CHILD LABOR AS INVOLUNTARY SERVITUDE: THE FAILURE OF CONGRESS TO LEGISLATE AGAINST CHILD LABOR PURSUANT TO THE THIRTEENTH AMENDMENT IN THE EARLY TWENTIETH CENTURY

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ABSTRACT:

Numerous times in the early twentieth century, Congress considered the problem of child labor. Child labor's opponents bemoaned the harsh conditions under which children toiled, and frequently referred to the practice as "child slavery." Yet although Congress twice succeeded in legislating on the topic, both times it found itself stymied by the Supreme Court, which struck down the statutes as exceeding congressional authority. In response, Congress passed the Child Labor Amendment to the Constitution, but failed to obtain its ratification. It was only after the 1937 reversal in Supreme Court Commerce Clause jurisprudence that the Court sustained a federal child labor law. Curiously, Congress never attempted to legislate against child labor by characterizing the practice as a form of involuntary servitude prohibited by the Thirteenth Amendment. Why didn't Congress seize upon this potential basis?

This Article addresses that question. First, it discusses the constitutional viability of the Thirteenth Amendment approach in the early twentieth century. Then, examining the history of the movement against child labor, the Article reveals that Congress simply overlooked the approach in the movement's early stages in light of more salient precedent involving the commerce and taxing powers. By the time the approach was proposed in the House Judiciary Committee in 1922, Congress had already shifted

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attention to passing the Child Labor Amendment. Twice chagrined by the Supreme Court, members of Congress believed the Court would reject any attempt to limit child labor under existing constitutional powers. Consequently, the Thirteenth Amendment argument never advanced to the full body of the House or Senate. Finally, the Article explains that the approach might have been politically viable if considered earlier, before the Court struck down the first federal child labor statute. The Article concludes by assessing implications that a Thirteenth Amendment basis for federal child labor legislation might have had for the development of Progressive-era labor legislation.

I. INTRODUCTION

By the early twentieth century, "the industrial revolution had remolded American life,"[1] reaching its hands into nearly every corner of the American economy, but particularly contributing to the rise of child labor.[2] By 1900, one child out of every six between the ages of ten and fifteen was employed, totaling to nearly two million child laborers across the United States.[3] Children as young as five years old worked alongside their parents in factories,[4] and were exposed to "irreparable injury" from industrial accidents, poisoning, and disease.[5]

In response, reformers sought to effect legislation regulating or prohibiting child labor and its harmful conditions. Child labor's opponents initially focused their efforts on the states and made significant progress.[6] It became apparent, however, that the standards and degree of enforcement of child labor laws varied widely across the states, and that some states were hesitant to legislate at all.[7] Additionally, competitive economic conditions placed undue pressure on cooperating states to unwind or under-enforce their legislation, in order to retain industry rather than lose it to

1. STEPHEN B. WOOD, CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA: CHILD LABOR AND THE LAW 1 (1968).

2. *Id.* at 3; *Child-Labor Bill: Hearings on H.R. 12292 Before the H. Comm. on Labor*, 63d Cong. 93 (1914) [hereinafter *1914 Hearings*].

3. RAYMOND G. FULLER, CHILD LABOR AND THE CONSTITUTION 2 (1923).

4. *1914 Hearings*, *supra* note 2, at 120-25; *see also id.* at 125-41 (documenting cases of children as young as three years old working alongside their parents in canneries).

5. FULLER, *supra* note 3, at 4; Edward F. Waite, *The Child Labor Amendment*, 9 MINN. L. REV. 179, 202 (1925).

6. Julie Novkov, *Historicizing the Figure of the Child in Legal Discourse: The Battle over the Regulation of Child Labor*, 44 AM. J. LEGAL HIST. 369, 372 (2000); Waite, *supra* note 5, at 181.

7. WOOD, *supra* note 1, at 6, 14 ("By 1900, most industrial states had enacted some form of child labor regulation; however, most of this legislation was inferior to the standards . . . in the more progressive northeastern states. . . . Their laws, with rare exceptions, failed to meet desirable standards, and enforcement was lax, sometimes virtually nonexistent."); James Barclay Smith, *A Child Labor Amendment Is Unnecessary*, 27 CAL. L. REV. 15, 17 (1938).

other states that attracted industry by their lower regulatory standards.[8] Reformers became convinced, therefore, that "federal control of child labor was a public necessity"[9] because only federal legislation could be applied uniformly and sustained.[10]

Over the next thirty years, child labor's opponents convinced Congress to repeatedly attempt legislation. Congress first enacted a statute pursuant to its power to regulate interstate commerce,[11] which the Supreme Court struck down in *Hammer v. Dagenhart*.[12] Congress next attempted to pass a law pursuant to its taxing power,[13] but again was thwarted by the Court.[14] Many proposals were made to pass a constitutional amendment that would ensure congressional power to legislate on child labor, and one of these gained the approval of the House and Senate but failed to be ratified by the states.[15] Finally, after the "switch in time" in 1937, which marked the Supreme Court's new receptiveness to economic legislation,[16] Congress returned to an approach based on the Commerce Clause, and this time managed to sustain the Fair Labor

8. WOOD, *supra* note 1, at 14; Jasper Yeates Brinton, *The Constitutionality of a Federal Child Labor Law*, 62 U. PA. L. REV. 487, 487 (1914); Seymour Moskowitz, *Malignant Indifference: The Wages of Contemporary Child Labor in the United States*, 57 OKLA. L. REV. 465, 478 (2004); Novkov, *supra* note 6, at 373.

9. Waite, *supra* note 5, at 182; *see* WILLIAM G. WHITTAKER, CONG. RESEARCH SERV., RL 31501, CHILD LABOR IN AMERICA: HISTORY, POLICY, AND LEGISLATIVE ISSUES, at CRS-4 (2005); Brinton, *supra* note 8, at 487; Novkov, *supra* note 6, at 373.

10. *See* 41 CONG. REC. 1811 (1907) (statement of Sen. Beveridge) ("States can not properly deal with this National evil. Manufacturers of a State having a good law *will* violate it because of the competition of States having bad laws. Uniformity is the only remedy."); *1914 Hearings*, *supra* note 2, at 18 ("Congress should forbid interstate commerce in the products of child labor because . . . It is difficult if not impossible to secure uniform and effective laws in the different States . . . [and] every proposition to enact an effective State law is opposed by the industries that would be affected on the ground that such a law would handicap them in competition with other States.").

11. Keating-Owen Child Labor Act of 1916, ch. 432, 39 Stat. 675.

12. 247 U.S. 251 (1918).

13. Child Labor Tax Act, ch. 18, §§ 1200-1207, 40 Stat. 1057, 1138-40 (1919), *invalidated by* Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).

14. *Bailey*, 259 U.S. at 44.

15. *See Proposed Child-Labor Amendments to the Constitution of the United States: Hearings Before the H. Comm. on the Judiciary*, 68th Cong. 1 (1924) [hereinafter *1924 Hearings*]; *Child-Labor Amendment to the Constitution: Hearings Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. (1923) [hereinafter *1923 Hearings*]; H.R. REP. NO. 68-395 (1924); S. REP. NO. 68-406 (1924); H.R. REP. NO. 67-1694 (1923); S. REP. NO. 67-1185 (1923); 65 CONG. REC. 7294-95, 10,142 (1924); *see also* HUGH D. HINDMAN, CHILD LABOR: AN AMERICAN HISTORY 74 (2002); *A 20th Amendment?*, TIME, Jan. 5, 1925, *available at* http://www.time.com/time/magazine/article/0,9171,719693,00.html.

16. John W. Chambers, *The Big Switch: Justice Roberts and the Minimum-Wage Cases*, 10 LAB. HIST. 44, 44-48 (1969); Michael Nelson, *The President and the Court: Reinterpreting the Court-Packing Episode of 1937*, 103 POL. SCI. Q. 267, 267 (1988).

Standards Act with important provisions addressing some forms of child labor.[17]

Throughout this period, Congress never once attempted to enact child labor legislation pursuant to its power under the Thirteenth Amendment, Section 2 of the Constitution—that is, its power to "enforce . . . by appropriate legislation"[18] the Thirteenth Amendment's prohibition of "slavery [ ]or involuntary servitude."[19] But this approach was logical—or at least should have merited serious consideration. Members of Congress repeatedly referenced the harsh labor conditions under which children toiled, and persistently characterized them as "child slavery." In addition, the Thirteenth Amendment's core meaning and its judicial interpretation at the time supported, or at least permitted, such an approach. As a result, the mystery arises: Why didn't Congress seize upon its Thirteenth Amendment power as a potential basis for legislating against harsh forms of child labor, particularly when its legislative attempts pursuant to other constitutional powers failed?

This Article answers the questions of whether, when, and why Congress considered—and abandoned—this Thirteenth Amendment approach. Part II addresses the philosophical and constitutional viability of the argument that child labor, carefully defined, constitutes a form of involuntary servitude prohibited by the Thirteenth Amendment.

Part III elaborates upon the history of the movement for federal child labor legislation and explains, at each stage, why Congress failed to duly consider the Thirteenth Amendment approach. As it turns out, in the movement's early stages, many members of Congress failed to realize that any constitutional power might permit them to limit child labor other than the taxing power or the power to regulate interstate commerce, due primarily to the intellectual influence of precedent concerning regulation of similar subjects, among other factors. By the time the Thirteenth Amendment idea was proposed to the House Committee on the Judiciary in 1922, Congress was already well on its way to passing a Child Labor Amendment. The Supreme Court had chagrined Congress twice in its attempts to legislate against child labor under existing constitutional powers, leading members of the Committee to believe that the Court would reject any such attempt. As a result, the Thirteenth Amendment argument never escaped the Committee to be considered by the full body of either the House or the Senate.

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17. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (2006)); United States v. Darby, 312 U.S. 100, 109-10 (1941).

18. U.S. CONST. amend. XIII, § 2.

19. *Id.* amend. XIII, § 1.

Part IV acknowledges several political and practical factors that may have affected the appeal of the Thirteenth Amendment approach, but explains that none were likely to disqualify the approach if Congress had fully considered it. The final Part discusses the impact that the Thirteenth Amendment approach to federally regulating child labor otherwise might have had on the development of the Progressive-era labor movement.

II. EARLY-TWENTIETH-CENTURY CHILD LABOR VIOLATED THE THIRTEENTH AMENDMENT

A. Prohibited Practice

The Thirteenth Amendment prohibits two similar but distinct practices: slavery and involuntary servitude.[20] It authorizes Congress to "enforce [that prohibition] by appropriate legislation."[21]

1. Child Labor as Slavery

In many ways, child labor, as manifested in the early twentieth century, resembled the Thirteenth Amendment conception of slavery. The harsh conditions under which children toiled were physically damaging, as were the work conditions for nineteenth-century slaves.[22] The economic conditions that pressured employers to utilize slave labor similarly pressured them to use child labor because, in either case, the employee is willing to work more cheaply because of his or her weaker bargaining power.[23]

The definition of slavery in that time period, however, focused on

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20. *Id.*

21. *Id.* amend. XIII, § 2.

22. *See* EDWIN MARKHAM ET AL., CHILDREN IN BONDAGE 63-65 (Arno Press, Inc., 1969) (1914) (describing how Pennsylvania child laborers worked in manufacturing in hundred-degree conditions and had to rapidly carry items repeatedly over a distance of a hundred feet, making seventy-two trips per hour); 41 CONG. REC. 1553-57, 1792-826, 1867-83 (1907) (statement of Sen. Beveridge) (reporting "pouring of cold water on children to keep them awake after they have worked *standing on their feet ten* hours," young children being "mangled and torn in the machinery," poisoning by dye, and "inhalation of dust, impure air, and injurious gases" causing "chronic bronchitis, tuberculosis, and catarrh of the upper air passages" as well as "consumption" and "anaemia"); *infra* notes 112-114 (reporting Rep. Ricketts's comments finding similar the working conditions for slaves and child laborers).

23. *Compare* Novkov, *supra* note 6, at 380 (describing the vulnerability of child laborers whose parents could not protect them), *and* 53 CONG. REC. 2014 (1916) (statement of Rep. McKellar) ("There are but two reasons for child labor. One is that children can be employed cheaper than adults and thereby their employers can make more profits out of the particular business in which they are employed."), *with* BRUCE M. MITCHELL & ROBERT E. SALSBURY, ENCYCLOPEDIA OF MULTICULTURAL EDUCATION 220 (1999) ("As the plantation system developed, the need for cheap labor intensified, resulting in a dramatic increase in the number of Africans who were sold into slavery . . . .").

more than laborers' work conditions and underlying economic realities. The first edition of *Black's Law Dictionary* was published in 1891, less than thirty years after the passage of the Thirteenth Amendment and less than twenty years before Congress first considered regulating child labor. That dictionary defined "slavery" as "that civil relation in which one man has absolute power over the life, fortune, and liberty of another."[24] Akhil Amar has similarly written that, under the Thirteenth Amendment's definition, "slavery is a system of domination, degradation and subordination, in which some people are allowed in effect to treat other persons . . . as property rather than persons."[25] The *Civil Rights Cases*, which the Supreme Court decided in 1883 and which served as binding precedent during the anti-child-labor movement, defined the necessary incidents of slavery as "[c]ompulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities."[26] In 1906, the Court declared in *Hodges v. United States* that the word "slavery," as used in the Thirteenth Amendment, means "a condition of enforced compulsory service of one to another," and "in Webster slavery is defined as 'the state of entire subjection of one person to the will of another.'"[27]

These definitions of slavery as broad subjugation across aspects of one's life beyond compulsory labor suggest that child labor, in many cases, may have seemed too narrow a form of subjugation to constitute Thirteenth Amendment slavery.[28] Additionally, some late nineteenth- and early twentieth-century cases suggested that the prohibition of slavery was "well known to have been adopted with reference to a state of affairs which had existed in certain states of

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24. BLACK'S LAW DICTIONARY 1101 (1st ed. 1891).

25. Akhil Reed Amar, *Remember the Thirteenth*, 10 CONST. COMMENT. 403, 405 (1993).

26. 109 U.S. 3, 22 (1883).

27. 203 U.S. 1, 16-17 (1906); *see also* CONG. GLOBE, 38th Cong., 1st Sess. 1200 (1864) (statement of Rep. Wilson) (defining slavery, during the Thirteenth Amendment debates, as "the state of entire subjection of one person to the will of another").

28. *But see* Scott v. Sandford (The Dred Scott Decision), 60 U.S. 393, 624-25 (1856) (Curtis, J., dissenting) ("[T]he *status* of slavery embraces every condition, from that in which the slave is known . . . simply as a chattel, with no civil rights, to that in which he is recognized as a person for all purposes, save the compulsory power of directing and receiving the fruits of his labor."); Akhil Reed Amar & Daniel Widawsky, Commentary, *Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney*, 105 HARV. L. REV. 1359, 1377 (1992) (arguing that child abuse is a form of Thirteenth Amendment slavery, not involuntary servitude); Novkov, *supra* note 6, at 380 n.60 ("Working class parents viewed children as economic assets . . . .").

the Union since the foundation of the government,"[29] suggesting that the Thirteenth Amendment's prohibition of *slavery* was seen, at least at that time, to extend only to African slavery in the South and very close analogues.

2. Child Labor as Involuntary Servitude

Even if early-twentieth-century child labor did not sufficiently resemble slavery in the minds of the members of Congress, which seems doubtful given their many references to child labor as a form of "child slavery,"[30] it could still be viewed as a form of involuntary servitude. *Bailey v. Alabama* was decided in 1911 between two congressional attempts to legislate against child labor: the Beveridge bill and the Keating-Owen Act.[31] In that decision, the Court declared that "the [Thirteenth] Amendment was not limited to [African slavery] .... It was a charter of universal civil freedom for all persons ... under the flag. ... The words involuntary servitude have a 'larger meaning than slavery.'"[32]

The content of this "larger meaning" is less clear. The Court claimed that:

> The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude.[33]

The Court's definition of "involuntary servitude" as "that control by which the personal service of one man is disposed of or coerced for another's benefit" corresponds with the narrower of two definitions of "involuntary" included in the 1891 edition of *Black's Law Dictionary*, which reads, "An involuntary act is that which is performed with

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29. Robertson v. Baldwin, 165 U.S. 275, 282 (1897); *see also* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 69 (1872) (stating that the slavery prohibition was "to forbid all shades and conditions of African slavery"); Bailey v. Alabama, 219 U.S. 219, 241 (1911) (explaining that "involuntary servitude" was included in the Thirteenth Amendment precisely because "slavery" would not cover certain forms of labor, including "the form of apprenticeship for long terms ... [and the] reduc[tion] [of] the slaves to the condition of serfs attached to the plantation" (quoting *Slaughter-House Cases*, 83 U.S. at 69)).

30. *See infra* notes 98-114, 234-236, and accompanying text.

31. Bailey v. Alabama, 219 U.S. 219 (1911); Keating-Owen Child Labor Act of 1916, ch. 432, 39 Stat. 675 (1916), *invalidated by* Hammer v. Dagenhart, 247 U.S. 251 (1918); H.R. 17838, 59th Cong. (1907).

32. *Bailey*, 219 U.S. at 240-41 (quoting *Slaughter-House Cases*, 83 U.S. at 69).

33. *Id.* at 241; *see* Butler v. Perry, 240 U.S. 328, 332 (1916) ("'[I]nvoluntary'" servitude was intended to cover those forms of compulsory labor akin to African slavery which ... tend to produce like undesirable results."); *Robertson*, 165 U.S. at 282.

constraint or with repugnance . . . . An action is involuntary, then, which is performed under duress."[34] Similarly, debates over the Child Labor Amendment in the mid-1920s revealed that at least one member of Congress believed that "involuntary servitude" referred to "physical labor [performed] under physical compulsion or other form of duress."[35] I will refer to this set of definitions as the "duress-based" conception of involuntary servitude.

Child laborers in the early-twentieth-century United States were often made to work through the exercise of duress. They were threatened by their parents and employers with corporal punishment or "withdrawal of [financial] support" upon which they had no choice but to depend.[36] Employers frequently engaged in tactics to make children labor against their apparent will, for example, by pouring cold water over child mill and factory workers to keep them awake and working,[37] and by whipping "breaker boys" to force them back into the coal mines.[38] Additionally, most parents withheld the compensation their children earned, which sustained their severe dependency upon their parents and forced them to continue to work at their parents' behest.[39]

But child labor might also be seen to fit an "incapacity-to-consent" conception of involuntary servitude. The 1891 edition of *Black's Law Dictionary* provided a second, broader definition of "involuntary," which read, "An involuntary act is that which is performed . . . without the will to do it," where "will" is defined as "[t]he power of the mind which directs the action of a man."[40]

Indeed, many people believed, even in the early twentieth century, that children lacked such power of mind, and were therefore

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34. BLACK'S LAW DICTIONARY 643 (1st ed. 1891).

35. 66 CONG. REC. 1443 (1925) (statement of Sen. Walsh).

36. *Child Labor: Hearing on H.J. Res. 327 Before the H. Comm. on the Judiciary*, 67th Cong. 7 (1922) [hereinafter *1922 Hearing*] (Lawson brief); J.F. Lawson, *Child Labor and the Constitution*, 56 AM. L. REV. 733, 734 (1922); *see* BUREAU OF LABOR STATISTICS OF THE STATE OF N.C., TENTH ANNUAL REPORT 63 (1897) (describing how "parents force[d] their children to work with them in the mill"); PUB. SCHS. OF CINCINNATI, SEVENTY-SIXTH ANNUAL REPORT 10 (1905) (describing how Cincinnati parents "force[d] their children to work").

37. 41 CONG. REC. 1553 (1907) (statement of Sen. Beveridge).

38. SUSAN CAMPBELL BARTOLETTI, GROWING UP IN COAL COUNTRY 17 (1996).

39. *See 1923 Hearings*, *supra* note 15, at 52 ("[T]he mothers are paid and the children are never paid."); *1922 Hearing*, *supra* note 36, at 7 ("[Children] do not receive the meager compensation which they earn. It goes to the parent or guardian as an incentive to him to force [the child's] labor . . . ."); Moskowitz, *supra* note 8, at 474-75 (describing how children's pay envelopes in the nineteenth and twentieth centuries were given directly to their parents, who personally signed for and retained their children's wages).

40. BLACK'S LAW DICTIONARY 643, 1241 (1st ed. 1891).

less capable than adults of consenting to many aspects of their treatment,[41] but particularly incapable of consenting to labor.[42] Edward Waite wrote, in a 1925 article in the *Minnesota Law Review*, "Because they are too young to appreciate the risks involved . . . , boys and girls will not observe the precautions necessary for self-protection in industries in which there is danger of industrial poisoning or accidents . . . ."[43] His words evince a common knowledge that children could not provide real or informed consent to their labor, particularly in factories and mills where significant physical risks were imposed, because they lacked sufficiently developed mental capacity to appreciate those risks.[44] One scholar has recognized that the early-twentieth-century view in at least Massachusetts "envisioned young people as naturally unable to discern their best interests and act as their own agents."[45] Similarly, Justice Harlan's dissent in *Robertson v. Baldwin* noted, "[A] minor is incapable of having an absolute will of his own before reaching majority."[46] Testimony during the 1922 House Judiciary Committee hearings also demonstrated that many contemporaries believed that children lacked the mental capacity to consent to hard physical labor, particularly industrial labor performed for an employer rather than

41. *See 1923 Hearings*, *supra* note 15, at 50 (describing age of consent laws for marriage); 65 CONG. REC. 10892 (1924) (statement of Rep. Ward).

42. *See 1923 Hearings*, *supra* note 15, at 120, 123 (letters to Sen. Shortridge); Andrew Alexander Bruce, *The Beveridge Child Labor Bill and the United States as Parens Patriae*, 5 MICH. L. REV. 627, 627 (1907) (stating that the government's right to interfere with children's employment contracts had "always been conceded" because "[f]rom an early time minors have been placed under contractual disability by the law and have been looked upon as wards of the State. . . . in a large measure [because of] the actual disability of the minor and his unquestioned need [for] protection"); *see generally* HOLLY BREWER, BY BIRTH OR CONSENT; CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY (2005) (describing the Anglo-American historical transition, over the seventeenth through nineteenth centuries, to broader adoption of the notion that children lacked judgment and contractual capacity).

