

THE AUTOCRATICALLY FLEXIBLE WORKPLACE

A HISTORY OF OVERTIME REGULATION IN THE UNITED STATES

Marc Linder

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Part III

Maximum-Hours Laws Before the Fair Labor Standards Act

It is now generally recognized that wage floors and hours ceilings should be established so that the marginal worker cannot be made the football of competition.¹

A. [Solomon Barkin] Well...we have found that even where you have completely automatic devices...one of the effects [of longer hours] is to increase the susceptibility of that individual to accidents or to decline—or to reduce the period of full usefulness at that machine, so that the person becomes what is technically called older at a much younger age and can't be kept on that machine and must be taken on to another type of work where he will not be as exhausted.

...

Q. [Sterling McNees] Well, isn't that a satisfactory way to operate industry? Hasn't it worked out successfully that way?²

¹*Fair Labor Standards Act of 1937: Joint Hearings Before the Senate Committee on Education and Labor and the House Committee on Labor, 75th Cong., 1st Sess. 161 (1937) (testimony of Leon Henderson).*

²Record at 853a-54a, *Holgate Bros. Co. v. Bashore*, 331 Pa. 255 (1938). Barkin was an economist testifying as an expert witness on behalf of the defendant, the Department of Labor and Industry; McNees was the attorney representing the plaintiff, Holgate Bros. Co.

State and Federal Maximum-Hours Regulation Before the Fair Labor Standards Act

Every one at all conversant with labour questions knows that overtime is extremely common, and that the men themselves are the greatest supporters of the system. And yet the men, in their meetings and by their formal declarations, are constantly protesting against the practice. Nor is it difficult to reconcile these two facts. The men, acting in a body and thinking of their common interests, protest against overtime, because they know that it restricts the area of employment and lowers the rate of wages. But when each individual man comes to deal with his own case, these considerations are replaced by others of a very different character. To the individual workman, a request to work overtime presents itself mainly...as an offer of more money.... From his point of view he would be a fool to reject the offer. Moreover, if he reflects on the matter...from a wider point of view, he will probably argue that his refusal will do no particular good to his comrades. One man who stands out against overtime will not abolish the practice. The system is there, and he may as well take advantage of it. If he doesn't, somebody else will. There is...nothing illogical...in the contradiction between the speech and action of the average trade unionist in the matter of overtime. He does the best he can for himself and family by working overtime, and he does the best he can for his society and his class by protesting against the practice.¹

As the FLSA was wending its way through Congress in 1937, the Bureau of National Affairs published a study of workweek and overtime provisions in representative collective bargaining agreements of important industries and firms. The near ubiquity in the contracts of the 40-hour normal workweek prompted the BNA to conclude that "the 40-hour week may almost be regarded as a national standard already on the way to general acceptance." A 50-percent overtime premium was also "[t]he usual custom," although many unions had also secured time and a half for hours beyond eight per day as well as double time for holidays and Sundays.² Such union achievements, however, were not customary among unorganized workers before the New Deal, and not until industrial organizing vastly expanded in 1936-37 did the practice of overtime rates spread too.³ As late as the 1920s, for example, thousands of automobile workers worked forced over-

¹Sidney Webb and Harold Cox, *The Eight Hours Day* 154-5 (1891).

²"Work Week and Overtime Pay in Contracts," *Labor Relations Reports* 1:97 (Sept. 27, 1937).

³Testimony of Prof. David McCabe, Transcript of Record at 420-21, in *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446 (1947).

time without premium wages.⁴ And members of the United Mine Workers in the crucial Appalachian area did not secure premium overtime pay until 1937, tonnage and piecerate workers not gaining time and a half rates until 1943.⁵

Applying financial disincentives to employers in the form of overtime penalties was not the only method available to Congress to limit the workweek when it debated the FLSA in 1937-38. To be sure, in 1916 Congress had enacted the Adamson law establishing eight hours as the basic workday for workers operating railways and requiring additional compensation for overtime,⁶ but 20 years later Congress could also have chosen to prohibit employing any worker for more than a specified number of hours per day or week. After all, there were ample alternative regimes for it to consider.

