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Child Labor Amendment

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THE CHILD LABOR AMENDMENT

BY EDWARD F. WAITE*

THE proposal of an amendment to the federal constitution should be a matter of keen interest to every intelligent American. While only the few who are members of state legislatures have direct responsibility in the matter of adoption or rejection, public opinion will and ought to speak the decisive word. The evils of a written law which does not voice the real will of the people are raised to the *n*th power when that law is basic, national and paramount. One need not demand that a legislator shall be a mere mouthpiece for a majority of his constituents, nor abate in any wise one's fealty to sound principles of representative government, in order to expect the lawmaker to be guided in large measure by what he conceives to be the settled judgment of those whom he represents not as a mere agent but as a trustee. As a unit in the mass whose reasoned conclusions, rather than their mere preconceptions and casual impressions, are entitled to be recognized as public opinion, the writer has felt in the present instance a rather urgent duty to inform himself. Having reached conclusions, he thinks he has a duty to avow them. It is only because, for his own satisfaction, he has studied the subject more than most people, even lawyers, are likely to take the time to do, that he presumes to commit his views to the pages of a law journal. He must disclaim at the outset the authority of an original student either of social and industrial conditions of national scope, or of questions of federal constitutional law. If this discussion has any value it will be simply as a reflection of considerations that have had weight with one who has honestly sought to look with an open mind upon both sides of a most important issue, solemnly submitted by Congress to the states, and, in a real though not a literal sense, to the

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people of the states. The reader, therefore, must not expect a brief for or against the amendment; rather, an attempt to analyze the questions involved in the interest of clear thinking, and a review of what are conceived to be the determinative facts and the reasonable deductions from them.

In March, 1924, the House Committee on the Judiciary, to which had been referred sundry resolutions "proposing" (in the language of the report)[1] "an amendment to the constitution which would give to Congress power to regulate and prohibit child labor," recommended the following amendment:

"ARTICLE .....

"Section 1. The Congress shall have power to limit, regulate and prohibit the labor of persons under eighteen years of age.

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

In April the Senate Committee on the Judiciary,[a] reporting upon a resolution "proposing an amendment to the constitution of the United States conferring power on the Congress to legislate in respect of child labor," recommended the amendment in the same form, in which form it afterwards passed both Houses by large majorities. We may therefore continue to style the amendment, as it was styled in the congressional reports and debates, "the Child Labor Amendment." To speak of it, as has been done in controversial discussions, as a "fraudulent amendment," a "so-called Child Labor Amendment," or a "Labor Amendment," is simply a way of asserting that its effect would be something other than to enable Congress to regulate and prohibit child labor.

There can be no useful result of a discussion of the subject unless there is at the outset a common understanding of the term "child labor." The term has been in use for many years, and until the pending controversy there has been no question about its meaning. By usage it has come to have a restricted signification,—a very common fact in the evolution of language. It does not mean and never has meant the mere work of children at home or elsewhere, work suitable to the age and strength of the child, under safe and wholesome surroundings; it does not mean and never has meant—as has been strangely claimed in the current local debates —study in school. It is such labor of children as deprives them

[1]H. R. Report No. 395, 68th Congress, 1st Sess.
[a]Senate Committee Report, 68th Cong., 1st Sess. No. —, p. 1.

of a fair start in life, in terms of health, play and education, and of suitable work under home or school auspices or supervision.[2] Child labor means and has always meant since the day of Lord Shaftesbury the gainful labor of children at unfit ages, for unreasonable hours or under unwholesome conditions. This is plainly the sense in which the term is used in the titles of the federal acts of 1916 and 1918. That child labor thus understood is a social injustice, a political menace, and in the long run an industrial handicap no longer admits of argument. That within proper limits it presents a suitable and indeed an exigent field for legislative control is equally well settled in the United States and elsewhere. Practically all the states and most of the civilized countries of the world now have child labor laws. The legislative process necessarily involves the selection of the age-groups to which the law shall apply, and the proscribing of conditions deemed to be harmful, including occupations, hours and other relevant details. Legislation in this field began in the United States about the middle of the last century. Most of the state laws have been enacted since 1895, and many of them in the face of persistent opposition. As social and industrial conditions have grown more complex and public opinion has become more sensitive and enlightened, the reform has spread and required standards have been raised.[3]

The need for federal legislation was first suggested in Congress in 1906, when Senators Lodge and Beveridge and Representative Herbert Parsons introduced bills forbidding interstate carriers to transport the products of any factory or mine that employed or permitted the labor of children under fourteen years of age. Senator (now United States Circuit Judge) Kenyon repeatedly introduced a bill of like import. Finally the Keating-Owen bill was passed in 1916 and went into effect September 1, 1917. This was accomplished after a long and hard fight with the powerful business interests which are active in opposing the pending amendment. The bill made it a misdemeanor to put into interstate commerce for shipment the product of any mine or quarry

[2]Fuller, Child Labor and the Constitution 22. Mr. Fuller is an exceptionally sane, keen and well informed student of the subject. His book, published in 1923, before the pending amendment was framed, and therefore before the controversial stage of the discussion became acute, is commended to all who seek information from an authoritative source.

[3]All the states now have, in some form, this type of legislation; but only eighteen have standards practically equal to those adopted in the federal acts of 1916 and 1918. Thirteen of these are reported as in advance of the federal standards.

where children under sixteen were employed, or the product of any mill, cannery, workshop, factory or manufacturing establishment in which children under fourteen were employed, or where children between fourteen and sixteen worked more than eight hours a day or between 7:00 o'clock A. M. and 7:00 P. M. The effect was to fix minimum standards for the nation which the states might exceed but below which they might not fall. This law was in operation nine months, when it was declared unconstitutional by the United States Supreme Court in a five-to-four decision, Justices Holmes, McKenna, Brandeis and Clarke dissenting.[4] The gist of the majority opinion was stated as follows by Charles E. Hughes in the course of the wide-spread public discussion which followed the decision:

"The fundamental proposition thus established is that the power over interstate commerce is not an absolute power of prohibition but only one of regulation, and that the prior decisions in which prohibitory rules had been sustained" (e. g., the lottery act, the pure food and drug act, the "white slave traffic" act, the Mann act, the act giving power to Congress over the transportation of intoxicating liquors) "rested upon the character of the particular subjects there involved. It was held that the authority over interstate commerce was to regulate such commerce and not to give Congress the power to control the States in the exercise of their police power over local trade and manufacture."

So convinced was Congress that federal control of child labor was a public necessity that another attempt was made at once. Senator Pomerene sponsored a measure designed to reach the evil under a different power of the national government. His bill adopted the standards of the earlier act and undertook to enforce them by a scheme of taxation. A law to this effect was passed within six months after the *Dagenhart* decision and was in operation three years. It was in turn declared unconstitutional in May, 1922, Mr. Justice Clarke dissenting.[5] The court held that it was an abuse of the federal taxing power to use it "to stop the employment of children within the age limits prescribed," which, in the court's view, was the real purpose and effect of the act under consideration.

The two decisions made it evident that federal control; which practically the whole country had come to regard as desirable, could

[4]Hammer v. Dagenhart, (1918) 247 U. S. 251, 62 L. Ed. 1101, 38 S. C. R. 529.

[5]Bailey v. Drexel Furniture Co., (1922) 259 U. S. 20, 66 L. Ed. 817, 42 S. C. R. 449.

be accomplished only by a constitutional amendment granting to Congress new and appropriate power. Such amendments were soon proposed, and the subject was before Congress in various forms for more than a year before the present proposal was finally submitted to the states.

