

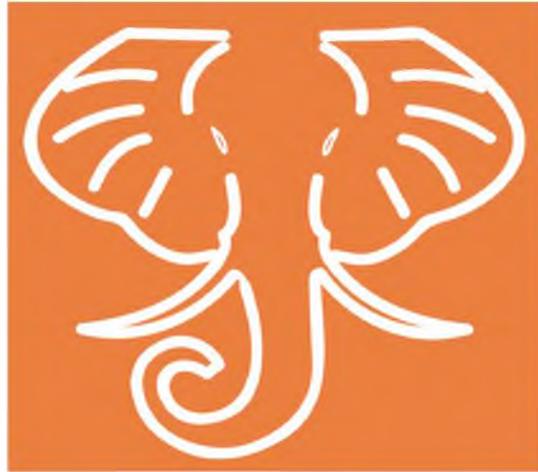
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“MOMENTS ARE THE ELEMENTS OF PROFIT”

OVERTIME AND THE
DEREGULATION OF WORKING HOURS
UNDER THE FAIR LABOR STANDARDS ACT

Marc Linder

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*Overtime and the
Deregulation of Working Hours
Under the Fair Labor Standards Act*

Marc Linder

**Fānpìhuà Press
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You cannot get more out of a man than is in him, and if you take too much one day, there will be so much less to obtain on succeeding days. As stated by Professor Clark of Columbia University: "If you want a man to work for you one day and only one day, and secure the greatest possible amount of work he is capable of performing you must make him work for twenty-four hours. If you would have him work a week it will be necessary to reduce the time to twenty hours; if you want him to work for a month a still further reduction to eighteen hours a day. For the year, fifteen hours a day will do; for several years, ten hours; but if you wish to get the most out of a man for a working lifetime, you will have to reduce his hours of labor to eight each day."

John Mitchell, *Organized Labor: Its Problems and Ideals and the Present and Future of American Wage Earners* 123-24 (1903)

Except perhaps for the Social Security Act, it [the Fair Labor Standards Act] is the most far-reaching, far-sighted program for the benefit of workers ever adopted here or in any other country. ... Do not let any calamity-howling executive with an income of \$1,000 a day, who has been turning his employees over to the Government relief rolls in order to preserve his company's undistributed reserves, tell you—using his stockholders' money to pay the postage for his personal opinions—that a wage of \$11 a week is going to have a disastrous effect on all American industry.

President Franklin D. Roosevelt, Fireside Chat, June 24, 1938, in *Public Papers and Addresses of Franklin D. Roosevelt: 1938 The Continuing Struggle for Liberalism* 391, 392 (1941)

The FLSA, in actuality, made no difference to most American workers, some of whom were brutally exploited.

Jonathan Grossman, "Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage," 101 (6) *Monthly Lab. Rev.* 22-30 at 29 (June 1978)
(U.S. Dept. of Labor official historian)

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Preface

It is wrong for the Government to deny our citizens the privilege of working as long as they wish so long as the choice is theirs and so long as the opportunity presents itself.¹

[M]y grandfather at the turn of century fought for the 40 hour [week]. His slogan used to be, “8 hours for work, 8 hours for rest and 8 hours for what we will.” I am not sure what the slogan is for a 72 hour week or a 96 hour overtime over a three week period.²

The enormous increases in the productivity and intensity of labor that have brought about a post-industrial, hi-tech, information society have done little to abate capitalism’s drive to impose a longer workday and workweek than millions of workers want to work. Although rising productivity makes shorter working hours possible and heightened fatigue associated with greater intensity of labor should make them necessary,³ employers and economists still regard longer hours as a means of boosting the rate of growth and accumulation.⁴ Nor has the rhetoric of the new virtual economy rid capitalists of their venerable habit, as Victorian factory inspectors put it, of “petty pilferings of minutes”⁵ of unpaid labor, which, when practiced systematically, enhance profitability considerably.

The end of the nineteenth and beginning of the twentieth century witnessed large-scale campaigns by organized labor for the eight-hour day. A century later the legislative initiative on hours regulation in the United States has passed back to capital. The so-called maximum hours provision of the Fair Labor Standards Act (FLSA),⁶ which in reality is merely a “maximum nonovertime hours” provision,⁷ has never prohibited employers from working their adult employees

¹*Overtime Penalty Pay Act of 1964: Hearings Before the Select Subcommittee on Labor of the House Committee on Education and Labor*, 88th Cong., 2d Sess. Pt. 2 at 768 (1964) (statement of Rep. John B. Anderson).