43. Waite, *supra* note 5, at 202.

44. *See* James D. Schmidt, *"Restless Movements Characteristic of Childhood": The Legal Construction of Child Labor in Nineteenth-Century Massachusetts*, 23 LAW & HIST. REV. 315, 347-48 (2005) ("Questions about age, capacity, and experience informed hundreds of litigations about children's industrial accidents across the United States in the late nineteenth and early twentieth centuries."); *id.* at 348 (claiming that, by 1911, Massachusetts courts recognized children's natural incapacity to appreciate the dangers of their position and stated, for example, that "[c]hildren were 'a class who are least able to protect themselves by appreciating and avoiding danger, or to request instructions as to matters beyond their understanding, or to arrange by contract for their protection, or to resist any compulsion'") (quoting Berdos v. Treemont and Suffolk Mills, 95 N.E. 876, 877 (Mass. 1911)).

45. Schmidt, *supra* note 44, at 349.

46. 165 U.S. 275, 298 (1897) (Harlan, J., dissenting).

household chores performed for a parent.[47] The National Child Labor Committee's general secretary testified in 1923 that children were vulnerable and unable to protect themselves "through the exercise of the ballot. . . . [The child] is a ward. Therefore a child has the right to go before the Federal Government for relief that is refused or neglected by his own Commonwealth."[48]

There was also a growing trend toward questioning whether parents should always have authority to consent on behalf of the child who lacks capacity to consent for himself.[49] Such parental authority to consent to a child's service to another master was already limited in some contexts.[50] For example, many states had statutorily limited masters' hiring of underage apprentices because "[t]he infant apprentice, having no will in the matter, is to be cared for and protected in such way as, in the judgment of the state, will best subserve the interests both of himself and of the public."[51] Additionally, several states had proposed or enacted laws prohibiting child abuse, demonstrating an awareness that parents did not always act in their children's interests.[52] For example, Congress itself proposed a bill in 1884 to "protect[ ] children from cruelty and abuse" in Washington, D.C. In reporting upon that bill, the Senate Committee on the District of Columbia observed that other states' child abuse laws had "proved very beneficial in the protection of young children from many of the cruelties to which experience shows they are often subjected at the hands of vicious and criminal parents."[53]

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47. *1922 Hearing*, *supra* note 36, at 8 (Lawson brief) (referring to children as "individuals legally and actually incapable of acting for themselves" who are "legally and actually incompetent to insist upon the terms and conditions which make contracts fair to themselves. They are peculiarly helpless in their dealings with an employer, even were they free").

48. *1923 Hearings*, *supra* note 15, at 53 (statement of Owen R. Lovejoy, General Secretary, National Child Labor Committee).

49. Novkov, *supra* note 6, at 382 (describing how Pennsylvania and Indiana recognized, as early as 1905, "the state's duty to step in when the child's parents were not performing [their] function adequately").

50. *See, e.g.*, Respublica v. Keppele, 2 U.S. (2 Dall.) 197, 199 (1793) (deciding that no parent could enforce his child's service by "commit[ting] him to goal if he runs away . . . [or] demand[ing] the penalty of five days service for every day of absence," nor could he bestow such enforcement power upon another).

51. Robertson v. Baldwin, 165 U.S. 275, 297 (1897) (Harlan, J., dissenting).

52. *See* S. REP. NO. 48-94, at 1 (1884) (acknowledging child abuse statutes in several states, including New York); James A. Post, *Report from Michigan*, 25 NAT'L CONFERENCE OF CHARITIES AND CORR. 62 (1899) (reporting on an 1897 Michigan child abuse statute that was modeled on an Ohio bill); Amar & Widawsky, *supra* note 28, at 1374 & n.64 (citing examples of criminal child abuse laws that existed when the Thirteenth Amendment was ratified).

53. S. REP. NO. 48-94, at 1.

Both the duress-based and incapacity-to-consent conceptions of involuntary servitude had been applied to child employment by at least one court prior to congressional attempts to limit child labor. In the 1880 case of *Ancarola v. United States*, the Circuit Court for the Southern District of New York applied the 1874 Padrone Statute—which Congress passed to prohibit the inveiglement, importation, sale, and binding of people to involuntary service in the United States[54]—to the employment of child street musicians.[55] The lower court had emphasized:

> [T]he age of the child is important, for, as you know, in regard to some things a child of such tender years is incapable of consent. . . . [I]f you believe from the evidence that the intention of the accused in bringing the child to this country was to employ the child as a beggar or as a street musician, for his own profit, and that such intended employment was one injurious to its morals and inconsistent with its proper care and education . . . then you will be justified in finding that he intended to hold such child to involuntary service . . . notwithstanding the fact that the child had consented to the employment in Italy, and that no evidence of a subsequent dissent, while under the control of the accused, has been given.[56]

The lower court's argument is consistent with the notion that children are incapable of consenting before a certain age—that is, that the children's actions may be *involuntary*. The second part of the quotation, regarding the intention of the accused to bring the child to labor in particular ways for the accused's profit and inconsistent with the child's benefit, permits the characterization of the children's actions as involuntary *servitude*.[57]

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54. Padrone Statute, ch. 464, 18 Stat. 251; *see Ancarolo. The Padrone. How He Bought Seven Boys To Make Street Beggars of Them*, N.Y. TIMES, Nov. 16, 1879, at 5 (discussing the now-illegal inveiglement due to the Padrone Act).

55. United States v. Ancarola, 1 F. 676, 682-84 (C.C.S.D.N.Y. 1880).

56. *Id.* at 682.

57. *See* Bailey v. Alabama, 219 U.S. 219, 241 (1911) ("[C]ontrol by which the personal service of one man is disposed of or coerced for another's benefit . . . is the essence of involuntary servitude."); Amar & Widawsky, *supra* note 28, at 1377 ("'[S]lavery' . . . is usefully understood as domination and degradation not plausibly for the benefit of the child."). *Cf.* BREWER, *supra* note 42, at 282-83 (describing eighteenth-century challenges to paternal power and questions about "[w]ho would act in the children's best interest"); Janet L. Dolgin, *Why Has the Best-Interest Standard Survived?: The Historic and Social Context*, 16 CHILD. LEGAL RTS. J. 2, 5-6 (1996) (describing the "appearance in the first half of the 19th century of custody decisions that relied on the best interests of the child. . . . By the start of the 20th century, the best-interest standard had become firmly institutionalized"); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 237-42 (C.G. Edward White ed., 1985) (discussing the creation of the best-interests-of-the-child doctrine); Michael Grossberg, *Children's Legal Rights? A Hisorical Look at a Legal Paradox*, *in* CHILDREN AT RISK IN AMERICA: HISTORY, CONCEPTS, AND PUBLIC

The Circuit Court agreed with much of the lower court's reasoning, but its language supported both a duress-based and an incapacity-based conception of involuntary servitude with respect to the particular circumstances.[58] It argued that not only were children incapable to consent for themselves, but parental consent was also insufficient.[59] The pressure or duress brought upon children by their employers *and parents* was too strong, given their incapacity. Specifically, the court claimed:

> The influence brought to bear upon [these children] by their parents and uncles, and by . . . the defendants, to induce them to consent, in view of their condition in life and their ages and their inexperience, was enticement and inveiglement. . . . [T]he children, in serving the defendant as street musicians, for his profit, to the injury of their morals, subject to his control, could not properly be considered as rendering him voluntary service. They were incapable of exercising will or choice affirmatively on the subject. They were cast off by their parents . . . and their being in this country at all with the defendant was, on all the facts, really involuntary on their parts, although the sham form of their consent was gone through with. . . . [T]here was ample evidence to warrant the jury in finding inveiglement in Italy, and the intent of the defendant, with full knowledge of such inveiglement, to hold the children in this country to involuntary service to him as street musicians.[60]

Given *Ancarola*'s logic, it is particularly curious that Congress never thought to apply similar theories to child laborers in the early twentieth century. Of course, some features distinguished *Ancarola*'s child street musicians from the child factory and mill workers that comprised the majority of congressional concern. For example, the street musicians had been enticed to come to the United States and separated from their families and support networks in a way that left them more vulnerable than child factory and mill workers born in the United States and still living with their parents, who could more easily renege on their consent to allow their children to work.[61] The Padrone Statute only prohibited knowingly holding a person to involuntary service if he had been "inveigled or forcibly kidnapped in any *other* country," or "sold" or "bought," which might not have been construed to apply to children born in the United States who were

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POLICY 116-17 (Roberta Wollons ed., 1993) (quoting a Georgia judge's 1836 opinion that "this legal right of the father to the possession of his child must be made subservient to the [child's] true interests and safety").

58. *Ancarola*, 1 F. at 683-84.

59. *Id.* at 683.

60. *Id.* at 683-84.

61. *See id.* at 683.

merely employed (rather than "sold") here.[62] However, this should not have precluded Congress from believing that the Thirteenth Amendment authorized broader legislation, particularly given *Ancarola*'s language emphasizing that parents had pressured their children into involuntary service—that same parental pressure was brought to bear on many child factory and mine workers.[63] Even if children who were inveigled from abroad were particularly vulnerable, the logic of *Ancarola* applied, albeit with slightly less force, to child factory and mill workers born in the United States.

Admittedly, also, *Ancarola* was not a Supreme Court case, and therefore could not convey to Congress that the Court would be receptive to such an approach. As discussed in Subsection II.C.2, the Court's receptiveness to congressional claims of constitutional power became of great concern during the 1920s.

But at a minimum, *Ancarola* demonstrates that at least part of the legal community envisioned child employment, under certain circumstances, as a form of involuntary servitude, based on both a duress-based conception and an incapacity-to-consent conception. *Ancarola* could have provided a viable source of argumentation for Congress in regulating child labor under the Thirteenth Amendment.

B. Protected Individuals

To support their argument that child *physical abuse* constitutes Thirteenth Amendment slavery, Akhil Amar and Daniel Widawsky have offered compelling evidence that the Thirteenth Amendment in "both letter and spirit extends" to children, even if their maltreatment is by their parents' hands, and even if they have no African roots.[64]

Amar and Widawsky acknowledge dictum in the Supreme Court's 1897 opinion in *Robertson v. Baldwin* that "the Thirteenth Amendment was not intended to apply to the 'exceptional' case of 'the right of parents and guardians to the custody of their minor children or wards.'"[65] But they argue that the Amendment's legislative history suggests that it applies to at least some parental treatment of children. Specifically, several members of Congress emphasized the similarities between the parent-child and master-slave relationship during the Thirteenth Amendment debates.[66] Additionally, while one member proposed a version of the Thirteenth Amendment that would have created a "sweeping exception to the ban on involuntary

62. Padrone Statute, ch. 464, 18 Stat. 251 (emphasis added).
63. Lawson, *supra* note 36, at 734.
64. Amar & Widawsky, *supra* note 28, at 1360.
65. *Id.* at 1373-74 (quoting Robertson v. Baldwin, 165 U.S. 275, 282 (1897)).
66. *Id.* at 1367.

servitude for all 'relations of parent and child, master and apprentice, guardian and ward,'" the Reconstructive Congress never accepted that alternative version.[67] The 1874 Padrone Statute and the 1867 case of *In re Turner*, in which a Circuit Court decision by Justice Chase invalidated the coercive apprenticeship of a young girl, provide further evidence that, shortly after its passage, the Thirteenth Amendment was thought to protect children as well as adults.[68]

Amar and Widawsky also demonstrate that the Thirteenth Amendment protects individuals of all races. Members of the Reconstruction Congress repeatedly emphasized that the Thirteenth Amendment's protection extended beyond individuals with African roots to individuals of all races,[69] and a developed line of Supreme Court precedent concurred in that conclusion.[70] Child laborers in the early twentieth century were, therefore, within the Thirteenth Amendment's scope of protection.

III. HISTORY OF THE ANTI-CHILD-LABOR MOVEMENT: WHEN AND WHY WAS THE THIRTEENTH AMENDMENT APPROACH CONSIDERED AND REJECTED?

A. First Attempts: The Beveridge Bill and the Keating-Owen Act

1. History of the Beveridge bill and the Keating-Owen Act

Congress first considered federal child labor legislation in December 1906 and January 1907, when three senators of different states submitted a flurry of proposals to prohibit child employment in factories and mines.[71] In early 1907, one of them—Albert Beveridge—presented the first major appeal for child labor legislation on the Senate floor.[72] During three days of debate, Beveridge recited the horrors of child labor in factories, mills, and mines, cataloguing details of abusive treatment.[73] He proposed

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67. *Id.*

68. *Id.* at 1369 (citing United States v. Ancarola, 1 F. 676 (C.C.S.D.N.Y. 1880); In re Turner, 24 F. Cas. 337, 337-40 (Chase, Circuit Justice, C.C.D. Md. 1867); *see also* Amar, *supra* note 25, at 404.

69. Amar & Widawsky, *supra* note 28, at 1368.

70. Bailey v. Alabama, 219 U.S. 219, 240-41 (1911); Hodges v. United States, 203 U.S. 1, 17 (1906); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72 (1872). Furthermore, many of the children that *Ancarola* found protected by the Padrone Statute were white. *See* Amar, *supra* note 25, at 404.

71. FULLER, *supra* note 3, at 237.

72. WOOD, *supra* note 1, at 13; *see* William Carey Jones, *The Child Labor Decision*, 6 CAL. L. REV. 395, 395 (1918).

73. 41 CONG. REC. 1552-57, 1792-826, 1867-83 (1907); WOOD, *supra* note 1, at 13-14.

amending a bill on child labor in the District of Columbia to include one he had previously proposed, which would prohibit carriers of interstate commerce from transporting products of factories or mines that employed children under age fourteen.[74] But many of Beveridge's fellow senators were skeptical of the constitutionality of his proposal, even those who agreed wholeheartedly with its aim.[75] During the debates, the senators repeatedly interrupted him to express concerns that his proposed legislation pursuant to the Commerce Clause would invade and provide precedent for unlimited future incursion upon powers reserved to the states.[76] Ultimately, Beveridge's proposal failed to come to a vote in either house of Congress.[77] A nearly identical bill, presented by Senator Kenyon in every Congress until 1914, met the same fate.[78]

Despite the Beveridge bill's failure, Congress remained actively interested in child labor. In 1907, Congress passed an act "[t]o authorize the Secretary of Commerce and Labor to investigate and report on the industrial, social, moral, educational, and physical condition of woman and child workers in the United States."[79] The act resulted in a nineteen-volume report that extensively catalogued child labor conditions across a number of industries.[80] In the meantime, however, the House Committee on the Judiciary issued a report concluding that the "jurisdiction and authority [of Congress] over the subject of woman and child labor certainly falls under the police power of the States, and not under the commercial power of Congress."[81]

Despite that House Report, Congress continued to discuss Commerce Clause legislation. The Palmer-Owen bill represented a new approach. Instead of punishing the interstate carrier of child labor products, the bill would punish the *producer* who employs child labor and then ships the resulting goods in interstate commerce.[82] The House passed the bill late in the session, so it was reported to the Senate Committee on Interstate Commerce but never acted upon by the Senate.[83] The bill was revived in the Sixty-Fourth Congress,

74. H.R. 17838, 59th Cong. (1907); 41 CONG. REC. 1552 (1907).

75. 41 CONG. REC. 1801-02, 1873 (1907) (statements of Sens. Tillman and Spooner).

76. *Id.* at 1808, 1882; WOOD, *supra* note 1, at 17.

77. FULLER, *supra* note 3, at 237.

78. *Id.*

79. Act of Jan. 29, 1907, ch. 432, 34 Stat. 866; *see* JURISDICTION AND AUTHORITY OF CONGRESS OVER THE SUBJECT OF WOMAN AND CHILD LABOR, H.R. REP. NO. 59-7304, at 1 (1907).

80. WOMAN AND CHILD WAGE-EARNERS IN THE U.S., S. DOC. NO. 61-645 (1910).

81. H.R. REP. NO. 59-7304, at 8.

82. FULLER, *supra* note 3, at 237.

83. *Id.* at 237-38.

however, as the "Keating-Owen bill."[84] During hearings and debates, these versions were subjected to the same constitutional scrutiny as was the Beveridge bill. But members of Congress were encouraged by recent Supreme Court decisions that seemed to support the Keating-Owen bill's approach. Consequently, the House passed the bill by a vote of 337 to 46 on February 2, 1916,[85] and the Senate approved it 52 to 12 on August 8.[86] The Keating-Owen Act was signed into law on September 1, 1916.[87]

The Act did not last long. Less than a year after it took effect,[88] the Supreme Court declared it unconstitutional on June 3, 1918 in *Hammer v. Dagenhart*.[89] In its 5-4 decision the Court held, as many members of Congress had feared, that the Keating-Owen Act was not a proper regulation of interstate commerce.[90] Because the goods excluded from interstate commerce (that is, child labor products) were "of themselves harmless," and their interstate shipment was not "necessary to the accomplishment of harmful results," judicial precedent authorizing exclusion of harmful goods from interstate commerce did not apply.[91] The Court therefore found that the Act violated the Fifth and Tenth Amendments of the Constitution by interfering with the states' "exercise of the police power over local trade and manufacture."[92] Justices Holmes, McKenna, Brandeis, and Clarke dissented.[93]

Throughout this early stage of the movement to federally limit child labor, members of Congress failed to conceive of the Thirteenth Amendment's prohibition of involuntary servitude as a legislative basis. Many members of Congress believed that Congress had no power to directly affect child labor in the states.[94] They believed that Congress could only "act in one of two or three ways to control [the child labor] situation. 1. By the power to regulate interstate commerce. . . . 2. By the taxing power. . . . 3. By the power to regulate the mails. . . ."[95]

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84. *Id.* at 238.

85. 53 CONG. REC. 2035 (1916).

86. *Id.* at 12313.

87. Keating-Owen Child Labor Act of 1916, ch. 432, 39 Stat. 675 (1916), *invalidated by* Hammer v. Dagenhart, 247 U.S. 251 (1918).

88. *Id.* § 7, 39 Stat. at 676.

89. 247 U.S. 251 (1918).

90. *Id.* at 277.

91. *Id.* at 271-72.

92. *Id.* at 274.

93. *Id.* at 277-81 (Holmes, J., dissenting).

94. *E.g.*, 41 CONG. REC. 1873 (1907) (statement of Sen. Spooner); *see* FULLER, *supra* note 3, at 244.

95. *1914 Hearings*, *supra* note 2, at 19 (statement of Owen R. Lovejoy, Secretary,

As a result, in *Dagenhart*, the government attorneys' only suggested source of authority for the Keating-Owen Act was the Commerce Clause.[96]

Yet the descriptions of child labor in congressional hearings and debates during this period invoked terminology and concepts underlying the Thirteenth Amendment. For example, testimony offered by child labor's opponents in congressional hearings repeatedly referred to child labor as closely akin to slavery. Owen R. Lovejoy,[97] General Secretary of the National Child Labor Committee, declared during a hearing on the Palmer-Owen bill:

> [T]he only instance in which contracts with minors have been considered valid in recent years is between the guardian of a minor child and an employer in the form of an apprenticeship, and that is becoming so out of good form that in the recent Children's Code enacted in Ohio, it has been left out on the ground that it establishes a kind of slavery.[98]

Lovejoy also quoted from a memorandum on the bill, which stated, "In brief there are but two grounds on which the [bill] can be seriously opposed. The first is by those who do not want little

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National Child Labor Committee, quoting from a brief entitled *Memorandum on the Palmer-Owen Child-Labor Bill*); *see* 41 CONG. REC. 1873 (1907); WOOD, *supra* note 1, at 29 ("Although selection of the commerce power [as the basis for federal child labor legislation] was almost certain, the merits of the commerce and taxing powers were carefully considered.").

96. *See* Hammer v. Dagenhart, 247 U.S. 251, 268 (1918); Brief for Appellant, at 4, *Dagenhart*, 247 U.S. 251 (No. 704). It is difficult to determine why the government did not offer the Thirteenth Amendment as authority for enacting the federal child labor statutes at stake in either *Dagenhart* or the later case on the Child Labor Tax Act, *Bailey v. Drexel Furniture Co.* Perhaps they could have presented the argument as an ex-post justification for a federal child labor statute even if Congress had a different basis in mind when enacting that statute. It is hard to rule out the possibility that government attorneys considered and rejected that option: the Department of Justice records available for the relevant time period (1916-1922) are quite sparse, see General Records of the Department of Justice [DOJ], THE NAT'L ARCHIVES, http://www.archives.gov/research/guide-fed-records/groups/060.html (last visited Aug. 24, 2009), and the only U.S Solicitor General's Office records available for that time period contain no mention of *Hammer* or *Bailey*. *See* Desk File of Assistant Attorney General La Rue Brown (1918).

97. While Owen R. Lovejoy shared his surname with nineteenth-century abolitionist Elijah Parish Lovejoy, and both his surname and first name with Elijah's brother Owen, who was an abolitionist and a Republican congressman, it appears that he was related to neither (or at least not closely related to either). *See* CLARENCE EARLE LOVEJOY, THE LOVEJOY GENEALOGY WITH BIOGRAPHY AND HISTORY 1460-1930, at 369-71 (1930); E-mail from Stow Lovejoy to Martha Lovejoy (Nov. 11, 2008, 9:35PM EST) (on file with author). Had Mr. Lovejoy descended from these famous abolitionists, perhaps he would have more easily conceived of the Thirteenth Amendment approach to regulating child labor.