It is therefore apparent, notwithstanding what appears to be a wide-spread notion to the contrary, that federal regulation of child labor is far from being a new idea. If there be any question here it is not whether it should be tried out, but whether it should be permanently abandoned. To answer the latter question it is appropriate to consider whether the policy proved salutary while in operation; if so, whether under changed or changing conditions its resumption is now desirable in itself; whether, if still desirable in itself, it is worth an amendment to the constitution, by which alone it can be accomplished. It is not until these points have been determined in the affirmative that we come to the merits of the amendment in the form now proposed. The questions cannot be intelligently answered without looking carefully into the facts. This does not mean that every inquirer must go to the ultimate sources of information. Fortunately there is available a mass of summarized and reliable material. The Children's Bureau of the United States Department of Labor, established upon the urgent recommendation of President Roosevelt as an investigating agency, has been in active operation for more than a decade, and has prepared and published many useful reports embracing not only general conditions involving child labor, but a considerable number of selected industries and localities.[6] Not only do these publications have the value and authority as evidence which usually attaches to official reports, but more. The Bureau has had as its directors two of the ablest and sanest of American women, Julia Lathrop and Grace Abbott; and from considerable acquaintance with its work I accept its statements of fact as based upon thoroughly scientific data, gathered and interpreted with more than ordinary intelligence and good faith. In seeking answers to the questions of fact above suggested I have relied mainly upon this source, and assure the reader that where book and page is not referred to in our discussion it can be supplied in every instance.

Was federal regulation a good thing in 1917-22? The answer

[6]For a list, see Child Labor in the United States, Bureau Publication No. 114.

must be yes. The act of 1916 was administered through the inspectors of the Children's Bureau and that of 1918 through agents of the Internal Revenue Division of the Treasury Department. The expense was less than $150,000 per year.[7] There was harmonious co-operation between federal and state officials, with generally good results upon the industrial status of children, effort being concentrated chiefly upon states where conditions were most unfavorable. There was never more than a casual federal inspection in Minnesota, the reason being that our standards are, with inconsequential exceptions, equal or superior to the federal minima. For the administration of the 1916 act there were seventeen traveling representatives of the Children's Bureau. Probably there would have been more if the appropriation had been larger, but it is tolerably certain that in no event would there have been "an army of inspectors." Expense was saved by making friendly working arrangements with state labor departments. The number employed by the Treasury Department under the later act is not before me, but it could not have been large. That neither group was a meddlesome crew is attested by a resolution of the Association of Governmental Labor Officials of the United States and Canada, in convention at Richmond, Va., May 4, 1923, calling upon Congress to submit a child labor amendment.[8] The Association was chiefly composed of officials of state labor departments.

"From the experience gained during the years the first and second federal child labor laws were in effect the value of federal legislation in reducing the evils of child labor is known. Federal legislation did not discourage state initiative, nor interfere with the enforcement of state laws, nor discourage state effort in behalf of the children of the state. On the contrary, it stimulated the states which had standards lower than those set up by the federal laws to make the protection provided by the state laws equal to that provided by the federal laws, and for states which had as high or higher standards it made further progress easier by eliminating the unfair competition of low-standard states."[9]

[7]Annual Report, Children's Bureau, 1924, p. 8.

[8]Research Information on Essential Aspects of the Child Labor Amendment; issued by the Federal Council of the Churches of Christ in America, p. 13. The same pamphlet quotes interesting testimonials from the State labor commissioners and factory inspectors of Arkansas, Louisiana, South Carolina, Tennessee, Texas, Rhode Island and Maine. The state factory inspector of South Carolina said: "The law might not have been welcomed, upon the ground that it was an intrusion upon the rights of states; but we must confess that it has been of great help to us in enforcing our own state laws." The corresponding official in Rhode Island said that the federal law served in the three years it was in effect to reduce from 8313 to 4815—a drop of more than 42 per cent—the number of boys and girls under 16 years of age in the mills and factories of Rhode Island.

[9]Annual Report. Children's Bureau, 1924, p. 8.

Further evidence might be cited on this point, but it would be cumulative and space need not be taken to present it. I have found nothing in the testimony of opponents of the amendment before the congressional committees, nor in the literature now being put into circulation by them, tending to show that the effect of federal control was other than salutary.[10]

When we inquire whether, under present conditions, it is desirable to regain the lost vantage ground if this can be done without paying too great a price; and if so, whether the price that must be paid—an amendment to the federal constitution—would be too great, we encounter serious embarrassments. One of the greatest hindrances to a really informed public opinion as to the merits of the amendment is the difficulty with which even the intelligent citizen ascertains for himself, or is led to accept from others, the relevant facts. He is and should be exceedingly conservative in the matter of amending the constitution,—"tinkering" with it, as he is likely to style the process. Only a great evil can justify this remedy. Few have come widely into personal contact with child labor in its more sinister aspects, and fewer still have studied the subject. Distinguished names have weight, but they are hardly conclusive. The fact, for example, that since the decision of the *Drexel Case* two presidents of the United States have thought proper to urge an amendment in their annual messages, ought to secure for the claim that *some* amendment is desirable more respectful attention than it is now receiving in certain influential quarters; but this is not enough. How can the public-spirited and open-minded citizen who wants to have an opinion, resting upon a basis of fact, get his foundation? He has before him now, not the question whether we shall have *an* amendment, but whether we shall have the precise amendment framed by the present Congress.

It is not worth while to inquire into the questions I have just suggested if the proposed amendment is in a form which sensible people cannot approve. Therefore, whatever may be the logical order of our discussion, the next point to be determined by one who wishes to reach a conclusion without useless exploration of a field of unfamiliar fact concerns the form of the amendment,—the effect which the very words in which it is written would or

[10]To be strictly accurate, I refer to a trifling (and negative) exception to this statement, found on p. 112 of the report of the Senate Judiciary Committee, above cited.

might have if incorporated into the fundamental law of the land. If a demurrer ought to be sustained, that ends the matter; there need be no trial of the facts.

Ignoring the vitally important factors of judicial interpretation and constitutional limitations, the claim is made that the amendment, if adopted, would enable Congress at will to limit, regulate and prohibit *all* forms of labor on the part of *all* children up to the eighteenth birthday[11]—subject only to one provision, about which there can be no difference of opinion,—there could be no abrogation of state authority in particulars where the minimum requirements of a state law exceed the minimum requirements of the federal law; e. g., since the greater includes the less a federal law fixing a minimum age of 14 would not interfere with a state law fixing 16 as the limit for the same occupational group.[12] If this interpretation is correct; if Congress could without check or hindrance other than such as it might place upon itself, establish and enforce any limitation, regulation or prohibition it might choose to pass with respect to the employment of children under 18 in work of any sort, nobody would tolerate the thought of adopting the amendment. But it could not. Every lawyer knows this, upon familiar principles of interpretation, and without regard to con-

[11]I use the expression "*children* up to the eighteenth birthday" advisedly. Many states class as "children" in their labor legislation all persons under 18, and some carry their regulation in certain particulars to the 21st birthday. They do not, of course, undertake to prohibit all labor by minors of 18 and 20, inclusive; but they prohibit their labor in certain occupations and under certain conditions; that is, as to such they "limit" and "regulate." If the limitation and regulation are sound, the law is good; though no lawyer can doubt that a sweeping prohibition by a state, not based upon the reasonable considerations which must characterize the exercise of police power, would be summarily disposed of by the Supreme Court of the United States under the fourteenth amendment.

Since 1912 the laws of Minnesota have contained the following provision: "*No boy under the age of 18 years* shall be employed or permitted to work as a messenger for a telegraph or messenger company in the distribution, transmission or delivery of goods or messages before 5 o'clock in the morning or after 9 o'clock in the evening of any day; and no *girl under the age of 21 years* shall be thus employed at any time. Any person employing any *child* in violation of the provision of this section shall be guilty of a misdemeanor." Minn., G. S. 1913, sec. 3849. Another prohibition of certain employments to persons under the age of 18 is found in sec. 8682.

Many states (including Minnesota) class persons under 18 as "juveniles" and make them subject to the special consideration and protection of the state as parens patriae.

[12]Of course, whatever the proper interpretation of the amendment, Congress would have implied power to pass all other laws necessary and appropriate to carry into effect its enactments directly authorized by the amendment.

siderations involving the construction of the amendment in the light of other provisions of the constitution. I have intended in my consideration of the subject, and intend in this article, to treat with respect honest opinions with which I have come to disagree, and to assume good-faith wherever it is possible to do so; but it is hard to be patient with some of the things that are being said by people who ought to know better.