One such counter-model available to Congress was Senator Hugo Black's 30-hour bill, which would have denied access to the channels of interstate commerce to any products produced in establishments that employed anyone more than five days per week or six hours per day,⁷ and which the Senate passed by a large majority in 1933. The New Deal, according to one interpretation, rejected this approach that year when the forces advocating increased production and employment prevailed over the continuing campaign for shorter hours; the overtime provision of the FLSA, on this view, was later intended by President Roosevelt as a diluted accommodation of the demand by the AFL for work sharing and a 30-hour work week.⁸ The 30-hour bill that Representative Connery introduced in the

⁴BLS, *Wages and Hours of Labor in the Motor Vehicle Industry: 1925*, at 23-24 (Bull. No. 438, 1927); BLS, *Handbook of Labor Statistics 1924-1926*, at 772 (Bull. No. 439, 1927); Robert Dunn, *Labor and Automobiles* 94-95 (1929).

⁵"Wage Chronology No. 4: Bituminous-Coal Mines, 1933-48," *Monthly Lab. Rev.* 68(3):303-307 at 305 (Mar. 1949).

⁶Act of Sept. 5, 1916, ch. 436, §§ 1, 3, 39 Stat. 721, 722.

⁷This approach was reminiscent of the program of the Boston Eight-Hour League, which in 1872 proposed amending the patent law so that a patent would be forfeited if the firm that produced the patented product worked any of its employees more than eight hours. Marion Cahill, *Shorter Hours: A Study of the Movement Since the Civil War* 39 (1932).

⁸Benjamin Hunnicutt, *Work Without End: Abandoning Shorter Hours for the Right to Work* ch. 5-7 (1988). The most important legislative history may be consulted in: *Thirty-Hour Work Week: Hearings Before a Subcommittee of the Senate Committee on the Judiciary*, 72d Cong., 2d Sess (1933); H. Rep. No. 124: *Thirty-Hour Week Bill*, 73d Cong., 1st Sess. (1933); *Thirty-Hour Week Bill: Hearings Before the House Committee on Labor*, 73d Cong., 1st Sess. (1933); *Thirty-Hour Week Bill: Hearings Before the House Committee on Labor*, 73d Cong., 2d Sess. (1934). See also Grant Farr, *The Origins of Recent Labor Policy* 59-76 (Univ. Colo. Studies, Ser. in Econ. No. 3, 1959); Stanley Vittoz, *New Deal Labor Policy and the American Industrial Economy* 73-96 (1987). On employers' positive attitude toward work sharing during the Depression, see National Industrial Conference Board, *Shorter Work Periods in Industry* 35-43 (1932); on the view of the Communist Party of the U.S.A. that work sharing appealed to employers as a device for wage cutting, see Labor Research Association, *The History of the Shorter Workday* 34-

House in 1937 made the proposal more flexible by authorizing the Secretary of Labor to exempt employers from the law with respect to certain employees if the employer could prove that special conditions required them to be employed more than five days or six hours.⁹

In addition to such rigid or flexible maximum 30-hour bills, Congress could also have looked to an array of federal and state statutes that for decades had limited the daily hours of labor on government work to eight with no provision for overtime work, subject only to exceptions for emergencies. For example, in 1892 Congress enacted such a law on behalf of laborers and mechanics employed by the United States or any contractor or subcontractor on public works of the United States, making violation of the law a misdemeanor.¹⁰ Twenty years later, Congress enacted a similar law for the benefit of employees of federal government contractors, imposing a contract penalty for violations of five dollars per day per worker.¹¹

Not surprisingly, such regimes were anathema to employers, who saw them as an opening wedge to “enforcing in private employment a universal eight-hour day, and a rigid eight-hour day at that, not one in which double pay for overtime was to be allowed, but one in which...no...laborer...would be permitted to sell more than eight hours of his own skill and labor...no matter what his necessities might be....”¹² During the many congressional hearings on such proposals during the 1890s and early 1900s, employers’ representatives made it clear that the bills’ denunciation and prohibition of overtime “of course creates an absolute revolution in every industrial establishment in this country where Government work is performed.”¹³ Yet the Senate Education and Labor Committee, in reporting out

36 (1942).