98. *1914 Hearings*, *supra* note 2, at 14, 26.

children emancipated from industrial slavery."[99]

Additionally, newspaper and journal articles cited during the debates and hearings similarly invoked the language of slavery and involuntary servitude.[100] Senator Beveridge quoted from an *American Federationist* article during debates over his proposed bill, stating, "These are American children, dragged into the mills when scarcely out of their babyhood, . . . being robbed of health . . . forced to labor as in the days of negro slavery negro children never were."[101] In debates over the Keating-Owen bill, Senator Robinson described several editorials in Southern newspapers. The *Galveston Tribune* "pointed out that while the parent has a right to the profits of the child's earnings, still the child is not a chattel of the parent, and therefore no right exists in the parent to dwarf [the child's] body, stifle his aspirations, or impair his prospects for vigorous maturity."[102] The *Roanoke World* called child labor "the slavery that would barter the lives of God's precious charges for gain."[103] The *Atlanta Way* declared, "Let us hope . . . there will arise no defender of this child slavery when the Keating bill is put upon its passage in the Senate of the United States."[104] Senators Gallivan and Keating referenced other newspaper articles from all over the United States that referred to child labor as "the slavery of too many of our little citizens in the mines and the mills," "bondage," "hideous slavery of childhood," "[t]he [m]odern [s]lavery," "the dwarfing blight of legalized juvenile slavery," and, most simply, "child slavery."[105] One South Carolina newspaper article reported that child labor

> constitutes a form of slavery, white slavery, slavery more detestable and repugnant than that which drenched the favored Land of the Sun in blood four decades since . . . . It is more far-reaching than the chattel slavery of antebellum times . . . ; it is more abominable than the slavery of old, because the negro was furnished food and medicine when sick, quarters calculated to keep him healthy and vigorous, and reasonable rest periods . . . while the [child] victims of rapacity and greed . . . are not able to have equivalent comforts.[106]

Many members of Congress themselves tended to refer to child

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99. *Id.* at 33.

100. *See also* Brinton, *supra* note 8, at 503 (referring to child labor as "child slavery").

101. 41 CONG. REC. 1819 (1907).

102. 53 CONG. REC. 12,055 (1916).

103. *Id.*

104. *Id.*

105. *Id.* app. at 220, 1806, 1809-11 (quoting the *Boston Post*, *Denver Post*, *Roanoke World*, *New Decatur Daily*, *Asheville Citizen*, and *Atlanta Way*).

106. *Id.* app. at 1811 (quoting the *Greenville Piedmont*).

labor as "child slavery." Senator Beveridge emphasized that his bill did not strike at all employment of children, but rather only at "child toil[,] . . . at child *slavery* in the mines, the factories, and the sweat shops of the nation."[107] Senator Tillman, in discussing the Beveridge bill, referred to "millionaires who have . . . built mills and made industrial slaves out of white children instead of the chattel black slaves of the old days."[108] Senator Kenyon called the Keating-Owen bill a "bill for the emancipation of children in this country."[109] Representative McKellar similarly stated:

> [I]nhuman parents are willing to put their little, innocent, helpless children into slavery in order to avoid working themselves. . . . We have long since made the slaves free. . . . Surely, it is time that we were breaking the shackles of slavery from the young children of our land. . . . I am told there are more than 2,000,000 of children in this country under 14 years of age slaving and toiling their young lives away in these institutions in order to bring greater ease and comfort to inhuman parents and in order to satisfy the greed of inhuman masters.[110]

Others referred to child labor as "slavery," "a species of slavery," "slave toil," and other terms associated with oppression.[111] Representative Ricketts claimed child labor was "a form of slavery . . . really worse than the [old-time black] slavery of the South."[112] He pointed out similarities in the conditions for black slaves and child laborers—slaves were "driven about by force and required to perform such labor as their masters might require, without regard to price, physical and mental protection, or sanitary conditions," while child laborers receive "only nominal" compensation that "does not measure up to the value of [their] services" and are exposed to unsanitary conditions that are "conducive to contagion."[113] Ricketts argued that "the present system of child labor . . . is nothing more or less than a substitute for the original slavery . . . . [By child labor] they will have reinstated a form of slavery . . . far more serious to the Nation as a whole than old-time black slavery."[114]

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107. 41 CONG. REC. 1553, 1794 (1907) (statement of Sen. Beveridge).

108. *Id.* at 1801.

109. 53 CONG. REC. 3038 (1916).

110. *Id.* at 2014.

111. *E.g.*, *id.* at 12,285 (statement of Sen. Townsend); *id.* app. at 184-85, 250 (statements of Rep. Ricketts); *id.* app. at 233, 238 (statements of Rep. Shouse and Sen. Keating) ("oppressed childhood"; child laborers as "the weak, the oppressed"); *id.* at 1578 (statement of Rep. Byrnes) ("I am not in favor of the oppression of children."); 41 CONG REC. 1802 (1907) (statement of Sen. Beveridge) ("They can no longer make the blood of children into gold . . . .").

112. *Id.* app. at 184 (statement of Rep. Ricketts).

113. *Id.* app. at 184-85.

114. *Id.*

Members of Congress also compared the problem of regulating child labor to that of regulating slave labor. Senator Kenyon argued that child labor, like slavery, "is a national problem."[115] He referenced an article that reported that popular opposition to child labor paralleled prior opposition to slavery.[116] Some members of Congress compared the products of child and slave labor in arguing that they could or could not be excluded from interstate commerce.[117] During one such discussion, Senator Nelson and Senator Borah bitterly disputed whether child labor was analogous to peonage.[118] Senator Nelson argued, "[T]he peonage laws are based upon the fact that peonage is a species of slavery, and is violative of the thirteenth amendment of the Constitution of the United States. . . . [H]ence they have no application in this case."[119] Senator Borah retorted, "The practice of the employment of child labor is on exactly the same plane as peonage. It is accentuated by the same spirit and sustained by the same principle as the condemnation of peonage."[120] Borah referenced the similarities between the practices to argue that interstate commerce regulation should be equally permissible for the products of each. But, like the rest of Congress at that time, Borah failed to make the more basic argument that these similarities implied that the power most directly relevant to prohibiting peonage—namely, the Thirteenth Amendment's enforcement power—might be equally relevant to prohibiting certain forms of child labor.

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115. *Id.* at 3027 (statement of Sen. Kenyon) ("When Sumner was told that slavery was sectional, he replied, 'That while slavery might be sectional, freedom was national'; and the freedom of children to work out their destiny is a national problem.").

116. *Id.* at 12,218 ("No state in this day can stand for child labor any more than it could stand for slavery, for the duel, or for hazing."); *cf. id.* app. at 1570 (extension of remarks of Rep. Siegel) (claiming that "the Republican Party . . . freed the slaves and now is determined to free the country from child labor").

117. *See, e.g., Child-Labor Bill: Hearings on H.R. 8234, H.R. 13892, and H.R. 12292 Before the H. Comm. on Labor*, 64th Cong. 142-43 (1916) [hereinafter *House 1916 Hearings*] (statement of Rep. Kitchin) (arguing that the fact that Congress never proposed to exclude the products of slave labor from interstate commerce suggests that the products of child labor could not be so excluded); 53 CONG. REC. app. at 265 (1916) (extension of remarks of Rep. Platt) (contemplating the strength of Rep. Kitchin's argument); *id.* at 3055 (statement of Sen. Kenyon) ("As to the question of whether Congress could pass a law prohibiting the shipment of goods made by those in slavery, . . . I do not believe there is anyone now but would believe that . . . Congress could do that very thing."); *id.* at 12,089 (statement of Sen. Cummins) ("Can anyone doubt that we would have the right to say that the channels of interstate commerce should not be used in order to send out and sell the product of . . . men held in peonage?").

118. 53 CONG. REC. 12,089 (1916).

119. *Id.*

120. *Id.*

2. Why Congress Did Not Consider Thirteenth Amendment Legislation During the Era of the Beveridge Bill and Keating-Owen Act

Given the widespread view, both within and beyond Congress, of child labor as a form of slavery, why did Congress fail to conceive of regulating child labor under the Thirteenth Amendment, which had proscribed slavery in the United States since 1865? The answer, at least for the early stages of the anti-child-labor movement, appears to be that Congress was excessively influenced by its earlier successes in enacting Commerce Clause legislation.[121] As a result, Congress was disinclined to innovate in selecting a constitutional power to regulate child labor. Most members were convinced there was no need to be creative because the Commerce Clause provided sufficient authority.

Several previous statutes enacted pursuant to the Commerce Clause served as primary inspiration. In defending his bill, Beveridge listed numerous federal laws that prohibited the importation or interstate transportation of various types of goods, including slaves, counterfeit coins, convict-made goods, explosive materials, falsely labeled food products, cattle lacking an Agricultural Department certificate, gold and silver goods showing the words "U.S. Assay," loose hay or other highly combustible materials, "obscene" materials and articles designed for immoral use, quarantined cattle, certain insects, lottery tickets, and prize fight films.[122] Representative Keating, during the Keating-Owen bill debates, listed several other such items, including women if transported for immoral purposes, commodities in which the carrier has a legal interest, intoxicating liquors (prohibited indirectly), uninspected meats, and "dangerous, or harmful" virus or serum.[123] The Supreme Court had already upheld the constitutionality of many of these laws.[124] Given the number and nature of such federal

121. *See House 1916 Hearings*, *supra* note 117, at 136 (statement of Rep. Roberts) ("We ought to know from experience of the Sixty-third Congress that it ought not be difficult to get through Congress a statute based on the commerce clause of the Constitution without injuring the Constitution itself.").

122. 41 CONG. REC. 1881 (1907).

123. 53 CONG. REC. app. at 223 (1916) (quoting Thomas I. Parkinson's brief); *see Interstate Commerce in Products of Child Labor: Hearings on H.R. 8234 Before the S. Comm. on Interstate Commerce*, 64th Cong. 116 (1916) (Parkinson brief).

124. *See, e.g.*, Weber v. Freed, 239 U.S. 325, 329-30 (1915) (upholding a law against bringing films of prize fights into the United States); Adams Express Co. v. Kentucky, 238 U.S. 190, 202 (1915) (holding that the Kenyon-Webb Act prohibited shipment of liquor intended for use in violation of state law); United States v. Lexington Mill & Elevator Co., 232 U.S. 399, 413 (1914) (upholding a law prohibiting unbranded

prohibitions sustained by the Court, "[i]t was but natural . . . that the opponents of Child Labor should assume that the Commerce Clause was sufficient to eradicate the evil."[125] Two cases in particular—*Champion v. Ames*,[126] which upheld prohibition of the interstate shipment of lottery tickets, and *Hoke v. United States*,[127] which upheld prohibition of the interstate transportation of women for immoral purposes—heavily influenced Congress to select the Commerce Clause as authority for the Keating-Owen Act.[128]

The Supreme Court's decision in *Champion* "greatly encouraged Beveridge and largely shaped his constitutional argument."[129] Beveridge cited the lottery case for the principles that Congress may *prohibit entirely* the foreign or interstate shipment of certain items, and—later echoed by the Senate Committee on Interstate Commerce—that Congress may use the Commerce Clause to accomplish an object indirectly that it could not accomplish directly.[130] During the Keating-Owen bill debates, several senators adopted a law professor's interpretation that:

> [T]he lottery case is authority for the doctrine that interstate carriers may be prohibited [by Congress] from carrying, or shippers or manufacturers from sending, from State to State and to foreign countries, commodities produced under conditions so objectionable . . . as to be subject to control, as to their manufacture, by the State under an exercise of their police power or of a character designed or appropriated for a use which might similarly be forbidden by law.[131]

The Senate Committee on Interstate Commerce referred to the lottery case as "[t]he first great case in which [the Supreme Court] definitely held . . . that Congress may exercise its power over

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adulterated food); Hoke v. United States, 227 U.S. 308, 323 (1913) (upholding a law prohibiting transport of women for immoral purposes); Hipolite Egg Co. v. United States, 220 U.S. 45, 58 (1911) (upholding law permitting confiscation of interstate shipments of unbranded adulterated food); United States *ex rel.* Att'y Gen. v. Delaware & Hudson Co., 213 U.S. 366, 414 (1909) (upholding prohibition of interstate transport of commodities in which the carrier has a legal interest); Champion v. Ames, 188 U.S. 321, 329-30 (1903) (upholding prohibition of interstate transport of lottery tickets).

125. Bruce R. Trimble, *The Child Labor Problem*, 5 KAN. CITY L. REV. 184, 184 (1937).

126. *Champion*, 188 U.S. at 321.

127. *Hoke*, 227 U.S. at 308.

128. *See House 1916 Hearings*, *supra* note 117, at 124; FULLER, *supra* note 3, at 238-39; WOOD, *supra* note 1, at 29-30; Novkov, *supra* note 6, at 388. Indeed, the *Dagenhart* dissent cited both *Champion* and *Hoke*. Hammer v. Dagenhart, 247 U.S. 251, 278-79 (1918) (Holmes, J., dissenting).

129. WOOD, *supra* note 1, at 14.

130. 41 CONG. REC. 1871, 1875 (1907); S. REP. NO. 64-358, at 19 (1916).

131. 53 CONG. REC. 3047, 3050 (1916) (statements of Sens. Sutherland and Kenyon) (quoting Professor Willoughby of Johns Hopkins University).

interstate commerce for the protection of the morals and general welfare of the people."[132] In a House Committee on Labor hearing, Professor Thomas Parkinson indicated that the lottery case had flouted prior conceptions of the Commerce Clause's scope and should thus embolden Congress to similarly limit child labor.[133] Members of Congress repeatedly referred to *Champion* as permitting exclusion of immoral or harmful goods such as those produced by child labor.[134]

The Court's 1913 decision in *Hoke* was similarly significant. *Hoke* upheld the Mann Act, which prohibited interstate transportation of women for immoral purposes—most importantly, for prostitution.[135] "Any doubts that might have remained about the constitutionality of federal social legislation were largely dispelled early in 1913, when the Supreme Court unanimously sustained the Mann Act."[136] In debates over the Keating-Owen bill, Senator Kenyon quoted from *Hoke*, reading, "'the powers . . . conferred on the Nation are adapted to be exercised . . . to promote the general welfare, material and moral.'"[137] "If this be true," he argued, "[Congress] can prevent the transportation between the States of articles made by the labor of mere children."[138] The Senate Committee on Interstate Commerce echoed this view, stating that *Hoke* "necessarily and definitely establish[ed] the principle that Congress can exercise its power over interstate commerce in the interest of the public health, safety, morals, or welfare."[139]

The primary immoral purpose that the Mann Act targeted (namely, prostitution) was commonly known as "white slavery."[140] The term was first used in nineteenth-century Britain to refer to child prostitution,[141] but in the context of the Mann Act, it was used to refer to female prostitution in general.[142] The fact that "slavery" had already been applied to a practice that Congress had prohibited using only the Commerce Clause may have affected the likelihood

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132. S. REP. NO. 64-358, at 18.

133. *Constitutionality of Keating-Owen Child Labor Bill: Hearing Before the H. Comm. on Labor*, 64th Cong. 3-4 (1916) (statement of Professor Thomas I. Parkinson, Director of the Legislative Drafting Research Department of Columbia University).

134. *See, e.g.*, 53 CONG. REC. 3048-52, 12083, 12202, 12281 (1916) (statements of Sens. Kenyon, Sutherland, Borah, and Cummins).

135. 227 U.S. 308, 320-21 (1913).

136. WOOD, *supra* note 1, at 27.

137. 53 CONG. REC. 3047, 3051 (1916).

138. *Id.*

139. S. REP. NO. 64-358, at 20 (1916).

140. DEBORAH G. FELDER, A CENTURY OF WOMEN 35 (1999); FREDERICK K. GRITTNER, WHITE SLAVERY: MYTH, IDEOLOGY AND AMERICAN LAWS 61 (1990).

141. *See* C. TERROT, TRAFFIC IN INNOCENTS: THE SHOCKING STORY OF WHITE SLAVERY IN ENGLAND 13 (1960).

142. Hoke v. United States, 227 U.S. 308, 322 (1913).

that its members would think of a Thirteenth Amendment approach to the related problem of "child slavery"—that is, child labor.

Why the Thirteenth Amendment was not the basis for the Mann Act is also unclear. Perhaps members of Congress implicitly rejected that approach because they did not think that all activities prohibited by the Mann Act were sufficiently akin to involuntary servitude. After all, the Mann Act applied even when a woman had *consented* to her interstate transportation or to the "immoral" sexual liaison.[143] Since adult women are capable of consent, the Mann Act prohibited many activities that might be deemed "voluntary" and hence would not constitute involuntary servitude.[144]

It is also possible that Congress simply overlooked the Thirteenth Amendment approach for "white slavery" just as it did for "child slavery." Stanley Finch, Chief of the Department of Justice's Bureau of Investigation, pointed out this congressional oversight in an address on the "white-slave traffic." Finch argued:

> The great majority [of white slaves] consists of young women and girls who have either been led to such lives by deception and trickery or who have been driven to them by force and fraud. . . . With [the white-slave traffickers] the girls are mere chattels . . . and deals are made between them for the exchange of girls or for the turning of them over to other traffickers. . . . No other form of slavery which has ever been devised can equal her condition.[145]

He emphasized that numerous investigations supported the claim

> that young women and girls have been actually deprived of their liberty and held in involuntary servitude of the vilest kind (they having had their street clothes taken away from them in many cases, having been confined by barred windows and locked doors, and also having been deprived of their liberty by drugs, threats of violence, and by actual personal violence).[146]

Finch claimed that the Thirteenth Amendment vested "sufficient authority . . . in the Federal Government to enable it, by enacting and enforcing appropriate legislation, to absolutely wipe out every vestige of this awful traffic."[147] He noted, however, that:

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143. White Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825, 826 (1910) (criminalizing the interstate transportation of a woman for immoral purposes "whether with or without her consent").

144. *See, e.g.*, Caminetti v. United States, 242 U.S. 470, 486 (1917) (clarifying that the Mann Act's prohibition applied to the "immoral" purpose of engaging in noncommercial consensual extramarital sex).

145. STANLEY W. FINCH, THE WHITE SLAVE TRAFFIC, S. DOC. NO. 62-982, at 3, 6 (1912).

146. *Id.* at 7.

147. *Id.*

> [w]ith reference to the slavery clause of the Constitution, it will perhaps be somewhat surprising to learn that there is no Federal law which makes it a crime for one person to hold another in slavery or involuntary servitude, unless such person has been, in the first instance, kidnapped or carried away or bought or sold; . . . [thus] there seems to be no statute under which persons so holding [these women or girls] in slavery can be punished by the Federal Government.[148]

Therefore, "a most rigid law should be enacted under [the Thirteenth Amendment]."[149]

Unfortunately, Finch's timing was off. By the time he delivered his May 1912 address, the Mann Act had already been enacted pursuant to the Commerce Clause. Consequently, Congress had little reason to duplicate that legislation using the Thirteenth Amendment, and even less reason after the *Hoke* Court upheld the Mann Act in 1913. Finch's Thirteenth Amendment argument never gained prominence during congressional development of the Mann Act, and therefore was unavailable to inspire Congress in its crusade against child labor.[150]

Champion, *Hoke*, and the other cases that sustained federal statutes excluding items from interstate commerce misled Congress into thinking that the Court would continue to expansively interpret the Commerce Clause. Many members were under the impression that Congress possessed a "federal police power" analogous to the states' police power.[151] Specifically, they believed that "Congress has the power not only to prohibit the transportation in interstate commerce of anything that is injurious to commerce itself, but that may be detrimental to public health, public morals, and public welfare."[152] Cases decided between the Beveridge bill's failure in 1907 and the Keating-Owen Act's passage in 1916, such as *Hoke* and others, suggested that the House Committee on the Judiciary's 1907 opinion, which claimed that Congress lacked commercial power to regulate child labor, was incorrect.[153] The strongest proponents of federal child labor commerce-based legislation became unwaveringly

148. *Id.* at 7-8.

149. *Id.* at 8.

150. Of course, even if Finch had inspired a Thirteenth Amendment approach to "white-slave traffic," he might not have done so for *child labor*. And because his argument emphasized the use of force and hence a duress-based conception of involuntary servitude, it did not address the more unique Thirteenth Amendment justification for limiting child labor—children's incapacity to consent.

151. FULLER, *supra* note 3, at 238; *e.g.*, 53 CONG. REC. 3048, 3056, 12081 (1916) (statements of Sens. Kenyon and Borah). *But see* 53 CONG. REC. 3054, 12198 (1916) (statements of Sens. Brandegee and Overman).

152. 53 CONG. REC. 3045 (1916) (statement of Sen. Kenyon).

153. *E.g.*, *id.* at 3046, 3049.

convinced of its constitutionality.[154]

B. *Second Attempt: The Child Labor Tax Act*

1. History of the Child Labor Tax Act

Many members of Congress were taken aback by the Supreme Court's decision in *Hammer v. Dagenhart*.[155] The day after, Senator Kenyon expressed pessimism about congressional ability to further legislate on child labor.[156] *Dagenhart* so angered Senator Owen that he introduced a bill identical to the one overturned, combined with a proposal to strip the Court's jurisdiction to consider the constitutionality of child-labor legislation.[157] Owen's colleagues rejected the jurisdiction-stripping proposal,[158] but did not reject his determination to pass a new child-labor act.[159] The taxing power had already been mentioned during congressional consideration of the Palmer-Owen and Keating-Owen bills.[160] As a result, "it [soon] appeared highly likely that congressional legislation based upon the taxing power would be chosen."[161]

Within a few weeks of *Dagenhart*, Senator Pomerene proposed two new bills to limit child labor, one under the commerce power, and one—which proved more influential—under the taxing power.[162] Other members introduced similar tax-related bills.[163] Shortly after World War I ended on November 11, 1918, Pomerene again proposed a taxing measure, this time as an amendment to the Revenue Bill of 1918.[164] The tax bill imposed the same standards for employers of child labor as the Keating-Owen Act, but instead of imposing a penalty of excluding employers' goods from interstate commerce, the bill imposed a tax of ten percent on employers' net income if they failed to meet its standards.[165] The Child Labor Tax Act was enacted

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154. *E.g.*, 41 CONG. REC. 1822 (1907) (statement of Sen. Beveridge) ("[A]s to the question of *power*, constitutional power, so far as the products of [child] labor enter into interstate commerce, I have not the slightest doubt of it.").