²[Maine] *Legislative Record*, H-2022 (Rep. Samson, Mar. 30, 1998). The word “week” has been substituted in brackets for “day,” which was manifestly a typo or a misspeaking.

³Edward Denison, *Why Growth Rates Differ: Postwar Experience in Nine Western Countries* 59 (1969 [1967]).

⁴Edward Denison, *The Sources of Economic Growth in the United States and the Alternatives Before Us* 35-66 (1962).

⁵*Reports of the Inspectors of Factories for the Half Year Ending 31st October, 1856*, at 48 (C. 2153, 3 Parl. Pap. 1857 Sess. 2).

⁶The title of the overtime provision is “Maximum Hours.” Fair Labor Standards Act of 1938, ch. 676, § 7, 52 Stat. 1060, 1063 (current version at 29 U.S.C. § 207 (1994)). As a court noted with regard to a related statutory term (used in § 218): “‘Maximum workweek’ does not in fact limit the number of hours an employee may work. ... It must refer to that number of excess hours worked for which an overtime rate must be paid.” *State v. Comfort Cab, Inc.*, 286 A.2d 742, 748 (N.J. Super. 1972).

⁷29 C.F.R. § 778.101 (1999).

for as long as firms find necessary: "Not only may an employee be worked twenty-four hours per day; but one hundred and twenty-four hours of overtime per week would not violate the law so long as the employee was paid for all such overtime at the required rate."⁸

As the FLSA's time and a half for overtime provision has increasingly lost its deterrent force and brought about the de facto deregulation of working hours, the labor movement has sought to make a virtue of the market-knows-best Zeitgeist by claiming that the "purpose of the FLSA's overtime provision is not to create an entitlement of employees, who work long hours for premium pay for overtime work. Rather, its purpose is to generate a national system in which employers are discouraged from requiring overtime work. The overtime provisions of the Act are intended to be a free market mechanism to enforce a national 'hours of work' rule."⁹ However, this effort to salvage some elements of hours regulation ignores the contradiction inherent in basing mandatory labor standards on anarchic free labor markets, which tend to reach equilibrium at the lowest common denominator of needy workers and greedy employers.

The labor movement's self-contradictory position also overlooks the close affinity between "free-market" overtime laws and nineteenth-century declaratory or hortatory legal day's work statutes. New Hampshire enacted the first in 1847, entitled, "An Act regulating the hours of labor in manufactories." It provided: "In all contracts for or relating to labor, ten hours of actual labor shall be taken to be a day's work, unless otherwise agreed by the parties; and no person shall be required to or holden to perform more than ten hours of labor in any one day, except in pursuance of an express contract requiring a greater time."¹⁰ Such statutes, which indiscriminately classified involuntary overwork as consensual, reflected a conviction, not alien to that underlying the FLSA, that state intervention on behalf of workers "should not curtail individual liberty to contract, but could be effective without so doing."¹¹

Nevertheless, the mere fact that the FLSA modestly charges employers for

⁸Missel v. Overnight Motor Transp. Co., 126 F.2d 98, 104 (4th Cir. 1942).

⁹Michael Leibig, "The Attack on the Forty-Hour Week," in *Hearings on the Fair Labor Standards Act: Hearings Before the Subcommittee on Workforce Protections of the House Committee on Economic and Educational Opportunities*, 104th Cong., 1st Sess. 211, 213 (1996). Leibig is a long-time union-side labor lawyer.

¹⁰1847 N.H. Laws, ch. 488, § 1 at 465-66. The Illinois legislature has never repealed its meaningless eight-hour law: "On and after the first day of May, 1867, eight hours of labor between the rising and the setting of the sun, in all mechanical trades, arts and employments, and other cases of labor and service by the day, except farm employments, shall constitute and be and legal day's work, where there is no special contract or agreement to the contrary." 820 ILCS 145/1 (1999).