⁹H.R. 1606, § 1, 75th Cong., 1st Sess. (Jan. 5, 1937). Black’s bill that had passed the Senate 53-30 in 1933 included an amendment to the same effect. This approach resembled that of a World War I-era bill that would have prohibited shipment in interstate commerce of any commodity produced in any lumber mill, logging camp, or wood-working establishment on which “any labor employed has been permitted to work more than eight hours in any day,” but authorized the secretary of labor to permit labor to be employed more than eight hours in emergencies as determined by him. H.R. 11599, 65th Cong., 2d Sess. (1918).

¹⁰Act of Aug. 1, 1892, ch. 353, 27 Stat. 340.

¹¹Act of June 19, 1912, ch. 174, 37 Stat. 137. See generally, H. Rep. No. 165: *The Eight-Hour Law*, 62d Cong., 1st Sess. (1911); Cahill, *Shorter Hours* at 261-67. For earlier statutes, see Matthew Kelly, “Early Federal Regulation of Hours in the United States,” *Indus. & Lab. Rel. Rev.* 3(3):362-74 (Apr. 1950).

¹²*Eight-Hour Day: Hearings Before the Senate Committee on Education and Labor*, 62d Cong., Pt. 4, at 131-32 (1912) (testimony of James Emery, NAM).

¹³*H.R. 11651—Eight Hours for Laborers on Government Work: Hearings Before the House Committee on Labor* 60 (59th Cong., 1906) (testimony of Lewis Payson, former Republican Representative from Illinois, representing employers).

the bill that was enacted in 1912, not only mocked the objection that it was “revolutionary,” but declared that whatever “inconvenience” the eight-hour day might cause employers was “of minor importance compared to the general benefit...for laborers. We believe it means better work, better citizens, and in the end better for society.”¹⁴

To be sure, during World War I, Congress authorized the president, with respect to national emergencies, to suspend the two eight-hour laws for work performed for the U.S. Navy or under War Department contracts for constructing military buildings or public works for purposes of national defense, and to authorize payment of time and a half for work beyond eight hours.¹⁵ Once President Wilson’s executive orders inaugurated this wartime overtime regime,¹⁶ employers complained not about the universal eight-hour day—which had ceased to be a threat—but about the market-induced compulsion to pay premium overtime to workers engaged in civilian work in a factory that was also engaged in government work. The federal government itself took this objection seriously since the application of the overtime regulation to the many dual-purpose firms “would have the effect of disturbing the conditions in their factories, upsetting the well-developed organization of some of the most important factories of the country....” Because the federal government could not attain its goal of standardizing war-related wage scales without also standardizing overtime wages, it faced a dilemma, which it never resolved: “On the one hand it is desirable to eliminate a great cause of labor trouble, put an end to a sense of injustice in the workers resulting from what must to them appear to be an arbitrary discrimination.... On the other hand, it is very important in this crisis not to interfere with the normal and effective flow of the production of the supplies needed by the Army.”¹⁷

Some state laws limiting the hours of female workers in effect when Congress was debating the FLSA imposed absolute caps on the workday and/or workweek, while others permitted overtime work.¹⁸ (Thirty years later, in the wake of the enactment of federal antidiscrimination legislation and the ensuing invalidation of gendered hours laws and failure of state legislatures to enact gender-

¹⁴S. Rep. No. 601: *Hours of Daily Service of Laborers and Mechanics upon Government Contracts*, 62d Cong., 2d Sess. 7, 3 (1912).