155. WOOD, *supra* note 1, at 179.

156. *Id.* at 186 n.20 (citing N.Y. TRIB., June 14, 1918, at 16).

157. 56 CONG. REC. 7431-35 (1918) (describing bill S. 4671, introduced by Sen. Owen); WOOD, *supra* note 1, at 189.

158. 56 CONG. REC. app. at 461 (1918) (statement of Rep. Mason).

159. *See, e.g.*, 56 CONG. REG. 8341 (statement of Sen. Pomerene).

160. *See supra* note 95 and accompanying text.

161. WOOD, *supra* note 1, at 185 (citing N.Y. TRIB., June 14, 1918, at 10).

162. 56 CONG. REC. 8341 (1918).

163. *See id.*; *supra* note 95 and accompanying text.

164. FULLER, *supra* note 3, at 238.

165. *Id.*; Comment, *Regulating Child Labor by Federal Taxation*, 31 YALE L.J. 310, 310-11 (1922).

on February 24, 1919.[166] Only three years later, on May 15, 1922, eight Supreme Court Justices declared it unconstitutional in *Bailey v. Drexel Furniture Co.*[167]

2. Why Congress Did Not Consider Thirteenth Amendment Legislation During the Era of the Child Labor Tax Act

During this stage of the anti-child-labor movement, Congress again failed to conceive of the Thirteenth Amendment approach, despite the fact that analogies between child and slave labor were made during debates over the taxing bill, just as they were for the Keating-Owen bill.[168] Instead, Congress eagerly rushed to enact tax legislation, thinking no other legislative option was available.[169] As in the previous stage, Congress likely failed to consider the Thirteenth Amendment approach because it had been misled to favor another approach by Supreme Court precedent—this time, precedent upholding similar federal taxes. The two cases upon which members most heavily relied were *McCray v. United States*[170] and *Veazie Bank v. Fenno*.[171]

McCray dealt with a tax on artificially colored oleomargarine, a butter substitute.[172] The Court decided that even if congressional motives in enacting the tax were to suppress the oleomargarine industry, they were "[not] open to judicial inquiry," and therefore Congress had validly exercised its taxing power.[173] *Veazie* upheld a ten percent tax imposed on currency issued by state banks, stating, "The power to tax may be exercised oppressively .... So if a particular tax bears heavily ... it cannot, for that reason only, be pronounced contrary to the Constitution."[174] In debates, several members of Congress referred to "the oleomargarine case," the "State bank case," or both, for the propositions that Congress *can* regulate indirectly through its taxing power on subjects it has no power to regulate directly, and that courts cannot inquire into congressional

166. Child Labor Tax Act, ch. 18, §§ 1200-1207, 40 Stat. 1057, 1138-40 (1919), *invalidated by* Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922); *see* FULLER, *supra* note 3, at 238; WOOD, *supra* note 1, at 216.

167. *Bailey*, 259 U.S. at 44; FULLER, *supra* note 3, at 238.

168. For example, Senator Thomas suggested that the taxing power could have been used to tax the products of slave labor. *See* 57 CONG. REC. 617 (1918).

169. *See id.* at 611, 619 (statements of Sen. Lodge and Kenyon).

170. 195 U.S. 27 (1904).

171. 75 U.S. 533 (1869).

172. *McCray*, 195 U.S. at 28.

173. *Id.* at 53.

174. *Veazie*, 75 U.S. at 548.

motives for a tax.[175] Indeed, these cases had been cited by the *Dagenhart* dissent for those very propositions,[176] perhaps suggesting to members of Congress that the *Dagenhart* dissenters were signaling an alternate constitutional theory for child labor legislation that might capture the *Dagenhart* majority's support.

While a few other members of Congress expressed reservations, presciently predicting the Court's grounds for striking down the Child Labor Tax Act in 1922,[177] the bill's proponents were disinclined to believe them since the Court's prior jurisprudence had so broadly defined the taxing power.[178] As a result, members made little effort to hide their true motives in enacting the tax bill, to the Act's detriment. Justice Taft emphasized that "proof [of congressional intent to destroy child labor] is found on the very face of [the Act's] provisions,"[179] but Congress's explicit and audacious disregard for *Dagenhart* did not help. Indeed, while four of nine Justices had dissented in *Dagenhart*,[180] Congress's attempt to circumvent that decision so offended the Court that only one of those same nine Justices dissented in *Bailey*.[181]

C. *New Approach: The Child Labor Amendment*

1. History of the Child Labor Amendment

The Child Labor Tax Act was first declared unconstitutional by a lower court, but Congress resiliently discussed reenacting the Act,

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175. 57 CONG. REC. 610-11, 613, 616, 618, 3031 (1918) (statements of Sens. Kenyon, Lenroot, Lodge, Kellogg, Overman, Pomerene and Rep. Humphreys); *see* WOOD, *supra* note 1, at 195-98; W.F. Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29 YALE L.J. 137, 144-45 (1919) (attributing the Child Labor Tax Act's passage to *McCray*); Jones, *supra* note 72, at 400-01; *Regulating Child Labor by Federal Taxation*, *supra* note 165, at 311-14. The federal government remained convinced these precedents necessitated upholding the Child Labor Tax Act, and they featured prominently in the government's Supreme Court brief defending the Act. *See* Brief on Behalf of Appellants and Plaintiff in Error at 14, 16, 20, 22, 26-27, 33-35 & n.1, 38, Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) (Nos. 590, 657).

176. Hammer v. Dagenhart, 247 U.S. 251, 278-79 (1918) (Holmes, J., dissenting).

177. *See, e.g.*, 57 CONG. REC. 609, 614 (1918) (statements of Sens. Hardwick and Overman).

178. Given *McCray* and *Veazie*, several legal scholars shared Congress's not-unreasonable expectation that the Child Labor Tax Act would be upheld. *See, e.g.*, Jones, *supra* note 72, at 400-01; *Regulating Child Labor by Federal Taxation*, *supra* note 165, at 314. After *Bailey*, one scholar expressed dismay that "[*McCray* and *Bailey*] leave the matter in a very unsatisfactory situation. The cases cannot be distinguished and they are both still law." Note and Comment, *Constitutional Law: Tax on Employment of Child Labor*, 21 MICH. L. REV. 88, 89 (1922).

179. Bailey v. Drexel Furniture Co., 259 U.S. 20, 38 (1922).

180. 247 U.S. 251, 277-78 (1918) (Holmes, J., dissenting, joined by McKenna, Brandeis, and Clarke, JJ.).

181. 259 U.S. at 44 (Clarke, J., dissenting).

confident that the Supreme Court would ultimately uphold it.[182] Once the Court rejected the Act in *Bailey*, Congress was at a loss.[183] "To many, the destruction of the child labor tax unmistakably signaled the death knell of contemporary reform; . . . [a]t the federal level, nothing consequential seemed any longer attainable, with the possible exception of a child labor [constitutional] amendment."[184]

Numerous proposals for a constitutional amendment that would endow Congress with the power to regulate child labor quickly proliferated.[185] Between 1922 and 1924, over fifty were submitted in Congress.[186] They varied somewhat. A few sought to provide Congress with power to regulate the employment or labor of all persons under the age of 16,[187] but the vast majority would have covered all under the age of 18.[188] A few would have authorized regulation of women's employment as well.[189] Additionally, the proposals varied in whether they referred to the regulable practices as "employment" or "labor."[190]

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182. 61 CONG. REC. 5853 (1921) (statement of Sen. Pomerene).

183. In addition, child working conditions worsened after *Bailey*. *See* Joan Aldous, *The Political Process and the Failure of the Child Labor Amendment*, 18 J. FAM. ISSUES 71, 74 (1997) (documenting an increase in the number of children employed and the durations they worked, and stating that only thirteen states had standards comparable to the federal ones and "[o]nce more, certain industries were planning to relocate in states with 'lax' child labor laws.").

184. WOOD, *supra* note 1, at 294; *see* Charles C. Burlingham, *The Need for a Federal Child Labor Amendment*, 21 A.B.A. J. 214, 214 (1935).

185. This was not the first time a child labor constitutional amendment was suggested, however. During the Keating-Owen bill era, several members of Congress mentioned the possibility. *E.g.*, H.R.J. Res. 298, 63d Cong. (1914), *reprinted in* 2 PROPOSED AMENDMENTS TO THE U.S. CONSTITUTION 71 (John R. Vile ed., 2003) [hereinafter PROPOSED AMENDMENTS]; *House 1916 Hearings*, *supra* note 117, at 135-36 (statement of Rep. Rogers); *see also* 53 CONG. REC. 12295 (1916) (statement of Sen. Hitchcock); 56 CONG. REC. 7431-35 (1918) (statement of Sen. Owen) (proposing an amendment to strip the Supreme Court of jurisdiction to decide the constitutionality of federal child labor statutes).

186. *See* S. DOC. NO. 69-93 (1926), *reprinted in* PROPOSED AMENDMENTS, *supra* note 185, at 106-24; H.R. DOC. NO. 70-551 (1928), *reprinted in* PROPOSED AMENDMENTS, *supra* note 185, at 139; FULLER, *supra* note 3, at 258.

187. S. Con. Res. 4, 68th Cong. (1924), *reprinted in* PROPOSED AMENDMENTS, *supra* note 185, at 567; H.R.J. Res. 173, 68th Cong. (1924), *reprinted in* PROPOSED AMENDMENTS, *supra* note 185, at 569; H.R.J. Res. 223, 68th Cong. (1924), *reprinted in* PROPOSED AMENDMENTS, *supra* note 185, at 570.

188. *E.g.*, S.J. Res. 19, 68th Cong. (1923), *reprinted in* PROPOSED AMENDMENTS, *supra* note 185, at 562; H.R.J. Res. 327, 67th Cong. (1922), *reprinted in* PROPOSED AMENDMENTS, *supra* note 185, at 553; *see* S. DOC. NO. 69-93, *reprinted in* PROPOSED AMENDMENTS, *supra* note 185, at 106-24.

189. *E.g.*, H.R.J. Res. 102, 68th Cong. (1923), *reprinted in* PROPOSED AMENDMENTS, *supra* note 185, at 566; H.R.J. Res. 155, 68th Cong. (1924), *reprinted in* PROPOSED AMENDMENTS, *supra* note 185, at 568.

190. *Compare* S.J. Res. 1, 68th Cong. (1923), *reprinted in* PROPOSED AMENDMENTS,

On June 1, 1922, only two weeks after *Bailey* was decided, the House Committee on the Judiciary held hearings on one such proposal.[191] During these hearings, Congress first learned of and discussed the Thirteenth Amendment approach to regulating child labor as a form of involuntary servitude.[192] Samuel Gompers, who was then President of the American Federation of Labor, submitted to the Committee's attention a brief drafted by a government attorney named James Lawson.[193] The brief claimed that child labor is a species of involuntary servitude, discussed the basis for regulating child labor under the Thirteenth Amendment, and proposed a bill to do exactly that.[194]

Curiously enough, Congress did not pursue the Thirteenth Amendment approach. Lawson's brief, bill, and analysis never made it out of the Committee. Instead, on February 23, 1923, the House Committee on the Judiciary submitted a report regarding the Committee's decision between fifteen different proposals for a Child Labor Amendment.[195] In that report, the Committee recommended one specific proposal but never mentioned the Thirteenth Amendment idea.[196] The Senate Committee on the Judiciary recommended a nearly identical form of the amendment one day later,[197] having similarly held hearings on many different proposals in January 1923.[198] The Senate's report also did not mention the Thirteenth Amendment power.[199]

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supra note 185, at 561, *and* H.R.J. Res. 327, *with* S.J. Res. 224, 67th Cong. (1922), *reprinted in* PROPOSED AMENDMENTS, *supra* note 185, at 558, *and* H.R.J. Res. 458, 67th Cong. (1923), *reprinted in* PROPOSED AMENDMENTS, *supra* note 185, at 555.

191. *1922 Hearing*, *supra* note 36.

192. *See id.* at 5 (statement of Samuel Gompers, President, American Federation of Labor) ("This is a novel thought, a thought and a principle that I have never yet heard or read, applied to the subject under consideration . . . ."); *id.* at 6 (Lawson brief) ("Neither Congress nor the Supreme Court has given any consideration to the power of Congress under the thirteenth amendment of the Constitution to prohibit [child labor as] involuntary servitude.").

193. In the hearing transcript, the author of the brief presented by Samuel Gompers is "James F. Lasson." *Id.* at 6. In the *American Law Review* article containing an expanded version of this brief, however, the author is "J.F. Lawson." Lawson, *supra* note 36. A directory of federal government employees documents that a "James F. Lawson" was employed in 1921 as a law clerk for the Department of Agriculture. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, OFFICIAL REGISTER OF THE UNITED STATES: 1921, at 739 (1922). Consequently, this Article uses "Lawson" for the last name of the brief's author.

194. *1922 Hearing*, *supra* note 36, at 7-8.

195. H.R. REP. NO. 67-1694, at 1 (1923).

196. *Id.* at 3.

197. *See* S. REP. NO. 67-1185, at 19 (1923).

198. *See 1923 Hearings*, *supra* note 15, at 1.

199. S. REP. NO. 67-1185, at 19.

Neither of these two favorably reported versions of the Child Labor Amendment reached any point of deliberation.[200] Instead, members of Congress continued to submit competing proposals throughout the first few months of the next Congress.[201] Further hearings to evaluate and refine them were held before the House Committee on the Judiciary in February and March 1924.[202] The House Committee on the Judiciary reported favorably on a particular version of the amendment on March 28, 1924.[203] The Senate Committee on the Judiciary supported an identical version on April 15.[204] For several days, debates continued.[205] The House adopted the final version of the amendment on April 26 by a vote of 297 to 69; the Senate concurred on June 2 by a vote of 61 to 23.[206] The text read as follows:

> 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.[207]

The amendment then proceeded to the states for ratification, where it languished for many years. Opponents rallied around cries that the amendment was a socialist plot, would interfere with parental authority and undermine traditional family arrangements, would prevent children from working in healthy agricultural employment, and would produce excessive federal bureaucracy.[208] By late 1925, only four states had ratified the amendment, while nineteen had rejected it.[209] In the 1930s with the coming of the New Deal, however, a flurry of additional states ratified[210] and some

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200. H.R. DOC. NO. 70-551, at 140 (1928).

201. *See* S. DOC. NO. 69-93, at 112-24 (1926).

202. *1924 Hearings*, *supra* note 15.

203. H.R. REP. NO. 68-395, pt. 1, at 21 (1924).

204. S. REP. NO. 68-406, at 1 (1924).

205. 65 CONG. REC. 7084-85, 7165-206, 7250-321, 7337, 7726-27, 9597-603, 9786-87, 9813, 9858-66, 9991-10,012, 10,073-129, 10,139-42 (1924).

206. *Id.* at 7294-95, 10,142; *see* HUGH D. HINDMAN, CHILD LABOR: AN AMERICAN HISTORY 74 (2002); Aldous, *supra* note 183, at 79; *A 20th Amendment*, *supra* note 15.

207. H.R.J. Res. 184, 68th Cong. (1924) (passed, but not ratified).

208. Aldous, *supra* note 183, at 75-80.

209. *See* JOHN R. VILE, *Child Labor Amendment*, *in* ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-2002, at 61, 63 (2d ed. 2003).

210. *See* Bill Kauffman, *The Child Labor Amendment Debate of the 1920s*, 10 J. LIBERTARIAN STUD. 139 (1992) (describing the rise, fall, and resuscitation of the Child Labor Amendment).

reversed their previous decisions to reject.[211] Those reversals were challenged in the courts.[212] The Amendment's opponents also argued that the lapse of time between passage and ratification should render eventual ratification, if it were to occur, ineffective.[213] The Supreme Court considered those questions in *Coleman v. Miller*, finding them nonjusticiable[214] and thereby "pointedly declin[ing]" to decide them.[215] Ultimately, only twenty-eight states ratified the amendment[216]—fewer than the necessary three-fourths of state legislatures that Article V requires. It became one of only six amendments in U.S. history that passed but failed to be ratified.[217] During the Child Labor Amendment's second set of hearings, debates accompanying passage, and ratification process, Lawson's Thirteenth Amendment approach did not arise again.

2. Why the House Judiciary Committee Did Not Propose Thirteenth Amendment Legislation to the House at Large

Congress's failure to pursue the Thirteenth Amendment approach is surprising for several reasons. First, Lawson's brief convincingly argued that child labor was a species of involuntary servitude. Lawson claimed, "The children . . . are in some manner compelled to perform their grinding tasks. There is held over them either the fear of corporal punishment or the withdrawal of that support which the parent or State owes the child."[218] By referencing children's unique and necessary dependency on parental or State support, Lawson fit child labor into the narrower definition of involuntary servitude: "physical labor [performed] under physical compulsion or other form of duress."[219] He further bolstered this argument by his claim that children do not even "receive the meager compensation which they earn. It goes to the parent or guardian as an incentive to him to force a labor which, however injurious, is unlikely to kill its victim before the legal right to it ceases."[220] He

211. *See A Needed Amendment*, NATION, Jan. 1934, at 60, *available at* http://newdeal.feri.org/nation/na3460.htm; VILE, *supra* note 209, at 63.

212. *See* VILE, *supra* note 209, at 63; Coleman v. Miller, 307 U.S. 433, 447-49 (1939).

213. *See Coleman*, 307 U.S. at 451-54.

214. *Id.* at 450, 454; *see* VILE, *supra* note 209, at 63.

215. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 457 n.* (2005).

216. VILE, *supra* note 209, at 63.

217. Morton Keller, *Failed Amendments to the Constitution*, 9 WORLD & I 87, 88 (1987). Technically, the Amendment is still pending ratification.

218. *1922 Hearing*, *supra* note 36, at 734.

219. 66 CONG. REC. 1443 (1925) (statement of Sen. Walsh); *see* BLACK'S LAW DICTIONARY 643 (1st ed. 1891).

220. *1922 Hearing*, *supra* note 36, at 735.

emphasized the similarities between the treatment of child laborers and of recognized slaves: "There are few of the incidents [of slavery], which united to keep the colored race in slavery and the Mexican Indian in peonage, that are not present to keep these children in servitude when an unnatural parent or inalert State so wills."[221]

But Lawson further argued, "The law everywhere denies [children] the capacity to make their own contracts. They are legally and actually incompetent to insist upon the terms and conditions which make contracts fair to themselves. They are peculiarly helpless in their dealings with an employer, even were they free."[222] In so doing, Lawson delivered the broader claim that child labor is involuntary servitude because of unique psychological features of children that make them less capable of consent than adults. This argument was consistent with Black's Law Dictionary's broader definition of "involuntary": "[a]n involuntary act is that which is performed . . . without the will to do it," where "will" is defined as "[t]he power of the mind which directs the action of a man."[223]

Lawson also addressed counterarguments. To those who would argue the Thirteenth Amendment protected only African slaves, Lawson wrote, "children are within the description of persons protected by the amendment," and cited a Supreme Court decision for the proposition that the Amendment "reaches every race and every individual."[224] To those who would argue the Amendment does not reach parent-child relations, Lawson wrote, "[d]oubtless the [T]hirteenth [A]mendment was not addressed to the evils which may arise in the home when parenthood forgets its obligations. But these children are not working in their homes or directly for their parents. They are farmed out in the service of great factories or worse establishment."[225] Lawson further explained that "[s]ince the particular evil to be reached is the involuntary servitude of children in factories, mines, etc., it can be reached without disturbing the ordinary relations of parent and child . . . ."[226] He emphasized that state law limited the parent's right and authority over his child and her contracts long before the Thirteenth Amendment, which he claimed endowed *Congress* with power to make such law.[227] To those who would argue that state regulation of parent-child relations would preclude congressional child labor regulation, Lawson wrote:

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221. *Id.* at 734.

222. *Id.*

223. BLACK'S LAW DICTIONARY 643, 1241 (1st ed. 1891).

224. *1922 Hearing*, *supra* note 36, at 7 (quoting Hodges v. United States, 203 U.S. 1, 17 (1906)).

225. *Id.* at 7.

226. *Id.* at 8.

227. *Id.* at 9.

> The State statutes which regulate the relations of parent and child . . . can be on no higher footing than any other exercise of State power, when coming into conflict with the Constitution and laws of the United States. . . . [W]hen [state statutes] . . . are so administered as to result in the enslavement of any individual they give way before the prohibitions of the Federal statute.[228]

Lawson not only argued that Congress could prohibit child labor as involuntary servitude, but also that it could *define* involuntary servitude by distinguishing "legitimate contracts and legislation for the benefit of the child . . . from contracts and laws designed or drawn to permit his exploitation."[229] Lawson claimed the power to make this distinction "is a necessary incident to the power to prohibit involuntary servitude."[230] Analogizing to a federal statute that nullified state laws concerning debt collection under contracts that impose peonage for repayment, Lawson argued, "Whatever obligation the child owes its parent or the State can equally be protected from satisfaction by compulsory labor."[231] Lawson additionally pointed to congressional power to define "intoxicating liquors" under the Eighteenth Amendment, which the Supreme Court had recognized in *Ruppert v. Caffey*.[232] Because "[t]he power to prohibit is thus a power to define[,] . . . [a]n exercise of power over the contracts made with or for infants bear[s] a reasonable relation to the power to prevent their enslavement and ought on principle to be upheld, if exercised directly, under the [T]hirteenth [A]mendment."[233]

The second reason why it is surprising that Congress failed to pursue the Thirteenth Amendment approach is that its members continued to refer to child labor as "slavery" throughout the Child Labor Amendment process, even after Lawson's proposal was presented.[234] They quoted from newspaper articles that claimed that "child labor . . . ma[kes] a slave of the child"[235] and "that American legal machinery . . . is invoked to keep a child a prisoner and to make of his labor a marketable chattel."[236] Furthermore, Representatives Tincher, Wefald, and Cooper each separately analogized the movement to prohibit child labor to the movement to abolish slavery

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228. *Id.* at 7.

229. *Id.* at 8.

