THE AUTOCRATICALLY FLEXIBLE WORKPLACE

A HISTORY OF OVERTIME REGULATION IN THE UNITED STATES

Marc Linder



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Part IV

The Fair Labor Standards Act

Perhaps Congress should have gone further and prohibited any employee from working over 42 hours in any event. This, however, it did not see fit to do. ... True, the detriment to well-being of workers exists as much in a case where overtime is worked and paid for as where it is worked without being paid for. Had it desired to do so, Congress might have absolutely forbidden the employment of any worker beyond a certain number of hours.... Presumably, however, it felt it more desirable to attempt to achieve the same result by merely imposing a penalty for the overtime....¹

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The Legislative History and Purposes of the FLSA Overtime Compensation Provision

According to Mr. Justice Murphy, the purpose of the overtime provisions was twofold: "to spread employment by placing financial pressure on the employer through the overtime pay requirement...and...to compensate employees for the burden of a workweek in excess of the hours fixed in the Act." ... The learned Justice's statement fails to dispel a lingering doubt as to whether Congress in 1938 actually regarded workweeks over forty hours as burdensome.¹

Enactment of the FLSA overtime provision was accompanied by a sea change in public evaluation of hours regulation. In the 1920s, a standard international text on state regulation of working time noted that rules merely governing premiums for overtime were not of a fundamental character.² As late as 1935, Elizabeth Brandeis, one of the country's leading experts on and advocates of labor standards legislation, frankly characterized state hours laws similar to what would soon be enacted under the FLSA as "of the unenforceable type permitting overtime for extra pro rata pay." Yet, three years later President Roosevelt tried to persuade the millions of listeners to his fireside chat on the eve of the FLSA's enactment that the new law "sets...a ceiling over hours of labor." To be sure, this public relations effort may have been facilitated by the act itself, whose overtime provision is conveniently mislabeled, "Maximum Hours."

Despite such misleading cues, in 1940 Frances Perkins, the Secretary of Labor during the entire Roosevelt administration and one of the most ardent

¹E. Merrick Dodd, "The Supreme Court and Fair Labor Standards, 1941-1945," 59 *Harv. L. Rev.* 321-75 at 321 n.2 (1945).

²Emil Lederer and Jakob Marschak, "Arbeiterschutz," in *Grundriss der Sozialökonomik: Das soziale System des Kapitalismus: Die autonome und staatliche soziale Binnen-politik im Kapitalismus* 9:II:259-319 at 287-88 (1927).

³Elizabeth Brandeis, "Labor Legislation," in John Commons et al., *History of Labor in the United States, 1896-1932*, at 3:397-697 at 551 (1935). Even a critical leftist seemed unaware of the contradiction between confirming that an 1868 statute limiting the workday on government contracts to eight hours was ineffective because it permitted agreements to work overtime and asserting that the FLSA did not interfere with overtime work. Irving Richter, "Four Years of the Fair Labor Standards Act of 1938: Some Problems of Enforcement," *J. Political Economy* 51(2):95-111, at 96, 98 (Apr. 1943).

⁴Public Papers and Addresses of Franklin D. Roosevelt: 1938: The Continuing Struggle for Liberalism 391, 392 (1941[June 24, 1938]).

⁵Fair Labor Standards Act of 1938, ch. 676, § 7, 52 Stat. 1060, 1063.

opposed wage and hour legislation on the grounds that it would impede the flow of capital to and foster its exodus from localities that survived "only because of existing low wages and long hours." Roosevelt rejected such growth strategies: "In the long run the profits from child labor, low pay, and overwork inure not to the locality or region where they exist but to the absentee owners who have sent their capital into these exploited communities to gather larger profits for themselves." He argued that new firms would be more likely to bring "permanent wealth" to communities if they insisted on "good pay and reasonable hours," because the workers would be more efficient and happier. Finally, resuming the minimalist theme, the president sought to reassure Congress that the FLSA did not aim for "drastic change": "We are seeking, of course, only legislation to end starvation wages and intolerable hours; more desirable wages are and should continue to be the product of collective bargaining."⁷⁴

These conflicting, confused, and understated policy reasons underlying the overtime provision may be contrasted with those apparently buttressing what at the time was the country's best-known overtime statute—Oregon's 1913 law covering men and women in factories.⁷⁵ It prohibited employing anyone in a factory more than ten hours a day (except when engaged in emergency work), but permitted up to three hours a day of overtime if it was compensated at time and one-half the regular wage.⁷⁶ Its preamble articulated a public policy that working any person more than ten hours a day in a factory "is injurious to the physical health and well-being of such person, and tends to prevent him from acquiring that degree of intelligence that is necessary to make him a useful and desirable citizen of the state."⁷⁷

In passing on the law's constitutionality, the Oregon Supreme Court accordingly elaborated on the legislative policies in a manner wholly unlike later judicial interpretation of the FLSA. It divined that "the legislative mind" viewed long hours as increasing the risk of injuries in factories with high-powered machinery, but it also observed that "a man who day in and day out labors more than 10 hours must not only deteriorate physically, but mentally. The safety of a country depends upon the intelligence of its citizens, and if our institutions are to be preserved the state must see to it that the citizen shall have some leisure which he may employ in fitting himself for those duties which are the highest attributes of good citizenship." ⁷⁸

⁷⁸State v. Bunting, 139 P. 731, 735 (Or. 1914).



⁷⁴⁸³ Cong. Rec. 8, 9 (1938).

⁷⁵Its fame resulted from the U.S. Supreme Court's having upheld its constitutionality despite its limitation on the hours of adult men. Bunting v. Oregon, 243 U.S. 425 (1917).

⁷⁶1913 Or. Laws ch. 102, § 2, at 169.

⁷⁷1913 Or. Laws ch. 102, § 3, at 169.