¹⁵Act of Mar. 4, 1917, ch. 180, 39 Stat. 1168, 1192. See also U.S. Dept. of Labor, Wage and Hour Div., *Annual Report for the Fiscal Year Ended June 30, 1940*, at 31-32 (1941).

¹⁶Exec. Order No. 2559-A, Mar. 24, 1917; Exec. Order No. 2605, Apr. 28, 1917.

¹⁷“Federal Eight-Hour Law and Executive Orders Pertaining Thereto,” *Monthly Lab. Rev.* 7:193-96 at 195-96 (1918) (memorandum to the War Labor Policies Board from the committee appointed to investigate applicability of the eight-hour laws).

¹⁸For an international survey at the turn of the century, see *Report of the Industrial Commission* 216:2-48 (57th Cong., 1st Sess., H. Doc. No. 185, 1901).

neutral hours law, the United States lost “even the limited protection against hours deemed long enough to be hazardous to the health of women....”¹⁹ The statute for the District of Columbia, which Congress enacted in 1914, was of the first type, rigidly limiting female workers’ daily hours to eight.²⁰ To prevent overtime from undermining the laws’ purpose, some states provided for time and a quarter, time and a half, and/or double time, while others authorized daily overtime so long as the weekly total did not exceed the maximum number of hours; other states confined overtime to a certain number of days, while still others required employers to prove to a state agency that irreparable injury would result without overtime. California, for example, prescribed a maximum eight-hour day, six-day, 54-hour week in the fruit and vegetable canning industry, but permitted longer hours in emergencies provided that employers paid one and one-quarter the minimum rate for all daily hours up to 12 and double-time for hours beyond 12.²¹ Indeed, the California Industrial Welfare Commission, in justifying the switch from a limit of 10 hours per day and time and a quarter overtime and a limit of 72 hours per week to nine hours per day and time and a quarter overtime up to 12 hours and double time thereafter, argued that:

it has taken a long step in more drastically penalizing overtime than by the legal limitation of seventy-two hours per week. Double time rate, except as an emergency measure, is practically prohibitive. With juries of men in country districts whose fruit may perish if not canned, conviction for violation of the limitation of hours law is most difficult to achieve, some canners even saying they were willing to pay a \$50 or \$100 fine if necessary to save their fruit.²²

The Texas 9-hour-day and 54-hour-week law permitted longer hours in extraordinary emergencies, but only with the employee’s consent and at double-time rates. A Kansas six-day, 54-hour-week regulation permitted one 10-hour working day per week, provided that the weekly limit was not exceeded. Under Wy-

¹⁹Edward Denison, *Why Growth Rates Differ: Postwar Experience in Nine Western Countries* 69 n.33 (1969 [1967]). On the rise and demise of gendered hours laws, see Marc Linder and Ingrid Nygaard, *Void Where Prohibited: Rest Breaks and the Right to Urinate on Company Time* 67-127 (1998).

²⁰Act of Feb 28, 1914, ch. 28, § 1, 38 Stat. 291.

²¹For an overview of the overtime provisions state by state, see U.S. Women’s Bureau, *Labor Laws for Women in the States and Territories*, charts II-VI at 17-31 (Bull. No. 98, 1932).

²²Industrial Welfare Commission, State of California, *Report on the Regulation of Wages, Hours and Working Conditions of Women and Minors in the Fruit and Vegetable Canning Industry of California* 7 (Bull. No. 1, May, 1917). In the Australian state of Victoria, nineteenth-century factory acts for women and children provided for time and one half plus tea money. William Pember Reeves, *State Experiments in Australia and New Zealand* 2:45 (1903).

oming's eight and one-half hour law, overtime was authorized only in emergencies and provided that time and one-half was paid for daily overtime. Finally, the pre-New Deal weekly hours laws for textile workers in Georgia, Mississippi, and South Carolina imposed various limitations on overtime. In South Carolina, 60 hours of overtime were permitted annually to make up for time lost by accidents or other unavoidable causes, but this time had to be made up within three months. The Mississippi statute permitted indefinite overtime for emergencies or public necessity.²³