230. *Id.*

231. *Id.*

232. 251 U.S. 264 (1920).

233. *1922 Hearing*, *supra* note 36, at 8.

234. *See, e.g.*, 65 CONG. REC. 7167-68 (1924) (statement of Rep. Nelson) (referring to child labor as "child slavery" fifteen times); *id.* at 7188, 7265, 7317 (statements of Reps. Jacobstein, Tincher, and Wefald).

235. *Id.* at 7317 (statement of Rep. Thatcher) (quoting two LOUISVILLE HERALD editorials).

236. *Id.*

before and during the Civil War.[237]

Given the general concern regarding involuntary servitude in the child labor context and repeated references to child slavery by members of Congress, it is puzzling that Lawson's Thirteenth Amendment approach did not escape the House Judiciary Committee. What happened to the argument, and why was it lost in committee?

The best explanation is based on Lawson's proposal's particular timing. Lawson's bill arose *after* congressional attempts to regulate child labor pursuant to the commerce and taxing powers, and *after* the Court had struck them down. Congress was incensed, and the members of the House Judiciary Committee were committed to passing some form of bill that would not be overturned. The Committee, therefore, was rightly skeptical of the sustainability against Supreme Court scrutiny of any child labor bills predicated on existing congressional powers. That is, members of the Committee were convinced that it would be politically unwise to pass such a bill because the Court was set against them; they believed the Court would step down from the constitutional stand-off only if Congress clearly took the issue out of its hands by passing a constitutional amendment that explicitly authorized child labor legislation, so that it would not have interpretive room to strike down future statutes.

A number of exchanges in the hearings support this explanation. First, Representative Walsh emphasized, through his exchange with the president of the American Federation of Labor, Samuel Gompers, that he believed it would "be better to have a comprehensive constitutional amendment which would be so drastic as not to be subject to litigation than to" pass another bill that the Court would find unconstitutional.[238] Later, when Gompers reiterated that he would support "[a]ny measure passed by the Congress effectively abolishing child labor," Representative Hersey pointed out that "Congress has tried to do that twice now,"[239] suggesting that he believed a future attempt of that type would not succeed.[240] Similarly, in concluding his testimony, Gompers acknowledged that "we may not be able to prepare a bill to deal effectively with the

237. *Id.* at 7265, 7317 (statements of Reps. Tincher and Wefald) (analogizing federal regulation of child labor to Lincoln's decision to "den[y] any State the right to have slavery," and stating, "[W]e abolished chattel slavery after a bloody conflict that shook the world; to-day [sic] we take a step forward the abolishment of the industrial slavery of childhood"); *1924 Hearings*, *supra* note 15, at 16 (statement of Rep. Cooper) (analogizing the need for child labor legislation to the fact that slavery ended only with the Civil War, which "[did] away with what the States would not do for themselves").

238. *1922 Hearing*, *supra* note 36, at 10.

239. *Id.* at 11.

240. *See id.*

subject that will stand [the] test of the Supreme Court of the United States,"[241] seemingly to signal his understanding that this was one of the Committee's objections.[242]

Exchanges during other testimony in the 1922 hearings evinced the shared belief among the Committee's members that the Court was unlikely to sustain the Thirteenth Amendment approach. For example, Representative Chandler asked Owen R. Lovejoy, the General Secretary of the National Child Labor Committee, his thoughts on the Lawson bill:

> Mr. CHANDLER: Have you studied in any way the decision of the Supreme Court with reference to these child-labor cases and reference to constitutionality?
>
> Mr. LOVEJOY: I have, as well as a layman can.
>
> Mr. CHANDLER: Have you studied this bill?
>
> Mr. LOVEJOY: I have not; I never knew anything about it until I heard it read here.
>
> Mr. CHANDLER: Can you not venture any suggestions as to whether it would meet the constitutional requirements?
>
> Mr. LOVEJOY: I should prefer not to attempt that.
>
> Mr. CHANDLER: Is it not a fact that the Supreme Court has rendered a decision which makes it practically impossible to have Federal legislation that would be constitutional? Is it not impossible, probably? If that is a fact, why should we consider this bill and drive the Supreme Court on, so to speak? Why not consider the matter of effecting the reform through the legislatures of the States or go at once to a Federal amendment? I ought to be more familiar than I am, but from what I am told by other members of the committee who have studied the question, it would be impossible to pass any legislation which the Supreme Court would hold constitutional; that is, any Federal legislation. If that is the situation, it is a question whether the time of the committee should be taken up considering Federal legislation.[243]

In addition, Florence Kelley of the National Consumers League testified that it would be foolish to attempt further federal child labor legislation, given the Court's reaction to previous such attempts. Kelley stated, "I am convinced out of the twofold experiences that we have had that we should be childish and fatuous to attempt again by the method of Federal legislation . . . ."[244] When Representative Hersey asked her to evaluate the Lawson bill specifically, Kelley stridently declared, "We should be designated morons [if we were to

241. *Id.* at 13.
242. *See id.*
243. *Id.* at 14-15.
244. *Id.* at 17.

pass that bill]. A moron is a person who learns nothing from experience."[245] Representative Hersey pushed Kelley on the issue, asking her whether Congress should pass another child labor law or a child labor constitutional amendment.[246] Kelley replied, expanding upon her previous comments:

> I would be glad to say that in recent years we have come to believe that the moron is a person who is incapable of learning by experience. We have tried twice with the advice of the wisest lawyers whom we could summon to our aid, of whom more than one is now a member of the Supreme Court of the United States. We have tried twice to frame laws that the Supreme Court would uphold, and having failed twice, I think we would enlist ourselves among the morons if we spent another 40 years experimenting in the field of Federal legislation.[247]

Yet, despite its concerns about the Lawson bill's constitutionality and the Court's likely reaction, the Committee seemed receptive to Lawson's idea.[248] Representative Walsh invited Gompers "to study further the bill presented by Mr. La[w]son and express [his] judgment at some future meeting of the committee" regarding the bill's viability.[249]

Unfortunately, Gompers was disinclined to do so based on his own timing constraints: he had plans for the next month to "engage[ ] in conventions of the American Federation of Labor and its departments."[250] As a result, he told the Committee, "I doubt that I shall be able to give very much thought to the details of these bills or resolutions and point out where they can be improved."[251] But Representative Walsh did not give up so easily. He pushed Gompers: "You have some officer or committee that might study that measure and be prepared to submit an opinion?"[252] Gompers resisted: "I think they will be very busy, too."[253] However, Gompers finally acquiesced, at least in part: "I do say that so far as time and opportunity permit, the general subject on the legislative features of the facts of the La[w]son bill will be given the best thought of which I am capable."[254]

Given this and other exchanges, it seems another peculiar aspect

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245. *Id.* at 18.

246. *Id.*

247. *Id.*

248. *See id.* at 11 (statement of Rep. Hersey) (expressing openness to the possibility that the Lawson bill, once modified, might be presented to Congress).

249. *Id.* at 10.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* at 11.

of the timing of Lawson's proposal may account for its failure to survive the Committee's hearing. Lawson's proposal arose in a hearing conducted very near the end of the second session of the Sixty-Seventh Congress.[255] Representative Hersey commented that this timing meant that Congress might not be able "to do any new work" until December.[256] But the Committee was dissatisfied with the current state of Lawson's proposal,[257] and Gompers's hesitance to spend much time further studying it over the next few months suggested that it could not be developed quickly. The members of the Committee were impatient to approve some form of legislation or amendment in order to submit it to the full body of the House.[258] They neither wished to develop the bill themselves,[259] nor believed that they could do so before the session ended.[260] As a result, whether they expected Gompers might produce a revised version of the Lawson bill or not, the Committee decided not to pursue the Thirteenth Amendment approach, instead approving and submitting to the House one of the proposed versions of the Child Labor Amendment in 1923.[261]

It appears that Gompers himself also failed to pursue the Thirteenth Approach after the hearing. Many prominent biographies of Samuel Gompers, including his autobiography, mention neither Lawson's proposed bill nor any actions by Gompers that could be considered as following up on it.[262]

Instead, it seems that Gompers bowed to the growing momentum for a Child Labor Amendment. As he had indicated in his testimony,[263] the American Federation of Labor Annual Convention began on June 12, 1922,[264] eleven days after the House Judiciary Committee hearing. June 14 was "Child Labor Day" at the

255. *See id.*

256. *Id.*

257. *See id.* at 10 (statement of Rep. Hersey).

258. *See id.* at 11 (statement of Rep. Hersey) (expressing that the entire Committee was "anxious to have [the evil of child labor] removed").

259. *See id.* (statements of Reps. Hersey and Chandler).

260. *See id.* (statement of Rep. Hersey) ("Do you expect us to wait until Mr. La[w]son submits the bill which has been referred to to [sic] a committee and have a hearing and to hear from you and pass this legislation during this session being held now?").

261. H.R. REP. NO. 67-1694, at 3 (1923).

262. *See, e.g.*, HAROLD C. LIVESAY, SAMUEL GOMPERS AND ORGANIZED LABOR IN AMERICA (Oscar Handlin ed., 1978); SAMUEL GOMPERS, SEVENTY YEARS OF LIFE AND LABOR: AN AUTOBIOGRAPHY (1925); BERNARD MANDEL, SAMUEL GOMPERS: A BIOGRAPHY (1963); FLORENCE CALVERT THORNE, SAMUEL GOMPERS—AMERICAN STATESMAN (1957).

263. *See supra* note 250 and accompanying text.

264. Am. Fed'n of Labor, *Convention Call!*, 29 AM. FEDERATIONIST 313, 333 (1922).

convention.[265] On that date, at least four different speakers called for a constitutional amendment to enable Congress to limit child labor.[266] Senator Robert M. LaFollette went further by attacking Chief Justice Taft and the "judicial oligarchy" for the decision in *Bailey*[267] and calling for a constitutional amendment that would preclude federal inferior court judges from declaring any federal law unconstitutional, thereby permitting Congress to "veto" any Supreme Court decision that struck down a law as unconstitutional simply by repassing the law.[268] Separately, the National Child Labor Committee voted on June 19, 1922—eighteen days after the hearing—to support a Child Labor Amendment.[269] Eventually, a number of other anti-child-labor organizations also voiced their support for such an amendment.[270]

Gompers would support any legislation or amendment that would successfully deal with child labor, although he favored legislation.[271] Once it appeared that *other* activists preferred a constitutional amendment, Gompers acquiesced to that plan and abandoned Lawson's Thirteenth Amendment-based proposal. On July 26, 1922, Senator Medill McCormick of Illinois introduced another proposal for a Child Labor Amendment, but this one was drafted by the Permanent Committee for the Abolition of Child Labor chaired by Gompers.[272] On January 10, 1923, Gompers testified again before Congress, this time before the Senate Judiciary Committee, and introduced the newly formed Permanent Conference for the Abolition of Child Labor, whose aim was to pass a constitutional amendment abolishing child labor.[273]

Lawson pushed his own Thirteenth Amendment approach in an article published in the September-October issue of the *American*

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265. *LaFollette Lashes Federal Judiciary*, N.Y. TIMES, June 15, 1922, at 1.

266. *Id.*

267. *Id.*; *see also* 5 LOUIS DEMBITZ BRANDEIS, LETTERS OF LOUIS D. BRANDEIS: ELDER STATESMAN 1921-1941, at 53 n.4 (Melvin I. Urofsky & David W. Levy eds., 1978).

268. *LaFollette Lashes Federal Judiciary*, *supra* note 265.

269. HINDMAN, *supra* note 206, at 74; *see also About NCLC*, NAT'L CHILD LABOR COMM., http://www.nationalchildlabor.org/history.html (last visited Nov. 12, 2010).

270. *A 20th Amendment*, *supra* note 15 (listing ten anti-child-labor organizations as favoring a child labor amendment).

271. *1922 Hearing*, *supra* note 36, at 10 (statement of Samuel Gompers) ("[S]o far as I have authority to speak for the organized men and women of labor, we would prefer legislation rather than constitutional amendment. . . . [But] if your committee fail[s] to find any way by which you can secure the desired results by any enactment of Congress, why, I believe some constitutional amendment should be adopted.").

272. Anna Y. Reed, *Child-Labor Legislation: A Point of View*, 23 ELEMENTARY SCH. J. 276, 276, 282 (1922).

273. *See 1923 Hearings*, *supra* note 15, at 21.

Law Review,[274] but never revised and resubmitted his bill. Lawson's article delivered many of the same arguments as his brief, but supplemented them with a few additional claims. First, he declared more strongly that "[w]hen the people of the United States in 1865 concluded to abolish slavery .... They were not content with abolishing the slavery of adults; they forbade the enslavement of children. The language they used is broad enough to forbid compulsory labor at home."[275] He also expanded upon his economic arguments about the effects of the modern transportation system's growth on child labor, and the effects of child labor on adult wages.[276]

Most importantly, Lawson continued to insist that there were "cogent reasons for preferring ... immediate legislation ... [to] further amendment of the Constitution."[277] Among these reasons were the fact that "[a]ction by amendment is slow" and would still necessitate legislation because the amendment only sought to *authorize* congressional child labor legislation, not to prohibit child labor directly.[278] Additionally, Lawson emphasized:

> The Constitution is the most important, the fundamental law of the land and it ought not lightly to be amended by adding provisions already contained. To resort to amendment for powers already in possession casts doubt upon all other powers expressed; begets disrespect for an instrument which cannot be taken at its word; and tends to induce a belief that Congress and courts are not responsive to the most solemnly declared will of the people. Congress should be as jealous of its prerogatives under the Constitution as courts or executive.[279]

Finally, Lawson claimed that a national issue like child labor should be addressed by "[n]ational legislators [who] are chosen upon issues involving the national welfare."[280] To enact an amendment, the question would need to be referred to state legislatures chosen on different political principles, which would be

> an abdication of national representative authority and a deprivation of the power of the people to act by their will once expressed.... Constitutional amendment involves either a very great exertion by the people or it involves action without any real reference to the people. By their Constitution the people ... prohibited involuntary servitude; and by the form of the language chosen, imposed upon Congress the duty as well as granted the

274. Lawson, *supra* note 36.
275. *Id.* at 733.
276. *Id.* at 739-42, 744.
277. *Id.* at 744.
278. *Id.*
279. *Id.* at 744-45.
280. *Id.* at 745.

power to enforce the prohibition.[281]

Despite Lawson's *American Law Review* article, his proposal never reemerged in debates over the Child Labor Amendment. The House Judiciary Committee's February 1923 report, which recommended one form of the Amendment to the House, echoed Lawson's skeptics in the 1922 hearing. It stated:

> The court therefore has made the issue clear; either we give up the plan of a Federal minimum and rely solely upon the States, or we undertake to secure a Federal amendment definitely giving to Congress the power to pass a child labor law, since the Supreme Court has found it does not now have that power.[282]

The Senate Judiciary Committee's report, issued one day later, similarly stated:

> Inasmuch as the Congress has twice considered it necessary and wise to enact a law for the protection of the child life of our Nation it would seem to be the mature and deliberate judgment of the people that such a law would be beneficial. We must assume that the Congress considered that it had the power to enact such laws and thought it for the welfare of the Nation to exercise that power. But inasmuch as the Supreme Court of the United States . . . decided that the Congress under the existing Constitution did not have that power, it is proposed to confer or delegate that power by way of a proposed amendment.[283]

As a result, many members of Congress remained unaware that any method other than constitutional amendment would permit them to legislate against child labor; instead, they insisted that no other method existed.[284] Intriguingly, Representatives Hersey, Foster, Michener, and Tillman were among that group, despite having been members of the House Committee on the Judiciary when Gompers presented the Lawson brief.[285] It seems, therefore, that the 1922 hearing testimony convinced these members of Congress that even if a bill based on the Thirteenth Amendment approach were to pass, it would not survive Supreme Court scrutiny.

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281. *Id.*

282. H.R. REP. NO. 67-1694, at 2 (1923).

283. S. REP. NO. 67-1185, at 16-17 (1923).

284. *E.g.*, 65 CONG. REC. 7168-69, 7181, 7268-69, 7275-76, 7281, 7296, 7306, 10,408 (1924) (statements of Reps. O'Connor, Hersey, Foster, Michener, Dickstein, Moore, Tillman, Celler, Denison, Winter, and Hammer); *1924 Hearings*, *supra* note 15, at 3, 6, 12 (statements of Reps. Dallinger and Rogers); *see 1924 Hearings*, *supra* note 15, at 69; FULLER, *supra* note 3, at 251; *A 20th Amendment*, *supra* note 15; Novkov, *supra* note 6, at 374, 394; Waite, *supra* note 5, at 182-83.

285. 65 CONG. REC. 7169, 7181, 7268, 7276 (1924) (statements of Reps. Hersey, Foster, Michener, and Tillman).

D. Back to Square One: The Fair Labor Standards Act as Commerce Clause Legislation

1. History of the Fair Labor Standards Act

By late 1932, child labor abolitionists had shifted their focus away from ratification of the Child Labor Amendment.[286] Congress began to incorporate child labor provisions into general labor statutes based on its commerce power. For example, the 1933 National Industrial Recovery Act (NIRA)[287] encouraged industries to develop their own "codes of fair competition," and temporarily eliminated child labor in at least one industry through the industry-developed Cotton Textile Code.[288] The Supreme Court, however, struck down NIRA in *Schechter Poultry Corp. v. United States* as an unconstitutional delegation of congressional power.[289] Similarly, the Agricultural Adjustment Act (AAA) and Jones-Costigan Sugar Stabilization Act were less comprehensive companion measures to the NIRA with child labor provisions,[290] but the Court struck down the AAA in January 1936.[291]

On June 2, 1936, one day after the Court struck down New York's minimum wage law,[292] President Franklin Delano Roosevelt described Supreme Court precedent as leaving a "No Man's Land"[293] in which neither the federal nor state government could legislate. Because Roosevelt spoke succinctly,[294] he was unclear as to which aspect of the precedent he was referring. The Court potentially had left a no man's land on minimum wage and maximum hours laws through its decisions, including *Morehead*, that neither states nor the federal government could enact those laws because the Due Process Clauses of the Fifth and Fourteenth Amendments protected liberty of contract.[295] But it also potentially had left a no man's land with respect to *child labor* laws by its jurisprudence limiting the ability of

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286. *See* WHITTAKER, *supra* note 9, at CRS-6.

287. National Industrial Recovery Act of 1933, ch. 90, 48 Stat. 195 (1933) (codified as amended at 15 U.S.C. § 703 (1934)), *repealed by* Exec. Ord. No. 7252.

288. *See* WHITTAKER, *supra* note 9, at CRS-6.

289. 295 U.S. 495, 537 (1935).

290. *See* WHITTAKER, *supra* note 9, at CRS-7.

291. United States v. Butler, 297 U.S. 1, 75-78 (1936).

292. Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 618 (1936).

293. *Roosevelt Sees a "No Man's Land,"* N.Y. TIMES, June 3, 1936, at 1.

294. *See id.*

295. *See Morehead*, 298 U.S. at 618; Adkins v. Children's Hosp., 261 U.S. 525, 562 (1923). These cases, among a handful of others, are said to have motivated Roosevelt's court-packing plan, *see* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 511 (5th ed. 2006), the threat of which led the Court to overturn *Adkins* just a few months later in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937).

both states and the federal government to regulate child labor products in interstate commerce. Specifically, the Court's previous decisions had established that "states cannot exercise [the commerce power] without the assent of [C]ongress."[296] Consequently, "[s]tates may not exclude goods from other states manufactured under conditions of child labor or other substandard working conditions."[297] Yet the Court's decision striking down the Keating-Owen Act in *Dagenhart* precluded *Congress* from doing so as well.[298] By reading the Commerce Clause both broadly (to preclude state regulation) and narrowly (to preclude federal regulation), the Court had created an area—child labor products in interstate commerce—in which neither state nor federal government could legislate.

On the same day as President Roosevelt's statement, Senator Schwellenbach proposed a bill designed to challenge the existing "no man's land."[299] The bill would give congressional consent to states' outlawing or regulating child labor products transported into their state through interstate commerce, so long as they regulated them only to the same extent as they would if the products had been made within their own territory.[300] His bill did not gain traction, however. Instead, on June 30, 1936, Congress passed the Walsh-Healey Government Contracts Act, which prohibited some forms of child labor in the performance of government contracts.[301] Congress did not then regulate child labor in *private* contracts, intending the Walsh-Healey Act to serve as an interim measure until a broader statute could be passed.[302]

Then, on January 4, 1937, the Supreme Court upheld the Ashurst-Sumner Act in *Kentucky Whip & Collar Co. v. Illinois Central Railroad*.[303] That Act made it unlawful to knowingly transport in interstate or foreign commerce goods made by convict labor into any state that prohibited the sale, receipt, possession, or use of such goods.[304] The Court's decision encouraged Congress to

296. Leisy v. Hardin, 135 U.S. 100, 119 (1890); *see* David Fellman, *Federalism and the Commerce Clause*, 10 J. POL. 155, 160 (1948).

297. Paul A. Freund, *Umpiring the Federal System*, 54 COLUM. L. REV. 561, 568 (1954); *see 1914 Hearings*, *supra* note 2, at 18.

298. Hammer v. Dagenhart, 247 U.S. 251, 276-77 (1918).

299. 80 CONG. REC. 8627-30 (1936).

300. *Id.*

301. Walsh-Healey Government Contracts Act, ch. 881, § 1(d), 49 Stat. 2036, 2037 (1936) (prohibiting labor performed for government contracts by males under sixteen years old or females under eighteen years old).

302. Rudolf Modley, James R. Patton, Jr. & Gerard D. Reilly, *Problem Child Among Labor Laws: The Walsh-Healey Act*, 1963 DUKE L.J. 205, 209-10.

303. 299 U.S. 334 (1937).