The problem with this pathos-radiating rhetoric is that it failed to deal with the obvious fact that employers were privileged to work their employees 13 hours—and thus expose them to greater risks of injury and make them unfit for good citizenship—provided that they paid time and a half for the last three hours. As the leading turn-of-the-century treatise on the police power observed, "where the time for all street railroad employees is fixed at ten hours per day, with the right to work overtime for special compensation, the justification on the ground of public safety evidently fails. If safety or health really forbid excessive work, special compensation does not remove the objection, and the fact that it is allowed indicates that the restriction rests on economic grounds."⁷⁹

More puzzling was the success with which Felix Frankfurter, who represented the state of Oregon, persuaded the U.S. Supreme Court in Bunting v. Oregon to uphold the statute as regulating health and hours rather than wages. Frankfurter's argument that it was "an hours law and not at all a wage law" was implicitly based on his contention that there was so little overtime work in Oregon industry that the law made little difference. The overtime provision "merely...allow[ed] for a limited and reasonable flexibility in time of unusual business pressure," but "even now, when employers do not have to pay time and a half, over 93 per cent find it unprofitable to employ men beyond ten hours as a normal standard." His assertion that the statute was reasonable in "safeguarding abuse of the exception by the punitive provision"80 revealed that an overtime law would cease being reasonable if its punitive provision no longer deterred employers. The U.S. Supreme Court accorded only "a certain verbal plausibility" to the employer's contention that the law was intended to permit 13 hours' work for 14 and a half hours' pay; that the legislature chose to "achieve its purpose through the interest of those affected" rather than by a "rigid prohibition" was not fatal.81

Oddly, although labor standards advocates characterized the Oregon statute as "of a very ineffective type" because it permitted three hours of overtime at time and a half, the FLSA was not attacked for permitting 16 hours a day of premium overtime.⁸²

⁸²Brandeis, "Labor Legislation" at 681.



⁷⁹Ernst Freund, *The Police Power: Public Policy and Constitutional Grounds* 301 (1904).

⁸⁰Supplemental Memorandum for Defendant in Error at 1-2, Bunting v. Oregon, 243 U.S. 436 (1917). Frankfurter incorrectly reported his own data, which in fact showed that in 1909 93.7 percent of industrial workers in Oregon were employed less than 10 hours a day. Supplemental Brief for Defendant in Error upon Re-Argument at 63, Bunting v. Oregon, 243 U.S. 436 (1917).

⁸¹Bunting v. Oregon, 243 U.S. at 436-37.

advocates of the FLSA, unambiguously vindicated employers' power to make their employees work unlimited hours under the new law:

It has been said that one reason for the collapse of the French Republic was the adoption of the 40-hour week. The French 40-hour-week law was a rigid statute which prohibited all overtime beyond 40 hours, not only for the individual worker but also for the entire industrial establishment. ... The American hour laws, however, were very carefully framed to avoid this rigidity, and any employer in the land can legally and automatically ask his employees to work as many hours beyond 40 as he cares to without asking permission of the Government so long as he pays the overtime rate of time and one-half.⁶

Perkins was wrong about France,⁷ but she stated the record correctly for the United States, and her Wage and Hour Administrator⁸ and the U.S. Supreme Court agreed.⁹ When asked at the Convention of the International Association of Governmental Labor Officials a month before the FLSA was to go into effect whether the law was not "a rigid and inelastic 44-hour week for the first year," Administrator Elmer Andrews replied: "No, sir. … It is not a rigid 44-hour week. That is a common misunderstanding of the act. [T]hey can work as much longer as they wish as long as they are paid at the rate of time and one-half."¹⁰

In spite of the FLSA's manifestly permissive regulation of hours, both the Right and the Left have perpetuated myths about workers' statutory entitlement

¹⁰U.S. Bureau of Labor Statistics, Labor Laws and Their Administration 1938: Proceedings of the Twenty-fourth Convention of the International Association of Governmental Labor Officials, Charlestown, S.C. September 1938, at 28 (Bull. No. 666, 1939).



⁶Twenty-Eighth Annual Report of the Secretary of Labor for the Fiscal Year Ended June 30 1940, at 5 (1940). Perkins made this statement in a speech to the Seventh National Conference on Labor Legislation; "Calls Short Hours Best in Emergency," N.Y. Times, Dec. 10, 1940, at 18:3.

⁷As Perkins herself knew or should have known, at the same time she made this statement, her own Wage and Hour Administrator was publishing a detailed account of the French hours law concluding that the "frequently repeated statement that the French 40-hour law contributed to the defeat of France by bringing about curtailment of production, is subject to correction in the light of history. The act was fully in effect but a short time, liberal provision was made for the exemption of defense industries, and even general relaxations were permitted many months before the outbreak of war...." U.S. Dept. of Labor, Wage and Hour Div., Annual Report for the Fiscal Year Ended June 30, 1940, at 63 (1941). A French decree of Nov. 12, 1938, not only made a worker's refusal to work overtime in the interest of national defense a breach of contract, subjecting him to forfeiture of unemployment benefits for six months, but criminalized any attempts to induce others not to work over-time. Id. at 57.

⁸"It is clear that there is no absolute limitation upon the number of hours that an employee may work. If he is paid time and a half for overtime, he may work as many hours a week as he and his employer see fit." U.S. Dept. of Labor, Wage and Hour Div., Interpretative Bull. No. 4 (Dec. 20, 1939 [Oct. 21, 1938]), reprinted in BNA, Wage and Hour Manual at 95 (1940 ed.).

Overnight Motor Transp. Co. v. Missel, 316 U.S. 572 (1942).

to the 40-hour week. Disconnected from reality, for example, is a Republican congressman's recent assertion that the "rights" to the minimum wage and 40-hour workweek created by the FLSA "have become as ingrained as constitutional guarantees." Similarly fanciful is the leftist pathos that the FLSA "made the eight-hour day and forty-hour week the law of the land" or "part of the social contract...." Much closer to the mark was the characterization by Donald Nelson, chairman of the War Production Board, in opposition to efforts by employers to suspend the overtime law during World War II: "It governs wages rather than the hours in which a man may work." More accurate, too is a later scholar's judgment that the FLSA "did not really establish the forty-hour week norm so much as it buttressed management's insistence that there be no further reductions in weekly work time standards," even if employers did not support the FLSA's creation of that norm. 16

Some of this confusion that has impeded understanding of the purposes of the overtime penalty/premium can be eliminated by scrutinizing the FLSA's legislative history. The immediate precedents for the overtime provision under the

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¹¹¹⁴² Cong. Rec. E 1789 (Sept. 27, 1996) (Rep. Thomas Petri, R. Wis.). Similarly, Rep. Wood (D. Mo.) was wrong in asserting at the 1937 FLSA hearings that "this bill would take away from the employee the right to work for as low wages as he pleased and for as many hours as he pleased." 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. 139 (1937). He was right about the minimum wage, but not about long hours. Some countries whose constitutions guarantee substantive social-economic rights have anchored a limit on working hours in them. For example, Brazil's constitution of 1988 mandates "normal" working hours not to exceed eight per day and 44 per week; to be sure, it also mandates premium rates of at least time time and a half for hours beyond the normal. Tit. II, ch. II, art. 7, §§ XIII and XVI. The 44-hour figure was a compromise between the constitutional provision in effect between 1943 and 1988 and the 40 hours that unions pushed for at the Constitutional Assembly. International Labour Office, Conditions of Work Digest, vol. 14: Working Times Around the World 73-74 (1995).

