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## ACKNOWLEDGMENTS

I have been teaching undergraduate students the three landmark child labor cases—*Hammer v. Dagenhart*, *Bailey v. Drexel Furniture Company*, and *United States v. Darby Lumber*—in my constitutional law course for twenty-five years. Like many people who considered the cases involving federal institutional powers and constraints, I tended to view the child labor precedents as historical examples, involving long-settled constitutional issues, where the Supreme Court worked to define the scope of the congressional Commerce Clause and taxing powers. After observing some contemporary interest groups and elected officials criticize child labor laws and the *Darby Lumber* decision, which upheld federal child labor restrictions, I wondered whether my generation had failed to learn the lessons of history. I decided to study the origins of oppressive child labor and the protracted state and federal legal struggle to regulate the practice. This book is the result of that investigation. The project has led me to a better understanding of the role child labor has played in the nation's social, political, and legal development. My hope is that students, teachers, and general readers will be enlightened by the story as well.

Several staff members at the University Press of Kansas contributed to the publication of this book. I would like to thank former editor Charles “Chuck” T. Myers for his enthusiasm and early support of the project. I am grateful to Editor-in-Chief Joyce Harrison for managing the initial stages of the review process. My editor, David Congdon, shares my interests in political science, law, and history. I appreciate his work supervising the reader reports, subsequent revisions, and final stages of manuscript review. I also want to thank Michael Kehoe for his efforts in marketing the book, my production editor, Larisa Martin, for her work in coordinating the later stages

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of the book-making process, and Martha Whitt for her meticulous copy-editing. Finally, I want to thank the various reviewers who read all or portions of the manuscript, including Robert Macieski, David S. Tanenhaus, and my friend and former coauthor Derek Hoff. Although the manuscript benefited greatly from the comments of these reviewers, I take full responsibility for any errors or omissions in the book.

This book would not have been possible without the support of my department, the College of Arts and Sciences, and the Provost's Office at Kansas State University. My department head, Jeff Pickering, offered encouragement throughout the process, and I appreciate his assistance in securing grant funding and sabbatical leave. The semester of leave provided much-needed quiet time for writing. I am grateful for my political science colleagues who supported me as I dealt with some health issues while writing the manuscript. It is a pleasure to work with such a fine group of people. Several political science graduate students assisted with various aspects of the research, including Chelsey Eimer, Madushika Nadeeshani Weerasinghe Pathirana, and Derek Shaw. I appreciate their help tracking down books, obscure reports, and other materials.

A University Small Research Grant supported a week of field research at the Library of Congress's Manuscript Division. The staff in the Manuscript Reading Room provided valuable assistance and access to several paper collections, including those of Albert J. Beveridge, Felix Frankfurter, Alexander J. McKelway, National Child Labor Committee, National Consumers' League, Theodore Roosevelt, and Harlan Fiske Stone. My research also benefited from the resources available at K-State's Hale Library and access to the Edgar Gardner Murphy Papers in the Southern Historical Collection, Wilson Library, at the University of North Carolina, Chapel Hill.

Projects like this one often demand a lot of time away from family. My wife, Leah, deserves praise for her patience and support over the years. I also want to thank our two boys, David and Eric, for giving me the joy of being a father. Around the time that I completed the manuscript, Leah and I helped move David, our youngest son, into the dorms for his freshman year in college. Now officially an empty nester, I miss having the boys (who are now fine young men) around the house. Although I'm sure I will learn to relax and enjoy my newfound freedom, perhaps another book project will make the transition easier.

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## INTRODUCTION

The archives of the Library of Congress house thousands of photos of working children taken by Lewis W. Hine over a century ago for the National Child Labor Committee (NCLC).<sup>1</sup> One famous photo shows a ten-year-old girl taking a momentary glimpse out the window while tending a spinning machine in a textile mill. She had already been working for over a year. The picture is just one of more than one thousand images showing children at work in the cotton and silk mills. Another photo depicts a group of boys, between ten and fourteen years old, working the breaker rooms in a coal mine. Covered in coal dust, the boys are hunched over a conveyor belt as they separate the dull slate from the sharp, glistening coal deposits. A “breaker boss” with a large stick stands behind the youth, keeping them on task. Another image shows a group of two dozen breaker boys with blackened faces posing for a photo after a day’s work. Most of the boys are under fifteen, but they look like little men.