Of greater relevance in the FLSA context are the (partly) ungendered maximum-hours laws that North Carolina and South Carolina, centers of the southern textile industry, enacted in 1937 and 1938, respectively.²⁴ Although they were of such limited scope and so lacking in adequate enforcement that they failed to offer a practical alternative to the overtime approach to which Congress was unquestioningly committed in fashioning the FLSA in 1937-38, they are nevertheless of interest as expressions of the restrictions that even southern legislators were willing to impose on employers in order to deal with the consequences of the Depression.²⁵

North Carolina, the southern state that was achieving the greatest progress in passing protective labor legislation,²⁶ enacted its Act Establishing Maximum Working Hours Excepting Agriculture and Domestic Service on March 23, 1937 (effective July 1, 1937), two months before the FLSA bills were introduced. To guide judicial interpretation, the legislature, with an eye to the competitive risks inherent in an individual state's setting labor standards in the absence of a national regime, programmatically articulated the state's "public policy" to mean that the "relationship of hours of labor to the health, morals and general welfare of the people is a subject of general concern which requires appropriate legislation to limit hours of labor to promote the general welfare of the people...without jeopardizing the competitive position of North Carolina business and industry."¹

²³U.S. Women's Bureau, *Labor Laws for Women in the States and Territories*, charts II-VI at 17-31.

²⁴As early as 1919, the Michigan legislature adopted a joint resolution submitting to the voters a proposed amendment to the state constitution (article V section 29 of which already authorized such legislation regarding women and children) empowering the legislature to enact laws relating to the hours and conditions under which men might be employed. The voters approved the amendment at the November 1920 election, but the legislature failed to act on the authority. 1919 Mich. Pub. Acts, Jt. Res. No. 5 at 767; 1920 Mich. Pub. Acts 833-34.

²⁵Herbert Lahne, *The Cotton Mill Worker* 137-46 (1944).

²⁶Thomas Stokes, "South Improves Labor Statutes," *Pittsburgh Press*, June 14, 1937, at 10:1-2.

¹1937 N.C. Sess. Laws, ch. 409, § 2 at 849, 849.

In addition to retaining a sexist regulatory structure that capped women's hours at 48 per week and 9 per day, while permitting men to work 55 hours weekly and 10 hours daily, the statute embraced numerous exclusions, restricting its applicability considerably. Of great significance to the state's industrial firms in conferring flexibility, the law provided that in any workplace where two or more shifts of eight or fewer hours were in use, "any shift employee may be employed not to exceed double his regular shift hours in any one day whenever a fellow employee in like work is prevented from work because of illness or other cause." In emergencies, the law also permitted repair crews, engineers, electricians, firemen, watchmen, office and supervisory employees as well as employees in continuous process (including bleaching, dyeing, finishing, and dry kiln) operations and in work which by nature prevented second shifts, to work 60-hour weeks. Further flexibility came in the form of excluding from the 10-hour daily maximum any employee whose employment was "required for a longer period on account of an emergency due to breakdown, installation or alteration of equipment." Mercantile employers were entitled to employ women 10 hours a day during the week preceding Christmas and two additional weeks for taking inventory; employers in seasonal industries processing perishable or semi-perishable commodities were entitled to employ women up to 10 hours daily and 55 hours weekly. The maximum hours law did not apply at all to a whole variety of industries, including such important ones in North Carolina as cotton gins, cottonseed oil mills, tobacco redrying plants, tobacco warehouses, commercial fishing, and hotels. In addition, employees of railroads, common carriers, and public utilities regulated by the Interstate Commerce Commission or the state Utilities Commission were excluded from the reach of the act as were all state and local government workers. No employer employing 8 or fewer persons in each place of business was covered, while all persons working in bona fide office, foremanship, clerical or supervisory capacity, in executive positions, learned professions, as commercial travellers, or commissioned outside salesmen. Finally, the state Commissioner of Labor was empowered to convert the maximum hours law into a mere time and a half overtime regulation (for hours beyond 55) for adult male workers by issuing permits to any petitioning employer who "by reason of a seasonal rush of business...finds or believes it to be necessary that the employees of...its manufacturing plant shall work" more than 55 hours weekly "for a definite length of time not exceeding sixty days."²