¹¹Elizabeth Brandeis, "Labor Legislation," in 3 John Commons et al., *History of Labor in the United States, 1896-1932*, at 397-697 at 541 (1935).

the privilege of violating the aspirational norm of a 40-hour week triggered employers' efforts in the 1990s, after the Republicans had gained a majority in both Houses of Congress, to repeal the act's "rigid and inflexible" hours provisions.¹² Associations of big and small businesses, represented by the Labor Policy Association and the Flexible Employment, Compensation, and Scheduling Coalition, have prepared an "assault" on labor's "most sacred icon—the 40-hour week."¹³ Employers are poised to persuade Congress to create 80-hour two-week or even 160-hour four-week pay periods, during which they would be free to work their employees any number of hours during an individual week without being required to pay time and a half for hours beyond 40 per week.¹⁴ (Perversely, the U.S. Supreme Court has anticipatorily approved this policy inversion by adducing employers' privilege under the act to "tell the employee to take off an afternoon, a day, or even an entire week" as flowing from the FLSA's purpose of protecting workers from "the evil of overwork.")¹⁵ In contrast, the labor movement, even if successful in warding off such thrusts under a Democratic president, is in no position to secure enactment of statutory protection against employers' power-based imposition of mandatory overtime, let alone to persuade Congress that a shorter workweek is possible and desirable.

In spite of the considerable attention paid to employers' recent campaign to roll back hours regulation, participants and observers have overlooked capital's vigorous opposition to such state intervention literally since the day the FLSA went into effect in 1938. The balance of social and ideological forces has become so skewed that without having to fear public ridicule in the press, senators can characterize bills that empower firms to eliminate the 40-hour week as "put[ting] work schedule decisionmaking back in the hands of employees."¹⁶ Management, in turn, buttresses the claim that it "has retained its inherent right...to require that employees shall respond to its call for overtime"¹⁷ on the grounds that anarchy is the unthinkable alternative: rolling electrical blackouts are "of course, possible,

¹²141 *Cong. Rec.* S 11787, 11788 (1995) (Sen. Ashcroft) (Lexis).

¹³Saul Friedman, "Time Short for 40-Hour Week? Partisan Clash over OT Rules," *Newsday*, Sept. 4, 1995, at A21 (Lexis).

¹⁴E.g., Work and Family Integration Act, S. 1129, § 2, 104th Cong., 1st Sess. (1995) (160 hours); H.R. 2723, § 2, 104th Cong., 1st Sess. (1995) (160 hours); Family Friendly Workplace Act, S. 4, § 3(b), 105th Cong., 1st Sess. (1997) (80 hours) (filibustered by Democrats); Family Friendly Workplace Act, S. 1241, § 3, 106th Cong., 1st Sess. (1999) (80 hours, permitting up to 50-hour workweek without overtime liability, sponsored by 38 Republicans).

¹⁵*Christensen v. Harris County*, 68 U.S.L.W. 4343, 4345 (U.S. May 1, 2000).

¹⁶141 *Cong. Rec.* S 11787, 11788 (Aug. 7, 1995) (Sen. John Ashcroft, R. Mo.).

¹⁷*Van Dorn Co.*, 48 Lab. Arb. (BNA) 925, 928 (1967).

if there is a law that says that overtime can't be mandatory."¹⁸ Even in 1960, in the midst of the postwar Keynesian boom and cooperation between strong unions and management, a monumental Brookings Institution study of collective bargaining found nothing paradoxical in asserting that some plants had become "vulnerable to employee control of leisure" and asking: "Who is to control the use of their leisure time?"¹⁹

Although, as even Friedrich Engels conceded, the working hours of a modern factory are incompatible with individual workers' autonomy,²⁰ the compulsion to keep invested capital continuously in motion, as Sidney and Beatrice Webb agreed, makes it "a special aggravation of this subordination, that, under the circumstances of the modern capitalist industry, the employer's decision will perpetually be biased in favor of lengthening the working day." Yet this "autocratic judgment of their employer,"²¹ which may typically reflect firms' inexorable prioritizing of the demands of competition and profitability over workers' needs, is not the only conceivable countermodel; democratic co-determination of the length of the workday is also thinkable. However, as long as the dominant ideology ordains, as *The New York Times* editors put it in 1912, that "[t]he interest of the public is rather in the output than in the length of the working day,"²² the compulsions of production will prevail over human needs.