304. Ashurst-Sumner Act, ch. 412, 49 Stat. 494 (1935) (codified at 18 U.S.C. §§ 1761-1762 (2006)).

pursue child labor regulation along those lines.[305]

In January 1937, therefore, while some members of Congress still thought a constitutional amendment necessary,[306] others were encouraged by the Ashurst-Sumner Act's example. On January 6, President Roosevelt opposed a constitutional amendment in his Message to Congress, asking instead for an "enlightened" view on social legislation from the judiciary.[307] Senator Wheeler proposed a child labor bill modeled after the Ashurst-Sumner Act on March 24, 1937.[308]

But five days later, the Court decided *West Coast Hotel Co. v. Parrish*, marking the Court's "switch in time."[309] That same day, Senator Johnson proposed a bill returning to the Keating-Owen bill's model, but with some minor changes.[310] Hearings were held on a combined Wheeler and Johnson proposal, among others, in May 1937.[311] During those hearings, Senator Wheeler expressed skepticism that the Court would uphold the Johnson bill if it did not also include the Wheeler approach based on the Ashurst-Sumner Act.[312] But other senators thought the Court would be inclined to reverse itself, based on the growing number of cases in which it had overruled its previous anti-regulatory precedents.[313] Ultimately, the Senate Interstate Commerce Committee recommended the Wheeler-Johnson bill, which combined the Ashurst-Sumner and Keating-Owen approaches into a single bill, arguing that the composite "would strengthen the likelihood of effective control of a grave problem through legislative processes" by attacking the problem

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305. *See* Trimble, *supra* note 125, at 187-88; 82 CONG. REC. app. at 433 (1937) (extension of remarks of Rep. Schneider) (explaining that the Senate form of the bill that eventually became the Fair Labor Standards Act after modification "also incorporated the prison-made goods principle [by] forbidding the shipment of child-made goods into a State which has forbidden their sale").

306. John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 464, 464 (1939); *e.g.*, 81 CONG. REC. 625 (1937) (statement of Sen. Capper).

307. 81 CONG. REC. 4960-61 (1937); *see* Forsythe, *supra* note 306, at 464.

308. *See To Regulate the Products of Child Labor: Hearings on S. 592, S. 1976, S. 2068, S. 2226, and S. 2345 Before the S. Comm. on Interstate Commerce*, 75th Cong. 11 (1937) [hereinafter *Senate 1937 Hearings*].

309. *See* W. Coast Hotel v. Parrish, 300 U.S. 379 (1937).

310. *See Senate 1937 Hearings*, *supra* note 308, at 11-12.

311. *See id.*

312. *See id.* at 12-13.

313. *E.g.*, *id.* at 163 (statement of Sen. Bryan) ("[T]here is at least a reasonable chance that the direct exclusion of child-labor products from interstate commerce would be held constitutional by the Supreme Court *as now constituted.* The Court has expressly overruled earlier decisions with respect to State minimum-wage laws . . . ." (emphasis added)).

"from two sides, one of which was certainly constitutional."[314]

Just after the May hearings, President Roosevelt sent a bill to Congress championed by Senator Hugo Black and Representative William Connery.[315] The Black-Connery bill went through a set of hearings in June 1937.[316] While it originally included provisions based upon the Ashurst-Sumner principle,[317] the House Labor Committee removed them.[318] The bill instead proceeded solely on the theory underlying the Keating-Owen Act with the express purpose of challenging *Dagenhart*.[319] Representative Schneider was a particularly strong advocate of the Keating-Owen approach. He reasoned that, while he would support it even if no specific opinion of the Court confirmed his belief that it would be upheld:

> [W]e have in the opinions of the Court itself ample evidence that it would so reverse itself. In the Kentucky Whip and Collar case the Court definitely removed the contention that the fact that the usefulness and harmlessness of the goods being shipped need have anything to do with the validity of an act forbidding their transportation in interstate commerce. In the Jones and Laughlin and Friedman-Harry Marks cases the Supreme Court removed the contention that because the production of goods was a local matter the regulation of interstate shipment of those goods was beyond the power of Congress.[320]

Representative Schneider also emphasized the viability of the approach given the changes in the Court's composition since *Dagenhart*: "The Federal statute involved . . . was held valid by four dissenting Justices in *Hammer v. Dagenhart* in 1918. It is not unreasonable to assume that there would be at least five Justices in 1938 who would hold such a statute valid. . . . especially in view of

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314. S. REP. NO. 75-726, at 2 (1937); *see Senate 1937 Hearings*, *supra* note 308, at 12; *Fair Labor Standards Act of 1937: Joint Hearings on S. 2475 and H.R. 7200 Before the S. Comm. on Education and Labor and the H. Comm. on Labor*, 75th Cong. 2 (1937) [hereinafter *House-Senate 1937 Hearings*]; Forsythe, *supra* note 306, at 487.

315. Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP'T OF LABOR, http://www.dol.gov/oasam/programs/history/flsa1938.htm (last visited Nov. 12, 2010).

316. *House-Senate 1937 Hearings*, *supra* note 314, at 1.

317. Paul H. Douglas & Joseph Hackman, *The Fair Labor Standards Act of 1938*, 441 Pol. Sci. Q. 505 (1938).

318. Forsythe, *supra* note 306, at 487.

319. *See House-Senate 1937 Hearings*, *supra* note 314, pt. 1, at 5-6 ("Nothing but a challenge to the child-labor decision will enable the Court, even if it is so minded, to correct the old decision . . . . Hence, I have no hesitation in urging that the time has come when the child labor decision should be challenged and reargued. We may reasonably entertain the hope that *Hammer v. Dagenhart* will be laid to a tardy and unmourned repose beside the lifeless remains of *Adkins v. Children's Hospital*.").

320. 82 CONG. REC. 1823 (1937).

recent changes in personnel."[321]

Representative Schneider eventually was proved right. The Fair Labor Standards Act (FLSA) was enacted on June 25, 1938, adopting the Keating-Owen approach of banning outright the shipment of goods produced by manufacturers who had recently employed certain forms of child labor.[322] Three years later, a unanimous Supreme Court upheld the FLSA, including its child labor provisions, in *United States v. Darby*.[323] By upholding the commerce approach to legislating on child labor, *Darby* effectively rendered the still-outstanding Child Labor Amendment moot. Similarly, after *Darby*, the need for the Thirteenth Amendment approach disappeared.

2. The Failure to Revive the Thirteenth Amendment Approach During the Era of the Fair Labor Standards Act

Congress's failure to reconsider the Thirteenth Amendment as a basis for child labor provisions of the Fair Labor Standards Act may fit into a broader pattern of federal legislators' disregard of that Amendment when drafting labor regulations during that era. For example, James Pope has written about this puzzle in the context of federal laws protecting workers' rights to unionize and collectively bargain. Pope finds that, "[b]y the early 1930s, . . . legislators routinely echoed labor's claim that restrictions on worker self-organization and protest amounted to slavery and involuntary servitude."[324] Yet federal collective bargaining laws passed during that time period, such as the Wagner Act, reflected none of that rhetoric.[325] Pope claims this dissonance resulted because the "elite, progressive lawyers" who collaborated in producing these laws were stubbornly opposed to using a constitutional fundamental rights basis.[326] While workers and union leaders were concerned with promoting labor freedom, a value intertwined in their minds with Thirteenth Amendment slavery, the lawyers who drafted the statutes were concerned with promoting their own influence over economic policy.[327] As a result, they sought to expand the zone for policymaking by legislatures and administrative agencies, a goal that

321. 83 CONG. REC. 2468 (1938).

322. Fair Labor Standards Act (FLSA) of 1938, ch. 676, § 12, 52 Stat. 1060, 1067 (1938) (codified as amended at 29 U.S.C. § 212 (2006)).

323. 312 U.S. 100, 125-26 (1941).

324. James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1, 112 (2002).

325. *Id.* at 114.

326. *Id.* at 113.

327. *Id.* at 26.

directed them to the more fact-intensive, policy-balancing nature of the Commerce Clause over the more abstract, fundamental rights nature of the Thirteenth Amendment.[328]

Perhaps Pope's story also explains Congress's failure to invoke the Thirteenth Amendment as its basis for regulating *child labor*. Of course, one difference between the collective bargaining and child labor contexts is that, during this time period, the Child Labor Amendment had already passed and was pending ratification. But Pope's explanation may still apply to child labor. The Child Labor Amendment was, by its nature, *not* a fundamental rights approach. It did not itself prohibit child labor; instead, it only authorized Congress to do so. Thus, it may have fit progressive lawyers' and politicians' desire to promote their own influence, by providing greater room for Congress and its advisors to investigate facts and balance interests. In contrast, the Thirteenth Amendment did not invite policy balancing. While the Thirteenth Amendment, Section 2 also delegates power to Congress, it is directed toward enforcing the fundamental right against slavery and involuntary servitude established in Section 1, a right that may have seemed—given the Court's involvement with rights determination in the *Lochner* era—to invite excessive judicial determination.[329]

Even if Pope's arguments do not directly explain why Congress did not invoke the Thirteenth Amendment to regulate child labor during the era of the Fair Labor Standards Act, they may do so indirectly. Because Congress was disinclined to use the Thirteenth Amendment as its basis for collective bargaining laws, little congressional precedent existed on that Amendment to guide Congress in drafting a child labor law. Furthermore, broader labor regulations at that time were not predicated on the Thirteenth Amendment because they dealt with adult labor, for which the special duress of a child's complete dependency on his parents and his incapacity to consent were not present. Additionally, the Lawson bill was no longer available to guide Congress: while considered by the House Judiciary Committee in 1922, it never emerged to the

328. *Id.* at 26-27.

329. Still, if presented earlier, members of Congress might have supported the approach despite its fundamental rights approach if they had known the Court would not sustain the policy-balancing approaches attempted, because they cared more about passing and sustaining a federal child labor statute than about its specific constitutional basis. *See, e.g.*, 53 CONG. REC. 2019 (1916) (statement of Rep. Denison) ("[T]his legislation is of such importance to the country, its desirability is so clear, I am willing to give the bill the benefit of any doubt I may have as to its validity."); 57 CONG. REC. 611 (1918) (statement of Sen. Lodge) (expressing that he was "no fonder of resorting to that [taxing] power . . . than anyone else," but it seemed necessary to pass a child labor bill); *see* Aldous, *supra* note 183, at 79-80 (stating that feelings were generally "anti-child-labor in principle, not as it was spelled out in the amendment").

House or Senate floors. By the mid-1930s, many of the 1922 Committee's members were no longer in Congress.[330] As a result, Congress might have been hesitant to pursue a novel Thirteenth Amendment approach, and new members might not even have been aware of the option.

Once the Ashurst-Sumner Act was passed, Congress had salient and recent Commerce Clause precedent for regulating the products of immoral labor. The Ashurst-Sumner Act's principle easily extended to child-made goods.[331] This commerce approach tided Congress over until circumstances made it evident that the Supreme Court might reconsider *Dagenhart*.

Once the switch in time occurred, Congress became even more eager to enact the child labor law under the Commerce Clause, in order to have *Dagenhart* overturned and thereby facilitate other economic legislation pursuant to that Clause. For example, Senators Barkley and Davis discussed the potential for a new law, based on the old Keating-Owen Act, to provide a test case for the Court to overrule *Dagenhart*.[332] Senator Johnson acknowledged that the Wheeler-Johnson bill was designed to "squarely challenge[ ]" *Dagenhart*.[333] Similarly, Representative Schneider declared that he would "heartily welcome the presentation of exactly the issues of the 1916 child labor law to the Supreme Court again."[334] After the switch in time, Congress had little reason to look to the Thirteenth Amendment to regulate child labor, because the Commerce Clause became a potentially sustainable basis for the law. Ultimately, *Darby* rendered the Thirteenth Amendment approach superfluous.

IV. POLITICAL AND PRACTICAL APPEAL OF THE THIRTEENTH AMENDMENT APPROACH

The previous Part explained that members of Congress considered the Thirteenth Amendment approach to child labor legislation only once in the early twentieth century, and then only in the House Judiciary Committee, which seemed receptive to the approach on its merits but hesitated to propose it to Congress at

330. For example, Representatives Hersey, Foster, and Tillman were no longer members of Congress. *See Congressional Biographical Directory*, U.S. CONGRESS, http://bioguide.congress.gov/biosearch/biosearch.asp (last visited Sept. 25, 2010) (use surnames as search terms).

331. *See* Fred L. Kuhlmann, Note, *Child Labor Amendment or Alternative Legislation?*, 22 WASH. U. L.Q. 401, 401-02 (1937); 82 CONG. REC. app at 433.

332. *See Senate 1937 Hearings*, *supra* note 308, at 103-04.

333. 81 CONG. REC. 7668-69 (1937) (statement of Sen. Johnson); *see also id. at* 4960-61 (reporting President Roosevelt's call to pass a child labor law that would directly challenge *Dagenhart*).

334. 82 CONG. REC. 1823 (1937).

large in the light of *Dagenhart* and *Bailey*. This Part examines whether the approach might have appealed to the entire congressional body, had it learned of it at an earlier, more opportune time (before the Supreme Court had twice struck down federal child labor statutes). This Part evaluates the Thirteenth Amendment approach in comparison to the approaches actually implemented: the commerce approach, the taxing approach, and the Child Labor Amendment. Ultimately, this Part concludes that the Thirteenth Amendment approach would have appealed to Congress.

Of course, this Part's analysis is subject to many of the usual difficulties and caveats that attend to any exercise of inferring legislative intent. Congress is and was—both now and in the early twentieth century—a "they," not an "it."[335] It is exceedingly difficult to identify the marginal legislators that supported a bill and to know which understanding they held, let alone which understanding was held by the bill's typical supporter or full set of supporters.[336] Relevant evidence is limited to the bill's own text and the few sources of legislative history (debates, hearings, reports) in which the legislators spoke or wrote about their views of it. Not only are these sources limited, but they may have been manipulated strategically by one or more legislators for political ends, and so may not reflect fairly any consensus on the bill's meaning.[337]

The difficulties are compounded further by this historical counterfactual exercise of inferring whether these legislators would have supported an approach never put before them. "We do not know how majorities feel about choices with which they were never confronted."[338] The limited evidence available is further limited on the question of whether the legislators would have supported the Thirteenth Amendment approach, since Congress virtually never

335. *See generally* Kenneth Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 239 (1992) (arguing that legislative intent is an expression without meaning that provides an "insecure foundation for statutory interpretation").

336. *See* KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION 263 (1991); Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 478 (2007). These difficulties have led critics of the courts' use of legislative history to declare that "[c]ollective intent is an oxymoron." Honorable Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 813 (1998); *see* Shepsle, *supra* note 335, at 239.

337. *See* Kozinski, *supra* note 336, at 813-14; Miranda Oshige McGowan, *Against Interpretation*, 42 SAN DIEGO L. REV. 711, 730-31 (2005); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 33-36 (Amy Gutmann ed., 1998); WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 224-25 (2d ed. 2006).

338. Shepsle, *supra* note 335, at 248.

discussed it.

These caveats are important to remember—they temper this Part's conclusions, but do not undermine them altogether. First, the reader may take some solace in the fact that early-twentieth-century legislative history is less likely than modern-day legislative history to have been manipulated in order to persuade courts. This is because "[e]xtensive use of legislative history [by courts] in this country dates only from about the 1940s."[339] Consequently, early-twentieth-century members of Congress had little reason to expect that their words in legislative records could influence the Court's likelihood to uphold their statutes, and thus they had little reason to misrepresent their motivations.[340] For example, members of Congress, in enacting the Child Labor Tax Act, openly declared their intention to circumvent *Dagenhart*,[341] most likely because they did not expect the Court to rely on their statements. Thus, the legislative history in this Part probably is more reliable than critics would suggest. Second, this Part weaves together evidence from a variety of sources, reflecting statements of numerous members of Congress. Its conclusions, therefore, are nuanced, careful, and worthy of credence, due to the large volume of historical evidence they reflect.

Accounting for these caveats, the evidence available suggests that Congress may well have been more receptive to (and perhaps sufficiently more receptive as to adopt) a Thirteenth Amendment approach to regulating child labor, had it been proposed before the Supreme Court's decisions in *Dagenhart* and *Bailey*. The Sections that follow examine whether various potential objections might have made members of Congress hesitant to adopt the Thirteenth Amendment approach. Section III.A analyzes objections based on the kinds of child labor to which the approach would extend. Section III.B analyzes objections based on the approach's likely scope of precedent for broader economic legislation. Section III.C analyzes objections based on the South's possible skepticism of the Thirteenth Amendment. Each Section concludes that the objections likely would not have defeated the approach, had it been more opportunely proposed to Congress.

A. The Regulated Forms of Child Labor

Might members of Congress have objected to the Thirteenth Amendment approach because they feared it would limit certain

339. Scalia, *supra* note 337, at 30.

340. *Cf. id.* at 34 (stating the converse, that "Ironically, but quite understandably, the more courts have relied upon legislative history, the less worthy of reliance it has become.").

341. *See supra* notes 177-81 and accompanying text.

forms of child labor that Congress did not desire to limit? Specifically, public opinion seemed to oppose limiting child labor on farms or performed for the child's parents within the home.[342] For example, the three most important federal child labor laws enacted before and after the Supreme Court's switch in time—the Keating-Owen Act, the Child Labor Tax Act, and the Fair Labor Standards Act—explicitly did not affect farm or home child labor, suggesting that their drafters intentionally avoided encompassing those forms.[343] In addition, several contemporary news sources and activists reported concerns that the Child Labor Amendment might interfere with parent-child relationships and disrupt the sanctity of the home, or might deprive farmers of their children's assistance.[344] Indeed, a few members of Congress expressed those fears as well.[345]

Evidence suggests, however, that these concerns would not have defeated the Thirteenth Amendment approach for a few reasons. First, the Thirteenth Amendment prohibition might not extend to most farm and home child labor that the public and members of Congress sought to protect, because that labor generally did not fit conceptions of involuntary servitude. The conditions to which children were usually subjected on farms were thought to be less harmful than the conditions in factories, mines, and related industry;

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342. *See* Aldous, *supra* note 183, at 75, 77; J.E. Hulett, Jr., *Propaganda and the Proposed Child Labor Amendment*, 2 PUB. OPINION Q. 105, 108-09 (1938); Charles E. Lane, *The Child Labor Amendment to the Constitution*, 39 COM. L.J. 73, 73 (1934).

343. Keating-Owen Child Labor Act of 1916, ch. 432, 39 Stat. 675, 675 (1916) (confining the Act—depending on age group, work duration, or night work—to products from "any mine or quarry" or "any mill, cannery, workshop, factory, or manufacturing establishment"), *invalidated by* Hammer v. Dagenhart, 247 U.S. 251 (1918); Child Labor Tax Act, ch. 18, § 1200, 40 Stat. 1057, 1138 (1919) (same), *invalidated by* Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922); Fair Labor Standards Act (FLSA) of 1938, ch. 676, §§ 3(*l*), 13(c), 52 Stat. 1060, 1061, 1068 (1938) (codified as amended at 29 U.S.C. § 212 (2006)) (explicitly excluding child labor for parents or guardians—except manufacturing or mining—and child farm labor).

344. *E.g.*, *1924 Hearings*, *supra* note 15, at 158 (statement of Mary G. Kilbreth, President, Woman Patriot Publishing Co.) (declaring that, if the Child Labor Amendment were ratified, "[t]he daughter could be prevented helping her mother with the housework and the son forbidden to help his father on the farm . . . allowing invasion of the privacy of the home"); WALTER I. TRATTNER, CRUSADE FOR THE CHILDREN 199, 284 (1970) (similar); *A 20th Amendment*, *supra* note 15 (reporting these types of concerns about the Child Labor Amendment).

345. *E.g.*, 65 CONG. REC. 7174 (1924) (statement of Rep. Crisp) ("[The Child Labor Amendment] confers upon Congress the power to say a girl under 18 years of age can not work to assist her own mother in doing the housework, cooking, dish washing, and so forth, in her own home, and that a son of like age can not help his own father to work on a farm."); *id.* at 7257, 7308 (statements of Reps. Bullwinkle and McSwain) (speaking against the further centralization of power over the private household); 66 CONG. REC. 2568-69 (1925) (statement of Sen. Bayard) (expressing fear that child labor legislation would infringe upon children working on farms).

indeed, most farms provided the child laborers with fresh air and built discipline and physical strength that proved beneficial to the children in the long run.[346] The same was thought of child housework conditions.[347]

The greater risks and harms of industrial work could be considered to render that work "servitude" because it benefited the employer and was inconsistent with the benefit of child employees.[348] In contrast, farm labor and home labor, which benefited the children who performed them, might be involuntary under an incapacity-to-consent or duress-based conception, but likely would not constitute involuntary "servitude."[349] Indeed, in his brief, James Lawson wrote

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346. *See, e.g., Argument in Opposition to the Form and Validity of H.R. 8234, Commonly Known as the Keating Child Labor Bill: Hearing on H.R. 8234 Before the S. Comm. on Interstate Commerce*, 64th Cong. 32 (1916) (statement of James A. Emery, Attorney, Washington, D.C.); 41 CONG. REC. 1808 (1907) (statement of Sen. Beveridge) ("I have no objection to the working of children in the open air; . . . I think labor on a farm within their strength is a good thing . . . . This bill strikes at the . . . national danger of child's labor in factories and mills and sweatshops . . . ."); 53 CONG. REC. 12,136 (1916) (statement of Sen. Thomas) ("[T]here is no work so helpful, no work so healthful, to a child as outdoor work on a farm . . . ."); *id.* at 12,137 (statement of Sen. Sherman) ("[T]here is a very wide difference . . . between working in the open air and working in the closed walls of a factory with limited advantages for health . . . . I do not know of a healthier crowd of boys that was ever produced any place in the country than those [who worked on farms with me]."); *id.* at 12,138 (statement of Sen. Vardaman) ("[T]he child on a farm . . . is not subjected to . . . [t]he hot, dust-laden, mephitic air of the mill [that] everyone knows is unhealthy, and especially to a child of tender years . . . [which is the opposite of] the pure, stimulating air, sunshine, and moderate employment which the boy on the farm enjoys. Really I do not know anything that contributes more to the physical, mental, and moral development of the child than life upon the farm."); 65 CONG. REC. 7085 (1924) (statement of Rep. Stevenson) ("[L]egitimately carried on labor on the farm is not a detriment, it is one of the greatest things for any boy or girl that they can have."); *id.* at 7178 (statement of Rep. Foster) ("[A]uthority should be given Congress to legislate against . . . an exploitation of child labor under conditions impairing the health and education of such children. No such conditions will arise on the average normal farm where farming alone is practiced."); *see also* FULLER, *supra* note 3, at 38 (farm labor presents "none of the hazards of mines and factories to the growing body and soul"); HAMLIN GARLAND, A SON OF THE MIDDLE BORDER 100 (1917) ("There are certain ameliorations to child labor on a farm. Air and sunshine and food are plentiful.").

