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Child Labor Amendment or Alternative Legislation?

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was enacted from considerations of public concern in order to subserve the general welfare and such a law cannot be abrogated by mere private agreement.[66] It is more in accord with the public interest to permit regulation of the continuing substituted obligation.

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CHILD LABOR AMENDMENT OR ALTERNATIVE LEGISLATION?

It is now thirteen years since the Child Labor Amendment[1] was submitted to the states for ratification. Seven states are still needed to obtain the necessary three-fourth ratification.[2] Determined efforts are being put forth to secure ratification in seven more states. However, the resistance is still formidable enough to make any prediction as to the adoption of the Amendment highly speculative.

Furthermore, there is an impressive group of authorities which regards the Amendment as already rejected and possible ratification at this date as unconstitutional. This contention is supported on two grounds, namely, (1) the comparatively long lapse of time since the submission of the amendment to the states in 1924, and (2) rejections which preceded subsequent ratifications in many of the states. This argument presents an additional and significant obstacle to the successful operation of the provisions of the Amendment.

As an alternative, a new type of legislation for the regulation of child labor has been proposed. The suggested legislation fol-

on the wife to show the support afforded by the second husband is inadequate, in order to have the alimony continued. Cohen v. Cohen, 150 Cal. 99, 88 Pac. 267 (1906); Cole v. Cole, 142 Ill. 19, 13 N. E. 109 (1892).

65. R. S. Mo. 1929, sec. 1355.

66. Walter v. Walter, 189 Ill. App. 345 (1919); Recht v. Kelly, 82 Ill. 147, 25 Am. St. Rep. 301 (1876).

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

"Sec. 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." Joint Resolution, 43 Stat. 670 (1924).

2. Up to Jan. 1, 1937, twenty-four states had ratified. Since the first of the year, five more states have ratified. North Carolina, Texas and South Dakota recently rejected the Amendment. The following state legislatures have not as yet ratified and will convene in regular session this year: Connecticut, Delaware, Florida, Georgia, Kansas, Maryland, Massachusetts, Missouri, Nebraska, New Mexico, New York, Rhode Island, South Carolina, Tennessee, and Vermont.

lows the pattern established by the Ashhurst-Sumners Act.[3] That Act makes it unlawful knowingly to import goods made by convict labor into any state where the goods are intended to be received, possessed, sold, or used in violation of its laws. It also provides that packages containing convict-made goods must be plainly labeled as such and disclose certain specified information. The Ashhurst-Sumners Act was passed to supplement the prior Hawes-Cooper Act.[4] The purpose of this latter act was to divest convict-made goods of their interstate character upon arrival and delivery in the state. It succeeded in removing their immunity from state legislation. However, it did not subject the goods to state law until after the arrival and delivery in the state. The Ashhurst-Sumners Act seeks to prohibit the shipment of goods at the place of their manufacture.

Precedent for this type of legislation was started as far back as 1913 when the Webb-Kenyon Act[5] was passed. This act prohibits the transportation of intoxicating liquors into any state when it is intended that they should be received, possessed, sold, or in any manner used in violation of its laws. This Act was upheld by the Supreme Court in *Clark Distilling Co. v. Western Maryland Ry. Co.*[6] The subject of this act was regarded as a commodity harmful to health. Convict-made goods on the other hand, are harmless commodities, and the constitutionality of the Ashhurst-Sumners Act was doubtful[7] until the recent decision of the Supreme Court in *Kentucky Whip and Collar Company v. Illinois Central R. R. Company.*[8]

In that case the court held that "where the subject of commerce is one as to which the power of the state may constitutionally be exerted . . ., Congress may . . . put forth its power to regulate interstate commerce so as to prevent that commerce from being used to impede the carrying out of state policy." No unconstitutional delegation of power is involved, since "Congress

3. 49 Stat. 494, 49 U. S. C. A. sec. 61-64 (1935).
4. 45 Stat. 1084, 49 U. S. C. A. sec. 60 (1929).
5. 37 Stat. 699 (1913). The language of this section was reenacted without change in 1935. 49 Stat. 877, 27 U. S. C. A. sec. 122 (1935).
6. 242 U. S. 311, 37 S. Ct. 180, 61 L. ed. 326 (1917).
7. The District Court upheld the act in part. It declared that Congress could require labeling. It declared the act invalid so far as it prohibited transportation of convict-made goods into states which prohibited their sale. Kentucky Whip & Collar Co. v. Illinois Cent. R. Co., 12 F. Supp. 37 (D. C. W. D. Ky., 1935). The Circuit Court of Appeals, however, sustained the act in its entirety. Kentucky Whip & Collar Co. v. Illinois Cent. R. Co., 84 F. (2d) 168 (C. C. A. 6, 1936).
8. 4 U. S. Law Week 485 (1937).

has formulated its own policy and established its own rule. The fact that it has adopted its rule in order to aid the enforcement of valid state laws is no ground for constitutional objection." The Act is not a violation of "due process" under the fifth amendment because Congress is as free as the states to recognize the fundamental interests of free labor.