In a pseudo-antipaternalistic turn, factory autocrats sought to invert this logic

¹⁸1 [California] Senate Committee on Industrial Relations, *Interim Hearings on AB 1295—Mandatory Overtime* 177 (Nov. 8, 1977) (statement of Wayland Bonbright, ind. rels. mgr., Pac. Gas & Elec. Co.). Bonbright's invocation of alleged mass refusals to work overtime in the British electrical power industry at the time of the hearings was misleading since overtime was a minor aspect of the labor action. More importantly, no British law empowered workers to refuse to work overtime, and union officials opposed the actions. The point here is that if workers feel strongly enough about their working conditions to strike and thus impose considerable inconvenience on the rest of the working class and society, they may do so with or without legal sanction. "Power Cuts Unofficial But Effective," *Economist*, Nov. 5, 1977, at 110 (Lexis); "Pay Policy Under Public-Sector Siege," *Economist*, Nov. 12, 1977, at 85 (Lexis).

¹⁹Sumner Slichter, James Healy, and E. Livernash, *The Impact of Collective Bargaining on Management* 238 (1960).

²⁰Friedrich Engels, "Dell' Autorità," in I:24 Karl Marx [and] Friedrich Engels, *MEGA (Gesamtausgabe)* 82, 85 (1984 [1873]). Only disingenuousness can account for the following response by the Master Builders Society of London on August 26, 1858, to a request by carpenters for a reduction in hours from ten to nine with no change in pay: "inasmuch as there is no compulsion by which workmen are obliged to labour for a given number of hours, it really amounts to an alteration in the rate of wages." G. Shaw Lefevre and Thomas Bennet, "Account of the Strike and Lock-Out in the Building Trades of London, in 1859-60," in *Trades' Societies and Strikes: Report of the Committee on Trades' Societies, Appointed by the National Association for the Promotion of Social Science* 53-76 at 55 (1860).

²¹Sidney Webb and Beatrice Webb, *Industrial Democracy* 327, 334 (new ed., 1920 [1897]).

²²"The Eight-Hour Day," *N.Y. Times*, July 2, 1912, at 10, col. 3.

by projecting the collective normalization of the working day as an expropriation of the worker. In rhetoric that still resonates with free-marketeers, Alfred I. Du Pont, vice-president of E. I. Du Pont Company, testified to Congress in 1904 against federal regulation of government contractors: “To peremptorily establish the eight-hour limitation, denying the right to labor more than eight hours a day...must clearly militate against the laborer in the exercise of his labor, which is his property and the privilege of contracting or marketing his property rights.”²³ That the Du Ponts were fantasizing about workers who could exercise their labor 24 hours a day emerged two decades later from a prediction by Irénée du Pont, president of the company:

“[T]here are a number of great things which chemistry can and will do....

“[A] study of the ductless glands will likely lead to the identification of some “reagent” which...will maintain the vigor of youth far beyond three-score-years-and-ten. This does not refer only to sexual vigor, but to the power—more important to maintain—which enables a young man to work longer hours and withstand fatigue which can not be withstood by men who have reached their mental prime of life.

“I think it likely that material will be found which, taken into the human system, will accomplish the results of eight hours’ sleep. This will change the active existence of a man from sixteen hours a day to twenty-four hours a day....”²⁴

As is always the case with state-imposed labor standards, overcoming the imperatives of capital’s self-valorization must confront resistance based on employers’ more prosaic principal argument—that national labor laws exert a harmful impact in a world in which global competition is no longer a menacing tendency dimly visible on the horizon, but a force to be reckoned with daily in ways big and small. In the words of the chairman of the House Economic Opportunities Committee: “As each American firm encounters the challenges of the modern global economy, it faces a seriously outdated and inflexible federal scheme of regulating employee compensation and scheduling.”²⁵ The defense is venerable. As far back as the 1840s, British employers defended overtime work as “necessary to compete with the lightly-taxed foreigner....”²⁶ In the late nineteenth century, when the federal government was said to be still merely “a

²³*Eight Hours for Laborers on Government Work: Report by the Hon. Victor H. Metcalf, Secretary Department of Commerce and Labor, on H. R. 4064 (Eight-Hour Bill) 33-34 (H. Doc. No. 413, 58th Cong., 3d Sess. 1905).*

²⁴“Chemistry’s Tremendous Tomorrow,” 79(5) *Literary Digest* 23-24 (Nov. 3, 1923).