347. *See, e.g.*, EDGAR GARDNER MURPHY, THE PRESENT SOUTH 108 (1904) (declaring that the child "labors in the home, under the eye of a guardianship which is usually that of the parent, which is full of a parental solicitude"); Louis Coolidge, Radio Address: The Child Labor Amendment: An Appeal to the Christian Men and Women of Massachusetts 4 (1924), *in* Novkov, *supra* note 6, at 399 (chores at home are "wholesome labor"); Waite, *supra* note 5, at 2 (home labor is "work suitable to the age and strength of the child, under safe and wholesome surroundings").

348. *See supra* notes 56-57 and accompanying text.

349. Furthermore, because home and farm child labor was generally performed under parental supervision, whereas parents could not always observe their children's treatment during factory labor, one would expect exploitation and harmful treatment

that "[d]oubtless the thirteenth amendment was not addressed to the [child labor] which may arise in the home."[350] If farm and home child labor did not constitute slavery or involuntary servitude under Section 1 of the Amendment, Congress would not be authorized by Section 2 to act upon those practices. Consequently, congressional members who represented constituents or ideological interest groups that opposed regulation of farm and home child labor need not have objected to the Thirteenth Amendment approach on that basis.

Second, even if the Thirteenth Amendment would authorize Congress to limit certain forms of child labor on farms or in the home, Congress would not be *required* to enact a law that would enforce that aspect of the Amendment's prohibition, so its members could have continued to satisfy their supporters by excluding most farm and home child labor from legislation. Section 2 authorizes Congress to enforce the Thirteenth Amendment "by appropriate legislation."[351] At the time, no Supreme Court case purported to require a high standard of connection between the alleged rights violation and the congressional remedy (e.g., "congruence and proportionality"), as *City of Boerne v. Flores* later did.[352] Instead, the *Civil Rights Cases* held, "[T]he power vested in Congress to enforce [the Thirteenth Amendment] by appropriate legislation, clothes Congress with [the] power to pass all laws *necessary and proper* for abolishing all badges and incidents of slavery in the United States."[353] While that decision declared a particular law unconstitutional, it established a relatively lenient standard which likely permitted Congress to decide the proper scope of its own legislation in most cases. Thus, Congress could legislate against only those forms of child labor that it believed most egregiously violated the Thirteenth Amendment, while excluding most farm or home child labor.

As additional support for this proposition, *Ruppert v. Caffey* had

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of children to be rarer in homes and farms than in industrial factories. *See* 53 CONG. REC. 12,138 (1916) (statement of Sen. Vardaman) ("[T]he child on the farm, as a general rule, works with his parents, under the direction and kindly care of his mother and father. He is not subjected to the inconsiderate, selfish domination of the boss in the factory, whose sole aim and effort, without regard to the mental and moral well-being of the child, is to make money out of the child's labor.").

350. *1922 Hearing*, *supra* note 36, at 7.

351. U.S. CONST. amend. XIII, § 2.

352. 521 U.S. 507 (1997). Even after *Boerne*, Congress may have broader power to enforce the Thirteenth Amendment than the Fourteenth Amendment, because of *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 822-24 (1999); William M. Carter, Jr., *Judicial Review of Thirteenth Amendment Legislation: "Congruence and Proportionality" or "Necessary and Proper"?*, 38 U. TOL. L. REV. 973 (2007).

353. 109 U.S. 3, 20 (1883) (emphasis added).

upheld Congress's power to define (to some extent) terms in a constitutional amendment it sought to enforce—in that case, "intoxicating liquors" in the Eighteenth Amendment.[354] Consequently, Lawson wrote that Congress had the authority to define involuntary servitude, as "a necessary incident to the power to prohibit [it]."[355] While *Hodges* and the *Civil Rights Cases* seemingly limited that authority,[356] in those cases Congress attempted to curtail conduct (exclusion because of race from places of public accommodation, deprivation of other constitutional rights) that was far further than child labor from plausible involuntary servitude.[357]

Third, evidence suggests that Congress desired to have the *power* to limit farm and home child labor under some circumstances, or at a minimum would not have rejected an approach that would recognize that power. For one thing, the Commerce Clause, as interpreted by Congress for the Keating-Owen Act, would have permitted future regulation of child labor products produced in farms or the home (and thereby regulation of farm and home child labor) if the products crossed state lines, as a few senators noted.[358] Similarly, the taxing power, upon Congress's interpretation, would authorize taxing profits from the sale of any child labor products, even those made on farms or in the home.

The Child Labor Amendment provides further evidence of Congress's desire to have the authority to limit farm and home child labor under some circumstances. It utilized the term "labor" instead of "employment,"[359] and therefore explicitly authorized Congress to limit *all* forms of child labor, not just where children were hired by an outside employer.[360] Indeed, Congress's decision to include that expansive language appears intentional, because it rejected several proposed revisions that would have explicitly excluded farm and home child labor from the Child Labor Amendment's coverage.[361]

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354. 251 U.S. 264 (1920).

355. *1922 Hearing*, *supra* note 36, at 8.

356. Hodges v. United States, 203 U.S. 1 (1906); Civil Rights Cases, 109 U.S. 3 (1883); *see* RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 18-19 (2007) (describing how the Supreme Court narrowed the Thirteenth Amendment's scope beginning in the 1870s).

357. Indeed, *Hodges* stated that the Thirteenth Amendment clearly refers to "a condition of enforced compulsory service of one to another." 203 U.S. at 16. Such a characterization fits child labor either under the duress-based conception or incapacity-to-consent conception.

358. *See, e.g.*, 41 CONG. REC. 1808 (1907) (statements of Sens. Fulton and Tillman).

359. *See supra* note 207 and accompanying text.

360. *See* Aldous, *supra* note 183, at 75-76.

361. *See* H. DOC. NO. 551, at 143-44 (1928); 65 CONG. REC. 7293-94, 10,140 (1924); *see also* Bentley W. Warren, *The Proposed Child Labor Amendment; Its Implications and Consequences*, 11 VA. L. REV. 1, 8 (1924).

While the Amendment may have failed to be *ratified* because it too expansively covered farm and home child labor, this did not preclude its *passage*. These facts suggest that Congress, while disinclined at that time to regulate farm and home child labor, was both comfortable with and desired an approach that would provide it with the authority to do so *at a future time*, should it prove necessary.

More specifically, evidence suggests that Congress desired to exercise that authority in exactly the circumstances that Thirteenth Amendment legislation would address—that is, where working conditions were particularly harmful to child laborers.[362] The contours of the Thirteenth Amendment, Section 2 power therefore fit Congress's goals far better than those of the commerce or taxing powers. The commerce approach would permit Congress to regulate child labor when and only when its products pass through interstate commerce. The taxing approach would permit Congress to regulate child labor when and only when establishments employing child labor earned measurable income from it. But Congress's true concern was not the *interstate shipment* of products of child labor[363] or the *income* that accrued from them. Neither of the federal legislative approaches Congress actually implemented corresponded directly to Congress's true target—labor that was harmful to the children who performed it.[364]

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362. *See, e.g.*, 65 CONG. REC. 7178 (1924) (statement of Rep. Foster) ("[I]n amending the Constitution authority should be given Congress to legislate against any practice that might hereafter develop in agriculture, if such practice was purely commercial and an exploitation of child labor under conditions impairing the health and education of such children."); Fair Labor Standards Act (FLSA) of 1938, ch. 676, §§ 3(*l*), 12, 52 Stat. 1060, 1061, 1067 (1938) (codified as amended at 29 U.S.C. §§ 203(*l*), 212 (2006)) (regulating "oppressive child labor," defined by when the occupation is "particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being," or the employment is not "confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being"); 82 CONG. REC. 1798 (1937) (statement of Rep. Lea); *see* WHITTAKER, *supra* note 9, at CRS-2; Aldous, *supra* note 183, at 72.

363. Indeed, Congress adopted the Child Labor Tax Act, which taxed producers *regardless* of whether their child labor products were ultimately shipped in interstate commerce. *See* Child Labor Tax Act, ch. 18, § 1200, 40 Stat. 1057, 1138 (1919). Additionally, statements made during consideration of the Child Labor Amendment suggest that some members may have desired to regulate child labor even in *intra*state commerce. *See, e.g.*, *Senate 1937 Hearings*, *supra* note 308, at 84 (statement of Courtney Dinwiddie, General Secretary, National Child Labor Committee) ("We agree very heartily with the statements made here today to the effect that the Federal child-labor amendment is essential to control child labor, because, as pointed out, the best estimates would indicate that only about 25% of child labor is involved in interstate commerce.").

364. *See* 53 CONG. REC. 3047 (1916) (statement of Sen. Kenyon); 57 CONG. REC. 617 (1918) (statement of Sen. Thomas); *see also* Richard B. Sherman, *The Rejection of the Child Labor Amendment*, 45 MID-AM. REV. 3, 3 (1963); Joseph F. Tripp, *Law and*

B. *The Scope of Precedent for Federal Economic Legislation*

Might members of Congress have objected to the Thirteenth Amendment approach because they feared it would not establish sufficient precedent to support other federal economic legislation, such as adult labor legislation? Many Progressive activists who supported child labor legislation supported expansive adult labor legislation as well, usually in the form of minimum wage or maximum hours laws.[365] Similarly, some members of Congress who supported federal child labor statutes also advocated or voted for federal adult labor legislation.[366] Yet the Thirteenth Amendment approach would not have easily lent itself to federal regulation of adult labor. Features that were crucial to the Thirteenth Amendment's application to child laborers—the severe dependency of the child on his parents or the child's inferior mental abilities—were not present for adult laborers.[367]

Historical evidence suggests, however, that any congressional desire to regulate adult labor would not have defeated the Thirteenth Amendment approach. First, congressional debates suggest that Congress may have adopted the commerce and taxing approaches

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Social Control: Historians' View of Progressive-Era Labor Legislation, 28 LAB. HIST. 447, 460 (1987) (reformers sought to protect children from being "physically and intellectually stunted by work on mills, mines, and factories"); NAT'L CHILD LABOR COMM., PUBLICATION NO. 362: WHAT IT IS AND WHAT IT DOES 1 (1931) (on file with the Yale University library).

365. *See* Tripp, *supra* note 364, at 448; Robert H. Wiebe, *How Much Influence Did Middle-Class Businessmen Have on the Progressive Agenda*, *in* WHO WERE THE PROGRESSIVES? 77, 84 (Glenda Elizabeth Gilmore ed., 2002).

366. For example, Representatives Keating, Cary, Green, and Cox, among others, supported a law which addressed both women's and children's labor in Washington, D.C. Act of Sept. 19, 1918, ch. 174, 40 Stat. 960; 56 CONG. REC. 8871-80 (1918). These same four voted for the Keating-Owen Act. *See* 53 CONG. REC. 2035 (1916). Of course, since the minimum wage law applied only in Washington, D.C., one should not infer that its supporters would necessarily support federal legislation affecting adult labor in the *states*.

367. Of course, a separate theory could have been advanced for the Thirteenth Amendment's application to adult laborers—for example, that maximum hours/minimum wage legislation reflects the most extreme terms to which a reasonable person would consent under non-coercive bargaining conditions, and hence such legislation enforces the Thirteenth Amendment's prohibition of involuntary (coerced) servitude. *See* sources cited *infra* notes 4188-19. But such a separate theory would not as easily or necessarily follow from the duress-based conception of involuntary servitude, because adults are generally not as dependent on any given employer for satisfaction of their material needs as a child is on his or her parents, and hence they may not be as easily coerced into harsh working conditions. The incapacity-to-consent conception also would not suggest this theory, because adults were then thought to be fully capable of evaluating choices and offering meaningful consent whereas many—if not most—children were not. *See supra* notes 41-53 and accompanying text.

despite the broad scope of precedent that they would establish for future adult labor regulation, not because of it. Indeed, several members, even those who supported the policy goal of reducing child labor, expressed serious fears that those two approaches provided too few limits on congressional power to regulate labor and manufacturing.[368] For example, a number expressed discomfort that the logic permitting regulation of child labor products in interstate commerce would also permit regulation of *any* aspect of manufacturing for products shipped between states.[369] Some expressed specific concern that Congress might use that power to regulate adult labor.[370] They expressed similar concerns about the broad interpretation of the taxing power necessary to sustain the Child Labor Tax Act.[371]

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368. *E.g.*, 53 CONG. REC. 12,090 (1916) (statement of Sen. Brandegee) ("I hope there is a limit. I rather think that we have arrived at that limit already. If we pass this bill, I think we shall have exceeded the limit."); *id.* at 12,198 (statement of Sen. Overman); *id.* app. at 286 (extension of remarks of Rep. Black) ("If [the Keating-Owen Act] is constitutional there are no more rights left to the States at all, if Congress wants to take them away. You can regulate everything . . . ."); 57 CONG. REC. 611 (1918) (statement of Sen. Hardwick) (expressing fear that the taxing power "may become the Frankenstein which will utterly destroy all other constitutional powers and limitations"); *id.* at 615, 3030 (statements of Sen. Hardwick and Rep. Venable); *see* WOOD, *supra* note 1, at 17 & n.55; WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 179 (1908) (stating that the commerce approach would leave no limits on congressional power under than "the limitations of opinion and of circumstance").

369. *E.g.*, 41 CONG. REC. 1825-26 (1907) (statements of Sens. Bacon, Fulton, and Rayner); 53 CONG. REC. 12,203 (1916) (statement of Sen. Fletcher); *id.* at 12,302-03 (excerpt from Edwin Maxey, *The Constitutionality of the Beveridge Child Labor Law*, GREEN BAG, May 1907, at 290, inserted at Sen. Thompson's request) ("[I]f this is a legitimate exercise of the power of Congress over commerce, the extent of control which Congress may exercise over production becomes almost entirely a question of expediency, not of law. A large part of the police power now exercised by the States will have disappeared . . . .").

370. *E.g.*, 53 CONG. REC. 12,064 (1916) (statement of Sen. Hardwick); *id.* at 12,198 (statement of Sen. Overman) (expressing concern that the power underlying the Keating-Owen Act would also authorize prohibiting interstate shipment of goods not produced by union labor or made by employees receiving below a given wage); *id.* at 12,303 (excerpt from Maxey, *supra* note 369) (implying that the same power would permit excluding goods produced in factories or mines where men work longer than eight hours a day or sold by employers of foreigners, Mormons, union laborers, or nonunion laborers); *see* 41 CONG. REC. 1882 (1907) (statement of Sen. Beveridge) (documenting concerns about the overbreadth of the commerce approach); *see, e.g.*, 41 CONG. REC. 1875-76 (1907).

371. *E.g.*, 57 CONG. REC. 617 (1918) (statement of Sen. Thomas) (expressing concern that the taxing power could be used to exorbitantly tax businesses employing women, Jews, or Germans to discourage their employment); *see also 1914 Hearings*, *supra* note 2, at 19 (excerpt from *Memorandum on the Palmer-Owen Child-Labor Bill*) ("[The taxing approach] would provide a precedent that might seriously affect all existing labor legislation. The Government could destroy any kind of industrial activity of

Senator Tillman and Senator Thomas were two examples of senators who supported federal child labor legislation in theory, but were concerned that the commerce and taxing approaches were overbroad.[372] Tillman ultimately voted against the Keating-Owen Act[373] and Thomas ultimately voted against the Child Labor Tax Act[374] seemingly because the approaches embodied in those acts would have authorized too much other economic regulation. Their votes, and the votes of other similar members of Congress, suggest that they might have been receptive to an alternative approach—such as the Thirteenth Amendment approach—that would have been confined more closely to the problem of child labor.

Even the actions of some members of Congress who ultimately voted in *favor* of the Keating-Owen Act or the Child Labor Tax Act suggest that an alternative, narrower approach would have successfully passed. For example, Senators Kenyon, Husting, and Robinson all voted in favor of the Keating-Owen Act,[375] but their statements suggest that they did so believing that even the commerce approach would authorize only limited economic regulation.[376] Senator Lenroot voted in favor of and spoke similarly about the Child Labor Tax Act.[377] Consequently, one could infer that these senators might have supported the Thirteenth Amendment

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which it did not approve by imposing a prohibitive tax.").

372. *See* 41 CONG. REC. 1801 (1907) (statement of Sen. Tillman) (calling child labor a form of making "industrial slaves out of white children," and indicating support for federal child labor legislation if Beveridge could "show [him] how to do it . . . constitutionally"); *id.* at 1807-08 (statement of Sen. Tillman) ("[If Beveridge's bill] does not differentiate the kinds of labor and protect us in some way or other, it will be so broad and sweeping that I am afraid it will go too far."); 53 CONG. REC. 12,294 (1916) (statement of Sen. Tillman) (stating that, were it not for the overbreadth of the commerce approach, he "heartily favor[ed]" Congress's legislating on child labor); 57 CONG. REC. 617 (1918) (statement of Sen. Thomas) ("Much as I sympathize with the constantly growing sentiment in favor of the prohibition of child labor. . . . [the taxing approach] goes further than any of the preceding [precedents] . . . for the purpose of effecting social changes and reforms, and . . . political and industrial punishment under the guise of social reform.").

373. *See* 53 CONG. REC. 12,313 (1916).

374. *See* 57 CONG. REC. 621 (1918).

375. *See* 53 CONG. REC. 12,313 (1916).

376. *E.g.*, *id.* at 3048, 3054 (statements of Sen. Kenyon) ("I can not harmonize [Beveridge's] position with the fifth amendment to the Constitution."); *id.* at 12,064 (statement of Sen. Robinson); *id.* at 12,209 (statement of Sen. Husting) (claiming that even the commerce approach would not permit Congress to prohibit the sale of goods made by any labor organization, for example); *id.* at 12,214 (statement of Sen. Kenyon) (labeling concerns that the commerce approach would permit *adult* labor legislation "utterly silly").

377. *See* 57 CONG. REC. 621 (1918); *id.* at 615 (statement of Sen. Lenroot) (stating that the taxing power "can not destroy fundamental inherent rights of an individual . . . [w]hich neither State nor Federal Governments can directly destroy").

approach even if it did not authorize much economic regulation beyond child labor, since the senators supported other approaches they believed to be limited.

Second, historical evidence suggests that a narrow approach to child labor legislation would have been sufficient to gain the votes of even those members of Congress who were comfortable with or enthusiastic about establishing broader precedent. The Child Labor Amendment provides one example. Its text contained no congressional authorization to regulate adult labor,[378] and indeed might have implied by negative inference that none existed, yet it passed by large margins. In fact, Congress specifically selected such confined text; competing proposals would have authorized regulating women's labor as well, but Congress declined them.[379]

The Child Labor Amendment's passage therefore suggests that the ultimate congressional priority was to enact legislation that could not or would not be struck down by the Court, regardless of its precedential value for regulating adult labor. And on that dimension, the Thirteenth Amendment approach might have proved particularly appealing. Precisely *because* it could be confined to child labor, the Court that decided *Dagenhart* and *Bailey* would have been more likely to sustain that argument than its alternatives.

Dagenhart's language suggests that the Court might have sustained a narrower approach to regulating child labor. The *Dagenhart* majority emphasized that if the commerce power extended to regulating the production of articles intended for interstate commerce, "all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the States, a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the states."[380] It also wrote:

> The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed.[381]

These quotations evince that the *Dagenhart* Court may have

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378. H.R.J. Res. 184, 68th Cong. (1924) (passed, but not ratified), *reprinted in* PROPOSED AMENDMENTS, *supra* note 185, at 569.

379. *See supra* note 189 and accompanying text.

380. Hammer v. Dagenhart, 247 U.S. 251, 272-73 (1918).

381. *Id.* at 276.

narrowly interpreted the commerce power in order to avoid the conclusion that the power would extend to regulating manufacturing and other local matters.

Similarly, in *Bailey v. Drexel Furniture Co.*, the Court emphasized the "proper scope" of congressional commerce and taxing powers,[382] and the "limited grants of power" to enact federal tax legislation.[383] The Court wrote that upholding the Child Labor Tax Act would enable Congress to "take over to its control any one of the great number of subjects of public interest,"[384] and "[t]o give such magic to the word 'tax,' would be to break down all constitutional limitation of the powers of Congress."[385] Thus the Court narrowly interpreted the taxing power to avoid its extension to regulating any subject of public interest.

Consequently, the Thirteenth Amendment approach might have been more likely than these other approaches to be sustained by the early twentieth-century Supreme Court, because it provided a narrower basis upon which to uphold a federal child labor act—a basis that would avoid authorizing broader economic regulation that the Court might have feared.[386] But further, it would have provided a unique set of arguments to overcome the other constitutional obstacle to the Keating-Owen Act and Child Labor Tax Act—the Tenth Amendment. Specifically, the Court stated in *Dagenhart* that "[t]he grant of power to Congress over the subject of interstate commerce . . . was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment."[387] The Court stated that *Bailey* was indistinguishable from *Dagenhart*, and emphasized that upholding the Child Labor Tax Act would undermine the states' jurisdiction to regulate local matters of public interest, "which [is] reserved to [the states] by the Tenth Amendment."[388] If the Thirteenth Amendment approach could better hurdle a Tenth Amendment bar, it might have successfully persuaded the Court to sustain a federal child labor enactment.

Indeed, the approach permitted two related arguments against applying the Tenth Amendment to federal child labor legislation. First, because the Thirteenth Amendment—unlike the clauses concerning the commerce and taxing powers—was ratified *later* than

382. 259 U.S. 20, 39 (1922).