More than three hundred photos in the NCLC collection capture children between five and fourteen working as oyster shuckers or shrimpers for canning companies. In one picture, a group of children stand in front of a mound of shells over three times their height. Another photo features Manuel, a bare-footed five-year-old shrimp picker, with a bucket in each hand and a face that looks years beyond his tender age. In a 1911 photo, Mary, an eight-year-old girl, stands over a wooden bin shucking oysters. She started at 3:00 a.m. and by the time she quits at 5:00 p.m., she will earn five cents for a four-pound bucket of shelled oysters. Another image shows three boys, all appearing younger than fourteen, making cigars. One has a large “stogie” stuffed in his mouth and all the boys reportedly chewed tobacco and smoked. These photos, available online, are visual reminders of a time in American history when many children worked long hours, often in unhealthy and dangerous conditions, in a daily struggle for subsistence. Poverty, greed, weak state labor laws, and nonexistent federal regulations permitted this kind of child labor exploitation.

Most Americans today do not give child labor laws much thought. Child

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labor, however, was a prominent policy issue in American politics for nearly one hundred years, especially during the first few decades of the twentieth century. Children had worked since the first settlers arrived on the shores of America. Their labor helped families survive and contributed to the community. During the 1800s, however, public attitudes about working children changed from viewing labor as a personal and public good to a moral and social evil. In *Child Labor: An American History*, Hugh Hindman uses data from the National Child Labor Committee archives to document the growth of child labor as a social problem.<sup>2</sup> Hindman argues that industrialization both created the problem of child labor and provided the impetus toward its eradication. The evolution of public opinion on child labor paralleled the transformation of the American economy from its local agricultural base to a national industrial juggernaut. The turning point was a shift in household economy from production for domestic consumption to production for markets where children worked outside the family in factories and mills.

Regulation of working children began in the 1840s at the state level in a haphazard and inefficient way. Weakened by legislative compromises and lack of enforcement mechanisms, early state laws combating child labor were limited and ineffective. Reformers consistently lobbied for tougher regulations. After the American Civil War (1861–1865), a growing number of people sensed that child labor was a problem, but accurate information on the scope of the practice was unavailable. Data from the 1870 Census revealed a significant portion of child workers, thus spurring reform efforts. As part of the Progressive Era (1890–1920), numerous individuals, interest groups, and politicians devoted a substantial amount of their time, talents, and resources to the issue of working children. Federal attempts to curb child labor started in 1906 and resulted in several laws, four major Supreme Court decisions, an (ultimately unsuccessful) Child Labor Amendment proposed by Congress in 1924, and landmark legislation such as the Fair Labor Standards Act of 1938. Along the way, there were contentious constitutional battles over states' rights under the Tenth Amendment to control local labor conditions versus federal power to regulate interstate commerce and levy taxes to restrict child labor. There is a rich and illuminating legal and political history to be told about the struggle to regulate child labor in America. This book attempts to tell that story.

Before we proceed much further, a definition of child labor is in order. Many people have different ideas about the nature and scope of child labor, and the concept has changed over the years. At its most basic level,

child labor may be defined as the commercial employment of children age seventeen and under for their labor. But it is much more than that. As used throughout this book, child labor is mostly a pejorative term. A social reformer writing almost a century ago defined child labor as “the work that interferes with a full living of the life of childhood and with the best possible preparation for adulthood.”<sup>3</sup> Another commentator defined the term in its legal meaning as “the gainful labor of children at unfit ages, for unreasonable hours or under unwholesome conditions.”<sup>4</sup> Walter I. Trattner, the author of the first comprehensive history of child labor reform, defined child labor as “the work of children under conditions that interfere with their physical development and their education.”<sup>5</sup> In contemporary legal terms, these definitions describe what is called “oppressive child labor.”<sup>6</sup> All three definitions suggest a difference between children’s work, which is constructive, and child labor, which is exploitative.