¹²David Roediger and Philip Foner, Our Own Time: A History of American Labor and the Working Day 257 (1989).

¹³Kathryn Sklar, "Two Political Cultures in the Progressive Era: The National Consumers' League and the American Association for Labor Legislation," in *U.S. History As Women's History: New Feminist Essays* 36-62 at 61 (Linda Kerber et al. eds. 1995).

¹⁴Hearings on H. R. 6790, to Permit the Performance of Essential Labor on Naval Contracts Without Regard to Laws and Contracts Limiting Hours of Employment, to Limit the Profits of Naval Contracts, and for Other Purposes Before the House Committee on Naval Affairs, 77th Cong., 2d Sess. 2576 (1942).

¹⁵Ronald Edsforth, "Why Automation Didn't Shorten the Work Week: The Politics of Work Time in the Automobile Industry," in *Autowork* 155-79 at 162 (Robert Asher and Ronald Edsforth eds., 1995).

¹⁶David Roediger, "The Limits of Corporate Reform: Fordism, Taylorism, and the Working Week in the United States, 1914-1929," in Worktime and Industrialization: An International History 135-54 at 148 (Gary Cross ed. 1988).

FLSA were the President's Reemployment Agreement (PRA or blanket code), which Roosevelt asked employers to comply with in July 1933 pending adoption of codes for their industries, and various industry codes promulgated under the National Industrial Recovery Act (NIRA) in 1933 and 1934.¹⁷ In his fireside chat a month after the NIRA's enactment, Roosevelt himself described "a universal limitation of hours per week for any individual by common consent" as "[t]he essence of the plan." The PRA provided that employers would not, for example, work any factory worker more than 35 hours per week, but conferred the right on them to work a maximum workweek of 40 hours during a period of six weeks; however, this provision did not apply to "very special cases where restrictions on hours of highly skilled workers on continuous processes would unavoidably reduce production but, in any such special case, at least time and a third shall be paid for hours worked in excess of the maximum."

Under the codes:

The need for establishing rates of pay for overtime work arises from the very general occurrence of provisions permitting an extension of the regular working time either by allowing hours to be averaged over specific periods or by fixing definite additions to the usual schedule in periods of concentrated demand. Such extensions are sometimes regarded as part of the usual scheduled hours but more often they are considered overtime for which extra compensation must be paid. [T]he principle of extra pay for such employment is recognized in 86 percent of the approved codes.

Time and a half is the rate at which overtime is most generally compensated, with time and a third ranking next in frequency. ...

Of the small number of codes that do not provide for overtime pay, a few either prohibit such employment or make no allowance for employment beyond the scheduled maximum. However, it is more usual to find that the codes that do not grant overtime pay are so planned that extra hours may be worked under the averaging provision or peak-season allowances permitting extra working time during fixed periods.²⁰

²⁰Margaret Schoenfeld, "Analysis of the Labor Provisions of N.R.A. Codes," Monthly Lab. Rev. 40(3):574-603 at 589-91 (Mar. 1935). Without any evidence, the Office of National Recovery Administration, Div. of Review, Work Materials No. 35: The Content of NIRA Administrative Legislation, Part B: Labor Provisions in the Codes 81 (written by Ruth Reticker) (Spec. Studies Sect., Feb. 1936) claimed: "Historically, overtime rates were provided in union agreements for work beyond certain specified hours known as the



¹⁷The PRA and the codes were precursors to the FLSA overtime provision also with respect to the exclusion of executive employees; see Marc Linder, "Moments Are the Elements of Profit": Overtime and the Deregulation of Working Hours Under the Fair Labor Standards Act ch. 2 (2000)...

¹⁸Franklin D. Roosevelt, "Praising the First Hundred Days and Boosting the NRA," in FDR's Fireside Chats 28-36 at 36 (Russell Buhite and David Levy eds. 1993 [July 24, 1933]).

¹⁹U.S. Bureau of Labor Statistics, *Handbook of Labor Statistics: 1936 Edition* 500 (Bull. No. 616, 1936).

In fact, in mid-1934 the National Recovery Administration (NRA) curbed the practice of averaging hours over periods ranging from two weeks to an entire year (six months being the predominant period) in order to accommodate seasonal peaks or labor shortages because such an approach was difficult to enforce and interfered with the regularization of employment.²¹ The new order prescribed that:

To the extent that it is impracticable to provide an inflexible maximum hours limitation in view of peculiar seasonal or other needs of an industry, a stated maximum with a proviso for a definite tolerance (on a weekly or daily basis) may be provided. To penalize abuse, the payment of overtime for hours worked in excess of the stated maximum but within the tolerance, should be required. Where a definite tolerance is not sufficient, particular defined circumstances (such as emergency maintenance and repair) may justify unlimited tolerance, with payment of overtime for all time in excess of the maximum.²²

President Roosevelt himself commended the use of overtime premiums under the codes. In a statement on the extension of the automobile manufacturing code in 1935, he highlighted as one of the code's most important advances the establishment of the "principle" of payment of time and a half for overtime in excess of 48 hours, which "will benefit the employees through additional compensation for any necessary overtime work and deter the employment of workers in any unnecessary overtime." (The automobile code did not originally provide for premium overtime and even the amended version was to little effect since the weekly hours could be averaged over the entire model year.)²⁴

A labor standards bill that Secretary of Labor Perkins had her department's solicitor, Charles Gregory, draft in 1935 also provided for administrative discre-

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basic day or basic week. This was primarily a wage device, intended to increase pay rather than to limit hours. In the NRA codes the purpose of the overtime provision seems to have been to provide some elasticity for employers who were reducing basic hours to the NRA standards, an elasticity protected against abuse by the requirement of penalty rates for overtime hours."

²¹Schoenfeld, "Analysis of the Labor Provisions of N.R.A. Codes" at 585.

²²NRA, Press Release No. 6619, July 20, 1934, in *Monthly Lab. Rev.* 39(3):622-23 (September 1934).

²³"Statement by the President on the Extension of the Automobile Code," in *Public Papers and Addresses of Franklin D. Roosevelt: The Court Disapproves: 1935*, at 4:70, 71 (1938 [Jan. 31, 1935]). Roosevelt characterized the "payment of overtime where permitted in exceptional circumstances, such as extraordinary seasonal demand," as having been established as one of the policies implementing the principles underlying the NRA. "The President Hails the First N.R.A. Code," in *Public Papers and Addresses of Franklin D. Roosevelt: The Year of Crisis: 1933*, at 2:275, 277 (note) (1938 [July 9, 1933]).