One hesitates to suggest even the possibility of extreme folly in this field on the part of Congress. Distrust of our institutions ought not lightly to be pushed to that extent. But let us give heed to warnings which, strange to say, have had currency over the signature of capable lawyers. Suppose Congress should pass a law framed on the theory that study in school is "labor" within the meaning of the amendment, or forbidding farmer boys of 17 to do any work on the home place, or limiting to one hour per day the work of children whose labor is not wholly forbidden, or requiring all children in industry to be paid the current wages of adults, or expressly limiting the work of all persons under 18 to occupations where they might not possibly come into competition with adults, or discriminating in educational prerequisites between public and parochial schools; if the question of the validity of such laws ever reached a federal court would they be sustained? To state these queries is to answer them. It is apparent that no such absurdities would be sanctioned. The courts do not reject the guidance of common sense when they interpret the language of legislation, statutory or constitutional. To cite authorities here would be to insult the intelligence of the reader, be he lawyer or layman.

But there is a "twilight zone." It is possible to imagine attempts to legislate under the amendment which would not amount to palpable absurdities, and yet would be of such a sort that sensible and just people would regard them as unreasonable. Would there be no protection against these? Certainly there would be. Between all legislatures and the people, in our balanced form of government, stand the courts. When in any state the question arises whether a given law is authorized by the constitution, the constitution becomes the subject of judicial interpretation. If the language of the instrument is complete and unequivocal in respect to the subject matter, interpretation becomes mere citation and the point is settled. But experience has shown that constitutional grants of legislative power ought to be in general terms, expressive

of a principle or policy and not attempting to cover the subject involved with the detail appropriate to a legislative act. This was the wise method of the founders, and it has been followed in amendments to the great instrument they bequeathed to us. As to such provisions judicial interpretation is more than mere citation; the language of the constitution must be construed to ascertain its meaning as applied to the law which is being tested. Thus there has grown up a recognized set of principles of constitutional construction. They cannot be discussed within the limits here available, but I venture to say that they require that words and phrases which are possibly susceptible of different meanings shall be so construed as to accomplish the purpose for which they were designed; and that in arriving at that purpose they should be considered not only in connection with all other provisions of the constitution but in the light of conditions existing at the time of framing and adopting the particular constitution or amendment.[13]

Down to the present moment all grants of general powers to Congress have been subject to judicial interpretation in the light of these principles. Can it be claimed that a different rule would be applied to any law passed under the authority of the pro-

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[13]"The language of a constitutional amendment should be read in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then construed, if there be therein any doubtful expressions, in a way, so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted." Maxwell v. Dahl, (1900) 176 U. S. 581, 44 L. Ed. 597, 20 S. C. R. 448, 494.

"Perhaps the safest rule of interpretation, after all, will be found to be to look into the nature and objects of the particular powers, duties and rights, with all the lights and aids of contemporary history; and to give the words of each just such operation and force, consistent with their legitimate meaning as may fairly secure and attain the ends proposed." Mr. Justice Story in Prigg v. Pennsylvania, (1842) 16 Pet. (U.S.) 539, 610, 10 L. Ed. 1060.

I cite a few paragraphs from an authoritative article in 12 C. J. on Constitutional Law, by Professor Throckmorton of the Law School of Western Reserve University:

"The fundamental purpose in construing a constitutional provision is to ascertain and give effect to the intent of the framers and the people who adopted it. The court therefore should constantly keep in mind the object sought to be accomplished by its adoption and the evils, if any, sought to be prevented or remedies." (p. 700.)

"The courts should aim to give effect to the purpose indicated by fair interpretation of the language used." (p. 701.)

"If a literal interpretation of the language used in a constitutional provision would give it an effect in contravention of the real purpose and intent of the instrument as deduced from a consideration of all its parts, such intent must prevail over the literal meaning." (p. 702.)

"The press, public writings and current literature may be resorted to for the history of the times and the conditions existing at the time of the adoption of a constitutional provision." (p. 711, note 62 (e).)

posed amendment? Thus interpreted the amendment can mean but one thing,—the granting of power to Congress to prohibit labor by persons under 18, at ages and in occupations, for hours and under conditions, which in its judgment are injurious to the children so employed and detrimental to the public welfare; that is, it is a grant of police power to Congress in the field of "child labor," giving the meaning to this term which was recognized at the beginning of this article, and which is the only possible meaning to be derived from past or contemporaneous usage. Much of the misconception which has been injected into the public discussion of the amendment has arisen through ascribing to the word "labor" a meaning which it does not have and has never had when used in legislation respecting the work of children, or in the advocacy of such legislation. The prohibition of injurious forms of work to children under 18 is, as we have seen, a familiar idea; and that is what "labor" means in the proposed amendment. The real question is whether we are willing to let Congress decide what forms of work are injurious, subject to judicial safeguards and without interference with more advanced standards set up by the states.

In addition to general principles of interpretation, a barrier to the unreasonable exercise of congressional power under the proposed amendment would be found in the fifth amendment, providing that Congress shall not deprive any citizen of liberty or property "without due process of law." A like restriction upon the power of the states, in the fourteenth amendment, has proven a sufficient protection against unwarranted exercise of the police power of the states. When cases involving this point have come up from the states to the Supreme Court, that tribunal has applied a well established test,—whether the law in question is reasonably adapted to afford needed protection against danger to health, morals or general well being.[14] It has recently applied this test to a law of Congress passed under its power of legislation for the District of Columbia.[15] It seems to me as clear as any proposition of law can be which has not been specifically decided by a court of last resort, that any arbitrary and unreasonable control over child labor would be held to be a deprivation of liberty and property

[14]"Police power is the power inherent in a government to enact laws, within constitutional limits, to promote the order, safety, health, morals and general welfare of society." 12 C. J. 904.

[15]Adkins v. Children's Hospital, (1923) 261 U. S. 525, 67 L. Ed. 785, 43 S. C. R. 394.

without due process of law. The *Adkins* ("minimum wage") case, cited in the notes is illuminating. It is declared in the syllabus that "the right to contract about his own affairs is part of the liberty of the individual protected by the due process clause of the federal constitution." This, of course, means the fifth amendment, since the act under consideration was a federal act. In both the majority and minority opinions it is assumed throughout that the same principles of interpretation which had been often applied to the exercise of the police power by the states were applicable to the act in question. Mr. Justice Sutherland, in the majority opinion, cited *Coppage v. Kansas,*[16] and quoted with approval the following statement of the law:

"An interference with this liberty" (i. e., the liberty of personal employment) "so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary unless it be supportable as a reasonable exercise of the police power of the state."

The question of legal reasonableness is always one for judicial determination; and it would seem quite certain that in conconstruing a federal law a federal court would be no more reluctant to assert conservative views than it has been when an adverse conclusion would sweep aside the legislative policy of a sovereign state. Certainly the tenth amendment would always be kept in mind.

I have seen assertions that the fifth amendment would not be a bar to unrestricted legislation under the proposed twentieth; and very wide currency has been given to statements based upon this assumption, although not making the explicit claim. For example, James A. Emery, general counsel for the National Association of Manufacturers, in what seems to me a most adroit, uncandid and misleading argument,[17] says:

"Neither is this grant of power confined to regulation, but it includes the right to 'prohibit' the labor of any person under 18. It is commonly said by the proponents of the proposal that it is intended merely to give Congress the power which the states presently possess over the same subject. It is not open to dispute that no state possesses the power to prohibit the labor of all persons under 17, much less 18 years of age."

Mr. Emery knows, of course, that the reason the states do

[16](1915) 236 U. S. 1, 14, 59 L. Ed. 441, 35 S. C. R. 240.