²⁵William Goodling, “National Press Club Remarks” (Jan. 10, 1995) (Lexis) (formerly House Labor Committee).

²⁶J. Binns, *Prize Essay on Systematic Overtime Working and Its Consequences, Moral, Physical, Mental, and Social* 7 (1846).

state of courts and parties,"²⁷ expanding monopolies deployed the same capital-logic. Testifying before Congress against a bill to establish an absolute eight-hour day for laborers, workmen, and mechanics on public works or work performed for the United States government, the representative of the Bethlehem and Carnegie steel companies observed:

it is evident that the interests of many of the largest manufacturing concerns would be injured by the passage of this act. In the world's competition for foreign trade the cheapest product secures the market. Any effort by Congress to indirectly reduce the hours of labor...must militate against the manufacturing interests of this country, compelling them ultimately to do work and produce results at a disadvantage in competition with manufacturers in other parts of the world beyond the paternal control of the Congress of the United States.²⁸

To the owner of a shipbuilding company with six million dollars invested in plant, it made a "vast difference" whether a worker and hence that plant worked eight hours or nine.²⁹ The passage of a century has done little to alter this capital-logic as developments in the 1990s at an "immense, windowless" AT&T/Lucent Technologies microelectronics factory in Orlando, Florida, revealed:

[M]ore and more American factory workers are being assigned the short-week, extended-hour schedules.

Management experts call them compressed workweeks. At factories like Lucent's, the eight-hour-a-day, five-day workweek has all but vanished and given way to schedules that management deems efficient, even if they ignore the calendar's seven-day cycles and community patterns of work, sleep and play....

Abbreviated workweeks...have been a growing trend in manufacturing. Nearly all automobile tire companies and most big semiconductor companies have shifted to the new schedules. The big General Motors plant...that turns out Saturn automobiles has adopted one, too. ...

Efforts are being made in Congress to speed the shift to abbreviated workweeks. Many companies want Congress to change overtime provisions of the Fair Labor Standards Act...that require employers to pay time and a half for any work beyond 40 hours a week, with one proposal seeking a monthly ceiling instead.

"The week is getting redistributed toward work," said Jerome M. Rosow, president

²⁷Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (1984 [1982]).

²⁸*Hours of Labor for Workmen, Mechanics, Etc., Employed Upon Public Work of the United States*, Sen. Doc. No. 318, 55th Cong., 2d Sess. 5 (1898) (testimony of Joseph McCammon).

²⁹*Hours of Labor for Workmen, Mechanics, Etc., Employed Upon Public Work of the United States* at 74 (testimony of Charles Cramp, pres., William Cramp & Sons Ship and Engine Building Co.).

of the Work in America Institute.... Part of the price, he said, is the traditional weekend: "Leisure is getting squeezed out."

The impetus, experts say, is a redoubled emphasis on efficient production, the same pressure that has been driving the tides of corporate downsizing. It is another tactic to wrest additional profits and lower-cost production from factories.

[M]anagement decided that to hold its own in competition...worldwide, it could not let its machinery sleep when people do. "The equipment has to keep running," said the plant manager, Robert B. Koch.

Before, the company had been running on a less-compressed week with four 10-hour days. But that meant that for several hours a day the machinery stood idle. "The company eyeballed that quiet time," said Thomas S. Christian, president of Local 2000 of the International Brotherhood of Electrical Workers, who helped negotiate the schedule with 12-hour shifts. ...

An extreme form of workweek compression is the product of something...experts call best cost scheduling. Under that concept people work 12-hour shifts for three days and take three days off. They also work for 30 days and then switch to nights for 30 days. ...

Four years ago the A. E. Staley Manufacturing Company...imposed the schedule on its workforce. The union local...voted 96 percent against it, precipitating a 30-month lockout before the workers acquiesced....

To give management greater flexib[ility] in setting workers' hours, Senator John Ashcroft...has proposed legislation that would replace the 40-hour week with a 160-hour month. ...