Proponents of child labor regulations did not attempt to eliminate all work performed by minors. Reformers recognized the educational and developmental value in children’s work. Child labor legislation does not prevent children from working part-time during the school year or extended hours over the summer. Regulations do not prohibit children from performing odd jobs for neighbors or doing chores around the house, such as washing dishes or taking out the trash, although some children may mildly protest such tasks. As strange as it seems, however, those arguments became part of the debate over the failed Child Labor Amendment. For various reasons that will be explained in the pages that follow, the text of the amendment used the phrase “child labor,” rather than “child employment,” which implies payment for work. Opponents of the amendment used the broad language to claim that the proposal would give Congress the power to regulate chores around the house or family farm and even homework assignments for school. It was a rather specious contention because reformers never sought such invasive restrictions. For some citizens concerned about the growing concentration of federal power, however, this was an effective argument against the amendment.

There are several key historical observations involving child labor and society that are important for understanding the development of child labor laws. First, child labor has always been a problem of poverty, both cause and effect. For most of American history, economic necessity compelled children of the poor to start work at an early age in order to contribute to the family income. This was especially true during the second Industrial Revolution of the late 1800s, which saw and with the influx of millions of immi-

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grants from Europe. Prior to the development of a welfare state and public assistance programs, a child's income was often essential to the survival of his or her family. Alternatively, children of wealthy families were never sent to work in coal mines, glass factories, or textile mills. Because the working poor had few options, low-income parents often opposed and evaded child labor laws. Once committed to a life of labor at an early age, however, few children advanced out of poverty. Child labor was always cheap labor.

Second, child labor and public education are inextricably linked. As the government restricted their labor, children needed something productive to do with their time. Learning filled the gap. The first compulsory school laws were enacted in the 1850s but few children were covered by them, and they mandated only three months of schooling a year. In 1870, less than 5 percent of children were subject to compulsory attendance laws; by 1908, that number climbed to 72 percent. A system of state-funded public schools, however, was not widely available for most of American history. Consequently, the expansion of public schools, compulsory school attendance, and improved educational standards became some of the most effective child labor reforms.

A third key observation is that reformers have always viewed child labor as both an individual and community problem. When children are sent to work at an early age for long hours under harsh conditions, they often grow up illiterate and physically and socially degenerate. Those individual disabilities had consequences for society. Some of the earliest critiques of child labor expressed concern that the practice undermined democracy and social order. Child labor was viewed as a threat to the foundations of representative government. Middle-class reformers envisioned a generation of uneducated working poor who would grow up to be ignorant and angry adults vulnerable to the radical doctrines of anarchism and communism. Other reformers warned that the physical toll on child workers created a population unfit for war and American imperial ambitions. These instincts were inherently conservative yet they informed some of the Progressive arguments against child labor.

Finally, child labor reform encompassed class and racial dimensions. Many of the social reformers were educated middle- and upper-class citizens from midwestern and northeastern cities. Progressive-Era crusaders were wealthy philanthropists, university professors, journalists, clergy, and community activists from such centers of social reform as Hull House, a settlement house in Chicago cofounded by Jane Addams and Ellen Gates Starr. These social reformers sought restrictions on the labor of working-class im-

migrant families, many of whom resented their efforts. Additionally, the story of the child labor reform movement is really a narrative about white reformers seeking regulations on labor performed by primarily white children. This was especially true in the post-Reconstruction New South. Because racial segregation excluded black children from manufacturing jobs, many poor white children labored for long hours in the textile mills. Historian Shelley Saltee has demonstrated that to promote even minimal reforms in southern states, northern and southern Progressives used a “white supremacy” strategy to build support for reform among the southern middle-class.<sup>7</sup>