²⁴Edsforth, "Why Automation Didn't Shorter the Work Week" at 157-58.

tion in setting the overtime premium.²⁵ And less than a year before Congress began debating the FLSA it enacted the Walsh-Healey Government Contracts Act, which prohibited the employment of any person in excess of eight hours per day or 40 hours per week under any contract with the United States for the manufacture or furnishing of any materials in an amount exceeding \$10,000, but authorized the Secretary of Labor to permit longer hours for which time and a half was mandatory.²⁶

Unlike the maximum-hours statutes that prohibited work beyond a certain number of daily or weekly hours,²⁷ from its very earliest drafts the FLSA merely required employers to pay workers a 50 percent premium for overtime hours. Despite the enormous changes that the bill underwent over more than a year, this provision was a constant.²⁸ In the confidential draft that President Roosevelt's legislative brain-trusters, Thomas Corcoran and Benjamin Cohen, prepared on April 30, 1937—as the bill's congressional opponents never tired of repeating, the bill was filled with "Cohenisms and Corcoranisms"²⁹—a section headed, "Exemptions from fair labor standards," provided that "the maintenance...of an oppressive or substandard work week shall not be deemed to constitute a substandard labor condition if the employees so employed receive additional compensation for such overtime employment at the rate of one and one-half times the regular hourly rate at which such employees are employed."³⁰ The administra-

³⁰Confidential Revised Draft: Fair Labor Standards Act of 1937, § 5(b) (Apr. 30, 1937) (National Archives, Labor Dept. Records, Labor Standards—1937 File, Fair Labor Standards Bill). See also Confidential Revised Draft: Fair Labor Standards Act of 1937, § 6(b) (May 20, 1937) (National Archives, Labor Dept. Records, Labor Standards—1937 File, Fair Labor Standards Bill). The earliest FLSA draft bills also enforced compliance by means of the same financial disincentive. Any employee employed for more hours per week than the maximum work week required by a labor standard order "shall be entitled to receive as reparation from his employer additional compensation for the time that he was employed in excess of such maximum work week at the rate of one and one-half times the agreed wage at which he was employed or the minimum wage, if any, for such time established by this act or by an applicable labor standard order, whichever is higher, less the amount actually paid to him for such time by the employer." Confidential Revised Draft: Fair Labor Standards Act of 1937, § 20(a) (Apr. 30, 1937). The administration bill introduced on May 24, 1937, contained identical language. S. 2475, § 21(a),



²⁵Frances Perkins, *The Roosevelt I Knew* 254 (1946).

²⁶Act of June 30, 1936, ch. 881, §§ 1(c), 6, 49 Stat. 2036, 2037, 2038-39. The act was later amended to provide for an exception pursuant to § 7(b) of the FLSA pertaining to union collective bargaining agreements. Act of May 13, 1942, ch. 306, 56 Stat. 277.

²⁷See above ch. 4.

²⁸Ronald Ehrenberg and Paul Schumann, "The Overtime Pay Provisions of the Fair Labor Standards Act," in *Report of the Minimum Wage Study Commission* 3:149-233 at 222 n.6 (1981), mistakenly assert that: "Initial drafts of the legislation established outright prohibitions for long hours. The idea of instituting a penalty for overtime instead apparently was instituted only as a compromise during the late stages of the debate."

²⁹82 Cong. Rec. 1487 (1937) (Rep. James Mott, R. Ore.).

tion's FLSA bill that was introduced in the Senate and House on May 24, 1937, contained identical language.³¹ Indeed, President Roosevelt himself, in his message to Congress accompanying the bill, optimistically stated that "permitting longer hours on the payment of time and a half for overtime, it should not be difficult to define a general maximum working week."³²

All later versions of the House and Senate FLSA bills during 1937 and 1938 included either language identical with that of the original bill or some variant of this time and one-half for overtime provision.³³ An unsuccessful House floor amendment filed on behalf of the AFL would have made it unlawful to employ anyone for more than eight hours a day or 40 hours a week, but would have permitted "emergency work" in excess of such hours for which employers were required to pay time and one half.³⁴ And a Senate floor amendment would have imposed absolute limits on the length of the workweek. Introduced by Senator Francis Maloney (D. Conn.), it would have required the proposed Labor Standards Board to take a census of unemployment; if it counted more than 8 million unemployed, it would have been required to set the working week at 30 hours; at the other end of the spectrum, if fewer than 2 million people were unemployed, the working week would have been established at 40 hours. Without debate the amendment was defeated 45 to 37, with the strongest FLSA supporters generally opposing it.³⁵

Contemporaries were not confused about the distinction between a statutory limit on working hours and an overtime law. In sharp contrast to the permissive hours regulation scheme that Congress was preparing, a majority of the population favored caps on working hours. Public opinion polls revealed that in July 1937, 60 percent of those surveyed thought that "the federal government ought to set a limit on the number of hours employees should work in each business...." Some insight into the class-based conflict over hours is furnished by the fact that in May 1937, just a week before the FLSA bill was introduced in Congress, when 58 percent of respondents favored such limits, 68 percent of Democrats agreed as opposed to only 34 percent of Republicans. Indeed, just a few months earlier, 65 percent of respondents expressed themselves in favor of the thirty-hour week. According to a survey conducted in May 1942, 84 percent of respondents knew

^{35 81} Cong. Rec. 7952-54 (July 31, 1937).



⁷⁵th Cong., 1st Sess.

³¹S. 2475, § 6(b), 75th Cong., 1st Sess. (May 24, 1937).

³²S. Rep. No. 884: Fair Labor Standards Act, 75th Cong., 1st Sess. 1, 3 (1937).

³³E.g., S. 2475, § 6(a), 75th Cong., 2d Sess. (House bill, Dec. 17, 1937); S. 2475, § 5, 75th Cong., 3d Sess. (House bill, Apr. 21, 1938).