[17]An Examination of the Proposed Twentieth Amendment to the Constitution of the United States (being the so-called Child Labor Amendment); circulated by the National Committee for the Rejection of the Twentieth Amendment, Union Trust Bldg., Washington, D. C.

not possess the power referred to is because its exercise would be contrary to the "due process" clause of the fourteenth amendment. Therefore he means to state by implication that laws passed under the proposed amendment would not be subject to the "due process" clause of the fifth. The only argument I have seen in support of this position rests upon the general terms in which the proposed amendment is phrased, and the claim that, being subsequent in time, it repeals, pro tanto, the fifth amendment. I have looked in vain for the citation in the literature of the opposition of a single authority.

I cannot undertake to present a lawyer's brief on this point. I have already indicated what seems to me the effect of established canons of constitutional interpretation, irrespective of questions specifically relating to implied repeal and paramountcy of later provisions over earlier ones. The correctness of the following quotations, as general statements of the law, will not be disputed:

"Distinct constitutional provisions are repugnant to each other only when they relate to the same subject or are adopted for the same purpose and cannot be enforced without substantial conflict."[18]

"If two provisions are irreconcilably repugnant, the last in order of time and local position will be preferred; but this rule should be applied only as a last resort, and only when it is impossible to harmonize the provisions by any reasonable construction which will permit them to stand consistently together."[19]

"A clause in a constitutional amendment will prevail over a provision of the original instrument inconsistent with the amendment; for an amendment to the constitution becomes a part of the fundamental law, and its operation and effect cannot be limited or controlled by previous constitutions or laws that may be in conflict with it. But repeal of constitutional provisions by implication is not favored, and an amendment should not be construed as effecting any greater innovation on the existing constitution than is reasonably necessary to accomplish the object of its enactment."[20]

"The bills of rights inserted in American constitutions contain a declaration of general principles as a basis of government, copied from the Magna Charta and the English Bill of Rights of 1689. These bills are regarded as parts of the constitutions in which they are recited and are to be construed with other constitutional provisions."[21]

Mr. Justice Shiras, in *Prout v. Starr,* said:[22]

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[18]12 C. J. 709.
[19]Ibid.
[20]Ibid.
[21]12 C. J. 710.
[22](1903) 188 U. S. 537, 543, 544, 47 L. Ed. 584, 23 S. C. R. 398.

"The constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity."

And again:

"It is one of the important functions of this court to so interpret the various provisions and limitations contained in the organic law of the Union that each and all of them shall be respected and observed."

In the case just cited, in *Eisner v. Macomber*[23] and in *Evans v. Gore*,[24] it was held that the eleventh and sixteenth amendments should be so construed as not to interfere with certain prior constitutional provisions. The eighteenth amendment does not deprive the citizen of the rights safeguarded by the fifth in the matter of unreasonable searches and seizures[25] or self-incrimination.[26] In the opinion by Mr. Justice McKenna in *Corneli v. Moore*[27] (the case involving the Volstead Act) it is assumed that *Rhode Island v. Palmer*,[28] establishes the proposition that the fifth amendment is not repealed by the eighteenth.

I am quite aware that I am not presenting this branch of the subject in the manner of a jurist versed in the learning of constitutional law; but my researches have furnished a satisfactory basis for my own conclusion, which I shall hold at least until the other side presents a brief. My view that the proposed amendment would be subject to the fifth amendment is buttressed by the unequivocal declarations of such distinguished students of the law as Dean Pound of Harvard, Dean Lewis of Pennsylvania and Professor Costigan of California. If further support is needed, I quote with permission from a private letter written under date of January 3, 1925, by a lawyer and publicist whose opinion on this subject seems to me, under all the circumstances, second only in authority to a pronouncement by the United States Supreme Court, Senator George Wharton Pepper, of Pennsylvania:

"After the best consideration of the subject that I am capable of giving, I have reached the definite conclusion that any act of Congress, passed in the exercise of authority given by the proposed amendment, would inevitably be declared unconstitutional if it attempted to do the things which the fifth amendment prohibits the Federal Government from doing.

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[23](1920) 252 U. S. 189, 64 L. Ed. 521, 40 S. C. R. 189.
[24](1920) 253 U. S. 245, 64 L. Ed. 887, 40 S. C. R. 550.
[25]United States v. Kelih, (1921) 272 Fed. 484.
[26]Snyder v. United States, (1922) 285 Fed. 1.
[27](1921 257 U. S. 491, 66 L. Ed. 332, 42 S. C. R. 176.
[28](1919) 253 U. S. 350, 64 L. Ed. 946, 40 S. C. R. 518.

The framers of the constitution conceived it to be clear that Congress, without express constitutional declarations, would necessarily be subject to all the limitations which had become characteristic of English constitutional liberty. They, therefore, did not incorporate the Bill of Rights in the original Constitution because they thought it superfluous to do so. To make assurance doubly sure the Bill of Rights was afterwards incorporated by amendment. The purpose was to declare for all time that the federal government, as such, must in all things conform to those standards which are the essence of our system. Unless and until we expressly put the Bill of Rights out of the constitution its declarations constitute a continuing warning to Congress that anything done by it, in the exercise of its powers, will be inoperative unless it can stand the fire-test which the Bill of Rights applies. A Child Labor law will in this respect stand on the same footing as any other law. I have no doubts whatever on this point."

It has been urged that the proposed amendment is not within the authority of Congress to submit to the states, being such an infringement on the principle of state autonomy as to be beyond the power of three-fourths of the states to insert it in the constitution. This, doubtless, is what is meant when it is styled "revolutionary." The revolution was accomplished, however, when it was held in *Rhode Island v. Palmer*[29] that by the eighteenth amendment general police power over an appropriate subject might be conferred upon Congress.

Applying the foregoing principles of interpretation to section 1 of the proposed amendment, and construing it with the fifth amendment, I venture the confident opinion that it means precisely this, and if adopted will be so construed:

The Congress shall have power to limit, regulate and prohibit, by reasonable laws, all gainful labor of persons under 18 years of age which is detrimental to their health, morals or general well-being.

If the reader asks why it was not written thus I shall have to confess my inability to answer, further than to say that the language was appropriately made as concise and general as possible, and that every word was chosen (as is shown by the congressional documents) by qualified persons, with great care and after critical examination.[30] Language is a delicate and elastic medium,

[29](1919) 253 U. S. 350, 64 L. Ed. 946, 40 S. C. R. 518.

[30]I do not take space to refer to certain verbal criticisms which, though insistently made, seem to me rather trifling. They are well answered in an article by Miss Marguerite M. Wells in the Minneapolis Tribune of Sunday, January 11, 1925.

and those who frame an amendment to the federal constitution having the character of an enabling act must have regard to the future, making their phrasing broad enough to cover unforeseen conditions. They must of necessity place some reliance, in considering the practical scope of powers conferred by any form of words, upon legislative discretion and judicial fairness and good sense.

In so far as the attack upon the amendment proceeds merely upon the theory that any federal legislation on the subject of child labor would be in violation of the rights of the states, it is a revival of an argument which was discredited and rejected by the passage of the acts of 1916 and 1918, and by the general satisfaction with which the country as a whole accepted those laws and their administration. But if the correctness of our interpretation of the amendment be conceded, there remain two grounds of opposition that are worthy of respectful attention. It may be claimed that even as thus interpreted it would unwisely open new fields to federal legislation; and again, that conditions have so changed or are so rapidly changing that federal control which was appropriate a few years ago is no longer desirable.