Many law journal articles and book chapters have examined state and federal attempts to regulate child labor, but no scholar has provided a comprehensive analysis and balanced treatment of the legal arguments, economic issues, and broader constitutional history involving the efforts to limit oppressive child labor. Few books on the market adequately describe the constitutional conflict over child labor in America, and the books in print have several limitations.<sup>8</sup> As the title implies, this book is primarily a legal history of the decades-long struggle over child labor in America. Emphasis is placed on the doctrinal development of state child labor and school attendance laws, the debates in state legislatures and Congress, the development of administrative powers to enforce the laws, the political battle over the Child Labor Amendment, judicial review of child labor laws, and legal commentary on important cases. While a detailed analysis of every state child labor law is not practical, this work provides summaries of state laws at important historical junctures and highlights conflicts in several battleground states, such as Massachusetts and New York, critical in the development of child labor laws. I also incorporate throughout the book the most recent legal and political science research and analyses on the four federal child labor laws, interest group tactics and strategies, and the major Supreme Court decisions.

Dozens of interest groups campaigned for and against child labor laws across decades. The primary reform groups were the National Child Labor Committee, the National Consumers’ League, the American Federation of Labor, and the National Federation of Women’s Clubs. Opponents of child labor regulations included the Southern Textile Committee, the National Association of Manufacturers, the American Farm Bureau Federation, and the Catholic Church. Each side had its share of defections. Some early child labor reform advocates, such as New York governor Alfred E. Smith, became vocal opponents of the Child Labor Amendment, while groups like

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the American Farm Bureau ultimately switched their position in support of the amendment. Like other policy areas in which interest groups are active, child labor law opponents used three strategies to defeat regulations: (1) lobbying to secure votes in a legislature, at both the state and congressional levels; (2) challenging the constitutionality of child labor laws in state and federal courts; and (3) influencing the substance of the laws so that the administrative provisions surrounding them were so inadequate as to make the regulations unenforceable.<sup>9</sup> All three tactics involve important features of interest-group politics and public policymaking.

In examining the long struggle over child labor, several conclusions regarding the relationship between law and society are warranted. First, law is a social institution that both shapes and is influenced by social forces. Legal change is often incremental and slow. Society must work through an experimental process of trial and error in developing laws to address social problems.<sup>10</sup> Public attitudes on child labor evolved across decades, influenced by personal observation, empirical research, interest-group advocacy, and the media. Also, technological developments in manufacturing altered the apprenticeship system and work environment, and economic conditions influenced the nature and prevalence of child employment.

Age limits for child labor are a good example of this legal dynamic. Many of the early laws (1840–1890) fixed the minimum age for factory and mill employment at ten to twelve years. By modern standards, that age range is too early to stop being a kid attending school and begin a life of labor. As society progressed, reformers recognized that the age limit should be higher because children need more room for mental and physical development. The next generation of child labor laws (1890–1910) set thirteen or fourteen as the minimum for employment and recommended compulsory education through that age, albeit only for three months a year. Eventually, fifteen and then sixteen became the standard minimum age for industrial and manufacturing work. By the time reformers proposed the Child Labor Amendment in 1924, eighteen was the recommended minimum for employment in dangerous job categories. Each incremental increase in the minimum age generated intense opposition from many employers, parents, and interest groups who benefited in some way from child labor. For instance, when in 1886 Connecticut set the minimum at thirteen years for employment in mechanical, mercantile, or manufacturing establishments, critics claimed that the law was too sweeping and would give children a “perpetual Fourth of July” the entire year.<sup>11</sup>

Second, mere enactment of child labor laws was not enough to solve the

policy problem. Some citizens and officials believed that once a law was on the books, the social evil of child labor was resolved and thus additional laws were unnecessary. The reality, however, was much more complex. Around the turn of the twentieth century, Roscoe Pound, dean of Harvard Law School, developed a sociological jurisprudence that emphasized the impact of social forces upon the law and noted the differences between the law on the books and the law in action. For Pound, “the life of the law is in its enforcement.”<sup>12</sup> By 1900, twenty-eight states had child labor laws on the books. Reformers, however, consistently complained that both child labor and school attendance laws were “a farce,” “inoperative,” or “dead letter,” and that more effective laws were needed to improve administration and enforcement.