³⁴82 Cong. Rec. 1591 (Dec. 15, 1937). The amendment, which was offered by Rep. Griswold (D. Ind.), was defeated 162-131. *Id.* at 1604.

that a 40-hour week in a plant meant merely that the employees had to be paid overtime—not that they could not work there more than 40 hours.³⁶

Although the distinction between a ban and a financial disincentive was well known, it was widely assumed that the overtime deterrent would be effective. Leon Henderson, who had been director of the Research and Planning Division of the National Recovery Administration, testified at the House and Senate Labor Committee FLSA hearings in June 1937: "Many lessons are to be learned from the N.R.A.... Certainly it was learned that penalty overtime rates need to be stiff to force reemployment and training." The New York Times, which was militantly skeptical of the FLSA, editorialized: "The House wage-hour bill, it is true, does not absolutely prohibit a working week in excess of forty hours, but provides that hours in excess of that must be paid for at the rate of one and one-half times the regular rate. For many marginal firms and others this will be equivalent to prohibition, particularly in view of the increases in regular hourly rates by the bill."38 (During World War II, when the work-spreading argument had lost its vitality and Secretary Perkins defended the overtime premium instead on the grounds that it did not really restrict hours, the Times pointed out that this claim ignored the law's purpose of making overtime "prohibitively costly....")³⁹

In 1939 a scholar confirmed that few doubted that "both the expected and the probable effect of the hours provision...will be to restrict working hours to the maximum permitted at straight time." A contemporaneous study of the automobile industry confirmed that the "overtime differential makes extra work so costly as to be impractical except under very unusual conditions." With respect to the FLSA and to even stricter provisions in collective bargaining agreements, management "would like to be able to operate 45 or 48 hours a week during 20 weeks each year without paying overtime rates. This would enable them to rely more completely on their best employees, and there would be less need for the temporary hiring of less efficient men. ... Such a change is now impossible owing both to union attitudes and to the Wage-Hour Act."

⁴¹William McPherson, Labor Relations in the Automobile Industry 71, 72 (1940).



³⁶Public Opinion: 1935-1946, at 290 (quote), 292 (Hadley Cantril ed., 1951).

³⁷Fair 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. 158 (1937).

³⁸"The Question of Hours," *N.Y. Times*, May 22, 1938, sect. IV, at 8:1, 2 (editorial). The paper repeated this claim in "Working Hours," *N.Y. Times*, May 26, 1938, at 24:3.

³⁹"Fighting the War on a 40-Hour Week," N.Y. Times, Feb. 16, 1942, reprinted in 88 Cong. Rec. 1328 (1942). See also below ch 11.

⁴⁰Orme Phelps, The Legislative Background of the Fair Labor Standards Act: A Study of the Growth of National Sentiment in Favor of Governmental Regulation of Wages, Hours, and Child Labor 41 (1939).

Congress did not make identification of its precise intent in enacting the overtime penalty an entirely straightforward task. In contrast, the Great Depression prompted the Quebec legislature to be explicit about the work-sharing goal of its hours statute. Thus when that province enacted a law in 1933 authorizing the limitation of working hours, the preamble unambiguously declared the legislature's intent:

Whereas the economic crisis throughout Canada and in this Province is depriving a great many workmen of work and obliges the State to come to their assistance to meet their needs and those of their families;

Whereas serious economic and social troubles result therefrom; and

Whereas a better distribution of labour would tend to relieve this situation by affording to a greater number of workmen, who ask no more than to work, an opportunity to do so.42

Likewise, when Ontario enacted a maximum-hours law in 1944, government ministers explaining the bill in the legislature expressly declared that demobilization and the ratcheting down of military production had made work-spreading necessary.43

To be sure, the interpretation advanced by the United States Supreme Court in the early 1940s, which has been repeated ad nauseam ever since, namely, that spreading employment was the principal goal of the FLSA's overtime provision⁴⁴—occasionally the Court added that the overtime penalty was also designed to compensate workers "for the burden of a workweek beyond the hours fixed in the Act"45—is neither implausible nor bereft of a basis in the legislative history.46

⁴²An Act Respecting the Limiting of Working Hours, Québec Stat. 1933, ch. 40, at 127.

⁴³See below ch. 17.

⁴⁴E.g., Southland Gasoline Co. v. Bayley, 319 U.S. 44, 48 (1943) (citing Overnight Motor Transportation Co. v. Missel for the proposition that FLSA "sought a reduction in hours to spread employment as well as to maintain health"). David Montgomery, Beyond Equality: Labor and the Radical Republicans, 1862-1872 at 237 (1967), noted that the early post-Civil War eight-hours movement, unlike that in the early twentieth century, did not focus on work-spreading or reduction of injuries. Yet by the mid-1880s the Illinois Bureau of Labor Statistics reported that in the previous 20 years "the plane of the shorter-day demand" had shifted from the beneficial physical, mental, and moral results for workers to the need to deal with unemployment caused by overproduction resulting from maintenance of long hours despite proliferation of labor-saving machinery. Fourth Biennial Report of the Bureau of Labor Statistics of Illinois: 1886, at 474 (1886).

⁴⁵Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 578 (1942). See also Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 40 (1944) (citing *Overnight* and *Southland Gasoline Co.* for the proposition that purpose of the FLSA overtime provision was to spread employment and compensate workers for the burden of long hours).

⁴⁶As Edward Denison, The Sources of Economic Growth in the United States and the Alernatives Before Us 39 (1962), noted: "It is at least doubtful that standard weekly hours Digitized by GOO

Nevertheless, it cannot be anchored in the most authoritative texts such as the House and Senate reports or the FLSA bills.⁴⁷ That this goal was in the air is obvious from a *New York Times* editorial published the day after the administration bills were filed. While the editors did not object to the maximum-hour provision if the law's aim was "simply to protect labor from oppressively long hours," the bill aroused their suspicions because it "evidently aims at quite different purposes. This is to keep hours short for the purposes of 'spreading the work' and 'creating employment.'" The *Times* cared about the difference because it deemed the latter conception fallacious: "The nation cannot be made richer by working less. Hours legally frozen below the number necessary to insure health and efficiency and reasonable leisure simply reduce our national production of wealth...and reduce the demand for labor by at least as much as they reduce the working week."⁴⁸

Nor can it be denied that work-spreading had been an explicit goal of earlier government hours legislation in the United States. Indeed, its impeccable conservative pedigree was on display as far back as 1890, when future president William McKinley, then Republican leader of the House of Representatives, spoke in favor of an absolute eight-hours bill governing laborers and mechanics employed by the Federal government or by contractors on public works:

It has been said that it is a bill to limit the opportunity of the workingman to gain a livelihood. This is not so; it will have the opposite effect. [W]hen we constitute eight hours a day's work, instead of ten hours, every four days give an additional day's work to some workingman who may not have any employment at all. [Applause.] It is one more day's work, one more day's wages, one more opportunity for work and wages, an increased demand for labor. ... The tendency of the times the world over is for shorter hours for labor, shorter hours in the interest of health, shorter hours in the interest of humanity, shorter hours in the interest of the home and the family....⁴⁹

Even more unmistakable in its intent was the Hoover administration's Economy Act of June 30, 1932, which declared with regard to Federal Government employees that "in so far as practicable, overtime work shall be performed by substitutes or unemployed regulars in lieu of persons who have performed a day's work during the day during which the overtime work is to be performed, and

⁴⁹²¹ Cong. Rec. 9300-9301 (1890).



would have been set where they were if the reduction had not been expected to result in more employment rather than entirely in less work being done."