That the amendment would open to Congress departments of industry which it did not try to enter in 1916 and 1918 is true. Subject to the rule of reasonableness it might have entered them if it had been correct in supposing that under its constitutional authority it then had power to legislate on the subject of child labor; but it did not do so. Each of the two acts prohibited only:

Labor of children under 14 in manufacturing establishments, etc.; labor of children under 16 in mines and quarries; labor of children between 14 and 16 in any employment more than 8 hours per day and 48 hours per week, and between 7 P. M. and 6 A. M. The supporters of the amendment must be prepared to defend it upon the understanding that if adopted Congress would be able, again subject to the rule of reasonableness, to forbid the labor of children in any gainful employment and under any conditions deemed to be injurious, including, for example, work on farms and in truck gardens, in offices and stores, and even in their homes; to establish more rigid limitations upon hours than those before adopted, and to prescribe physical and educational prerequisites; in short, to do anything (but no more) that a state can now do in the field of child labor, save that the state's possible age limit is the twenty-first birthday, whereas the federal limit would be the eighteenth. When the dust of current sophistries is

blown away, the precise question before the country is whether it is willing to grant this power to Congress, as against the entire abandonment of federal control. Here clear-thinking and social-minded people may honestly differ according to their views as to the seriousness of the child labor evil, the extent of their reluctance —shared in varying degrees by practically all our citizens—to enlarge the powers of the central government, their confidence—or lack of it—in Congress and the federal courts, and their faith—or lack of it—in local public opinion in the several states as a sufficient safeguard for the children of the nation against the ignorance, indifference and cupidity of those parents, and the thoughtlessness and selfishness of those employers, from whom they need to be protected. The New York World has stated the case as follows:

"The child labor amendment is not 'Bolshevism.' It does not prohibit the labor of youths up to 18 years of age. It does not prohibit boys from doing chores on the farm, or girls from washing dishes. It does not threaten the family, the home, religion or the flag.

"The issue is simply this: shall the federal government enter the field of child-welfare legislation, or shall that fundamental social duty be reserved to the states? That is the only issue for intelligent, fair minded people. The World certainly has not the slightest difference of opinion with the National Child Labor committee over the necessity of throwing every possible legislative safeguard around children up to 18 years of age. The only argument is over whether the safeguards shall be provided by Congress and the states, or by the states alone."

In its issue of December 8, 1924, The World in an elaborate editorial article based its opposition to the amendment on three grounds:

1. It is unnecessary, the progress of the states in child labor legislation during the last twelve years "being proof beyond a doubt that the movement for the protection of children has real vitality in the states and that it is not dependent upon federal legislation."

2. Experience with the Volstead Act and other legislation of that character shows that "the government at Washington cannot successfully reach into the localities and enforce a legal standard of personal living which the bulk of the people in that locality do not support. . . As fast as public sentiment is educated the states will raise their own standards and enforce their own laws. The federal government cannot, except on paper, raise them any faster."

3. Child labor laws, to be effective, lead to other forms of social legislation for the welfare of children which are obviously "not proper undertakings for the government at Washington, for they involve a mass of detail and a knowledge of local conditions which are quite beyond the competence of Congress or of a federal department." In the line of this objection The World said further in the article first quoted:

"The argument which weighs most heavily with The World is the great danger to democratic institutions of too great concentration at a central city of power over intimate local affairs. Throughout the world legislatures are at a low ebb of prestige because they attempt more than they can accomplish. The records of the last twenty-five years show an alarming increase of power at Washington accompanied by serious weakness in the working of the governmental machine. We do not feel justified now in adding to the responsibilities of Washington the great and expanding duty of social-welfare legislation. Because the twentieth amendment initiates a movement in that direction, The World opposes its ratification."

The World's editorials, and a closely parallel letter of Joseph Lee of Boston, a leader in important movements for social betterment, published in the Boston Transcript of October 14, 1924, seem to me the fairest and therefore the strongest statements I have seen of the case against the amendment. The published arguments of some of the most distinguished opponents are built upon a careless and incorrect interpretation of the amendment,[31] and therefore lack the force they would otherwise have.

I shall not discuss The World's second and third points. People will give them much or little weight according to individual temperament and habitual attitude toward theories of "states' rights." With some preconceptions are so fixed that argument is useless. Others, though holding views inclining strongly in the same direction, will yield to convictions as to the country's need. The crux of the situation is in The World's first point. Those who are intelligently convinced that all will soon be well with children in industry without federal intervention will of course oppose the amendment, and ought to do so. Those who are not thoroughly convinced upon the second and third points (if they are disinterested and openminded) will give them emphasis according to the

[31]For example, see the article by President Nicholas Murray Butler in 10 Jour. of the Am. Bar Assoc. 849; and a pamphlet by Dr. Henry S. Pritchett issued by the National Committee for Rejection of Twentieth Amendment, and reprinted in the Citizens Alliance Bulletin (Minneapolis), January, 1925.

extent of their agreement with or dissent from the first. We come, therefore, to a place in our discussion where consideration of the determinative facts can be postponed no longer.

A discussion of the facts is attended with no little difficulty. What one wishes to know is the real extent of the child labor evil at the present time, and whether the states are making such progress in correcting it that to leave it patiently in their hands is a reasonably safe policy. Bald statistics are notoriously misleading, and to analyze and interpret them is a most laborious process. In the controversial literature with which the country is being flooded statements of fact are made on one side and on the other flatly denied or attempted to be explained away. One who wishes to know the truth must either investigate for himself,—a practical impossibility,—or else determine what sources of summarized information he will accept as reliable. As I write my table is piled with census reports and reports and bulletins of the federal Children's Bureau; with pamphlets, tracts and newspaper clippings almost without number, presenting, sometimes temperately and sometimes intemperately, both sides of the question. Having sufficiently satisfied myself to be sure that I am in favor of the amendment, how can I present the facts to the reader in such a way that he may form an independent judgment? I know of no way to eliminate, as I should like to do, the personal factor. I have more confidence in some sources of information than in others; but it would be quite out of the question for me to give in extenso my reasons for discrimination. I have long been within the limits of my capacity and opportunity an inquirer into social conditions, and I think I have learned fairly well to place a value upon the utterances of those who profess to speak upon such matters with authority. As I have already indicated I have great confidence in the federal Children's Bureau. From a strictly legal standpoint this is the proper attitude toward statements of detailed and summarized facts made by official investigating agencies which have not been discredited. Further, it seems to me that the conclusions of students of social problems reached at a time when there could be no fear that the heat of controversy had warped their judgment are entitled to great weight. Out of the mass of available material I shall make a few citations that I believe to be of value. I cannot cover all the ground; there will be many spaces for the thoughtful reader to fill in.

First let us inquire whether, without specific reference to

present-day conditions, the child labor evil in the United States has been a serious matter in recent years, or a mere bogey of sentimental "uplifters." The well-known sanity and common-sense of the late Dr. Samuel G. Smith of St. Paul give weight locally to his views as a social student. He says:[32]

"Child labor in factories, stores and mines is both a social and an economic question. There are said to be two million children at work in the United States under sixteen years of age. This makes one in fifteen of the children of that age. . . The first evils relate to the child himself. He is deprived of proper education and the natural birth-right of the proper development of mind and body. The case of the working girl is even worse than that of her brother. Her early introduction into public life is a danger to her morals, and the burdens of exhausting labor promise the degeneration of the race. The value of child labor has enormously increased in modern times on account of the introduction of machinery into production. A nimble child at a low wage is often worth more to the employer than his father would be, even on the same terms. . . Child labor is an injury both to the child and to its parents. Many fathers are actually pauperized by the wages of their children, and many a child who commences to work too early and under conditions too severe, turns out to be a future tramp or drunkard. The strain puts the nervous system awry and prevents normal social development."

Dr. William Byron Forbush has long enjoyed a wide reputation as a keen and sympathetic observer of boy-life. He says:[33]

"Educators emphasize the loss of play as being a wrong committed upon the child by labor, equal in importance to its effect upon his physical development. . . The monotony of the uneducative activities which are possible to a child laborer not only stunts his mental growth but it predisposes him toward restlessness, constant change of employment, vagabondage, and crime. It is the testimony of a leading superintendent of a house of refuge that almost all the boys committed to his institution were working boys at the time of their arrest or just previous to their arrest."

Again:

"The relation of child labor to delinquency is plain. When a child is removed from school before he is fitted for any calling, and is used almost as a part of the machinery of a great industrial plant, he is likely either to be thrown out upon the scrap heap of the world at an early age, unready for any productive employment, or else weary and discouraged, to be peculiarly exposed in his few hours of recreation to the temptations of his neighborhood. Here certainly is one of our most appealing cases of social injustice."[34]

[32]Smith, Social Pathology, 335.
[33]Forbush, The Coming Generation 276.
[34]Ibid., p. 290.