Even this extraordinarily porous statute, which ultimately limited the hours of comparatively few adult male workers, proved too restrictive to the state legislature, which six years later at the height of World War II transformed it into a mere time and a half overtime law for males working more than 55 hours

²1937 N.C. Sess. Laws, ch. 409, § 3 at 849-51.

weekly.³

After having helped elect Olin Johnston—who had himself begun working in a textile mill at the age of eleven and campaigned in support of a broad array of labor legislation—governor in 1934, South Carolina's organized textile workers failed to pressure the state legislature into passing a maximum hours bills in 1935. Lacking a legislative majority, the labor movement was forced to make the kinds of compromises and concessions⁴ that were glaringly on display when the legislature in 1936 passed a law establishing a maximum eight-hour day and 40-hour week for cotton, rayon, silk, and woolen textile mills, but postponed the effective date of the law's operation until the legislatures in neighboring Georgia and North Carolina imposed similar limitations on their textile industries.⁵ Although those states failed to act and the South Carolina law therefore never went into effect, in 1938 the legislature amended the law so that it went into effect immediately, but was to become inoperative on May 1, 1939, unless Congress enacted a similar law.⁶ Court injunctions, however, prevented enforcement of the law, which because of its eight-hour daily limitation, was stricter than the FLSA.⁷

Compromises and concessions were also the order of the day in the porous maximum hours law that South Carolina enacted on May 11, 1938, just a few weeks before Congress passed the FLSA. It limited the hours of male and female employees in all manufacturing and mercantile establishments as well as mines, bakeries, dry cleaners, and restaurants to 56 hours weekly and 12 hours daily. But at the same time it provided for massive exemptions encompassing hotels, building trades, printing firms, saw mills, logging, turpentine industry, agriculture, fruit and vegetable canning, cotton gins, oil mills, gold mining, domestic labor, persons employed in bona fide executive positions or learned professions, drugstore prescription clerks, nurses, the oyster industry, and rural communities with populations of fewer than 2,500 (except manufacturing plants).⁸ The South Carolina statute adopted almost verbatim the provision from the North Carolina

³1943 N.C. Sess Laws ch. 59, § 1 at 55.

⁴Bryant Simon, *A Fabric of Defeat: The Politics of South Carolina Millhands, 1910-1948*, at 9, 123-40 (1998). According to Landon Storrs, *Civilizing Capitalism: The National Consumers' League, Women's Activism, and Labor Standards in the New Deal Era* 167-69 (2000), the National Consumers' League, which took a leading role in the enactment of labor standards laws in the South, believed that the textile workers union, buoyed by its successes with employers, overestimated its legislative strength and made the mistake of pushing for 40-, rather than 48-hour laws.

⁵1936 S.C. Acts No. 832, §§ 2 and 12 at 1568, 1570.

⁶1938 S.C. Acts No. 702, § 11 at 1565, 1567.

⁷Lahne, *The Cotton Mill Worker* at 140, 147 n.29. Lahne's information was based on a 1941 letter to him from the state Labor Department.