⁴⁷For an argument that spreading work by means of an overtime premium designed to reduce the workweek would lower productivity, raise prices, and decrease employment, see Fred Best, Work Sharing: Issues, Policy Options and Prospects 120-36 (1981).

⁴⁸"Federal Wage-and-Hour Control," N.Y. Times, May 25, 1937, at 26:2.

work on Sundays and holidays shall be performed by substitutes or unemployed regulars in lieu of persons who have performed a week's work during the same week."50

A few members of Congress also spoke out clearly along these lines during the FLSA floor debates. Senator (and future Vice President) Alben Barkley was perhaps the strongest advocate of this position:

If we have arrived at a time in this country when we must choose between two horns of a dilemma, one of which is that all our people may work three-fourths of the time and the other that three-fourths of them may work all the time and one-fourth of them never work, then I choose the former. I believe it will be socially, economically, and industrially more wholesome and safe for all the available labor in America to be able to work three-fourths of the time than for three-fourths of it to work all the time and one-fourth never to work.

The bill makes a modest beginning by undertaking to establish among the laborers who are not organized, who have no voice around the conference table, who have no mechanics through which to make a choice of representatives in collective bargaining, an opportunity and possibility of spreading employment among all those able and willing to perform it in order that those who are willing and able to perform it may obtain work.⁵¹

A seemingly persuasive, but ultimately ambiguous, piece of legislative history supporting the work-spreading interpretation arose during the House floor debates in December 1937. Representative Alfred Bulwinkle (D. N.C.) offered an amendment that would have prohibited the employment of any employee between midnight and 6 o'clock in the morning in any manufacturing industry that did not require continuous production unless the employee was paid time and a half. Bulwinkle explained that the amendment's purpose was to eliminate the graveyard shift in several industries, chiefly textiles, because "largely but not altogether chiselers, carry this night work on, which is detrimental to the health of the employees and...to industry...." The provision was in fact taken from a textile bill—hearings on which had been going on when the FLSA was introduced in May and which was shelved to make way for the FLSA in which it was designed to "take the profit out of the graveyard shift...and yet permit its use whenever a special seasonal profit would justify the payment of time and a half." States the profit of the graveyard shift... and yet permit its use whenever a special seasonal profit would justify the payment of time and a half."

Night work had proliferated in cotton manufacturing in the twentieth century

⁵⁴82 Cong. Rec. at 1696 (Rep. Keller). On the textile industry as the New Deal "guinea pig," see Stanley Vittoz, New Deal Labor Policy and the American Industrial Economy 14, 24, 28-32 (1987).



⁵⁰ Economy Act of June 30, 1932, ch. 314, § 211(a)(3), 47 Stat. 382, 406.

⁵¹⁸¹ Cong. Rec. 7941 (July 31, 1937).

⁵²⁸² Cong. Rec. 1695 (Dec. 16, 1937).

^{53&}quot;Basic 40-Hour Work Week, 40 Cts. Hour Minimum Pay, Planned in Federal Bill," N.Y. Times, May 22, 1937, at 1:1.

from two sources: "when business was good each mill hastened to get as much of the market as possible when the getting was good, and when business was bad the spreading of the overhead costs over a greater volume of production meant that in the depressed market of slim margins the double-shift mill had a slight edge over the single-shift mill." Even after the World War I textile boom had subsided, southern mills retained the night shift, despite workers' aversion, higher wage rates, and lower productivity, because continuous operation reduced unit costs. The resulting overproduction led to losses, but the logic of competition prevented individual firms from eliminating night work and individual states from banning it unless their competitors did likewise.⁵⁵

The importance, if not the quantification, of these microeconomic factors was present to mind when the House Labor Committee held hearings, just 12 days before the FLSA bill was introduced, on a so-called little National Recovery Act bill to regulate the textile industry. The subcommittee chairman, Representative Kent Keller (D. Ill.), who was opposed to graveyard shifts on economic and so-cial grounds, was reluctant to enact an outright ban because "it may limit a manufacturer who has necessarily to deal with a temporary condition, such as a shift in styles. If we should allow that practice in a case like that, a manufacturer could afford to work that shift and labor would also be benefited. The operator certainly would not use the graveyard shift unless it paid to do so." Keller then asked the chief economist of the Bureau of Labor Statistics, F.A. Hinrichs, whether imposing time and a half for all hours worked between 11 p.m. and 7 a.m. would discourage night work while permitting it where profitable:

MR. HINRICHS. I am quite sure that the payment of penalty overtime rates rather than the fixing of flat maxima gives a larger degree of flexibility. There ought to be a sufficient penalty so that the practice would be indulged in only under the most favorable market circumstances. I should say that normally the payment of 50 percent more than the going rate for labor would effectively bar the use of such overtime. One could not produce for stock under those conditions.

MR. KELLER. Do you think that would be an effective means of doing away with the abuses of the graveyard shifts?

MR. HINRICHS. The only reason I hesitate to answer in the affirmative absolutely is that I do not know the exact amount by which the overhead of a mill will be reduced by three rather than two shifts. I do not know the balance between the cut in overhead and the increase in 50 percent in labor costs; but a 50-percent increase in labor costs, if not offset, would be a complete barrier.⁵⁷

⁵⁷To Regulate the Textile Industry at 178.



⁵⁵Herbert Lahne, The Cotton Mill Worker 143-44 (1944).

⁵⁶To Regulate the Textile Industry: Hearings Before the Subcommittee of the House Committee on Labor, 75th Cong., 1st Sess., pt. 3 at 178 (1937).

Representative Keller may never have received the underlying data he requested to determine whether the 50-percent premium sufficed to make night work unprofitable in textiles, but an analogous calibration underlay the overtime penalty under the FLSA. There its purpose was not to overcome the fixed scale economies of 100-percent capacity utilization, but to overcome the economies of fixed or quasi-fixed benefits paid to workers regardless of how many hours they worked. In both cases, however, achieving the legislative objective depended on calculating the correct empirical data, adopting the appropriate premium, and keeping it up to date as the underlying variables changed over time. Just as Congress assumed that the number of workers employed by firms that were already paying time and a half and on which the FLSA would have no impact was relatively small, it must also have assumed that the penalty rate might have to be adjusted upwards from time to time to keep the hiring of additional workers profitable when they had to be paid financially significant benefits that increased little or not at all when employees already on the payroll worked overtime.