Perhaps the most useful and authoritative book which has been produced, dealing broadly with the social status of children, is "Problems of Child Welfare," by Dr. George B. Mangold, 1914. His section on child labor[35] is a classic in its thorough and temperate treatment of the subject in its various phases. It is hard to select a quotation, but I choose the following, almost at random:

"Child labor debars the child from acquiring an adequate education, and thus handicaps him in his efficiency as a citizen. Many working children are illiterate; others have so little education that almost no advantage can result. The demands of the state are becoming increasingly urgent, and every reasonable effort should be made to equip every boy and girl for the duties of citizenship. . . Unfitness for the social and political life of today follows in the wake of child labor, and the citizenship of our country is thereby endangered."[36]

Much has been said by opponents of the amendment about the proposed invasion of homes, because it would give power to Congress to legislate against home employment. In Minnesota we know little about this phase of the child labor evil. I quote again from Mangold:[37]

"In many industries a limited amount of work is sent to individual homes to be completed there. This results in one of the phases of the sweating system. Among these industries are the manufacture of men's ready-made clothing, women's and children's underwear, hosiery, dolls' clothes, artificial flowers, shirts, cuffs and collars, leather goods, paper boxes, brush making, hand embroidery and nut picking. A large proportion of the home work is carried on in tenements in the large cities, where the work is usually done by the mothers and the children. The children of school age cannot assist during school hours, but help in the mornings and evenings. . . . It is not unusual for all the children and female members of a family to engage in home work until the late hours of the evening. The investigation of child labor conditions made by the federal government discovered children five years of age and upward employed in the making of men's clothing and agents for the State of New York likewise found children of these ages actively engaged in work. The principal nationalities represented were the Bohemians, Italians, and Russian Jews."[38]

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[35]Pp. 271-341.

[36]Mangold, Problems of Child Welfare 303.

[37]Ibid., 288.

[38]It seems strange indeed that in the light of such conditions, which, however improved, doubtless still exist to some extent, there should be so much disturbance of the public mind over the possibility of official interference with parental rights. For a quarter of a century the juvenile courts have "interfered" when necessary to protect children against foolish parents, and the hue and cry against "meddling" of this sort long since subsided.

But, it is said, conditions are much better now than they were a dozen years ago, and are rapidly improving. Fortunately they *are* much better,—thanks to the gallant fight for childhood made by the very people we now hear denounced as "socialistic" foes of the social order. Are they good enough, or likely to become good enough, and soon enough, so that we should submit to evils still existing and sure to continue for an indefinite time, relying solely on the states to remedy them, rather than invoke the federal aid that was found so useful in 1917 to 1922? As our inquiry now is as to the survival of bad conditions it will be appropriate to refer to some that have been officially found and reported. There has been no general survey to learn their extent. Such information as is at hand has been obtained, for the most part, incidentally to routine inspections, though a few industries have been specially investigated. In our citations no precise line of division will be drawn between material reciting conditions found and the recent remedial efforts of the states: the two points are often covered together.

The census of 1920 showed 2,773,506 children, 10 to 17 inclusive, engaged in gainful occupations. Of these 1,125,220 were employed in agriculture, forestry and animal industry; 772,850 in manufacturing and mechanical industries; and 50,401 in mining. The corresponding figures for the different ages are as follows:[39]

	10 to 13	14	15	16	17
Total	378,063	257,954	425,201	778,957	933,691
Agriculture, etc.	328,958	150,977	167,374	230,291	247,620
Manufacturing, etc.	9,473	50,512	125,352	270,603	316,910
Mining	647	1,499	5,045	19,772	23,438

No one claims, of course, that all the children in these industries needed or now need the protection of a federal law; but it is evident that the more children there are at work at a given time the greater the aggregate number of those who *may* be working under harmful conditions. Unfortunately the number of children under 10 in industry,—none of whom ought to be at work,—is not noted in the census. Miss Abbott, Chief of the Children's Bureau, is authority for the opinion that there were and still are a considerable number of these. It should be borne in mind that the census was taken in January, when employment in agriculture[40] and other

[39]Children in Gainful Occupations, 14th census, p. 64.

[40]In view of the different interpretations given to the figures respecting agricultural employment I quote the following from the instructions to

forms of outdoor work was at low ebb, at a time of industrial depression and while the deterrent features of the federal act of 1918 were still in operation. Further, it should be remembered that the group of children at work is being continually replenished. Many who have suffered harm pass daily beyond the eighteenth birthday and carry with them the ill effects of premature or otherwise unsuitable employment.

A report of the Children's Bureau submitted in May, 1923, and presumably containing material gathered not very long before (the date, however, not appearing) contains the following:[41]

"Many children were found working without employment certificates of any kind—some of them children under 14 and therefore too young to obtain certificates, and some of them children of certificate age. No certificates were held in two states by one-half of the children under 16 found at work, in another state by nearly one-third of those found working about coal mines, and in still another by one-third of those found in glass factories, and by more than two-thirds of the boys found in shipyards engaged in work on Government orders. In one state it was found that the canners generally did not understand that the state law required them to have certificates, and in another no certificates were found on file in canneries.

"Inspectors found, moreover, that in some states and some industries very young children, a considerable number of them only 7, 8, or 9 years of age, and many children under 14, were being employed in violation of both the state and the federal laws. In the canneries visited in one state more than two-fifths, and in those visited in another about two-thirds, of all the children under 16 were less than 14 years of age. In these two states alone 1,060 children under 14—at least 10 of them only 5 years old or younger and 7 only 6 years of age—were found working in canneries. In one state, moreover, 2 children 5 years of age and 9 aged 6 years were found employed in factories; in another, in 95 glass and pottery factories, 99 children under the age of 14 were found, one of them being only 8 and another only 9 years old."

Employment of boys and girls under unsanitary conditions, and of boys under 14 at heavy and hazardous work, was found in the fish canneries of Washington in the summer of 1923.[42]

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enumerators: "In the case of children who work regularly for their own parents on a farm the entry in column 26 should be *farm laborer*. . . Children who work for their parents at home merely on general household work, on chores, or at odd times on other work, should be reported as having no occupation. Those, however, who somewhat regularly assist their parents in the performance of work other than household work or chores should be reported as having an occupation." Ibid., p. 16. These instructions evidently left much to the discretion of the enumerators.

[41]Administration of Child Labor Laws, Part 5, Bureau Publication No. 133, p. 2.

"A study of industrial accidents to minors in Wisconsin, Massachusetts and New Jersey is nearing completion. Facts concerning minors to whom compensation had been paid were obtained from the files of the state industrial commissions and accident boards. This meant that in Wisconsin records of accidents which had caused disability of more than 7 days duration were included, and in Massachusetts and New Jersey records of those which had caused disability of more than 10 days duration. Within 12 months in these three states there were 7,478 such accidents to minors under 21 years of age, 496 to children under 16 years, 2,039 to children of 16 or 17. . . 38 minors died from their injuries and 920 were partly disabled for life. . . Because they are too young to appreciate the risks involved either to themselves or to others, boys and girls will not observe the precautions necessary for self-protection in industries in which there is danger of industrial poisoning or accidents due to power-working machinery.[43]

Note the following:

Washington Post, Sept. 2, 1924:

"Raymond Ball, 13 years old, suffered fatal injuries at Gaithersburg yesterday when his clothing caught and he was drawn into the machinery at the Thomas Canning Company Plant. He died on the operating table at Georgetown University hospital. . . . The boy went to work for the company a few hours before the accident."

Washington Post, Sept. 15, 1924:

"Easton, Md., Sept. 14.—Two men were fatally scalded when the boiler in the canning factory of Joseph O. Bernard at Henderson, near here, exploded about 10 o'clock this morning. Five persons are reported to be dying in the hospital here as a result of the explosion, and a dozen others received slight injuries.

"Those who are in critical condition are Vincent Balson, 10 years old; Joseph Miloski, 10; James R. Mulvir, 52; Katie Ozeaiska, 10, and Mary Rogahaski, 9."