The Ashhurst-Sumners Act[9] requires the cooperation of the states in order to have any effect. Most state legislatures have enacted laws restricting or prohibiting the sale or importation of convict-made goods.[10] Before the supplementary federal legislation, such laws would have been held unconstitutional in so far as they applied to articles in interstate commerce. Now, they are constitutional. In *Whitfield v. State*,[11] the Court of Appeals of Ohio sustained state legislation of this nature.

The practical effect of this type of coöperative action between state and federal governments is to some extent to bridge the void between national and state commerce powers without changing the Constitution.[12]

Prior to the decision in the *Kentucky Whip* case, the power of Congress to prohibit shipment of articles under the commerce clause was limited to those articles (1) which are dangerous to transport,[13] (2) which make use of interstate commerce to extend an evil into the state to which they are shipped,[14] or (3) which

9. 49 Stat. 494, 49 U. S. C. A. sec. 61-64 (1935).

10. A note in 21 Cornell L. Q. 357, 361, f. n. 35 (1936) lists the following state statutes: Ariz. Rev. Code (1934 Supp.) sec. 5333 a-f; L. 1933, c. 103, prohibits sale in open market of domestic and imported goods; prohibits expenditure of public money for their purchase; confines their use to state institutions. Ark. Acts 1933, No. 253, p. 791. Calif. 3 Gen. L. (1931 Deerings) sec. 8062 a (1929). Colo. L. 1933 c. 53, sec. 149. Ga. Acts 1931 (Ex. Sess.) p. 90. Idaho L. 1933 (Ex. Sess.) c. 216, p. 460. Ill. L. 1931, p. 728. 8 Burns Ind. Stat. Ann. (1931) sec. 42-612 (1933). Ky. L. 1934 (Ex. Sess.) c. 5, sec. 1-5. Me. L. 1931, c. 221, p. 231. Mass. Acts 1932, c. 252, p. 323. Minn. L. 1935, c. 268, sec. 5. Mont. L. 1933, c. 172, p. 375. N. J. L. 1931, c. 235, p. 587. N. M. Stat. Ann. (1929) sec. 130-176. N. D. Code Ann. (1933 Supp.) sec. 4468 (a). Ohio Code Ann. (Page Perm. Supp. 1926-1935) sec. 2228-1, 2. Ore. Code Ann. (1935) sec. 59-402. 61 Pa. Code Ann. (1930) sec. 255, 257. 2 Tex. Pen. Code, sec. 1137, i (1935). Utah L. 1933, c. 67, 68. Vt. L. 1935 (Sp. Sess.) No. 132. Wash. Rev. Stat. Ann. (Remington 1932) sec. 5847-1 (1933).

11. 197 N. E. 605 (Ohio, 1935).

12. For a treatment of the historical development of this type of legislation see Corwin, National-State Coöperation, (1937) 46 Yale L. J. 599.

13. Grayson v. Lynch, 163 U. S. 468, 16 S. Ct. 1064, 41 L. ed. 230 (1896) (diseased cattle); Horn v. Mitchell, 232 Fed. 819 (C. C. A. 1, 1916) (explosives).

14. Champion v. Ames, 188 U. S. 321, 23 S. Ct. 321, 47 L. ed. 492 (1903) (lottery tickets); Hipolite Egg Co. v. United States, 220 U. S. 45, 31 S. Ct. 281, 55 L. ed. 364 (1913) (white slaves); Clark Distilling Co. v. Western

are excluded to render effective a policy on a subject over which Congress has jurisdiction.[15] The Supreme Court in the *Kentucky Whip* case added a new class of articles to the list. Congress may now prohibit the shipment of goods in interstate commerce in order to prevent that commerce from being used "to impede the carrying out of a state policy."

The possibilities of applying the same type of legislation to the child labor problem are already being developed. The Clark-Connery bill before Congress would bar the shipment of products made with child labor into any state where the goods are to be sold or used in violation of its laws. In contemplation of the passage of the Clark-Connery bill, a supplementary bill has been introduced in the Missouri legislature.[16] This bill proposes to prohibit the sale in Missouri of products produced wholly or in part in this or in any other state with child labor. The federal and state bills are, of course, mutually dependent. The federal bill, without appropriate state legislation, would be of no value; the state bill, without the federal legislation, would amount to an unconstitutional invasion into the domain of interstate commerce.

Federal legislation on child labor was attempted in 1916. The Child Labor Act[17] of that year undertook to prohibit the interstate shipment of goods from factories where children were employed. In *Hammer v. Dagenhart*,[18] the Supreme Court invalidated the Act on the ground that Congress could not prohibit the movement of ordinary commodities. In a five-to-four decision the court held that an evil, to be subject to correction by

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Md. R. Co., 242 U. S. 311, 37 S. Ct. 180, 61 L. ed. 326 (1917) (liquor); Brooks v. United States, 267 U. S. 432, 45 S. Ct. 345, 69 L. ed. 699 (1925) (stolen automobiles); United States v. Popper, 98 Fed. 423 (N. D. Cal. 1897) (obscene literature).