When the first child labor laws were enacted in the mid-1800s, a professional administrative system did not exist at the state or federal level. Massachusetts pioneered the first state bureau of labor statistics in 1869, which, according to the US Department of Labor website, was the first such department in the world.<sup>13</sup> By 1900, only twenty-one states had an administrative agency devoted to labor issues. At the national level, a Federal Bureau of Labor was established in 1884 and placed within the Interior Department, but the US Department of Labor was not formed until 1913. The federal Children’s Bureau, the first agency of its kind in the world to focus on child welfare, was created in 1912. A system of bureaus and commissions provided much-needed statistical information on the nature and scope of child labor, and administrative officials were essential to rigorous enforcement of the laws. Once established, however, bureaus often lacked necessary personnel, resources, and administrative powers to investigate and force compliance with the law. Factory inspectors were needed to enforce child labor laws and truant officers were necessary to compel school attendance. Over time, those tools were provided, but it took decades to develop an effective administrative structure.<sup>14</sup>

Finally, the history of child labor laws informs our understanding of courts, public policy, and social change. State supreme courts upheld early state legislative efforts to restrict child labor under broad police powers to promote public health, safety, and welfare. Meanwhile, federal courts, especially the US Supreme Court, prevented social reform by striking down three congressional attempts to regulate child labor. From the time Senator Albert J. Beveridge introduced the first federal bills to restrict child labor in 1906, to the Supreme Court decision in *United States v. Darby Lumber* (1941), where the Court upheld child labor provisions in the Fair Labor

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Standards Act, thirty-five years had passed. *Darby Lumber* was an important expansion of congressional power, but it arrived after the worst forms of child labor exploitation had ended. Unlike other policy issues of the twentieth century, such as civil rights, religious freedom, and the rights of criminal defendants, the US Supreme Court was not a catalyst for constitutional and social change on the issue of child labor.<sup>15</sup>

Probably more than any other factor, competing visions of the nature of the federal system, called dual and cooperative federalism, influenced the legal struggle over child labor.<sup>16</sup> Since the earliest debates over the practice, dual federalism adherents claimed that the US Constitution created a strict division of powers between the national government and the states, with the federal government limited to its enumerated or delegated powers. Those enumerated powers, they argued, said nothing about regulating local labor conditions. Reformers contended that Congress has both enumerated and implied powers to regulate child labor as interstate commerce and to tax products made with child labor, especially to prevent unfair market competition. Under cooperative federalism, federal and state governments share responsibility for policy problems, and the US government may intervene to bring about needed uniformity in child labor laws to serve national interests. States may still regulate, but if state law conflicts with federal requirements, federal law is supreme. These contrasting views of federalism affected every major congressional debate and federal court decision on child labor.

Child labor laws have been in place at the state level for over 170 years, and the major federal legislation governing child labor, the Fair Labor Standards Act (1938), has been on the books for 80 years. Following *Darby Lumber*, a social consensus developed around child labor issues. For decades, the conventional wisdom has been that children should be restricted from working certain dangerous jobs and excessive hours because education, recreation, and personal development are more important to child welfare than any wage contribution a child can make to the family budget. Consequently, few major conflicts involving child labor laws have erupted since the 1940s. Federal and state laws have been amended to cover areas still ripe for reform, but few child labor issues generate much public interest. Several subjects remain contentious, however. Children of migrant farmworkers are laboring long hours picking crops, and policymakers continue to debate the roles played by children in agriculture, such as kids operating machinery on family farms. These areas are noted for weak regulations and enforcement.

Following the Republican Tea Party victories in Congress and state legislatures in the 2010 midterm elections, some newly elected libertarian and conservative representatives openly questioned the wisdom of child labor and compulsory education laws and argued for their repeal or reform. More recent, President Donald Trump's cabinet pick for secretary of education, Betsy DeVos, generated controversy in part because of her association with the Acton Institute, a conservative think tank that favors free market principles over public institutions. An article on the organization's website advocated a return of child labor, characterizing the practice as "a gift our kids can handle."<sup>17</sup> Some of these modern critics of child labor laws take the extreme laissez-faire position that the government should stay out of the field of child labor altogether, while others simply want to allow kids more freedom to work, often at much cheaper wages than adults. Republican senator Mike Lee of Utah, for example, argued that the federal government has no authority to regulate child labor, even though that power was unanimously affirmed in *Darby Lumber*.

