941, the federal government would—finally—assume the responsibility for keeping small children away from work.
BIBLIOGRAPHY


Consumers’ League of Cleveland Ohio. “Report from Child Labor Committee of the


Hearings on the Strike at Lawrence, Massachusetts, House Document No. 671, 62nd Cong., March 2, 1912.


Nebraska Child Labor Committee. Lecture, Annual Meeting of the National Child Labor
Committee, Boston, January 13-16, 1910.


Van Der Vaart, Harriet. “Children in the Glass Works of Illinois.” in Child Labor and the