15. N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 26 S. Ct. 272, 50 L. ed. 515 (1906) (transporting coal in violation of a law which established a minimum rate); United States v. Del. & H. R. Co., 213 U. S. 366, 29 S. Ct. 527, 53 L. ed. 836 (1908) (transporting goods in violation of the Hepburn Act). See also, 2 Willoughby, *Constitution of the United States* (2d ed. 1929) 994.

16. The proposed act would prohibit the sale in Missouri of any product of mine, mill, cannery, workshop, factory, or manufacturing establishment produced or mined wholly or in part by child labor. By child labor is meant the employment of children under sixteen years of age. (Eighteen years is the minimum in mines.) Committee substitute for Senate Bill No. 1, 59th General Assembly. A bill of similar nature is also before the House of Representatives. House Bill No. 13, 59th General Assembly.

17. 39 Stat. 675, (1916).

18. 247 U. S. 251, 38 S. Ct. 529, 62 L. ed. 1101, 3 A. L. R. 649, Ann. Cases 1918 E, 724 (1918).

Federal legislation, must depend on the use of interstate commerce. The Child Labor Act was interpreted as an attempt to regulate mining and manufacturing within the states, contrary to the tenth amendment. The majority felt that Congress had no authority to exclude goods from interstate commerce merely because of the unfair competition they might offer with goods manufactured under more expensive conditions.[19]

The present proposals are, however, to be distinguished from the prior Child Labor Act. The *Kentucky Whip* case has in effect dissolved the legal distinction in interstate commerce powers between commodities dangerous to the health and welfare of the people and commodities which in and of themselves are harmless as regards legislation which is intended only as supplementary to valid state legislation.

Convict-made goods and goods produced with child labor are almost identical in this respect. Consequently, in the light of the *Kentucky Whip* case, there can be little doubt as to the constitutionality of the proposed legislation. But, does such legislation offer the solution to the problem of child labor?

At first glance, this type of legislation would seem to present an adequate substitute for the Amendment without involving the procedural obstacles connected with altering the Constitution. A more critical analysis, however, discloses several vital defects in the scheme.

The Clark-Connery bill assumes cooperation on the part of the states. It is quite possible that some states will refuse to pass any law; other will probably enact legislation with extremely lax provisions. Even though all forty-eight states do coöperate and pass laws, it is too much to expect uniformity among them.[20] It exhausts the mind to imagine the intricate problems that would arise in determining the legality of a particular shipment. An inspector would have forty-eight different laws to contend with

19. In a vigorous dissenting opinion, Mr. Justice Holmes relied upon precedent as establishing the doctrine that Congress, in the exercise of an acknowledged power may reach indirectly a result which it is not constitutionally authorized to reach directly. The court cannot constitutionally inquire into the real motive for the action.

20. Edward S. Corwin suggests the possibility of securing uniformity among the state laws by federal grants-in-aid to those states which would adhere to specific requirements in passing their legislation. This suggestion, however, has not been advanced in connection with either the convict-made goods legislation or with the proposed child labor legislation. Nevertheless, it offers a possible solution of the problem of securing uniformity. Corwin, Nation-State Coöperation (1937) 46 Yale L. J. 599, 615-622.

in order to determine whether a given shipment could leave the place of manufacture.[21] The shipment of an article would necessitate an inquiry as to whether any of its component parts were the products of child labor. Similar practical difficulties would be encountered in the labeling of goods produced with child labor.

In view of these rather apparent defects, the alternative legislation would appear to be a poor substitute for the proposed Amendment. As an improvement on present conditions, it deserves support. The Child Labor Amendment, however, would concentrate control, simplify procedure, and unify requirements so as to escape the above objections to the alternative legislation. It is submitted that a comparison between the two suggested solutions discloses the alternative legislation to be an unnecessarily intricate and comparatively ineffective method of settling the problem of child labor.

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EFFECT OF ADVERTISING ON THE MANFACTURER'S LIABILITY

"Look for the big red letters on the package." Advertisements by radio, newspaper, circulars, and labels today comprise the method of inducing the public to purchase commodities by brands and trade names. Advertising has had a tremendous growth since 1900. Thirty-seven years ago a full page advertisement aroused fears for the solvency of a company.[1] Today millions of dollars are spent on advertising. The economic results have been the extension of modern research and mass production. The legal problem is whether the manufacturer has been made to bear responsibility in proportion to the benefits reaped by his advertising.

Under present day conditions the consumer is dependent upon remote producers.[2] Business has become more and more complex under modern marketing conditions, until, it would seem today,

21. Mr. Corwin suggests that this type of coöperative action will make it possible for the federal government to use state officials in the enforcement of its law. This would eliminate the duplication of effort on the part of federal and state officials.
Ibid. l. c. 604, 610, 612 f. n. 52.
The practicability of such a proposal is, however, questionable. Certain states are definitely opposed to the proposed restrictions on child labor. Efficient enforcement of the law by the officials of such a state could not be expected.

1. Wm. T. Nardin, St. Louis Globe-Democrat, Jan. 19, 1937, p. 1B:4.
2. Vold, *Sales* (1931) 476.