⁸1938 S.C. Acts No. 943, § 1 at 1883, 1883-84.

statute authorizing longer workweeks during “rushing business”⁹—which the International Labour Organisation’s 1919 Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week (never ratified by the United States) also permitted.¹⁰ Finally, the law limited the weekly hours of all female workers in garment factories to 40 and those of all employees in finishing, dyeing, and bleaching plants to 48 until May 1, 1939, at which time the provision was to become inoperative unless the U.S. Congress had previously enacted a similar law.¹¹

In spite of the huge number of workers who were placed outside the protection of the law, the South Carolina Supreme Court, upholding a trial judge who had already invalidated it by July 1938, promptly struck it down as unconstitutional the following year. In fact, it was precisely these gaps that proved its undoing. To be sure, it was not the spotty protection of workers, but the arbitrarily and unreasonably discriminatory manner in which liability was imposed on employers in certain industries that prompted a drugstore to file an action the day the statute went into effect. The court declined the suggestion of the defendant-Commissioner of Labor that the court strike out the exemptions on the grounds that the court would then be impermissibly legislating because the resulting statute would subject all establishments to the 56-hour regime, whereas the legislature expressly stated that it did not intend to regulate hours in that universal manner.¹² In addition, the court found the statute invalid on the grounds that it violated constitutionally secured due process and equal protection and constituted an improper exercise of the state’s public power because nothing in the law indicated that it was based on a theory that work in excess of 56 hours weekly was unhealthful or dangerous or that it would combat unemployment.¹³

Perhaps the best-known pre-New Deal statute imposing an absolute limit on

⁹1938 S.C. Acts No. 943, § 2(c) at 1884-85.

¹⁰“Regulations made by public authority shall determine for industrial undertakings...the temporary exceptions that may be allowed, so that establishments may deal with exceptional cases of pressure of work.” Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week, art. 6(1)(b) (1919).

¹¹1938 S.C. Acts No. 943, § 2(d) at 1885.

¹²The New Mexico Supreme Court, while striking down a 1933 8-hour-day/48-hour-week statute for male employees of mercantile establishments on the grounds that the classification was unreasonable, asserted: “Had the legislature, in keeping with the social trend of the times, made a sweeping enactment of an eight hour day for all wage earners in the state, this court would have viewed it with great sympathy....” *State v. Henry*, 37 N.M. 536, 537-38 (1933).

¹³*Gasque, Inc. v. Nates*, 2 S.E.2d 36 (S.C. 1939). The Supreme Court reported and merely affirmed the lower court’s ruling without adding anything. Storrs, *Civilizing Capitalism* at 169, erroneously claims that the court held the law unconstitutional on the grounds that it covered men.

hours—apart from the 1897 New York statute prohibiting employers from requiring or permitting any employee to work more than 10 hours a day or 60 hours a week in a bakery,¹⁴ which was struck down by the U.S. Supreme Court's infamous *Lochner* decision in 1905 as exceeding the police power¹⁵—had been enacted in Utah in 1896 and provided: "The period of employment of workingmen in all underground mines or workings shall be eight hours per day, except in cases of emergency where life or property is in imminent danger." Identical language prohibited work beyond eight hours in "smelters and all other institutions for the reduction or refining of ores or metals," and violations of either provisions were declared misdemeanors.¹⁶ The statute's renown arose from an employer's challenge to its constitutionality on the grounds that it deprived him of his property without due process of law and interfered with employers' and employees' freedom to contract.

The U.S. Supreme Court upheld its constitutionality as a reasonable exercise of the police power to protect the health of workers exposed to especially dangerous work environments, but it also went much further, limning the class-based inequality that makes freedom of and to contract illusory:

The legislature has also recognized the fact...that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employes, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority.

[A]lthough the prosecution in this case was against the employer of labor..., his defence is not so much that his right to contract has been infringed upon, but that the act works a peculiar hardship to his employes, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class. But the fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself.¹⁷

¹⁴1897 N.Y. Laws ch. 415, art. 8, § 110, at 461, 485.

¹⁵*Lochner v. New York*, 198 U.S. 45 (1905).

¹⁶1896 Utah Laws ch. 72, at 219.

¹⁷*Holden v. Hardy*, 169 U.S. 366, 397 (1898).