These attacks on child labor restrictions represent just one front of a broad-based ideological assault on the welfare state and government regulations of the economy that originated during the Progressive, New Deal, and Great Society periods. Everything from Social Security, the minimum wage, and Medicaid to welfare programs and child labor laws are under attack. These policy battles have existed for decades but they intensified after the Republican ascendance in state and federal government. One liberal commentator suggested that Republicans were trying to "repeal the Twentieth Century."<sup>18</sup> The contemporary critique of child labor laws presents an opportunity to revisit the history and rationale for such legislation. As this book demonstrates, there are good reasons why our society has chosen to restrict child labor and compelling arguments against efforts to weaken or repeal the laws.

Children still work in America, and they will continue to do so into our future. Across the United States, teens work in fast-food restaurants and movie theaters, staff retail stores at local malls, bag groceries in supermarkets, and work numerous other jobs. But they no longer perform those tasks to the detriment of their health or education. The worst forms of child labor have been abolished. Some economists dismiss reform efforts and give the market and technological change all the credit for eliminating oppressive child labor. Others emphasize the activism of humanistic social reformers. The truth lies somewhere in between. No single interest group or event is responsible for bringing an end to oppressive child labor. Over many de-

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cedes a combination of factors all worked to end the evil of child labor exploitation: advocacy by the National Child Labor Committee and labor unions for effective child labor laws; technological improvements that displaced children from some jobs; higher wages for adult workers so their children do not have to prematurely enter the job market; and the development of programs like Social Security and unemployment compensation, which provided support for family members. Of course, child labor is still a serious global problem that warrants attention and reform, but that issue is beyond the scope of this book.<sup>19</sup>

As much as possible, the following chapters and discussions are organized chronologically to help the reader understand the historical development of child labor laws. Chapter 1 examines the British experience with child labor, colonial and early American attitudes regarding working children, the impact of industrialization on child workers, the shift in public opinion on child labor from a social good to a moral evil, and early state child labor and compulsory school attendance laws. Chapter 2 covers the reform spirit of the Progressive Era, the formation of the National Child Labor Committee, and the unsuccessful initial efforts to pass federal child labor legislation. The next chapter reviews the legislative debate over the first federal child labor law, the Keating-Owen Act, and analyzes the Supreme Court decision in *Hammer v. Dagenhart*. Chapter 4 describes the interest-group battles and congressional debates over the second federal law, the Child Labor Tax, and the decision in *Bailey v. Drexel Furniture Company*.

Frustrated with the Supreme Court's invalidation of the first two federal child labor laws, reformers turned to amending the Constitution. Chapter 5 covers the intense political battle during 1924 and 1925 over the proposed Child Labor Amendment. It appeared that opponents had defeated the amendment within a few years, but the Wall Street stock market crash in October 1929 and resulting Great Depression breathed new life into the proposal. The following chapter discusses the second round of the struggle over the amendment, from 1933 to 1940. Although the amendment was not ratified, Congress enacted the Fair Labor Standards Act (FLSA) as one of the last major legislative victories of Franklin D. Roosevelt's New Deal. Chapter 7 examines the congressional debate over the historic labor legislation, including the child labor provisions, the legal challenge to the FLSA, and the final victory over child labor in *United States v. Darby Lumber*. The last chapter covers the post-World War II amendments to the Fair Labor Standards Act and contemporary child labor issues. Finally, the Postscript reviews the libertarian and conservative attacks on child labor laws following

the Tea Party victories in the elections of 2010. Some state child labor laws have been weakened, but no major changes have occurred to federal regulations. With Republicans in control of Congress and the presidency and comprising a majority in many state legislatures following the 2016 elections, the social and legal consensus on child labor laws may be seriously challenged in the coming years.



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