"The Children's Bureau study included two areas in which orchard fruits and crops are raised—one in the Willamette Valley, Oregon, and the other in the Yakima Valley, Wash., and an area in the Puyallup Valley, Wash., where raspberries are the principal fruit crop. Of the 1,803 children under 16 years of age who worked on the farms in the sections surveyed 1,006 were children in migratory families. All the migratory children were hired laborers. . . Although most of the work was easy these western children worked long hours. . . In the Yakima and Willamette Valleys . . . 43 per cent worked 10 hours or more a day. . . The migratory children in the Yakima and Willamette Valleys, like migratory children in other sections of the country, suffered

[42]Annual Report, 1924, p. 13.
[43]Ibid., pp. 8 and 9.

a serious loss of their schooling as a result of their migrations. Fifty-one per cent . . . had missed at least four weeks of school during the year of the Children's Bureau study."[44]

If any reader desires to learn the nature and results of the intensive studies carried on by the Children's Bureau, he is referred to the monographs in the list which I have cited.[45] Three I happen to have before me,—"Canal-Boat Children," and "Child Labor and the Work of Mothers in the Beet Fields of Colorado and Michigan," both published in 1923, and "Child Labor and the Work of Mothers on Norfolk Truck Farms," published in 1924, all disclose employment of very young children, employment of older ones in violation of state laws, and serious interference with school attendance, similar to those existing in the limited district covered by the survey in Washington. The evils of migratory child labor in the East, which it is exceedingly difficult to reach by state laws, are pointed out by Miss Abbott in her testimony before the House Committee on the Judiciary. She states that partial reports from school attendance officers of Philadelphia show that in the spring of 1921 at least 1,300 school children left the city to work on the truck farms of Delaware and New Jersey, many of them remaining until fall to work in the cranberry bogs. "The majority," she says, "do not return to the city until the last of October or first of November, and then, eight or nine weeks late, straggle back to the already overcrowded schools." The result, of course, is a high percentage of retardation.[46]

A succinct resumé of existing state laws, which I believe to be correct, appears in a pamphlet prepared by Wiley H. Swift, of the National Child Labor Committee.[47] It is as follows:

"(a) Eleven states allow children under 16 to be worked from nine to eleven hours a day. One state has no regulation whatever of daily hours.

"(b) Four states do not forbid the use of children under 16 at night work.

"(c) Thirty-five states fail to require as much as a common school education for children between 14 and 16 who leave school to work.

"(d) Thirty-five states fail to regulate adequately or reasonably the employment of children under 18 at dangerous employ-

[44]Annual Report, 1924, p. 11.

[45]See Page 183.

[46]Hearings before the Committee on the Judiciary, H. R., 68th Congress, 1st Session, Doc. 497, p. 25.

[47]A Defense of the American System of Government, Pub. No. 320 of the National Child Labor Committee, November, 1924.

ment; fourteen states fail as to children under 16; five states fail to make any distinction at all as to employments commonly recognized as dangerous.

"(e) Twenty-three states with a 14-age limit have exemptions which open the doors for children under 14.

"(f) In thirty-nine states it is not unlawful to put children under 18 to oiling or cleaning machinery in motion and nineteen states permit children under 16 to be employed at this hazardous job.

"(g) In thirty-seven states children under 16 may be put to work on scaffolding and in thirty-six states children under 16 are allowed to work on railroads.

"(h) In thirty-nine states it is legal to put children under 18 running elevators and in twenty-nine children under 16 may thus be employed.

"(i) Twenty-two states have no laws to forbid or regulate the employment of children under 18 where dangerous or poisonous acids, liquids, dyes or gases are used."[48]

The standards of the two federal laws were certainly low enough; but as I have noted above only eighteen states equal them at practically all points. All states have a minimum age limit of 14, though some have important exceptions; but in hours and details of protection many are distinctly below the standards of 1916 and 1918, which may fairly be accepted as providing the least in the way of legislative safeguards that the enlightened and humane sentiment of the country demands for its children in industry. Before the Senate Committee Miss Abbott testified as follows:[49]

"The Children's Bureau made investigation of nine states immediately after the handing down of the decision which held the first child labor act unconstitutional, and we found that many hundreds of the children in those States had been dependent upon the federal law for their protection against premature and excessive employment, and that with the federal protection withdrawn the sole effective restriction on the entrance of children into industry was in many cases lost. This situation existed not only in states where the standards fixed by the state laws were lower than the federal standards, but also in states in which equal or higher legal standards existed but were not adequately enforced." . . . "In the investigations" [of 392 factories] "after the law was declared unconstitutional, 909 children under 14 years of age were found at work, . . . 3,189 under 16 years of age were working more

[48]In September, 1923, the legislatures of forty-four states had met since the act of 1918 was declared unconstitutional, but in only eight had any improvement been made in the age and hour standards of child labor laws. Annual Report of Children's Bureau, 1923, p. 12. No state having laws that fall below the standards of the former federal acts has yet brought its laws up to those standards.

[49]Senate Report, p. 36.

than eight hours a day, and 149 were employed at night. In thirteen mines inspected 62 children under 16 years of age were found to be employed."

Investigation of textile mills in Georgia in November and December, 1922, after *Bailey v. Drexel Furniture Co.*[50] was decided, showed numerous violations not only of the federal standards recently invalidated but of state laws as well.[51]

In South Carolina the limits of working hours for children over 14 are the same as for adults,—not over 10 hours per day or 55 hours per week. Mr. Gibert, the chief inspector of the state Department of Labor, was produced before the Senate Committee by Mr. David Clark, editor of the Textile Bulletin, and an inveterate foe of all federal control of child labor. The following extract from Mr. Gibert's testimony is suggestive:[a]

"Senator *Colt:* Has there been any movement in South Carolina to raise the standard with regard to child labor, lessening the hours below the present statute?

Mr. *Gibert:* I have not heard of any.

Senator *Colt:* Has there been any movement of that kind?

Mr. *Gibert:* Not recently.

Senator *Colt:* Are the people of South Carolina, in your opinion, satisfied with the present regulations with regard to child labor?

Mr. *Gibert:* Yes, sir; I believe they are.

Senator *Colt:* Of their own volition, so far as you may be able to state, do you think of their own will they would be disposed at the present time to raise the standard?

Mr. *Gibert:* I would not think so.

Senator *Colt:* At least there is no concerted movement that you know of along that line?

Mr. *Gibert:* No, sir."

A bulletin issued by the Organizations Associated for the Ratification of the Child Labor Amendment, issued January 16, 1925, is authority for the statement that the Georgia legislature, at the same session which rejected the amendment (declaring in the resolution that it "would destroy parental authority and responsibility throughout America, would give irrevocable support to a rebellion of childhood which menaces our civilization"), refused to amend the state law which now permits children to work sixty hours per week in cotton mills and imposes no daily limitation whatever. The legislature of North Carolina which rejected the

[50](1922) 259 U. S. 20, 66 L. Ed. 817, 42 S. C. R. 449.

[51]Testimony of Miss Abbott before the House Committee, p. 38.

[a]Senate Report, p. 103.

amendment likewise failed to reduce the eleven-hour working day for children under sixteen years, which is permitted by the state law.

Other instances of ill conditions surrounding children in special industries, and other facts suggestive of the uncertainty of reliance upon the states for thorough and speedy reform in this field, might easily be cited. That public opinion is being educated there can be no doubt; but I am mindful that powerful reactionary interests are still at work in certain states, as they long have been; and that in certain industries the exigencies of competition make backward communities a heavy drag upon those that tend to be progressive. While we wait many children will be harmed and the lives of some will be ruined.

You ask what ground there is to think that help will come from federal control. I point to results in 1917 to 1922 for some assurance; and for the rest I fall back upon a faith in the ultimate rectitude of the American people, as a nation, in spite of experience under the fifteenth and the eighteenth amendments.