383. *Id.* at 41 (quoting Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869)).

384. *Id.* at 38.

385. *Id.*

386. *See* FULLER, *supra* note 3, at 243 ("It may be that the Court would have upheld the child labor tax law but for fear that a favorable decision would become a precedent for unforeseen incursions into the realm of state rights.").

387. Hammer v. Dagenhart, 247 U.S. 251, 273-74 (1918).

388. Bailey v. Drexel Furniture Co., 259 U.S. at 38.

the Tenth Amendment, it could have constrained the states' exclusive police powers reserved under the Tenth Amendment.[389] Certainly those police powers could not preclude Congress from enforcing the Thirteenth Amendment's prohibition of *slavery*—otherwise, the Amendment's enforcement power provision would provide no power at all. The same argument could be made about *involuntary servitude*, because that prohibition is embedded in the exact same surrounding language.[390] A Court that would accept that child labor constitutes a form of involuntary servitude would seemingly be required by that logic to relinquish its Tenth Amendment objection to federal child labor legislation.

Second, and relatedly, the history surrounding the Thirteenth Amendment's passage and ratification demonstrates its design to authorize Congress to eliminate conduct that the states refused to combat. The Thirteenth Amendment was enacted after the Civil War in a nationalist impulse, and Section 2 was intentionally included out of fear that some states would not respect the Amendment's prohibitions.[391] Hence, the Tenth Amendment's reservation of state powers should not preclude a federal child labor enactment.

Granted, the *Civil Rights Cases* had found a federal statute that Congress claimed to have enacted under Section 2 of the Thirteenth Amendment to be "repugnant to the [T]enth [A]mendment."[392] But in that case Congress had sought to regulate something far further from slavery or involuntary servitude than child labor: the admission of persons to places of public accommodation.[393] The Court decided that denying admission to places of public accommodation was not a form of servitude, so the law was an improper exercise of Section 2

389. *See* ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS § 68, at 65 (1904), *reprinted in* 1 HISTORICAL WRITINGS IN LAW AND JURISPRUDENCE § 68 (R.W. Helmholz & Bernard D. Reams, Jr., eds., 1981) ("[T]he [T]hirteenth [A]mendment interfered vitally with the police power of the states . . . ."); *cf.* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (describing how the Fourteenth Amendment enforcement power narrowed the previously passed Eleventh Amendment's guarantee of state sovereign immunity); Lochner v. New York, 198 U.S. 45 (1905) (holding that the Fourteenth Amendment fundamentally altered the scope of state police power).

390. U.S. CONST. amend. XIII, § 1.

391. *See* AMAR, *supra* note 215, at 361 (discussing how proposed but rejected drafts of the Thirteenth Amendment would have left abolition to the states, but the selected version "reflected the spirit of nationalism . . . summoned up by the [Civil War] itself" by providing the Section 2 enforcement power); ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 39-48, 56 (2004); Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981, 1007, 1022-24 (2002) (describing the Amendment's "revolutionary transformation . . . in federal-state relations").

392. The Civil Rights Cases, 109 U.S. 3, 15 (1883).

393. *Id.* at 6-8.

authority and the Tenth Amendment could apply.[394]

In contrast, one could argue that child labor is "compulsory service . . . for the benefit of" the employer, which is the type of service that even the *Civil Rights Cases* defines as slavery or involuntary servitude.[395] Similarly, while *Hodges* had declared that "[n]otwithstanding the adoption of [the Thirteenth Amendment] . . . the [Tenth] Amendment . . . is not shorn of its vitality,"[396] that declaration was in the context of a law prohibiting conspiracy to deprive an individual of general constitutional rights, rather than a law directed at compulsory or involuntary labor.[397] Where treatment more plausibly fits the definition of involuntary servitude, and the Thirteenth Amendment enforcement power applies, it obviates the Tenth Amendment objection. Indeed, the Supreme Court might have been persuaded by this argument had it been presented to them along with a Thirteenth Amendment justification for a federal child labor enactment. This is particularly true given that many of the Justices then on the Court seemed receptive to the Thirteenth Amendment's purposes, in that they had acted in 1911 to strike down an Alabama state peonage law as violating the Thirteenth Amendment.[398]

The Thirteenth Amendment approach also might have persuaded the Court to reject a Fifth Amendment Due Process Clause "liberty of contract" challenge. While the Court did not explicitly reference the Fifth Amendment in *Bailey*,[399] the Court mentioned that Amendment briefly in *Dagenhart*,[400] and also cited it in rejecting other federal labor statutes, such as the minimum wage law in *Adkins v. Children's Hospital*.[401] A Thirteenth Amendment approach to regulating child labor philosophically forecloses the liberty of contract argument, because a finding that child labor constitutes involuntary servitude either due to children's severe dependency on their parents or due to their incapacity to consent to injurious labor necessarily implies that the labor is not freely given,

394. *Id.* at 21-25.

395. *Id.* at 22; *see supra* Part II.

396. Hodges v. United States, 203 U.S. 1, 16 (1906).

397. *Id.* at 21 (Harlan, J., dissenting).

398. Bailey v. Alabama, 219 U.S. 219 (1911). Five Justices who joined that opinion participated in deciding *Dagenhart* on June 3, 1918; four participated in deciding *Bailey* on May 15, 1922. *See Members of the Supreme Court of the United States*, U.S. SUPREME COURT, http://www.supremecourt.gov/about/members.aspx (last visited Nov. 13, 2010) (containing a listing of Justices, their dates of judicial oath, and their dates of termination of service).

399. *See generally* Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).

400. 257 U.S. 251, 269 (1918).

401. 261 U.S. 525, 545 (1923).

and therefore that the laborers' liberty is protected, rather than impinged, by prohibiting the labor arrangement.[402] Certainly the Court could not find that the Fifth Amendment Due Process Clause protected the labor arrangements between slave masters and their slaves, and it similarly could not find that it protected involuntary service arrangements. Furthermore, the "later in time" argument for the Thirteenth Amendment's narrowing of the Tenth's Amendment's scope applies to narrowing of the Fifth Amendment Due Process Clause's scope as well.

The Child Labor Amendment offered some of the same doctrinal advantages as the Thirteenth Amendment, such as the "later in time" and "history of the amendment" arguments for why the Tenth Amendment should not preclude a federal child labor law, and the "later in time" argument with respect to the Fifth Amendment Due Process Clause. But the Child Labor Amendment was a far more difficult option to pursue. It required passage by two-thirds of the members of each house of Congress (which occurred) and ratification by three-fourths of the states (which did not occur).[403] In addition, some members of Congress and ratifiers might have been hesitant to enact the Amendment because of its likely permanence due to the difficulty of further amendment.[404] The Thirteenth Amendment approach therefore would have been more politically feasible.

C. Southern Objections

Might Southern members of Congress in the early twentieth century have objected to a Thirteenth Amendment approach to regulating child labor based on general disdain for the Thirteenth Amendment and its values, or because of a concern that legitimizing the use of Congress's enforcement power under that Amendment might lead its expansive future application? Indeed, the South had vigorously opposed the Thirteenth Amendment's passage and ratification in 1865.[405] Perhaps such opposition was still alive and well, to the effect that Southern members of Congress would not have voted for a federal child labor enactment based on the Thirteenth

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402. *See* Lochner v. New York, 198 U.S. 45, 57 (1905) (emphasizing that New York could not regulate adult male bakers' labor because "[t]here is no contention that bakers as a class [lack] intelligence and capacity"); Muller v. Oregon, 208 U.S. 412, 421-23 (1908) (distinguishing *Lochner*, in upholding a similar regulation of women's labor, by emphasizing that "woman has always been dependent upon man").

403. U.S. CONST. art. V.

404. *See* Smith, *supra* note 7, at 16 ("[W]hen we are dealing with as enduring a standard as a constitutional provision it cannot be wise and wholesome if opposition will be so extensive as to bring disrespect for government.").

405. *See* TSESIS, *supra* note 391, at 48; MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 230-31 (Christopher Tomlins ed., 2001).

Amendment enforcement power, even if they otherwise would support a federal child labor law.

As it turns out, however, even if Southern members of Congress would have refused to support such an enactment, congressional support for a federal child labor statute was so strong that it likely would have passed anyway. Take the voting patterns for the Keating-Owen Act as an illustration. The Keating-Owen Act passed in Congress by overwhelming margins.[406] Imagine that all the members of Congress from the Southern states that had seceded during the Civil War and formed the Confederate States of America[407] (which includes all the Southern states forced into military districts during Reconstruction)[408] who had voted "yay" on the Keating-Owen Act instead would have voted "nay" on a Thirteenth Amendment child labor statute. Assuming that all other members of Congress would vote the same way as they voted on the Keating-Owen Act, the Thirteenth Amendment enactment would still have passed by substantial margins: 294 to 89 in the House, and 42 to 22 in the Senate.[409] The Thirteenth Amendment enactment even would have passed if Southern members who had *not voted* on the Keating-Owen Act additionally all voted "nay" on the Thirteenth Amendment enactment, in which case the voting tallies would be 294 to 104 in the House, and 42 to 26 in the Senate.[410] These calculations demonstrate that the majorities favoring a federal child labor statute in both houses of Congress were so large that not only all Southern members of Congress, but also many others, could have opposed a Thirteenth Amendment enactment without precluding its passage.[411]

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406. *See supra* notes 85-86 and accompanying text.

407. The seceded states were Alabama, Arkansas, Georgia, Florida, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia, *see* CHARLES P. ROLAND, THE CONFEDERACY 32-33 (Daniel J. Boorstin ed., 1962), and also West Virginia because its land and population were part of Virginia upon secession, although the territory and loyalties of its people were contested during the Civil War. *See generally* OTIS K. RICE & STEPHEN W. BROWN, WEST VIRGINIA: A HISTORY (1993).

408. PETER P. HINKS, JOHN R. MCKIVIGAN & R. OWEN WILLIAMS, *Reconstruction Acts in the United States (1867-1868), in* ENCYCLOPEDIA OF ANTISLAVERY AND ABOLITION 566, 566 (2007).

409. *See* 53 CONG. REC. 2035, 12,313 (1916).

410. *See id.*

411. Of course, Southern senators could have filibustered to prevent a vote on a Thirteenth Amendment enactment. Indeed, Southerners threatened a filibuster against the Keating-Owen Act, and President Woodrow Wilson persuaded the Democrats to permit the bill to come to a vote. *See* ARTHUR S. LINK, WOODROW WILSON AND THE PROGRESSIVE ERA, 1910-917, at 226-27 (1954); WOOD, *supra* note 1, at 66-67; Keith E. Whittington, *Congress Before the* Lochner *Court*, 85 B.U. L. REV. 821, 848-49 (2005). Given President Wilson's and the public's support for a federal child labor law, however, it is probable that he instead could have persuaded Southern senators not to filibuster a Thirteenth Amendment enactment.

Historical evidence suggests further that not *every* Southern member of Congress would have opposed a Thirteenth Amendment enactment. For example, several Southerners were among those in Congress who referred to child labor as a form of slavery.[412] Additionally, the South's primary use of child labor was for agriculture,[413] as opposed to the heavy industry for which children in the North were employed,[414] which suggests that the Thirteenth Amendment approach might have appealed to Southern members because it could primarily target Northern forms of child labor with their harmful industrial conditions.[415] Indeed, some Southern congressmen blamed Northern business interests for introducing industrial child labor into the South and seemed enthusiastic about regulating child labor even in their own states precisely to prevent such exploitation.[416]

V. CONCLUSION

Existing literature on the welfare state has been criticized on the basis that it "does not sufficiently explore why breakthroughs that might well have happened did not occur at relevant points in nations' histories."[417] This Article explores one such potential breakthrough by carefully evaluating why Congress in the early twentieth century failed to pass legislation that would regulate child labor as a form of involuntary servitude. The preceding discussion has demonstrated

412. *See, e.g.*, 41 CONG. REC. 1801 (1907) (statement of Sen. Tillman (Ark.)); 53 CONG. REC. 2014 (1916) (statement of Rep. McKellar (Tenn.)); *see, e.g.*, 53 CONG. REC. 1578, 12,054-55 (1916) (statements of Rep. Byrnes (S.C.) and Sen. Robinson (Ark.)).

413. *See* 65 CONG. REC. 7200 (1924) (statement of Rep. Tague) ("[T]he Southern States have a larger percentage of child labor than any other section of the country because of the predominance of agriculture in the South . . . ."); *id.* at 7174 (statement of Rep. Crisp) ("The Southern States have a larger percentage of child labor than any other section of the country because of the predominance of agriculture there.") (quoting pamphlet entitled "Child Labor Facts" distributed by proponents of the child labor amendment); Kauffman, *supra* note 210, at 3 ("In 1900, only 10 percent of minors employed in industry were of the South.").

414. *See* 65 CONG. REC. 7200 (1924) (statement of Rep. Tague) ("[T]he New England States have a larger proportion of child labor in nonagricultural work than any other section."). *But see* 53 CONG. REC. 12,287 (1916) (statement of Sen. Smith); VILE, *supra* note 209, at 62 (reporting that Southern children were "frequently employed in the textile industry").

415. *See supra* notes 346-50 and accompanying text.

416. *E.g.*, 41 CONG. REC. 1801 (1907) (statement of Sen. Tillman) (referring to the "northern millionaires who have gone down [to the South] and built mills and made industrial slaves out of white children"); *see also* A.J. McKelway, *Child Labor in the Southern Cotton Mills*, 27 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 8 (1906) (describing how "the child labor system of the South is an advantage to Northern mills").

417. A.S. Orloff & T. Skocpol, *Why Not Equal Protection? Explaining the Politics of Public Social Spending in Britain, 1900-1911, and the United States, 1880s-1920*, 49 AM. SOC. REV. 726, 727 (1984).

that the Thirteenth Amendment comprised a viable basis for regulating child labor at that time. A subset of Congress—specifically, the House Judiciary Committee—did once consider that approach, but the timing was inopportune. Samuel Gompers, who had put forth the Lawson bill proposing the approach, was too busy with other aspects of the labor movement to follow up when Congress requested further research, and the congressional session was about to close. Furthermore, Congress had already failed twice in its legislative attempts pursuant to the commerce and taxing powers, and was already well on its way to passing a Child Labor Amendment. As a result, its members were skeptical about whether the Supreme Court would sustain any approach based on existing congressional powers under the Constitution, and saw little need to attempt further legislation when in their view the Child Labor Amendment would more definitively resolve the question for the Supreme Court.

By the time Congress returned to seriously considering child labor legislation, when the Child Labor Amendment had been stalled by insufficient state ratification, the climate had changed. The nature of federal collective bargaining and other labor legislation may have dictated the tone by pushing Congress toward the Commerce Clause in those contexts, and, by analogy, in the child labor context. Once the Ashurst-Sumner Act passed, and the switch in time occurred, the new viability of congressional power to regulate child labor products in interstate commerce obviated the Thirteenth Amendment approach. As a result, the approach never received its due attention. Instead, it disappeared into the depths of legislative history.

This early-twentieth-century story is particularly interesting because historical evidence suggests that the Thirteenth Amendment approach might have been politically viable if it had been considered earlier. Congress likely would have found the approach appealing for several reasons. First, the Thirteenth Amendment approach more precisely applied to the forms of child labor that Congress desired to regulate. The approach generally would not apply to farm and home child labor that Congress sought to leave undisturbed, but would permit regulation of harmful child labor across industries and regardless of interstate shipment or taxable income. Second, the approach would have provided a narrower basis for sustaining federal child labor legislation, which would have particularly appealed to conservative members of Congress and would have satisfied other members by increasing the likelihood that the Court would uphold the legislation. In addition, the logic of the approach would have provided a better basis to refute anti-regulation arguments predicated on the Fifth and Tenth Amendments. Finally,

while some Southern members of Congress might have opposed the approach on principle or out of lingering animosity toward the Thirteenth Amendment, a number of them might have supported it because they considered child labor a form of slavery or because the approach could be implemented to target primarily Northern industrial child labor. And even if all Southern members of Congress had opposed it, the vast support for federal child labor legislation at that time suggests that a statute based on that approach would have passed anyway.

This Article has important implications for the legal and intellectual history of Thirteenth Amendment arguments in the context of labor freedom. A number of scholars have evaluated the notion that Thirteenth Amendment is underlaid by a spirit of labor autonomy,[418] and have discussed the historical appeal of the notion that involuntary servitude includes unsavory adult labor conditions produced by economic coercion.[419] Researchers in this field report that the Thirteenth Amendment essentially lay dormant in the early decades of the twentieth century.[420] It was not until the late 1930s that the federal government utilized the Thirteenth Amendment; at that time the Department of Justice Civil Rights Section began to aggressively enforce anti-peonage statutes and to bring civil rights

418. *See, e.g.*, James Gray Pope, *Labor and the Constitution: From Abolition to Deindustrialization*, 65 TEX. L. REV. 1071, 1096-97 (1987) (claiming that the Thirteenth Amendment is "the sole constitutional provision that directly addresses labor liberty"); Lea S. Vandervelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 439-40 (1989).

419. *See, e.g.*, GOLUBOFF, *supra* note 356, at 142-43 (describing how the Department of Justice's Civil Rights Section used the Thirteenth Amendment in the 1930s and 1940s in a manner that expanded the conception that involuntary servitude encompassed extreme forms of economic coercion); ROBERT J. STEINFELD, COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY 253-90 (2001); James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"* 119 YALE L.J. 1474, 1565-1567 (2010) (describing how labor rights claims under the Thirteenth Amendment might be framed); James Gray Pope, *The First Amendment, the Thirteenth Amendment, and the Right To Organize in the Twenty-First Century*, 51 RUTGERS L. REV. 941, 964 (1999) (describing union and labor activists' "Thirteenth Amendment theory of collective labor rights" in the 1930s and 1940s); James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 942 (1997); Pope, *supra* note 324, at 112; Rebecca E. Zietlow & James Gray Pope, 38 U. TOL. L. REV. 839, 841 (2007).

420. RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 543 (2d ed. 1992); *see* G. SIDNEY BUCHANAN, THE QUEST FOR FREEDOM: A LEGAL HISTORY OF THE THIRTEENTH AMENDMENT 82 (1976); GOLUBOFF, *supra* note 356; Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1637, 1683 (2001); Rebecca E. Zietlow, *The Promise of Congressional Enforcement*, *in* THE PROMISES OF LIBERTY: THIRTEENTH AMENDMENT ABOLITIONISM AND ITS CONTEMPORARY VITALITY 182, 186 (Alexander Tsesis ed., 2010).

actions against abusive government officials.[421] Even then, politicians affirmatively chose not to base broader labor rights statutes on Congress's Thirteenth Amendment enforcement power, instead relying primarily on the Commerce Clause.[422]

This Article reveals that the Thirteenth Amendment's role in the labor context might have been greater during its dormant period, if only to authorize congressional child labor legislation. Additionally, the mere use of the Thirteenth Amendment in the labor context (particularly if the Court had upheld a federal child labor statute enacted pursuant to that Amendment) might have prompted both Congress and the executive branch to more seriously consider the Amendment as a tool to fight coercive forms of adult labor, and to consider it earlier. Ironically, while the Thirteenth Amendment approach might have been appealing because it could be justified by arguments that would narrowly support child labor regulation without establishing broader precedent for adult labor, the approach—by being more likely to be sustained by the Court—might have been the better route to encourage Congress and the executive branch to push the boundaries of the Thirteenth Amendment's prohibition of involuntary servitude over the remainder of the twentieth century.

Similarly, had the Supreme Court sustained a federal child labor law based on the Thirteenth Amendment approach in the early twentieth century, it might have influenced the development of some adult labor jurisprudence. For example, had the Court then recognized the validity of an incapacity-to-consent notion of involuntary servitude, it might have decided or reasoned differently in the modern case of *United States v. Kozminski*, which involved labor performed by mentally disabled individuals under potentially harmful working conditions.[423] As it happened, the Court's 1988 decision in *Kozminski* established that "the term 'involuntary servitude' necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process."[424] While the Court acknowledged that "a victim's age or special vulnerability may be relevant in determining whether a particular type or a certain degree of physical or legal coercion is sufficient to hold that person to

421. GOLUBOFF, *supra* note 356, at 111-40; Risa L. Goluboff, *Race, Labor, and the Thirteenth Amendment in the 1940s Department of Justice*, 38 U. TOL. L. REV. 883 (2007); Zietlow, *supra* note 419, at 186.

422. *See* Pope, *supra* note 324; *supra* notes 324-28 and accompanying text.

423. 487 U.S. 931 (1988).

424. *Id.* at 952.

involuntary servitude,"[425] it rejected the government's argument that involuntary servitude can occur through mere "psychological coercion" even though it recognized that—for vulnerable individuals like the mentally disabled—psychological coercion can "deprive[] the victim of the power of choice."[426] Effectively, then, the Court declined to adopt a pure incapacity-to-consent conception of involuntary servitude, instead favoring a primarily duress-based conception. It is far from certain, but seemingly quite possible, that the Court might have been more amenable to an incapacity-to-consent conception with respect to mentally disabled laborers had it already been presented to and adopted by the Court with respect to child laborers in an early-twentieth-century case.

In conclusion, this Article provides extensive historical evidence that the Thirteenth Amendment provided a constitutionally and politically viable basis for regulating child labor in the early twentieth century, but Congress's consideration of that approach was too little and too late. Consequently, child laborers in the early twentieth century suffered for lack of uniform protective legislation that would free them from a form of involuntary servitude. The federal child labor legislation episode became one in a series of standoffs in an ongoing power struggle between Congress and the Court over economic legislation—a struggle that culminated in President Roosevelt's court-packing plan and the Court's famous switch in time. Had Congress relied upon the Thirteenth Amendment approach instead of or in addition to other approaches in its early federal child labor legislation, a small victory in sustaining that legislation against Court scrutiny might have paved the way for an expansion of the Thirteenth Amendment's role in the labor context over time.

425. *Id.* at 948.
426. *Id.* at 949.