One congressman immediately opposed the Bulwinkle amendment because it abandoned "the theory behind" the FLSA: by seeking to curtail production, it would merely promote capital intensification on the other two shifts employing the same number of workers.⁵⁸ This objection prompted the chair of the House Labor Committee, Representative Mary Norton (D. N.J.), to reply that evidence available to the committee contradicted that claim: "In fact, it has been proven to us that if we could do this it would do more to spread employment than any other thing concerned in the bill. That is the purpose of the bill—to try to spread employment." Several representatives were understandably puzzled by how preventing overproduction by eliminating one-fourth of the aggregate working time available to the entire covered working class (as opposed to shortening some workers' working days) could possibly be consistent with work sharing; nevertheless, the amendment was agreed to, although the House bill itself was not passed.⁵⁹

The dubious work-sharing capacity of the anti-graveyard shift proposal was underscored later in the debate when Michigan Representative Shafer successfully prevailed on the House to exempt the food-processing industry from the provision in order not to disadvantage the Kellogg plant in Battle Creek, which had converted its three eight-hour shifts to four six-hour shifts during the Depression to combat unemployment. Shafer feared that the Bulwinkle amendment would make Kellogg "close down one of these shifts, thereby causing a number of men to lose their jobs." When another congressman, who was skeptical of the Bulwinkle amendment itself, asked whether the same argument did not apply to

⁵⁸82 *Cong. Rec.* at 1696 (Rep. Smith, Conn.).

⁵⁹82 Cong. Rec. at 1696-97.

any manufacturing process using a night shift but lacking a great excess of machinery on which the discharged workers could work during the day, Shafer concurred, but his amendment was nevertheless agreed to.⁶⁰

Employers' later efforts to persuade the courts that the FLSA overtime premium applied only to the minimum wage⁶¹ called attention to an aspect of the legislative history that underscores that at the very least work-spreading was not Congress's sole goal. But in the days between the end of the FLSA hearings in late June 1937 and the re-drafting of the bill as a whole in early July by Senator Black's labor committee, *Business Week* portrayed employers as too preoccupied with their rebellious workers to focus on the potentially disastrous statute: "Little imagination is necessary to translate the effect of this provision and others on labor costs, manufacturing costs, and price levels, but most industrialists do not appear to be concerned, either because they are too busy or because they are afraid to turn their back on their employees and come to Washington when labor trouble looms so large at home." Perhaps the most powerful evidence supporting the employers' view was found in the report issued by the Senate in July 1937 recommending passage of an amended FLSA bill:

The right of individual or collective employees to bargain with their employers concerning wages and hours is recognized and encouraged by this bill. It is not intended that this law shall invade the right of employer and employee to fix their own contracts of employment, wherever there can be any real, genuine bargaining between them. It is only those low-wage and long-working-hour industrial workers, who are the helpless victims of their own bargaining weakness, that this bill seeks to assist to obtain a minimum wage.⁶³

This explanation clearly eschewed any policy of creating an across-the-board norm for the length of the workweek or of work sharing. Its only motivation was combating impoverishment among sweated workers. The House report a month later added the goal of expanded purchasing power, but also emphasized that the bill "only attempts in a modest way to raise the wages of the most poorly paid workers and to reduce the hours of those most overworked."⁶⁴

Even the single most important textual warrant in the legislative history for the work-spreading argument offers only tenuous support for the U.S. Supreme Court's assertion *Overnight Motor Transportation Company v. Missel* in 1942

⁶⁴H. Rep. No. 1452: Fair Labor Standards Act, 75th Cong., 1st Sess. 9 (1937).



⁶⁰⁸² Cong. Rec. at 1775. See generally, Benjamin Hunnicutt, Kellogg's Six-Hour Day (1996).

⁶¹See below ch. 10.

^{62&}quot;Wage-Hour Fate—and Politics," Bus. Wk., July 3, 1937, at 24.

⁶³S. Rep. No. 884: Fair Labor Standards Act, 75th Cong., 1st Sess. 3-4 (1937).

that the statutory overtime premium was designed to apply "financial pressure...to spread employment to avoid the extra wage.... In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected to have an appreciable effect in the distribution of available work."65 Although the Court cited no source to document its assertion, the Fourth Circuit, on whose opinion it relied heavily, pointed to President Roosevelt's message to Congress in connection with the introduction of the FLSA bill on May 24, 1937, for its claim that: "It seems plain from the legislative history of the Act that...one of the fundamental purposes of the Act was to induce worksharing and relieve unemployment by reducing hours of work."66 Yet the president had merely said: "We know that overwork and underpay do not increase the national income when a large portion of our workers remain unemployed. Reasonable and flexible use of the long-established right of government to set and change working hours can, I hope, decrease unemployment in those groups in which unemployment today principally exists."67 This presidential hope raises more questions than it answers. In particular, it fails to explain why workers who are not underpaid should receive a state-mandated overtime premium or to identify the purpose of the mandatory premium for groups not suffering from unemployment or at times when unemployment in general is low.

The work-spreading argument is further undermined by the fact that employers were privileged to ignore the disincentive effect of the overtime premium to employ workers beyond 40 hours by reducing their hourly wages so that they could continue to work the same number of overtime hours for the same total weekly wages. The Labor Department initially took the position that this tactic violated the FLSA, but acquiesced after several courts upheld its legality, provided that the lower wage exceeded the statutory minimum.⁶⁸ This result hinged, in turn, on judicial rulings that the language in the FLSA stating that "[n]o provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act"69 was merely precatory and therefore unenforcible. Declaring this provision legally meaningless was facilitated by comparison with the original FLSA bill, which had authorized a proposed Labor Standards Board to issue labor standard orders that it deemed "necessary or appropriate to prevent the established minimum wage becoming the maximum wage and to prevent the discharge or reduction in wages of employees receiving more than the established minimum wage"; the Board

⁶⁹FLSA, § 18.



⁶⁵Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 578 (1942).

⁶⁶ Missel v. Overnight Motor Transp. Co., 126 F.2d 98, 103 (4th Cir. 1942).

⁶⁷S. Rep. No. 884 at 3.

⁶⁸See below ch. 9.

would also have been empowered to "prevent the circumvention or evasion" of its orders. Significantly, even this provision, which had teeth but was deleted before enactment, revealed the FLSA's intended limitations when it went on to confine the Board's power to establish minimum wage standards to those that "will affect only those employees in need of legislative protection without interfering with the voluntary establishment of appropriate differentials and higher standards for other employees in the occupations to which such orders relate."