Unions...see the bill as an effort to restore the sweatshop hours of the turn of the century. ... "[C]learly this is an effort to let employers get overtime without paying for it."³⁰

Labor's rhetoric, however, did modulate during the twentieth century. It is difficult to imagine a labor leader in the early twenty-first century echoing the sentiments of Samuel Gompers, the president of the American Federation of Labor and chief public disputant of the manufacturing interests in 1898, that the eight-hour day gave workers the opportunity for "more rest, so that they may have the means by which they can think for themselves, rather than having our captains of industry doing all the thinking for them."³¹ By the late twentieth century, when millions of workers had come to rely on overtime pay to make ends meet, it had even become rare for union officials to be blunt enough to complain, as they did in the 1960s, that "employers use overtime as a substitute for decent hourly rates."³² And the opposition that an Alaska state senator

³⁰Peter Kilborn, "Factories that Never Close Are Scrapping 5-Day Week," *N.Y. Times*, June 4, 1996, at A1, col. 5 (Lexis).

³¹*Hours of Labor for Workmen, Mechanics, Etc., Employed Upon Public Work of the United States* at 41.

³²*Amendments to the Fair Labor Standards Act: Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, Pt. 1, 89th Cong., 1st Sess.

mounted in 1919 against the presence of a time and a half overtime provision in an eight-hour bill on the grounds that it offered a premium for the violation of the proposed law would doubtless stamp him as an enemy of labor today.³³

143 (1965) (statement of William Du Chessi, vice pres., Textile Workers Union).

³³"8 Hour Law May Not Pass Senate," *Weekly Nome Industrial Worker*, Apr. 26, 1919, at 1, col. 4 (Sen. John Ronan). To be sure, since Ronan was a member of a mine owners association who had supported the ten-hour day and helped break strikes by recruiting strikebreakers, it seems unlikely that he was speaking as an avid advocate of the absolute eight-hour day. Evangeline Atwood, *Frontier Politics: Alaska's James Wickersham* 171 (1979).

Acknowledgments

Although this book is the most extensive analysis ever published of the history of hours regulation under the FLSA, its four essays do not deal with all aspects of a law that is profoundly flawed by an enormous number of exclusions and exemptions.¹ Chapter 1, by far the longest, is new and offers a detailed historical sweep of the origins and development of the overtime provision and its fecklessness as a safeguard against firms' imposition of mandatory overtime. Chapters 2, 3, and 4 are revisions of earlier works. Chapter 2, which deals with the exclusion of so-called executive employees from the overtime provision, is a thorough revision, expansion, and update of "Closing the Gap Between Reich and Poor: Which Side Is the Department of Labor On?" 21 *N.Y.U. Review of Law and Social Change* 1-32 (1993) (©Marc Linder). Chapter 3, which explains how and why much of the time workers are required to travel, change clothes, and engage in other activities for employers' benefit, came to be noncompensable, is a revision incorporating new material and an update of "Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947," 39 *Buffalo Law Review* 53-180 (1991) (©Buffalo Law Review, with whose permission the original article is used here). Chapter 4, which reveals how construction and other employees in small firms came to be excluded from the overtime law, updates and makes minor revisions to "The Small-Business Exemption Under the Fair Labor Standards Act: The 'Original' Accumulation of Capital and the Inversion of Industrial Policy," 6 *Journal of Law and Policy* 403-535 (1998) (©Marc Linder).

Several archivists and scholars were extremely helpful in unearthing materials about the remarkable Alaska eight-hour law of 1917, the first-ever account of which appears in Chapter 1. With resourcefulness and tenacity Judy Skagerberg at the Alaska State Archives in Juneau located a huge volume of crucially important documents. Sylvie Savage at the Alaska and Polar Regions Archives, Rasmuson Library, University of Alaska Fairbanks, provided correspondence from the papers of Governor Riggs and Judge Bunnell. Diane Kodiak at the National Archives and Records Administration in Anchorage furnished the record in the test case that held the law unconstitutional. John Stewart, the chief archivist at the Alaska State Archives, Joe Sullivan of Brown University, and Prof. Mary Mangusso of the University of Alaska at Fairbanks History Department all pointed the way to sources.

¹Omitted, for example, is an account of the exclusion of farmworkers from the overtime provision of the FLSA, which was analyzed in Marc Linder, "Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal," 65 *Texas L. Rev.* 1335-93 (1987), and updated in Marc Linder, *Migrant Workers and Minimum Wages: Regulating the Exploitation of Agricultural Labor in the United States* 125-75 (1992).