Out of a large number of leaflets and pamphlets circulated by opponents of the amendment only two that have come to my attention present with any detail the fact side of the question. One, a little leaflet issued by the Boston "Citizens' Committee to Protect Our Homes and Children," Hon. Herbert Parker, President, is partial and summary, dealing only with numbers of children in cotton mills and age limits for factory work under present state laws. The other is a clever and on its face a rather formidable document. It is entitled "Find the Facts, by Nila Frances Allen, Former Chief, Child Labor Tax Division, Bureau of Internal Revenue, Treasury Department, Washington, D. C." I cannot discuss it here, but I have in my possession comments by Miss Allen's successor in office, and an analysis of its statements personally vouched for by Miss Abbott, of the Children's Bureau, which to my mind thoroughly discredit it as a compendium of relevant details.

So much has been said, and with such success, to convince the farmers that their interests would be jeopardized by the amendment, that I cannot bring this paper to a close without quoting somewhat at length from a reference to the subject in the Annual Report of the Children's Bureau for 1923:[52]

[52]Pp. 13-15. This is not open to the charge of being framed with reference to the pending debate, as is evident not only from its date, but from the method of approach.

"The industrial division of the bureau has continued the series of studies begun in 1920 of rural child labor and its relation to school attendance. The attempt has been made to select for study a sufficient number of typical farming areas in different sections of the country to give a fairly representative picture of the work of children on farms. By personal interviews detailed information has been obtained regarding approximately 11,000 rural child laborers under 16 years of age, in 12 states. . . It seems unnecessary to point out that helping father with the chores and mother with the dishes or doing other work which develops a sense of family solidarity and has real training value for children is not classified as child labor. In these surveys the bureau has been studying the full-time employment, usually seasonal, of young children. Such surveys have been made in sugar-beet growing sections of Michigan and Colorado; in representative cotton-growing counties of Texas; in truck and small-fruit areas of southern New Jersey, Maryland, and Virginia; in the wheat, potato-raising, and grazing sections of North Dakota; in rural Illinois; and in tobacco-growing districts of Kentucky, South Carolina, Virginia, Massachusetts, and Connecticut. . .

"In the localities for which the information secured has been compiled, from 15 to 40 per cent of the children at work were under 10 years of age, a proportion which is very significant in view of the fact that the 647,309 children under 16 years of age enumerated in the census of 1920 as engaged in farm work include none under 10 years. Only from 17 to 29 per cent of the child workers were between 14 and 16 years of age. Approximately 4,600 worked on the home farm, but 3,700 were hired laborers, and of these over 1,000 were seasonal laborers migrating from the cities chiefly for harvest work.

"From 30 to 60 per cent of the children who did farm work in the various localities studied by the Children's Bureau had been absent from school to do this work. About one-fifth of those who had been absent for farm work had missed at least 40 days, or 8 weeks, of school. Largely as a result of their irregular school attendance, from 38 to 69 per cent of the white and from 71 to 84 per cent of the colored children included in the bureau's surveys, information from which has been tabulated, were from one to six years behind the grades which at their ages they should normally have reached. In all areas in which comparative material was secured the amount of retardation was much greater among working than among non-working children attending the same schools.

"The protection of the city child from premature employment has in large measure been secured by the votes of country legislators, who were shocked to find young children working in the mines, before furnaces, at dangerous machinery, or for long hours at monotonous indoor tasks. The advantages of farm work as compared with factory work do not need enumeration. But

with the improvement in rural schools by state distributive funds and by other means, we should make sure that the farm boys and girls are given the same opportunity to attend school and to profit by group games and other forms of recreation as are the city children. Unfortunately the advantage which the country has compared with the city has offered to children is being steadily reduced. The infant mortality rate in the cities is going down, while the rural rate, although lower to begin with, is remaining stationary. Illiteracy is more general in the country than it is in the city, and the number of children who are going to high school is relatively smaller.

"While it might be assumed that a good compulsory school-attendance law is all that is required to control child labor in the rural districts, the experience everywhere has been that it is impossible to enforce a school-attendance law when the community sanctions or does not prohibit child labor; and too often rural children have suffered from the community's approval or tolerance of their employment so long as it was confined to farm work. . .

"As the conditions are most serious where migratory families are employed in farm labor, this problem is probably the one that should be first attacked; but, unfortunately, it presents special difficulties. That the ordinary machinery for local enforcement of the school-attendance laws will not reach these forlorn migratory children is obvious. Other methods can hardly be said to be in the experimental stage as yet. As to the children who cross state lines, the authorities in the state from which they came are helpless and those in the state to which they go do not regard the education of children from another state, although temporarily under their jurisdiction, as a local problem. This would seem to be a situation in which Federal action may eventually be necessary."

A recent bulletin of the Bureau says:

"In one of the Texas areas sixty-four per cent of the white children and a still larger per cent of the colored children were behind the grades normally reached by children of their age. In the sugar-beet fields of Colorado about sixty per cent of the working children whom the Bureau studied were retarded. Among a large group of children working on the truck farms and in the strawberry fields and cranberry bogs of New Jersey and Delaware seventy-one per cent were at least a year below their normal grades, twenty-two per cent were three to six years retarded."

Let it not be forgotten that all these children are citizens not only of their respective states, but of the United States. Who knows how many of them will become voters in Minnesota?

Those who are disturbed by the fact that in percentage of illiteracy the United States ranks lower than Germany, Denmark, Switzerland, the Netherlands, Norway, Sweden, England and Wales, Scotland, and France,[53] may well consider whether some

aspects of child labor on the farm are not assuming the proportions of a national problem.[a]

Few public questions that have come before our generation have aroused a more general—or at any rate, a more vocal—interest than this one. Almost everybody has an opinion and is ready, if not eager, to express it. There has been much hasty committal, much misunderstanding, much wrathful jousting at men of straw. One should be slow to charge intentional misrepresentation in any quarter; but certainly much has been said that is not true. When people know what the amendment means, and if they come to think alike as to the effect that may be given to it in legislation, they will still differ according to their attitude toward what we rather loosely term "states' rights." This underlying principle of our form of government was thus stated by James Wilson in the debates of the Convention of 1787:

"Whatever object of government is confined in its operation and effects within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends in its operation and effects beyond the bounds of a particular state, should be considered as belonging to the government of the United States."[54]

Believing that the policy heretofore approved and acted upon by the people of the United States,—that child labor is a matter of national concern,—should not be abandoned, I agree in substance with Theodore Roosevelt, who said in 1907:

"States' rights should be preserved when they mean the people's rights, but not when they are invoked to prevent the abolition of child labor—not when they stand for wrong or oppression of any kind, or for national weakness or impotence at home or abroad. The states have shown that they have not the ability to curb the power of syndicated wealth, and therefore in the interest of the people it must be done by national action."[55]

I have confidence in our balanced system of government and am willing to trust much to the ultimate good sense and political prudence of Congress.

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[53]Address by Israel M. Foster, of Ohio, sponsor for the child labor amendment in the House of Representatives, May 27, 1924.

[a]Three sections of the country have more than 10% of their children 10 to 15 years, inclusive, at work; East South Central, 12.7%; South Atlantic, 14.3%; West South Central, 12.7%. Illiteracy is above the average in all these sections. School attendance is below the average in all. (Recent Bulletin of the Federal Children's Bureau.)

[54]Eliot's Debates 424. Quoted by Dr. John A. Ryan, The Proposed Child Labor Amendment, p. 10.

[55]Quoted in editorial article in The Journal of the National Education Association for January, 1925.

I revere the constitutional guaranties of private rights, and believe with all my heart that they can and will be fully and wisely guarded by the Supreme Court of the United States.

I am satisfied that child labor is still a menace to the nation's children and therefore to the nation, and that action by the several states will afford too slow and doubtful a remedy.

I do not know how many children are today in harmful industry, and I do not need to know. There are thousands and more will take their places. I learned long ago that 12 inches make 1 foot; 3 feet make 1 yard; 5½ yards make 1 rod; but I have never learned just how many stunted and ruined lives of children make a case for a constitutional amendment. I am inclined to think it is a variable number, according to one's estimates of social values.

If child labor is a real and substantial evil, the most we can do to cure it is none too much, and even some abatement of one's theories as to appropriate boundary lines between state and national responsibility might not be too great a price to pay.