President Roosevelt himself could have served as a prime witness for those arguing for a minimalist interpretation of the FLSA. In a fireside chat to the nation on October 12, 1937, explaining why he was calling an extraordinary session of Congress for the next month, Roosevelt, after mentioning "the millions of men and women and children who still work at insufficient wages and overlong hours," stated: "I am a firm believer in fully adequate pay for all labor. But right now I am most greatly concerned in increasing the pay of the lowest-paid labor...." More specifically he added: "A few more dollars a week in wages, a better distribution of jobs with a shorter working day will almost overnight make millions of our lowest-paid workers actual buyers of billions of dollars of industrial and farm products."⁷² Then on November 15, 1937, the opening day of the extraordinary session, in his message to Congress Roosevelt focused his labor agenda on the proposition that the "exploitation of child labor and the undercutting of wages and the stretching of the hours of the poorest-paid workers in periods of business recession have a serious effect on purchasing power." He therefore characterized as the "two immediate purposes" of the proposed legislation "banish[ing] child labor and protect[ing] workers unable to protect themselves from excessively low wages and excessively long hours."73

Roosevelt's State of the Union address to Congress on January 3, 1938, shifted the emphasis somewhat toward long hours generally. He noted that the minimum wage and maximum hours provisions promulgated under industry codes pursuant to the NIRA had proved their social and economic worth, and insisted that "the people of this country, by an overwhelming vote, are in favor of having the Congress—this Congress—put a floor below which industrial wages shall not fall, and a ceiling beyond which the hours of industrial labor shall not rise." Concealing the fact that no FLSA bill imposed such a ceiling on hours, he then returned to the perspective of impoverishment by referring to those who

^{73&}quot;Message from the President," in 82 Cong. Rec. 9, 11 (1937).



⁷⁰S. 2475, § 12(6) and (7) (May 24, 1937).

⁷¹S. 2475, § 12(6) (May 24, 1937).

⁷²"A 'Fireside Chat' Discussing Legislation to Be Recommended to the Extraordinary Session of the Congress," in *Public Papers and Addresses of Franklin D. Roosevelt: 1937 Volume: The Constitution Prevails* 429-38 at 435 (1941).

opposed wage and hour legislation on the grounds that it would impede the flow of capital to and foster its exodus from localities that survived "only because of existing low wages and long hours." Roosevelt rejected such growth strategies: "In the long run the profits from child labor, low pay, and overwork inure not to the locality or region where they exist but to the absentee owners who have sent their capital into these exploited communities to gather larger profits for themselves." He argued that new firms would be more likely to bring "permanent wealth" to communities if they insisted on "good pay and reasonable hours," because the workers would be more efficient and happier. Finally, resuming the minimalist theme, the president sought to reassure Congress that the FLSA did not aim for "drastic change": "We are seeking, of course, only legislation to end starvation wages and intolerable hours; more desirable wages are and should continue to be the product of collective bargaining."⁷⁴

These conflicting, confused, and understated policy reasons underlying the overtime provision may be contrasted with those apparently buttressing what at the time was the country's best-known overtime statute—Oregon's 1913 law covering men and women in factories.⁷⁵ It prohibited employing anyone in a factory more than ten hours a day (except when engaged in emergency work), but permitted up to three hours a day of overtime if it was compensated at time and one-half the regular wage.⁷⁶ Its preamble articulated a public policy that working any person more than ten hours a day in a factory "is injurious to the physical health and well-being of such person, and tends to prevent him from acquiring that degree of intelligence that is necessary to make him a useful and desirable citizen of the state."⁷⁷

In passing on the law's constitutionality, the Oregon Supreme Court accordingly elaborated on the legislative policies in a manner wholly unlike later judicial interpretation of the FLSA. It divined that "the legislative mind" viewed long hours as increasing the risk of injuries in factories with high-powered machinery, but it also observed that "a man who day in and day out labors more than 10 hours must not only deteriorate physically, but mentally. The safety of a country depends upon the intelligence of its citizens, and if our institutions are to be preserved the state must see to it that the citizen shall have some leisure which he may employ in fitting himself for those duties which are the highest attributes of good citizenship." ⁷⁸

⁷⁸State v. Bunting, 139 P. 731, 735 (Or. 1914).



⁷⁴⁸³ Cong. Rec. 8, 9 (1938).

⁷⁵Its fame resulted from the U.S. Supreme Court's having upheld its constitutionality despite its limitation on the hours of adult men. Bunting v. Oregon, 243 U.S. 425 (1917).

⁷⁶1913 Or. Laws ch. 102, § 2, at 169.

⁷⁷1913 Or. Laws ch. 102, § 3, at 169.

The problem with this pathos-radiating rhetoric is that it failed to deal with the obvious fact that employers were privileged to work their employees 13 hours—and thus expose them to greater risks of injury and make them unfit for good citizenship—provided that they paid time and a half for the last three hours. As the leading turn-of-the-century treatise on the police power observed, "where the time for all street railroad employees is fixed at ten hours per day, with the right to work overtime for special compensation, the justification on the ground of public safety evidently fails. If safety or health really forbid excessive work, special compensation does not remove the objection, and the fact that it is allowed indicates that the restriction rests on economic grounds."⁷⁹

More puzzling was the success with which Felix Frankfurter, who represented the state of Oregon, persuaded the U.S. Supreme Court in Bunting v. Oregon to uphold the statute as regulating health and hours rather than wages. Frankfurter's argument that it was "an hours law and not at all a wage law" was implicitly based on his contention that there was so little overtime work in Oregon industry that the law made little difference. The overtime provision "merely...allow[ed] for a limited and reasonable flexibility in time of unusual business pressure," but "even now, when employers do not have to pay time and a half, over 93 per cent find it unprofitable to employ men beyond ten hours as a normal standard." His assertion that the statute was reasonable in "safeguarding abuse of the exception by the punitive provision"80 revealed that an overtime law would cease being reasonable if its punitive provision no longer deterred employers. The U.S. Supreme Court accorded only "a certain verbal plausibility" to the employer's contention that the law was intended to permit 13 hours' work for 14 and a half hours' pay; that the legislature chose to "achieve its purpose through the interest of those affected" rather than by a "rigid prohibition" was not fatal.81

Oddly, although labor standards advocates characterized the Oregon statute as "of a very ineffective type" because it permitted three hours of overtime at time and a half, the FLSA was not attacked for permitting 16 hours a day of premium overtime.⁸²

⁸²Brandeis, "Labor Legislation" at 681.



⁷⁹Ernst Freund, *The Police Power: Public Policy and Constitutional Grounds* 301 (1904).

⁸⁰Supplemental Memorandum for Defendant in Error at 1-2, Bunting v. Oregon, 243 U.S. 436 (1917). Frankfurter incorrectly reported his own data, which in fact showed that in 1909 93.7 percent of industrial workers in Oregon were employed less than 10 hours a day. Supplemental Brief for Defendant in Error upon Re-Argument at 63, Bunting v. Oregon, 243 U.S. 436 (1917).

⁸¹Bunting v. Oregon, 243 U.S. at 436-37.